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Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing*Jaime Flattery**

This article analyzes the existence of the ‘right to be heard’ in EU Competition law and queries whether firstly, it is properly adhered to in Commission proceedings and secondly, whether the current system is in compliance with Article 6 of the European Convention of Human Rights (ECHR). It demonstrates that although this fundamental right is deeply rooted in EU case law and has been enshrined in EU legislation such as Regulation 1/2003, the Best Practice Guidelines and the Charter of Fundamental Rights, the extent of the safeguards fall short of EU human rights standards. It discusses the right in the context of administrative law and highlights the importance of taking an objective rather than a formalistic approach to ‘fairness’. In Part II there is a practical examination of the extent of the right to be heard within the current framework. Emphasis is put on the important role, but also on the limitations of the Hearing Officer’s powers. The article then examines the rights of the complainant and the limited rights of other interested parties to participate. It also highlights through case analysis, deficiencies in both the written and oral components of the hearing and suggests that the oral hearing in particular needs urgent reform. This leads to a consideration in Part III, of the impact of Article 6 ECHR. Here the article addresses the reluctance of EU Courts to accept the changing nature of competition proceedings from ‘administrative’ to ‘criminal’, despite support for the contention from the Advocate Generals and the ECtHR. The article applies the ECtHR criteria in order to conclude they are penal in nature. Amongst the recommendations, it suggests that a more adversarial process should be adopted; with a public oral hearing and cross-examination of witnesses. Thus the paper assesses the conflict between efficiency and justice in the enforcement system but recognises the first as desirable; the second as vital.

INTRODUCTION

In its quest for effective enforcement of EU competition policies, one of the primary concerns of the Commission is to apply its procedures in order to ‘strike the right balance between efficient enforcement and adequate protection of the rights of the defence’.¹ Mindful of these sensitive and potentially conflicting goals, the EU Courts have taken a prominent role in legitimising a strong enforcement of Articles 101 & 102 TFEU by ensuring that the rights of defence, and in particular the right to a fair hearing, are upheld as fundamental requirements of the administrative process.

Some issues for discussion in this article include the origins and development of the right to a fair hearing (Part I) and critically, the impact that it has had on EU Competition proceedings. In this respect, this paper will discuss the existing procedural

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¹ Wouter P.J. Wils, *Efficiency and Justice in European Antitrust Enforcement*, 2008, Hart Publishing, foreword.

protections and the contribution of the Commission's recent *Best Practice Guidelines* and the *Guidance on Hearing Officers*. Particular emphasis will be put on the rights of parties other than the accused undertakings. (Part II).

In assessing the effectiveness of the safeguards, the article will draw attention to the Commission's own 'monopolist' role over proceedings arising from its sole concentration at first instance of the functions of investigator, prosecutor and decision maker. It will then move to consider the conformity of the enforcement system with Article 6 ECHR and the impact of the European Court of Human Rights case law on EU competition rules. Given the heightened debate surrounding the classification of competition law, the author will inquire whether the time is now ripe to accept that phenomenally high fines imposed by the Commission may be synonymous to the leveraging of a 'criminal charge' within the meaning of Article 6 ECHR. (Part III).

Thus the primary aim of this paper is to delve into the law to assess whether the current system, despite its recent improvements, may still unjustly prioritise efficiency and effectiveness over fairness. In this event the article will consider some reforms that may be introduced to avoid infringement of the right to a fair hearing as recognised in EU law and under the ECHR.

PART I. THE SOURCES OF PROCEDURAL PRINCIPLES IN COMPETITION LAW - THE RIGHT TO A FAIR HEARING AS A HIGHER PRINCIPLE OF EU LAW

'Audi Alteram Partem' as a general principle of EU law

The right to a fair hearing, has long been 'deeply entrenched' in the EU legal system as a general principle of law common to the member states.² This fact is firmly reflected in the now legally binding Charter of Fundamental Rights of the European Union.³ Article 41 of the Charter states that every citizen 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'. Most importantly this includes 'the right of every person to be heard, before any individual measure which would affect him or her adversely is taken'. In this sense the rule has developed into an objective standard of good administration as it not only serves the individual interest, but also the common interest by its observance of procedural requirements in the administrative process.⁴

² See generally Giannakopoulous, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-Subsidies proceedings*, 2004, Kluwer Law. See also A Andreangeli, *EU Competition Enforcement and Human Rights*, 2008, Edward Elgar, who discusses the rise of the principle as a result of the influence of the common law rules of natural justice in proceedings.

³ Protocol No 1 attaches the Charter of Fundamental Rights (hereinafter the 'Charter'), to the Treaty of Lisbon (TFEU) and accords it the same status as the Treaty, OJ 2000 C 364, p 1. Also Article 6(2) TFEU asserts that the Union protects fundamental rights as enshrined in the Charter, the ECHR and the constitutions of the Member States.

⁴ Nehl, *Principles of Administrative Procedure in EC Competition Law*, 1999, Hart, p 96.

The principle was first ‘constitutionalised’ in EU competition proceedings by the *Transocean Marine Paint* case where the ECJ accepted that ‘there is a general rule that a person whose interests are perceptibly affected by a decision taken by a public authority, must be given the opportunity to make his point of view known’.⁵ The practical significance of this principle entitled the undertaking to be informed in good time of the Commission’s exemption conditions and to have the opportunity to submit its observations. Thus the right to be heard was, like most general principles, developed by the courts in the absence of express legislative protection and in pursuance of its duty to uphold the rule of law in the Community legal order. The Court emphasized the importance of the right in situations where ‘the obligations have far reaching effects’.⁶

The principle was soon confirmed in *Hoffmann la Roche* although the Court used more restrictive terminology in referring to ‘the right to be heard before a sanction or penalty’ is inflicted.⁷ This formalistic interpretation, repeated in *Hoechst I*,⁸ was soon abandoned and the courts began to adopt a more liberal position whereby a measure only had to ‘adversely’ affect or even ‘significantly’ affect a person’s interests. This expansion ensures that the right to be heard can also be invoked by complainants and other interested parties in the infringement proceedings.⁹

The scope of protection offered by the right to a fair hearing in the Charter of Fundamental Rights

- i) A result of convergence between the principle of good administration and other EU principles associated with fair treatment

The Court’s attempts to define and expand the scope of the right to a fair hearing have also been borne out of the development of overlapping principles, such as the ‘principle of care’ and the ‘principle of good administration’.¹⁰ These different

⁵ Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, which concerned an action for annulment of an exemption renewal decision under Article 81(3) on the basis that a particular provision had not been mentioned in the statement of objections nor raised at the hearing.

⁶ *Transocean, ibid*, para 15. It is submitted that this statement was included to highlight the greater importance the right would have in cases involving fines. See also Case 121/76 *Moli v Commission* [1977] ECR I- 1971, para 20, which concerns the right to be heard before the administration adopts a ‘measure liable to gravely prejudice the interests of an individual’.

⁷ Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461, paragraph 9; See also, *Lenaerts & Vanhamme* where the term ‘sanction’ is expansively interpreted as meaning ‘any Community measure which inflicts a loss on a private party (fines, periodic payments, surcharges) or at least imposes a *restitutio* on such a party’.

⁸ Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, at 15; see also Case 322/81 *Nederlandsche-Industrie-Michelin* [1983] ECR 3461, at 7.

⁹ The necessity for third parties to have a ‘sufficient interest’ in order to participate will be discussed in the next section.

¹⁰ Nehl, 1999, op cit, fn 4, p 27, notes that the link between the two principles was not always readily accepted by the Courts. In the past, pleas based on a breach of the principle of good administration were rejected and rather the problem was dealt with under the heading of other principles. See for example Case C-32/95P

permutations of essentially a right to be treated fairly in proceedings denote the gradual expansion of the concept. Nehl submits that both principles govern the question as to what extent the administration is obliged to take into account submissions made by individual parties under the exercise of their right to be heard.¹¹ Where the Union's institutions have a power of appraisal for instance, respect for the guarantees in administrative procedures is even more fundamental.¹²

Therefore the explicit inclusion of Article 41 as a 'free-standing' right in the Charter (violation of which could lead to annulment) gives applicants a clear fall back position in order to ensure their right to a fair hearing is respected, notwithstanding the level of protection offered by the legislature.¹³ It is submitted that Article 41 will help to develop a benchmark, a minimum set of guarantees, while at the same time recall that 'the concept of a fair hearing remains open and dynamic; it may be used to generate other doctrines, or it may be seen as a general standard for judging whether a certain hearing process is fair all things considered'.¹⁴ Through its comprehensive 'umbrella' provisions, it can be seen as tantamount to an EU 'due process' clause.¹⁵ In keeping with one of the key aims of this article - to assess whether preference is given to efficiency over justice in competition procedures, this concept of objective 'fairness' will remain at the core of the analysis. Essentially this concerns the extent to which the procedural guarantees both fulfil their function in EU Competition law and respect the ECHR standards.¹⁶

ii) Convergence between standards in the EU and the ECHR

In addition to the merging of principles towards a common concept of 'fairness', the convergence of fundamental rights standards in the EU with those of the ECHR is

Commission v Lisrestal [1996] ECR I-5373 and Case T-260/94 *Air Inter v Commission* [1997] ECR II-997, where the Court annulled the decision due to a breach of the principle of care instead. See also failed attempts to introduce a right to be heard for third parties in state aid proceedings based on the 'principle of good administration' Case C-198/91, *William Cook plc v Commission*; and Case C-225/91 *Matra SA v Commission* where the plea was withdrawn.

¹¹ Nehl, *ibid*, p 99.

¹² Such guarantees include the duty of the competent institutions to examine carefully and impartially all the relevant aspects of the individual case. Case C-269/90 *Technische Universität München* [1991] ECR I-5469, para 14; Case T-44/90 *La Cinq v Commission* [1992] ECR II-1, para 86; and Joined Cases T 528/93, T 542/93, T 543/93 and T 546/93 *Métropole télévision and Others v Commission* [1996] ECR II 649, para 93).

