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**The Hearing Officer in EU Competition Law Proceedings: Ensuring Full  
Respect for the Right to Be Heard?***Nicolo Zingales\**

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This article will discuss, in light of the expected accession of the European Union (EU) to the European Convention of Human Rights (ECHR), whether the current enforcement structure of competition law in the EU is consistent with the right to fair trial enshrined in Art 6 ECHR. After a brief introduction summarizing the terms of the debate on the ‘fair trial’ in EU competition law, the focus will shift to the role of the Hearing Officer and its evolution to illustrate the combination in its role of two different functions: on the one hand, ensuring respect of the right to be heard; on the other, improving the quality of the decision and minimizing the risk of annulment through judicial review. To emphasize the fundamental importance of giving priority to the former if EU competition law proceedings are to avoid potential condemnations for breach of Article 6 ECHR, a paragraph will describe the intensity of the judicial control operated by the EU adjudicature over violations of due process. Following a critical analysis of procedural guarantees available in competition proceedings and the associated powers and responsibilities of the Hearing Officer, the article will conclude with two suggestions for a potentially improved respect of the right to be heard under the current mandate, and a word of optimism for a revision of the mandate and an indication of what should be the main priority of such reform.

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**1. THE LEGAL ISSUE: FRICTION BETWEEN EU COMPETITION LAW AND THE  
ECHR**

Various commentators and a number of court cases<sup>1</sup> have questioned whether the system for the enforcement of competition law in Europe, where the Commission

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<sup>1</sup> D Slater, S Thomas and D Waelbroeck, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ (2009) *European Competition Journal* Vol 5, Issue 1, p 97; D Waelbroeck and D Fosselard, ‘Should the Decision-making power in EC Antitrust Procedures be Left to an Independent Judge? The impact of the European Convention of Human Rights on EC Antitrust Procedures’ (1994) 64 *Yearbook of European Law* 111\_42; J Schwarze, R Bechtold and W Bosch, ‘Deficiencies in European Competition Law: Critical Analysis and proposals for change’, GleissLutz Rechtsanalt, Stuttgart, 2008; I Forrester, ‘Due process in Competition Cases: a distinguished institution with flawed procedures’, (2009) *European Law Review*, 34(6), p 817; A Andreangeli, ‘The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings’, (2006) *European Law Review* vol 31 issue 3 pp 342-363; A Andreangeli, O Brouwer, D de Feydeau, I Forrester, D Geradin, A Komninos, K Hofstetter, Y Katsoulacos, C Lemaire, M O’Regan, L Ortiz Blanco, D Slater, S Thomas, D Ulph, D Waelbroeck, U Zinmeister, ‘Enforcement by the Commission: The decisional and enforcement structure in antitrust cases and the Commission’s fining system’, (2009) Brussels, European Union OPC. For the case-law of the EU, see *inter alia* Cases 45/69, *Boehringer Mannheim v Commission* [1970] ECR 153; Cases 100-103/80, *Musique de Diffusion Française v Commission*, [1983] ECR 1825, p 1920; Case T-11/89, *Shell v Commission* [1992] ECR II-757,

carries out both a prosecutorial and an adjudicative function, might not lead to a violation of Article 6 of the European Convention of Human Rights (ECHR).

Most arguments have been grounded on the first paragraph of Article 6, which provides that, ‘in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. The usual allegations are that competition decisions involve the determination of civil rights and obligations, and that because of the combination of its functions, the Commission is not an ‘independent and impartial tribunal’ as the ECHR would require. The argument goes that, although the Commission does not fall within the meaning of ‘independent and impartial tribunal’,<sup>2</sup> it is de facto a tribunal since its decisions are immediately binding even if challenged before the General Court (except for those exceptional cases where interim measures are granted).<sup>3</sup> Alternatively, a more moderate view holds that, since a considerable amount of time lapses before one can exercise his right to be heard before the General Court, competition proceedings may in specific cases fail the test of the ‘reasonable time’ requirement of Art 6(1) ECHR.<sup>4</sup>

Opponents of these views contend pointing to the absolute necessity to have in place such an enforcement structure for efficiency reasons,<sup>5</sup> and place emphasis for that purpose on a *caveat* that the ECHR jurisprudence has established with respect to the scope of application of Article 6 ECHR: starting from the *La Compte* case,<sup>6</sup> the

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para 39; Case T-348/94, *Enso Espanola v Commission* [1998] ECR II-1875; Case T-112/98, *Mannesmannröhren-Werke AG v Commission*, [2001] ECR II-729, para 60. As to the ECHR jurisprudence, see the decision of the European Commission of Human Rights, *M & Co v Federal Republic of Germany*, Appl. 13258/87, 64 D & R 138 (1990), where the applicants were not allowed to launch a procedure against Germany on the basis of Article 6 of the Strasbourg Convention for action required of Germany by EU law to enforce a competition fine imposed by the European Commission, given that Germany had transferred its powers to the EU and the EU was not incompatible with its membership of the Strasbourg Convention given that fundamental rights received an equivalent protection under EU law; see also, more recently, the application lodged and pending before the CFI in the Case T-56/09, *Saint Gobain Glass France and Others v. Commission*.

<sup>2</sup> Case 218/78 R, *Heintz van Landenyeck SARL v Commission*, [1980] ECR 3125, para 81; Cases 100-103/80, *Musique de Diffusion Française v Commission*, [1983] 3 CMLR 221 para 7; Joined Cases T-109/02, 118/02, 122/02, 125/02, 126/02, 128/02, 129/02, 132/02 and 136/02, *Bollorè and others v Commission*, [2007] ECR II-947, para 86; Case T-54/03, *Lafarge SA v Commission*, [2008] ECR II-120, at 47.

<sup>3</sup> See below, Section 2.2.

<sup>4</sup> The reasonableness of a period is to be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities: see Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, para 29, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, para 187

<sup>5</sup> See *inter alia* W. Wils, ‘The combination of the Investigative and Prosecutorial Functions and the Adjudicative Function in Antitrust Enforcement: A Legal and Economic Analysis’ (2004) *World Competition* 27 No. 2, 201-224.

<sup>6</sup> *La Compte, Van Leuven and De Meyere v Belgium*, Appl. no. 6878/75 and 7238/75, A/43 para 51. On the same line of reasoning, see *Albert and Le Compte v Belgium*, Appl. No. 7299/75 and 7496/76, A/58 para 29; *Ozturk v Germany*, A/73 (1984) 6 EHRR 409, para 46; *Bendenoun v France*, A/284 para 56.

European Court of Human Rights (ECtHR) has repeatedly held that the determination of civil rights and obligations or the prosecution and punishment of offences which are ‘criminal’ within the meaning of Article 6 *can* be entrusted to administrative authorities, provided that the persons concerned are able to challenge any decisions made before a judicial body that has full jurisdiction and that provides the full guarantees of Article 6(1) ECHR. Similarly, the ECtHR has stated that, in specialized areas of administrative nature, it is sufficient for the court to exercise a restricted jurisdiction and leave the determination of facts to an administrative body, ‘particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Art 6(1)’.<sup>7</sup> However, when the determination of facts lies at the heart of the judicial proceedings and of the applicant’s contestation (as it is often the case for competition law proceedings), the ECtHR requires that the review Court have the power to rehear the evidence or to substitute its own views to that of the administrative authority, for otherwise there would be a risk ‘that there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute’.<sup>8</sup> It is clear, then, that it is crucial for the validity of both exceptions to have in place a robust system of judicial review.

Two additional arguments are often underestimated by this type of discussions: first, as recently recalled by one of the critics of the current enforcement system,<sup>9</sup> the ECtHR has not ruled so far in favour of the applicability of this ‘efficiency’ justification to competition law proceedings. This has an important bearing on the prospects for future pronouncements by the court on these issues, as it implies that in order to hold the EU accountable for violation of ‘due process’ under Art 6(1) ECHR there would be no need for the ECtHR to overrule established jurisprudence. Based on previous case-law, however, it is reasonable to assume that the ECtHR will not provide a definite and general answer to whether such justification can be used in the competition enforcement domain: it will rather look at the specific context, and may accept the justification only to the extent that (1) specific violations of due process can be corrected in the following phase of the proceedings; and (2) such violations are not irremediable or decisive for the further continuation of the proceedings.<sup>10</sup>

Secondly, and along the same line of reasoning, a distinction should be made in this regard between charges that fall under the meaning of criminal established by the Convention and charges classified as ‘criminal’ under both domestic and convention law: for the latter hypothesis, in which criminal charges are more serious, the case-law

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<sup>7</sup> *Jane Smith v. The United Kingdom*, Appl. No. 25154/94; *Bryan v United Kingdom* Appl. No. 19178/91, 21 EHRR 342, [1995] Series A No 335-A; *Chapman v. United Kingdom*, Application No. 27238/95, 33 E.H.R.R. 399 [2001] 10 BHRC 48; *Greco v Romania*, Appl. no. 56326/00

<sup>8</sup> *Tsfayo v UK*, App. No 60860/00, All ER (D) 177 (Nov), para 48. See also D Slater, S Thomas and D Waelbroeck, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ (2009) *European Competition Journal*, Vol.5, Issue 1, p 97.

<sup>9</sup> I Forrester, *op cit*, n 1, p 821.

