DUE PROCESS RIGHTS BEFORE EU AGENCIES: THE RIGHTS OF DEFENSE

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The fundamentals of America’s procedural due process jurisprudence are well-known. Those fundamentals involve the language of the Fifth and Fourteenth Amendments, the requirement that a deprivation of due process rights must be the result of state action, and the requirement that this governmental action must adversely impact a protected liberty or property interest. The names of procedural due process cases also are familiar including old warhorses from the right/privilege era like Bailey v. Richardson and McAuliffe v. Mayor of New Bedford, and classics from the period of the due process explosion like the iconic Goldberg v. Kelly, Board of Regents v. Roth, Perry v. Sindermann, Paul v. Davis, Mathews v. Eldridge, Goss v. Lopez, Ingraham v. Wright, and Cleveland Board of Education v. Loudermill. The decisions discuss issues of whether due process is required.

1 They are well-known even though due process issues rarely come up in the day-to-day world of administrative practice at the federal, state, and local levels. WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 109 (5th ed. 2008). The issues rarely come up because most administrative agencies provide more safeguards than the constitutional minimum. Id.

2 The Fifth Amendment states, “No person shall be... deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Fourteenth Amendment states, “[N]or shall any State deprive any person of life, liberty, or property, without due process of law...” U.S. CONST. amend. XIV, § 1.

3 Both the Fifth and Fourteenth Amendments list deprivations of “life, liberty, or property,” but the use of the term “life” is generally limited to matters of capital punishment. Fox, supra note 1, at 110; infra note 6.

4 Administrative law casebooks in the United States typically devote a substantial amount of coverage to procedural due process. See, e.g., PETER L. STRAUSS, TODD D. RAKOFF & CYNTHIA R. FARINA, GELGHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 767–901 (Robert C. Clark et al. eds., rev. 10th ed. 2003). There are many interesting due process decisions so a major challenge for any casebook author is deciding which cases to include, which ones to relegate to note status, and which ones to leave out completely.

5 182 F.2d 46 (D.C. Cir. 1950).
6 29 N.E. 517 (Mass. 1892).
8 408 U.S. 564 (1972).
9 408 U.S. 593 (1972).
at all, and if it has been triggered, what kind of process is due and when procedural safeguards must be afforded.\textsuperscript{15}

When due process applies, the Supreme Court has stated that the courts must weigh three factors in determining whether the procedural safeguards are adequate: the private interest affected by the agency action; the risk of error inherent in the agency's existing procedures and the probable value, if any, of additional or substitute procedures; and the government's interest in maintaining the existing procedures, in terms of both the fiscal and administrative burdens that might be encountered, if new procedures are mandated.\textsuperscript{16} The many cases applying these factors show that the safeguards required by due process range from notice and some relatively informal opportunity to comment or respond,\textsuperscript{17} to notice and a full-fledged oral, adversarial hearing with direct and cross-examination and the other safeguards associated with civil trials in our state and federal courts.\textsuperscript{18}

Many of the due process safeguards protecting persons who appear before administrative agencies in the United States are also recognized in the European Union (EU), as protecting persons, associations, and companies involved in proceedings before the European Commission (Commission) and EU agencies such as the European Environmental Agency and the European Aviation Safety Agency.\textsuperscript{19} Although the treaties governing the EU do not have provisions like the Fifth and Fourteenth Amendments,\textsuperscript{20} rights equivalent to

\textsuperscript{16} Mathews, 424 U.S. at 334–35.
\textsuperscript{17} See, e.g., Goss, 419 U.S. at 565.
\textsuperscript{19} The American Bar Association's in-depth report on administrative law in the EU looks at the European Commission as well as agencies empowered by the Council of the EU (Council) or the Commission, including the Office of Harmonization in the Internal Market, the European Agency for the Evaluation of Medical Products, and the European Food Safety Authority, to make individualized decisions. This report also looks at adjudicatory proceedings in the competition, state aids, and trade remedies sectors. See Michael Asimow & Lisl Dunlop, Adjudication, in ADMINISTRATIVE LAW OF THE EUROPEAN UNION 3–6, 9 (George A. Bermann et al. eds., 2008). "The European Commission, which represents the common interest of the EU, is the main executive body of the EU. It has the right to propose legislation and ensures that EU policies are properly implemented." Europa, Europe in 12 Lessons: How Does the EU Work?, http://europa.eu/abc/12lessons/lesson_4 (last visited Sept. 20, 2008). Many agencies have been established by the Commission and the Council other than those listed above. See generally PAUL CRAIG, EU ADMINISTRATIVE LAW 148–52 (Gránne de Búrca et al. eds., 2006) (discussing the development of the agency model in the European Union).
\textsuperscript{20} The Charter of Fundamental Rights of 2000 recognizes several rights associated with due
notice and opportunity to be heard have evolved in the EU, and as in the United States, the range and kinds of process rights required in particular settings vary considerably. These rights derive from both common law and civil law doctrines including natural justice and the duty to act fairly in the United Kingdom, constitutional law requirements for proper administrative procedure in Germany, constitutional justice in Ireland, the rights of defense in France, equality of arms, and principles of good administration recognized in other European nations. They developed in large part through the decisions of the European Court of Justice (ECJ) and the Court of First Instance (CFI). These safeguards will be referred to collectively as either the "right to be heard" or the "rights of defense."

This Article discusses the procedural safeguards that have been recognized in the EU and the parallels between procedural due process in the United States and the rights of defense in the EU. It compares these respective rights and safeguards and explains how U.S. and EU procedures for agency adjudications are converging. Part II sets out the fundamental principles of process, and it would have been given binding legal force under the Constitutional Treaty of 2004 that was not approved by several countries. It appears to be dead. See generally Jerry L. Mashaw, Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance, 76 GEO. WASH. L. REV. 99, 99–100 (2007). See also infra notes 63–66 and accompanying text.

21 See CRAIG, supra note 19, at 349–50. This Article will not discuss the participation rights afforded by Community legislation in regard to establishing standards equivalent to agency regulations. There are EU parallels to notice and comment rulemaking in the United States with requirements about making information available to interested persons, consulting with interested persons under certain circumstances, and allowing for comment on proposed norms. Id. at 322–30.


24 Id. at 1182, 1197.

25 Mashaw, supra note 20, at 99–100.

26 Jürgen Schwarze’s book discusses the rights of defense while Paul Craig discusses the right to be heard. Compare, e.g., SCHWARZE, supra note 22, at 1324, with CRAIG, supra note 19, at 361. Craig also discusses "process" rights, covering most of the rights we associate with due process in the United States. See CRAIG, supra note 19, at 349. See also Asimow & Dunlop, supra note 19, at 36–37, 37 n.78.

27 See Asimow & Dunlop, supra note 19, at 36–37.
American due process and EU right to be heard jurisprudence. Part III provides a detailed analysis of the rights of defense in the EU and highlights how this bundle of rights parallels the rights to notice and opportunity to be heard in the United States. Part IV discusses four of the significant components of the rights of defense: adequate notice, the opportunity to make one's views known to the administration, the right of access to documents in the administration's files, and the requirement of reasoned decisions. The Article concludes that notwithstanding the infrequent utilization of adversarial hearings in EU administrative adjudications, the procedural safeguards provided in adjudicative proceedings before the Commission and EU agencies satisfy the U.S. conception of procedural due process. These procedures are essential for protecting and maintaining the rule of law in the EU, as well as in the United States.28

II. GENERAL OBSERVATIONS

A. Due Process Fundamentals

The basic principles of America's procedural due process jurisprudence have been announced and applied many times by the Supreme Court. The requirements apply only to deprivations of liberty and property interests protected by the Fifth and Fourteenth Amendments. Liberty and property are "broad and majestic terms," but there are boundaries.29 For instance, a person's liberty interests include his or her good name, reputation, honor, and integrity,30 but a person is not deprived of a liberty interest when he or she is simply not retained or rehired to a particular job.31 Similarly, to have a property interest in something such as an occupational license or disability benefits, a person must have more than an abstract desire or need for that interest, or more than a unilateral expectation of it. Instead, there must be a legitimate claim of entitlement to the property interest.32

28 Jill Wakefield, The Right to Good Administration, in 58 European Monographs 21 (2007) (stating that the rule of law necessarily includes fair and impartial administrative procedures).
29 Bd. of Regents v. Roth, 408 U.S. 564, 571-72 (1972). The Fifth and Fourteenth Amendments refer to deprivations of "life, liberty, [and] property." Discussion of due process protections in the context of criminal prosecutions is beyond the scope of this Article.
31 Roth, 408 U.S. at 575.
32 Id. at 577. In contrast, the Supreme Court has made clear that there is no requirement for hearings when an agency promulgates rules or regulations of general public applicability as
The Supreme Court has held that some form of hearing is required before an individual is deprived of a protected liberty or property interest. The essence of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The extent to which due process requires a full evidentiary hearing in the context of agency adjudications prior to the deprivation of a protected interest varies considerably from context to context. "Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances," instead, it "is flexible and calls for such procedural protections as the particular situation demands."

In only one case, Goldberg v. Kelly, has the Court held that a "hearing closely approximating a judicial trial is necessary." The elements identified by Justice Brennan in Goldberg were notice, an oral hearing before an impartial decision maker with direct and cross-examination, opportunity to obtain counsel, and a decision that is based exclusively on the basis of the record compiled at the hearing and is accompanied by a statement of reasons. However, Goldberg represents the high-water mark in America’s due process explosion. Due process is often satisfied by procedures much less formal than what Justice Brennan set forth. Identification of the specific dictates of due process in a particular situation requires consideration of three factors: the private interest affected by the official action; the risk of erroneous deprivation of that interest with the existing procedures and the value, if any, of additional safeguards; and the government’s interest, including the function involved and opposed to deciding a particularized case that directly impacts an individual. Compare Londoner v. Denver, 210 U.S. 373 (1908), with Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).


Goldberg is “an extreme case” and most post-Goldberg U.S. Supreme Court decisions have approved far fewer procedural elements. Id. at 249.
the fiscal and administrative burdens that additional or substitute procedural requirements would entail.41

The provisions of the federal Administrative Procedure Act (APA)42 for formal adjudication provide more procedural safeguards than required by the Due Process Clause of the Fifth Amendment.43 Most agency adjudications are, however, classified as "informal," and the APA is almost silent on mandating procedures for informal adjudication.44 Still, most informal agency action that offers minimal procedural safeguards passes constitutional muster45 and the rock-bottom minimum is notice and some opportunity for comment.46 That rock-bottom minimum is, however, too sparse in many contexts.47 Instead, it is appropriate to say that due process might be satisfied if a decision making procedure has the four ingredients which one leading scholar defined as being essential to an acceptable system of adjudication.48 These ingredients are: (1) parties must be apprised of the agency's position, i.e., parties must receive notice and have an opportunity to comment on the evidence against them; (2) agencies must be as open as possible in reaching their decisions; (3) any action must be accompanied by a statement of findings and reasons; and (4) agencies must try to remain consistent through the application of precedent to the decisions.49

B. EU Right to Be Heard Fundamentals

One might say that recognition of the right to be heard in the EU is surprising given the general differences between the common law and civil law approaches to administrative adjudication.50 In common law systems,
adjudications are often quasi-judicial and adversarial. For instance, under the APA in the United States, the investigation and adjudicative stages of a proceeding are separate, with hearings conducted before an impartial administrative law judge who did not have a role in the investigation. There is generally a separation of functions so that the persons who investigate and prosecute are not permitted to be decision makers. This separation is also seen in the United Kingdom where administrative determinations can be challenged at a hearing conducted by a tribunal whose members have not been involved with the case.

