EU ADMINISTRATIVE LAW

COMPETITION LAW ADJUDICATION

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1. Preliminary chapter: Substantive background

Unlike those of other jurisdictions, the European Union's rules on competition[1] are to be found in the most fundamental constitutional text of the Union, the EC Treaty.[2] This is not affected by the recent Treaty for a Constitution for Europe.[3]

The basic competition rules are Articles 81 and 82 of the EC Treaty (EC).[4] Article 81(1) EC prohibits as incompatible with the common market all agreements between undertakings,[5] decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the common market, in particular those which:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

However, Article 81(3) EC makes it possible to declare the prohibition of such restrictive agreements inapplicable when the agreements have some competitive and economic advantages and contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and do not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or (b) afford such undertakings the

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[1] In this report we use the EU term "competition law" instead of the US "antitrust".

[2] References to the "Treaty" mean the European Community (EC) Treaty.

[3] OJ [2004] C 310/1.

[4] Also of relevance is Article 86 EC which refers to the case of "public undertakings".

[5] "Undertaking" is the technical term for "firm" in EC competition law.

possibility of eliminating competition in respect of a substantial part of the products in question.

An agreement must first be identified as restricting competition under Article 81(1) EC before its beneficial countervailing effects can be analyzed under Article 81(3). According to the case-law of the European Court of Justice, Article 81(1) EC requires the agreement to be examined in its legal and economic context; thus; this stage of the provision already calls for a certain degree of economic analysis.[6] However, this economic analysis should be viewed in the context of "reasonableness", rather than as the fully-fledged weighing of the agreement's pro- and anti-competitive effects. That weighing of the agreement, together with the full examination of the economic efficiencies accruing from it, take place only in terms of the third paragraph of Article 81 EC.[7] Article 81(3) EC can be applied individually, i.e. to a specific agreement or practice, or collectively, to circumstances for which the European Commission provides so-called "Block Exemption Regulations"[8] which apply an exemption to particular defined categories of agreements.

Article 82 EC prohibits the abuse of a dominant position. It is not the creation of dominance that is unlawful under EC competition law rules, but the abuse of a dominant position. Therefore, before behavior can be considered to amount to an abuse, the firm in question must be dominant. Some examples of abuse of a dominant position are given below:

Pricing abuses: the imposition of unfairly high prices or predatory low prices may be considered to be abusive, since such prices allow the company to achieve benefits that it would not be possible to achieve in a more competitive environment. Imposing different prices for the same product in different areas without any justification is also considered to be anti-competitive.

Granting of fidelity rebates: rebates granted by dominant companies in order to secure their customers infringe Article 82 EC.

Abuse of intellectual property rights: the mere existence of a patent, trademark or copyright is not sufficient to establish a dominant position. However, the imposition of unfair licensing terms or charging an excessive price for a product protected by intellectual property rights may be an abuse.

Tying clauses: a supplier of a service may not oblige a customer to buy a product which he would not otherwise buy, as a condition of selling another product to that customer. The selection of a technology should always be made with regard to general principles of standardization, notably the principle of openness. Indeed, if the selection of a technology could result in imposing tying restrictions on manufacturers or users, while giving a particular advantage to suppliers of services or operators, it would most likely be considered as a restriction of competition.

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[6] The Art. 81(1) EC assessment of agreements also includes the application of the ancillary restraints concept, which covers restrictions of competition that are directly related and necessary to the implementation of a main non-restrictive transaction, and proportionate to it (see *Commission Notice – Guidelines on the Application of Article 81(3) of the Treaty*, OJ [2004] C 101/97, paras. 29-30).

[7] See Case T-112/99, *Métropole Télévision (M6) and Others* v. *Commission*, [2001] ECR II-2459, where the Court, while admitting that an economics-based approach was called for to some extent under Art. 81(1) EC, took the view that the balancing of pro-competitive and anti-competitive effects should only take place under Art. 81(3) EC, which is the only provision that can accommodate a "rule of reason" test (paras. 72-77).

[8] A "Regulation" is a Community legislative act with full and direct effect in the Community and in the EU Member States' internal (national) legal orders.

Other types of abuse: the imposition of discriminatory and unfair conditions by the dominant company on any categories of users, or any other company having contractual relationships with the dominant company, is abusive.