<sup>10</sup> Decision of the European Commission of Human Rights, Case *H v UK*, App. no. 100000/82, D.R., vol. 33 p 265.

of the ECHR has clarified that the ‘efficiency’ justification cannot find application.<sup>11</sup> Now, even if the categorization as criminal of any fine imposed pursuant to Regulation 1/2003 is explicitly ruled out,<sup>12</sup> and even if the same regulation excludes its application to national laws which impose criminal sanctions on natural persons, nonetheless, an exception remains with respect to those cases in which ‘such sanctions are the means whereby competition rules applying to undertakings are enforced’.<sup>13</sup> In such cases, it seems difficult to argue against the qualification of ‘criminal’ under both domestic and convention law, for this is in line with the three criteria identified by the ECHR jurisprudence for the autonomous definition of ‘criminal charge’ under the Convention: the classification of the offence under national law, the nature and severity of the charge and the purpose of the fine (namely, whether it was both punitive and deterrent).<sup>14</sup> Without going into the details of each of the three criteria, it can be maintained that, where national law establishes a threat of imprisonment for resistance to inspections,<sup>15</sup> the proceedings can be deemed criminal in the Convention’s sense as at least two out of the three (non-cumulative) criteria militate in favour of such qualification.<sup>16</sup> An argument can be advanced, therefore, that given the increasing trend toward criminalization of anti-cartel laws in Europe and the reliance of the European Commission on the procedures established by national law for the execution of dawn raids where an investigated company refuses to surrender to the Commission’s inspection,<sup>17</sup> the two-tiered system described above could be found to fall foul of the requirements of a fair trial ex Article 6 ECHR. This seems to be an inevitable conclusion for those cartels in which decisive evidence is gathered through dawn raid inspections, at least with regard to those countries that have in place anti-cartel

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<sup>11</sup> *De Cubber v Belgium*, Series A no. 86 para 31-32 and *Findlay v Ukm* 25/2/97, reports 1997-I, para 79.

<sup>12</sup> Article 24 (5) Regulation 1/2003.

<sup>13</sup> Recital n. 8, Regulation 1/2003.

<sup>14</sup> *Engel v Netherlands*, series A No. 22[1979-80] 1 EHRR 647.

<sup>15</sup> Note that this can be either a result of the national competition law, or even a more general national legislation that makes hindering an official proceeding a criminal offence, as it the case for Sweden: see in this regard J. Coyet and M.P. Giolito, ‘Putting your Hands in Someone Else’s Drawers – Some Thoughts on the Use of Coercive Measures When Conducting Dawn Raids in the Homes of Directors, Managers and Other Staff Memebers’, in M Johanson, K Almestad, J Azizi and M Baldi, *Liber amicorum in honour of Sven Norberg: A European for All Seasons*, Bruylant 2007, p 153.

<sup>16</sup> A similar finding was reached unanimously by the European Commission of Human Right following an application (subsequently withdrawn) by a French company against France concerning the violation of Art 6(1) ECHR pursuant to the enforcement of its competition law. The Commission concluded that, despite the domestic classification as ‘administrative’, competition law was criminal in the Convention sense because of the nature of the law in itself (seeks to protect the general interest of the public, akin to criminal law) and the severity of the fine (up to 5% of the annual turnover to ensure deterrence). See Appl. No 11598/85, *Stenuit v France*, [1992] ECC 401, Decision of the Commission of Human Rights of 27 February 1992, A/232-A. 18. More recently, the ECtHR held in *Jussila* that ‘competition law’ cases are part of the ‘gradual broadening of the criminal head [of Article 6] to cases not strictly belonging to the traditional categories of criminal law’. See *Jussila v Finland* (2007) 45 EHRR 39, at para 43.

<sup>17</sup> Article 20 (6) Regulation 1/2003.

legislation that applies criminal sanctions for resistance to inspections ordered by the Commission.<sup>18</sup>

The debate about the applicability of Article 6 ECHR to competition proceedings has been refreshed recently by the entering into force of the Lisbon Treaty, which contains one important novelty in this respect: the Charter of Fundamental Rights acquires the same legal value as the Treaties.<sup>19</sup> As a result, the EU will be obliged to give full respect to the fundamental rights enshrined therein, including the right to a fair hearing referred to in Article 41,<sup>20</sup> and the EU courts will have to tackle the question of whether competition proceedings comply with the requirements of Art 6(1) ECHR,<sup>21</sup> which is explicitly incorporated in Article 41 of the Charter. Conceivably, this will trigger a stricter scrutiny over the respect by the community procedures of fundamental rights than the one carried out by the ECtHR, which has so far limited itself to presuming the compatibility with the Convention of acts adopted by States in fulfillment of obligations imposed by the EU, save the possibility of rebutting such presumption in a particular case if it considered that the protection of fundamental rights was *manifestly* deficient.<sup>22</sup>

## 2. THE POSSIBLE SOLUTIONS: JUDICIAL REVIEW AND THE HEARING OFFICER

Against this backdrop, it is important to understand the role played by the General Court and the Hearing Officer in competition proceedings. These are, as a matter of fact, the forces that impose some real constraint on the Commission's decision-making power. This is not to minimize the role of the Legal Service and the Chief Competition Economist, both performing an important work in ensuring the legality of the decision and its consistency with sound economic principles. But their role remains one of internal control, which is unlikely to be as effective as that of someone whose objective is not aligned with that of the institution that is subject to such control (in particular, enforcing the competition rules). By contrast, it will be illustrated throughout the article

<sup>18</sup> The problem lies in the fact that the Commission's decision is not a warrant, as would be required under the ECHR case-law, because it is not granted judicial authorization: see I Aslam and M Ramsden, 'EC Dawn Raids: A Human Rights Violation?', (2008) 5(1) *CompLRev* 70, and A Riley, 'The ECHR Implications of the Investigations Provisions of the Draft Competition Regulation' (2002) 51(1) *ICLQ* 55.

<sup>19</sup> Article 6 TEU.

<sup>20</sup> Right to a good administration, which implies also a 'right of every person to be heard before any individual measure which would affect him or her adversely is taken'. The standard of protection of such right must also not be inferior to that of the ECHR in light of article 52.2 of the Charter, according which, 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

<sup>21</sup> See, for instance, Case T-99/04, *AC-Treuband AG v Commission* [2008] ECR II-1501, where it held, '[T]he Court has no jurisdiction to assess the lawfulness of an investigation under competition law in the light of provisions of the ECHR, inasmuch as those provisions do not form part of Community law'.

<sup>22</sup> Judgment of the ECtHR (Grand Chambre) of 30 June 2005, *Bosphorus Hava Yollari Tuzüm Ve Ticaret Anonim Şirketi v Ireland*, Appl no 45036/98, para 156.

that, even though the Hearing Officer is part of the Commission and thus formally constitutes an ‘internal check’, its progressive empowerment with quasi-judicial prerogatives and the increased focus of its role on the protection of the right to be heard may contribute to moving it away from such categorization, towards one of a *de facto* external check provided with some ‘teeth’ to the enforcement of its mandate. Another feature that is frequently cited amongst the ‘checks and balances’ of the current enforcement system is the role of the Advisory Committee on Restrictive Practices and Dominant Positions, as detailed by Article 14 of Reg 1/2003. However, it is submitted here, as it has been recognised elsewhere,<sup>23</sup> that such Committee cannot be the solution to the problem of due process. Its approach is naturally deferential to the authority who has been working for a considerable amount of time on the case and has seen the whole body of evidence. As a matter of fact the Advisory Committee has never voted against the adoption of a Commission Decision. Hence, no further reference will be made for the present purposes to such committee and the focus will remain on what are considered the two truly significant ‘checks’ to assess whether they are able to ensure compliance with Article 6 ECHR. The aim of this article is to enable us to answer, in line with the ECHR case-law cited above, the following question:

‘Is the two-tiered enforcement system adopted by the Commission capable of ensuring that (i) violations of due process occurring in one phase of the proceedings can be corrected in the following one (i.e., either by the Hearing Officer or by the Court of First Instance), and (ii) such violations are not irreparable or decisive for the further continuation of the proceedings?’

## 2.1. Judicial review: an imperfect remedy for due process violations

As every community based on the rule of law, the EU provides a means by which the individuals or entities affected can lodge an application for judicial review of a decision taken by the public authority, including to lament a violation of due process. Under Article 263 TFEU, the Court of Justice of the EU has jurisdiction to review the legality of any act or Regulation adopted by a European institution by which they are ‘directly and individually concerned’.<sup>24</sup> This allows natural or legal persons, the interests of which have not been adequately represented or protected by the institution in the formation of the act, to request the General Court to review the original reasoning leading to the formation of the act, and determine with a fresh mind whether the institution concerned had the competence, misused its powers or violated an essential procedural requirement, the Treaties or any rule of law relating to their application.<sup>25</sup> However, when compared to a situation in which the process of formation of the act duly takes into account in the first place all the interests concerned, the effectiveness of this *ex-post* control can only be limited, as it suffers from two main disadvantages.

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<sup>23</sup> I Forrester, *op cit*, p 834.

<sup>24</sup> Article 263(4) TFEU.

<sup>25</sup> Article 263(2) TFEU.

The first, obvious disadvantage is a timing issue: on average, letting aside the special categories of staff cases, intellectual property and appeals from the Civil Service Tribunal, the General Court delivers its judgments in 33 months<sup>26</sup> from the date in which the application was submitted. During this period, undertakings and individuals will *de facto* have to live with the consequences of the contested act without having access, in the short-term, to an effective legal remedy. To minimize the likelihood that such situation might give rise to substantiated claims of ‘denial of justice’,<sup>27</sup> Article 104 of the Rules of Procedure of the General of the Court affords the applicant the opportunity to apply in cases of urgency for *interim measures* which have a suspensory effect on the enforcement of a decision of any measure adopted by an institution. However, the case-law has demonstrated that the conditions for such type of requests to be granted, based upon the showing of *fumus boni iuris* (i.e., a *prima facie* case) and *periculum* (i.e., a serious and irreparable harm) *in mora*, are extremely stringent. A well known example is the rejection in 2008 of the application for interim measures in the *Microsoft* case, where the applicant argued that the disclosure of the information relating to the interoperability of a product with competitors’ products that had been ordered by the Commission would have altered the market conditions in such a way that that Microsoft would not only lose market share but also would no longer be able to regain the market share lost. On that occasion, the Court made clear that it is for the undertaking concerned to adduce any factual evidence to support its argument, in that particular case by demonstrating that there would be obstacles preventing it from regaining a significant part of the share which it could have lost as a result of the remedy.<sup>28</sup>

More recently, in the *Intel* case,<sup>29</sup> the Court rejected an application submitted by Intel to avoid the consequences of a final decision which would be taken on the conclusion of a Commission’s procedure in breach of its rights, stressing that the occurrence of the harm alleged depended on a future and hypothetical event, namely the adoption by the Commission of a final decision unfavourable to the applicant.<sup>30</sup>

The second disadvantage of actions for annulment *vis a vis* full participation to the proceedings leading to the adoption of the act is the limited scope of the protection

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<sup>26</sup> Statistics referred to the year 2009, available at [http://curia.europa.eu/jcms/jcms/Jo2\\_7000/](http://curia.europa.eu/jcms/jcms/Jo2_7000/)

<sup>27</sup> This term has been interpreted in international law as referring to extreme situations having at object an improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures and unjust decisions. See AO Adede, ‘A Fresh Look at the Meaning of the Doctrine of Denial of Justice under International Law’ 14, *Can YB Int’l L* 72 (1976). As to the circumstances that might give rise to it, there is little doubt that an unjustified and protracted delay in adjudicating would be sufficient for a potentially successful claim, particularly when the consequences of the delay are likely to be irreparable at a later stage of the proceedings. For the leading contribution on this subject, see J Paulsson, *Denial of Justice in International Law*, Cambridge University Press, 2005 Cambridge, UK.