In contrast, the civil law approach is often described as inquisitorial (investigative might be a more apt description). Hearings are considered part of the agency’s investigation. The decision maker controls the proceeding from start to finish, conducting an active and independent inquiry into the merits of the case, including the examination of witnesses. There might be little formal procedure before the agency; if there is a hearing it will be for fact finding; and the company or individual that is the target of the investigation must wait for the completion of the agency’s process and then apply to a specialized court for review.

For example, a typical case in the competition sector with the European Commission starts with an investigation by staff in response to a complaint about a possible violation of EU law or in response to an application for a benefit or an exemption. This is followed by notice to the target company or the applicant with the agency’s tentative findings. During the course of the investigation, there might be a hearing conducted by the same persons who are handling the investigation. This hearing will give the target or applicants an

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51 Asimow & Dunlop, supra note 19, at 32–33.
52 5 U.S.C. §§ 554(d), 556(b) (2006).
53 Id. But see Withrow v. Larkin, 421 U.S. 35 (1975) (authority of state medical examining board to investigate physicians, present charges, rule on those charges, and impose punishment does not violate due process).
54 SCHWARZE, supra note 22, at 1180.
55 Asimow & Dunlop, supra note 19, at 34 n.72 (explaining that the term “inquisitorial” has “unfortunate connotations” and suggesting it may be more accurate to use the terms “inquiry” or “investigational”).
57 CRAIG, supra note 19, at 362.
58 Asimow & Dunlop, supra note 19, at 3, 35.
59 Bignami, supra note 22, at 64.
60 Asimow & Dunlop, supra note 19, at 35. See id. at 3.
opportunity to present their side of the matter, but it is not an adversarial proceeding. In some sectors, however, independent officers conduct the hearings instead of the persons who are doing the investigation. The ultimate decision makers do not attend these hearings.61

Notwithstanding the differences between common law and civil administrative adjudications, the Committee of Ministers of the Council of Europe adopted a resolution in 1977 concerning the protection of individuals in relation to acts of administrative authorities. The resolution's preamble acknowledges the significant differences between the legal systems of the Community's member states and then provides that "there is a broad consensus concerning the fundamental principles which should guide the administrative procedures and particularly the necessity to ensure fairness in the relations between the individual and administrative authorities."62 These principles include "the right to a hearing before the administration; the right of access to essential facts; the right to legal advice; the duty of the administration to give reasons for its decisions; [and] the duty of the administration to indicate the possibilities for legal challenge to its decision."63

The EU's founding treaties, however, have little to say about administrative procedure, and some of the safeguards now associated with the rights of defense were provided in regulations (the equivalent of statutes)64 enacted by the Community for specific areas.65 The Charter of Fundamental Rights of the European Union, as proclaimed by the Nice European Council in December 2000,66 provides for a right to good administration with safeguards that are similar to those included in the rights of defense or the right to be

61 Id. at 35.
64 See Rob Widdershoven, European Administrative Law, in ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES 259, 270 (René Seerden & Frits Stroink eds., 2002).
65 See SCHWARZE, supra note 22, at 1186–88.
heard. The Charter would have become part of the EU Constitution, and it is substantially more detailed than the U.S. Constitution’s due process clauses:

Article II-101 Right to good administration
1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.
2. This right includes:
   (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
   (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
   (c) the obligation of the administration to give reasons for its decisions.

The Charter was intended to declare existing EU law and not to create new obligations. Accordingly, had the EU Constitution been enacted, this “right to good administration” would have given constitutional status to several of the components of the rights of defense and fair procedure that evolved in the EU from decisions of the ECJ and the CFI. These courts, like the United States

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67 Mashaw, supra note 20, at 99–100. See Asimow & Dunlop, supra note 19, at 5 n.3; CRAIG, supra note 19, at 280; Widdershoven, supra note 64, at 279.

68 Asimow & Dunlop, supra note 19, at 4 n.1 and accompanying text, 5 n.3 and accompanying text. See CRAIG, supra note 19, at 279–81; Mashaw, supra note 20, at 100. The Treaty Establishing a Constitution for Europe, commonly called the European Constitution, was signed in Rome in 2004 by twenty-five representatives of EU’s member states. It had to be ratified by all member states by November 1, 2006. Eighteen states ratified before the European Constitution was rejected by France and the Netherlands in 2005. The remaining seven states postponed voting on ratification, so the Constitution was not approved. A reform treaty was approved at the informal European Council in Lisbon on October 18 and 19, 2007, and was signed on December 13, 2007. See Europa, A Constitution for Europe, http://europa.eu/scadplus/constitution/introduction_en.htm (last visited Oct. 1, 2008); Europa, Institutional Reform of the European Union, http://europa.eu/institutional_reform/index_en.htm (last visited Oct. 1, 2008).


70 CRAIG, supra note 19, at 385.

71 Bignami, supra note 22, at 67. See CRAIG, supra note 19, at 361 (explaining that the
Supreme Court, have taken an active role in determining whether a litigant's rights of defense have been infringed in any respect, and in ensuring that the essential elements of fair procedure are observed.\textsuperscript{72} The ECJ has said that the "silence of [regulations and other texts] in a matter that affects the protection of the rights of individuals" must not be construed in a manner unfavorable to those rights. The right to be heard cannot be restricted or excluded by legislative acts.\textsuperscript{73}

Notwithstanding the fact that the member states of the EU have not adopted the European Constitution,\textsuperscript{74} the right to be heard is now a general rule of Community law and a part of fundamental rights jurisprudence.\textsuperscript{75} It is complemented by case law from the ECJ and CFI that imposes on agencies a duty to examine carefully the relevant factual and legal aspects of individual cases.\textsuperscript{76} In essence, there is an obligation to exercise care in deciding cases. Moreover, although the Charter of Fundamental Rights is not binding, the ECJ and CFI can look to it as an interpretative guide and as declaratory of the case law that has developed the several components of the right of good administration.\textsuperscript{77}

III. THE EU'S RIGHT TO BE HEARD JURISPRUDENCE

A. Overview

The procedural rights developed through the ECJ's case law are similar to rights to notice and an opportunity to be heard under America's due process jurisprudence.\textsuperscript{78} The several components of the rights of defense command

\textsuperscript{72} CRAIG, \textit{supra} note 19, at 361; SCHWARZE, \textit{supra} note 22, at 1192 (quoting Case 46/72, deGreef v. Comm'n, 1973 E.C.R. 543, 558).


\textsuperscript{74} See \textit{supra} notes 66, 68 and accompanying text.

\textsuperscript{75} CRAIG, \textit{supra} note 19, at 314, 361. Professor Craig writes that the content of hearing rights in the EU have been determined by "a mixture of \textit{ad hoc} case law, combined with sector-specific legislation that applies the courts' precepts and fleshes them out." \textit{Id.} at 362.

\textsuperscript{76} HANS PETER NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW 107 (1999).

\textsuperscript{77} CRAIG, \textit{supra} note 19, at 386.

\textsuperscript{78} Asimow & Dunlop, \textit{supra} note 19, at 36.
that persons receive adequate notice of the Commission's position, including the essential facts on which the Commission's objections are based; they must be given adequate time to prepare; and they are entitled to inspect documents in the Commission's file in order to make arguments and lodge objections subject to requirements of confidentiality and secrecy. In addition, the ECJ and CFI's decisions recognize protection against self-incrimination, the confidentiality of lawyer-client communications, and an opportunity to be heard—sometimes orally and sometimes in writing. Finally, persons and companies may be entitled to diligent examination on the part of the administration, to receive the agency's decision within a reasonable time, and to a statement of reasons for the Commission's action.

The ECJ and CFI, like the U.S. Supreme Court in the venerable Londoner and Bi-Metallic decisions, have not extended the right to be heard to the promulgation of standards of a general or legislative nature. In addition, separation of functions challenges, parallel to the failed challenge in Withrow v. Larkin, have been unsuccessful in the EU as well. In Withrow, the U.S. Supreme Court upheld the combined functions exercised by the Wisconsin Medical Examining Board against the challenge that allowing this agency to investigate a doctor's alleged misconduct and hold a disciplinary hearing on whether or not his license should be suspended or revoked was unconstitutional. The doctor-appellant was unable to show any bias and the Supreme Court was reluctant to intrude because "[n]o single answer [on combined functions] has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly

79 The term Commission is being used in this Article to refer not only to the Commission but also to those European agencies established by the Council and empowered to make adjudicatory decisions in areas like competition, trademark law, food safety, and pharmaceutical licensing. See id. at 39.
80 Id.
81 Id. at 47.
82 CRAIG, supra note 19, at 349 (discussing process rights, including transparency and the right to diligent examination); Asimow & Dunlop, supra note 19, at 48–49. See generally Mashaw, supra note 20, at 104–05 (arguing that requiring reasons to be given in the United States and the EU serves to create authentic democratic governance); Widdershoven, supra note 64, at 283.
83 CRAIG, supra note 19, at 319.
84 421 U.S. 35 (1975).
85 CRAIG, supra note 19, at 370–72.
86 421 U.S. at 38–39, 43.
unlikely." It did indicate, however, that its response would be different if the same person served as both judge and prosecutor.

The similar challenge before the EU courts is that having the Commission serve as both prosecutor and judge violates Article 6(1) of the Convention of Human Rights (Convention) and its mandate that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. These challenges have failed, with the ECJ apparently accepting the argument that the Commission is not a tribunal. In addition, the CFI has noted that it exercises full powers of judicial review over the Commission and that it is an independent and impartial court for purposes of the Convention. Nevertheless, in response to concerns about the Commission's authority, it has appointed hearing officers to preside over competition proceedings to make sure that the rights of defense are guaranteed, and since 2004, oral hearings in competition cases have been conducted by an independent hearing officer.

As in United States due process jurisprudence, the full range of the rights of defense protections will not necessarily be afforded in every case. There are variations depending on the facts and the nature of the interests at stake. Similarly, the exact dimensions of those safeguards that are afforded will vary depending on the context; for example, the agency's required explanation for its decision might be relatively brief in some situations and very detailed in others. Still, compliance with the right to be heard is so important that a court may raise deprivations of this right on its own motion. In recognizing the rights of defense, the EU courts have acknowledged that procedural safeguards protect individuals against arbitrary and capricious administrative actions and lead to more informed and better agency decisions, and the

87 Id. at 51.
88 Id. at 53.
89 CRAIG, supra note 19, at 370–71.
90 Id. at 370. Craig also points out that the ECJ's explanations on this subject have been "terse." Id.
93 CRAIG, supra note 19, at 349–50. For instance, there might be a right to a reasoned decision in a particular adjudication but no right to an oral hearing. Id. at 349.
94 See infra notes 203–19 and accompanying text.
96 To paraphrase a famous saying, " 'formality [or process] [is] the sworn enemy of the arbitrary, and the twin sister of freedom [or fundamental fairness].' " SCHWARZE, supra note 22, at 1178 (quoting RUDOLF VON JHERING, VON GEIST DES RÖMISCHEN RECHTS 471 (Basel, 1883)).
resulting decisions are more likely to be accepted by affected persons. In sum, administrative procedures ensure respect for the rule of law.