Finally, the EU competition law enforcement system requires notification to the Commission of proposed concentrations (mergers). The Merger Regulation[9] contains the rules for notification of proposed transactions, establishes the timetable for merger review proceedings and specifies the Commission's investigative powers and the rights of the parties. The Merger Regulation applies regardless of whether or not the parties are domiciled in the Community and whether or not the transaction will be implemented in the Community. This means that it may be applicable to concentrations effected outside the EU.

2. Introduction

2.1 The fundamentals of the EU competition law enforcement system

Competition law enforcement in Europe has been perhaps the most obvious "success story" of the direct enforcement of EU law by the EU organs. Contrary to most other areas of EU law, where enforcement lies primarily with national administrative authorities (indirect Community administration, *administration communautaire indirecte*)[10] and national courts (Community judges of general jurisdiction, *juges communautaires de droit commun*),[11] the European competition law enforcement system has been Brussels and Luxembourg-based. For the past 40 years, the European Commission has been the basic public antitrust enforcement authority, under the judicial control initially of the European Court of Justice (ECJ) and, since 1989, also of the European Court of First Instance (CFI), both located in Luxembourg.[12] During that period, the role of national administrative authorities and national courts in EC competition enforcement has not been particularly strong, while private enforcement in Europe is certainly far less developed than in the US.[13] The whole institutional system of antitrust enforcement in Europe has been fundamentally different from the equivalent US system, owing to the overwhelmingly central role of public enforcement. The founding model of EC competition law centers on administrative decision-making, as opposed to adjudication in the strict sense, i.e. enforcement in judicial fora.[14] For this reason,

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[9] *Regulation 139/2004 on the control of concentrations between undertakings*, OJ [2004] L 24/1.

[10] On this Community transformation of national administrative authorities, see in general Bernard Dubey, "Administration indirecte et fédéralisme d'exécution en Europe", 39 *Cahiers de droit européen* 87 (2003), pp. 87 *et seq*.

[11] See e.g. Robert Lecourt, *L'Europe des juges* (Bruxelles, 1976), pp. 8-9; Denys Simon, *Le système juridique communautaire* (Paris, 2001), pp. 163-164, 167 ; Olivier Dubos, *Les juridictions nationales, juge communautaire, Contribution à l'étude des transformations de la fonction juridictionnelle dans les États-membres de l'Union européenne* (Paris, 2001).

[12] On the initial view of EC competition law as Brussels-based, see the article by Ian S. Forrester and Christopher Norall, "The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law Is and Could Be Applied", 21 *Common Market Law Review* 11 (1984), pp. 41 *et seq*. The authors argued for a more active role for national courts in competition enforcement. On the centrality from a political science point of view of the then DG IV, now DG COMP, the Directorate-General responsible for competition law enforcement in the European Commission, see Stephen Wilks and Ian McGowan, "Competition Policy in the European Union: Creating a Federal Agency?", in: Doern & Wilks (Eds.), *Comparative Competition Policy, National Institutions in a Global Market* (Oxford, 1996), pp. 245 *et seq*.

[13] As we explain below, this may soon change.

[14] See David J. Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, 1998), p. 386. According to that author, "the lack of private suits for enforcement in Community courts and

the term "adjudication" may not be entirely appropriate to describe EC competition law enforcement. Indeed, European lawyers would rather refer to "administrative enforcement" by the Commission and then "exercise of judicial review" by the European Courts. We are mindful, however, of the need to ensure consistency in the terminology of the current research project, and, therefore adopt the term "adjudication", albeit with the above provisos.

It is conventional to argue that in the past 40 years the Commission has availed itself of a substantial degree of administrative discretion in its enforcement of the Treaty competition rules. According to this view, while its decisions are subject to judicial review by the European Courts,[15] that review has always been seen as rather limited. Looked at more closely, however, this statement does not seem to be accurate. It is true that in some areas of economic regulation, such as anti-dumping cases, the Commission has enjoyed "immunity" from rigorous judicial review, but in the antitrust area the Courts have not in reality shied away from exercising a far-reaching control of legality, leaving the Commission only a limited margin of appreciation.[16] In the last two to four years, in particular, the CFI has applied a much tighter and stronger grip on Commission powers. This was noticeable primarily in merger cases, where for the first time Commission prohibition decisions were annulled,[17] but also to a certain extent in antitrust cases.[18] In the same context, the power exercised by the President of the CFI to suspend the application of Commission Decisions in high-profile cases involving new and challenging legal issues has become increasingly manifest.[19]