¹³ This article deals firstly with Article 41 as opposed to Article 47 ECHR (the right to an effective remedy) in order to demonstrate that even if the proceedings are merely 'administrative', the entitlement to a 'fair hearing' is still present. What is fair in the circumstances will depend on the ultimate classification of the proceedings as either, administrative or criminal.

¹⁴ Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures*, Oxford, 1996, p 220.

¹⁵ Kanska Klara, 'Towards Administrative Human Rights in the EU-Impact of the Charter of Fundamental Rights', (2004) 10(3) *European Law Journal* 296-326.

¹⁶ See Joshua, 'The Right to be Heard in EEC Competition Proceedings', (1991) 15 *FILJ* 16, para 33, 'As the courts in England and the United States have repeatedly stressed—fairness is a flexible concept and its observance does not necessarily lie in adherence to a set of mechanical rules'.

important for the assurance of defence rights in competition cases.¹⁷ Under Article 52(3) of the Charter - where there are rights that are common to both the Charter and the ECHR, the latter's interpretation must be recognised as a minimum standard of protection.¹⁸ Article 52(3) of the CFR provides that, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention. This shall not prevent Union Law from providing more extensive protection'. Thus the scope of the right to a fair hearing in circumstances similar to factual scenarios in the European Court of Human Rights (ECtHR) case law, should ensure the granting of an equivalent 'hearing' in competition proceedings. However such an objective is juxtaposed against the strained 'administrative' label that the Commission and the Courts have traditionally seemed reluctant to abandon. As the final part of this article will examine, whether this entails classifying the proceedings as criminal, quasi-criminal¹⁹ or otherwise, a substantive rather than a formalistic approach is necessary. Despite the current situation²⁰ and the absence of binding effect of the ECHR in this jurisdiction, by following the interpretive obligations in Article 52(3) of the Charter, the determination of the right to a fair hearing should be such as to ensure equivalent standards of protection as Article 6(1) ECHR.

Furthermore, if the line of arguments classifying the imposition of fines by the Commission as criminal in nature is accepted, then this obligation becomes even more pressing.²¹ The significance is that criminal law requires the observance of the full rights of defence without exception. This means granting a hearing by an independent, impartial tribunal and also permitting applicants to have recourse to the additional procedural safeguards in Article 6(2), 6(3) ECHR and in Articles 47-49 of the Charter.²² It may also mean reassessing the Commission's amalgamation of functions as given the

¹⁷ Note the increased reliance of the ECJ on the ECHR eg. *Metock v Minister for Justice, Equality and Law Reform* (Case C-127/08) [2008] ECR I-6241 (Article 8 ECHR); and Case T-99/04 *AC Treubund*, [2008] ECR II-1501, paras 45-48, which held that the right of access to the file is not an end to itself or absolute; see also Opinion of Advocate General Mischo in Cases C-244/99 P and C-251/99 P, points 331 and 125 respectively (Joined Cases C-238, 244, 245, 247, 250-252, and 254/99 P *LVM and Others v Commission* [2002] ECR I-8375), Case 235/92 *Montecatini SpA* [1999] ECR I-4539, para 176.

¹⁸ Article 52(3) of the CFR provides that, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention. This shall not prevent Union Law from providing more extensive protection'. See also Arnall, 'From the Charter to Constitution and beyond; fundamental rights in the new European Union'; [2003] PL 774.

¹⁹ Schwarze, Bechtold, Bosch, 'Deficiencies in European Community Competition Law: Critical analysis of the current practice and proposals for change', Gleiss Lutz Rechtsanwälte, September 2008, fn 160 – 'the fines imposed by the Commission are of a criminal or at least quasi-criminal nature'.

²⁰ The Union's likely accession to the ECHR is however imminent. Article 6(3) of the Charter provides the legal basis and the institutions have begun the first steps in the process. See Commission proposal on negotiation of accession Directive, 17.03.2010 and the European Parliament's Committee on Constitutional Affairs Draft Report 2.2.2010.

²¹ This issue will be examined more extensively in Part III.

²² These include most notably the possibility of a public trial, the opportunity to cross-examine witnesses who have submitted evidence against them and full lawyer client protections. For a more detailed description of the traits of a full criminal adversarial trial see Joshua, op cit, fn 16, p 39.

current lack of a *de nova* or full review by the EU Courts in competition cases – a stricter separation of the powers ‘at first instance’ may be required.²³ The recent Opinion of Advocate General Bot sums up the dangers:²⁴

‘In giving precedence to the efficiency of the administrative procedure, the Court of First Instance’s stance causes me to have certain reservations. It amounts to calling into question the fundamental nature of the principle of observance of the rights of the defence in what might be described as ‘quasi-criminal’ proceedings in which the Commission enjoys a very broad discretion and where judicial review is restricted.’

Lastly, the consequences in national law of a Commission infringement decision can lead to separate criminal penalties and/or indemnity claims under national rules, which serves as a further reason to demand rigorous compliance with the procedural safeguards.²⁵

PART II. NOT WITHOUT RECOGNITION - SECTOR SPECIFIC LEGISLATION AND THE COMMISSION’S EFFORTS TO GUARANTEE THE RIGHT TO BE HEARD

The Commission has since filled the legislative lacuna which existed in relation to the respect for the right to a fair hearing with specific regulatory measures. Article 27(1) of Regulation No 1/2003²⁶ asserts that the undertakings concerned must be afforded the opportunity to be heard on the allegation of anti-competitive conduct raised by the Commission against them. The latter’s Implementing Regulation 773/2004²⁷ and the Notice on Access to File²⁸ help to define the extent of this right. The Commission Decisions which established and defined the role of the Hearing Officer²⁹ have also

²³ D Slater, S Thomas, D Waelbroeck, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ (2009) 5(1) Euro CJ 22.

²⁴ Opinion of Advocate General Bot in Joined Cases C-322/07 P, *Papierfabrik August Koehler AG*, Case C-327/07 P *Bolloré SA*, Case C-338/07 P *Distribuidora Vizcaína de Papeles, SL v Commission*, [2009] ECR I-7191.

²⁵ Case C-344/98, *Masterfoods* [2000] ECR I-11369, at paras 49-60. See also Case T-65/98, *Van den Bergh Foods v Commission* [2003] ECR II-4653, at para 199. See the arguments of Wils, *Efficiency and Justice in EU Anti-trust Enforcement*, Chapter 1, p 15; Christopher Harding- ‘Effectiveness of Enforcement and Legal Protection’, p 664 in Ehlermann & Atanasu (eds), *European Competition Law Annual 2006, Enforcement of Prohibition of Cartels*, 2007, Hart.

²⁶ Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4.1.2003, p 1. See also its preamble, recital 37 which says that it respects fundamental rights in particular as set out in the Charter of Fundamental Rights and its provisions will be interpreted and applied with respect to those rights.

²⁷ See Articles 10 to 12 and 15 which set out the way in which the parties can exercise their right to be heard, Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (*Implementing Regulation*), OJ L 123, 27.4.2004, p 18.

²⁸ Notice on the rules for access to the Commission file in cases pursuant to Arts 81 and 82 of the EC Treaty, Arts 53, 54 and 57 of the EEA Agreement and Regulation 139/2004 [2005] OJ C325/.

²⁹ Commission Decision of 23.05.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162 19.06.2001, p 21, replacing the earlier Terms of reference in Decision 94/810/ECSC, EC.

gone some way towards adapting Commission procedures in response to strong criticism from applicants, lawyers, politicians, academics and even judges.³⁰ These developments follow the ‘pattern that emerged in the 1980s and 1990s of a growing awareness by the Commission of the need to be more procedurally scrupulous while not fundamentally changing how decisions were taken’.³¹ The new Guidelines on the procedures of the Hearing officer and those on Best Practice in competition proceedings³² were introduced to improve transparency and predictability – again likely in response to a perceived lack of objectivity and fairness in EU competition proceedings. So in light of these recent attempts at due process, despite their early stages of implementation, we shall consider if there is propensity for change in relation to the existing guarantees of fair procedure.

The Hearing Officer as the overall supervisor and guardian of the right to be heard - increased emphasis on his independence

According to the preamble of the 2001 Decision, the Hearing Officer (HO) is an independent and experienced person with ‘the necessary integrity’ to be entrusted with the conduct of the administrative proceedings. They are essentially the ‘guardians of fair proceedings’ before the Commission. Although clearly addressing some of the principal concerns of undertakings, the new Guidelines do not change the mandate or status of the HO. He is not the equivalent of an administrative judge³³ nor is the hearing before him tantamount to a trial. What they do achieve is an increased emphasis on their independence in stating that they are ‘entirely independent’ and ‘carries out his functions on an *individual* basis’.³⁴ Moreover, as opposed to formally saying he ‘has direct access to the Competition commissioner’, the Guidelines now highlight that he ‘is attached to the competent member of the commissioner for administrative purposes’.³⁵ However, the HO is still regarded as a Commission official, is remunerated by and has his office in the same buildings as DG Competition. Therefore, regardless of the personal integrity of his character, the position does not even remotely attract the same degree of impartiality in the eyes of the parties as a neutral judge would

³⁰ See House of Lords Select Committee on the European Union, XIX Report: ‘Strengthening the Role of the Hearing Officer’, sess 1999/2000; B Vesterdorf, ‘The Court of Justice and Unlimited Jurisdiction: What does it mean in practice?’, GCP, June 2009.

³¹ Forrester, ‘Due process in EC competition cases: a distinguished institution with flawed procedures’, (2009) 34 EL Rev 817, notes the position of Hearing Officer first created in 1982 - largely due to the controversy surrounding the *IBM* case where the defendant company was on bad terms with the Director of the investigation and alleged prejudice.

³² DG Competition Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU; DG Competition, ‘Best Practices in proceedings concerning Articles 101 and 102 TFEU’, Released on 6 January 2010. Note also ‘Best Practices on submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in Merger cases’.

³³ As is the position in competition law enforcement in the USA.

³⁴ Guidance para 1 & 9.