Most components of the right to be heard were recognized initially by the ECJ while reviewing Commission decisions that imposed fines and other penalties on companies violating the EU's competition rules. The case law coming from the competition sector arguably reflects the fact that this was one of the few areas where the Commission could impose sanctions directly. The right to be heard jurisprudence is not, however, restricted to this sector. It has been recognized in other areas such as anti-dumping and customs proceedings. According to the ECJ, the rights of defense are to be respected in all proceedings that could adversely affect an individual, such as the imposition of fines, penalties, and other forms of hardship.

Notwithstanding the widespread recognition of the components of the right to be heard discussed in the following sections, there is no uniform administrative procedure in the EU. Since there is no EU equivalent to the APA, the procedures followed in adjudications vary from sector to sector and from agency to agency. However, some of the principles announced by the courts have been implemented legislatively in some sectors. Also, there is not yet an EU decision that parallels Mathews v. Eldridge and its test for balancing the interests of a party in additional procedural protections against the agency’s interests and the cost of additional procedures.

97 See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 171 (2d ed. 2001) (stating that known standards “are essential to an individual’s effective and comfortable participation in the agency’s application of its standards”).


99 Widdershoven, supra note 64, at 282.

100 Id. See Asimow & Dunlop, supra note 19, at 15–16. Cf. Bignami, supra note 22, at 63.


102 CRAIG, supra note 19, at 361.

103 Bignami, supra note 22, at 66.

104 Asimow & Dunlop, supra note 19, at 6 (“EC administrative procedure does not fit any preestablished template.”).

105 See id. at 11.


107 CRAIG, supra note 19, at 362.
B. Early Case Law: Triggering Acts

Courts in the United States must answer two questions to determine what procedures, if any, are required by due process. First, does due process apply? Second, if due process does apply, what procedures must be afforded to the person appearing before the agency?\(^{108}\) In regards to the first question, the action taken by the agency must deprive a person of a protected liberty or property interest in order to trigger due process.\(^{109}\) While there are many decisions defining liberty and property interests, the members of the Supreme Court have often disagreed about the precise nature of the interests that are protected.\(^{110}\) The Court has not, however, accepted the argument that any government decision that has a significant adverse impact on an individual should be protected by due process.\(^{111}\)

In contrast, a fairly persuasive argument can be made that the ECJ has recognized the principle that the rights to notice and an opportunity to be heard are triggered by any governmental action that adversely impacts an individual or that has some perceptible effect on a person's interests.\(^{112}\) Although most ECJ decisions involve persons and undertakings that have suffered economic injury resulting from unfair competition or the denial or revocation of a permit or franchise, the language of many decisions is broad, requiring a "hearing even where no sanction is imposed, provided that there is some adverse impact or some significant effect on the applicant’s interests."\(^{113}\)

\(^{108}\) PIERCE, SHAPIRO & VERKUIL, supra note 15, at 232; FOX, supra note 1, at 110.
\(^{109}\) FOX, supra note 1, at 123-30.
\(^{110}\) Id. (discussing various circumstances that may trigger due process).
\(^{111}\) PIERCE, SHAPIRO & VERKUIL, supra note 15, at 233-35, 253-55 (discussing the views of Professors Davis and Van Alstyne).
\(^{112}\) CRAIG, supra note 19, at 314, 361.
\(^{113}\) Id. at 361. We must not confuse the kind of adverse impact that triggers the right to be heard with the kind of harm that would give a person standing to seek review. As in the United States, there is a great deal of EU case law and literature on standing. Standing is not a problem for a person who is being sanctioned or penalized by an individualized determination, but attacking a quasi-legislative norm is difficult. Article 230(4) of the EC is the key. It states that "[a]ny natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former." Consolidation Versions of the Treaty Establishing the European Community, art. 230, 2002 O.J. (C 325) 1, 126 [hereinafter EC Treaty]. This has been interpreted to mean that persons other than those to whom an action is addressed can claim to be individually concerned if the decision affects them "by reason of certain attributes peculiar to them, or by reason of circumstances in which they are differentiated from all other[s]." CRAIG, supra
Transocean Marine Paint is one of the most influential ECJ decisions in the development of the rights of defense. It involved an association of marine paint manufacturers seeking to renew an exemption concerning an agreement among them to restrict competition. The Commission had granted this exemption several years earlier, but now it informed the association that a simple renewal would not be possible for several reasons, including growth of its membership and linkage between two members and large chemical companies. It also indicated that the renewed exemption would be subject to fresh conditions including the obligation to notify the Commission of "any changes in the participatory relationships of the members."

The Commission then renewed the exemption with a specific condition requiring Transocean’s members to inform it of "any links by way of common directors or managers between a member of the Association and any other company or firm in the paints sector[,] . . . including all changes in such links or participations already in existence."

This specific condition apparently caught the association’s members by surprise because they asked the ECJ to annul it. They argued that the condition had not been brought to their attention prior to the Commission’s decision and were therefore never given the opportunity to make their views known on the subject. In essence, they could not infer from the Commission’s
statements, which mentioned the possibility of fresh conditions, that this objectionable condition would be imposed, and they would have voiced their objections to the Commission had they known. They asserted that the Commission violated its procedural rules. In terms of American due process jurisprudence, they were denied adequate notice and, as a result, they did not have a meaningful opportunity to be heard regarding the objectionable condition. That objectionable condition adversely affected their property interest in their exemption from the EU’s competition rules.

The ECJ agreed with Transocean. It noted that the Commission’s regulations required it, before making a decision, to give associations the opportunity to be heard on matters to which the Commission objects, and that the Commission’s regulations applied the “general rule” that

a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known. This rule requires that an undertaking be clearly informed, in good time, of the essence of conditions to which the Commission intends to subject an exemption and it must have the opportunity to submit its observations to the Commission. This is especially so in the case of conditions which . . . impose considerable obligations having far-reaching effects.

The Court did not specify the source of this general rule. It acknowledged that the Commission enjoys considerable discretion, but in this situation, it agreed with Transocean that the challenged condition was not suggested in the filed documents or in the hearing. The Court emphasized

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118 Id. at 1077–78. Members argued that the obligation was not contained in the notice of objections, and thus, they had no opportunity to make their views known. Id. at 1077.

119 See, e.g., Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.” (citations omitted)).

120 Transocean, 174 E.C.R. at 1079.

121 Id. at 1080 (emphasis added).

122 Bignami, supra note 22, at 64.

123 Transocean, 1974 E.C.R. at 1080–81. The Commission was required to reach a “fresh
the clear link between adequate notice and the right to be heard. A person whose interests may be affected by an agency’s decision has the right to make his point of view known (an opportunity to be heard), and the meaningful exercise of this right requires that person to be informed of the agency’s position (a right to notice).

This general rule became a “fundamental principle of Community law” in Hoffmann-LaRoche & Co. v. Commission.\textsuperscript{124} Hoffmann-LaRoche, a Swiss drug manufacturer, sought to annul a Commission decision regarding the company’s alleged abuses of its dominant position in the market for vitamins and vitamin ingredients. The company asserted several grounds for annulment, including irregularities in the Commission’s administrative procedures by not allowing it to inspect certain documents in the Commission’s possession.\textsuperscript{125} Even though the Court determined that the company had, in fact, seen the documents relied upon by the Commission, it made the following statement:

\emph{Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings. . . . Thus it emerges from the provisions quoted above [regulations as well as decisions] and also from the general principle to which they give effect that in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of . . . the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty.}\textsuperscript{126}

The Court’s statement in \textit{Hoffman-LaRoche}, that the right to be heard must be respected in all administrative proceedings in which sanctions may be imposed, is not as expansive as saying that any person who might be adversely affected by administrative action has a right to be heard. However, it is a strong statement about the importance of this fundamental principle in EU
jurisprudence. Moreover, subsequent decisions, discussed below, show that the right to be heard is triggered in a variety of contexts other than cases involving the potential imposition of fines and penalties; they also demonstrate that "adversely affected" and "perceptibly affected" have been given expansive readings by the ECJ and the CFI.127 The EU courts do not seem to be struggling with defining liberty interests and property interests for the purpose of determining what triggers the rights of defense.

C. Who Has a Right to Notice and an Opportunity to Be Heard?

1. Economic Harm as Adverse Impact

There is no doubt that the target of an administrative proceeding, be it a company or an individual, has a right to notice and to be heard. When are others entitled to these rights? In Commission v. Lisrestal, the ECJ stated:

Observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question .... That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views.128

This case involved companies that had applied for and received financial assistance from the European Social Fund (Social Fund) to provide employment opportunities in Portugal through vocational training. Before the Social Fund paid the balance of the assistance to these companies, its auditors determined that several of the recipients did not have sufficient staff or infrastructure and that there had been improper invoices on some expenses. The Social Fund communicated this information to a Portuguese agency that in turn told the undertakings (beneficiaries of the financial assistance) that they had to repay specific amounts to the Social Fund and a particular Portuguese

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127 CRAIG, supra note 19, at 314–15.
128 Case C-32/95, Comm’n v. Lisrestal-Organização Gestão de Restaurantes Colectives Ltd., 1996 E.C.R. I-5373, I-5396 (emphasis added). See also Asimow & Dunlop, supra note 19, at 44–45.
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authority. The ECJ affirmed the CFI’s determination that the undertakings’ rights of defense had been infringed. They had received a letter from the Portuguese authority that merely informed them that there had been an investigation to check on the implementation and legality of the program, but there was no explanation of the Commission’s reservations and suspicions. The decision to reduce the subsidy and order repayment was adopted before the beneficiaries had an opportunity to be heard by the Commission. This action violated the beneficiaries’ rights of defense notwithstanding practical problems faced by the Commission in trying to consult the beneficiaries directly.

Lisrestal shows that administrative action that might result in economic harm to a person who applied for and received a benefit triggers the right to be heard. Potential economic loss or hardship is the requisite adverse effect. The undertakings that had received the financial assistance for their vocational training projects became, in essence, targets of administrative action after the auditors found financial irregularities, and they were adversely affected by the Social Fund’s determination.

In Air Inter SA, the CFI stated:

[It] must be observed that the application of the fundamental principle of the rights of the defence cannot be excluded or restricted by any legislative provision. Respect for that principle must therefore be ensured both where there is no specific legislation and also where legislation exists which does not itself take account of that principle.