Indeed, there has been talk among competition specialists in Europe of a "judicialization" of EC competition law enforcement in Europe, and it is significant that in 2002 Fordham Corporate Law Institute dedicated a whole session to this new phenomenon in EC competition law.[20] The "judicialization" phenomenon seems to be more than a flash in the pan, and there are good reasons to believe that the European Courts, especially the CFI, as it becomes increasingly specialized in EC antitrust law, will exercise its powers in a continuously rigorous manner, especially for Commission decisions that deal with complicated, controversial and novel competition law theories, and impose particularly

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their rarity in Member State courts means that the Commission makes most decisions regarding objectives to be pursued, conduct to be challenged, resources to be used and the arguments to be employed in justifying decisions". See also in this sense Claus-Dieter Ehlermann, "The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution", 37 CMLRev. 537 (2000), p. 553; Dan G. Goyder, *EC Competition Law* (Oxford, 2003), p. 460.

[15] According to Article 230(2) EC, Commission decisions may be challenged on grounds of "*lack of competence, infringement of an essential procedural requirement, infringement of [the EC] Treaty or of any rule of law relating to its application, or misuse of powers*".

[16] See e.g. CFI Judge Hubert Legal's critical article, "Editorial: Le contentieux communautaire de la concurrence entre contrôle restreint et pleine juridiction", 2/2005 *Concurrences* 1.

[17] Case T-342/99, *Airtours plc.* v. *Commission*, [2002] ECR II-2585; Case T-5/02, *Tetra Laval BV* v. *Commission*, [2002] ECR II-4381; Case T-310/01, *Schneider Electric SA* v. *Commission*, [2002] ECR II-4071. See on these developments Aurelio Pappalardo, "Evolutions récentes du contrôle des concentrations (1er juillet 2002 – 30 juin 2004)", 12 *Journal des tribunaux (droit européen)* 204 (2004), pp. 204-207.

[18] E.g. Case T-41/96, *Bayer AG* v. *Commission (Adalat)*, [2000] ECR II-3383, upheld on appeal in Cases C-2/01 P and C-3/01 P, *Bundesverband der Arzneimittel-Importeure* v. *Bayer and Commission*, [2004] ECR I-23.

[19] Case T-184/01 R, *IMS Health Inc.* v. *Commission*, Orders of 10.8.2002 and 26.10.2001, [2001] ECR II-2349 and [2001] ECR II-3193, respectively; appeal dismissed by Order of 11.4.2002 of the President of the ECJ in Case C-481/01 P(R), *NDC Health Corporation and NDC Health GmbH & Co. KG* v. *IMS Health Inc.*, [2001] ECR I-3401.

[20] See in particular Joachim Bornkamm, "Judicial Control and Review of Antitrust Administrative Authorities", in: Hawk (Ed.), *Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law and Policy 2002* (New York, 2003), pp. 369 *et seq.*

burdensome and restrictive measures on the undertakings concerned (e.g. prohibition of a merger, sweeping positive measures, injunctions, etc.)

2.2 The passage to a system of legal exception in the main area of EC competition enforcement

The Community antitrust system is a mixture of a "prohibition" and an "abuse" system. Article 81 EC prohibits the *existence* in itself of an agreement or concerted practice, behavior as such being in principle immaterial. On the other hand, Article 82 EC prohibits not the existence of a dominant position as such, but only its *abuse*. The prohibition system is generally acknowledged to be a more efficient system with regard to cartels.

As far as Article 81 EC is concerned, the enforcement system has recently undergone a complete reshuffle. For about 40 years, i.e. between 1962 and 2004, restrictive agreements that seemed likely to fall under Article 81(1) EC had to be notified to the Commission, which had exclusive competence to immunize them by granting an "individual exemption decision" under Article 81(3) EC.[21] Alternatively, the agreement could qualify for the benefit of one of the Commission's "block exemption Regulations", a regulatory instrument which exempts categories of agreements that fully comply with certain conditions laid down in it. This system was known as the "administrative prior authorization" or "notification system".