<sup>28</sup> Order of the President of the CFI, Case 201/04, *Microsoft v Commission*, para 319.

<sup>29</sup> Order of the President of the CFI, Case 457/08, *Intel v Commission*, para 85.

<sup>30</sup> Unfavourable decision which, for the record, materialized approximately 100 days after the order of the Court.

that this legal tool can afford. In that regard, one should keep in mind that judicial control is simply a legality control, by which the Court cannot really substitute its reasoning to that of the institution<sup>31</sup> but simply controls that this is not illegal under one of the grounds of annulment listed in Article 263 TFEU. Notwithstanding the fact that the General Court has shown an increasing willingness to engage in the examination of the Commission's assessments,<sup>32</sup> the bar for contesting the Commission's reasoning remains high: the Court will limit its analysis to 'manifest errors of appraisals or misuses of power'. As emphasized by a growing strand of literature,<sup>33</sup> the outcome of an increasing number of court cases in competition law is being determined by reference to 'complex economic assessments', leading to a deferential approach to judicial review. This is particularly problematic where the application for annulment is lodged by an individual who is adversely affected by the contested act; i.e. an individual who is entitled not simply to a right of participation, but to the stricter panoply of safeguards that attaches to the right to be heard.

Moreover, judicial review might also be unable to render justice to the aggrieved parties who simply allege the violation of essential procedural requirements, which ideally represent the 'typical' ground of appeal to challenge a procedural deficiency such as the violation of the right to be heard, and entitle the Court to raise the issue of its own motion.<sup>34</sup> The problem with such ground of appeal is that the Court has adopted a rather restrictive approach to qualifying a procedural rule as essential to ground on it the annulment of a Commission's decision: it requires the undertaking concerned to bear the burden of proving that the contested act would have been different if the procedure had been respected.<sup>35</sup> Fortunately, the General Court has distinguished this line of case-law from another one concerning the more serious violations of procedural requirements that protect fundamental principles of EU law, such as the right to be heard: in those circumstances, the aggrieved party can lament violation of an essential procedural requirement simply by showing that the breach of the procedural rule has

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<sup>31</sup> In competition law proceedings, the usual assertion is that the Court cannot substitute its assessment with the legal and economic appraisal of the Commission: see Case 74/74, *CNTA SA v Commission* [1975] ECR, paras 21-22; Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595; Case T-155/04 *SELEX Sistemi integrati Spa v Commission* [2006] ECR II-4797, para 28.

<sup>32</sup> A tendency that has been more apparent in the merger review context: see for example Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585; Case T-310/01, *Schneider Electric SA v Commission* [2002] ECR II-4071; Case T-5/02, *Tetra Laval BV v Commission* [2002] ECR II-4381; Case T-464/04, *Impala v Commission* [2006] ECR II-2289.

<sup>33</sup> I Forrester, 'A Blush in Need of Pruning: The Luxuriant Growth of "Light Judicial Review"', paper presented at the 14<sup>th</sup> Annual Competition Law and Policy Workshop of the European University Institute, June 19-20, 2009, to be published in 2009 Competition Law Annual (Hart Publishing); V. Rose, 'Margins of Appreciation: Changing Contours in Community and Domestic Case Law', (2009) Competition Policy International Vol. 5 No. 1; Andreangeli, and others, op cit, n 1.

<sup>34</sup> Case C-304/89, *Oliveira v Commission*, [1991] ECR I- 2283, para 18.

<sup>35</sup> Joint Cases 209, 215 & 218/78, *Van Landuyck c Commission*, [1980] ECR 3125, para 47; Case 150/84, *Bernardi c Parlement*, [1986] ECR 1375, para 28; Case 30/78, *Distillers Company c Commission*, [1980] ECR 2229, para 27; Case T-7/90, *Kobor v Commission*, [1990] ECR II-721, para 30; Case T-7/89, *Hercules c Commission*, [1991] ECR II-1711, para 56.



played a role in the contested decision, that is, if it concerns the gathering of evidence which the Commission has used to reach the decision.<sup>36</sup> This means that an applicant for annulment will be relieved from having to prove the ‘but-for’ outcome where the violation has tainted a piece of evidence relied upon by the Commission in its decision.<sup>37</sup> However, it will not prevent the Court from annulling merely a part of the decision if the remainder can stand on its own. Moreover, it is not clear whether such rule, which resembles the unforgiving exclusionary rule generally applied in criminal cases, could be invoked for the exclusion of the *assessment* of evidence legitimately collected (where the assessment was carried out in violation of the right for the parties to have their submissions duly considered) or of evidence that has been gathered violating procedural rules that are not meant to protect a fundamental right such as the right to be heard.

In light of the above, it is understandable why the availability of an action for annulment ex Article 263 of the Treaty should only be considered as a safeguard, designed to operate when for some particular reasons the affected parties have not been able to exercise their participatory rights throughout the first phase, i.e. the process that led to the adoption of the final act. Judicial review cannot be taken as a panacea for the violation of rights of defence, nor as a systematic fix for the problems of competition law proceedings. Even the CFI (now General Court) has acknowledged, in this respect, that judicial control cannot be a substitute for a thorough investigation of the case in the course of the administrative procedure.<sup>38</sup>

## 2.2. The creation of the Hearing Officer

The figure of the Hearing Officer was introduced in European competition policy in September 1982<sup>39</sup> in order to ensure that a potential addressee of the SO has the opportunity to be heard from a Commission official who is experienced in competition but independent from the directorate, and thus not involved in the case.<sup>40</sup> Specifically, the Mandate contains a list of rules that confer to this figure the power of scrutiny over a variety of Commission’s acts, and thereby indirectly create a right for parties to a Commission’s proceedings to avail themselves of his power.

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<sup>36</sup> E.g., Case T-54/03, *Larfage SA v Commission*, [2008] ECR II-120, para 70; Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP et T-61/02 OP, *Dresdner Bank e.a.v Commission*, [2006] ECR II-3567, para 158.

<sup>37</sup> This brings the EU case-law in line with the holdings of the ECtHR concerning failure of the public authority to disclose exculpatory evidence to the accused: according to the ECtHR, it is not necessary to show specific prejudice from the failure to disclose. See *Bulut* (1996) 24 EHRR 84; *Kress v France*, judgment of 7 June 2001 (GC) para 74; *Martinie v France* (2007) 45 EHRR 15 (GC) paras 45-50.

<sup>38</sup> Case T-36/91, *Solvay v Commission*, [1995] ECR II-1833, para 108: ‘any infringement of the rights of defence which occurred during the administrative procedure cannot be regularized during the proceedings before the Court of First Instance, which carries out a review solely in relation to the pleas raised and which cannot therefore be a substitute for a thorough investigation of the case in the course of the administrative procedure’.

<sup>39</sup> Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L 162, 19.6.2001, p. 21), hereinafter ‘the Mandate’.

<sup>40</sup> Until 1982, hearings took place within DG IV, and were chaired by the Director General.

From a fairness perspective, the initiative by the Commission to create this new post was laudable, as it amounted to spontaneously imposing a self-restraint on its own powers. Realistically, the rationale underlying such innovation was the growing criticism for the lack of transparency and impartiality of the proceedings.<sup>41</sup> In addition, one can claim that this represented a strategic move towards a more effective enforcement, since it has been recognized both historically<sup>42</sup> and by general theory of law<sup>43</sup> that fairness of procedures has a direct bearing on the rate of compliance and law-abidingness within a particular legal system.

It is also important to note that entrusting a third party with ensuring fairness and transparency on the DG Competition's operations has proved to be a double-edged sword: first of all, because this is a perfect mechanism for undertakings to slow down proceedings, submitting to the Hearing Officer a variety of requests that are of dubious purpose, and may reveal to be simply well engineered dilatory tactics. This inevitably affects the efficiency of the DG Competition's enforcement machine, and given its policy of using as the value of 10% of the turnover of a company in the previous business year as a cap for the maximum fine that can be imposed,<sup>44</sup> it may have an adverse impact on the ability of the enforcer to impose truly dissuasive sanctions. In this respect it can be noted that the possibility of 'gaming' the calculation of the maximum threshold has been considerably narrowed by the European Court of Justice (ECJ), holding in a recent judgment that the turnover must be reflective of the normal economic activity and thus it is justified for the Commission to refer in exceptional circumstances to business years different from the previous one.<sup>45</sup> However, it should also be remembered that this ruling was in response to an extreme case and does not take away the fact that the Hearing Officer can be used for dilatory tactics.

Secondly, the progressive delegation of powers to the Hearing Officer has created the paradox that if an undertaking fails to bring a dispute which has arisen with DG Competition before the Hearing Officer, for which it has decision-making power, this can be taken as acceptance of the position expressed by DG Competition and weigh against the party before the European Courts, if it were to raise this procedural matter.<sup>46</sup> In fact, such a situation seems paradoxical to the extent that this sign of

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<sup>41</sup> To be precise, it is common belief that the creation of the Hearing Officer's post followed the publication by the House of Lords of a Report on the European Union in June 1982, which criticized the lack of impartiality of the hearings before the Director General and thus the inability of the parties to a Commission's proceedings to be heard effectively. Nevertheless, this does not put in discussion the merits of the Commission in having finally implemented such initiative.