In this case, the Commission decided to open particular air routes in France after holding a fact-finding proceeding prompted by complaints from an air carrier that French authorities had denied it access to the routes. The legislation governing this agency proceeding did not provide for participation

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130 Id. at I-5398.
131 Id. at I-5374, 5398–99. See also CRAIG, supra note 19, at 315–16. See generally Case T-42/96, Eyckeler & Malt AG v. Comm’n, 1998 E.C.R. II-401; CRAIG, supra note 19, at 365 (stating that the CFI in Eyckeler held “the regulatory scheme provided for contact between the individual concerned and the national administration, and between the national administration and the Commission, but there was no provision for [the applicant] to be heard before the Commission”). Thus, the CFI held that the applicant was entitled to make its views known regarding matters taken into account by the Commission.
by potentially affected companies, such as an existing franchisee on these routes. Here, an air carrier that had the exclusive concession on those same routes asserted that its rights of defense had been infringed by the Commission’s action ordering France to open the routes to other carriers. The complaining carrier also emphasized it would be harmed by the new competition. The CFI agreed.\textsuperscript{133}

Here again, possible financial losses due to increased competition would have been the consequence of the challenged Commission decision. This action triggered the rights of defense. The CFI said the carrier’s right to be heard could be observed either directly before the Commission or through dealing with the French authorities. In any event, the air carrier had a right to be heard before the adoption of a decision that would cause an adverse economic impact.\textsuperscript{134} The court ultimately concluded that the Commission and French authorities had respected the carrier’s right to be heard by following procedures in deciding to open the particular routes to competition.\textsuperscript{135}

These pronouncements about the right to be heard were similar to statements made in Kingdom of the Netherlands v. Commission.\textsuperscript{136} This was a state aid case—a bilateral proceeding involving the Commission and the member state granting a subsidy—including the Commission’s objections about subsidies extended by the Netherlands to a messenger service company under a Dutch law regulating postal services. The court held that the Netherlands’ right of defense had been infringed by an inadequate statement of objections—a telex message that was too general—and the failure of the Commission to afford it a further hearing to make its views known on certain issues.\textsuperscript{137}

Moreover, notwithstanding the silence of the rules and regulations governing state aid proceedings in which a state aid determination may potentially affect the rights of companies, the ECJ held that the direct beneficiary of the challenged state aid, here the messenger service company, was entitled to a specific statement of reasons and the right to be heard because its economic interests were directly affected by the Commission’s action.\textsuperscript{138}

\textsuperscript{133} Asimow & Dunlop, supra note 19, at 45.
\textsuperscript{134} See Air Inter SA, 1997 E.C.R. at 1019–20.
\textsuperscript{135} Id. at II-1022, 1027.
\textsuperscript{137} Id. at I-638–40. See also CRAIG, supra note 19, at 363.
\textsuperscript{138} Netherlands, 1992 E.C.R. at 1-640. The company was directly named in the Dutch postal law. \textit{Id.}
The Court stated that the Commission had informal discussions with the company concerning problems raised by the Dutch postal law and competition rules, but that the Commission never informed it "in precise terms of its specific objections" to the state aid.\textsuperscript{139} In short, although the messenger service had some idea that there could be a problem with its favored treatment under Dutch postal law, it was entitled to know the Commission's precise objections. This inadequate notice infringed the company's right to be heard.\textsuperscript{140}

2. Adverse Impact Other than Fines and Penalties

The right to a fair hearing outside the context of a proceeding that can result in penalties was recognized in \textit{Al-Jubail Fertilizer Co. v. Council of the European Communities}.\textsuperscript{141} In 1986, the Commission instituted an anti-dumping proceeding regarding imports of urea, a powdery compound used in fertilizer, and later adopted a regulation imposing an anti-dumping duty. Fertilizer companies from Saudi Arabia applied to annul or modify this regulation, complaining that they had not received adequate disclosure of the basis on which the Commission intended to take action, notwithstanding their requests for information. Accordingly, they asserted that they had been denied a right to be heard and could not effectively comment on the Commission's findings.\textsuperscript{142}

The Advocate General noted that the challenged measure was adopted in the form of a legislative provision and that the investigation was not necessarily directed at specific undertakings like the Saudi companies. Still, he asserted that the right of defense, as announced in \textit{Hoffman-LaRoche}, applied to anti-dumping proceedings.\textsuperscript{143} The Court agreed. It stated that the right to a fair hearing must be observed "not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them."\textsuperscript{144}

\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id. See also CRAIG, supra} note 19, at 363–64 (discussing Case T-266/97, Vlaamse Televísie Maatschappij NV v. Comm'n, 1999 E.C.R. II-2329).
\textsuperscript{141} Case C-49/88, 1991 E.C.R. I-3187, 3241. \textit{See also CRAIG, supra} note 19, at 315.
\textsuperscript{142} \textit{Al-Jubail Fertilizer Co.}, 1991 E.C.R., at I-3189–91.
\textsuperscript{143} \textit{Id. at I-3222} (opinion of Advocate General Darmon).
\textsuperscript{144} \textit{Id. at I-3241}. 
Specifically, there was an obligation, subject to protecting business secrets, to disclose information to the fertilizer companies so that they could defend their interests and make their views known on the correctness and relevance of the facts and circumstances presented to the Commission.\(^4\) The anti-dumping duty was annulled as to the Saudi companies.\(^5\) Here, as in penalty cases, the adverse effect the Saudi companies would have suffered as a result of the agency action was financial, i.e., paying a higher duty on their fertilizer that was exported to the EU.

3. **Hearings for Rejected Applicants**

The due process rights of applicants for licenses, franchises, and other government benefits are uncertain.\(^6\) Section 555(e) of the APA provides that rejected applicants and petitioners for agency action are entitled to a brief statement of grounds for the denial,\(^7\) but the United States Supreme Court has not extended due process rights to applicants for benefits.\(^8\) An argument against such an extension of due process is that an applicant who does not satisfy all the criteria necessary for receiving the benefit has failed to establish a property interest in that benefit.\(^9\) In contrast, although the ECJ also has been reluctant to extend the right to be heard to disappointed applicants for individual benefits and privileges like franchises and subsidies, it has mandated hearings upon a showing of adverse impact to the person's legal position.\(^10\)

Applicants are granted hearing rights in some sectors. For instance, regulations provide that rejected applicants for trademarks are entitled to file observations and sometimes have an oral hearing. Similarly, applicants to the Committee for Medical Products for Human Use are entitled to submit written

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\(^{145}\) *Id.* See also Asimow & Dunlop, *supra* note 19, at 41.


comments and to have an oral hearing. In customs disputes that are considered by the Commission, the ECJ has held that an undertaking seeking an exemption from duties has the right to have its case examined carefully and impartially, to make its views known, and to receive a reasoned decision.

For instance, in one customs case, the issue was whether an electron microscope, similar to one a university wanted to import from Japan, was manufactured in the Community. If one was not available, then the Japanese model could be imported duty-free. Accordingly, the Commission’s decision on this issue would have a financial impact on the university—the applicant for the exemption. The ECJ had no difficulty concluding that the university’s right to be heard included making its views known on the circumstances and on the documents taken into account by the decision makers. Similarly, the CFI has held that importers who apply to the Commission for the repayment or remission of customs duties have a right to make their views known. The potential adverse impact is financial—the applicant for relief paid a customs duty that it regarded as too high or improper and is subsequently seeking remission of those funds.

Some disappointed applicants have not been afforded hearings. For instance, Windpark Groothusen v. Commission involved a German company that applied for financial assistance to help its construction of a wind park. The application was submitted pursuant to a special EU initiative to promote energy technology in which the Commission published an invitation for interested parties to submit projects for possible financial support. Eligibility conditions, selection criteria, and an application procedure were published. The Commission received seven hundreds proposals, including fifty-two in the field of wind energy. A technical committee on wind energy examined these applications, granted financial support to eleven, and placed eight on a reserve list. The German company was informed that it was on the reserve list, but was later told that it would not receive any funding. It then brought an annulment action in the Court of First Instance, alleging that its

152 Asimow & Dunlop, supra note 19, at 46.
154 Id.
155 Id. at I-5501. See Asimow & Dunlop, supra note 19, at 43.
158 Id. at I-2877.
159 Id. I-2878–79.
right to be heard had been infringed. The CFI dismissed the action and the ECJ affirmed, stating:\textsuperscript{160}

A person’s right to a hearing before adoption of an act concerning that person arises only where the Commission contemplates the imposition of a penalty or the adoption of a measure likely to have an adverse effect on that person’s legal position. As regards, in particular, the procedure for the selection of projects to receive funding as part of the promotion of energy technology in Europe . . . , where the number of participants is high, the fact that, once their project has been submitted, candidates are not as a general rule given further opportunity to express their views during the selection procedure is explained, moreover, by the work entailed in evaluating a large number of projects.\textsuperscript{161}

It is not surprising that both the CFI and the ECJ concluded that Windpark’s right to be heard had not been violated given the high number of applicants, the fact that the applicants were aware in advance of the criteria for selecting the various projects, and the fact that special committees evaluated the many applications. Moreover, the applicant’s legal position was not in any way affected by the rejection, and the agency action did not subject it to any kind of fine or penalty. Another way to explain this outcome is that the selection process afforded Windpark and other applicants due process because the selection criteria and application procedure were published, the applications were reviewed impartially by technical committees with expertise, and rejected applicants received a brief explanation for the decision. In sum, the selection process was rational and fair.\textsuperscript{162}

However, it is not clear how the ECJ and CFI would treat a single disappointed applicant for a particular license or a rejected undertaking seeking permission to market a product.\textsuperscript{163} Is denial of the benefit or rejection

\textsuperscript{160} Id. para. 2.

\textsuperscript{161} Id. at 1-2875.

\textsuperscript{162} This approach arguably satisfies the standards-based approach to due process recommended by Professors Shapiro & Levy. See Shapiro & Levy, supra note 98, at 110. See, e.g., Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968). See also infra notes 203–19 and accompanying text (discussing the EU’s fair hearing requirement for a statement of reasons).

\textsuperscript{163} Asimow & Dunlop, supra note 19, at 46.
of an application a sufficient adverse affect to trigger at least some minimal protection, such as providing the disappointed applicant with an explanation of the denial? The ECJ’s case law on reasoned decisions shows that the specificity and detail that is required of the explanation depends on the circumstances, and that in many situations, a brief explanation will be sufficient. After all, the Treaty Establishing the European Community establishes a right to a statement of reasons, and a brief explanation would seem to be required by an agency’s duty to act fairly.

As noted above, the ECJ and CFI’s uncertainty regarding applicants and the right to be heard parallels, to some degree, questions about the due process rights of applicants for licenses, franchises, and benefits in the United States. Justice Marshall, dissenting in Board of Regents v. Roth, stated that in his view,

> Every [person] who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the ‘property’ right that I believe is protected by the Fourteenth Amendment and that cannot be denied ‘without due process of law.’ And it is also liberty – liberty to work – which is the ‘very essence of the personal freedom and opportunity’ secured by the Fourteenth Amendment.

> ... Thus, when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action.

