

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Atte Oka

**PROCEDURAL RIGHTS OF COMPANIES IN CARTEL AND
STATE AID PROCEEDINGS UNDER EU AND FINNISH LAW**

Bachelor thesis

Supervisor: Associate Professor Dr. Tatjana Evas

Tallinn 2017

I hereby declare that I am the sole author
of this Bachelor Thesis and it has
not been presented to any other university of examination.

Atte Oka

" "..... 2017

The Bachelor Thesis meets the established requirements

Supervisor Tatjana Evas

" "..... 2017

Accepted for examination " "..... 2017

Board of Examiners of Law Bachelor's Theses

.....

Table of Contents

1. Introduction	6
2. Main Actors in EU Competition Law Matters	8
2.1. The European Commission’s role in Competition procedures	8
2.1.1. State aid investigation procedure under EU law.....	8
2.1.1.1. Preliminary investigation procedure.....	10
2.1.1.2. Formal investigation procedure	11
2.1.2. Antitrust: Cartel investigation procedure under EU law.....	13
2.2. Involvement of national competition authorities	15
2.2.1. Finnish competent national competition authorities and legislation.....	16
2.2.2. Principle of sincere co-operation between the European Union and national authorities.....	18
3. Procedural rights of undertakings in state aid and cartel investigation proceedings	20
3.1. Scope - administrative law	20
3.1.1. State aid - Council regulation 2015/1589	21
3.1.1.1. General principles of EU administrative procedural law applicable to State aid proceedings	22
3.1.1.2. Finnish administrative law applicable to State aid proceedings	23
3.1.2. Cartels - EU Competition Law, Cartel Legislation.....	24
3.2. Hearing of the parties and the right to be heard	24
3.2.1. Cartels - EU Competition Law, Cartel Legislation.....	24
3.2.2. General Principles of EU administrative procedural law applicable to State aid proceedings	25
3.2.3. National Finnish administrative law applicable to State aid proceedings.....	25
3.3. Access to file and information requests	26
3.3.1. Cartels - EU Competition Law, Cartel Legislation.....	26
3.3.2. General Principles of EU administrative procedural law applicable to State aid proceedings	27
3.3.3. National Finnish administrative law applicable to State aid proceedings.....	28
3.4. Oral proceedings and commitment decisions	29
3.4.1. Cartels - EU Competition Law, Cartel Legislation.....	29
3.4.2. General Principles of EU administrative procedural law applicable to State aid proceedings	30
3.4.3. National Finnish administrative law applicable to State aid proceedings.....	30
3.5. Conclusions: Procedural rights of undertakings in EU State aid and cartel investigations	31
4. State aid case law	34
4.1. The aim of case analysis	34
4.2. Justifications and procedure in State aid cases	34
4.2.1. Decisions of the European Ombudsman	34
4.2.2. Finnish state aid case law	36
4.2.2.1. Comparative analysis of Finnish State aid and Cartel cases.....	39
4.2.3. European case law on access to an administrative file	41
5. Summary and conclusions	44
6. List of sources	51
Annex 1	59
Annex 2	60

Tables

Table 1: Order of investigation in State aid procedure	12
Table 2: Undertakings position in relation to MS and EC.....	18
Table 3: Comparative Table on the Rights of the Undertaking in State Aid and Cartel investigations	59
Table 4: Illustrative table of the Undertakings stance in relation to MS competition authorities and EC. Case law included.	60

Abbreviations

TFEU - Treaty on the Function of the European Union

MEAE - Ministry of Economic Affairs and Employment

FCCA - The Finnish Competition and Consumer Authority

TEU - Treaty on European Union

ÅI - Ålands Industrihus Ab

1. Introduction

This Bachelor's thesis is a comparative research in the area of European competition law. In the sphere of competition law the emphasis is on the procedural regulations of State Aid and cartels. More specifically, the thesis focuses on the procedural rights of undertakings that have received State aid or been part of a cartel, that is allegedly contrary to EU law. The substantive law, i.e. the applicable rules on State aid and cartels, are governed by the EU Competition law. However, the procedural rules are at large, with some exception to minimum procedural rules, left for the Member State to regulate. Under national law the State aid and cartel proceedings are part of an administrative procedure, thus the administrative rights of the undertaking in the procedure is researched.

I have been working during my studies in a municipal transport agency, which allocates public funds to their own activities as well as subsidiary activities. The role of the undertaking that is involved in the State aid investigation procedure was closely related to my work there.¹ Moreover, the subject is of interest to contemporary research due to the fact that States do often have to aid companies financially which purports the legal rights that should be enjoyed by the undertakings. For a comparative analysis, this thesis will also examine the procedural rights of undertakings in cartel investigations.

On the basis of the analysis of the academic literature related to competition law it may be concluded that undertakings in cartel proceedings have more procedural rights granted to them than the undertaking under state aid proceedings.² In this context, some concerns have been expressed in the academic literature³ arguing that the defence of the beneficiary undertaking in state aid proceedings could be undermined by the lack of concrete rights under EU or national law. The comparative analysis of the procedural rights in State aid and cartel investigations under EU

¹ The agency had allocated their resources to an industrial estate company. The Finnish competition authorities asked for clarifications of the allocation because it was suspected to be incompatible State aid. The legal rights that an undertaking has after the Commission has initiated their procedure seemed thus an important area to research. The amount of work that the staff had to put in to declaring the use of public funds was substantial. The rarity of the situation slowed down the handling of the matter.

² See for example, Laprévotte, F., C. A Missed Opportunity? State Aid Modernization and Effective Third Parties in State Aid Proceedings. *European State Aid Law Quarterly* 426, 2014.

³ See for example, Giljstra, D., J. Legal Protection in Competition Cases. *Legal Issues of European Integration* 87, Kluwer Law International 2007, p 94. See also Laprévotte, F., C. A Missed Opportunity? State Aid Modernization and Effective Third Parties in State Aid Proceedings. *European State Aid Law Quarterly* 426, 2014, p 426.

law, triggers the question: Why does an undertaking in cartel proceedings have more procedural rights than an undertaking that has received state aid? Both investigations are carried out by the European Commission and the legislation on a national level is identical, administrative procedural law.

Accordingly, the main research questions that the thesis aims to analyse and explain are (1) **why State aid beneficiaries have fewer rights, in the European Commission's investigation procedure, than companies in cartel investigation proceedings** and (2) **what implications those differences have on the procedural rights of the undertaking?** In order to answer the research questions, following the Introduction, first, the procedural rights of all parties involved into the State aid and cartel proceedings are determined and analysed. The thesis starts with the analysis of the Commission's role in the state aid and cartel procedures followed by the Finnish national authorities' role in the administrative procedure (Chapter 2). Secondly, in Chapter 3 the substantive legal rights under EU law and Finnish law are examined followed by the comparative analysis of the differences in procedural rights and explanation of possible reasons and impacts of those differences on the rights of the undertakings. EU and Finnish case law is analysed in Chapter 4. The research concludes with synthesis and conclusions on the main differences in procedural rights and answer to the thesis main research questions (Chapter 5).

Due to the complexity of the competition law proceeding, the scope of this research is limited to a specific stage of the State aid investigation, namely formal investigation. Also in the analysis of the antitrust laws, the thesis does not focus on the specific types of schemes that cartels are involved in, or the description of the actions taken by a cartel. The thesis focuses on a comparative analysis of the procedural rights, assuming a general scenario, i.e. that the Commission has initiated an investigation towards an undertaking for being a participant in a cartel or for receiving incompatible State aid. The specific types of the cartel scenarios or the preliminary stages of the investigation in State aid cases while may be important, are excluded from the scope of this analysis due to the limitations on the length of the bachelor thesis.

This research is based on the analysis of applicable EU law and Finnish national law: literature review, statistical tables and financial statements of undertakings. The sources used for this research are selected from European law journals and articles concerning competition law. The journals and articles concerning administrative procedure and competition law in State aid and cartel procedures.

2. Main Actors in EU Competition Law Matters

2.1. The European Commission's role in Competition procedures

The European Commission (the Commission) is the EU institution responsible for enforcing competition rules in order to contribute to the development of the internal market.⁴ Areas relevant to competition law such as antitrust enforcement and oversight of State aid are enforced by the Commission.⁵ Competition policies and laws can however not be enforced solely by the Commission on a national level in Member States. Each Member State has a structure of national competition officials whose task is to monitor the undertakings seated or established in their jurisdiction and consequently notify the Commission when a suspected breach of Competition law is identified.

The following chapter aims to introduce the reader to the different investigations that are carried out by the Commission in competition matters. By presenting when the Commission should intervene with an investigation and how the Commission investigates breaches of Competition law the position of the Commission, the Member State and the undertaking are described and placed in relation in the scope of procedural rights.

2.1.1. State aid investigation procedure under EU law

The State aid is regulated in articles 107-109 of the Treaty on the Functioning of the European Union (TFEU). The Council Regulation 2015/1589 lays down detailed rules on the procedural aspects of application of Article 108 (the Procedural Regulation).⁶

Article 107(1) prohibits aid granted from the States resources. Article 107(1) TFEU determines which kind of aid can distort competition and should be considered incompatible aid. Articles 107(2) and 107(3) determine what kind of aid is compatible with the internal market and what aid could be considered to be compatible with the internal market. According to article 108(1) it is the Commission's task to monitor and keep under review aid that exists in member states of the

⁴ Article 105(1), Consolidated version of the Treaty on the Functioning of the European Union, OJ, C 326, 26.10.2012, see also; European Commission, Competition, Overview, http://ec.europa.eu/competition/general/overview_en.html (19.4.2017).

⁵ Article 108(1), TFEU.

⁶ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015.

European Union. The Commission can monitor and keep under review granted aids in all the Member States due to the notification system that is in place in the European Community.⁷ The State aid control in the European Union requires that States notify the Commission prior to the State actually granting the aid to the entity that they have chosen.⁸ Member States must wait for the Commission to approve the aid, in order for the aid to be considered lawful and compatible with the internal market.⁹

Aid granted by a State is divided into existing aid and new aid.¹⁰ Existing aid within the meaning of Article 1 (b) of the Procedural Regulation is either already approved or implemented.¹¹ New aid on the other hand, according to Article 1 (c) of the Procedural Regulation means all other notified aid measures,¹² that are not existing aid, are subject to review of the Commission. The Member State has to notify the Commission of an intended State aid measure only when the Member State grants new aid.¹³ Existing aid, under Article 108(1) TFEU, is not subjected to the notification obligation.¹⁴ The European Commission cannot order recovery of existing aid but rather propose measures to modify the usage of the aid, and if necessary to remove the existing aid.¹⁵

The procedure of examining State aid, by the Commission, starts with a notification from a Member State of any plans to grant aid from the States resources.¹⁶ After receipt of the notification, the Commission shall examine the plan to grant aid.¹⁷ The Commission will engage in a preliminary investigation of the aid and by way of a preliminary investigation determine whether the notified aid does or does not constitute State aid, and whether the the Commission will raise

⁷ For an overview see e.g. European Commission, Competition, State aid procedures, Notified aid, http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html (19.2.2017).

⁸ For an overview see e.g. European Commission, Competition: State aid procedures, Factsheets, 2013 available at: http://ec.europa.eu/competition/publications/factsheets/state_aid_procedures_en.pdf (08.11.2016).

⁹ Art. 9 (4), Council Regulation (EU) 2015/1589.

¹⁰ European Commission, State Aid Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU. Publications Office of the European Union 2013, Section 2, New or Existing aid?

¹¹ Art. (1) (B), Council Regulation (EU) 2015/1589. For discussion see e.g. Craig, P., Búrca, D., G. EU Law Text, Cases and Materials, Oxford University Press 2015, p 1146-1147.

¹² *Ibid*, art. (1) (C).

¹³ Art. 2 (1), Council Regulation (EU) 2015/1589.

¹⁴ European Commission, State Aid Manual of Procedures (2013) *supra* nota 10. Section 5, 1. The obligation to notify.

¹⁵ Laprévotte F., C. *supra* nota 2, 2014, p 427.

¹⁶ Art. 2 (1), Council Regulation (EU) 2015/1589.

¹⁷ *Ibid*, art. 4, p 1.

objections to the aid measure or decide not to raise objections.¹⁸ If the Commission finds, after the preliminary investigation, that the aid measure is not compatible with the internal market it shall initiate formal investigation proceedings according to Article 108(2) TFEU.¹⁹ The formal investigation procedure is opened when the Commission has problems in determining the compatibility of the notified aid in the preliminary investigation.²⁰ The opening of the formal investigation allows third parties to comment in order to assist the Commission in resolving the questions which arose of the notified aid.²¹ After examining the notified aid, the Commission shall give either a positive decision (aid compatible with the internal market),²² conditional decision (if Member State fulfils certain obligations the aid measure can be accepted)²³ or a negative decision (aid is not compatible with the internal market).²⁴

2.1.1.1. Preliminary investigation procedure

The investigation carried out by the Commission is divided into preliminary investigation procedure and formal investigation procedure.²⁵ The differences between the two procedures should be noted in order to draw a distinction between the rights of interested parties, which in turn is relevant in relation to the procedural rights that are the core study subject of this thesis. The preliminary investigation is conducted between the Commission and the Member State concerned.²⁶ The preliminary investigation procedure is primarily conducted in order for the Commission to assess whether a formal investigation is needed.²⁷ The main differences between the two types of investigation procedures is that interested parties are allowed to submit observations to the Commission related to the matter that is being investigated only when the preliminary procedure is concluded and a formal investigation²⁸ procedure is initiated.²⁹ If a party to the investigation wants to challenge a decision adopted by the Commission in the phase of the

¹⁸ *Ibid*, art. 4, p 2, 3, 4.

¹⁹ *Ibid*, art. 4, p 4.

²⁰ European Commission, State Aid Manual of Procedures, 2013, *supra* nota 10. Section 6 - Formal Investigation Procedure, chapter 1 (1).

²¹ *Ibid*.

²² Art. 9 (3), Council Regulation (EU) 2015/1589.

²³ *Ibid*, art. 9 (4).

²⁴ *Ibid*, art. 9 (5).

²⁵ Art. 4 (4), Council Regulation (EU) 2015/1589. For discussion see e.g. Craig, P., Búrca, D., G. EU Law Text, Cases and Materials, Oxford University Press 2015, p 1146-1147.

²⁶ Lenaerts, K., Maselis, I., Gutman, K. EU Procedural Law, Oxford University Press 2014, p 376.

²⁷ Preamble (8), Council Regulation (EU) 2015/1589.

²⁸ for the analysis see e.g. Lenaerts K., et.al. *supra* nota 26, 2014, p 376.