<sup>42</sup> A famous quotation from the common law is, 'Justice should not only be done, but should manifestly and undoubtedly be seen to be done': *The King v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256, 2259 (Hewart, CJ)

<sup>43</sup> Tyler, *Why People Obey the Law*, Princeton University Press, 2006.

<sup>44</sup> Regulation 1/2003, Article 23(2).

<sup>45</sup> Case C-76/06, *Britannia Alloys v Commission*, [2007] ECR I-4405, paras 40-44. For a more detailed explanation, see the Opinion of the Advocate General Bot in the same case, paras 38-77.

<sup>46</sup> Case T-44/00, *Mannesmannröhren-Werke v Commission* [2004] ECR II-223, para 51 et seq. A confirmation of this approach can be found in the Opinion of the Advocate General Geelhoed in Case C-308/04 P, *SGL Carbon*

greater importance of the role of the Hearing Officer is not accompanied by the attribution of more fully-fledged judicial prerogatives; such as the power to issue subpoenas to compel attendance and to mandate compliance with its decisions, both outside and within the Hearing context.

These side-effects certainly did not materialize under the 1982 mandate, for the powers of the Hearing Officer were really of limited remit, and the scope for misuse by the defendants of such powers almost non-existent. At the outset, the Hearing Officer's scrutiny over a case regarded only the phase of decision, which was identified as the oral hearing and any decision taken subsequently, and did not culminate in the adoption of a final document explaining to the Commission the overall conduct of DG Competition during the proceedings. The report that was submitted by the Hearing Officer was what would be nowadays called the 'interim report',<sup>47</sup> which concerned the developments at the hearing and his observations, but could also contain observations on substantive issues, relating *inter alia* to the need for further information, the withdrawal of certain objections or the formulation of further objections. This report was given exclusively to the Director General and the Director responsible, hence there was nothing written that could be relied upon by the alleged infringer of competition law as conclusive evidence<sup>48</sup> of bad administration in case of annulment proceedings before the courts.<sup>49</sup>

In 1994, with the first revision of the Mandate, this aspect was modified introducing the so called 'final report', essentially corresponding to the old report but which could in exceptional cases be disclosed outside DG Competition. Such report was indeed in principle merely for internal purposes, and could be attached to the draft decision submitted to the Commission *only if* the Commissioner deemed it appropriate, 'in order to ensure that when [the Commission] reaches a decision on an individual case it is fully apprised of all relevant information'.<sup>50</sup> From the very wording of this provision, and the discretion that was left to the Commissioner to decide whether to make this report public, one can see that the role of the Hearing Officer had been conceived originally more as one of strengthening the Commission's case, rather than conferring rights on individuals. However, this initial picture of the Hearing Officer has with time become less accurate, starting from the introduction by the 1994 Mandate of decision-making powers concerning the participation in the hearing of third parties, the authorization of the persons to be heard orally, the possible extension of time limits for replies, and

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AG, [2006] ECR I-5977, para 101, and the judgment of the Court in that same Case (which follows the Opinion), para 96.

<sup>47</sup> See below, Section 3.4.

<sup>48</sup> There were, of course, the minutes of the oral hearing, but these were simply the presentation of contrasting views represented at the hearing, and did not in any way include conclusions drawn by the chair of that hearing.

<sup>49</sup> On the impossibility of using the Report in court, see Case T-15/89, *Chemie Linz c Commission* [1992] ECR 1275.

<sup>50</sup> 94/810 ESC, EC Commission Decision of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (i.e., the 'enlarged Mandate'), Article 10.

most importantly the resolution of disputes on access to file issues. From that moment onwards, the array of functions of the hearing officer made it progressively move away from the sort of peer-review focus for which it had been initially conceived, growing into a form of external control that increasingly resembles that of a judicial (or quasi-judicial) body.

A great obstacle to this transformation was the central issue of the publicity of the report: what is the material benefit from the Hearing Officer's oversight, if the people who eventually decide the case (i.e., the college of Commissioners) can remain completely unaware of its findings? On this matter, the revision of the Mandate in 2001 presented a significant improvement, establishing that a final report on the right to be heard, including procedural issues such as disclosure of documents and access to file, time limits for replying to the Statement of objections (SO) and the proper conduct of the oral hearing, must be attached to the decision, sent to the parties with the decision, and published in the Official Journal.<sup>51</sup> However, the reform was not so radical as to have the Hearing Officer completely abandon its 'peer-reviewing' role: the new Mandate, as the previous one, preserved the so called 'interim report' and its merely internal purpose. From an efficiency viewpoint, the usefulness of this exercise is even more questionable now that DG Competition has introduced 'peer review panels'<sup>52</sup> for virtually every case involving procedural or technical complexities.

Finally, one further important step was taken to depart from the traditional model: the post of the Hearing Officer was detached from DG Competition, and attached only for administrative purposes to the Cabinet of the Commissioner for competition. Here too, the move represented a significant improvement from the system previously in place, but not a net separation from the sort of 'restrained oversight' that follows as a natural consequence of the fact that the controller (the hearing officer) is controlled by the hierarchical superior (the Commissioner) of the controlled (DG Competition). Through this residual attachment, in fact, the Commissioner for Competition is able to have a significant influence on future developments of the Hearing Officer: he has the authority to decide, for example, the amount of resources to be devoted to the fulfilment of the Hearing Officer's objectives, as opposed to the traditional (and arguably more 'populist') objective of fining undertakings for breaches of the competition rules. And while nothing prevents him from preserving the only remaining bit of internal reviewing function of the Hearing Officer, i.e. the 'interim report', recent public statements<sup>53</sup> suggest that there may be some margin of manoeuvre to accomplish

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<sup>51</sup> Article 15 of the enlarged Mandate.

<sup>52</sup> There is apparently no official public notice of a commitment to use peer review panels systematically, but a first mention of this intention was done in October 2003 by the Commissioner: see Commissioner Monti, 'EU competition policy after May 1994', Speech delivered at the 30th Annual Fordham Conference on International Law and Policy (New York, 24 October 2003).

<sup>53</sup> See J Almunia, 'EU Antitrust policy: the road ahead', Speech at the International Forum of Competition Law, 9 March 2010, Brussels. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/81&format=HTML&aged=0&language=FR&guiLanguage=en>: 'there is always the need to consider possible improvements [...] while I believe that our administrative system is sound, I am

the final, missing reforms for the creation of an independent quasi-judicial body. As a first step in that direction, it is suggested here that the hearing officer be completely separated not only from DG Competition, but also from the Cabinet of the Commissioner for Competition, and attached for administrative purposes to the Secretary General.

### 3. WHAT DOES THE HEARING OFFICER PROTECT? IN-BUILT PROCEDURAL GUARANTEES

Already as early as in the eighties and nineties, the ECJ down-played allegations of lack of a ‘fair trial’ stating that the mere availability of an action for annulment before the CFI under Art 230 EC<sup>54</sup> and the observance of procedural guarantees laid down by the regulations governing the enforcement of competition law allow the Community’s competition enforcement system to meet the requirements of a fair trial for the undertakings concerned. Much emphasis by the Court was placed on the fact that notwithstanding the fact that DG Competition cannot be qualified a Tribunal within the meaning of Article 6(1) of the European Convention of Human Rights,<sup>55</sup> it must observe the procedural guarantees laid down by EU law.<sup>56</sup>

What did the ECJ exactly mean, in *Heintz van Landenyeck SARL*,<sup>57</sup> when referring to the ‘procedural guarantees’ laid down by EU law? The following (non-exhaustive) list, representing the guarantees that the Court found to have been respected by the Commission may serve as an illustration of the broader concept: i) the obligation to schedule a hearing within a reasonable time, if requested by the investigated parties; ii) the obligation to grant application to be heard to any natural and legal person that shows a sufficient interest,<sup>58</sup> and if so, afford them the opportunity of making known their views in writing within such time-limit as the Commission may fix;<sup>59</sup> iii) the obligation to grant access to file pursuant to the applicable regulations; iv) the right for undertakings or associations of undertakings against which proceedings are commenced to propose that the Commission hear persons who may corroborate ‘the facts set out in their written observation on the objections raised against them’;<sup>60</sup> v) the right for

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always open to listen to constructive criticism with a view to ensure that our procedures are conducted in an objective and impartial manner’. See also J Almunia, ‘Los nuevos retos de la política de competencia de la UE’, Speech delivered at the Comisión Nacional de la Competencia Lunes 15 de marzo de 2010, Madrid: ‘Siempre estaré dispuesto a escuchar críticas constructivas y a mejorar nuestras reglas de funcionamiento para aumentar su transparencia’.

<sup>54</sup> Case T-156/94, *Siderurgica Aeristrain Madrid SL v Commission*, [1999] ECR II-645, paras 102 & 109. See also, more recently, Case T-348/94, *Enso Espanola, v Commission* [1998] ECR II-1875, holding that the Commission is subject to ‘effective’ judicial review by an independent and impartial judge.

<sup>55</sup> See above n 2.

<sup>56</sup> Joined Cases 209-215, 218/78 R, *Heintz van Landenyeck SARL v Commission* [1980] ECR 3125.

<sup>57</sup> *Ibid.*

<sup>58</sup> Article 19.2, Reg 17/69.

<sup>59</sup> Article 5, Reg 99/63.

<sup>60</sup> Article 3.3, Reg 99/63.

undertakings against which the proceedings are commenced to request the Commission to hear third parties;<sup>61</sup> and, vi) the obligation to consult with the Advisory Committee.