Although the U.S. Supreme Court has not extended due process rights to applicants for benefits, a strong argument can be made that due process requires governmental authorities to treat applicants for benefits fairly and to make selections among multiple applicants for limited funds or among several candidates for a finite number of positions in accordance with ascertainable and rational standards. Perhaps this can be extended to include a duty to

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164 See infra notes 203–05 and accompanying text.
165 EC Treaty art. 253, 2002 O.J. (C 325) 1, 143.
166 Cf. Mashaw, supra note 20, at 120–21.
168 See supra note 149.
169 See, e.g., Hornsby v. Allen, 326 F.2d 605, 609–10 (5th Cir. 1964) (stating that a
give reasons. Moreover, the perceived burden of giving reasons for all decisions is slight when there are, in fact, reasons for a rejection or denial.\textsuperscript{170}

The APA provides that anyone denied an application or petition is at least due a "brief statement of the grounds for denial."\textsuperscript{171} This is not, however, required by due process; it is a statutory requirement.\textsuperscript{172} In contrast, the duty of EU agencies to state reasons for their actions is codified at Article 253 of the EC Regulations.\textsuperscript{173} This duty is regarded as an "essential procedural requirement."\textsuperscript{174} A statement of reasons enables persons affected by a decision to defend their rights; it helps courts supervise the work of agencies; and it provides guidance to citizens, the EU’s member states, and others so they can see that the law is being applied fairly.\textsuperscript{175} This duty is related to the principle of procedural legal certainty that is observed in the EU. This principle requires that decisions must be clear and definite and that time limits are observed and enforced.\textsuperscript{176}

4. Legislative Determinations and the Rights of Defense

Like the U.S. Supreme Court in the venerable Londoner and Bi-Metallic decisions, holding that due process does not apply to rule-making as opposed to adjudication, the ECJ and the CFI have not extended the right to be heard to the promulgation of standards of a general or legislative nature.\textsuperscript{177} The ECJ has stated that the right to be heard relates only to Commission actions of a direct and individual concern\textsuperscript{178} and not to a measure setting economic policy and applying to all persons or undertakings situated similarly to the deprivation of due process occurs when a state board denies a liquor license without a hearing and without established regulations pertaining to license approval and denial), \textit{reh`g denied,} 330 F.2d 55, 56 (5th Cir. 1964) ("[E]very applicant should be apprised of the qualifications necessary to obtain a license and should be afforded a reasonable opportunity to show that he or she does or does not meet them."); Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d Cir. 1968) (stating that housing authority’s selection of applicants must be guided by ascertainable standards). \textit{See also} Shapiro & Levy, \textit{supra} note 98, at 110 & 138 n.164.\textsuperscript{170} Roth, 408 U.S. at 591 (Marshall J., dissenting). \textit{See also} Mashaw, \textit{supra} note 20, at 119.

5 U.S.C. § 555(e) (2006).\textsuperscript{171} Fox, \textit{supra} note 1, at 138 & n.70.\textsuperscript{172} Widdershoven, \textit{supra} note 64, at 289.\textsuperscript{173} \textit{Id.}\textsuperscript{174} \textit{Id.}\textsuperscript{175} \textit{Id.} at 285. \textit{See also infra} notes 203–19 and accompanying text. \textit{See generally} Mashaw, \textit{supra} note 20, at 116–24 (discussing what makes reason-giving legitimizing).\textsuperscript{176} CRAIG, \textit{supra} note 19, at 319.\textsuperscript{177} Case C-104/97, Atlanta AG v. Comm’n, 1999 E.C.R. I-6983, I-7027.\textsuperscript{178}
challenger.\textsuperscript{179} The ECJ also said that there is no provision of Community law entitling an undertaking to a right to be heard when the Commission was adopting a regulation or a norm of a legislative nature, even when the undertaking was directly and individually concerned with the measure in question.\textsuperscript{180} Moreover, the ECJ and the CFI have made clear that the fact a person participated in the process leading up to the adoption of a general act does not give them standing to challenge that act.\textsuperscript{181}

\textit{D. Preliminary Investigations and the Right to Be Heard}

Investigations have a significant role in administrative proceedings in the EU.\textsuperscript{182} For instance, a complaint about a company’s alleged anti-competitive practices may result in an investigation followed by notice to the target company setting forth the agency’s tentative objections. Similarly, there might be an investigation following a company’s application for a permit or license.\textsuperscript{183} An investigation could result in the agency’s decision to notify the company that it intends to reject the application. The notice that triggers the right to be heard often comes after the completion of an investigation by the agency and the agency’s submission of a statement of objections to the target undertaking.\textsuperscript{184}

In some sectors, such as competition and anti-dumping, regulations provide explicitly for preliminary investigations.\textsuperscript{185} An investigation, such as the examination of books and business records or entrance upon premises or land to investigate,\textsuperscript{186} can be a substantial interference with the rights and interests of the undertaking subject to the investigation. However, an administrative

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{179} CRAIG, supra note 19, at 317.
\item \textsuperscript{181} Case C-263/02, Comm’n v. Jégo-Quéré & Cie SA, 2004 E.C.R. I-3425, 3462–63; Case T-585/93, Greenpeace Int’l v. Comm’n, 1995 E.C.R. II-2205, 2229. See generally CRAIG, supra note 19, at 319–22 (arguing for enhancing participation rights when general measures are being enacted).
\item \textsuperscript{182} A great deal of EU administrative procedure follows the continental criminal inquisitorial/investigatorial model with staff for the relevant section of the Commission conducting an investigation of a proposed enforcement or of an applicant that concludes with a notice to the target or applicant setting forth the Commission’s tentative findings. Asimow & Dunlop, supra note 19, at 14.
\item \textsuperscript{183} Id. at 11–12, 35.
\item \textsuperscript{184} SCHWARZE, supra note 22, at 1335–36; Asimow & Dunlop, supra note 19, at 35.
\item \textsuperscript{185} SCHWARZE, supra note 22, at 1336–37.
\item \textsuperscript{186} Commission officials can carry out investigations pursuant to Article 14 or Regulation 17. Id. at 1329.
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authority's decision to commence an investigation does not necessarily trigger rights of defense such as receiving prior notice of the investigation or an opportunity to be heard prior to the investigation.

For example, the Commission sent inspectors to National Panasonic's offices in Slough, England without prior notice, after it had learned from Panasonic's German subsidiary about an agreement relating to product distribution. National Panasonic raised several objections to this inspection, including infringement of its right to receive advance notice of the Commission's intention to apply a decision against it and infringement of its right to be heard before being adversely affected by a decision. It asserted a right to request a stay of execution of the decision. The ECJ did not accept these arguments, stating that the right of defense "is chiefly incorporated in legal or administrative procedures for the termination of an infringement or for a declaration that an agreement, decision or concerted practice is incompatible" with EU competition law. In contrast, the sole objective of the investigation procedure is to enable the Commission to gather the necessary information to check the actual existence and scope of a given factual and legal situation. Only if the Commission considers that the data for the appraisal thereof collected in this way justify the initiation of a procedure . . . must the undertaking . . . concerned be heard before such a decision is taken . . .

Using language similar to the U.S. Supreme Court's explanation of warrantless administrative inspections in Marshall v. Barlow's Inc., the ECJ said that the purpose of carrying out this investigation at Panasonic's Slough office without warning was to prevent the possible destruction or concealment of documents. Moreover, if it was later determined that this decision to investigate was unlawful, a court could order the Commission to return documents and refrain from using any of the information it obtained improperly. In essence, National Panasonic had a right to be heard before it was held liable for violating the EU's competition rules, but its rights to

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188 Id. at 2058.
189 Id.
notice and a hearing were not infringed by the Commission's initial decision to investigate whether there was a basis for filing a notice of objections regarding National Panasonic's competitive practices.

Similarly, the Commission's decision, after conducting an investigation to formally commence a proceeding by notifying a company of its statement of objections regarding its marketing practices, did not violate a company's right of defense according to the decision in *IBM v. Commission.* In other words, a company is not entitled to notice and an opportunity to be heard before an agency decides to institute a proceeding against it. The filing of a statement of objections "does not compel the undertaking concerned to alter or reconsider its marketing practices and it does not have the effect of depriving it of the protection hitherto available to it against the application of a fine . . . ."

Moreover, the Court explained:

An application for a declaration that the initiation of a procedure and a statement of objections are void might make it necessary for the Court to arrive at a decision on questions on which the Commission has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial. It would thus be incompatible with the system of the division of powers between the Commission and the Court and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission.

The National Panasonic and IBM cases are analogous to the U.S. Supreme Court's decisions in *FTC v. Standard Oil Co. of California* and *Myers v. Bethlehem Shipbuilding Corp.* In *FTC v. Standard Oil Co. of California,* the Supreme Court held that the issuance of a complaint by the Federal Trade Commission was not final agency action subject to review under the APA prior to the conclusion of the agency adjudication. In response to Standard Oil's argument that it would be harmed by having to defend the administrative

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192 Case 60/81, 1981 E.C.R. II-2639.
193 Id. at II-2654.
194 Id.
action, the Court stated, "the expense and annoyance of litigation is 'part of the social burden of living under government.'" \textsuperscript{196}

In \textit{Myers}, the Court turned to the exhaustion doctrine as a basis for refusing to enjoin the National Labor Relations Board from holding a hearing on unfair labor practices charges against Bethlehem Shipbuilding. The Court said that to rule in Bethlehem Shipbuilding's favor would "in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance." \textsuperscript{197}

These two cases and others show that courts in the United States ordinarily will refuse to intervene during the preliminary stages of an administrative investigation and adjudication because the claim is not ripe or final or because the complainant has not exhausted remedies. An American court would rarely turn to procedural due process jurisprudence to justify its refusal to intervene. Still, the outcome is the same as in EU cases. Courts in the United States, like the ECJ and the CFI, are reluctant to grant interim legal protection and will ordinarily require a party to wait for the final decision before allowing the agency to file its challenge or seeking judicial review.\textsuperscript{198} The formal commencement of a procedure by the communication of a statement of objections triggers the right to be heard, but the decision to initiate the action cannot be reviewed by a court until the administrative proceeding has run its course.

IV. COMPONENTS OF THE RIGHTS OF DEFENSE

A. Adequate Notice

The ECJ and CFI have acknowledged that the right to be heard—to make your views known about proposed administrative action—is meaningless without adequate notice. These courts have insisted that notice of the nature of the case must be given and that the target individual or undertaking must have a right to respond to that notice.\textsuperscript{199}

\textsuperscript{196} \textit{Standard Oil}, 449 U.S. at 244 (quoting Petroleum Exploration, Inc. v. Pub. Serv. Comm'n, 304 U.S. 209, 222 (1938)).

\textsuperscript{197} \textit{Myers}, 303 U.S. at 50.

\textsuperscript{198} \textit{Cf.} SCHWARZE, supra note 22, at 1331.