Notification of agreements was not obligatory, but in practice it was an irresistible option, since it offered companies a substantial advantage, namely legal certainty that the agreement, even if illegal, would not lead the Commission to impose fines, at least for the period after the notification. In addition, notification had important positive consequences for the civil enforceability of the agreement, since because of the Commission's exclusive competence to grant an exemption, national courts did not have the power to consider the agreement unlawful and thus void, unless it was clear beyond any doubt that the agreement would not qualify for an exemption.[22]

At the end of April 1999 the Commission embarked on a most important policy change by publishing a White Paper on the modernization of the EC competition law procedural framework.[23] This was the first stage in a course that would inevitably lead to a "legal and cultural revolution" in EC antitrust.[24] The White Paper's aim was to propose a system of antitrust enforcement in the EU for the twenty-first century, thus marking the end of the "venerable" Regulation 17/1962,[25] which, as has been rightly pointed out, had existed for so

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[21] The notification system was introduced by Regulation No. 17 (*Regulation No. 17 of 6 February 1962 - First Regulation implementing Articles 85 and 86 of the Treaty*, JO [1962] L 13/204).

[22] This description is necessarily incomplete, but a fuller exposé lies outside the scope of this report.

[23] *Commission White Paper of 28 April 1999 on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No 99/027*, COM(1999) 101 final, OJ [1999] C 132/1.

[24] See Ehlermann, *op.cit.*, pp. 537 *et seq*.; Mario Monti, "The EU Gets New Competition Powers for the 21st Century", in: *Competition Policy Newsletter, Special Edition 2004*, p. 1. For a retrospective, see also James S. Venit, "Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty", 40 CMLRev. 545 (2003), pp. 545 *et seq*.

[25] The Commission had always been reluctant to consider amending Reg. 17 because it feared opening a Pandora's box. Its basic concern was that the Council might be tempted to weaken the Commission's ability to enforce the antitrust laws through uninvited amendments. See e.g. Joseph T. McCullough, IV, "The Continuing Search for Greater Certainty: Suggestions for Improving US and EEC Antitrust Clearance Procedures", 6 Nw.JInt'lL & Bus. 803 (1984), p. 886.

long that it was almost impossible to imagine any other state of affairs.[26] The basic elements of the proposed system were the abolition of notification and exemption procedures, and the decentralization of EC competition enforcement through national competition authorities and national courts. Such decentralization would extend the possible enforcers of EC competition law, while relieving the Commission of most of the bureaucracy involved in the current system and enabling it to concentrate on the most serious infringements of Articles 81 and 82 EC. The projected reforms were known as the "modernization" of EC competition law.

After an extended period of reflection, discussions and negotiations, the Council adopted on 16 December 2002 "Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty", which became Regulation 1/2003.[27] The new Regulation, which started to apply as of May 1, 2004,[28] was hailed by most actors in EC competition enforcement as a breakthrough, since it ended the Commission's monopoly on granting exemptions under Article 81(3) EC and placed national competition authorities and courts in the driving seat for much competition law enforcement, thus also lending more legitimacy to EC competition law.

The system of "legal exception" introduced by the new Regulation streamlines the application of Article 81 with that of Article 82. In other words, there is no longer a separation between paragraphs 1 and 3 of Article 81; rather, the rules are enforced as a whole, by the same enforcer or in the same forum. It is therefore no longer possible to notify agreements to the Commission, since there is no longer the possibility of an exemption as such.

2.3 Introductory note on the difference between an adversarial and inquisitorial administrative process

Notwithstanding the criticism sometimes heard, particularly from common law lawyers, that the Commission acts simultaneously as "*investigator, decision-maker, public prosecutor, judge and jury*",[29] a view which may explain the recent judgment of the US Supreme Court in *Intel*, where the Commission was considered as a foreign court for 28 U.S.C. § 1782 purposes,[30] proceedings before the Brussels-based body are in fact administrative and not judicial. This preliminary statement explains the primarily inquisitorial nature of the EC competition law enforcement proceedings. At the same time, it must be remembered that the Community's administrative and judicial structure is influenced to a large extent by continental as opposed to common law models. After all, the Communities began life as a