In short, the ECJ understands procedural guarantees to constitute rights of the parties to a Commission's proceeding (and in some limited circumstances of third parties)<sup>62</sup> to which correspond, in most occasions, Commission's obligations (an exception being made for those cases where the Commission enjoys a broad discretion on the conferral of the privilege). On the other hand, while some obligations impinge on the Commission by default, i.e. without the need for any impulse by the parties, certain others only arise upon submission and approval of a request in that sense. *Heintz van Landenyeck* may not entirely reflect the current situation, particularly as the decision-making power in some matters has moved from DG Competition to the Hearing Officer. Nonetheless, it is worth noting that the combination of Regulations 17/69 and 99/63 already contained an extensive list of guarantees for the undertakings party to a Commission proceeding. The rationale and purpose of those guarantees was essentially the same as their 'modernized' version in Regulation 1/2003 and 773/2004: ensuring respect for the 'right to be heard' and 'right of access to evidence'. One might even claim that the whole system has always been in fact designed around one concept, as the latter is rather instrumental to the exercise of the former.<sup>63</sup> Yet this classification may be too narrow, and overlook that the right of access to evidence has a critical importance in itself for allowing a party to ascertain whether the conclusions reached by DG Competition are supported by adequate evidence. This is arguably based on a different rationale than the mere 'participation' in the decision of the entities directly affected by it: the objective is to make sure that the administration of justice is transparent,<sup>64</sup> and thus to impose a 'check' on DG Competition even for cases where the parties do not intend to lodge an application for annulment. It becomes clear then the analogy of this twofold objective with the function of the hearing, which the acting Hearing Officers have recently portrayed as 'check' and 'balance' depending on the circumstances.<sup>65</sup> The rationale of procedural guarantees, and as a consequence the role played by the Hearing officer, may then turn to be different from context to context.

Some clarification in respect of the hierarchy and the coexistence of these two objectives can be sought in the Guidance paper ('Guidance') recently published by the

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<sup>61</sup> Within the meaning of Article 5 of Reg 99/63.

<sup>62</sup> See Case T-198/01, *Technische Glaswerke v Commission*, [2004] ECR II-2717, para 194. See also K Laenarts and J Vanhamme, 'Procedural rights of private parties in the Community administrative process', (1997) 34 CMLRev 531-569.

<sup>63</sup> S Wernicke, 'In Defense of the Rights of Defence: Competition law procedure and the changing role of the Hearing officer', *Concurrences* No. 3- 2009, para 22: 'A corollary of the right to be heard is the right to have access to file'.

<sup>64</sup> This is also recognized by official publications of the Commission: see H Johannes and J Gilchrist, 'Role and Powers of the Hearing Officers under the enlarged mandate', *EC Competition Policy Newsletter* vol 1 No 4 Spring 1995, p 12.

<sup>65</sup> M Albers and K Williams, 'Oral Hearings – Neither a Trial Nor a State of Play Meeting', *CPI Journal* March 2010 (1), pp 4-5.

Hearing Officer in conjunction with the Best Practices on the submission of economic evidence and the Best Practices on the conduct of proceedings concerning Article 101 & 102 TFEU (altogether ‘Best Practices’).<sup>66</sup> In this document, the Hearing Officer does not make plain a distinction between procedural guarantees depending on whether they ensure the respect of the *contradictoire* or the right of access to evidence. It rather proposes a more basic classification:

- (1) Rights of defence, which ‘mainly relate to questions concerning the truth and relevance of the facts and matters alleged and the documents used by the Commission to support a claim that there has been an infringement of competition law’.<sup>67</sup>
- (2) Procedural rights of complainants and all other parties to a Commission procedure.

The existence of two different kinds of procedural guarantees is thus recognized by the Guidance. However, it is a somewhat broader classification than the one suggested above, as both the right to be heard and the right of access to the file would seem to fall within the category of ‘rights of defence’. The fact that the definition of rights of defence starts with the word ‘mainly’ hints at the fact that the Hearing Officer does not intend these as constituting simply an explication of the principle of *contradictoire*, but rather prefers to leave the concept open.<sup>68</sup> This definition is closely aligned with recent case-law, which has qualified the right to a fair trial as ‘a fundamental principle of Community law and ... *part* of the rights of defence’ (emphasis added).<sup>69</sup>

Whatever the notion of ‘rights of defence’ refers to, it shall be kept in mind that they have been *all* identified as fundamental rights forming an integral part of the general principles of law, whose observance the Court ensures;<sup>70</sup> accordingly, given the supremacy of principles over rules, it follows that more weight ought to be attached to rights of defence than to those procedural guarantees belonging to the category of ‘procedural rights’. Does this mean that the latter category should be subject to a balancing with the effectiveness of competition enforcement? One may well argue that the answer ought to be in the affirmative.<sup>71</sup> But the guidance does not give a definite

<sup>66</sup> Both documents are available on DG Competition’s website, at [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/index.html](http://ec.europa.eu/competition/consultations/2010_best_practices/index.html).

<sup>67</sup> Guidance, para 4, citing in support the following case-law: Joined Cases C-238, 244, 245, 247, 250, and 254/99 P, *Limburgse Vinyl Maatschappij and others v Commission* [2002] ECR I-8375, para 91; Case 85/76, *Hoffman-La Roche v Commission* [1979] ECR 461, para 11.

<sup>68</sup> Other procedural rights pertaining to this category are the right to have a lawyer, the privilege against self-incrimination and, as mentioned above, the right of access to the file.

<sup>69</sup> Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v Commission*, [2008] ECR I-4951, para 61.

<sup>70</sup> Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, *Aalborg Portland v Commission*, [2004] ECR I-123, para 19.

<sup>71</sup> Alternatively, the consequence of the different value of these rights may be simply that alleged victims of violations of procedural rights will not be able to benefit from the facilitation on the burden of proof that the case-law seems to have established in favour of rights of defence: see *supra*, para 2.1 and case-law in n 35 and 36.

response to the consequences of such qualification, rather focusing on outlining the different breadth of those rights.

Specifically, it does so by exploring the different phases of the Commission's procedure: (a) the investigative phase, (b) procedures potentially leading to a prohibition decision, (c) the oral hearing, and (d) the post-oral hearing.

A description of the main issues related to each of these phases is sketched throughout the following paragraphs, in the attempt to give a clearer picture concerning potential deficiencies of the system with regard to the right to be heard. It should be noted, however, that the following list of attributions and potential deficiencies of the Hearing Officer's powers cannot be exhaustive, for the simple reason that the Guidance only refers to proceedings for the enforcement of Articles 101 and 102 TFEU, and not to the merger control area.

Two separate sections are dedicated by the Guidance to the admission to the procedure of third parties and to the so called 'other procedures'. While the latter contains some important remarks on the role of the Hearing Officer in commitment decisions that will be briefly discussed after the description of the four phases mentioned above, this article will not specifically address the former section in light of the fact that third parties other than complainants, if admitted, have a somewhat different status and enjoy only limited procedural rights. In essence, their right to be informed of the nature and subject of the proceedings is constrained by the discretion of DG Competition to determine the means by which they will be informed, and the scope of the right to make known their view is by consequence dependant on whether the information provided by DG Competition enables them to do so.<sup>72</sup> For the present purposes, it suffices to say that while at first blush, one may find regrettable that there is currently no legislative provision allowing the Hearing Officer to ensure that DG Competition delivers all the information necessary and relevant for these third parties to make known their view, it is not to be underestimated the capacity of the Hearing Officer to operate 'behind the curtains' in the particular case, to convince DG Competition that a broader array of information should be conveyed.

### 3.1. The investigative phase

The recognition of defence rights during the course of the investigative phase has been a critical issue, surely not one meant to be covered when the Commission 'launched' the Hearing Officer enterprise. Moreover, the fact that defence rights, and in particular the right to be heard, have no application in the investigative phase has found support from the jurisprudence of the ECtHR in the *Saunders* case.<sup>73</sup>

Rather, the expansion of the rights of defence to this area is the result of some relatively recent judgments where the Luxembourg's jurisprudence, perhaps warned by

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<sup>72</sup> Guidance, para 17.

<sup>73</sup> Case 43/1994/490/572, *Saunders v United Kingdom*, [1997] 23 EHRR 313, para 68.



prior developments in Strasbourg,<sup>74</sup> rebuffed the Commission for failing to give adequate protection to the right to be heard.<sup>75</sup> It is also thanks to these judgments that the ‘Hearing Officer enterprise’ passed the stage of being merely a reviewing and strengthening of the internal case, and developed into a more effective external check on the DG Competition’s operation.

As a result of that case-law, the investigated can now count on: the right to be informed of the purpose and the subject-matter of the investigation, except for cartel cases;<sup>76</sup> the right not to self-incriminate; the right to be represented by a lawyer; and, the right to raise confidentiality issues with the Hearing Officer. It should be noted, however, that notwithstanding the critical importance of this expansion of the rights of defence, the Hearing Officer recognizes his limited role in this phase of the proceedings: like the ECJ stated in *Dalmine*,<sup>77</sup> an undertaking subject to investigatory measures can only rely in full on its rights of defence once a SO has been notified to it. It is for this reason that it will look into the confidentiality issues only upon request of the investigated undertakings, and will address them ‘if raised in the reply to a Statement of Objections’.<sup>78</sup> This stimulates questions regarding the disposability of rights of defence: is it really acceptable for the European legal system that a public figure known as the ‘guardian of fair proceedings’<sup>79</sup> lacks the power to stop a violation of the rights of defence from materializing even when he is aware of it? Especially in light the fact that rights of defence are fundamental rights, shouldn’t they enjoy more powers to secure their respect?

### 3.2. Procedures potentially leading to a prohibition decision

Most of the work of the Hearing Officer is carried out following the notification of the Statement of Objections, which marks the entry into the territory of the procedures potentially leading to a prohibition decision. The procedural rights for the addressee in this phase include getting proper access to file,<sup>80</sup> applying to the Hearing Officer for

<sup>74</sup> See, in particular, two lines of cases brought by the European Commission of Human Rights: The first follows the decision of 4 July 1983, *H v UK*, Req. no. 100000/82, *supra* n 10. The other one is based on the decision of 13 December 1982 no. 9453/81, D.R. vol. 31 and 13 July 1983 no. 9022/80, D.R. vol. 33, p 21, establishing that the due process guarantees are applicable to the investigative phase in criminal matters, notably in a legal system where the collection of evidence is essentially carried out at this stage.

<sup>75</sup> Joint Cases C-204, 205, 211, 213, 217 and 219/00 P, *Aalborg Portland v Commission*, [2004] ECR I-123, para 63 (Cases 46/87 et 227/88, *Hoechst v Commission*, [1989] ECR 2859, para 15); Case T-99/04, *AC-Treuband*, [2008] ECR II-1501, paras 51-56 (Case C-105/04, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, [2006] ECR I-8725, paras 47-50).