³⁵ *Ibid*, Recital 6.

possess. Despite an increased role in recent years, he does not possess judicial powers to hear and decide on the case before him. His powers essentially relate to the physical conduct of the hearing, deciding disputes as to access to the file, maintaining confidentiality and reporting to the Competition Commissioner on the extent to which the rights of the defence have been respected. So although he may organise, decide disputes and conduct the proceedings with the utmost skill and impartiality, his power to influence the draft decision is limited as it is not his function to decide on the substance of the case³⁶ and, unsurprisingly, this has proven to be a serious source of concern to parties.³⁷

To sum up, his task is to safeguard the right to be heard throughout the whole procedure and ‘to contribute to the objectivity, transparency and efficiency of those proceedings’.³⁸ This includes both the written and oral exchanges between the parties.³⁹ Article 10(3) of the implementing Regulation⁴⁰ states that this right should be exercised for the large part in writing for reasons of administrative or procedural ‘economy’. Therefore, the Hearing Officer also has a role to play in the delicate balancing exercise between efficiency and justice and in the case of a dispute, he ultimately decides who will be heard during the procedure.

Procedural rights and the Hearing Officer’s main powers

The starting point from which the procedural rights of the parties become operative is from receipt of the statement of objections (SO) from the Commission. Notably it is rare that the HO will be called upon to intervene during the investigative stage⁴¹ because the undertaking has not been formally accused of infringing the competition rules until the SO has been communicated to it. This reflects the two stage structure of the procedure - investigative and then an *inters partes* stage. However in light of recent case law⁴² and the new Best Practice initiatives, it is submitted that there is no reason why the HO should not have a greater role in the pre-*inter partes* stage if a dispute arises regarding, for example, dawn raids and the confidentiality of documents.⁴³ Alternatively the introduction of the ‘State-of-Play’ meetings⁴⁴ is welcomed as it will facilitate an earlier appraisal of the allegations against the company, and an opportunity for it to

³⁶ This is left to the case team but with input from the Hearing Officer, Commission legal service, and Advisory Committee which is then transferred to the collegiate body of 27 Commissioners to adopt the final decision.

³⁷ Case T-56/09 *Saint Gobain Carglass Fr v Commission*, pending.

³⁸ Commission Decision of 2001, op cit, fn 29, recital 5.

³⁹ Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, para 132,

⁴⁰ Regulation 773/2004, op cit, fn 27.

⁴¹ Case 136/79 *National Panasonic* [1980] ECR 2033, Case T-99/04 *AC Treubund*, [2008] ECR II-1501, para 56 - only the right to be informed of the purpose and subject matter of the investigation.

⁴² Case T-99/04 *AC Treubund*, [2008] ECR II-1501, para 40.

⁴³ Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, para 59 and 110.

⁴⁴ Informal meetings (similar to those in merger proceedings) between parties and Senior Commission officials involved in the case, para 38 Guidelines.

understand DG Competition's preliminary views on the status of the case after its investigation.

i) Responsibility to ensure the SO meets minimum requirements

One of the Hearing Officers main responsibilities in ensuring the effective right to be heard is to ensure that the SO meets the minimum requirements of informing the undertaking of the allegations against it and secondly, that it is consistent with the grounds relied on by the Commission in its final decision. The underlying rationale is that the undertaking must be fully informed so as to be able to properly prepare its defence to refute the evidence against it before a final decision is taken. According to the case law, the statement of objections provides an essential procedural safeguard,⁴⁵ thus it must set out clearly all the essential factors upon which the Commission is relying.⁴⁶ Those factors include the facts alleged against the undertaking, the classification of those facts, the legal arguments and evidence on which the Commission relies,⁴⁷ and the factors it will take into consideration when setting the fine such as the duration of the infringement.⁴⁸ Moreover, since *ARBED* and recently *Bolloré* have confirmed, the Court has held that the statement of objections 'must specify unequivocally the legal person on whom fines may be imposed'.⁴⁹

ii) Ensuring the Consistency of the SO with the Draft Decision

In relation to the Hearing Officer's second role, he must supervise the consistency of the final decision with the Statement of Objections. Despite the fact that the SO is not an act that can be challenged before the Courts, being merely 'provisional',⁵⁰ if new facts or evidence arise and there is a fresh investigation, this will necessitate a new SO.⁵¹ The Best Practices Guidelines extend this obligation to situations where 'the intrinsic nature of the infringement' is modified. In this case a State-of-Play meeting followed by

⁴⁵ See Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, para 10 and 14.

⁴⁶ Case 45/69 *Boehringer Mannheim v Commission* [1970] ECR 769, para 9.

⁴⁷ Including any inferences which can be drawn from the evidence which have probative value otherwise this would amount to a denial of the right to be heard; See Case 136/79 *Atlantic Container Line* [1980] ECR 2033, para 172-173.

⁴⁸ See Cases C-62/86 *AKZO v Commission* [1991] ECR I-3359, para 29; Case T-48/00 *Corus UK v Commission* [2004] ECR II-2325, para 144,146; Case C-328/05 P *SGL Carbon*, not yet reported; T-109/02 *Bolloré* [2007] ECR II-947, para 67, and Case T-340/03, *France Télécom v Commission*, [2007] ECR II-107; Case C-202/07 P, [2009] ECR I-2369.

⁴⁹ See Joined Cases C-322/07 P *Koehler & Bolloré*, [2009] ECR I-7191, para 38; T-276/04 *Compagnie Maritime Belge Transports and Others v Commission*, para 143,146; Case 1 76/99 P *Arbed SA v Commission* [2003] ECR I-10687, para 21.

⁵⁰ Case 60/81 *IBM v Commission* [1981] ECR 2639, para 10, see also Joined Cases 142/84 and 156/84 *BAT and Reynolds Industries v Commission* [1987] ECR 4487, para 70.

⁵¹ See Case T-39/92, *Groupement des cartes bancaires 'CB' and Europay International v Commission* [1994] ECR II-49.

a supplementary SO will be issued.⁵² However, because it is assumed that the Commission will adapt its position in light of developments, this information may be given summarily as the decision does not necessarily have to be a ‘replica’ of the Statement of Objections.⁵³ Conversely, the Commission cannot rely on facts on which the target parties have not had an opportunity to make their views known.

The Court’s insistence on ensuring an effective right to be heard in this regard can be seen in the *Bolloré* appeal case. Here the Commission decision imposing a fine of €22.68m was annulled by the ECJ which overturned the General Court as it had not properly appreciated the consequences of the inconsistency between the evidence supporting the decision and that in the SO. Despite the fact that Bolloré had personally participated in the cartel, it could not also be held ‘individually and directly responsible’ for the actions of its subsidiary unless it had the opportunity to make its views known on certain documentary evidence which had been excluded from the SO. In this instance, the decision merited annulment not purely as a result of the procedural error, but due to the possibility that it may have amounted to a restriction on the defendant’s ‘rights of defence’.⁵⁴ Consequently the Hearing Officer has an important role in drawing up his final report to consider whether the draft decision of the case team deals only with objections in respect of which the parties have been afforded the opportunity of making their views known.⁵⁵

iii) Right of Access to File

In turning to the party’s right to access the Commission’s file, we note it is enshrined in the relevant legislation,⁵⁶ the case law⁵⁷ and the Charter of Fundamental Rights.⁵⁸ It is a ‘procedural safeguard intended to protect the rights of the defence’⁵⁹ and more precisely ‘an essential precondition of the effective exercise of the right to be heard’⁶⁰ which allows the undertakings to present their views on the conclusions reached by the Commission in its SO. Since the *Soda Ash* case, the Courts have ensured this protection with its principle of ‘equality of arms’. This grants the target undertaking the right to

⁵² Best Practice Guidelines paras 96, 97. Note that if the new evidence merely corroborates the Commission’s position, issuing a simple letter of facts will suffice.

⁵³ Opinion of Advocate General Bot in Case C-327/07 P, *Bolloré*, [2009] ECR I-7191, para 93.

⁵⁴ On the different consequences arising from excluding ‘inculpatory’ versus ‘exculpatory’ evidence, see K Lenaerts & I Maselis, ‘Procedural Rights and Issues in the Enforcement of Articles 81 and 82 of the EC Treaty’, in BE Hawk (ed), *Annual Proceedings of the Fordham Corporate Law Institute. International Antitrust Law & Policy*, New York, Juris Publishing Inc., 2001, 279-311.

⁵⁵ See Article 15 of Commission Decision of 2001, op cit, fn 29.

⁵⁶ See Commission Notice on access to file 2005, Regulation No 1/2003, Article 27 (2) and Articles 15 and 16 of the Implementing Regulation.

⁵⁷ Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359; Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103 & 104/95 *Cimenteries CBR and Others* [2000] ECR II-491.

⁵⁸ Under Article 41

⁵⁹ Case T-161/05, *Hoechst GmbH v Commission* [2009] ECR II-3555, para 160.

⁶⁰ Galligan, op cit, fn 14, p 545.

request access to the whole of the file, as it is not for the Commission to decide which documents are relevant to the investigated undertaking's rights of defence.⁶¹ However concerns for fairness in the proceedings are emphasized by the fact that disputes regarding 'access to file' are always balanced against the legitimate interests of undertakings to protect their business secrets and to maintain the confidentiality of internal documents.⁶² While 'access to file' issues in relation to target parties are generally concerned with the completeness of the SO,⁶³ in the context of multi-party proceedings they are also highly relevant. An example is where the Hearing Officer determines disputes relating to disclosure of information by the Commission to third parties or in relation to the publishing by the Commission on its website of the main facts and the fines imposed in its Decisions.⁶⁴

iv) Contribution of the Best Practice Guidelines

The BP Guidelines attempt to enhance transparency by stating that parties (possibly including complainants and third parties) may have earlier access during the investigation⁶⁵ and that they may request access to a non-confidential version of other parties' written replies to the SO and submit their comments thereon.⁶⁶ This is indeed in 'the interests of fair and effective enforcement'; however, it does not grant an unconditional right. It is submitted that the Hearing Officer's powers in deciding access issues are both a strength and a weakness in the system; positive because they help to ensure a fair balancing of the rights of all parties, but problematic in that the Commission's refusal to grant access to file to a target party can only be challenged *ex-post* in the course of annulment proceedings of the final decision.⁶⁷ However, this deficiency is countered by the fact that the Hearing Officer's decisions on disclosure of

⁶¹ *Solvay SA v Commission* (Soda Ash) (T-30/91) [1995] ECR II-1775 para 81; Case C-199/99 P *Corus UK v Commission* [2003] ECR I-11177, para 125.