²⁹ for the analysis see e.g. Lapr votte F.C., *supra* nota 2, 2014, p 427.

preliminary procedure, the party has to prove that the party's interests are affected by the decision of the preliminary investigation.³⁰ At the stage of the preliminary procedure the Courts have not allowed interested parties to have an influential role in the administrative procedure,³¹ meaning that only the Member State is heard in course of gathering evidence or requesting additional clarifications. The interested parties to the investigation, including the beneficiary of aid, will not have a right to be informed that the Commission is investigating aid in the preliminary investigation,³² interested parties neither have the right to submit comments nor access the file of the Commission.³³ In conclusion, the beneficiary of aid does not have in the course of the preliminary procedure a right to find out what the content of the investigation is, nor make their views known in the matter.³⁴

2.1.1.2. Formal investigation procedure

The preliminary investigation is conducted in order to determine the need for a formal investigation. The purpose of the formal investigation is to enable the Commission to acquire complete in-depth knowledge of the aid granted by Member States.³⁵ The formal investigation is then the type of investigation which goes more in detail to ascertain the objective facts of the aid, impacts on competition and the influence on market of the granted aid. The formal investigation procedure brings more procedural requirements to the Commission and more procedural rights for the interested parties, including the beneficiary. The preliminary procedure must be completed within two months of the notification of the aid³⁶ when the formal investigation procedure has a calculated timeframe of 18 months, which many formal investigations exceed.³⁷ The different time limits set for both investigations can be an indicator of the stance of the interested parties. The beneficiary of aid and interested parties have the opportunity to comment and clarify the

³⁰ Maselis, I., Gilliams, M., H. Rights of Complainants in Community Law. *European Law Review* 1997, 22(2), pp 103-124, p 116.

³¹ Laprévote, F., C. *supra* nota 2, 2014, p 428.

³² Case 84/82, *Federal Republic of Germany v Commission of the European Communities* (1984), ECR 1451, summary p 2.

³³ Laprévote, F., C. *supra* nota 2, 2014, p 437.

³⁴ Gjevari, A. Modernisation of EU State aid procedures: are the rights of third parties more protected? *Juridical Tribune*, Volume 5, Issue 2, 2015, p 49.

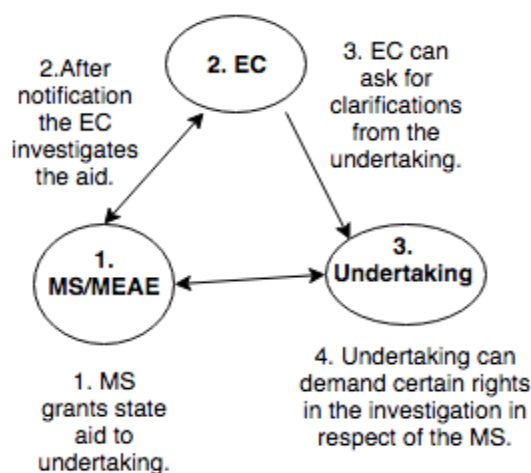
³⁵ European Commission, *State Aid Manual of Procedures*, 2013, *supra* nota 10. Section 6 - Formal Investigation Procedure, chapter 1 (2).

³⁶ Whereas (7), Council Regulation (EU) 2015/1589. For discussion see e.g. Maselis, I., Gilliams, M. H., Rights of Complainants in Community Law, *European Law Review*, 1997, 22(2), pp 103-124, p 114.

³⁷ Art. 9(6), Council Regulation (EU) 2015/1589. For detailed discussion see e.g. Laprévote, F., C. A Missed Opportunity? State Aid Modernization and Effective Third Parties in State Aid Proceedings. *European State Aid Law Quarterly* 426, 2014, p 432.

circumstances in the formal investigation procedure. Consequently, direct beneficiaries of State aid have more impact on the Commission's decision making in formal investigation procedure compared to the preliminary investigation due to the possibilities to comment and submit observations to the Commission.³⁸

Table 1: Order of investigation in State aid procedure (Source: author's compilation)



During the formal investigation, the Commission can request information such as market information, from any other Member State or any undertaking to ascertain facts and complete their assessment of the notified aid.³⁹

More substantial rights are acquired by the interested parties in the formal investigation procedure. When the Commission opens a formal investigation, the Commission is required to notify the parties concerned and request them to submit comments and observations on the aid that the Commission is investigating.⁴⁰ The rights of the interested parties do although remain limited also in the formal investigation procedure.⁴¹ The interested parties can take part in the administrative procedure but the Procedural Regulation limits this participation to the degree that interested parties may only submit comments concerning the subject being investigated,⁴² receive a copy of the decisions taken by the Commission⁴³ and inform the Commission of any other aid measures which may be incompatible with the internal market.⁴⁴ The investigation does not lead to an *inter parties* debate with the recipient of aid⁴⁵ meaning that the Member State is the only one heard in the process of investigating and the Member State is the entity that can raise a plea regarding a violation of their rights to defend in the procedure.⁴⁶

³⁸ Taylor, I., Soltész, U., Anestis, P., Navarro, E. Recent Developments in the Application of State Aid Rules. European Competition Journal, Vol 6, No 2, 2010, p 12.

³⁹ Art. 7 (1), Council Regulation (EU) 2015/1589.

⁴⁰ Art. 7(1), Council Regulation (EU) 2015/1589. For detailed discussion see e.g. Maselis, I., Gilliams, M. H. Rights of Complainants in Community Law, European Law Review, 1997, 22(2), pp 103-12, p 114.

⁴¹ Case T-17/93, Matra Hachette SA v Commission of the European Communities 1994, ECR 00595, p 34.

⁴² Art. 24 (1), Council Regulation (EU) 2015/1589.

⁴³ *Ibid*, p 2, Council Regulation (EU) 2015/1589.

⁴⁴ Laprévote, F., C. *supra* nota 2, 2014, p 429.

⁴⁵ For further analysis see e.g. Lenaerts K., et. al. *supra* nota 26, 2014, p 376.

⁴⁶ For further analysis see e.g. Lenaerts K., et. al. *supra* nota 26, 2014, p 376.

The principle of full disclosure, applicable in the formal investigation initiated by the Commission, means that all relevant facts must be disclosed to the Commission on initiative by the beneficiary.⁴⁷ This principle applies in the situation when an interested party, the beneficiary, of aid may be penalized by the Commission for infringing the existing competition rules.⁴⁸ The position of the party involved is still limited in the administrative procedure but the party may influence what kind of materials the Commission receives, thus influencing the decision of the Commission to a greater degree than by not participating at all in the investigation, especially compared to the preliminary investigation.

To summarise, the terms ‘existing aid’ and ‘new aid’, should be distinguished from one another along with the concepts ‘preliminary investigation’ and ‘formal investigation’, because the procedural rights of the beneficiary undertaking are largely dependent on in what phase of the investigation the Commission is in. There are differences in the possibilities to participate in the administrative procedure when comparing the preliminary investigation to the formal investigation procedure. Considering the broad scope of the topic, the thesis focuses only on the procedural rights in the context of the formal investigation procedure initiated against new aid or alterations to existing aid.⁴⁹

2.1.2. Antitrust: Cartel investigation procedure under EU law

This sub-section of the comparative analysis, regarding the European Commission’s powers in competition matters, presents and determines the relevant legislation and procedures in antitrust enforcement in the European Union. Chosen for this thesis, in the sphere of European antitrust enforcement the focus is on cartels. In order to proceed with the analysis of procedural rights the thesis first presents the laws prohibiting and regulating cartel enforcement and the procedure that is initiated by the Commission in alleged cartel practice.

The prohibition of cartels is regulated by article 101 of the TFEU. The rights and duties of the Commission in the investigation procedure are laid down in the Council Regulation (EC) No

⁴⁷ Art. 24 (2), Council Regulation (EU) 2015/1589.

⁴⁸ Maselis, I., Gilliams M. H., Rights of Complainants in Community Law. *European Law Review*, 1997, 22(2), pp 103-124, p 110.

⁴⁹ *Ibid.*

1/2003 (Antitrust Regulation).⁵⁰ The procedural right of the parties involved are more extensively regulated in Council Regulation (EC) No 773/2004 (the cartel Procedural Regulation).⁵¹

In the area of European competition law, it is the Commission who has the investigative powers to enforce Article 101 TFEU and investigate breaches of Article 101.⁵² Actions against cartels is a specific branch of antitrust enforcement and cartels are most of the time groupings of companies which are in collaboration to, for example, fix prices horizontally or agree on sharing markets in the same section of the market.⁵³ The Commission initiates an investigation towards an undertaking suspected of being a part of a cartel in a few different ways. The main way for initiating investigative proceedings against cartels are, a complaint, opening of an own-initiative investigation or by receiving a leniency application from a participant to the cartel.⁵⁴

The Commissions powers of inspection are stipulated in Article 20 of the Antitrust Regulation. The Commission is empowered to conduct all necessary inspections of undertakings, which includes entering premises of the undertaking, examining books and other records of the undertaking, obtaining copies from those books, sealing the premises of the undertaking for the duration of the investigation and interrogate members or staff of the undertaking.⁵⁵ After the initial investigative phase, after examining records and premises of the suspected undertaking, the Commission will decide if there is a need to conduct a wider investigation or to close the investigation if there is no evidence to support the infringement of Article 101 TFEU.⁵⁶

The Commission is responsible for investigating State aids and breaches of article 107 TFEU by way of initiating a preliminary investigation that can lead to a formal investigation determining the compatibility of the aid. Cartels are equally in the competence of the Commission, where the undertaking is investigated to determine if breaches of Article 101 TFEU have occurred. The

⁵⁰ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 4.1.2003.

⁵¹ Council Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L123, 27.4.2004.

⁵² for the details on the procedure see e.g. European Commission, Competition, Antitrust, Procedures in anticompetitive agreements, http://ec.europa.eu/competition/antitrust/procedures_101_en.html (26.11.2016).

⁵³ Hanlon, J. European Community Law, Sweet & Maxwell Limited, 2000, p 219.

⁵⁴ Whereas (1), Council Regulation (EC) No 773/2004.

⁵⁵ Art. 20 (2), Council Regulation (EC) No 1/2003.

⁵⁶ Art. 2 (1), Council Regulation (EC) No 773/2004; for detailed guidelines see e.g. European Commission, Competition, Antitrust, Procedure in anticompetitive agreements (Article 101 TFEU cases), http://ec.europa.eu/competition/antitrust/procedures_101_en.html (22.2.2017).

undertaking that has received State aid does not have a role in the investigation other than to provide information for the Commission. In State aid investigations, the undertaking does not necessarily even know that they are investigated when in cartels then investigation is quite evident if authorities come and search their office premises. Due to the fact that the State aid investigations do not allow the State aid beneficiary to participate in the administrative procedure the thesis in the next chapter presents the administrative procedural laws of Finland. The beneficiary undertaking may have more procedural rights granted on a national level, providing it a status other than just a source of information, therefore the nature of the State aid investigation has to be determined on a national level.

2.2. Involvement of national competition authorities

National competition authorities have as their responsibility in State aid procedures to notify the Commission of any State aid measure and to enforce EU competition laws by transposing EU laws to the national level.⁵⁷ Cartels can also appear nationally, meaning that a concerted practice or market sharing could happen without a cross-border element, therefore a national authority is also appointed to intervene in anti-competitive practices.⁵⁸ Additionally, national courts are obliged to enforce and oversee the rights of individual parties to a dispute.⁵⁹ For the purpose of the present analysis, the position of an undertaking in an administrative procedure shall be determined by using Finland as a reference jurisdiction. The investigative procedure in competition matters is going to be analysed from a perspective of Finnish laws and Finnish competition authorities. Administrative procedural rights of the undertaking, part to the investigation, is therefore going to be analysed based on Finnish administrative law acts.

Article 108(3) TFEU does not in itself impose any obligation or give any right to the defendant undertaking, but as the provision is established as directly applicable⁶⁰ by the Court of Justice, it

⁵⁷ Art. 2 (1), Council Regulation 2015/1589. See also; Directorate-General for Internal Policies, *An Academic View on the Role and Powers of National Competition Authorities* (2016). Section 1.2.1. Actor signalling and activation mechanisms, p 11.

⁵⁸ Art. 22 (2), Council Regulation (EC) No 1/2003.

⁵⁹ for analysis see e.g. Stryus, M. L., Abbott H., *The role of national courts in state aid litigation*. *European Law Review*, Sweet & Maxwell and its Contributors, 2003, 28(2), pp 172-189, p 177.

⁶⁰ Case 120-73, *Gebrüder Lorenz GmbH v Federal Republic of Germany et Land Rhénanie-Palatinat* (1973) ECR 1471, p 8.

is the role of national authorities to enforce the provisions in Article 108,⁶¹ thereby creating obligations for national authorities.

Finnish administrative laws regulate the procedural rights of the parties involved in a litigation. The party's rights in an administrative procedure are therefore determined accurately in national Finnish legislation. The presentation of national competition authorities will allow the author to determine the jurisdiction and the competent courts that are responsible for enforcing competition laws in State aid and cartel matters. By determining the nature of the procedure, from a national perspective, procedural rights of the undertaking can be examined in relation to the Member State. The author is able to describe, from the point of view of the undertaking, what an undertaking has the right to do when the Commission opens up a formal investigation on aid granted. The same applies with antitrust enforcement. There is a competent national authority in Finland that enforces the prohibition on concerted practises, thereby creating rights for the undertaking in relation to the national authorities.

2.2.1. Finnish competent national competition authorities and legislation

The Ministry of Economic Affairs and Employment (MEAE) is the principal national authority responsible for implementing EU State aid rules in Finland.⁶² Primarily it is the obligation of the Commission to control aid granted by EU Member States through notifications submitted by national authorities. In Finland, MEAE is responsible for submitting the notification of aid to the Commission and subsequently granting the aid to an undertaking.⁶³ The MEAE is the primary communication channel for documents that the Commissions issues and for documents from the national authorities to the undertaking under investigation.⁶⁴ Finland is a part of the EU, therefore based on the principle of supremacy, national laws are subordinate to Community legislation which are transposed in to national legislation. The act on the application of Certain State Aid Rules of the European Community (28.3.2001/300)⁶⁵ is the applicable legislation which transposes

⁶¹ Stryus, M. L., Abbott, H., The role of national courts in state aid litigation. *European Law Review*, Sweet & Maxwell and its Contributors, 2003, 28(2), pp 172-189, p 184.

⁶² 1 §, Laki eräiden valtion tukea koskevien Euroopan yhteisöjen säännösten soveltamisesta 28.3.2001/300, if not indicated otherwise, in this footnote and below, Finnish National Legislation (available in Finnish and Swedish) is uploaded from Finlex database.