<sup>76</sup> Best practices on the conduct of antitrust proceedings concerning Arts 101 & 102 TFEU, paras 14 and 23.

<sup>77</sup> Case C-407/04 P, *Dalmine v Commission* [2007] ECR I-829, para 59. See also Case T-99/04, *AC-Treuband AG v Commission* [2008] ECR II-1501, paras 76 et seq.

<sup>78</sup> Guidance, para 11.

<sup>79</sup> Guidance, para 3.

<sup>80</sup> According to the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005, C325/7.

any dispute concerning the disclosure by the Commission of confidential information which might be necessary to exercise the right to be heard, and requesting an extension of the time-limit to reply to the SO.

An important feature of the decision of the Hearing Officer in case of disputes on the disclosure of confidential information, which involves a balancing test between the third party's interest to confidentiality and the addressee's right to be heard, is that they can be immediately challenged to the General Court (and more specifically, only by the party who has provided the information in question). This is, once again, a procedural right that originates from the case-law of the Court of Justice,<sup>81</sup> which also established the procedure that the Commission must follow were it to consider the disclosure of information for which confidentiality is claimed (the famous 'AKZO procedure').<sup>82</sup>

By contrast, it seems remarkable that no legal recourse is provided to immediately challenge the Hearing Officer's decisions concerning access to file<sup>83</sup> and extensions of deadlines. Recently, the Court ruled in the *Intel* case against the possibility of appealing decisions refusing the extension of deadlines and access to certain documents necessary to ensure rights of defence, stressing that 'the decisions refusing to grant access to those documents and, subsequently, to extend the deadline for service of the reply to the SSO, even though they may constitute an infringement of the rights of the defence, are merely preparatory measures whose negative effects will be felt only in the event of any final decision finding that there has been an infringement'.<sup>84</sup> While the accuracy of this statement is irrefutable, it is submitted here that the fact that the negative effect will only materialize at a later stage of the proceedings does not mean that, as the reasoning of the Court implied,<sup>85</sup> those acts are not capable of immediately and irreversibly affecting the interests of an investigated party. Because of the wide discretion enjoyed by the Commission in 'complex economic assessments', and the consequent inability of an appellant to engage the Court in a discussion on the merits of its economic arguments, it seems at least questionable to assume that an investigated party will be able to obtain after the adoption of the final decision a valid remedy for any injustice that might be caused through interlocutory acts. The conclusion logically follows then that such acts ought to be amenable to judicial review according to Article 263 of the EC Treaty.<sup>86</sup> In absence of spontaneous legislative action in this regard, we will

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<sup>81</sup> Case 53/85, *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission*, [1986] ECR 1965, para 29.

<sup>82</sup> Such decision has to be notified to the company concerned, which has to be given the opportunity to bring an action before the Court of First Instance with a view to having the Commission's assessments reviewed. The information may then not be disclosed before one week after the decision has been notified.

<sup>83</sup> Such possibility was explicitly ruled out in Joined Cases T-10, 11, 12 & 15/92, *Cimenteries CBR v Commission* [1992] ECR II-2667. The approach was also endorsed by Advocate General Léger in his opinion in Case C-310/93P, *BPB Industries and British Gypsum v. Commission* [1995] ECR I-865, at footnote 101 and para 122.

<sup>84</sup> Order of the President of the CFI, Case T-457/08 R, *Intel v Commission*, [2009] ECR II-12, para 56.

<sup>85</sup> *Ibid*, paras 52-53.

<sup>86</sup> Of this opinion M Lewitt, 'Commission Hearings and the Role of the Hearing Officer: Suggestions for Reform', [1998] ECLR 406, quoting for comparison, Case 60/81, *IBM v Commission* [1981] ECR 2639; Case T-64/89, *Automec v Commission* [1990] ECR II-367; Case T-186/94, *Guerin Automobiles v Commission* [1995]

probably just have to wait, as for *AKZO*, for a court case to establish the possibility of lodging direct appeal against those measures, thus officially recognizing the otherwise lack of effective access to justice.

### 3.3. The oral hearing

Ensuring the objectivity of the oral hearing was the very purpose for the creation of the Hearing Officer's post, and initially its main focus. This is the reason why the powers of the hearing officer for the preparation and chairing of the hearing were well developed already in the first Mandate. Still, it is surprising that throughout the two revisions of the Mandate the need has never been felt to expand the scope of these provisions so as to confer participants to the hearing with some of the procedural guarantees that are considered ordinary in a trial-like situation. The absence of specific rules may lead on certain occasion to adverse effects on the dialectic process of the hearing: for example, since there are no specific rules regarding the standard to be met by third parties called on to testify as experts, it is not unimaginable that in response to the intervention of these 'experts', participants exhaust the limited time which is allotted to them in attacks to the reliability of such experts, instead of focusing on more important elements of the case. One may wonder then why the Hearing Officer has not adopted some Rules of procedure akin to those that are used by the General Court, though obviously reduced in length and scope, to minimize such problems.

Concerning the preparation of the hearing, the Mandate provides that the Hearing Officer establishes the date, duration, location and the attendants. The timing however will be usually a result of a compromise of the parties' availability with that of the other participants. In this respect, some criticism has been expressed stressing that the date should be fixed primarily in the interests of the addressees of the SO, whereas the current Mandate does not contain any criteria and the discretion enjoyed by the Hearing Officer in that regard is too broad.<sup>87</sup>

Another criticism can be raised in connection with the contacts that the Hearing Officer may make with the undertakings concerned. To facilitate the focus of the hearing on the critical issues, he may let them know in advance the issues on which he would like to hear their point of view. He may also invite them to a prior meeting with him, and if necessary with the relevant Commission's department; and ask for prior submission of the main content of the statements of the persons to be heard at the hearing.<sup>88</sup> While this sort of 'anticipation' of the hearing is no doubt useful to speed up the procedure and thus increase the efficiency of the hearing, a doubt may arise as to whether other participants to the hearing, and especially the addressees, would not be entitled to benefit from the anticipation made *vis a vis* any participant to the hearing: it

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ECR II-1753. Orders of the CFI of, Case T-134/95, *Dysan Magnetics and Review Magnetics v Commission* [1996] ECR II-81; Case T-9/97, *Elf Atochem v Commission* [1997] ECR II-909. In a similar fashion, see the Opinion of the Advocate General in *BPB Industries and British Gypsum v. Commission* [1995] ECR I-865, footnote 101.

<sup>87</sup> S Kinsella, 'Is it a Hearing if Nobody is Listening?', *CPI Antitrust Journal*, 2010 (1) p 4.

<sup>88</sup> Art 11 of the Mandate.

seems feasible, for example, and certainly fair that they obtain from the Hearing Officer non-confidential information about the object of the discussion to which an undertaking has been invited, as well as the material submitted in advance by the undertakings on behalf of the persons to be heard at the hearing. Along the same lines of preparing the ground for the operation of the *contradictoire*, a potential improvement in the preparation of the hearing would be the establishment of a rule (possibly, included in the Rules of Procedure the convenience of which was emphasised above) according to which the Commission must disclose in advance the exact content of its presentation, and allow the Hearing Office to send it to the parties concerned so as to enable them fully to exercise their right to be heard.

Concerning the chairing and the organisation of the hearing, it should be remembered that currently the hearing is an entirely voluntary process: both as to attendance, which cannot be compelled by the Hearing Officer, and as to the participation of its attendees, which do not have either the duty to respond to every chief accusation nor the right to receive specific answers from the Commission. But the most criticised issue regards the absence of a process of cross-examination of witnesses; in particular, leniency applicants. More often than not, investigations in cartel cases are driven by information submitted by fellow cartel members who have applied for the Leniency Programme. Given the fundamental importance of the right to be heard in the European legal system, it should naturally follow that the undertakings accused have the opportunity to confront with the accuser and contest the evidence provided, as would be required for criminal charges by Article 6(3) of the ECHR. However, due mainly to issues of confidentiality and fear of retaliation, it is hardly plausible that a leniency applicant will attend the hearing.<sup>89</sup> This is often recognized as one of the major failures of EU competition enforcement in securing protection of fundamental rights, which implies that until the system does not find a fix for such problem, it cannot be affirmed that the Hearing Officer ensures full respect for the right to be heard. Unfortunately, the Hearing Officer's inability lies within the very nature of the hearing, which has been conceived as an entirely voluntary process. As a result, it has no power to summon witnesses, nor have the participants to the hearing an obligation to answer questions or tell the truth. Even if some recent developments appear to show, as noted above,<sup>90</sup> that the delegation of decision-making powers to the Hearing Officer has turned failures to submit applications to him into evidence that could be used against an aggrieved party in further legal proceedings, this is clearly not the case for applications for oral hearing, since the hearing officer lacks any decisional powers as to the subject matter of the controversy.

We can thus only imagine how the hearing officer could manage cross-examination of leniency applicants, if it had the powers to issue subpoenas. Arguably, the problem of

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<sup>89</sup> For this reason it has been proposed the establishment of a direct relationship between the amount of leniency and the effective participation to the hearing: see J Modrall and R Patell, 'Oral Hearings and the best practices guidelines', CPI Antitrust Journal, 2010 (1), p 4.

<sup>90</sup> See n 46.

confidentiality could be to a large extent dealt with by making use of Article 12(3) of the Mandate, which allows the Hearing Officer to establish ‘whether the persons concerned should be heard separately or in the presence of other persons attending the hearing’. By holding *in camera* sessions where only the accused, the leniency applicant and their lawyers are present, the Hearing Officer would be able to preserve confidentiality *vis a vis* third parties - shielding both the accused and the accuser from private enforcement actions, for example - while ensuring respect for the right to be heard.

### 3.4. The Post-oral hearing

The post-oral hearing phase is the phase during which the Hearing Officer submits, as indicated above, an ‘interim report’ to the Commissioner. Such report, which addresses all procedural issues relating to the fairness of the procedure, may also contain observations on specific issues brought to the attention of the Hearing Officer by any part during the procedure, as well as on the substance of the case. Yet no right is vested on any party to the proceedings concerning such report. This can be attached under two different points of view: first, the existence of such provision seems to contrast with the objective of ensuring respect for the right to be heard, to the extent that the very exercise of such right is not fed into the subsequent decision of the Commissioner (except in cases where he spontaneously decides to react to the Hearing Officer’s comments). Secondly, as stressed above, the convenience of a provision as such is even more questionable after the establishment of ‘peer review panels’: a sceptical eye may well perceive this as an unnecessary duplication.