⁶² Commission Decision of 2001, op cit, fn 29, Article 8.

⁶³ E.g. consideration of whether the documents comprise both inculpatory and exculpatory evidence and the possibility for annulment only if 'the outcome could have been more advantageous for the person concerned or if, precisely because of the procedural defect, it is impossible to ascertain whether the decision would have been different' per Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003 in 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 A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del Tirreno SpA v Commission* [2004] ECR I-123, para 32.

⁶⁴ See *Austrian Banks Club-Lombard* cases; Joined Cases T-259/02 to 264/02 and T-271/02, *Raiffeisen Zentralbank Österreich and Others v. Commission* [2006] ECR II-5169, para 12 - the right to receive the SO cannot be restricted on basis of mere suspicion that the document may be misused.

⁶⁵ Best Practice Guidelines, para 65

⁶⁶ Note written documents submitted in connection to State of Play meetings will form part of the 'file' and non-confidential copies may be sent to third parties. See paras 39-40 BP Guidelines.

⁶⁷ See for example the failure to allow access to documents in Case *Aalborg Portland*, op cit, n 63, which ultimately led to the annulment of the Commission decision.

allegedly ‘confidential’ information, can be brought directly before the GC during the course of proceedings.⁶⁸

v) Deadlines to reply to the statement of objections

Time limits can also affect the fairness of the procedures as a very tight deadline may not allow an undertaking to effectively participate. However, Article 10 of the 2001 Decision provides that the parties may submit reasoned requests to the Hearing Officer for an extension of the time limit (usually of 2 months) imposed by the Commission. When deciding the Hearing Officer will balance the urgency of the case with its complexity.⁶⁹ It should be noted that deadlines will normally start running when access to the main documents in the file has been granted. However in the interests of legal certainty and efficiency, the fact that access to the entire file has not, in the addressee’s view, been granted does not automatically mean that a deadline set by DG Competition has not started running.⁷⁰ One of the new initiatives which may serve to ease the pressure of the time limits relates to the flexibility introduced by State-of-Play and triangular meetings. In addition to their flexible participant composition, they find a balance between efficiency and flexibility as they provide an option for parties to make use of the facility on a needs basis rather than according to a strict timeframe.⁷¹

Rights of the Complainant and Other Interested Parties

In addition to the target parties, the Hearing Officer must ensure that the right of complainants and other interested parties to effectively make their views known is maintained by the Commission. Over the years, their position has significantly improved⁷² and applications from concerned parties to participate in the proceedings are generally given fair consideration. This helps to counter the criticism that ‘the Community Courts have so far not been able or willing to set a reliable yardstick against which, the need for both procedural and judicial protection of third parties can be measured’.⁷³

i) Applications to be Heard

Firstly in turning to the complainant, the Regulation provides that they must receive a non-confidential version of the statement of objections and a date by which they can

⁶⁸ Article 9 procedure a.k.a the *AKZO* procedure.

⁶⁹ See Case T-44/00 *Mannesmannröhren-Werke AG* [2004] ECR II-2223, para 65.

⁷⁰ *Ibid.*

⁷¹ They may take place shortly after the opening of proceedings; still during the investigative phase, after replies to SO, after the oral hearing, or pursuant to commitment proceedings. See para 64.

⁷² See Nehl, *op cit*, fn 4, p 104. Previously ‘the principle of care’ was a stop gap for the shortcomings in the administrative process associated with other principles such as *audi alteram partem* in the degree of procedural protection offered to complainants.

⁷³ Nehl, *op cit*, fn 4, p 95.

make their views known in writing.⁷⁴ This correctly acknowledges that the interests of a complainant, such as a close competitor, may equally be as affected by the outcome of proceedings as the undertaking under investigation (who is potentially guilty of having infringed competition rules) and thus they deserve a right to effectively participate in the proceedings.⁷⁵ In practice, complainants are admitted to the proceedings by DG Competition on the basis of a formal complaint pursuant to Art 5 of Regulation 773/2004. The importance of defining these participatory rights is vital both for the protection of individual rights and for legal certainty in proceedings. It is also conducive to ensuring fairness and objectivity with respect to the Commission's wide discretion concerning; (1) who has the right to be heard and (2) as to which form the hearing will take.

The Hearing Officer responds to these needs, as he is responsible for admitting natural or legal persons with a 'sufficient interest' to proceedings before the Commission.⁷⁶ There is however no automatic right to be heard and applications for admission must be reasoned and must clearly explain the applicant's interest in the outcome of the proceedings.⁷⁷ In assessing a request for third party status, the Hearing Officer will take into consideration the contribution the party has made or is likely to make to establish 'the truth and relevance of the facts and circumstances' pertinent to the proceedings, as opposed to an exclusively private interest, or which would normally not be considered as 'sufficient'.⁷⁸ The HO may request further information from the party to this effect.

The Guidance further sets out other elements that will be considered; such as, the object of the association, whether the case raises questions of principle likely to affect the association and whether its mission is sufficiently closely connected to the subject matter of the case.⁷⁹ This is commendable as it recognises that a third party association may be affected by the proceedings and indeed deserve the right to be heard. However, the case-team retains considerable influence over participation applications as the

⁷⁴ Art 27 (1), Regulation No 1/2003 – 'complainants shall be associated closely with the proceedings', para 17 & 18 of Guidance on Hearing Officer.

⁷⁵ Case 5/85 *AKZO Chemie* [1986] ECR 2585; A Andreangeli, *EU Competition Enforcement and Human Rights*, Edward Elgar Publishing, 2008, p 40 citing CS Kerse and N Khan, *EC Antitrust Procedure* (5th edn, 2005). This represents a fair balance between the need to ensure a 'meaningful participation' and 'the legitimate interests of the investigated parties' insofar as it still allows them to make their views known.

⁷⁶ Regulation 1/2003, Article 27 (3): 'If the Commission considers it necessary' compared to the Guidance (para 32) and its *positive* wording – 'has the responsibility to'. This contrasts with what Nehl regards as the 'unhelpful' and 'purely negative definition constantly repeated by the courts, according to which third parties do not enjoy the same degree of procedural protection as applicants or target parties', *op cit*, fn 4, p 97.

⁷⁷ See paras 32 & 33 of the Guidance. Note applications will be accepted throughout the administrative proceedings.

⁷⁸ 'Sufficient interest' i.e. 'an economic or legal interest which is or may be detrimentally affected by the infringement of the Commission's decision', T-528/93 *Metropole*, [1996] ECR II-649, para 61.

⁷⁹ Guidance para 34.

Hearing Officer will only decide on applications after having requested comments from DG Competition.⁸⁰

The Hearing Officer's final report in the *De Beers*⁸¹ competition case is a good example of how the rules can succeed in upholding the right to be heard. Here Alorosa, a third party to the proceedings, was exceptionally allowed to be heard on the basis that given its former plans to merge with the De Beers, it was 'directly and individually' affected by the commitments De Beers had offered to the Commission.⁸²

Furthermore, the upside of protecting the rights of third parties may have significance for the outcome of the final decision. This is especially so in the context of cartels where the Commission has applied the Leniency Notice, as the parties who submit information can greatly impact on the condemnation of other cartel members. This aspect of the Best Practice Guidelines has been disappointing as third parties are still not informed of the substance of a leniency application filed by another party until the SO is issued.

ii) Forms of Participation for Third Parties

The Commission has considerable discretion as to the manner by which it facilitates third party rights so long as it respects the principle of good administration.⁸³ Normally third parties have the right to information in writing of the nature of the subject matter and to receive a date before which they may submit their views. Third party rights are significantly lesser than those of the target undertakings or complainants. Although they have the right to be informed of the 'nature and subject matter of the proceedings', they have no right to receive even a non-confidential copy of the SO.⁸⁴ Third parties may request an oral hearing but their rights cannot be exercised in a manner which would conflict with the rights of the defendant undertaking to be heard.⁸⁵ Presumably this is another manifestation of the Commission's attempt to

⁸⁰ Guidance para 35.

⁸¹ Opinion of Advocate General Kokott delivered on 17 September 2009 in Case C-441/07 P *Alrosa/De Beers*, judgment of 29 June 2010.

⁸² See also T-528/93 *Metropole Television and others*, [1996] ECR II-649, recital 1 of summary.

⁸³ Nehl, *op cit*, fn 4, p 141, adds that the Commission's wide discretion is counterbalanced by the procedural device of the concept of care. But see the peculiarity regarding para 8 of the 2010 Guidance on Hearing Officers as it curiously states that 'the Hearing Officer does not ensure the principle of "sound" administration' and defers to the Commissions Code of Good Behaviour (p 5). Despite this, where a party to the proceedings believes this 'principle' is not being respected (e.g. submissions not taken into account or lack of opportunity to be heard in an effective manner due to a tight deadline/insufficient access to the file) then the Hearing Officer is the first port of call for the enforcement of this perceived lack of good administration. Moreover, the Hearing Officer's website authoritatively sets Article 41 - the right to good administration - as the guiding principle of his whole mission.

⁸⁴ See Case T-17/93 *Matra Hachette SA* [1994] ECR 595, paras 16-18, HO Guidance paras 16-18.