⁶³ 1 §, 2 §, Laki eräiden valtion tukea koskevien Euroopan unionin säännösten soveltamisesta, 28.3.2001/300, for detailed information see; Ministry of Economic Affairs and Employment, EU Rules on State aid, Procedures and coordination, <http://tem.fi/en/procedures-and-coordination>, (7.12.2016).

⁶⁴ Valtioneuvoston asetus valtioneuvoston ilmoittamisesta komissiolle noudatettavissa menettelyissä 89/2011.

⁶⁵ Laki eräiden valtion tukea koskevien Euroopan yhteisöjen säännösten soveltamisesta 28.3.2001/300.

and implements the rules of Community law regarding notification of aid, recovery of aid and transparency of the decisions made. The enforcement and implementation of State aid rules is a matter of exercising public authority against an undertaking, thus, the whole investigation procedure is subject to the administrative laws of Finland.⁶⁶ The author's analysis focuses on the procedural rights of the undertaking under investigation concerning State aid, the nature of the investigation should be assessed from a national perspective. The legislation setting up administrative laws is the source of the rights that a defendant undertaking has when being investigated by the Commission, through the offices of the MEAE, which is a public entity that exercises public authority.

The Finnish Competition and Consumer Authority (FCCA) is the responsible public authority that intervenes in anticompetitive practises, such as cartels.⁶⁷ Violations of article 101 TFEU are the foundation of the competition policy in Finland, that prohibits cartels. FCCA can take own initiative to investigate breaches of Article 101 TFEU or on the basis of complaints.⁶⁸ The leniency policy,⁶⁹ introduced by the Commission is also in place in Finland.

Contrary to the national State aid proceedings that are decided by the Administrative Court on the recommendations of the MEAE, cartel infringements are adjudicated in the Market Court.⁷⁰ The Market Court is a special court in Finland and derives its jurisdiction from the Market Court Act.⁷¹ The FCCA enforces, among other, the Competition Act (No 948/2011).⁷² Section 5 of the Competition Act prohibits concerted practises,⁷³ to which cartels are included. Upon the investigation of the FCCA it can bring action to the Market Court if it finds an infringement by an undertaking that is contrary to the Competition Act.⁷⁴ The disputes adjudicated by the Market Court can be civil- or administrative in nature. Competition matters are however, according to the

⁶⁶ Hallintolaki, 6.6.2003/434.

⁶⁷ Kilpailulaki, 12.8.2011/948, 9 §. See also; competition control and advocacy, Finnish Competition and Consumer Authority, <http://www.kkv.fi/en/facts-and-advice/competition-affairs/> (4.1.2017).

⁶⁸ Kilpailu ja kuluttajavirasto, Kilpailuasiat, Kilpailurajoitukset, Toimenpidepyynnön tekeminen, <http://www.kkv.fi/Tietoa-ja-ohjeita/kilpailuasiat/kilpailurajoitukset/toimenpidepyynnön-tekeminen/> (23.2.2017)

⁶⁹ Commission Notice on Immunity from fines and reduction of fines in cartel cases, I. (1), (5), 2006/C 298/11, OJ C 298/17, 8.12.2006.

⁷⁰ 42 §, Kilpailulaki, 12.8.2011/948.

⁷¹ Markkinaoikeuslaki 1527/2001, 1 §.

⁷² Kilpailulaki, 12.8.2011/948.

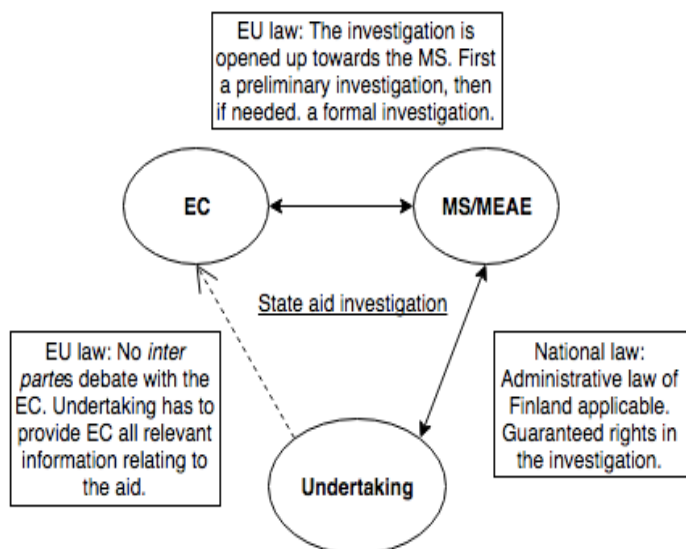
⁷³ *Ibid*, 5 §.

⁷⁴ *Ibid*, 42 §.

Market Court Proceedings Act (100/2013) 1 §⁷⁵ considered as an administrative procedure. Concerted practices, including cartels are then dealt with in the Market Court as a branch of administrative proceedings

Table 2: Undertakings position in relation to MS and EC

(Source: author's compilation)



State aid proceedings and cartel proceedings are thus both considered administrative procedures. Even though State aid is directly dealt with by the Administrative Court and cartels by the Market Court, both proceedings possess the same administrative procedural rights and duties. The substantive administrative procedural laws, including comparative analysis of rights and duties of undertakings in cartel and State aid proceedings are

analysed in more detail in the next section of the thesis (Chapter 3). The comparative analysis focuses on a national level on applicable administrative laws of Finland and on a European Union level on Commissions guidelines and Community laws regulating competition matters.

2.2.2. Principle of sincere co-operation between the European Union and national authorities

Presented above is the competent authorities and courts that are responsible for the State aid and antitrust breaches of competition matters in Finland. Article 4 (3) of the Treaty on European Union (TEU) determines the principle of sincere co-operation.⁷⁶ Article 4(3) TEU states that the Union and its Member States shall, in full and mutual respect, assist each other in carrying out tasks which flow from the Treaties. The principle of sincere co-operation obliges national courts, *inter alia*, to assist the competent Community institution to carry out the tasks which flow from EU Treaties.⁷⁷ The principle also obliges the Commission to refer information it holds to national

⁷⁵ Laki oikeudenkäynnistä markkinaoikeudessa, 100/2013, 1 §.

⁷⁶ Consolidated version of the Treaty on European Union, OJ C 326, art. 4 (3).

⁷⁷ *Ibid.*, art. 4 (3).

courts that are dealing with issues relating to infringements of Community rules.⁷⁸ The exchange of information is to ensure that national courts have the relevant information provided by the Commission when adjudicating a case relating to infringement of competition laws.⁷⁹ National courts are the only institution that can enforce Community rules on a national level. In terms of State aid investigation, it is the national authorities that have the power to modify the usage of existing aid and order recovery decisions.

In antitrust enforcement, the Commission has to be notified every time a case relating to the infringement of Article 101 is dealt with.⁸⁰ An infringement of competition laws is a matter exclusively handled by the European Commission although national courts play the role of the enforcer. The national courts, in State aid cases the Administrative Court and in cartel cases the Market Court, are under obligation to submit all relevant information to the Commission relating to the case due to the principle of sincere co-operation. The national courts may also ask the Commission for information that the Commission holds.⁸¹ In relation to State aid investigations, where the Commission acts on its own initiative, the Commission can submit written observations to the national courts in Finland and with the permission of the national court the Commission can also make oral observations to the case under investigation.⁸²

The principle of sincere co-operation is a fundamental starting point for the analysis of the laws regulating procedural rights for each party in the both State aid and cartel investigations. As the European Commission is responsible for enforcing competition laws throughout the European Union with the help of national courts and authorities, the characteristics of the proceedings best present themselves with the presentation of the appropriate laws and regulations.

This far the position of the Commission can be best described as a sort of plaintiff which invokes an investigative procedure against the defendant company by way of objecting against a measure contrary to EU competition laws where national courts act as intermediary. On the one hand taking the stance of the Commission by submitting evidence to the Commission and co-operating with

⁷⁸ Dekeyser, K., Smijter, E., D., The Exchange of Evidence Within the ECN and how it contributes to the European co-operation and co-ordination in cartel cases. *Legal Issues of Economic Integration* 32(2), 2005, pp 161-174, p 164.

⁷⁹ Chalmers, D., Davies, G., Monti, G., *European Union Law*, Cambridge University Press, 2010, p 945.

⁸⁰ Art. 15 (2), Council regulation (EC) No 1/2003.

⁸¹ Art. 15(1), Council regulation (EC) No 1/2003.

⁸² For further analysis see e.g. Dilkova, P. Y., The new procedural regulation in state aid - whether "modernisation" is in the right direction? *European Competition Law Review* 35(2), 2014, pp 88-91, p 91.

the Community bodies. On the other hand, acting in favour of the defendant undertaking by setting up the administrative procedure granting the undertaking certain rights. National courts may request an opinion from the Commission on the factual application of State aid rules.⁸³ The Commission takes a stance for a competition matter by way of objecting against it, the objection of the Commission in a matter relating to a competition law infringement is non-binding on the national court.⁸⁴ An opinion by the Commission, requested on basis of Article 23a of the Procedural Regulation is not legally binding but if the infringement doesn't stop the Commission can refer the infringement to the Court of Justice for a preliminary ruling that is binding on the national court.⁸⁵ The Commission has as its tasks to ensure that Member States fulfil their obligations.⁸⁶

A State aid investigation grants the undertaking that has received aid more procedural right on a national level. As the issue of State aid is according to Finnish legislation a branch of administrative law, the undertaking has right and duties in respect to the national officials, contrary to their stance in relation to the EC where the undertaking is only a source of information. MEAE is obliged to co-operate with the Commission and the undertaking in State aid and FCCA in cartel proceedings. The Commission can also provide MEAE with information relating to the investigation. Finnish administrative law is therefore the applicable legislation setting up rights for the beneficiary undertaking.

3. Procedural rights of undertakings in state aid and cartel investigation proceedings

3.1. Scope - administrative law

Following the analysis of main institutional actors on national and EU levels, this chapter focuses on the more detailed analysis of the substantive rights of a beneficiary undertaking on the EU as well as on national level, in the context of administrative procedural rights. The position of the Commission and MEAE was introduced in chapter 2. First, section 3.1 identifies and analyses

⁸³ Art. 29 (1), Council Regulation 2015/1589.

⁸⁴ European Commission, Competition, Cooperation with national courts, http://ec.europa.eu/competition/court/requests_opinions.html (28.3.2017).

⁸⁵ Art. 258, TFEU. See also; European Commission, Competition, Cooperation with national courts, <http://ec.europa.eu/competition/court/antitrust.html>, (28.3.2017).

⁸⁶ Art. 258, TFEU.

general procedural rights of an undertaking available under EU and national administrative law. Then, the specific procedural rights of the undertaking, including right to be heard (Section 3.2), access to files (Section 3.3) and right to an oral proceeding (Section 3.4) are analysed. Each section on procedural rights is structured as following, first the specific procedural right in a cartel investigation, this in order to acquire a comparative point of view to the State aid procedural right. Followed by the State aid specific procedural right analysed from a general EU administrative law perspective, concluding with the procedural right acquired by a State aid beneficiary on a national Finnish level. The focus is on main general principles which are basic procedural requirements stipulated as procedural rights. The specific procedural rights analysed in subchapters 3.1, 3.2, and 3.3 are important safeguards for an effective and legitimate defence in favour of the undertaking under investigation.⁸⁷

3.1.1. State aid - Council regulation 2015/1589

The rules on procedure which regulate the Commissions powers to investigate State aid cases are regulated in the Procedural Regulation.⁸⁸ Section 24 of the preamble to the Procedural Regulation determines that where unlawful aid has been determined, the Commission has the power to adopt interim measures which it directs towards the Member State concerned of granting the unlawful or incompatible aid.⁸⁹ The interim measure can take form of information injunctions, suspension injunctions and recovery injunctions.⁹⁰ The Procedural Regulation defines an interested party as any Member State, person, undertaking or association of undertakings whose interests could be affected by the granted aid.⁹¹ The beneficiary of aid, competing undertakings and trade associations are specified as the the ones who are particularly concerned as interested parties. An interested party includes also an undertaking that has received aid, the beneficiary of aid. In the Procedural Regulation, there is only one article related to the "Rights of interested parties", namely Chapter VII Article 24.⁹² The Procedural Regulation grants the interested parties certain rights, including:

⁸⁷ Gijlstra, D., J. Legal Protection in Competition Cases. Legal Issues of European Integration 87, p 94.

⁸⁸ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

⁸⁹ *Ibid*, preamble, section 24, Council Regulation (EU) 2015/1589.

⁹⁰ *Ibid*, art. 12, art. 13.

⁹¹ Art. 1 (H), Council Regulation (EU) 2015/1589.

⁹² Art. 24 (1)(2)(3), Council regulation (EU) 2015/1589.

- right to submit comments to the Commission after the decision to initiate the formal investigation procedure has been taken,⁹³ and
- right to obtain a copy of the decisions taken by the Commission.⁹⁴

Upon review of the Procedural Regulation, the rights of the beneficiary of aid are not specified other than the rights of interested parties, which also includes competing undertakings. The Procedural Regulation determines on a general level the procedure that is to be followed by the Commission regarding fines, recovery of aid and non-compliance.⁹⁵ The rights of the beneficiary as a party to an administrative procedure are not regulated in the Procedural Regulation. The absence of any specific procedural rights in the Procedural Regulation necessitates the analysis beyond the State aid specific Procedural Regulation and requires focus on the general principles of EU administrative procedural law, which is presented in the following sub-section.

3.1.1.1. General principles of EU administrative procedural law applicable to State aid proceedings

The procedure of investigating State aid by the Commission is at a national level an administrative proceeding. The Procedural Regulation does not as such include any specific principles that would safeguard the undertaking under investigation from the decisions made in State aid proceedings. Therefore, administrative procedural laws that govern administrative proceedings in general apply to State aid proceedings as well.

The rights in administrative procedure are similar to the specific ones laid out particularly for cartel investigations. Access to file and information, right to be heard, right to oral proceedings and the fairness of decisions.⁹⁶ The case analysis in Chapter 4 underlines that those general principles of administrative procedure, in fact, are the ones that are most frequently challenged by the defendant undertaking when being under investigation by the Commission. Therefore, it is important to analyse these principles as they intend to ensure fairness for the aid beneficiary under investigation. Article 41 of the European Charter of Fundamental Rights is the legislation where the administrative principles are laid out. The specific rights that an undertaking has, are not laid out directly in the Treaties nor in the Procedural Regulation in State aid matters.

⁹³ Art. 24 (1), Council regulation (EU) 2015/1589.

⁹⁴ *Ibid*, art. 24 (3).

⁹⁵ *Ibid*, art. 8, art. 16, art. 28, Council regulation (EU) 2015/1589.

⁹⁶ Charter of Fundamental Rights of the European Union, art. 41 - Right to a good administration, OJ C 326/391, 26.10. 2012.