[26] See Barry Doherty, "Community Exemptions in National Law", 15 ECLR 315 (1994). See also Claus-Dieter Ehlermann, "Developments in Community Competition Law Procedures", 1(1) *EC Competition Policy Newsletter* 2 (1994), who stresses: "*Regulation Nº 17 contains all the basic procedural rules for Community competition policy. If and when it is revised, it will only be revised once for the foreseeable future*".
[27] OJ [2003] L 1/1.
[28] Art. 45 Reg. 1/2003.
[29] This criticism was heard by sources unexpectedly close to Brussels. See the Resolution adopted by the European Parliament on 4 July 2002 debating the Commission Green Paper on the review of the Merger Regulation, Bulletin of the EU, in: http://europa.eu.int/abc/doc/off/bull/en/200207/p103040.htm. See also AG Vesterdorf's Joined Opinions in Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89, *Rhône-Poulenc SA and Others* v. *Commission*, [1991] ECR II-867, at II-887, stating that "*generally problems may arise if the same administrative authority has such wide-ranging powers that, in addition to investigating and prosecuting, it may also impose fines of such considerable amounts...*".
[30] *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S.Ct. 2466.

continental project, and the rather belated accession of the UK did not change this legal reality. Particular emphasis should be placed on the influence of French administrative law, which is far more inquisitorial than the US or British systems. In fact, the inquisitorial approach used in Commission proceedings is an adaptation of the inquisitorial process used in the judicial systems of continental Member States. Thus the "hearings" provided for in the antitrust area may be very different from those held in the US or Britain. Although the concepts of "due process" or "natural justice" appear in descriptions of EU law and practice, they may have a different meaning from those to which US or British lawyers are accustomed.

Under the adversarial model of administrative adjudication, there is a separation between the investigatory and adjudicatory phases. After the investigation is concluded, an independent decision-maker provides a trial-type hearing at the agency level (this is quite distinct from the judicial review provided later). This decision-maker is often called an administrative law judge (ALJ) in the US. In connection with that hearing, agency staff members who have played investigatory, prosecutorial or advocacy roles in the particular case may not serve as adjudicatory decision-makers or make *ex parte* communications to those decision-makers ("separation of functions"). In contrast, under the inquisitorial model of administrative "adjudication" there is no separation between investigation and adjudication, no separation of personnel between different functions. Instead, all administrative procedures are considered to be phases of the investigation. The "hearing" is an opportunity for the party being investigated to argue its side of the case, not a real trial before an independent decision maker. Thus the hearing is viewed as a phase of the investigatory process, not as a separate adjudicative process. The final Commission decision is collective and institutional in nature, not a decision for which particular persons take personal responsibility.

Nevertheless, the above description must be qualified in two ways. Firstly, while in principle the EU administrative enforcement system remains inquisitorial, the increasing trend towards introducing many adversarial elements, particularly in Commission antitrust proceedings, should not be under-estimated. The strengthening of the Hearing Officer's role forms part of this trend. This may be due to sociological reasons, most prominently the dominance of British and US law firms on the Brussels legal scene. Secondly, one must never lose sight of the role of the European Courts, especially the CFI, which is now recognized as the "natural competition judge" in Europe, or of the "judicialization" phenomenon described above.

3. Narrative

Atropine is a leading chemical manufacturer based in Port Sulfur, Louisiana, which produces a number of specialty products. One of these is atrobenzocarbide (ABC) used in the production of British chocolate, German mattresses and French brake linings. Technically, there are few alternatives to ABC. There is strong demand for ABC and only three suppliers, each using a different technology. The process used by Atropine is unique and secret; there are no patents. The Greek company Charon makes ABC of acceptable quality, but with dire consequences for the air quality of the neighboring region. The German company Gross has tried to make the product as efficiently as Atropine, but without success, and would therefore like to sell its business.

In 1975, the boss of Atropine met and enjoyed the company of Mr. Mendoza, the owner of Mendoza S.p.a., a Sicilian plant eligible for generous subsidies from the State, and with

plenty of space and workers who could turn their talents to making ABC. The parties agreed on a joint venture: Atropine would supply the secret technology and Mendoza would build the plant and run it. The deal provided that if Mendoza wanted to build a new plant using the technology, a fresh license from Atropine would need to be negotiated.

In 1999, the technology is still secret and still unique. Atropine is having some business problems, but Mendoza is doing well and wants to expand and build new plants on Elba, the Isle of Skye and Crete, thus diversifying geographically and culturally. Mendoza asks for a license to use the technology. Atropine refuses to grant a license to the new plants.