⁸⁵ *Ibid*, e.g. their presence at the oral hearing may mean the defendant undertaking cannot not express its views effectively due to confidentiality concerns. One possible solution is to allow third parties to submit written observations but not attend the oral hearing. See also Jellema, 'The redheaded stepchild of Community competition law: the third party and its right to be heard in competition proceedings', (2002) 20 Boston UILJ 211, p 272.

ensure fairness in the procedure by limiting opportunism, for example, from undertakings who try to take advantage of participation in order to uncover the commercial policies of their competitors. Giannakopoulos suggests that opening the proceedings to all and sundry would lead to numerous applications being heard which would then spur intense allegations regarding the confidentiality of the SO and its responses, leading to ‘protraction and delay of the procedure’.⁸⁶

iii) Obstacles and Further Challenges for Third Parties

The concern for efficiency must always be balanced with respect to the rights of defence as the Courts have repeatedly emphasised: observance of the rights of defence is a fundamental principle of Union law.⁸⁷ The conflict is exemplified by the ruling in the *Lisrestal* case.⁸⁸ Here the ECJ upheld the judgment of the CFI and rejected the Commission’s pleas in holding that practical grounds are not sufficient to justify the infringement of a fundamental principle such as the observance of the rights of defence. The position was subsequently strengthened in *Air Inter* where the Court restated that the right to a fair hearing should not be weakened as a result of a legislative gap or where legislation exists but fails to take proper account of the principle.⁸⁹

Moreover, there is a significant procedural obstacle for a third party who is denied a right to be heard to challenge this decision. The party must be able to show that in not hearing the third party the Commission ‘unduly restricted the inquiry’.⁹⁰ The Guidance has chosen to phrase this more positively in stating that the Hearing Officer’s decisions must have due regard to ‘the interest in efficient proceedings’.⁹¹

Andreangeli submits that ‘the rather limited possibility to access the oral hearing constitutes a factor of some concern’ as the requirement to show that an outright denial to join proceedings has ‘unduly restricted’ the investigation is a ‘rather high threshold’ which can ‘discourage third parties from exercising their hearing rights’.⁹² Certainly the

⁸⁶ Giannakopoulos, op cit, fn 2.

⁸⁷ Opinion of AG Bot in *Bolloré*, op cit, fn 49, para 88; Case C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, para 68; in particular the right to a fair hearing in Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel v Commission* [2007] ECR I-729, paragraph 151; also citing, Case C-44/06 *Gerlach* [2007] ECR I-2071, para 38; Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich and Austria v Commission* [2007] ECR I-7141, para 36.

⁸⁸ Case C-32/95P *Commission v Lisrestal* [1996] ECR I-5373 dealing with the administration of the European Social Fund and the Commission’s refusal to directly consult individuals due to an ‘excessive administrative burden’ paras 35-37; Case T-65/96 *Kish Glass v Commission* [2000] ECR II-1885, recital 32; Giannakopoulos, op cit, fn 2, p 408.

⁸⁹ See also *Air Inter*, op cit, fn 10, and Giannakopoulos, op cit, fn 2, p 408.

⁹⁰ A Andreangeli, op cit, fn 75, p 41.

⁹¹ BP Guidance, para 34.

⁹² Andreangeli, op cit, fn 75, p 41; see also Case 209-215 & 218/78 *Heintz van Landewyk v Commission* (FEDETAB) [1980] ECR 3125.

admission of third parties to the procedure, especially concerning the oral procedure, can help to clarify the facts and issues and thus give a better overall view⁹³ but it can also cause inefficiency and possibly lead to long and protracted procedures. However, it is submitted that the lack of cases in point⁹⁴ suggests that in practice third party rights are not ‘unduly restricted’ especially given the wide-ranging factors that the HO will consider for each application to be heard.⁹⁵

The Oral Hearing

One of the primary ways to ensure fairness in proceedings liable to adversely affect a person is to abide by the old adage that ‘justice should not only be done, but should manifestly and undoubtedly be seen to be done’.⁹⁶ Therefore a real opportunity for an accused undertaking to clarify, elaborate and emphasize its arguments before a neutral party who then decides as to guilt or innocence on the basis of the facts and evidence before it, would go a long way towards realising effective justice in competition law. The article will now consider to what extent the oral hearing in the ‘administrative sphere’ can succeed in fulfilling these objectives.

Article 12 of the Implementing Regulation 773/20047 provides that the Commission shall give the parties to whom it has addressed a SO the opportunity to develop their arguments at an oral hearing which is organised and conducted by the Hearing Officer.⁹⁷ He is responsible for ensuring its objectivity and that due account is taken of all the relevant facts, whether favourable or unfavourable to the parties, including the factual elements related to the gravity of any infringement. He then draws up an interim report on the extent to which the right to be heard has been respected in the whole of the proceedings and this is submitted to the Director General of Competition and the Competition Commissioner.⁹⁸ The most notable benefits of a hearing are summed up by the current Hearing Officer⁹⁹ where he concludes that the hearing would give:

‘the parties a chance to react to any allegations by other parties on the spot, to present their cases to a wider audience ... and to raise issues in the presence of many of those who are consulted before a final decision is reached’.

John Temple Lang, a former Hearing Officer, opines that the oral hearing has in recent years assumed more importance as companies take advantage of the fact that Member

⁹³ No 18064/91, *Ortenberg v Austria*, [1995] 19 EHRR 524, para.26

⁹⁴ Despite the fact that the third party has the right to challenge the Commission decision refusing to allow it to participate in the proceedings before the General Court.

⁹⁵ See para 34 Guidance on Hearing Officers; Article 6 Commission Decision of 2001, op cit, fn 29.

⁹⁶ *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259 per Hewart LCJ.

⁹⁷ Note for both the target and third parties, the right to an oral hearing is not automatic and must be requested. See Article 5, Commission Decision of 2001, op cit, fn 29.

⁹⁸ Article 13, *ibid*.

⁹⁹ Final report of the Hearing Officer in Case COMP/37.766 - *Dutch Beer market* OJ 2009, C133/6.

State representatives on the Advisory Committee are present and use this as a lobbying platform to try to influence them.¹⁰⁰

In the *CD-Contact Data GmbH* case¹⁰¹ the applicant considered that its right to an oral hearing was ‘particularly important’. It submitted that because there was no hearing, the Commission acted in breach of the principle of sound administration and the rights of the defence by exercising ‘undue influence’ on it to waive its right to a hearing. The Court was ready to consider the importance of the hearing as otherwise the applicant would be deprived of any opportunity to submit its observations during a formal hearing with third parties present but, on the facts it was unsuccessful in proving such undue influence. Similarly in *CISAC*, concerning an ‘authors collecting society’ with 27 members subject to competition proceedings, the importance of the oral hearing was implicit in the Hearing Officer’s report. Following the oral hearing, the Hearing Officer required a new ‘Letter of Facts’ to be issued to substantiate the SO and for a new round of access to documents and submissions to be opened in favour of *CISAC*. As a result of this hearing, he reported that the Commission actually decided to drop the conclusions in respect of *CISAC*.¹⁰² However, it appears that this case is more of an exception as the majority of the Hearing Officer’s reports do not attest significant flaws in the Commission’s procedures.¹⁰³ A final possible importance of the Hearing Officer’s role is that failure to address him in a dispute, for example, in ‘access to file’ issues, can later be used against a party.¹⁰⁴

At this point it is worth considering the Best Practice Guidelines and their initiatives with respect to allowing the undertakings to express themselves orally. Firstly the State-of-Play meetings provide an informal setting at the Commission’s premises,¹⁰⁵ where the parties concerned have ‘ample opportunity for open and frank discussions and to make their points of view known throughout the procedure’. They can be instigated upon the request of the parties but unlike oral hearings, can also result from the initiative of DG Competition. One of the advantages of this novelty is that it gives the undertakings an extra opportunity to clarify information and to influence the case team

¹⁰⁰ See Giannakopoulos, op cit, fn 2, p 185. See also Michael Albers, Karen Williams ‘Oral Hearings - Neither a Trial nor a State of Play Meeting’, Mar 16, 2010, at www.competitionpolicyinternational.com, who note, ‘Oral hearings are requested in around 75 percent of all cases for which a statement of objections (SO) has been issued’.

¹⁰¹ Case T 18/03 *CD-Contact Data GmbH v Commission*, [2009] ECR II-1021, para 88.

¹⁰² Case COMP/C-2/38.698, OJ 2008, C323/10. Presumably because the probative value of their evidence was insufficient to meet these additional procedural requirements.

¹⁰³ See the website at http://ec.europa.eu/competition/hearing_officers/reports.html.

¹⁰⁴ See Case T-44/00 *Mannesmannröhren-Werke AG* [2004] ECR II-2223; See also *AC Treubund* [2008] ECR II-1501, para 51, where the Court’s decision relied on the minutes of the oral hearing which revealed the applicant had actually admitted that the lack of prior information from the Commission would not have influenced its final decision.

¹⁰⁵ Or alternatively, if appropriate, by telephone or videoconference. See Best Practice Guidelines, paras 54-56

in their decision, if indeed the promise that Senior DG Competition management will chair the meeting is kept.¹⁰⁶

The Guidelines expressly mention that the parties subject to Commission proceedings have the opportunity to discuss the case either with the Director-General of DG Competition¹⁰⁷ or, when appropriate, with the Commissioner responsible for Competition.¹⁰⁸ However this seems to be more a reflection of practice rather than an enforceable right for the undertakings. The Best Practice guidelines do seem to recognise the importance of the oral hearing in the overall scheme of fair enforcement. They state:

‘In view of the importance of the oral hearing, it is the practice of DG Competition to ensure continuous presence of senior management (Director/Deputy DG) in oral hearings, together with the case team of Commission officials responsible for the investigation’.¹⁰⁹

On one hand, it seems that the Best Practice initiatives go some way towards remedying the current deficit whereby there is an absence at any point in the procedure of a hearing before the person who decides the case. They help to counter the fact that the Hearing Officer has in practice little input into matters relating to the substance of the case; or, at least, little visible input¹¹⁰ as his interim views are not available to the parties due to their classification as internal reports. Despite the fact that the Hearing Officer’s final report is made available to the parties and is now published on its website,¹¹¹ in the *Hoechst GmbH* case the Court maintained that:

‘it should be noted at the outset that the hearing officer’s report constitutes a purely internal Commission document, which is not intended to supplement or correct the undertakings’ arguments and which therefore does not constitute a decisive factor which the Community judicature must take into account when exercising its power of review’.¹¹²

This reflects the fact that the Hearing Officer’s role, despite being ‘independent’, is still merely a component of the Commission’s decision making process. Undoubtedly he contributes to the objectiveness and fairness of the proceedings but, it is the case-team and then ultimately the entire College of Commissioners (27 political representatives)

¹⁰⁶ See para 56.