According to the recent study, on administrative law applicable to EU bodies, commissioned by the European Parliament, there has not been an exhaustive catalogue or legislation for such administrative laws in primary or secondary EU law nor in the CJEU jurisprudence.⁹⁷ Therefore analysis of sector specific secondary legislation is of great importance, especially in the area of procedural law.⁹⁸ Accordingly, the thesis proceeds with an analysis of the procedural rights of an undertaking in State aid proceedings from the perspective of general EU administrative law with which the Commission should comply and that are also provide procedural guarantees for the beneficiary of aid in the investigatory proceedings.

3.1.1.2. Finnish administrative law applicable to State aid proceedings

To comparatively assess procedural rights in administrative proceedings relating to competition matters, this section analyses applicable national law for the beneficiary undertaking in State aid proceedings. The analysis does not focus on cartel investigations as cartels are under the sole competence of the Commission.⁹⁹ In State aid proceedings, the investigation is carried out between the Commission and the Member State. On a national level the undertaking is subject to an administrative procedure with the authorities of the Member State. Thereby, the undertaking has certain rights in a national context. The specific administrative rights, of the undertaking are based on the Administrative Procedure Act of Finland.¹⁰⁰ Also, Finnish Constitution determines provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right to appeal, as well as the other guarantees of a fair trial and good governance which shall be laid down by an act.¹⁰¹ The Constitution refers to the Administrative Procedure Act as a law applicable to the administrative proceedings.

⁹⁷ European Parliament, Directorate-General for Internal Policies, *The General Principles of EU Administrative Procedural Law*, 2015, p 7.

⁹⁸ Terhechte, J., P. *International Competition Enforcement Law Between Cooperation and Convergence*, Springer-Verlag Berlin Heidelberg 2011, p 33.

⁹⁹ Art. 11 (6), Council Regulation (EC) No 1/2003.

¹⁰⁰ Hallintolaki, 6.6.2003/434.

¹⁰¹ Suomen Perustuslaki 11.6.1999/731, 21 §.

3.1.2. Cartels - EU Competition Law, Cartel Legislation

Proceedings concerning breaches of Article 101 TFEU are more extensively regulated by substantive procedural laws. Cartel investigations are governed by the cartel Procedural Regulation¹⁰² and Antitrust Regulation.¹⁰³ Along with the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU,¹⁰⁴ substantive rules are laid out determining the conduct of the Commission and the rights that the undertaking under investigation has.

3.2. Hearing of the parties and the right to be heard

3.2.1. Cartels - EU Competition Law, Cartel Legislation

Article 27 of the Antitrust Regulation lays down rules for hearing the parties.¹⁰⁵ The undertaking which is under investigation should have the right to be heard by the Commission in the matter that the Commission has objected.¹⁰⁶ The Commission should base its decisions only on objections to which the undertaking has been able to comment on.¹⁰⁷ Noted from paragraph 2 in Article 27 especially relevant is the notion that "The rights of defence of the parties concerned shall be fully respected in the proceedings". The parties under objection by the Commission shall have an opportunity to be heard before the Commission consults the Advisory Committee on Restrictive Practices on Dominant Position.¹⁰⁸ Commission Notice on best practices, section 3.1. Right to be heard, states that a fundamental principle of EU law is that parties are heard before a decision that affects them adversely is taken.¹⁰⁹ The Commission ought to have appointed a hearing officer to each objection raised against an undertaking. The officer will safeguard the effective exercise of procedural rights independently from the Directorate-General for Competition.¹¹⁰

¹⁰² Commission Regulation (EC) No 773/2004, of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

¹⁰³ Council Regulation (EC) No 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

¹⁰⁴ European Commission, Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011/C 308/06.

¹⁰⁵ Art 27, Council Regulation (EC) No 1/2003.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Art. 14 (1), Council Regulation (EC) No 1/2003.

¹⁰⁹ Commission notice on best practices, *supra* nota 105. Section 3.1. Right to be heard (78).

¹¹⁰ *Ibid.*, Commission Notice on Best Practices, *supra* nota 105. Section 3.1. Right to be heard (79).

3.2.2. General Principles of EU administrative procedural law applicable to State aid proceedings

The right to be heard is established in the Antitrust Regulations as a principle which allows the parties to be heard in the matter in which the Commission has stated an objection. The Commission has contended that there is no procedure involving hearing the State aid beneficiary in cases concerning investigation of State aid, to which the Court concurred.¹¹¹ A right to a hearing is therefore not recognized in EU law in investigations concerning state aid.¹¹² The judgement contradicts to a certain extent to the general principle that a party should be heard in the proceeding if there is a chance that the decision adversely effects the party's interests.¹¹³ The general principles of EU administrative procedural law stipulate that the party concerned must be given the opportunity to make their views known.¹¹⁴ In the case of State aids, it is the Member State which is the entity that is being investigated by the Commission. The right to a fair hearing is thereby conferred to the MEAE who receives an objection by the Commission and gets the right to submit comments and be heard on the issue.¹¹⁵ Therefore, the main difference in procedural rights between State aid and cartel investigations is that in cartel cases it is directly an undertaking, while in State aid cases the party which has direct procedural rights vis-a-vis the Commission is the Member State rather than the undertaking.

3.2.3. National Finnish administrative law applicable to State aid proceedings

As have been analysed above EU law does not directly provide procedural right to a hearing to an undertaking in State aid investigation. The direct right to be heard is only granted to a national authority, i.e. MEAE. The right to be heard however, is granted to a beneficiary of a State aid under national administrative law, which is analysed in more detail below.

¹¹¹ Judgement of the Court of 10 July 1986, *case 40/85*, Kingdom of Belgium v Commission, p 26. Further analysis on the topic see e.g. Tridimas, T. *The General Principles of EC Law*, Oxford University Press 1999, p 244.

¹¹² *Ibid*, *case 40/85*, p 26, p 31.

¹¹³ Commission Notice on Best Practices, *supra* nota 105. Section 3.1. Right to be heard (78).

¹¹⁴ European Parliament, Directorate-General for Internal Policies, *The General Principles of EU Administrative Procedural Law*, Executive Summary, 2015, p 21, para. 16.

¹¹⁵ Analysis of the right see e.g. Hofmann, H., C., H., Micheau C., *State Aid Law of the European Union*, Oxford University Press 2016, p 43.

34 § of the Administrative Procedure Act determines the principle of hearing the parties part to an administrative procedure.¹¹⁶ The Administrative Procedure Act determines that, before deciding on an issue, the concerned parties should be reserved the opportunity to declare their standpoint in the matters that could affect the resolving of the dispute.¹¹⁷ The dispute can, however, be resolved without hearing the party in cases where: 1. The demands of the litigant are dismissed as unjustified; 2. The matter concerns voluntary service recruitment; 3. The matter concerns the personal evaluation of the litigant when granting benefits; 4. The hearing jeopardizes the decision-making; 5. Endangers the environment or public health, or; 6. If the hearing would be undisputedly unnecessary.¹¹⁸

The Finnish Administrative law can now be drawn parallel to the position of the beneficiary undertaking, in State aids, as a party to the proceedings. An undertaking has according to 34 § of the Administrative Procedure Act the right to be heard in a national setting in the Administrative Courts of Finland.¹¹⁹ Based on the Constitution, the undertaking has a guaranteed right to be heard and to make their views known, in any issue they are part of in front of the authorities in Finland, also regarding granted aid.

3.3. Access to file and information requests

3.3.1. Cartels - EU Competition Law, Cartel Legislation

The right to access documents and files of the Commission is a fundamental general principle in administrative proceedings.¹²⁰ In the course of transparency of decisions and the respect for the rights of defence, the ability to access documents is relevant as a procedural right. The Commissions file was originally the place where documents from the Inspection Directorate DG to the Operational Directorate was stored. Nowadays the "file" consists of all the documents in the possession of the Commission that are collected when investigating an issue by the

¹¹⁶ 34 §, Hallintolaki, 6.6.2003/434.

¹¹⁷ *Ibid*, 34 §.

¹¹⁸ *Ibid*, 34 §.

¹¹⁹ 34 §, Hallintolaki, 6.6.2003/434.

¹²⁰ Art. 15(1), Commission Regulation (EC) No 773/2004. See judgement: *Case T-30/91*, Judgement of the Court of First Instance, *Solvay v Commission*, p 59, "access to file is thus one of the procedural safeguards indented to protect the rights of defence" and: see for discussion e.g. Calzado, J., R., Stefano, G., D., *Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements*, Latham & Watkins, p 4.

Commission,¹²¹ in this context cartels. The access to Commissions files are specifically determined in the Commission Notice on rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty.¹²² The undertaking under investigation should be able to access the Commission documents in full and request information that relates to the issue which the Commission has objected against. The rights of the defence are protected by the access to file principle, because without knowledge of the information that the Commission has it would be disproportionately hard to prepare a defence relevant to the specific objections raised by the Commission. There is however an exception which prevents the undertaking from accessing the Commissions internal documents, documents containing business secrets of other undertakings and other confidential information¹²³ are excluded. The undertaking can neither request access to documents of correspondence between the Commission and the FCCA.¹²⁴

3.3.2. General Principles of EU administrative procedural law applicable to State aid proceedings

Access to the Commissions file in administrative proceedings is an essential requirement which allows the affected person to get full information on the matter being investigated in order for the defending party to enjoy the right to a fair hearing.¹²⁵ Regulation No 1049/2001 regarding public access to EU institutions documents provides a general right to the public for access to the documents held by the Commission.¹²⁶ The process of investigating State aids is a bilateral process between the Commission and a Member State. Access to file and specific documents must be applied for in a written form.¹²⁷ The applicant does not have to state any reasons for the application.¹²⁸ The Commission then evaluates the application and decides whether the applicant will have access to their file or part of their file.¹²⁹ Documents containing professional secrets or

¹²¹ Carreras, A., C., Valiente, B., U., Access to File as a Right of the Defence in Competition Procedures Before the EC Commission, Kluwer Law International, 1998, World Competition 21(4) p 7.

¹²² Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty. Art. 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004.

¹²³ Commission notice on best practices, *supra* nota 105. Section 3.1.2.

¹²⁴ Laki viranomaisten toiminnan julkisuudesta, 21.5.1999/621, 24 §.

¹²⁵ European Parliament, Directorate-General for Internal Policies, The General Principles of EU Administrative Procedural Law, Executive Summary, 2015, p 21, para. 17.

¹²⁶ Regulation (EC) No 1049/2001, of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, art. 2 (1). OJ L145, 31.5.2001. For discussion see e.g. Laprévotte, F., C. A Missed Opportunity? State Aid Modernization and Effective Third Parties in State Aid Proceedings, European State Aid Law Quarterly 426, 2014, p 430.

¹²⁷ Art. 6 (1), Regulation (EC) No 1049/2001.

¹²⁸ *Ibid*, Regulation (EC) No 1049/2001.

¹²⁹ Art. 7 (1), Regulation (EC) No 1049/2001.

documents which contain information about the decision-making process must be protected¹³⁰ therefore not released to the public.¹³¹ By drawing the information together, it can be established that the beneficiary of aid can access the Commissions file and request information, but there are no stipulated guarantees, on a European level, which would guarantee access to their documents. Thus, a right in favour of the beneficiary exists but the right to access the Commission files and documents is not guaranteed automatically.

3.3.3. National Finnish administrative law applicable to State aid proceedings

Public access to files is analogous in a national context to the right to access a document. The Administrative Procedure Act 24 § - openness of consideration determines that access to documents and the parties right to receive information is governed by the Act on the Openness of Government Activities.¹³² 12 § of the Act on the Openness of Government activities - access to a document pertaining to an individual, provides a right for every individual to access information contained in official documents pertaining to themselves.¹³³ In order to analyse the access from the standpoint of an undertaking that has received aid, 11 § parties' right of access should be examined. 11 § of the Act determines that the the applicant, in our case the beneficiary of aid, shall have the right to access documents and even documents which are not in the public domain, if the document may influence or have influenced the consideration of the matter.¹³⁴ There are however some restrictions to the right of access. Overriding public interest, criminal investigations, any unfinished documents, documents made in favour for public authorities before trial, public procurement projects, anonymous documentation and information that is to be kept secret such as witness testimonies, can restrict access to the documents held by national authorities.¹³⁵ Additionally, the act on Publicity of Proceedings in Administrative Courts 8 § determines that the administrative court may deviate from the restrictions on access to the extent that it is necessary for a fair trial or to secure overriding public interest and private interest.¹³⁶

¹³⁰ Art. 4 (3), Regulation (EC) No 1049/2001. Discussion on the topic see e.g. Driessen, B. Public Access to EU Institutions Documents: An Introduction. *Global Trade and Customs Journal*, Volume 3, Issue 10, Kluwer Law International 2008, p 331.

¹³¹ Art 4 (2), Regulation (EC) No 1049/2001.

¹³² 24 §, Hallintolaki, 6.6.2003/434.

¹³³ 12 §, Laki viranomaisten toiminnan julkisuudesta, 21.5.1999/621.

¹³⁴ 11 §, Laki viranomaisten toiminnan julkisuudesta, 21.5.1999/62.

¹³⁵ *Ibid*, 11 § (2).

¹³⁶ Laki oikeudenkäynnin julkisuudesta hallintotuomioistuimissa, 30.3.2007/381, 8 §.

Consequently, an undertaking that has received aid and is part to the administrative procedure in Finland has a right to access any document held by officials exercising public authority. The undertaking can then request access to the document held by the MEAE that relates to the aid granted. There does not appear to be any legislative restrictions restricting the access to documents that would have been issued by the Commission to the MEAE, therefore undertakings could in principle request documents from the MEAE even if the documents had originated from the Commission.

3.4. Oral proceedings and commitment decisions

3.4.1. Cartels - EU Competition Law, Cartel Legislation

Oral proceedings, as expressed by a Swedish Parliamentary Ombudsman, are seen as important since the right to be present and the right to participate in the procedure become satisfied when the party can orally present views and standpoints.¹³⁷ Oral statements can supplement written observations and help to ascertain facts¹³⁸ in order to allow the undertaking to discuss issues such as determining the amount of fines that will be imposed.¹³⁹ A right to have an oral proceeding is guaranteed by the Commission Notice on best practices section 3.1.6.¹⁴⁰ and in the Cartel Procedural Regulation Articles 6 and 12¹⁴¹ in cartel investigations.

Commitment decisions is also a peculiar right which is specifically laid out in the Notice on best practices and in the Antitrust Regulation, article 9.¹⁴² A commitment decision is an alternative way to act for both the Commission and the undertaking. Instead of imposing fines directly to the undertaking, the undertaking may offer the Commission a commitment to stop the activities that infringe competition, then the Commission makes the offer binding on the undertaking.¹⁴³ In commitments the Commission will not determine whether there has been an actual infringement but rather constitute a settlement between the undertaking and the Commission.¹⁴⁴

¹³⁷ Svensk Juristtidning, Europakonventionen: Varför har muntligheten ansetts så värdefull? SvJT 3016, p 326.