\textsuperscript{199} CRAIG, supra note 19, at 363.
The ECJ defined several aspects of the adequate notice component of the rights of defense in 1970, in *ACF Chemiefarma NV v. Commission.* 200 This was an application by a company based in Amsterdam to annul or amend a Commission decision rendered in 1969. The Commission opposed Chemiefarma's and other undertakings' fixed prices and quotas for the export of quinine and quinidine, and following a hearing, the Commission imposed fines on several of them. The applicant, Chemiefarma, made several arguments for annulment. Chemiefarma's argued that by not allowing it to consult essential documents and by violating several regulations, the company's rights of defense were infringed because Chemiefarma was given insufficient information about the objections lodged against it and the evidentiary basis for the complaints. 201 In ruling that the submissions were unfounded, the Court made this general statement about the need for adequate notice:

> Respect for the rights of defence requires that in its notice of complaints the Commission shall set forth clearly albeit succinctly the essential facts on which it relies and that in the course of the administrative procedure it shall supply the other details which may be necessary for the defence of the persons concerned. 202

The ECJ elaborated on the need for an adequate statement of objections, in *Imperial Chemical Industries, Ltd. v. Commission.* 203 This was an action to annul a Commission decision ordering Imperial Chemicals to pay a considerable fine for fixing prices for dyestuffs in violation of Article 85(1) of the Treaty Establishing the European Economic Community. Imperial Chemical alleged procedural errors on the part of the Commission in its notice of objections and its final decision, including the decision's reference to facts

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201 Id. at 669–73.
202 Id. at 662.
203 See also Case 45/69, Boehringer Mannheim GmbH v. Comm'n, 1970 E.C.R. 769, 770.
which did not appear in the notice of objections. \(^{204}\) Imperial Chemical contended that these procedural errors prevented it from responding to and commenting on the notice of objections and that the Commission adopted its decision before Imperial Chemical could make known its observations on the draft minutes of the hearing. The Court ruled that Imperial Chemical’s submissions were unfounded but stated that the notice of objections is the measure stating the attitude of the Commission concerning companies against which proceedings have been commenced. If a company continues or repeats prohibited actions during the period between the Commission’s decision to commence the action and receiving the Commission’s notice of objections, the company’s rights of defense are not prejudiced by having the Commission take facts of those repeated violations into account while preparing the notice of objections. \(^{205}\) After all, those violations are simply a continuation of earlier actions, and the Commission’s consideration of the subsequent violations accords with principles of administrative economy. \(^{206}\) Moreover, Imperial Chemical’s rights of defense were not infringed even though the final decision referred to facts not in the notice of objections because it was sufficient that the company was informed of the “essential elements of fact on which the objections are based.” \(^{207}\) In short, the record showed that the facts taken into account by the Commission in ruling against Imperial Chemical were stated adequately in the notice of objections. \(^{208}\)

In a later decision, the Court stated:

It is clear from previous decisions of the Court that the statement of objections must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure. That may be done summarily and the decision is not necessarily required to be a replica of the Commission’s statement of objections. \(^{209}\)

On the other hand, there are limits on how far this principle can be stretched. A notice that is too general or lacking in sufficient detail can

\(^{204}\) *Id.* at 635–36.

\(^{205}\) *Id.* at 650–51.

\(^{206}\) *Id.*

\(^{207}\) *Id.* at 621.

\(^{208}\) *Id.* at 650–51. *See also* SCHWARZE, *supra* note 22, at 1338–41.

infringe the rights of defense, and the ECJ has stated in several cases that matters not contained in the notice of objections may not be dealt with by the Commission.

The *Transocean* case, discussed earlier, also discusses the notice requirement. In that case, an association of marine paint manufacturers sought to renew an exemption from the EU's competition rules. The Commission informed them that a simple renewal would not be possible and that a renewed exemption would be subject to fresh conditions, including the obligation to notify the Commission of any changes in the participatory relationships of the association's members. The Commission then renewed the exemption with a specific condition requiring the association's members to inform the Commission of "any links by way of common directors or managers between a member of the Association and any other company or firm in the paints sector[,] . . . including all changes in such links or participations already in existence.'

The *Transocean* applicants asked the ECJ to annul the renewed exemption, arguing that the new conditions had not been brought to their attention prior to the Commission's decision, and thus, "they were never given the opportunity to make their views known on this subject." The *Transocean* applicants further stated that they could not infer from the Commission's statements regarding the imposition of fresh conditions that this particular condition might be imposed, and that they would have voiced their objections to the Commission had they known about the condition. In general, Transocean argued that the Commission violated its procedural rules.

In ruling for Transocean, the ECJ acknowledged that the Commission enjoys considerable discretion but that it is important for the Commission to do a preliminary canvassing of objections that might be raised by companies prior to exercising its discretionary powers. It agreed with Transocean that the challenged condition was not suggested in the filed documents or in the hearing. The association had not received adequate notice.

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212 Case 17/74, Transocean Marine Paint Ass'n v. Comm'n, 1974 E.C.R. 1063, 1078. See also Bignami, supra note 22, at 64.
214 Id.
215 *Id.* at 1078.
216 *Id.* at 1080–81. The Commission was required to reach a fresh decision after hearing the association's suggestions. *Id.* at 1081.
B. The Opportunity to Make Your Views Known

The ECJ emphasized in Transocean the clear link between adequate notice and the right to be heard. A person whose interests may be affected by an agency’s decision has the right to make his point of view known, and the meaningful exercise of this right requires that person to be informed of the agency’s position. The “general rule” that persons affected by public authority must have an opportunity to make their views known became a “fundamental principle of Community law” in Hoffmann-LaRoche v. Commission.217

Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of community law which must be respected even if the proceedings in question are administrative proceedings. . . . Thus it emerges from the provisions quoted above [regulations as well decisions] and also from the general principle to which they give effect that in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of . . . the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty.218

The Court elaborated on this right in SA Musique Diffusion Francaise v. Commission.219 This was a complex competition case regarding price fixing for high-fidelity sound-reproduction equipment imported from Japan. Substantial fines were imposed. The applicants, raised a variety of arguments for annulment including infringement of essential procedural rights.220 The court first rejected Musique Diffusion Francaise’s (MDF) argument that the Commission’s role as both prosecutor and judge violated the European Convention for the Protection of Human Rights.221 It then noted that regulations required the Commission,

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218 Hoffman-LaRoche & Co., 1979 ECJ CELEX WESTLAW 676J0085, ¶¶ 9, 11. See also Bignami, supra note 22, at 65.
220 Id. at 1877–78.
221 Id. at 1880. See also CRAIG, supra note 19, at 370–72. The challenge is that having the
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before rendering a decision, to give concerned parties an opportunity to be heard on matters to which the Commission had taken objection; it also noted that the proceedings were adversarial. In appropriate cases—particularly when fines might be imposed—companies can be afforded an oral hearing. Moreover, the Commission’s decision could deal only with those objections against the undertakings on which they had been afforded the opportunity to make their views known. The Court explained that Hoffman-LaRoche made this a fundamental principle of Community law, and that the right to a fair hearing meant that the undertaking was entitled “to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.” The court ultimately rejected MDF’s procedural objections.

The application of the right to be heard outside the competition sector was recognized in Fiskano AB v. Commission. In this case, a Swedish fishing boat was in a Netherlands fishing zone when it was inspected by Dutch authorities and, since the vessel was not on a list Dutch authorities had received from the Commission, was treated as unlicensed. After the Commission was informed of this, it sent a letter to Swedish authorities stating that the boat was engaged in illegal fishing and that it would not be considered for a new license for twelve months. Fiskano, the owner of the boat, challenged this action alleging, among other things, that its right to be heard

Commission serve as both prosecutor and judge violates Article 6(1) of the Convention of Human Rights and its mandate that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. These challenges have failed with the ECJ apparently accepting the argument that the Commission is not a tribunal. Id. at 370. The CFI has noted that it exercises full powers of judicial review over the Commission and that it is the independent and impartial court for purposes of the Convention. Case T-348/94, Enso Española SA v. Comm'n, 1998 E.C.R. II-1875, 1901–02. There are parallels here with the Supreme Court’s decision in Withrow v. Larkin, 421 U.S. 35 (1975) that upheld the combined functions exercised by the Wisconsin Medical Examining Board against the challenge that allowing the entity to both investigate a doctor’s conduct and then adjudicate his case was unconstitutional.


225 See also CRAIG, supra note 19, at 370.

226 See also CRAIG, supra note 19, at 364; Bignami, supra note 22, at 66 (discussing cases in the anti-dumping and customs sectors).
had been infringed because it was not given a chance to submit its views before the decision was adopted. The court agreed and annulled the decision:

It must be stressed in this respect that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question.

It follows . . . [that] the right to be heard requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his views of the matters on the basis of which the Commission imposes the penalty.

The scope of the right to make your views known is not as extensive in other sectors as it is in competition and anti-dumping cases. In general, the parties are entitled to a brief description of the facts and the reasons for the agency's proposed decision, to present their evidence and arguments in writing before the agency decides the matter, and to a reply from the agency with a statement of reasons. The right to be heard as it has evolved in the EU does not mandate an oral hearing in all cases. For example, while recognizing an importer's right to make its views known when it applies for repayment of custom duties, the CFI did not mandate an oral hearing unless the applicant could show that a paper hearing would not be adequate. In the absence of sector-specific legislation mandating an oral proceeding, the Commission ordinarily makes the call on whether to provide an oral hearing or whether the submission of written comments is sufficient. However, as noted above in the discussion of *Musique Diffusion*, the courts retain authority to hold that a

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227 Id. at 1-2909.
228 Id. at 1-2909–10.
229 Id. at 1-2909 (citations omitted). See also Asimow & Dunlop, supra note 19, at 44 n.108.
230 Bignami, supra note 22, at 67.
231 CRAIG, supra note 19, at 365; SCHWARZE, supra note 22, at 1363–64.
233 For example, in competition cases, an independent officer presides over oral hearings. See Bignami, supra note 22, at 65.
234 See supra notes 219–21 and accompanying text.
particular set of facts requires holding an oral proceeding, such as in cases where a fine might be imposed.

C. Access to Documents and Rights of Defense

Access to the agency's file is a vital component of the right to be heard in the EU because it is difficult to effectively challenge the agency's position without having access to the agency's evidentiary record. Access to the administration's file facilitates an individual's ability to respond, to ask questions, and to point out flaws in the administration's position.

This right was developed initially in competition cases and has been recognized in other sectors. The right of access goes beyond discovery, in which the person must seek documents from the administrative authority. Rather, it is a part of a right to good administration that is included in the Charter of Fundamental Rights: "[E]very person [has the right] to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy . . . ."