¹⁰⁷ Or the Deputy Director General. See para 64.

¹⁰⁸ See para 64.

¹⁰⁹ See para 94.

¹¹⁰ Despite the fact that the HO must be kept informed of all developments in the case and that he may also make further observations on any matter pertaining to the procedure or substance of the case.

¹¹¹ Commission Decision of 2001, op cit, fn 29, Article 16.

¹¹² See Case T-161/05 *Hoechst GmbH v Commission of the European Communities*, [2009] not yet reported, (CFI Sept. 30, 2009), para 176; Case T-335/94 *Limburgse Vinyl Maatschappij and Others v Commission* [1999] ECR II-931, para 375.

who are responsible for deciding whether to adopt the draft decision relating to the infringement.

Finally, despite the Best Practices and the Hearing Officers efforts to renew objectiveness and fairness in the proceedings; the guidelines are no substitute for a broader and more fundamental reform of Regulation 1/2003, which remains necessary to ensure both procedural fairness and possibly compliance with the ECHR.¹¹³

Deficiencies of the Oral Hearing

Ultimately from a party's point of view, the most it can hope for (or deserves) is to properly be able to present its arguments to the Commission and for them to be adequately taken into account. However the nature of the oral hearing and indeed the procedure as a whole, has led to critics identifying some serious and inherent problems that may violate the right to a fair hearing as protected under Article 6 ECHR.¹¹⁴

The first of these defects is that there is no hearing on the full facts, with the full guarantees of a criminal trial, before the person who will ultimately decide the case. The second related flaw to be analysed is more subtle, but nonetheless powerful. It relates to a perceived lack of independent and impartial decision making leading to the infringement decision. As a result of the fact that the same case team both investigates and draws up the draft infringement decision there is a certain perception that the whole proceedings may be subject to a degree of prosecutorial bias. Wils submits that this is due to psychological factors associated with the fact that a case can sometimes take years to complete so that a Commission official who actively pursues an investigation for the duration may find it hard to effectively take contradicting evidence into account. This reflects the Commission's investigative structure itself and the huge investment of resources once the investigation has been opened.¹¹⁵ Thus parties are often frustrated by the perceived unfairness of the intellectual process of reaching a conclusion. The last problem concerns the lack of any possibility for the undertakings to cross-examine the evidence submitted against them or to hold a public hearing which will be considered here in due course.

¹¹³See for instance ICC Commission on Competition, 'Due process in EU antitrust proceedings', Document No. 225/667 – 8 March 2010; Ulrich Soltész, 'What (Not) to Expect From the Oral Hearing', *The CPI Antitrust Journal* March 2010 (1) and Modrall & Patel, 'Oral Hearings and the Best Practices Guidelines', Mar 16, 2010 at www.competitionpolicyinternational.com.

¹¹⁴Waelbroek and Fosselard, 'Should the Decision-Making Power in EC Antitrust Procedures be left to an Independent Judge? - The Impact of the ECHR on EC Antitrust Procedures', (1994) 14 YEL pp 111-142.

¹¹⁵Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function' (2004) 27 *World Competition: Law and Economic Review* 202.

PART III. THE IMPACT OF THE ECHR ON EU COMPETITION LAW

Reluctance to apply ECHR case law – a recent softening in judicial attitudes?

i) No jurisdiction to Apply ECHR

Traditionally both the EU Courts and the Commission have typically held that EU competition law proceedings are not directly subject to the ECHR and secondly, that the proceedings are not criminal in nature and thus undeserving of the full protection of Article 6 ECHR guarantees.¹¹⁶ In relation to this first contention, the usual objections include a lack of jurisdiction to apply the ECHR supported by the premise that ‘the Commission is not a tribunal’ within the meaning of Article 6(1) ECHR. In the *Mannesmannröhren-Werke AG v Commission* case the Court held:

‘It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law.’¹¹⁷

Despite the General Court having recently restated this position in *AC Treubund*, it also showed a greater deference to the possibility of an ECHR influence. Hence the lack of ‘jurisdiction’ claim was immediately compensated with a recognition that in situations where ‘penalties, especially fines or penalty payments, may be imposed’ that the rights of the defence are ‘fundamental rights forming an integral part of the general principles of law’,¹¹⁸ whose observance the Union judicature ensures; the Court citing the *Aalborg Portland*¹¹⁹ and *Groupe Danone*¹²⁰ cases to this effect. Moreover in reiterating the ‘special significance’ of the ECHR and then noting the interpretative obligation in Article 52(3) of the Charter (as discussed in Part I) it seems the Court showed a willingness to apply the ECHR but fell foul of the jurisdictional limitations.¹²¹

It is submitted that now, given that the binding legal force of the Charter has since been realised by the Treaty of Lisbon - this interpretative obligation is unavoidable. Notably where the EU rights correlate to those under the ECHR, such as the presumption of innocence under Article 6(2) ECHR, the Court has showed a greater

¹¹⁶ Article 6 ECHR.

¹¹⁷ Case T-112/98, [2001] ECR II-729 paras 59, 60; see also Case T-374/94, *Mayr-Melnhof v Commission* [1998] ECR II-1751, para 311.

¹¹⁸ Case T-99/04 *AC Treubund*, [2008] ECR II-1501, para 46.

¹¹⁹ *Aalborg Portland*, op cit, fn 63, para 23.

¹²⁰ Case C-3/06P, [2007] ECR I-1331, para 68.

¹²¹ *AC Treubund*, op cit, fn 17, para 45; note also the careful wording in Case 347/87 *Orkem v Commission* [1989] ECR 3301, at para 30 – ‘[a]s far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself’.

willingness to take the Convention into account.¹²² Thus the applicant in *AC Treubund* may well have found the scope of his rights interpreted more restrictively than a future Court may decide in a similar scenario.

ii) Commission is not a ‘Tribunal’

In addition, the argument of non-applicability was bolstered by the assertion that the Commission is not a tribunal. The General Court in *Shell*¹²³ held that the fact that certain officials acted in administrative proceedings as investigators and ‘rapporteurs’ did not make it unlawful. Similarly in the *Bolloré* case the Court considered the application of Article 6(3) ECHR to competition proceedings where it restated that ‘it is clear from settled case-law that the Commission cannot be described as a “tribunal” within the meaning of Article 6 of the ECHR’.¹²⁴ This position was later confirmed in *Cimenteries*.¹²⁵

iii) Administrative versus Criminal

As regards the second contention, this brings into question the classification of competition enforcement as ‘administrative’ despite the fact that it exhibits clearly punitive and deterrent characteristics. This criminalisation of competition law sanctions has arguably become evident in recent years in light of the huge fines the Commission may legally impose, in some cases surpassing the billion Euro mark.¹²⁶ Despite the Opinions of the Advocate Generals that the fines are ‘sanctionative’¹²⁷ and ‘do in fact have a criminal law character’,¹²⁸ the Court has not yet renounced its views on the non-criminal nature of the fines. Most recently the GC repeated its careful literal interpretation in *Compagnie Maritime Belge*.¹²⁹

‘It follows from the wording of Article 19(4) of Regulation No 4056/86 (now Article 23 (5) of Regulation 1/2003) that even the fines imposed under that

¹²² See Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, para 178, Case C-199/92 *P Hüls v Commission* [1999] ECR I-4287, para 149.

¹²³ Case T-11/89 *Shell v Commission*, [1992] ECR II-757 para 39, also Cases 209-215 & 218/78 *Heintz van Landenye v Commission (FEDETAB)* [1980] ECR 3125, para 79-81; Joined Cases 100/80 to 103/80 *Musique diffusion française and Others v Commission* [1983] ECR 1825 (Pioneer) para 7-9.

¹²⁴ *Bolloré*, op cit, fn 49, para 86.

¹²⁵ *Cimenteries*, op cit, fn 57.

¹²⁶ See the fine of EUR 1.06 billion imposed on Intel for Article 102 TFEU infringement (COMP/C-3 /37.990 - *Intel*)

¹²⁷ See Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 February 2003 in Case 217/00 *Buzzi Unicem Spa*, op cit, fn 63, para 29.

¹²⁸ See Opinion of Advocate General Vesterdorf in Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, para I.3

¹²⁹ *Compagnie Maritime Belge*, op cit, fn 49, para 65; Case T-83/91 *Tetra Pak v Commission* [1994] ECR II 755, para 235.

provision are not of a criminal law nature.¹³⁰ Furthermore, it has been held that the effectiveness of Community competition law would be seriously affected if the argument that competition law formed part of the criminal law were accepted'.¹³¹

However it is respectfully submitted that arguments in favour of procedural efficiency need to be more openly balanced in light of human rights obligations. The Court has itself held in the past in *Lisrestal*¹³² that administrative or practical efficiency cannot justify the infringement of a fundamental principle such as the observance of the rights of defence.¹³³ Indeed, as Advocate General Bot highlighted, observing such rights is all the more critical 'in what might be described as quasi-criminal proceedings and where the Commission enjoys a very broad discretion and judicial review is restricted'.¹³⁴

In order to mitigate this conflict the Courts have recourse to the general principles of law with respect to the right to a fair hearing and apply standards that it considers to be fair in the circumstances. In the *Bolloré* judgment the GC stated that the Commission is not under an obligation to call witnesses to give evidence at the hearing, either for or against the company if it does not see it as necessary, but nor is it entitled to call witnesses to testify against the undertaking concerned without their agreement.¹³⁵ In looking to the facts at hand the GC considered it important that the applicant could not show that it had requested the Commission to provide details of the names of the third parties who submitted evidence or that it had asked for them to be questioned at the hearing and it held that Regulation No 17 had not been violated.¹³⁶

This methodology of using the general principles of law to deduce an overall appreciation of what is fair in the circumstances is a reasonable approach and is to be commended. However, objectively speaking, that consideration of fairness is obviously limited by the pigeon holing of the proceedings into an 'administrative' classification and thereby excluding the full application of Article 6(2) or Article 6(3) ECHR.¹³⁷

It is also interesting for the purposes of this article to note the Commission's own arguments as to the applicability of Article 6(3) in the *AC Treubund* case. It is submitted that failure to respect the guarantees under Article 6(3)(a) ECHR at the investigation stage must seriously compromise the fair nature of the proceedings; when account is

¹³⁰See para 86 and the cases cited - Joined Cases 209, 215 & 218/78 *Van Landenyeck and Others v Commission* [1980] ECR 3125, para 81, and Joined Cases 100-103/80 *Pioneer*, op cit, fn 123, para 7.