¹³⁸ Craig, P. P., *Administrative Law*, Third Edition, Sweet & Maxwell 1994, p 215.

¹³⁹ Commission notice on best practices, *supra* nota 105. Section 3.1.6. (107).

¹⁴⁰ Commission notice on best practices, *supra* nota 105. Section 3.1.6.

¹⁴¹ Art 6, art 12, Commission Regulation (EC) No 773/2004.

¹⁴² Art. 9, Council Regulation (EC) No 1/2003.

¹⁴³ Art. 9 (1), Council Regulation (EC) No 1/2003.

¹⁴⁴ Discussion relating to commitment decisions see e.g. Jones, A., Sufrin, B. *EU Competition Law, Text, Cases, and Materials*, Oxford University Press 2011, p 1092.

3.4.2. General Principles of EU administrative procedural law applicable to State aid proceedings

Oral proceeding should also be analysed as a general right in administrative proceedings. As noted in chapter 3.4.1. undertakings have the right to make oral submissions to the Commission to support their written statements in cartel cases. In State aid cases the Commission can also submit with the permission of the national court oral observations to a pertaining case.¹⁴⁵ Oral proceedings are however not marked as a right, that could be enjoyed by the beneficiary of aid, in the Procedural Regulation, nor in general administrative laws. Again, by noting that the State aid investigation procedure is a bilateral procedure between the Member State and the Commission it can be concluded that an oral proceeding cannot be demanded by the beneficiary of aid to support their written statements.

Commitment decisions which were described as a type of settlement in cartel investigations are neither mentioned in academic literature nor regulations regulating State aid. The only way to restore distorted competition is recovery of the granted aid. The purpose of recovery is to re-establish the situation that existed on the market before the granting of State aid.¹⁴⁶ By recovering the amount of aid that was granted, the situation on the market should then normalise and competition restored. In contrast to a commitment decision in cartel investigations there is no possibility for the aid beneficiary to negotiate with the Commission an alternative way to restore the distorted competition on the internal market. Aid granted is investigated and then a decision is given whether the aid is incompatible or unlawful, after which the aid shall be recovered. Separating from the commitment decision, a recovery decision is the amount of aid granted with interest on the aid capital.¹⁴⁷

3.4.3. National Finnish administrative law applicable to State aid proceedings

The Commission can submit oral observations to the national authorities in cases concerning State aid and undertakings have the right to complement statements orally in cartel investigations. 37 §, Oral demands and information, from the Administrative Procedure Act, addresses this point.

¹⁴⁵ Art. 15(1), Council regulation (EC) No 1/2003.

¹⁴⁶ Notice from the Commission, towards an effective implementation of Commission decision ordering Member States to recover unlawful or incompatible State aid. Section 2.2.1 (13), OJ C 272/4, 15.11.2007.

¹⁴⁷ Commission Regulation (EC) No 271/2008, of 30 January 2008, amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, art.9 (1) (2), OJ L82/1, 25.3.2008.

According to 37 §, the concerned authority shall upon request reserve to the party an opportunity to submit demands or information orally if it is necessary to clarify the matter and if a written procedure would cause unreasonable inconvenience.¹⁴⁸ Commitment decisions and the equivalence to State aid procedures was already dealt with briefly in chapter 3.4.2. regarding EU general administrative procedural rules. As there is no equivalent commitment procedure in State aid cases the author will neither analyse this point further in respect of national laws.

Although the State aid beneficiary does not have an influential role in the investigation in relation to the Commission, the undertaking is still reserved and guaranteed the right to make oral statements when the matter is adjudicated in the Administrative Court of Finland.

3.5. Conclusions: Procedural rights of undertakings in EU State aid and cartel investigations

In conclusion, Table 3¹⁴⁹ provides a comparative overview of the rights of undertakings in State aid and cartel investigations.

In cartel investigations, the undertaking is guaranteed the right to be heard directly before the Commission. The infringement will be decided by the Commission only in circumstances where the Commission has allowed the undertaking to submit their views on the matter. In terms of administrative State aid proceedings with the Commission, hearings are not recognized for third-parties, therefore the undertaking has to rely on national authorities' competence and Finnish administrative procedural laws if they want to be heard on the matter. A State aid recipient has on basis of the Finnish Administrative Procedure Act a right to be heard in front of national competition authorities.

Access to the Commission files and information request are also stated as a fundamental principle in cartel procedures. The rights of the defence are safeguarded by the fact that an undertaking can request relevant information concerning their infringement from the Commission's files. In State aid investigations, although, the undertaking can also request for documents from the Commission directly there is no explicit procedural guarantee to ensure that the undertaking will have access to those documents. The Member State who granted the aid will have a right to access the Commission's file and request information, either on their own account or by a request from the

¹⁴⁸ 37 §, Hallintolaki, 6.6.2003/434.

¹⁴⁹ See Annex 1, p 59.

undertaking to the Member States competition officials. The Finnish administrative law determines that the undertaking should have a guaranteed right to access documents pertaining to their investigation. Any document or piece of information that could influence the consideration on a State aid case could be requested from the national authorities, that will then request the information from the Commission or produce the information from their own sources.

Oral proceedings are guaranteed to undertakings subject to cartel investigation by the Commission. Also, commitment decisions, known also as a sort of settlement, are an alternative structural remedy that is its own administrative procedure that the litigating parties may offer to the Commission in cartel proceedings.¹⁵⁰ Oral submissions and commitment decisions are both guaranteed and made available for undertakings alleged for antitrust infringement. In State aids the right to make oral submissions is somewhat limited as the procedure is between the Member State and the Commission. The undertaking can submit oral submissions to the national competition authorities to clarify the matter but a direct oral dialogue with the Commission is not recognized as a procedural right. Commitment decisions are also disregarded as an alternative in State aids for the beneficiary undertaking, due to the fact that it would be the Member State that would need to commit for a resolution and primarily recovery of aid comes to question as it is the primary way to restore distorted competition.

An undertaking that has violated antitrust rules is then more involved in the decision-making as they have a direct connection and dialogue with the Commission. A State aid beneficiary is not involved to the same degree in the decision-making as the undertaking collects relevant information for the use of the national competition authorities that is then responsible to clarify the matter before the Commission in order for the aid measure to be lawful and compatible. Commitments can also be found solely in cartel cases as the undertaking can offer the Commission to stop the infringements and come to an agreement with the Commission. A State aid beneficiary does not have the same opportunity. A commitment is not allowed to be proposed by the undertaking to the national competition authorities who would then forward and negotiate the settlement with the Commission on behalf of the undertaking because ultimately it is the Member State that has violated State aid rules.

¹⁵⁰ Art. 9 (1), Council Regulation (EC) No 1/2003.

The differences in procedural rights are also highlighted by the fact that in cartel investigations the Commission could enter the premises of the undertaking to collect evidence and interrogate employees. In State aids, the undertaking is responsible to collect relevant information, on their own account, to the Member States competition authorities who then presents the information to the Commission. The differences in the procedural rights seem to be justified by the fact that the State aid investigation is conducted between the Commission and the Member State. The Member State granted the aid and is the infringer of competition law, whereas a cartel investigation is a matter resolved between the Commission and the undertaking or at a national level between the undertaking and the Administrative Courts, because there the infringer is the undertaking itself. An undertaking that is accused of cartel participation has the opportunity to engage in a direct dialogue with the judicial body that will resolve the issue, making the process a straightforward one. In State aid, the process is not as straightforward as it is the Member State that is the entity who grants rights of access to documents and information, hearing opportunities and oral submissions and then presents them to the Commission, highlighted in the *SFEI* case.¹⁵¹ The undertaking in a State aid investigation is therefore a third-party that can influence decisions only through another entity presenting facts in favour for them, requesting documents from the Commission and presenting evidence to the Commission. A proxy-like arrangement can be witnessed in State aids as the Member States officials act as the informant for both the Commission and the undertaking.

As the analysis in Chapter 3 indicates, a right to be heard, right to access to the Commissions files and documents and a right to oral proceedings are guaranteed both to undertakings in State aid and cartel investigations. However, there are important differences in terms of the access to those rights. If above mentioned procedural rights in cartel cases can be directly claimed and enforced under EU law against the Commission, then in the State aid cases, the same rights can only be claimed against Member State authorities, based on the national Finnish procedural rules.

¹⁵¹ Judgement of the Court of First Instance, *Case T-613/97, Union Française de l'express, DHL International SA, Federal express international SNC and CRIE SA v Commission of the European Communities* (2006), ECR 01531. P 81. " They state that the factual basis and reasoning of the French Government were adopted almost verbatim by the Commission in the contested decision."

4. State aid case law

4.1. The aim of case analysis

This chapter aims to describe and further clarify by reference to the Court of Justice of the European Union and national case law as well as the European Ombudsman's decisions the position of the parties involved in investigations initiated by the Commission and Finnish national competition authorities. Previous chapters provided an analysis of when investigations are initiated (Chapter 2.1), what kind of investigations there are (Chapter 2.1.1), who are the responsible authorities to start such investigations (Chapter 2.2) and the procedural rules and rights of the undertakings in the investigations (Chapter 3). By applying case law on the one hand from a European level and on the other hand from a national level, the thesis analyses practical application of the legislation. What is the reasoning for the difference that the Commission can investigate both State aid and cartel infringements but an argumentative dialogue is only allowed to the cartel participant and not the State aid beneficiary in relation to the Commission? How are the differences in procedural rights reasoned and justified in cases where a procedural aspect is challenged by a State aid beneficiary?

The emphasis in the analysis of the case law is on State aid cases. Chapter 3 established that investigations conducted towards cartels have procedural rights granted to the alleged cartel participant directly in respect of the Commission and on basis of EU law. Therefore, cartel cases are excluded from the case analysis in order for the thesis to acquire practical insights on the State aid beneficiary's rights and position. Case law and the European Ombudsman's opinions form the basis to justifications why the procedural rights of State aid beneficiaries are currently guaranteed only indirectly, through national administrative law as it has been explained in Chapter 3.

4.2. Justifications and procedure in State aid cases

4.2.1. Decisions of the European Ombudsman

Maladministration in the European Union's different institutions and bodies are investigated by the European Ombudsman.¹⁵² Because procedural rights of undertakings in administrative procedures in front of the European Commission concern administrative rights, the challenges an undertaking can make regarding inadequate procedural rights or maladministration could be

¹⁵² Art. 228, TFEU.

submitted to the European Ombudsman.¹⁵³ The Ombudsman can then try to resolve the administrative irregularity with the Commission or make a special report for the European Parliament.¹⁵⁴ There are several decisions made by the Ombudsman concerning alleged maladministration relating to the refusal of the Commission to grant the applicant access to their documents.¹⁵⁵ Chosen for a detailed analysis in this Chapter is the most recent decision which reinforces and confirms the established standpoint of the Ombudsman and the current legal praxis.

The Ombudsman's decision for a detailed analysis is the most recent one, decision made 23.9.2016. The Ombudsman's decision concerned inadequate rights of the beneficiary undertaking in State aid investigations is case 1179/2014/LP on the involvement of "interested parties" in State aid investigations carried out by the Commission.¹⁵⁶ The case brought to the European Ombudsman alleged breach of the Commission procedure to review and investigate State aid with regard to the principle of good administration and the right to an effective remedy.¹⁵⁷ The complainant founded his complaint on the point that interested parties, including the beneficiary of aid, only have the possibility to provide comments to the Commission after the beneficiary of aid has been notified that a formal investigation is initiated regarding the aid granted.¹⁵⁸ The way to ensure good administration, due process rights and effective remedying of a decision would, in the complainant's view be corrected if the interested parties were granted the right to get the evidence that exists in the Commission's State aid file before a decision is adopted.¹⁵⁹ The right to comment on the existing evidence before the Commissions takes a decision, for example is granted in antitrust cases.¹⁶⁰ The Commission responded to the complaint, that the procedure of investigating State aid is initiated against the Member State that has granted the aid which makes the beneficiary of aid and other interested parties merely information sources.¹⁶¹ The Commission argued in relation to the complaint that the beneficiary has no right to receive aid in the first place and a recovery decision directed towards the Member State serves only the purpose of restoring fair

¹⁵³ Art. 3(1), Decision of the European Parliament of 9 March, 1994, on the regulations and general conditions governing the performance of the European Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ L 113, 4.5.1994.

¹⁵⁴ *Ibid*, art. 3 (7).

¹⁵⁵ See for example: Decision of the European Ombudsman in case 407/2013/ANA, and, Decision of the European Ombudsman in case 145/2013/ANA.

¹⁵⁶ European Ombudsman, Decision of the European Ombudsman, case 1179/2014/LP.

¹⁵⁷ *Ibid*, p 2.

¹⁵⁸ *Ibid*, p 3.

¹⁵⁹ *Ibid*, p 5.

¹⁶⁰ *Ibid*, p 5.

¹⁶¹ *Ibid*, p 17.

competition on the market without any punitive implications for the beneficiary.¹⁶² The Ombudsman's reasoning concludes that the Procedural Regulation does not explicitly grant interested parties access to the State aid files, thus the Commission would be in breach of the regulation by granting interested parties full access to their documents.¹⁶³ By conclusion, the answer of the Ombudsman to the complainant, implies that the procedure is first and foremost directed towards the Member State concerned, not at the beneficiary of aid.¹⁶⁴ The Ombudsman noted the procedural rights of the beneficiary but concluded that on a European level the undertaking subject to the investigation is not entitled to participate in the administrative proceeding since the beneficiary of aid could not suffer any financial damage of any decision made.¹⁶⁵ Therefore, the direct participation in the administrative procedure that is conducted between the Member State and the Commission should not involve the beneficiary of aid other than for the purposes of information.¹⁶⁶ The Ombudsman's decision thereby confirmed that the investigation conducted by the Commission is directed exclusively towards the Member State who granted the aid. The State aid beneficiary does not have a right to receive aid, therefore the undertaking cannot have a role in the investigation other than to provide information to the Commission. Even if the Commission refuses access to their file it would not be a breach of any procedural right of the undertaking.¹⁶⁷

4.2.2. Finnish state aid case law

Cases relating to State aid granted by Finland that the Commission has objected against were searched from the Commissions case search engine and from Finlex case-law database, which is an online database comprising of precedents from the Administrative Court and the Supreme Administrative Court. There are a just a few cases in Finlex that relate to State aid, more specifically the recovery of State aid. On the Commissions database, more cases can be found as they do not represent precedents for Finnish legal praxis. One example, Kuopion HAO 15.10.2013 13/0413/3.¹⁶⁸ The case concerned a recovery order from the Commission where aid granted to an undertaking by the City Council was ordered for recovery. The undertaking then appeal the

¹⁶² *Ibid*, p 60.