For example, Solvay v. Commission is a competition case involving the manufacturing of synthetic soda ash in which Solvay, the target of the Commission's action, alleged several infringements of its rights of defense due to restricted access to the Commission's files. The CFI agreed with Solvay and made the following statement:

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235 CRAIG, supra note 19, at 365.
236 SCHWARZE, supra note 22, at 1363–64 (citing Case 209/78 Van Landewyck v. Comm'n, 2005 E.C.R. 3125 (opinion of Advocate General Reischl)); Bignami, supra note 22, at 66. This oral hearing may provide an opportunity to ask questions and probe the position taken by the agency. See CRAIG, supra note 19, at 369. This does not seem to be cross-examination as we know it in the United States. Of course, due process does not require cross-examination in all cases. See, e.g., Richardson v. Perales, 402 U.S. 389 (1971). Even under the APA's provisions for formal adjudications, there is no absolute right to cross-examination. See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 78 (1947); 5 U.S.C. § 556(d) (2006).
237 CRAIG, supra note 19, at 365. See also supra note 189.
238 Bignami, supra note 22, at 64–65 (discussing the evolution of the right of access in competition cases); CRAIG, supra note 19, at 367–68.
239 Charter, art. 41, 2000 O.J. (C 364) 1, 18; CRAIG, supra note 19, at 366–67. The principle of transparency is of vital importance in the EU, and transparency relates to the right of access to documents as well as to concerns about open meetings and open records. CRAIG, supra note 19, at 351, 359–60.
The purpose of providing access to the file in competition cases is to enable addressees of statements of objections to examine evidence in the Commission’s file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence.\textsuperscript{242}

The CFI recognized that just as adequate notice is essential to a meaningful right to be heard, so is having access to the materials in the file upon which the agency is basing its objections. The CFI also discussed the doctrine of equality of arms in \textit{Solvay}, the principle that the information available to the Commission and to the target company should be the same.\textsuperscript{243} It said this principle required the Commission’s target to be able to assess the probative value of the documents obtained from other undertakings that had not been annexed to the Commission’s statement of objections. It was not acceptable that the Commission, while investigating, decided for itself whether to use certain documents to prove its case rather than give the target an opportunity to decide whether other documents could help its defense. The Commission should have given the target a sufficiently detailed list that would enable it to decide whether to request access to particular documents.\textsuperscript{244}

Similar statements were made in \textit{SA Hercules Chemicals NV v. Commission.}\textsuperscript{245} The court explained that the Commission must not depart from its own rules in competition cases.\textsuperscript{246} It has an obligation to make available to undertakings all documents, whether in the Commission’s favor or otherwise, which it obtained during the investigation, save for business secrets of other

\textsuperscript{242} \textit{Solvay}, 1995 E.C.R. at II-1802 (citations omitted).
\textsuperscript{243} Asimow & Dunlop, \textit{supra} note 19, at 40.
\textsuperscript{244} Case T-30/91, 1995 E.C.R. II-1775, 1818. The Court recognized that creating these lists was a burden for the Commission but that the right of defense had to be respected. \textit{See also} Asimow & Dunlop, \textit{supra} note 19, at 40 n.93 and accompanying text; \textit{CRAIG, supra} note 19, at 367.
\textsuperscript{245} Case T-7/89, 1991 E.C.R. II-1711.
\textsuperscript{246} \textit{Id.} at II-1739. Agencies in the United States are under an obligation to follow the rules and regulations they promulgate. An agency’s failure to follow its own regulations “tends to cause unjust discrimination and deny adequate notice,” and consequently may result in violation of a person's right to due process. NLRB v. Welcome-Am. Fertilizer Co., 443 F.2d 19, 20 (9th Cir. 1971). \textit{See also} Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954); Sameena, Inc. v. U.S. Air Force, 147 F.3d 1148, 1153 (9th Cir. 1998).
companies and confidential documents. The right of defense would be infringed if the Commission were to deny access to documents that might be detrimental to its own case.

*Al-Jubail Fertilizer Co. v. Council of the European Communities,* a 1991 ECJ decision that recognized the right to be heard in an anti-dumping proceeding, also addressed a company’s right of access to materials in the Commission’s file. Saudi companies, in seeking to annul an anti-dumping duty, complained that they had not received adequate disclosure of the basis on which the Commission intended to take action. In particular, they insisted on disclosure of information about European costs of fertilizer production and prices of fertilizer that arguably supported the Commission’s conclusion that the domestic fertilizer industry was being injured by dumping. Without this information, the Saudi companies argued, they could not effectively comment on the Commission’s findings.

The Court agreed with the Saudi companies. Specifically, it held that there was an obligation, subject to protecting business secrets, to disclose information to the fertilizer companies so that they could defend their interests and make their views known on the correctness and relevance of the facts and circumstances presented to the Commission. The anti-dumping duty was annulled as to the Saudi companies.

The Commission’s obligations in regard to an undertaking’s rights of defense and the requirement that the Commission make documents available for inspection may at times conflict with the Commission’s obligation to protect confidential information and business secrets contained in documents.

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247 CRAIG, supra note 19, at 366. This is part of the wider principle of equality of arms. Id. The failure to disclose in Hercules was not prejudicial because seeing the responses of other targets to the statement of objections would not have led to a different result. Hercules Chemical, 1991 E.C.R. at II-1740.


250 Id. at I-3190–91.

251 Id. at I-3240–41. It stated that the right to a fair hearing must be observed “not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which, despite their general scope, may directly and individually affect the undertakings concerned and entail adverse consequences for them.” Id.

252 Id. at I-3241.

253 Id. at I-3243; see also Case C-269/90, Hauptzollamt München-Mitte v. Technische Universität München, 1991 E.C.R. I-5495, 5501 (University seeking to import a microscope from Japan had the right to make views known in a customs duty proceeding, including access to the documents taken into account by the Community institution).
that other companies provide in the course of the Commission’s investigation. Balancing the rights of defense against the right of confidentiality is not easy.\footnote{Asimow & Dunlop, \textit{supra} note 19, at 40.}

The ECJ noted in \textit{Chemiefarma}\footnote{See supra notes 200–02 and accompanying text.} that if documents necessary for a company’s defense appeared to divulge business secrets of another company, then the Commission had to first consult that other company before turning over those documents.\footnote{Case 41/69, \textit{ACF Chemiefarma NV v. Comm’n}, 1970 E.C.R. 661, 663.}

\textit{Michelin v. Commission} repeats the principle that observance of the rights of defense requires the Commission to enable the target to express its views effectively on the documents and other evidence used by the Commission to support its objections and allegations of infringement. On the other hand, once the Commission decides that information obtained during an investigation is covered by the principle of non-disclosure of business secrets, it is under a duty not to disclose that information to the target. As a consequence, the Commission cannot use that information to support its decision if the refusal to disclose reduces the target’s opportunity to express its views on the accuracy or scope of the information, or on the conclusions drawn from it by the Commission.\footnote{Case 322/81, \textit{Michelin v. Comm’n}, 1983 E.C.R. 3461, 3498–99. In this case, the Commission’s statement of reasons did not make express reference to a particular investigation, nor did it appear that the Commission relied on this particular part of its file by implication. The Court concluded that the Commission’s statement of reasons was sufficient and that no irregularity in its administrative procedure had been proven. \textit{Id.} at 3499.}

If the Commission discloses information to a target in breach of an obligation to maintain it in confidence, then it runs the risk of liability for damages to the person or undertaking that provided the information. This is shown in \textit{Adams v. Commission} in which the applicant, Stanley George Adams, who had once been an employee of Hoffman-LaRoche, disclosed information to the Commission that eventually led to an investigation and complaint against the company for abusing its dominant position in the market for vitamins.\footnote{Hoffmann-LaRoche is a very important \textit{“right to be heard”} decision. See supra notes 124–26 and accompanying text.} It was clear in Adams’s letter to the Commission that he did not want his identity revealed, yet edited photocopies of documents the Commission turned over to Hoffmann-LaRoche enabled the company to identify Adams as the informant, file a complaint against him, and have him
arrested and detained upon returning to Switzerland. The Court concluded that the Commission could have done more to protect Adams and to warn him that documents were being provided to Hoffman-LaRoche. It held that the Community was bound to pay the damages Adams suffered as a result of the discovery of his identity by means of documents handed over to Hoffman-LaRoche by the Commission.

D. Reasoned Decisions

An agency’s duty to state reasons for its action is codified in Article 253 of the EC Regulations:

Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

The duty to state reasons is regarded as an essential procedural requirement. A statement of reasons enables persons affected by a decision to defend their rights; helps courts supervise the work of agencies; and provides guidance to citizens, the EU’s member states, and others so they can see that the law is being applied fairly. Also, requiring a statement of reasons reinforces the agency’s duty to examine all aspects of the case carefully and impartially. This duty is related to the principle of procedural legal certainty that is

\footnote{260} Id. at 3589–90.
\footnote{261} Id. at 3592. See generally CRAIG, supra note 19, at 368–69 (discussing difficulties applying the right of access in complex, multiple party cases).
\footnote{262} Commission Regulation 297/03, Professional Secrecy in State Aid Decisions, 2003 O.J. (C 297) 6–9. The European Code of Good Administrative Behavior provides that reason-giving applies to decisions “which may adversely affect the rights or interests of a private person. . . .” Also, decisions should not be based on “brief or vague grounds or [grounds] which do not contain individual reasoning.” European Ombudsman, The European Code of Good Administrative Behavior art. 18 (Jan. 5, 2005) (prepared by P. Nikiforos Diamanours); Mashaw, supra note 20, at 112.
\footnote{263} Widdershoven, supra note 64, at 286; Mashaw, supra note 20, at 112–13.
\footnote{264} CRAIG, supra note 19, at 375.
observed in the EU. This principle requires that decisions must be clear and definite and that time limits are observed and enforced.265

The ECJ and the CFI often have discussed the Commission’s obligation to explain its decisions with findings of fact and conclusions of law:266

The Commission is required to state the reasons on which its decisions are based, enumerating the facts forming the legal basis of the measure and the considerations which led it to adopt the decision but it is not required to discuss all the issues of fact and of law referred to be [sic] every interested party in the course of the administrative procedure. The statement of reasons for a decision imposing a fine is to be considered sufficient if it indicates clearly and coherently the considerations of fact and of law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission’s reasoning.267

Even though there is some flexibility that turns on the facts and circumstances of each case with how this requirement is satisfied,268 an inadequate statement of reasons can lead to the annulment of a decision. For example, in Suproco NV v. Commission, the CFI annulled a decision because the lack of detail prevented it from reviewing the decision and also kept the parties from understanding why their petition for customs relief had been rejected.269 The CFI stated:

According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure

266 CRAIG, *supra* note 19, at 380–84.
268 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. Case T-101/03, Suproco v. Comm’n, 2005 ECJ CELEX WESTLAW 603A0101, at ¶ 20 (Sept. 22, 2005).
269 *Id.* ¶¶ 48–49.
in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review.\textsuperscript{270}

The Commission’s decision rejecting the petition for customs relief on imported sugar was annulled because it failed to explain its reasoning for the rejection.\textsuperscript{271} This rationale for reasoned decisions is a critical component of the rights of defense. It parallels the U.S. rationale for this aspect of due process jurisprudence: to enable affected persons to understand the agency’s decision and to facilitate judicial review.\textsuperscript{272}

The pragmatic approach of the EU courts in determining whether the reasoned decision requirement has been satisfied is illustrated by the Windpark Groothusen case that involved a disappointed applicant’s request for financial assistance to support its energy conservation project.\textsuperscript{273} The Court responded with the standard black letter law that the agency’s explanation must be appropriate to the nature of the measure in question and depends on the circumstances of each case, in particular the content of the measure in question. In upholding the relatively summary rejection of Windpark’s application, it noted that the number of applicants was high, that all applicants were aware in advance of the criteria for selecting the various projects, and that special committees evaluated the applications.\textsuperscript{274} There was no duty to provide a detailed statement of reasons to a rejected applicant with comparative information about the projects that were selected; it was sufficient to inform the applicant that funding had been exhausted.\textsuperscript{275}

Similarly, in Société Française des Biscuits Delacre v. Commission, the Court held that the Commission was not required to explain the details of setting a subsidy level for butter because the subsidy was adjusted every two weeks and the dairy industry knew about the process for setting prices.\textsuperscript{276}

The EU’s requirement of reasoned decisions, as interpreted pragmatically by the ECJ and the CFI, matches what U.S. administrative law statutes and

\textsuperscript{270 }Id. *\textsuperscript{20}. See also Case 222/86, UNECTEF v. Heylens, 1987 E.C.R. 4097, 4117.
\textsuperscript{271 }Asimow & Dunlop, supra note 19, at 23.
\textsuperscript{272 }Mashaw, supra note 20, at 113.
\textsuperscript{273 }See supra note 157 and accompanying text.
\textsuperscript{275 }Id. at I-2898, 2910.
\textsuperscript{276 }Case C-350/88, 1990 E.C.R. I-395, 422-23. Similarly, American due process jurisprudence does not require every detail to be covered, just enough “to show the major issues of fact and law that were resolved.” Mashaw, supra note 20, at 114.
case law require of decision makers.\(^{277}\) Section 557(c) of the APA provides that decisions in formal adjudications must be accompanied by “findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . .”\(^{278}\) The EU cases summarized above do not go as far in specifying the requirements for statement of reasons, but it is important to recognize that the APA goes well beyond the minimum required by due process. The Supreme Court stated in *Goldberg v. Kelly*:

> [T]he decisionmaker’s conclusion as to a recipient’s eligibility must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.\(^{279}\)

*Goldberg v. Kelly* is regarded as the high water mark of our procedural due process jurisprudence, illustrating that decisions can be quite informal and still pass due process muster. For instance, section 555(e) of the APA applies to informal adjudication and specifies:

> Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.\(^{280}\)

This requirement is easily satisfied. One court held that even a general statement that addresses only some of a petitioner’s arguments is sufficient,\(^{281}\) while another court stated that a person whose request for a waiver had been

\(^{277}\) Mashaw, *supra* note 20, at 113–16.