¹³¹See to that effect, Case C-338/00 P *Volkswagen v Commission* [2003] ECR I-9189, para 97.

¹³²Op cit, fn 88.

¹³³However see the contrasting Opinion of AG Bot at para 84 in the subsequent appeal to the ECJ, see discussion at fn 24, 53, 87, where giving precedence to the efficiency of the administrative procedure, caused him to have 'certain reservations'.

¹³⁴Op cit, fn 24.

¹³⁵*Bolloré*, op cit, fn 49 para 87, citing Case T-9/99 *HFB and Others v Commission* [2002] ECR II 1487, para 392.

¹³⁶Para 88.

¹³⁷See generally Lenaerts & Vanhamme, 'Procedural Rights of Private Parties in the Community Administrative Process' (1997) 34 CML Rev 531, p 556.

taken of the implementation of the procedure as a whole.¹³⁸ Accordingly the questions that need answering at this juncture are to what extent is a higher level of procedural guarantee required to ensure this view of objective fairness? Indeed, if competition proceedings do fall under the criminal classification, to what extent do the protections need to be increased in order to match those of the Convention?

Determination of a ‘criminal charge’ in the sense of Article 6 ECHR

In order to guarantee optimal procedural rights to individuals, the ECtHR has not limited itself to a formalistic definition of ‘criminal charge’ but has developed an autonomous interpretation of the notion of a ‘criminal charge’.¹³⁹ The criteria established in the seminal *Engel*¹⁴⁰ case and later expanded in the *Bendenoun* judgment,¹⁴¹ have underpinned a gradual broadening of the criminal head to cases not strictly belonging to criminal law in the traditional sense. These include administrative penalties,¹⁴² customs law,¹⁴³ penalties imposed by a commercial court and tax surcharges.¹⁴⁴ Indeed in *Société Stenuit v France*,¹⁴⁵ the now defunct European Commission of Human Rights concluded that the French competition law proceedings in light of the nature of the offence possessed ‘a criminal aspect ... for the purposes of the Convention’.

Thus, in applying the criteria established in the above mentioned jurisprudence, in order to determine the substantive nature of a ‘charge’, the ECtHR will examine; the classification in domestic law, the nature of the offence and the nature and severity of the penalty.¹⁴⁶ It will also consider whether the rules have a specific or general sense¹⁴⁷ and whether they are punitive or deterrent in nature. The latter criteria seem to have particular relevance and since the *Dubus* case¹⁴⁸ has recently confirmed, the level of the sanction itself will also be determinative. The *Dubus* judgment concerned a French financial company subject to procedures of the national Banking Commission. The applicant challenged the fact that the same people were both investigating his ‘misconduct’ and then deciding as to his guilt. The ECtHR held that as the Banking Commission had imposed a sanction with a ‘penal coloration’, that it had in fact

¹³⁸ *AC Treubund*, op cit, fn 17, para 40, the Commission invokes ECtHR caselaw to this effect in *Imbroscia v Switzerland* Eur. Court H. R. judgment of 24 November 1993, Series A no. 275, § 36.

¹³⁹ *Le Compte, Van Leuven and de Meyere v Belgium*, ser A No 43, [1982] 4 EHRR 1, para 45.

¹⁴⁰ Judgment of the ECtHR of 8 June 1976, *Engel and others v the Netherlands*.

¹⁴¹ Judgment of the ECtHR of 24 February 1994, *Bendenoun v France*, A 284.

¹⁴² *Öztürk v Germany* judgment of the ECtHR of 21 February 1984 - Case 8544/79.

¹⁴³ *Salabiaku v France*, judgment of the ECtHR of 7 October 1988, Series A no 141-A.

¹⁴⁴ *Guisset v. France*, no. 33933/96, ECHR 2000-IX.

¹⁴⁵ Judgment of the ECtHR of 27 February 1992, Series A no. 232-A.

¹⁴⁶ Note the criteria are neither cumulative nor equal, the first being less indicative.

¹⁴⁷ *Bendenoun*, para 46.

¹⁴⁸ Judgement of the ECtHR of 11 June 2009, *Dubus SA v France*, Application no. (5242/04).

fulfilled the same function as a ‘tribunal’ within the meaning of Article 6 ECHR¹⁴⁹ and therefore was necessarily subject to the same obligations of impartiality and independence. In light of this qualification, the Court held that the essence of Article 6 is respected if the defendant can establish the existence of a ‘separation organique’ between the different functions which would ensure a fair hearing without ‘un prejudgement’; that is prejudgment or bias.¹⁵⁰

However, based on the above judgements, the ECtHR carved an exception for certain procedures in order to guarantee the effectiveness of the administration. It drew a distinction between the hard core of criminal law and other minor offences¹⁵¹ holding that the criminal guarantees will not necessarily apply with their full stringency in some cases. For example, in *Bendenoun* which related to the imposition of tax surcharges, it was found that imposing criminal penalties in the first instance by an administrative or non-judicial body was compatible with Article 6(1), so long as there was a subsequent possibility for judicial review by a proper court.¹⁵² As the *Engel*¹⁵³ judgement stated:

‘the Convention calls at least for one of the following systems: either the jurisdictional organs themselves comply with the requirements of Article 6, paragraph 1, or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6, paragraph 1’.

Therefore the EU competition enforcement mechanism, and the limited option to bring judicial review proceedings before the GC, must be assessed in light of the ECtHR judgments and its established criteria.

i) Significance of the two tier administrative plus judicial system

In EU competition law the traditional view¹⁵⁴ is that the two phase judicial system satisfies the protections of Article 6 ECHR. It sees the GC as a trial court capable of curing any injustices of the administrative procedure by annulling in whole or in part the contested Commission decision. However, despite recent trends of more in-depth review in cases such as *Schneider Electric*,¹⁵⁵ critics often deplore the less than full ‘review

¹⁴⁹ *Dubus* para 38 - « La Cour est d’avis que la Commission bancaire, lorsqu’elle a infligé à la requérante la sanction du blâme, devait être regardée comme un « tribunal » au sens de l’article 6 § 1 de la Convention (voir en ce sens l’arrêt *Sramek c. Autriche*, 22 octobre 1984, § 36, série A no 84, où la sanction dans les circonstances de l’espèce, avait une « coloration pénale ». Ainsi, la Commission bancaire a statué en tant que « tribunal » et sur le « bien-fondé d’une accusation en matière pénale au sens de l’article 6 § 1 de la Convention. »

¹⁵⁰ See the arguments submitted by the French government in *Dubus*.

¹⁵¹ *De Cubber v. Belgium* judgment of 26 October 1984, Series A no. 86, p. 19, para 33 and 35.

¹⁵² *Bendenoun* op cit, fn 141, para 46; *Janosevic v Sweden* (No. 34619/97, ECHR 2002-VII), para 81.

¹⁵³ *Engel and others v the Netherlands*, op cit, fn 140.

¹⁵⁴ See notes from the Fordham Competition Law Institute’s, ‘Annual Conference on International Antitrust Law and Policy’, 2001 in Lenaerts and Vanhame, op cit, fn 137.

¹⁵⁵ Case T-351/03, *Schneider Electric SA v. Commission* [2007] ECR II-2237, para 183.

on the merits' available to the parties. Although it has full jurisdiction to review fines, the GC does not reassess all the factual elements of the case and rather limits its review to determining whether the Commission's analysis 'was vitiated by a manifest error of assessment or a misuse of powers'.¹⁵⁶

This approach may well be justified by the fact that competition decisions involve complex economic appraisals.¹⁵⁷ The rationale is that the Treaty attributed the Commission this enforcement power under Articles 101 & 102 and thus charged it with a duty to implement its 'overall policy objectives'. Moreover as Joshua submits, it reflects the viewpoint that the administration 'must not only have the authority to administer in the more traditional sense, but also to decide disputes arising out of its administration'. Indeed he deems that the 'effective administration of schemes of regulation presupposes a concentration of functions wholly foreign to the judicial process'.¹⁵⁸ However, the penultimate question pertains to whether this concentration of important powers in a single body is such as to render a lower standard of justice or fairness than would otherwise apply in judicial proceedings?

Application of Article 6 ECHR to EU Competition proceedings imposing fines

i) Applying the 'criminal charge' criteria to EU Competition procedures

Taking into account the ECtHR substantive approach to the nature of proceedings, it is clear that the provision in Art 23(5) of Regulation 1/2003, which expressly states that the fines are not of a criminal law nature, is not determinative. The extent to which this is true is evident if one takes an analytical approach and applies the Engel criteria (as restated in *Dubus*) to EU competition law proceedings. Firstly, competition rules are measures of general application as Articles 101 and 102 TFEU apply to all undertakings. Secondly, the rules attach penalties for non-compliance and they certainly aim to have a deterrent effect. Moreover, by taking a brief look at the gravity of the penalties in the form of fines one could certainly suggest that the fines are high enough to be classified as criminal.

ii) Consequences of falling within the notion of a 'criminal charge'

The crucial consequence is that greater standards of procedural guarantees are necessitated by 'criminal charges' as opposed to mere administrative sanctions. This boils down to the reality that as the stakes get higher, so too does the necessity to ensure fairness in the way a decision is arrived at - namely by guaranteeing the right to be heard. As Marshall correctly submits, the individual's interest in having an opportunity to convince the decision maker of his position is part of the 'instrumental

¹⁵⁶ Case 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, para 62, Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601.