¹⁶³ *Ibid*, p 35.

¹⁶⁴ *Ibid*, p 66.

¹⁶⁵ *Ibid*, p 19.

¹⁶⁶ *Ibid*, p 3.

¹⁶⁷ *Ibid*, p 57.

¹⁶⁸ Kuopion Hallinto-Oikeus, 15.10.2013, 13/0413/3.

recovery order in the Administrative Court on the basis that a district court had ordered the undertaking to apply for debt restructuring therefore recovery of the aid could not be executed.¹⁶⁹ The amount of aid that the City Council ordered to be recovered was determined by the Commission in their decision SA. 27420 (C 12/2009)¹⁷⁰. The undertaking challenged the amount of aid that was to be recovered and raised the issue of conflict between a national order for debt restructuring and the Commission's decision ordering the recovery of aid granted.¹⁷¹ The decision of the Administrative Court was challenged to the Supreme Administrative Court in case KHO:2015:7.¹⁷² The Administrative Court and the Supreme Administrative Court concluded that the City Council's recovery order was in line with the recovery order from the Commission and that the appeal should be dismissed. Recovery of aid was therefore upheld against the undertaking.¹⁷³

The principal case for analysis is case No. C 6/2008, Commission decision on State aid, implemented by Finland for Ålands Industrihus Ab (ÅI).¹⁷⁴ This case analysis will clarify the position of an aid beneficiary concerning aid granted by a public entity in Finland for the benefit of a company that developed real estate.

Through a complaint submitted to the Commission in 2006, the Commission was informed of certain measures taken by the Local Government of Åland (LG).¹⁷⁵ The measures taken by LG were in favour for a real estate company ÅI.¹⁷⁶ The LG had throughout many years given capital injections and loan guarantees to the undertaking, ÅI, for a real estate project "iTiden".¹⁷⁷ After the Market Economy Investor Principle¹⁷⁸ was applied and after a review by an auditing firm it was concluded that the capital injections and loan guarantees did provide an advantage to the

¹⁶⁹ *Ibid.*

¹⁷⁰ Commission Decision of On the Measures, SA. 2740 (C 12/2009) (ex N 19/2009) Implemented by Finland for Osuuskunta Karjaportti.

¹⁷¹ Korkein Hallinto-Oikeus, vuosikirjapäätös KHO 2015:7, "Oikeudellinen arviointi takaisinperittävän tuen määrän osalta." available at; www.kho.fi/fi/index/paatoksia/vuosikirjapaatokset/vuosikirjapaatos/1420790481761.html.

¹⁷² KHO 2015:7.

¹⁷³ P 1.5.4, KHO 2015:7.

¹⁷⁴ Commission Decision of 13 July 2011, No. C 6/2008, *Finland for Ålands Industrihus Ab*.

¹⁷⁵ *Ibid.*, 1. Procedure p 1.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*, p 2.2. The iTiden project, was meant to develop the region of Åland by gathering experts to concentrate in to one premise to innovate and develop technical skills.

¹⁷⁸ The market economy investor principle is a test of whether measures by public authorities represent State aid. Can public funds be compared to private funds in certain situations. Detailed information, please see: http://ec.europa.eu/competition/publications/cpn/2002_2_23.pdf.

undertaking that it would not have received had it relied on private capital.¹⁷⁹ The aid measures constituted new aid¹⁸⁰ and deemed unlawful and incompatible.¹⁸¹ A majority of the aid was ordered to be recovered by Finland from ÅI.¹⁸²

The procedure followed after the complaint was received consisted of, a request of information from the Commission to the republic of Finland concerning the supportive aid measures.¹⁸³ After reviewing the information submitted, the Commission informed Finnish authorities on January 2008 to initiate the procedure laid down in article 108(2) TFEU known as the opening decision to a formal investigation.¹⁸⁴

By analysing the first stages of the investigation, the Commission had a preliminary investigation on the basis of the complaint. After the Finnish authorities were consulted and facts received from both Finnish public authorities and the complainant the opening decision initiated the start of the formal investigation procedure. The Commission invited interested parties to submit further comments after the opening decision was published,¹⁸⁵ which was also the moment when the undertaking, ÅI, first got knowledge of the investigations initiated towards aid granted in favour for them. A noteworthy point of procedure is found in the decision, namely section (5).¹⁸⁶ According to chapter 1 section 5,¹⁸⁷ a meeting took place between the Commission services, the Finnish authorities and representatives of ÅI in 2010, a few years after the formal investigation procedure was initiated. The decision and the effects of the decision will be analysed in the following section.

The procedural details of the case were not presented any further in the decision or any available court documents.¹⁸⁸ On the surface of it, it appears that ÅI did not receive information of the investigation until the formal investigation was initiated. That is in line with what the Procedural Regulation stipulates on the preliminary investigation. The representatives could meet with the

¹⁷⁹ Commission Decision of 13 July 2011, No. C 6/2008, *Finland for Ålands Industrihus Ab*. p 20.

¹⁸⁰ *Ibid*, p 104.

¹⁸¹ *Ibid*, p 137.

¹⁸² *Ibid*, "Has adopted this decision", art. 3 (1).

¹⁸³ *Ibid*, p 1.

¹⁸⁴ *Ibid*, p 2.

¹⁸⁵ *Ibid*, p 3.

¹⁸⁶ *Ibid*, p 5.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid*, 1. Procedure.

Commission but only accompanied by Finnish authorities.¹⁸⁹ This would indicate that ÅI did not have a direct dialogue with the Commission but rather requested Finnish authorities to represent them. This case shows compliance with State aid procedural rules and adheres to what legislation determines on the State aid procedures.

This particular case was chosen for closer analysis because of the repercussion for the undertaking which took place after the recovery order was issued. The repercussions are analysed further in comparison to a cartel case from Finland in the next section (4.2.2.1). The Commissions decisions' does not highlight the procedure nor the procedural rights that the State aid beneficiary has, therefore case analyses only support the analysis and the determination of the position that a State aid beneficiary has, rather than what rights the aid beneficiary can demand to exercise on basis of EU law.

4.2.2.1. Comparative analysis of Finnish State aid and Cartel cases

The undertaking that has received State aid does then have a restricted position in the Commission's investigation compared to an undertaking that is alleged to be part of a cartel. The analysis of procedural rights relating to the investigation and the rights of the undertaking in the investigation do support the view that a State aid beneficiary cannot influence the decision-making to a great degree when the Commission initiates a formal investigation. What consequences can this imbalance have when looking at the state of alleged distorted competition from both sides? Is there any support for the lack of European-wide procedural rights for the State aid beneficiary in terms of dealing with the Commission's investigation when analysing the economic side of distorted competition, are there economic factors which support the procedural acts that determine why a cartel participant can plea and be heard by the Commission directly and why a State aid recipient has limited possibilities to discuss the case and decision of infringement with the Commission?

Examples of the economic consequences that a cartel has and that State aid has on the internal market are analysed by making use of the previously analysed case, ÅI and one Finnish asphalt

¹⁸⁹ *Ibid.*

cartel case.¹⁹⁰ Economically significant effects on competition could justify why the State aid beneficiary does not have a direct *inter parties* dialogue with the Commission. Ultimately, as well-known Finnish legal philosopher Kaarlo Tuori states, legislation is a way to achieve political goals.¹⁹¹ Economic effects are analysed by the author with the help of examining damage claims of plaintiffs in cartel cases and the amount of State aid that had been received in State aid cases. In the Finnish asphalt cartel case the Finnish court issued a decision imposing fines to be paid by the participating undertakings to municipalities and the Finnish State who suffered damages due to the cartel. The total amount of fines was 82.6 million euros of which Lemminkäinen Oyj was to pay 68 million euros.¹⁹² A single undertaking, Lemminkäinen Oyj, which was part of the cartel was obliged to pay up to 68 million euros in fines to suffering parties.¹⁹³ In ÅI's case relating to State backed loan guarantees and capital increases in the total amount up to 11,6 million was decided as incompatible State aid that was to be recovered from the undertaking.

When comparing the amount to be recovered from the State aid beneficiary with the fines imposed on the cartel participant it seems that a cartel would have had a more detrimental effect on competition, at least moneywise. A single undertaking that had to pay 68 million euros in fines did have more procedural rights in the investigation in respect of the Commission. A State aid beneficiary that received indirectly a competitive advantage up to the amount of 11 million euros had limited possibilities of directly communicating with the Commission and present their views directly to the entity deciding on the issue. Although the cartel had distorted competition to a greater extent, based on the damage claims, the involved undertakings were subject to paying fines. The cartel had according to the judgement been operating from 1994-2002 which made the undertaking more profitable for 8 consecutive years.¹⁹⁴ ÅI had an average annual turnover of 1 million euros from 2009-2011.¹⁹⁵ The decision of the Commission was given in 2011 which

¹⁹⁰ Lemminkäinen Oyj participated in the cartel. It is one of the largest construction companies in Finland, see for details: 50 largest companies, www.largestcompanies.fi/toplistat/suomi/suurimmat-yritykset-liikevaihdon-mukaan-ilman-tytaryhtioita/toimiala/talonrakentaminen (26.4.2017).

¹⁹¹ Tuori, K. Rättens nivåer och dimensioner, Publikationen från juridiska fakulteten vid Helsingfors universitet, 2013, p 10–11.

¹⁹² KHO: 2009: 83, 29.9.2009/2389, p 1204.

¹⁹³ Analysis of the cartel case see e.g. Connor, M., J., Kalliokoski, T. The Finnish Asphalt Cartel Court Decision on Damages: An Important EU Precedent and Victory for Plaintiffs, CPI Antitrust Chronicle, February 2014.

¹⁹⁴ KHO: 2009: 83, 29.9.2009/2389, Korkeimman hallinto-oikeuden päätöksen tiivistelmä, "yksi ja yhtenäinen kartelli vuosina 1994-2002".

¹⁹⁵ Ålands Industrihus AB, Taloustiedot, <https://www.asiakastieto.fi/yritykset/fi/alands-industrihus-ab/01450353/taloustiedot> (22.03.2017).

ordered the aid to be recovered.¹⁹⁶ In 2012 after the recovery decision ÅI made a result of negative 1,8 million euros and in 2013 a result of negative 21 000 euros.¹⁹⁷ The undertaking has then filed for bankruptcy and seized their activities.

The effects on competition in the two competition cases are therefore very different. An undertaking who has received aid on a relatively small scale from the State still does not have a right to defend themselves in front of the Commission in issues relating to State aid or make their views known in matters such as why they need State aid, how marginal the effect on competition can be and why recovery of the aid could be a disproportionate resolution. Larger undertakings that have used their position to participate in a cartel and therefore make large profits can defend themselves in front of the Commission and even agree on a commitment in order to avoid further investigations. Could ÅI still be operating in real estate if they had the same rights to influence as Lemminkäinen did in their administrative procedure with the competition authorities of Finland and the Commission. Conclusively, it appears that the Lemminkäinen cartel had a more harmful impact on competition than ÅI, which received aid only in order to be able to sustain their activities.

4.2.3. European case law on access to an administrative file

The procedural right to access the Commission file in State aid investigations is the procedural aspect in investigations that can be challenged by the defendant undertaking in State aid investigations, and other administrative procedures, initiated by the Commission because public access is provided as a right to be enjoyed in the Regulation 1049/2001.¹⁹⁸ Case law is harder to obtain in aspects relating to oral appeals and right to be heard in State aid cases because those procedural rights are granted to the Member State¹⁹⁹ making it almost impossible to challenge such a provision in the European courts because a complainant would challenge an administrative provision that was not provided by law in favour for them.

¹⁹⁶ Commission Decision of 13 July 2011 on State Aid, No C 6/2008, Implemented by Finland for Ålands Industrihus Ab.

¹⁹⁷ Ålands Industrihus AB, Taloustiedot, <https://www.asiakastieto.fi/yritykset/fi/alands-industrihus-ab/01450353/taloustiedot> (22.03.2017).

¹⁹⁸ Art. 2 (1), Regulation (EC) No 1049/2001.

¹⁹⁹ European Ombudsman, Decision of the European Ombudsman in case 1179/2014/LP, p 66.

The access to the Commissions files is a part of the right to defence, and additionally the public access to the Commissions files is a fundamental procedural principle that could be enjoyed by anyone engaged in an administrative procedure with the Commission. In the joined cases C-39/05P and C-52/05P²⁰⁰ two appeals were lodged on basis of a refusal of the Council of the European Union to grant the applicants access to an opinion of the Council's legal service.²⁰¹ This case can be drawn parallel the situation when access is applied to the Commissions files, as Regulation 1049/2001 regulates access to Council of the European Union and equally the Commission documents.²⁰² The application to access their legal opinion was refused on the grounds that the disclosure would undermine the protection of internal legal advice.²⁰³ The Court of Justice then assessed and determined that the public access provision ought to indicate that access should be granted if there is an overriding public interest and in those cases the access should be as wide as possible,²⁰⁴ even then the Council had to justify how the access could specifically and effectively undermine the investigatory interest of the Council.²⁰⁵ The appeals resulted in the Court of Justice setting aside the judgement of the Court of First Instance in so far as it related to the decision of the Council of the European Union and annulled the decision of the Council of the European Union refusing access to their internal opinion documents.²⁰⁶

Another case related directly to State aid and the access to the administrative files was dealt with in the Court of First Instance in case T-613/97.²⁰⁷ There was an appeal made by Syndicat Français de l'Express International (SFEI) to the Commission on an alleged aid measure in favour for SFEI from the French Post Office ('La Poste')²⁰⁸. Firstly, SFEI requested the Commission to organise a hearing in favour for them so that SFEI could get information of all aspects that the Commission holds in their file relating to the investigated aid measure.²⁰⁹ The primary information that SFEI requested was an economic study made by Deloitte which consisted of market data and information about the alleged aid.²¹⁰ The Commission refused access to their files and the study

²⁰⁰ Judgement of the Court (Grand Chamber), Joined Cases C-39/05P and C-52/05P.

²⁰¹ *Ibid*, p 1.

²⁰² Art. 2(1), Regulation (EC) No 1049/2001.

²⁰³ Judgement of the Court, Joined Cases C-39/05P and C-52/05P, p 11.

²⁰⁴ *Ibid*, p 33.

²⁰⁵ *Ibid*, p 49.

²⁰⁶ *Ibid*, Decision of the Grand Chamber, p 1, 2.

²⁰⁷ *Case T-613/97*, Judgement of the Court of First Instance, ECR 01531.