Mendoza says that refusing to grant a license is a violation of Articles 81 and 82 EC. Atropine denies this, and to demonstrate its confidence in its legal position, files a notification with the Commission, asserting that a "site license" of technology to one plant of known capacity is not restrictive of competition within the meaning of Article 81(1) EC. Mendoza files a simultaneous complaint. The notification and complaint are registered by DG COMP's antitrust registry and are then attributed to the Directorate that appears to be responsible for the matter. Both documents land on the desk of Charlotte, the case-handler in Directorate X. She is a Danish national who studied law in Denmark and at Tulane University in New Orleans, after which she passed the competitive examination to become a Commission official in 1995. She works with five colleagues, from Italy, Finland, France, Germany and Portugal, under a head of unit, Ms. O'Sullivan (an economist from Ireland), who has 17 years' seniority and is responsible, among other things, for the sector of the economy concerned by this case. Ms. O'Sullivan's Director is Mr. Ramirez (a former Spanish government official who became the head of cabinet of a Spanish Commissioner and now, with the arrival of the new Commission, has been made Director of Directorate X).

Charlotte the Dane decides that the complaint raises important points of principle, and agrees to meet Mendoza's counsel. He explains all the mysteries of technology to her, and convinces her that the provision calling for the negotiation of a fresh license is actually a prohibition on exploiting the licensed technology elsewhere in the EU. By trying to limit the production of its licensee, Atropine seems to be infringing Article 81 EC. Article 82 EC may also be a problem.

Charlotte the Dane starts drafting a note for her head of unit, in which she suggests addressing a request for information to Atropine, Charon, Gross and Mendoza. Charlotte has already prepared the necessary questionnaires and submits them to Ms. O'Sullivan together with her note. Since Ms. O'Sullivan agrees with Charlotte's analysis of the case, she signs the questionnaires, which then go out to the companies. After receiving the completed questionnaires, Charlotte analyzes the information provided by the companies. Since she sees a need for further clarification with respect to some of the answers given by some of the companies, she proposes asking Atropine and Gross further questions. These requests are duly signed by Ms. O'Sullivan and sent to the companies.

After receiving the additional information, Charlotte completes her analysis and comes to the conclusion that the Commission should issue a statement of objections,[31] because she is of the opinion that Atropine's refusal to grant the license to Mendoza constitutes an infringement of Article 81 EC. She therefore prepares a note to the Commissioner which briefly summarizes the facts and her analysis of the case. As a conclusion, she proposes to the Commissioner to issue a statement of objections. This note is to be signed jointly by

[31] See below.

Charlotte and the Director General before being sent to the Commissioner's Cabinet, where it needs to arrive a number of days before the weekly meeting between the Commissioner and DG COMP.[32] Before the Director General signs the note to the Commissioner, Charlotte's hierarchy should also sign the so-called "signataire", a kind of circular by which Charlotte's hierarchy is informed of the note in order to approve it before its submission to the Director General and subsequently the Cabinet. However, Mr. Ramirez and the Director General's personal assistant raise some questions concerning the concrete facts. Charlotte therefore has to make some amendments to the note, which means postponing its submission by one week.

Once the note is signed by the Director General and sent to the Cabinet, a copy is submitted to the Commission's Legal Service, which also participates in the weekly meeting between the Commissioner and DG COMP. The Legal Service too has some questions concerning the note and therefore asks for it to be made a point for discussion, a so called "B point".[33] At the meeting, Mr. Ramirez, assisted by Ms. O'Sullivan and Charlotte, presents the case to the Commissioner. The Legal Service then expresses concern that some of the arguments Charlotte has presented for issuing a statement of objections may need to be formulated differently. The Commissioner therefore approves the issuing of the statement of objections, on condition that Charlotte resolves the drafting problems in cooperation with the Legal Service before the statement is issued.

Charlotte therefore consults the Legal Service and then prepares another "signataire" with the draft statement of objections to be signed by the Commissioner. Like the first draft, it must be approved by Charlotte's hierarchy, Ms. O'Sullivan and Mr. Ramirez, and the Director General, before being presented to the Commissioner for approval. The Commissioner signs the statement of objections and it is sent to Atropine. A non-confidential version of the statement of objections is mailed to Mendoza. Atropine is given six weeks to reply to the statement of objections. Mendoza is invited to submit observations on the statement of objections by the same deadline.