¹⁵⁷ Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, para 34.

¹⁵⁸ Joshua, op cit, fn 16, p 39.

conception of due process'.¹⁵⁹ Examination of this 'instrumental value' highlights that it cannot be furthered without the participation of an adjudicator who is truly independent from the government or administrator involved in the case.

The argument accepting that an accumulation of functions is in compliance with the ECHR where the matter concerns certain administrative, minor or disciplinary offences,¹⁶⁰ cannot be accepted with respect to competition law. Its procedures are essentially criminal and they therefore deserve to have an independent and impartial tribunal to 'determine the charge' at first instance after a public hearing on all the facts and legal arguments. According to Forrester,¹⁶¹ this 'formal legal vice' is easily identified and should the matter ever arrive competently before the ECtHR, 'this element would perhaps be the strongest and most obvious imperfection'.

Another concern relates to the Article 6(3) ECHR guarantees and the fact that neither in the proceedings before the Commission, nor before the EU Courts, do the undertakings have the possibility of examining witnesses. This is particularly significant with regard to statements made in leniency applications as the undertakings charged in such statements do not have the possibility of examining the witnesses who made these potentially incriminating statements. In fact the Leniency Notice creates an incentive to confess as much as possible in order to implicate other undertakings. In addition, neither the Commission nor the EU courts are obliged to hear the witnesses.¹⁶² Therefore, whether the statements are true or false may not be examined at all. This constitutes a serious infringement of Art 6(3)(d) of the ECHR.¹⁶³ If the right to cross examine the persons who have submitted evidence against it was granted to the accused undertakings, it would also assist the Commission to assess whether it could indeed rely on the evidence in, for example, a subsequent court procedure.¹⁶⁴ Unfortunately as we have seen, the new Best Practice Guidelines failed to deliver on this point and did not introduce such a right. It is nevertheless submitted that this right should not extend to examining the Commission officials themselves given that they are not witnesses to the facts.¹⁶⁵

As regards the requirement for the hearing to take place in public (Article 6(3) ECHR), in practice this is of less concern in practice given that parties usually seek protection of their business secrets. However, in order to fully respond to the Article 6 obligations

¹⁵⁹ See Marshall, 'Adjudicatory Independence and the Values of Procedural Due Process', 95 Yale LJ 455, at p 477.

¹⁶⁰ *Öztürk v Germany*, ECtHR of 21 February 1984, Case 8544/79, para 56; *Kadubec v Slovakia*, ECtHR of 2 September 1998, Case 5/1998/908/1120, para 57.

¹⁶¹ Forrester, 'Due process in EC competition cases: a distinguished institution with flawed procedures', (2009) ELRev 841.

¹⁶² See comments on *Bolloré* at fn 24 and 49.

¹⁶³ *Haas v Germany*, ECtHR Case 73047/01 (November 17, 2005).

¹⁶⁴ See Ulrich Soltész, 'What (Not) to Expect From the Oral Hearing', The CPI Antitrust Journal March 2010 (1) p 5.

¹⁶⁵ Joshua, *op cit*, fn 16, p 65.

and to guarantee fairness and transparency of debate it is submitted that it should at least be an available option. Moreover in the *Jussila* case the ECtHR held that ‘an oral and public hearing constitutes a fundamental principle enshrined in Article 6(1)’.¹⁶⁶

Notably in the *Microsoft* case, the request for the oral hearing to be held in public was rejected. The HO maintained that he could not depart from a tradition that was in operation for more than forty years nor did he consider it would be in the interests of the parties or the ‘serenity’ of the case. In the author’s opinion, similarly to the arguments based on procedural efficiency, these are not sufficient justifications where fundamental rights are concerned. Consideration of higher principles than tradition or serenity is required, as is a consideration of human rights issues in competition law not as ‘a burden but rather as part of a compliance strategy’.¹⁶⁷

Currently, the possibility of a negative ruling from the ECtHR is not entirely excluded should an appropriate case arise. In essence it would mean that all the Member States of the EU would be held jointly responsible for the failures of the EU institutions insofar as their transfer of competences to the EU (in the area of competition law enforcement) has resulted in a failure to fulfil their ‘positive obligation’ to uphold the Convention under Article 1 ECHR. Overall, if the proceedings were to be classified as criminal, it would imply greater obligations at ‘first instance’ to ensure the effectiveness of the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal established by law as required under Article 6 ECHR.

RECOMMENDATIONS

Although the Commission’s good motives in seeking to implement competition policies for the common good are not questioned, it is submitted that its procedures lack the requisite qualities to appropriately fulfil its mandate in a fair and objective manner. In order to avoid the complete overhaul of institutional reform which could require Treaty amendment, the Commission could temporarily afford more powers to the Hearing Officer. This could be done by allowing the HO earlier intervention in the investigation process, by reinforcing his right to submit comments on the substance of the case and by giving greater weight to his comments where they are invoked in a subsequent judicial procedure. With regards to the protection of third parties, which has substantially improved, the Hearing Officer should be able to determine himself, on the basis of a third party application, whether the third party can be admitted without first having to consult with the Director of the case study. All of the above suggestions are naturally linked to further increasing the impartiality of his position vis-à-vis the case team and the other Commission personnel.

¹⁶⁶ *Jussila v Finland* (73053/01) [2009] S.T.C. 29 (ECHR (Grand Chamber)), para 40.

¹⁶⁷ Thomas Perroud, ‘The impact of Article 6(1) ECHR on competition law enforcement: A comparison between France and the United Kingdom’, <http://www.icc.qmul.ac.uk/GAR/GAR2008/Perroud.pdf>.

Some more radical reforms include creating a Competition Court with full ‘jurisdiction on the merits’¹⁶⁸ however this would undeniably require Treaty amendment. Alternatively, arguments such as granting the Hearing Officer a role similar to that of an Administrative Court Judge in the United States have often been debated and cast aside. According to the House of Lords Select Committee this is due to concerns to the effect that ‘making the Hearing Officer more like a judge would only blur the picture, possibly to the detriment of the effective application of the Union’s competition policy’.¹⁶⁹

That is not to say that the current process could not embrace a more adversarial process which could include a public oral hearing and the possibility to cross examine witnesses.¹⁷⁰ On the one hand, a public hearing would have to be accompanied by the prior preparation of a non-confidential version of each document to be used at the hearing so as not to infringe confidentiality safeguards. On the other hand, given the extensive disclosure requirements that are already in place, this may not prove to be such an additional burden for the parties.

Perhaps this classification or division of evidence suggestion, if considered in light of an interdepartmental reorganisation, could prove crucial to improving the system. For example it could envisage a physical division between the investigative evidence being dealt with by the investigative team from the evidence upon which the decision will be based, the latter being dealt with by another DG. This separation could notably cure or at least offset the current concerns regarding bias. The system could also clarify ‘access to file’ rights as all the evidence sent to the second DG would be freely available to all parties given its non-confidential nature. This could help to reduce time spent in relation to disputes on the disclosure of information.¹⁷¹ However this suggestion necessitates a more long term view of what constitutes efficiency/effectiveness as it would, of course, require an initial injection of extra resources, from all sides, in order to implement it.

CONCLUSION

As the first part of this article has suggested, there has been increasing convergence between EU administrative law principles. In this author’s view these developments are positive and may help to ensure a greater overall objectiveness and fairness in proceedings, arguably the most important criteria of any process. On the other hand, while EU human rights and the ECHR are often considered as parallel jurisdictions, ultimate convergence is now more likely as a result of the Treaty of Lisbon changes.

¹⁶⁸ Andreangeli, *op cit*, fn 75, chapter 7, p 225.

¹⁶⁹ House of Lords XIX Select Report on Strengthening the Role of the Hearing Officer 2001.

¹⁷⁰ In 13 EU countries the infringement decisions can only be applied by an organically separate court, e.g. Ireland, England, Finland, Estonia, Malta etc see Waelbroeck, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ (2009) 5(1) *Euro CJ* 22.

¹⁷¹ For support of this position see CD Ehlermann, ‘The European Administration and the Public Administration of Member States with Regard to Competition Law’, [1995] *ECLR* 454, p 456.

The implication is that there is now more scope for interplay between them; creating an opportunity to develop a more coherent set of standards relating to the fundamental right to a fair hearing. In the meantime, there is a strong interpretative obligation on the EU Courts to read the ECHR rights as ‘a minimum’ in the case of corresponding rights such as Article 41 and Articles 47-49 of the Charter with Article 6 of the ECHR. Thus the imposition of the highest procedural standards of protection is required in EU competition law; not because of any inherent desire to protect the infringers or to lend solidarity to the third parties, but more fundamentally, because it consists of a repressive system of enforcement that is concentrated in a body possessing *à la fois* powers of investigation, prosecution and adjudication.¹⁷² In such situations, the need to guarantee all the elements of procedural fairness becomes paramount as these pertain to the crucial right to a fair hearing. In this light it is submitted that a closer reading of the ECtHR case law such as *Dubus* and *Jussila* when considering competition law enforcement is vital. In so doing, it will be difficult to escape the classification of competition law as anything other than criminal in nature. Moreover, this should not be such a major adjustment as many Member States already provide for criminalisation of certain competition law infringements and others at least have separate courts to impose the penalties.

On a final note, ensuring human rights obligations in an increasingly criminalised area of law may be the most appropriate means of achieving the delicate balance between efficiency and justice and at the same time may provide the necessary impetus for positive change.

¹⁷²See C. Harding, ‘Effectiveness of Enforcement and Legal Protection’, in *Enforcement of Cartels in EC Competition Law*, EUI-RSCAS/EU Competition, Proceedings 2006, p664