²⁰⁸ *Ibid*, p 2.

²⁰⁹ *Ibid*, p 14.

²¹⁰ *Ibid*, p 24.

with the argument that the application relates to a document written by a legal person and therefore the application must be sent to the author, along with a refusal, the Commission argued protection of commercial and industrial secrecy.²¹¹ SFEI brought an action to the Registry of the Court of First Instance and put forwards four pleas for annulment of the Commission's decision. The first plea consisted of alleged infringement of the rights of their defence and in particular the right to access the Commissions file.²¹² According to SFEI the Commission should have provided them with sufficient information to enable them to effectively state their views and exercise the right to participate in the administrative procedure.²¹³ The competitive position of SFEI would be significantly affected by any decision therefore they saw that they would have an undisputed right to a fair hearing and access to the files in possession of the Commission.²¹⁴ The Court of Justice found in response to the plea of SFEI that the administrative procedure regarding State aid is directed and initiated only against the Member State who granted the aid and that the recipient of aid is only acting as "parties concerned in this procedure".²¹⁵ Case law confers the concerned parties, including the beneficiary of aid, the role of information source in respect to the Commission.²¹⁶ The parties concerned have according to the Court a right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case.²¹⁷ The Commission was then not obliged to forward to SFEI the information that it held which was received from the government of the Member State concerned. The Commission still had a duty to provide an adequate statement of reason for the actions and decisions taken.²¹⁸

Those cases analysed above provide practical illustration of the State aid beneficiary's position in relation to the Commission and the Court of Justice. Although public access is granted to the public bodies' documents and files in the EU, an applicant can however not be guaranteed that right. The involvement of the beneficiary in the administrative procedure is also relative. According to the Court of Justice the parties concerned have a right to be involved to the extent appropriate in the light of the circumstances of the case, which makes the position of the undertaking equivocal when involved in the investigation.

²¹¹ *Ibid*, p 25.

²¹² *Ibid*, p 37.

²¹³ *Ibid*, p 81.

²¹⁴ *Ibid*, p 82.

²¹⁵ *Ibid*, p 86.

²¹⁶ *Ibid*, p 89.

²¹⁷ *Ibid*.

²¹⁸ *Ibid*, p 90.

5. Summary and conclusions

To conclude this thesis, the author returns to the main research questions addressed in the thesis, which are - **Why State aid beneficiaries have fewer rights, in the European Commission's investigation procedure, than companies in Cartel investigation procedures, and what implications the differences have on the procedural rights of the undertakings?**

Bringing together the analysis of the EU competition law, national procedural rules and jurisprudence of the Court of Justice and national courts, the answer to the main research questions are (1) the differences in procedural rights may be explained by the fact that a State aid investigation is opened up towards the Member State rather than the undertaking, which is the case in a cartel investigation where the investigation is opened up directly towards the undertaking. (2) It has implications for the undertaking, in rights such as, the right to receive access to the Commissions files in order to search for documents that may assist the preparation of a defence and in the right to be heard and to present statements orally. The undertaking therefore has to rely on the competence of the national officials that represent their interests in the investigation with the Commission. The interests of the Member State could in cases be different from the interest of the undertaking therefore the undertaking cannot be certain of the outcome of the investigation.

To answer the research question, and support the conclusion presented above, **Chapter 2** started with the discussion of the main actors and procedures related to the State aid and cartel investigations. **Chapter 3** discussed in detail a division of procedural rights that are currently applicable in State aid and cartel investigation procedures initiated by the Commission.

A plan to grant State aid is notified by the Member State to the Commission, which then investigates the aid measures compatibility with the internal market. The author chose as a reference Cartels because the Commission investigates also Cartels which is another part of Competition law enforcement that is a task of the Commission. In Cartels, the undertaking that is alleged to be involved in the Cartel scheme has procedural rights granted to them which grant the undertaking a direct dialogue with the Commission. Regulation 1/2003 grants the undertaking a right to be heard in front of the Commission and the option of proposing a commitment decision to stop the infringing practice. The Commission Notice on rules for access to the Commission file grants the undertaking a right to access the documents and the file of the Commission and

additionally the Commission notice on best practices grant the undertaking a right to present oral evidence and statements.

The Procedural Regulation regulates the substantive rules on procedure regarding the Commissions powers to investigate State aid cases. By examining the general administrative principles of EU law and case law the author was able to determine that in State aids, the investigation is opened up towards the Member State who granted the aid, therefore Member State's officials have rights conferred to them in the investigation procedure rather than the undertaking.

Finland was therefore chosen as a reference jurisdiction. The beneficiary undertaking in State aid investigations have procedural rights granted to them on a national level, in an administrative proceeding with the national competition officials and the Administrative Courts. The Finnish Administrative Procedure act 434/2003 provides a right for the undertaking to be heard, a right to access any document pertaining to their case (with some minimum restrictions) and a right to present statements and information orally. The significant difference in procedural rights in both procedures is that the investigation is opened up in State aids towards the Member State who granted the aid and on the other hand in cartels, the investigation is opened up directly towards the undertaking that is suspected of breaching EU antitrust rules.

The undertaking that has received State aid does then semantically speaking not have fewer rights in the European Commission's investigation procedure because the undertaking has in essence the same administrative procedural rights as an undertaking has that is being investigated of cartel participation. This in turn can in some aspects limit and make the preparation of a defence more difficult because in order to obtain any relevant information pertaining to the investigation, for example a market study such as the Deloitte study in *SFEI* judgement, can only be discovered if access to the entire file is granted and the beneficiary undertaking's legal councils could search for the relevant documents that could support their defence.

The State Aid Modernisation project, SAM, has as its goal to reduce administrative costs that occur in administrative proceedings through various acts, such as extending the Block Exemption

Regulation²¹⁹ and placing a stricter burden on the Member State to adhere to State aid rules.²²⁰ According to the Commission the SAM project makes proceedings easier for the Member State as efficiency of proceedings, transparency of decisions and the evaluation of State aid becomes simplified under the SAM project.²²¹ Concerns expressed in academic literature however purport the view that the new State aid policy does not recognise the third-parties, including the beneficiary's, formal status in the procedure and pays minimal attention to the rights of third-parties.²²² Thus the modernisation is successfully construed for the Member States officials responding to competition investigations but not much for the beneficiary of aid, who still lack a formal status in respect to the Commission. The author suggests that if the investigation would be bilateral with the undertaking instead of bilateral with the Member State, then the administrative costs would be reduced at least on a national level when undertaking would have to fulfil minimum requirements and on their own account declare the amount of aid received and used. Then the administrative rights that govern administrative procedures in general, *inter alia* cartels, would be extended also to State aids and to the interested third-parties' to the investigation. The beneficiary undertaking would then have to rely less on the attributes of the Member States officials to present facts, make statements and acquire documents to attain more comprehensive legal certainty and transparency to the procedure by having a direct *inter parties* debate with the Commission, equal to Cartel investigations.

As it has been discussed in **Chapter 3** and summarized in Table 2, the procedural rights of the undertaking in State aid and in cartel investigations vary in terms of who is the appropriate entity to investigate and decide on the competition infringement. Thus, the State aid recipient cannot defend their views and standpoints directly in front of the Commission. The undertaking that has received State aid has to rely on the administrative procedural laws of their Member State in order to be heard on the matter and to acquire information and documents relating to the matter from and before the national competition authorities.

²¹⁹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Article 107 and 108 of the Treaty, OJ L 187, 26.6.2014.

²²⁰ Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 204/15, 31.7.2013.

²²¹ For complete opinion: European Commission, Press release database, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, State aid reform and the new Regional State Aid guidelines. http://europa.eu/rapid/press-release_SPEECH-13-92_en.htm (26.4.2017).

²²² For Detailed discussion see e.g. Laprèvote, F., C. A Missed Opportunity? State Aid Modernization and Effective Third Parties in State Aid Proceedings, *European State Aid Law Quarterly* 426, 2014, p 12-14.

Based on the analysis above it may be concluded that undertakings in State aid investigations have in principle the same procedural rights that as undertakings in cartel investigation procedures, but exercising those rights are dependent on who those rights are demanded to be exercised towards. The State aid beneficiary has the same procedural rights that undertakings in cartel investigations have, but in respect to the Member State that granted the aid. A State aid beneficiary has the right to be heard by the national competition authorities and the national administrative court. A State aid beneficiary has the right to request information from the national authorities and demand an oral hearing before the national Administrative Court. In cartels, the undertaking has the same rights but in respect of the Commission directly. Meaning that those procedural rights can be exercised and demanded directly from the Commission, on basis of EU law.

Drawing together the information and reasoning from the analysed cases and the European Ombudsman's decision discussed in **Chapter 4** there can be found a unified line of reasoning and argumentation why the beneficiary of State aid cannot be involved in the administrative procedure. First and foremost, the argument of opening up an investigation only towards the Member State who granted the aid which in turn suggests that only the Member State is granted rights in relation to the investigation and the Commission. There could then not be a lack of procedural rights and a right to participate when the investigation is directed on a separate entity who then delivers opinions and arguments for the Commission in cases relating to State aid. The entity who received aid is therefore, also according to the European Courts, only a source of information for them, not vice versa. A refusal to grant the undertaking a right to access their documents and files in the investigation procedure is justified with the obligation of the Commission to still deliver a statement of why the Commission refused access.

Secondly, the justifications of refusing the undertaking rights in the administrative procedure are argued with protecting the investigations and the documents of the Commission. The investigation could be infringed, for example, if one party did receive the chance to make oral submissions or access the entire administrative file and thereby receive an advantage that their counterpart or competitor did not have in case they would not have demanded equal stance and rights in the investigation. This would create another problem for the deciding officials since parties are to be treated equally in investigations, whether they are competitors or joined applicants of a motion.

The Ombudsman reasoned with the lack of rights to influence and participate with the stance that State aid beneficiaries did not have the right to receive aid in the first place if the aid was not

approved by the Commission. Therefore, they would not have a participatory role in the investigation because it is up to the Member State to recover the aid and up to the Member State to deal with the Commission, thereby excluding the undertaking from the investigation other than for providing supplementary information. The Ombudsman also reasoned that no punitive implications would occur to the undertaking because recovery is just a way to restore competition in an unfair competition situation. If the undertakings interests would not be adversely affected they would not have a right to participate because the general principle of administrative proceedings stated that a party has *inter alia* the right to be heard on a matter if the decision in the matter would adversely affect that party's interests. The overall conclusions of the main findings of the thesis are presented in Table 4.²²³

Until today the rules governing State aids have been virtually unchanged since the development of the internal market. As have been mentioned above, in 2012 The Commission engaged in a State aid Modernisation project with the aim to decrease administrative costs and to simplify the procedure so that less aspects in the procedure would be challenged and that State aid cases would be enforced more effectively by national courts.²²⁴ Closer cooperation with national courts, more extensive inspection of State Aid rules by the Commission, a stricter notification requirement to the Member States and the widening of the sphere of notifying aid involving a broader block-exemption regulation were introduced by the Commission to simplify State aid procedures. The aspect of procedural rights of the beneficiary undertaking in State aids, still remain the same and un-altered.

The author suggests a different approach to renew the system of State aids in order for legal certainty and transparency of decisions to be fulfilled for the beneficiary undertaking. As the situation stands, the process of investigating State aid is bilateral between the Member State and the Commission. By way of analogy, the author considers the system of receiving study allowances in Finland as a comparative reference. A student enrolls in a university and fulfils certain minimum requirements. After fulfilling the set requirements, the student can apply for a study allowance that the State approves and then guarantees for the benefit of the student. To draw this practice parallel to State aids: what if an undertaking had to fulfil certain requirement in order

²²³ See Annex 2, p 60.

²²⁴ See for details: European Commission, Competition, State Aid, State Aid Modernisation, (http://ec.europa.eu/competition/state_aid/modernisation/index_en.html (04.04.2017), for further discussion see Nicolaidis, P. State Aid Modernization: Institutions for Enforcement of State Aid Rules, World Competition 35 No. 3 (2012): pp 457-470, p 2.

to be qualified for State aid. After fulfilling the minimum requirements, the State would guarantee the aid measure that the undertaking has applied for. The undertaking would then apply to the Commission for an approval of the aid after which the Member State would receive an approval from the Commission to allow the aid measure. Thereby the requirements would have to be fulfilled by the undertaking before applying and receiving State aid making it the burden and responsibility of the undertaking to fulfil requirements. The process could then be conducted directly with the Commission, where the aid beneficiary would be recognized. To attain this kind of conversion in the administrative structure the author sees the only problem in the education of competition lawyers at a national level²²⁵ and in the current EU State aid procedural laws. By increasing the knowledge and the volume of education, in EU competition law, undertakings would have increased chances of getting the aid approved by the Commission and any appeals or motions would be avoided from the first place. Alternative ways to restore competition could also be applied to State aid cases such as commitments. The reduction of administrative costs is harder to obtain when every notified aid, if deemed incompatible, has to be investigated and recovered. Commitments applied to State aids could offer the undertaking a chance to redeem their activities and over a longer period of time repay the aid in its entirety, like considering the aid as a long-term loan, if deemed incompatible.

The author also sees the interest on the aid capital for the time when the aid was unlawful as problematic. Repayment of any aid capital can be a difficulty to the undertaking if the capital is already spent on for example renewing administration, legal councils and logistics supply chains. To impose interest on the aid capital is an additional burden that can drive the undertaking to bankruptcy, which can lead to insolvency and additional administrative costs both for the Member State and the judicial system of the EU and concerned Member State. By abolishing the requirement to pay interest on the received aid, more undertakings could apply for aid without having the risk to become insolvent. Interest rates could be imposed instead on cartels. The author would justify this switch with an approach of intent and purpose. In a renewed State aid system, the intent behind an application for State aid would be investigated by the Commission, thereby closing out malicious and fraudulent applications. Cartels on the other hand are seldom pure accidents, as the purpose of a cartel is to fix purchase prices or share markets. A cartel therefore requires an intent to distort competition with the purpose to make larger profits. If unlawful profits

²²⁵ Further analysis see e.g. Nicolaides, P. State Aid Modernization: Institutions for Enforcement of State Aid Rules, *World Competition* 35 No. 3 (2012): pp 457-470, p 6.

made by cartels would be imposed interest rates then fewer undertakings would consider the option to participate and at the same level out the imbalance of procedural rights that State aid recipients have, compared to undertakings that have participated in a cartel.