In addition to the submission of the report, the Hearing Officer may have a responsibility as a follow-up of the hearing. In particular, such responsibility arises only if he deems it appropriate, after consulting the director responsible, in view of the need to ensure respect for the right to be heard.<sup>91</sup> It consists in affording persons, undertakings and associations of persons or undertakings the opportunity to submit further written comments after the oral hearing, within a fixed date that is determined by the Hearing Officer. This is no doubt a valuable addition for the purpose of respecting the principle of *contradictoire*, which may sometimes require the extension of the dialectic process beyond the time allotted by the Hearing Officer. Therefore, this provision provides the opportunity to repair some potential deficiencies of the hearing, and in line with well-settled ECtHR case-law, it may affect the fairness of the entire proceedings.<sup>92</sup> From the right to be heard viewpoint, the protection afforded by this

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<sup>91</sup> Art 12(4) of the Mandate

<sup>92</sup> As reminded by the ECtHR in *Le Compte*, *supra* note 6, para 5: ‘Whilst Article 6 par 1 (Art 6-1) embodies the “right to a court” ... , it nevertheless does not oblige the Contracting States to submit “contestations” (disputes) over “civil rights and obligations” to a procedure conducted at each of its stages before “tribunals” meeting the Article’s various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies ... which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system’. The ECHR jurisprudence has also consistently assessed the existence of a violation of article 6 looking at the proceedings in their entirety,

provision could be seen as defective to the extent that it remains discretionary on the Hearing Officer to authorize such submissions. Conceivably, this is just a theoretical issue since it seems unlikely that the Hearing Officer, given their specific competencies and expertise, will let the need for an extension of the *contradictoire* beyond the hearing go unnoticed. Nonetheless, it can be argued that, precisely for the same reason as for the interlocutory acts referred to in section 3.1 above, decisions by the Hearing Officer regarding such matters should be amenable to judicial review.

Finally, a further task of the Hearing Officer during this phase is to address the issues raised by the parties in relation to a Supplementary SO or a Letter of Facts (i.e, a letter stating that the Commission intends to rely on new evidence that corroborates the objections already made). Importantly, the Best Practices recognize that, ‘the procedural rights which are triggered by the sending of the initial Statement of Objections apply *mutatis mutandis* in case a Supplementary Statement of Objections is issued, including the right of the parties to request an oral hearing’.<sup>93</sup> It follows that in case of a new SO, the Hearing Officer will essentially fulfil the same functions as those described in sections 3.2 and 3.3. By contrast, the implementation of the right to be heard may suffer some limitations in this phase with respect to the contestation of new factual elements (as opposed to new grounds for violations of competition rules) adduced as evidence: after receiving a letter of facts, the undertaking will only be granted the possibility to express its position within a fixed deadline and the position will only be expressed in writing. This appears to be in contrast with the practice of the majority of EU Member States and the major jurisdictions outside the EU, where as noted by the Organization for Economic Cooperation and Development (OECD), there must be an oral hearing before the members of the decision-making body that will ultimately take the decision.<sup>94</sup>

### 3.5. Other Procedures

The Guidance concludes the analysis of the different context of operations with a final section which concerns two types of procedural rights that are by their nature very different from the ones listed so far. The first regards complainants: according to the distinction made by the Hearing Officer above, complainants do not enjoy rights of defence but are entitled to the respect of some procedural rights. Concretely, however, these rights are functional to allow the exercise of the right to be heard and thus very similar (although with a different objective and narrower in scope) to those enjoyed by undertakings that are addressees or potential addressees of the SO. In particular, once complainants are informed by the Commission that it considers that there are insufficient grounds for pursuing a complaint, and that it gives them a definite time-

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rather than at a single stage of the proceedings : see for example, on the ‘reasonable time’ requirement, the judgment of the ECtHR of 24 November 1993 in *Imbroscia v Switzerland*, série A n° 275, para. 36, and the case-law cited therein.

<sup>93</sup> Best practices on the conduct of antitrust proceedings concerning Articles 101 & 102 TFEU, para 98.

<sup>94</sup> OECD country studies – European Commission – Peer Review of Competition Law and Policy – 2005, p 63, available at <http://www.oecd.org/dataoecd/7/41/35908641.pdf>.

period to submit observations in writing, they are entitled to: 1) submit a reasoned request to the Hearing Officer for an extension of the deadline; 2) request the Commission to access the documents in its possession upon which it has based its preliminary assessment; and, 3) submit a reasoned request to the Hearing Officer for disclosure of documents in possession of the Commission to which access was not given. Additionally, complainants enjoy procedural rights where their complaint is being pursued by DG Competition: namely, they are entitled to receive a non-confidential version of the SO and make their views known within a time limit set by DG competition. But the list of entitlements stops here, notably cutting short of the right to request a hearing. They have, of course, the right to be admitted by DG Competition to any hearing that might be scheduled within the procedure related to the case for which they have submitted a complaint. They have also the opportunity to request to be heard orally following the letter through which the Commission has notified them of the intention to reject the complaint. Only the addressees of the SO, however, have the right to request a hearing.

The existence of such different scope of protection for procedural right is important and well-founded, for the entitlement of complainants to such requests would place a substantial administrative burden on the Commission and would be, logically, not required by international human rights standards. The ECHR, for example, akin to other international human rights treaties, limits the right to a fair trial to situations involving ‘the determination of [one’s] civil rights and obligations or of any criminal charge against [oneself]’. The decision of a case for which one has complained clearly does not give rise to claims concerning his civil rights of obligations: even if it may affect him indirectly through the impact of competition in the market, his civil rights and obligations will remain untouched. However, it is interesting to note that the formulation of the notion of ‘beneficiaries’ of the right to be heard in the Charter of Fundamental Rights is broader in this respect, referring to the ‘right of every person to be heard before any individual measure which would affect him or her adversely is taken’. The argument could be made thus: that strict adherence to the Charter of Fundamental Rights requires interpreting such article to confer complainants with the right to request a hearing. A less demanding interpretation would be, of course, to consider the provision as merely imposing the obligation to make known one’s own view (for example, though the possibility to present observations in writing). Still, one could easily imagine cases in which the ability of the complainant to request a hearing serves to repair violations of due process occurred in a pathological situation. This option of conferring complainants with the right to request a hearing perhaps limited to some specific circumstances, like the absence of a request in that sense by the addressees or the emergence of new elements of fact following the hearing requested by the addressees, deserves at least some consideration after the entry into force of the Lisbon Treaty.

Finally, the Hearing Officer is entitled to ‘where appropriate ... assess the competition impact of commitments proposed in relation to any proceedings initiated by the

Commission ... in particular the selection of respondents and the methodology used'.<sup>95</sup> The Guidance paper goes even beyond that, specifying that a final report will be prepared in cases of commitment Decisions 'taking into account that the undertaking concerned has been put in a position to propose adequate commitments, or to modify them following a market test'.<sup>96</sup> The problem in this context is one of complexity: while it can be expected that the Hearing Officer will capably perform the task of checking the appropriateness of the respondents selected and the methodology deployed, it seems unlikely that - given the limited time and resources - he will be able to properly assess whether the undertaking was in the position to offer 'adequate commitments'. Grasping the notion of 'adequate' in complex cases arguably requires more than a skimming through some thousands of pages. Conceivably, this inadequacy could be at least minimized by allowing the Hearing Officer to sit in at the actual negotiations between DG Competition and the proposing party, so as to allow him to gain first-hand knowledge about how the different interests at stake have played out in the negotiation.

Those who defend the current institutional system could contend that such an arrangement would not be required under any of the current due process standards: undertakings are free to engage into a negotiation to propose commitments and are free to leave at any time. Moreover, commitment decisions do not establish any violation of competition law, nor do they impose any fine. Accordingly, it would seem hard to square these procedures into the notions of 'individual measure which would affect [one] adversely' and 'determination of rights and obligations' referred to by Article 41(2) of the Charter and Article 6(1) ECHR. Nonetheless, such a solution should be considered so as to avoid the risk that the Commission uses such negotiated procedures, and the alternative of a fine as a threat, to *de facto* impose solutions at its will and circumvent the procedural guarantees that the competition enforcement system otherwise provides.<sup>97</sup> In those circumstances, it would not seem to be an overstretch if the ECtHR were to hold that the protection of Convention rights (in particular, those enshrined in Article 6 ECHR) afforded by the EU legal system is 'manifestly deficient', so as to rebut the 'presumption of equivalence' and find a violation of Article 6(1) ECHR.<sup>98</sup> A similar finding was made, indeed, in a case concerning settlement of criminal matters in Belgium, where the ECtHR found a violation of Article 6(1) ECHR. Recognizing that '[t]he "right to a court", which is a constituent element of the right to a fair trial, is ... subject to implied limitations' and that 'in the Contracting States'

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<sup>95</sup> Article 14 of the Mandate.

<sup>96</sup> Guidance, para 68.

<sup>97</sup> See D Walebroeck, 'Le développement en droit européen de la concurrence des solutions négociées (engagements, clémence, non-contestation des faits et transactions): que va-t-il rester aux juges?', Global Competition Law Centre Working Paper 01/08, p 3: 'Le risque est [...] que la Commission utilise ces procédures pour le cas échéant forcer des engagements et des transactions de la part des entreprises et pour développer ainsi une politique parallèle de concurrence qui échappe entièrement au contrôle du juge et aux garanties minimales auxquelles notre Etat de droit reste attaché'.

<sup>98</sup> Judgment of the ECtHR (Grand Chambre) of 30 June 2005, *Bosphorus Hava Yollari Tuzüm Ve Ticaret Anonim Şirketi v Ireland*, Appl. no. 45036/98, para 156.



domestic legal systems a waiver of this kind is frequently encountered both in civil matters ... and in criminal matters' for its 'undeniable advantages for the individual concerned as well as for the administration of justice',<sup>99</sup> the Court went on to argue that '[a]bsence of constraint is at all events one of the conditions to be satisfied; this much is dictated by an international instrument founded on freedom and the rule of law' and that as 'the applicant waived the guarantees of Article 6 par 1 (Art 6-1) only "under the threat of [the] serious prejudice"',<sup>100</sup> there had been a violation of the Convention.