\(^{279}\) 397 U.S. 254, 271 (1970) (citations omitted). American courts have sometimes required agencies to explain inconsistent determinations. See, e.g., United Auto Workers v. NLRB, 802 F.2d 969, 974 (7th Cir. 1986).


denied was entitled to sufficient detail to permit a court to review the agency’s decision. 282

The modest requirements of section 555(e) are reinforced by the Supreme Court’s leading decision on informal adjudication, *Citizens to Preserve Overton Park v. Volpe*. 283 This decision has the effect of requiring courts reviewing informal agency action to take a hard look at the agency’s record to determine whether there was compliance with the governing statutes and whether proper procedures were followed. The prospect of this hard look review compels agencies to explain their decisions adequately in order to show that they have not abused discretion or violated any mandatory procedures. 284 This explanation is not an onerous burden; a brief letter might be sufficient. 285

It is plausible to argue that *Overton Park* only requires an agency to give the reviewing court a record that is adequate for judicial review. The decision does not mandate a specific form or content for the decision reached in an informal adjudication. 286 The ECJ’s and the CFI’s decisions that discuss the importance of reasoned decisions and explanations seem to go beyond what is required by section 555(e) of the APA and the Supreme Court’s decision in *Overton Park* by emphasizing the affected party’s interest in having an adequate explanation for the outcome as much as the reviewing court’s need for a reasoned decision. In practice, however, the differences may be more semantic than real. Both promote “the monitoring activities of both political and legal institutions,” through which “the fundamental value of reason giving is political and legal accountability.” 287 Moreover, by codifying a duty to state reasons in the EC Regulations, the EU has arguably made reason-giving a fundamental aspect of good administration that is not simply a component of hearing rights and to facilitate review. Perhaps reason-giving can be seen as a fundamental aspect of democratic governance, a check against arbitrary and capricious governmental action. 288

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284 FOX, supra note 1, at 300, 302.
288 Mashaw, supra note 20, at 118–24.
V. SYNTHESIS AND CONCLUSIONS: DO THE EU RIGHTS OF DEFENSE AFFORD DUE PROCESS?

It is reasonable to conclude, after reading many decisions of the ECJ and CFI, as well as considerable scholarly commentary, that the rights of defense have evolved into a robust set of procedural requirements that protect the interests of parties involved in adjudications before the Commission and EU agencies. Notwithstanding the lack of procedural uniformity from sector to sector and from agency to agency, this well-developed and still evolving bundle of procedures satisfies the requirements of procedural due process as it is appreciated and understood in the United States. Persons and undertakings in the EU are entitled to notice that informs them of an agency’s objections or concerns; they enjoy a right of access to the agency’s file; they are entitled to respond to the agency’s objections and present their side of the matter; and they have a right to a reasoned decision. These rights are bolstered by the ECJ’s and CFI’s recognition of general principles of good administration and the administrative agency’s duty of care or diligence, that is, the duty to examine all aspects of a case carefully and impartially. Moreover, the ECJ and the CFI have been willing to annul agency decisions when the administration failed to afford a party adequate procedural safeguards.

The most substantial differences between EU and U.S. procedural safeguards involve “hearings.” The right to respond to a EU agency’s concerns or objections does not necessarily involve an oral proceeding. Even when there is an oral hearing, the give and take between the agency, the parties, and persons appearing at the proceeding does not necessarily involve the kind of direct examination and cross-examination associated with “formal” agency adjudications in the United States under the APA. Hearings in the EU are rarely adversarial. As discussed earlier in this Article, the varied approach to how hearings are conducted under EU administrative law reflects the marriage of civil law and common law traditions. The EU’s varied approach to the hearing component of the rights of defense does not, however, undermine this Article’s central thesis that the bundle of procedural safeguards

289 See supra notes 60–66 and accompanying text.
290 See supra notes 203–05 and accompanying text; CRAIG, supra note 19, at 374–75; Wakefield, supra note 28, at 64–65.
291 See Asimow & Dunlop, supra note 19, at 12–13 nn.24–25 and accompanying text.
292 See supra notes 50–59 and accompanying text.
protecting parties before the EU Commission and EU agencies satisfies the U.S. conception of procedural due process.

The established three-part test for assessing the process due to a person in the U.S. was announced in *Matthews v. Eldridge*:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\(^{293}\)

It is important to remember that the Supreme Court, in applying this test to a person who claimed rights to a personal appearance and oral argument prior to the termination of disability benefits, ultimately concluded that those procedural safeguards were unnecessary because the underlying medical question depended on “routine, standard, and unbiased medical reports by physician specialists.”\(^{294}\) The *Mathews v. Eldridge* opinion also made clear that trial-type procedures are not the only means for reaching sound decisions in adjudications. “The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances.”\(^{295}\) In short, the test from *Mathews v. Eldridge*, quoted above, does not mandate an adversarial, trial-type hearing in all agency adjudications, nor does it impose all the other procedural safeguards associated in the United States with trial-type, adversarial hearings.\(^{296}\) The Supreme Court has backed

\(^{293}\) 424 U.S. 319, 335 (1976).

\(^{294}\) *Id.* at 344. The standardized and impartial nature of the documents gave them probative value so that an oral evidentiary hearing was not needed. AMAN & MAYTON, *supra* note 97, at 181. *See also* Richardson v. Perales, 402 U.S. 389, 404 (1971).

\(^{295}\) 424 U.S. at 348. The Court also said that in assessing the adequacy of a challenged decision making process “substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals.” *Id.* at 349.

away steadily from the adversarial model that it endorsed in \textit{Goldberg v. Kelly}.\textsuperscript{297} The trial-type proceeding is no longer regarded as the standard requirement.\textsuperscript{298}

Although the range of procedural safeguards varies with the nature of the decision and the interest at stake in both the United States and the EU,\textsuperscript{299} the essential elements in both procedural systems are notice reasonably calculated to appraise interested parties of the agency action that affords them an opportunity to present their objections to the administrative agency’s position,\textsuperscript{300} disclosure of the agency’s reasons for its proposed action,\textsuperscript{301} an opportunity for interested parties to present their side of the matter as well as facts and reasons to refute the agency’s position,\textsuperscript{302} and an unbiased decision maker.\textsuperscript{303} These key elements are required by the many procedural due process decisions in the United States, and they are mandated as well by the decisions of the ECJ and the CFI on the rights of defense.

These procedural safeguards in the United States and in the EU are essential for protecting and maintaining the rule of law.\textsuperscript{304} They ensure that agency officials follow known procedures and comply with known legal standards in reaching decisions. These safeguards thereby prevent arbitrary and abusive exercises of governmental power. They ensure that persons subject to governmental action as well as the agency itself will have information that is essential to a fair and accurate decision. They provide the parties an opportunity to inform the administrative agency’s decision makers about the facts and how the law should be applied to those facts. They constrain factual determinations and ensure fair application of the law to the


\textsuperscript{298} Rabin, \textit{supra} note 287, at 306. “Some argue that our system’s obsession with permitting the adversarial airing of grievances has created a monster.” \textit{See also} \textit{STEPHEN YEAZELL, CIVIL PROCEDURE 2} (7th ed. 2008).

\textsuperscript{299} CRAIG, \textit{supra} note 19, at 349, 360–63; AMAN & MAYTON, \textit{supra} note 97, at 151, 170.


\textsuperscript{303} AMAN & MAYTON, \textit{supra} note 97, at 173–74; CRAIG, \textit{supra} note 19, at 370–72.

\textsuperscript{304} Wakefield, \textit{supra} note 28, at 21. \textit{See} CRAIG, \textit{supra} note 19, at 360–61 (noting that the process rights “render it more likely that a correct outcome will be reached on the substance of a case” and recognized “what it means to treat a person as a human being”); AMAN & MAYTON, \textit{supra} note 97, at 170–71 (discussing the fairness and accuracy of decisions that are reached through procedures that abide by due process requirements).
DUE PROCESS RIGHTS BEFORE EU AGENCIES

These procedural safeguards ensure fair and accurate decisions on the merits for the benefit of the administration as well as the individual.

Moreover, values that are fundamental to the U.S. conception of procedural due process are also fundamental to the EU's rights of defense. Both approaches protect individuals from arbitrary and capricious exercises of administrative authority. They share an interest in having agencies reach rational results in individualized cases for the benefit of the parties and also the administrative agency. To achieve a rational result, some kind of fact-finding process is needed as well as a decision maker who applies the appropriate legal standard to those facts. Both approaches share an interest in accountability so that an impartial, outside observer can look at decisions and determine that the agency's action is rational and consistent with its mandate. Finally, both approaches assure that the decision is explained adequately for the benefit of the individual affected by the agency determination and serve the goals of rationality and accountability.

There are, of course, circumstances where most of the safeguards associated with an adversarial hearing are needed. This is recognized in the EU as well as in the United States. However, both approaches recognize that the fundamental values we associate with procedural due process and the rights of defense can be protected without adopting the adversarial model.

The rights of defense that have evolved in the EU and procedural due process under the Fifth and Fourteenth Amendments share common values and goals. Notwithstanding the differences between adjudicative proceedings before administrative agencies in the United States and the EU, there is convergence, and the respective doctrines are functionally equivalent.

305 Shapiro & Levy, supra note 98, at 111-13 (discussing the rule of law functions served by procedural due process requirements); AMAN & MAYTON, supra note 97, at 170-72.


307 See supra note 287, at 310-11 (explaining how a notice-and-comment proceeding before an independent hearing examiner who is required to provide the claimant with a documented statement of reasons for the decision safeguards the values of due process).