6. List of sources

1. Books

- 1.1. Chalmers, D., Davies G., Monti G. European Union Law. Cambridge University Press, 2010.
- 1.2. Craig, P., Búrca, D., G. EU Law Text, Cases, and Materials. Oxford University Press, 2015.
- 1.3. Craig, P., P. Administrative Law. Third Edition, Sweet & Maxwell 1994.
- 1.4. Hanlon, J. European Community Law. Sweet & Maxwell Limited, 2000.
- 1.5. Hofmann, H., C., H., Micheau, C. State Aid Law of the European Union. Oxford University Press 2016.
- 1.6. Jones, A., Sufrin, B. EU Competition Law, Text, Cases, and Materials. Oxford University Press, 2011.
- 1.7. Lenaerts, K., Maselis, I., Gutman, K. EU Procedural Law. Oxford University Press 2014.
- 1.8. Terhechte, J., P. International Competition Enforcement Law Between Cooperation and Convergence. Springer-Verlag Berlin Heidelberg 2011.
- 1.9. Tridimas, T. The General Principles of EC Law. Oxford University Press 1999.
- 1.10. Tuori, K. Rättens nivåer och dimensioner. Publikationen från juridiska fakulteten vid Helsingfors universitet, 2013.

2. Journal articles and collected volumes

- 2.11. Calzado, J., R., Stefano, G., D. Rights of Defence in Cartel Proceedings: Some Ideas for Manageable Improvements. Latham & Watkins 2012.

- 2.12. Carreras, A., C., Valiente, U., B. Access to File as a Right of the Defence in Competition Procedures Before the EC Commission. Kluwer Law International, 1998, World Competition 21(4).
- 2.13. Dekeyser, K., Smijter, E., D. Legal Issues of Economic Integration 32(2), 2005. PP 161-174, 2005, The Exchange of Evidence Within the ECN and how it contributes to the European co-operation and co-ordination in cartel cases.
- 2.14. Dilkova, P., Y. European Competition Law Review 2014, 35(2), The new procedural regulation in state aid - whether "modernisation" is in the right direction?
- 2.15. Driessen, B. Public Access to EU Institutions Documents: An Introduction. Global Trade and Customs Journal, Volume 3, Issue 10, Kluwer Law International, 2008.
- 2.16. Giljstra, D., J. Legal Protection in Competition Cases. Legal Issues of European Integration 87, Kluwer Law International 2007.
- 2.17. Gjevori, A. Modernisation of EU State aid procedures: are the rights of third parties more protected? Juridical Tribune, Volume 5, Issue 2, 2015.
- 2.18. Laprévotte, F., C. A Missed Opportunity? State Aid Modernization and Effective Third Parties in State Aid Proceedings. European State Aid Law Quarterly 426, 2014.
- 2.19. Maselis, I., Gilliams, M., H. Rights of Complainants in Community Law. European Law Review, 1997, 22(2), pp 103-124.
- 2.20. Nicolaidis, P. State Aid Modernization: Institutions for Enforcement of State Aid Rules. World Competition 35 No. 3 (2012): pp 457-470.
- 2.21. Stryus, M., L. Abbott H., European Law Review, 2003, 28(2), pp 172-189, The role of national courts in state aid litigation. Sweet & Maxwell and its Contributors.
- 2.22. Taylor, I., Soltész, U., Anestis, P., Navarro, E. Recent Developments in the Application of State Aid Rules. European Competition Journal, Vol 6, No 2, 2010.

3. European legal acts and official documents

3.23. Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004.

3.24. Commission Regulation (EU) No 1407/2013, OJ L352/1.

3.25. Consolidated version of the Treaty on the Functioning of the European Union, TFEU, OJ, C 326.

3.26. Consolidated version of the Treaty on European Union, TEU, OJ C 326.

3.27. Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ, L 248.

3.28. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001.

3.29. Council Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L123.

3.30. Directorate-General for Internal Policies, The General Principles of EU Administrative Procedural Law, 2015.

3.31. European Commission, State Aid Manual of Procedures, Internal DG Competition working documents on procedures for the application of Articles 107 and 108 TFEU, Publications Office of the European Union 2013.

3.32. European Union Agency for Fundamental Rights, EU Charter of Fundamental Rights.

3.33. Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011/C 308/06, OJ C308/6, 21.10.2011.

3.34. Commission Regulation (EC) No 271/2008, of 30 January 2008, amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

3.35. Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Article 107 and 108 of the Treaty, OJ L 187, 26.6.2014.

3.36. Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

3.37. Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2006/C 298/11), OJ C 298/17, 8.12.2006.

3.38. Decision of the European Parliament of 9 March, 1994, on the regulations and general conditions governing the performance of the European Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ L 113, 4.5.1994.

3.39. Regulation (EC) No 1049/2001, of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, art. 2 (1). OJ L145, 31.5.2001

4. Finnish legal acts

4.40. Hallintolaki 6.6.2003/434, (Ministry of Justice, Administrative Procedure Act 434/2003).

4.41. Laki eräiden valtion tukea koskevien Euroopan yhteisöjen säännösten soveltamisesta 300/2001.

4.42. Valtioneuvoston asetus valtiontukien ilmoittamisessa komissiolle noudatettavissa menettelyissä 89/2011.

4.43. Kilpailulaki 2011/948, (Competition Act No 948/2011).

4.44. Laki viranomaistoiminnan julkisuudesta 621/1999, (Finnish Ministry of Justice, Act on the Openness of Government Activities 621/1999).

4.45. Suomen Perustuslaki 731/1999, (The Constitution of Finland 731/1999, 11 June 1999).

4.46. Markkinaoikeuslaki 1527/2001, (Market Court Act, 1527/2001).

4.47. Laki oikeudenkäynnistä markkinaoikeudessa 100/2013, (Market Court Proceedings Act 100/2013).

4.48. Laki oikeudenkäynnin julkisuudesta hallintotuomioistuimissa 381/2007, (Publicity of Proceedings in Administrative Courts 381/2007).

5. Case law

5.49. Judgement of the Court of 10 July 1986, case 40/85, ECLI:EU:C:1986:305.

5.50. Judgement of the Court of 11 December 1973, case 120-73, ECLI:EU:C:1973:152.

5.51. Judgement of the Court of 20 March 1984, case 84/82, ECLI:EU:C:1984:117.

5.52. Judgement of the Court of First Instance (Second Chamber) of 15 July 1994, case T-17/93, ECLI:EU:T:1994:89.

5.53. Judgement of the Court of First Instance of 29 June 1995, case T-30/91, ECLI:EU:T:1995:115.

5.54. Judgement of the Court of First Instance 7 June 2006, case T-613/97, ECLI:EU:T:2006:150.

5.55. Judgement of the Court (Grand Chamber) 1 July 2008, Joined cases C-39/05P and C-52/05P, ECLI:EU:C:2008:374.

5.56. Commission Decision of 13 July 2011, No. C 6/2008, on State aid implemented by Finland for Ålands Industrihus Ab.

5.57. European Ombudsman, Decision of the European Ombudsman in case 1179/2014/LP, 23.9.2016.

5.58. Commission Decision of On the Measures, SA. 2740 (C 12/2009) (ex N 19/2009) Implemented by Finland for Osuuskunta Karjaportti.

5.59. Korkein hallinto-oikeus, vuosikirjapäätös KHO 2015:7.

5.60. Finlex, Kuopion HAO 15.10.2013, 12/0413/3.

6. Other e-materials

6.61. European Commission, Competition, State aid procedures, Notified aid, www.ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html (19.2.2017).

6.62. European Competition: State aid procedures, www.ec.europa.eu/competition/publications/factsheets/state_aid_procedures_en.pdf (08.11.2016).

6.63. The Control of State aid in the European Union: A major competition issue, Summary of: Council Regulation (EC) No 659/1999 - detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3A126045, (20.2.2017).

6.64. European Commission, Competition, Antitrust, Procedures in anticompetitive agreements, www.ec.europa.eu/competition/antitrust/procedures_101_en.html, (26.11.2016).

6.65. Ministry of Economic Affairs and Employment, EU Rules on State aid, Procedures and coordination, www.tem.fi/en/procedures-and-coordination, (7.12.2016).

- 6.66. Competition control and advocacy, Finnish Competition and Consumer Authority, www.kkv.fi/en/facts-and-advice/competition-affairs/, (4.1.2017).
- 6.67. Kilpailu ja kuluttajavirasto, Kilpailuasiat, Kilpailurajoitukset, Toimenpidepyynnön tekeminen, www.kkv.fi/Tietoa-ja-ohjeita/kilpailuasiat/kilpailunrajoitukset/toimenpidepyynnön-tekeminen, (23.2.2017).
- 6.68. European Commission, Cartels, Leniency, www.ec.europa.eu/competition/cartels/leniency/leniency.html, (4.1.2017).
- 6.69. The market court, www.markkinaoikeus.fi/en/index.html, (4.1.2017).
- 6.70. European Commission, Competition, Cooperation with national courts, www.ec.europa.eu/competition/court/requests_opinions.html, (28.3.2017).
- 6.71. European Commission, Competition, Cooperation with national courts, www.ec.europa.eu/competition/court/antitrust.html, (28.3.2017).
- 6.72. Access to European Parliament, Council and Commission documents, www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A114546, (10.02.2017).
- 6.73. European Commission, Press Release database, Antitrust: commitment decisions - frequently asked questions, www.europa.eu/rapid/press-release_MEMO-13-189_en.htm, (1.2.2017).
- 6.74. Official Journal of the European Union OJ C 272, 15.11.2007, notice from the Commission, towards an effective implementation of Commission decision ordering Member States to recover unlawful or incompatible State aid, [www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007XC1115\(01\)](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52007XC1115(01)), (13.2.2017).
- 6.75. European Ombudsman, could we help you? www.ombudsman.europa.eu/atyourservice/couldhehelpyou.faces, (29.3.2017).

- 6.76. Connor, M., J., Kalliokoski, T. The Finnish Asphalt Cartel Court Decision on Damages: An Important EU Precedent and Victory for Plaintiffs, CPI Antitrust Chronicle, February 2014.
- 6.77. Vuosikertomus 2002, Lemminkäinen konserni, Emoyhtiön tuloslaskelma, p 39.
www.lemminkainen.fi/globalassets/documents/investors/annual-reports/vuosikertomus-2002.pdf, (22.03.2017).
- 6.78. Ålands Industrihus AB, Taloustiedot, www.asiakastieto.fi/yritykset/fi/alands-industrihus-ab/01450353/taloustiedot, (22.03.2017).
- 6.79. European Commission, Competition, State Aid, State Aid modernization (SAM), www.ec.europa.eu/competition/state_aid/modernisation/index_en.html, (04.04.2017).
- 6.80. European Commission, Competition, Overview, www.ec.europa.eu/competition/general/overview_en.html, (19.04.2017).
- 6.81. Directorate-General for Internal Policies, An Academic View on the Role and Powers of National Competition Authorities, 2016,
[www.europarl.europa.eu/RegData/etudes/STUD/2016/578971/IPOL_STU\(2016\)578971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578971/IPOL_STU(2016)578971_EN.pdf), (24.4.2017).
- 6.82. Svensk Juristtidning, Varför muntlighet? SvJT 3016, Cecilia Renfors, p 326.
- 6.83. European Commission, Press release database, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, State aid reform and the new Regional State Aid guidelines, www.europa.eu/rapid/press-release_SPEECH-13-92_en.htm, (26.4.2017).
- 6.84. European Commission, Press release database, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, State aid reform and the new Regional State Aid guidelines, www.europa.eu/rapid/press-release_SPEECH-13-92_en.htm, (26.4.2017).

7. Annexes

Annex 1.

Table 3: Comparative Table on the Rights of the Undertaking in State Aid and Cartel investigations ²²⁶

	FORMAL INVESTIGATION - STATE AIDS	ANTITRUST INVESTIGATION - CARTELS
A RIGHT TO BE HEARD	**Right guaranteed in relation to national Finnish authorities. Not in relation to EC.	***Right guaranteed in relation to the EC. Decisions can be taken only in matters that the undertaking has been able to comment on.
ACCESS TO THE COMMISSIONS FILES AND DOCUMENTS	*Can be applied from the EC. **Guaranteed access only to documents that national officials hold pertaining to the investigation.	***A procedural guarantee ensuring the rights of the defence in relation to the EC. Correspondence between national competition officials and EC excluded.
A RIGHT TO ORAL PROCEEDINGS	**Evidence and statements can be presented orally in national Finnish administrative procedures. Not an option in relation to EC.	***Guaranteed right to present oral evidence straight to the Commissions hearing officers'.
COMMITMENT DECISIONS	*State aid investigations cannot be negotiated, commitment decisions not a viable option.	***The EC's investigation can be halted if the undertaking agrees to commit and stop the infringing practice.

(Source: Author's compilation)

²²⁶ *Limited rights. **Rights in respect of National authorities. ***Rights in respect of the EC.

Annex 2.

Table 4: Illustrative table of the Undertakings stance in relation to MS competition authorities and EC. Case law included.

Table of procedure	Undertaking Y	MEAE/FCCA	European Commission (EC)	Case law
State aid - Preliminary investigation	<ul style="list-style-type: none"> - No knowledge of the investigation. - No procedural rights in respect of the EC. 	<ul style="list-style-type: none"> - Only MS heard in the investigation. - MEAE being investigated for the aid granted to undertaking Y. 	<ul style="list-style-type: none"> - Conducted together with the MS. - Determines the need for a formal investigation. 	<ul style="list-style-type: none"> - Case 84/82 <i>Germany v Commission</i> - Confirmed that the beneficiary of aid does not have a right to know of the investigation.
State aid - Formal investigation	<ul style="list-style-type: none"> - A right to receive information that the investigation is opened. - Status of an interested party. - No <i>inter partes</i> debate with the EC. - Own initiative disclosure of all relevant information to EC. 	<ul style="list-style-type: none"> - Procedural rights in respect to the EC. - Right to be heard, right to access EC files. - Administrative court proceeding. 	<ul style="list-style-type: none"> - Statutory time limits. - Requirement to announce the opening of the formal investigation to the undertaking. - EC can ask for clarifications directly from undertaking Y. 	<ul style="list-style-type: none"> - Case T-17/93, <i>Matra Hachette SA v Commission</i> - confirmed the limited role of the beneficiary in the formal investigation. - Ombudsman's decision 1179/2014/LP confirmed that the investigation is conducted towards the MS, not the undertaking.
Antitrust - Cartel investigation	<ul style="list-style-type: none"> - Right to know of the investigation. - Procedural rights in respect of the EC. - Can suggest commitment to the EC. 	<ul style="list-style-type: none"> - Intervenes to anti-competitive practices. - Requirement to notify the Commission of breaches of Art. 101 TFEU. - Market court proceeding. 	<ul style="list-style-type: none"> - Allowed on-site examination of undertaking Y. - Competence to investigate all breaches of Art. 101 TFEU. 	<ul style="list-style-type: none"> - Case T-30/91 confirmed a right to access the Commissions files and documents as a general procedural guarantee.

(Source: Author's compilation)