#### 4. CONCLUSIONS

The preceding paragraphs have analysed the role of judicial review and of the Hearing Officer in competition proceedings in the attempt to appraise the compatibility of the current Commission's procedures with the right to a fair trial.

As a preliminary remark, it must be said that the Hearing Officer and the courts play in parallel, since they both operate, for purposes of our analysis, to identify and correct potential violations of the law which occur in DG Competition's proceedings. The main difference is that the law which the Hearing Officer aims to ensure the respect of is procedural, and thus his activity has only a limited field of application when compared to the courts (even though, at the internal level, the Hearing Officer may in fact exercise a control that resembles - at least for its scope - that operated by the Court). Another difference is that the scrutiny of the Hearing Officer, in cases of disputes for which its decision is requested, goes into the merit of the matter in question, substituting its reasoning with that of DG Competition; by contrast, the courts adopt a much more deferential stance, using criteria such as misuse of powers or manifest error, often associated with the notion of 'complex economic assessments'.

What conclusion have we reached, in terms of the question posed at the outset? The short answer would be that the doubts about the compatibility of such two-tiered system with Article 6(1) seem to be not unfounded. Not because of the two-tiered structure in itself, but rather because the system in place fails to give sufficient guarantees that any violation of the right to a fair trial suffered in DG Competition's proceedings will be corrected elsewhere. More specifically, judicial control seems generally inadequate to fulfil this task, with the exception of gross violations (i.e., violations of rights of defence that have played a role in the formation of the decision): for those violations, the standard of protection developed seems compatible with the test used by the Strasbourg Court. These are arguably by and large correspondent to the violations described in the second limb of the *H v UK* test, i.e. those irremediable or decisive for the further continuation of the proceedings, which cannot tolerate ex-post corrections. For all the other violations of the right of fair trial, then, it would be required for EU antitrust enforcement that the Hearing Officer meets the challenge in order not to fall foul of the first limb of the test. Unfortunately, we have ascertained

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<sup>99</sup> Judgement of the ECtHR of 27 February 1980, *Deweert v Belgium*, Appl. No. 6903/75, para 49.

<sup>100</sup> *Ibid*, paras 49-50.

from a survey of his functions that he is not equipped to do so, and that some amendments to its Mandate would be most needed in this respect.

This has given us the opportunity to review the history of the Hearing Officer and the evolution of its (limited) powers. Without doubts, the intrinsic value of the Commission's initiative in establishing this post has to be recognized and recollected with admiration. Nonetheless, it is arguable that had the post not been created, Member States would have been much more likely to be condemned by the Strasbourg Court for breach of the right to fair trial,<sup>101</sup> and as a consequence would have pushed to implement some changes in the European system for competition enforcement in order to avoid further liability under Article 6 ECHR. It is therefore not clear whether the alternative to the *status quo* would have been better. What is in any event appreciable is that the Luxembourg courts have in several occasions given their contribution towards the shaping up of a system of procedural guarantees that circumscribes competition proceeding in order to avoid the friction with the right to a fair trial under Article 6 ECHR.

The figure of the Hearing Officer, which represents the guardian of these procedural guarantees, is a figure that affords the Commission the opportunity to reconcile the objective of effective enforcement of competition with the value that those guarantees are meant to protect. Notwithstanding the Hearing Officer's commitment to the respect of those guarantees, the analysis above has shown that there are several occasions where it is simply not able to ensure its observance, even where it is apparent that the fundamental importance of those guarantees ought to prevail over the objective of effective enforcement. One explanation for that may be that the Mandate was drafted by members of DG Competition, who while regulating some specific grey areas of tension between rights of defence and effective enforcement of competition have understandably preferred to tilt the balance in favour of the latter. Regardless of what the driver was, the fact that the existing legal framework still tends to privilege the former objective is clear. This imbalance prevents the rectification by the Hearing Officer of certain violations of due process which might, in specific cases, lead to a finding of violation of both the Charter of Fundamental Rights and the ECHR. It is for this reason that, whereas the Hearing Officer's stated mission is to ensure that the hearing is properly conducted and contribute to the objectivity of the hearing itself and any decision taken subsequently, it is submitted here that its role may actually be broader. As a matter of fact, his functions are not limited to ensure the respect of the procedural rights contained in the antitrust regulation: he also overviews the case in its entirety, checking for the Commission's compliance with a variety of rules and principles. Notably, the word 'principles' needs to be emphasised here, for it militates in

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<sup>101</sup>This would occur, in fact, where the procedures of EU competition law were found to be manifestly deficient for the protection of the right to be heard and Member States would continue to cooperate in the EU framework for the enforcement of the competition rules. Such a scenario would be in line with the ruling of the ECtHR in *Soering*, according to which Contracting States are obliged to refuse their co-operation (i.e., the execution of a criminal conviction) if it emerges that the conviction is the result of a flagrant denial of justice: see *Soering v the United Kingdom* ECtHR judgment of 7 July 1989, Series A no.161, p. 45, para 113.

favour of the assertion that the scrutiny of the Hearing Officer on a case should not be merely confined to those issues for which the Mandate confers upon him a specific power. By contrast, as recognized by Article 3.1 of the Mandate, ‘the hearing officer shall take account of ... *principles laid down by the Court of Justice and the [General Court] of the European Communities*’ (emphasis added). As a result, the Hearing Officer can act ‘in defence of the rights of defence’<sup>102</sup> also when such rights are not explicitly provided by a specific regulation: this would be consistent not only with the higher hierarchical value of ‘principles’ over ‘laws’, but also with well settled case-law.<sup>103</sup> It would also, incidentally, send a strong signal regarding his emancipation from DG Competition and reinforce the rhetoric of effective separation from DG Competition.

Another occasion for the Hearing Officer to demonstrate a proactive approach towards the evolution of its role would be, as suggested above, the creation of a set of Rules of procedure applicable for the organisation and the conduct of hearings. This would make the process more rigorous and transparent, and could also represent a first step towards the consideration of the hearing as an obligatory participation. Such organisational measure would also benefit the exercise of the rights of defence, allowing streamlining of the process of confrontation and honouring the principle of *contradictoire*. Moreover, it would have a direct impact on the pursuit of the objectivity of the hearing, given the increased ability for its participants to organize efficiently their agenda.

This is, however, as far as the Hearing Officer can push the quest for due process with the current Mandate. He is constrained, unfortunately, not only by the lack of resources but also by a set of rules that are too basic, and for which an update would be more than desirable. Everything depends, in the next few years, on what the priorities of the Commissioner will be. There is some reason, however, to be optimistic: the issue of ‘due process’ is in the eyes of everyone. The fact that it has been the object in the last year of 7 public speeches, including one of the former Commissioner,<sup>104</sup> two of the former Director General,<sup>105</sup> one of the new US Attorney General for Antitrust,<sup>106</sup> one

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<sup>102</sup>S Wernicke, “‘In Defence of the Rights of Defence’: Competition law procedure and the changing role of the Hearing officer”, Concurrences No. 3- 2009.

<sup>103</sup>See e.g. C-48 & 66/90, *Netherlands v Commission*, [1992] ECR I-565, para 44; Case C-32/95 P *Commission v Lisrestal and Others*, [1996] ECR I-5373, para 21; Case C-288/96, *Germany v Commission*, [2000] ECR I-8237, para 99; Case C-287/02, *Spain v Commission*, [2005] ECR I-5093, para 37; and 13 September 2007, Joined Cases C-439 & 454/05 P *Land Oberösterreich v Commission*, [2007] ECR I-7141, para 36; Case T-260/94, *Air Inter v Commission*, [1997] ECR II-997, para 60.

<sup>104</sup>N Kroes, ‘The Lessons Learned’, Speech at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University, New York, 24 September 2009.

<sup>105</sup>P Lowe, ‘Reflections on the past seven years – “Competition policy challenges in Europe”’, Speech at GCR 2009 Competition Law Review, Brussels, 17 November 2009; ‘Due process in antitrust’, Keynote address at the CRA Conference on Economic Developments in Competition Law, Brussels, 9 December 2009.

<sup>106</sup>Christine Varney, Keynote address at the 13<sup>th</sup> Annual Competition Conference of the International Bar Association, 11-12 September 2009, Fiesole.

of the new Director General<sup>107</sup> and two of the new Commissioner,<sup>108</sup> is a strong signal that this is the right moment to advance our proposals.

After the series of comments and suggestions made above with regard to possible issues in the current system, this article would not be complete without a final remark to stress what is the most important, substantial but at the same time simple and concrete reform that the Commissioner could bring about with respect to the hearing process: make the so called ‘interim report’ available to the public, or at least to the alleged infringer(s). Such an innovation would really come a long way towards greater respect for the right to be heard, would enhance transparency and trustworthiness in the Commission’s enforcement machine and would significantly increase the importance of the Hearing Officer’s role. As argued by a Commission official in the early nineties, the diametrically different approach of the EU and the US (where all decisions and tentative decisions of the hearing examiner are made part of the record and are served on the parties so that they may take exceptions or submit their observations)<sup>109</sup> could be justified by the role played by the Hearing Officer in the decision-making process, which was far more limited (and indeed almost insignificant) in the EU.<sup>110</sup> However, given the direct connection of the Hearing Officer to the final decision-maker, its progressive empowerment and the specific attribution of the duty to report to the Commissioner, a serious doubt can be cast on whether such enormous difference is still justifiable.

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<sup>107</sup> A Italiener, ‘Challenges for European Competition Policy’, Speech at the International Forum Competition Law of the Studienvereinigung Kartellrecht, Brussels, 9 March 2010.

<sup>108</sup> See above n 53.

<sup>109</sup> See the Administrative Procedure Act, 5 U.S.C. Para 557 (c) 1988.

<sup>110</sup> J Joshua, ‘The right to be heard in EEC Competition Procedures’, 15 Fordham International Law Journal 16 (1991-1992), p 80.