Atropine, outraged by the allegations that it is infringing competition law, requests access to the Commission's file to verify the evidence on which the Commission's case is based. The Commission sends Atropine a CD-ROM containing digital versions of the documents constituting the Commission's file. They include a non-confidential version of Mendoza's complaint and evidence submitted by Mendoza.

In Atropine's reply to the statement of objections, its lawyers raise a number of arguments which contradict both the factual and legal grounds on which the Commission's statement of objections and Mendoza's complaint are based. In addition, they submit documentary evidence undermining some of the facts in question, and a legal opinion by Professor Simonides, a well-known authority in the field of EC competition law, stating that the legal interpretation adopted by the Commission is not in line with the case-law of the European Court of Justice. Atropine's lawyers request the holding of an oral hearing.

Mendoza too submits comments on the statement of objections and also requests to participate in an oral hearing before the Commission. In addition, Mendoza submits an

[32] The Commissioner and his senior officials meet on a weekly basis to discuss pending cases and seek approval for the line the officials propose to take. To prepare for the meeting, the officials draft a note for the Commissioner in which the proposed line or options are summarized.

[33] The agenda for the weekly meetings foresees A and B points. Only B points, i.e. points on which those attending the meeting see a need for discussion with the Commissioner, are discussed orally at the meeting, whereas A points are considered to be approved by the Commissioner without discussion.

economic study by VERITAS, a reputable Brussels-based consultancy which provides advice on economic aspects of EC competition law. This study shows that Atropine's refusal to license will have serious anticompetitive effects on the EU ABC market. Mendoza applies to take part in the oral hearing.

Mendoza also informs Matratzen GmbH, a German producer of mattresses which buys ABC from Mendoza and Atropine, of the proceedings before the Commission. Matratzen decides to intervene in the case, and sends the Commission a letter stating that Atropine's refusal to license has adverse effects on the German mattresses market. In its submission, Matratzen requests an opportunity to present its arguments during the oral hearing.

The applications from the parties requesting an oral hearing are forwarded to the Hearing Officer, Ms. Lopez, who had 15 years' experience as an official with the Directorate General for Competition before she was named a Hearing Officer. Her sole function is to organize hearings and make sure that the parties' right to be heard is respected. She does not otherwise participate in the proceedings before the Commission.

Ms. Lopez must invite Atropine to the hearing, but has discretion on whether or not to invite other parties. She thinks it would be helpful to hear Mendoza, but decides not to invite Matratzen, as she deems it sufficient for the company to present its arguments in writing. Ms. Lopez sets the date of the oral hearing in two months' time. She sends Atropine and Mendoza a letter informing them of the date, and asking them to provide her with an overview of the arguments they want to present at the hearing and details of any equipment they may want to use during it. She also invites the parties to an informal meeting in two weeks' time to discuss the schedule for the hearing. At this informal meeting, the lawyers of Atropine and Mendoza and the Commission representatives agree on the schedule.

On the day of the oral hearing, just before it begins, Atropine asks Ms. Lopez to allow it to present additional evidence. Atropine explains that this is a crucial piece of evidence which it was unable to supply at an earlier stage. Ms. Lopez agrees to allow the additional evidence to be presented at the hearing and Atropine provides all those taking part in the hearing with a copy of the documents on which it relies.

Ms. Lopez formally opens the hearing and invites Mr. Ramirez, who represents the Commission together with Ms. O'Sullivan and Charlotte, to present the Commission's case. Atropine's lawyers then present arguments purporting to rebut the Commission's allegations, as well as the new documentary evidence which contradicts the Commission's case. Ms. O'Sullivan asks a number of questions relating to the new evidence submitted by Atropine during the hearing. In addition, a representative of the German competition authority who has been sent to attend the hearing raises certain points relating to the German mattresses market. The hearing continues for a second day, during which Mendoza presents its arguments. Questions from the Commission follow, and then Ms. Lopez invites Atropine, the Commission and Mendoza to make concluding remarks.

After the hearing, Ms. Lopez prepares an interim report on what took place and on the observance of the right to be heard. The report also summarizes the Commission's case, the arguments put forward by the parties and third parties and developments at the hearing itself. In Ms. Lopez's view, some of the legal arguments made by the Commission are indeed not supported by the case-law of the ECJ. She points out that the Commission must be particularly meticulous in explaining such developments in its enforcement policy. Her report is given to Mr. Ramirez, Ms. O'Sullivan and Charlotte, and the Director General.

Although the report has no binding force, Charlotte takes it very seriously in drafting the decision on the case, and together with Ms. O'Sullivan she makes sure that the statement of reasons in the decision carefully discusses the new interpretation adopted by the Commission.

When a preliminary draft of the decision is ready, Charlotte drafts a note to the Director General and the Commissioner summarizing the facts and their assessment in light of EC competition law. She concludes that Atropine's refusal to license constitutes an abuse of Atropine's dominant position in the EU market. Charlotte proposes adopting a decision obliging Atropine to grant Mendoza a license and imposing a fine of EUR 20 million on Atropine. Charlotte's hierarchy is informed of the draft decision and the note before they are submitted to the Director General and, subsequently, the Commissioner's Cabinet. Before the draft decision is presented to the Commissioner for approval, it must be endorsed by Ms. O'Sullivan, Mr. Ramirez and the Director General. In addition, Charlotte's senior colleague, Mr. Lewandowski of Directorate A, is consulted. He raises some objections concerning the legal reasoning adopted in Charlotte's draft decision, and Charlotte therefore amends both it and the note. Finally, the note is signed by the Director General and sent to the Commissioner's Cabinet. Copies are also submitted to the Legal Service and to DG Enterprise, which is responsible for industrial policy concerning ABC. Neither raises any objections to the proposed decision. Also at this stage, Ms. Lopez prepares her final report, in which she comments solely on the observance of the right to be heard.

After internal consultations within the Commission are completed, a draft of the decision is sent to the Member States' national competition authorities and discussed at a meeting of the Advisory Committee composed of representatives of those authorities. The Advisory Committee suggests certain amendments to the draft decision. Charlotte drafts a new version of the draft decision including those amendments. The final draft of the decision, after approval by Charlotte's hierarchy, is submitted for consideration to the College of Commissioners. The opinion of the Advisory Committee and Ms. Lopez's final report are attached to the draft decision. After the Commissioner responsible for Competition policy has given a short presentation of the case, the College of Commissioners adopts the decision and it is sent to Atropine. A non-confidential copy of the decision is forwarded to Mendoza. At the same time, the Commission publishes a short press release to inform the public of the decision.

Atropine' lawyers decide to file an appeal against the Commission decision with the Court of First Instance. They are aware that it will probably take more than two years before the Court rules on the case. They therefore apply to the President of the Court for an order suspending the implementation of the Commission's decision until the Court has ruled on the appeal.

4. The Investigation Phase

4.1 Application phase: If the administrative process you are describing begins with an application for a particular benefit, license, or permission, please describe the application process. What information must be disclosed? What forms are filed? To whom is the application directed? Is it filed in a Member State - and if so, which Member State - or with the Commission? Are competitors or the general public notified of the application and, if so, how and when? Is there a pre-filing meeting where counsel can find out if the staff see any problems with the application? Is there a time limit on

the Commission's consideration of the application? If the application is denied, what form does the denial take?

For the application of Articles 81 and 82 EC, following the entry into force of Regulation 1/2003 which introduced a system of legal exception, the previous system of notification and administrative authorization has been abolished. Therefore, except for merger control, which is dealt with at the end of this sub-chapter, it is no longer appropriate to speak of an "application for a particular benefit, license, or permission". Indeed, the whole idea of the new system of enforcement of Articles 81 and 82 EC is diametrically opposed to such applications and relies instead on rigorous "self-assessment".[34]

However, the system of notification and administrative authorization survives in the national competition laws of certain Member States, though the overall trend is for the Member States to amend their competition laws and follow the EU example by introducing a system of legal exception. As long as the old system survives nationally, however, it must be borne in mind that restrictive agreements or practices, even if they affect the common market and thus fall under EC competition law, may still have to be notified in those Member States[35] that still follow the notification and authorization system.[36] Notification under national competition law will by no means lead to the prohibition under national law of agreements which are permitted under EU competition law, pursuant to Article 3 of the new Regulation 1/2003, which has strengthened the supremacy of EC over national competition law.

But even at Community level, there may be less evident instances where the Commission may still be seized with an application for a "benefit". Thus it is possible for undertakings to approach the Commission informally, in order to seek guidance. This is in essence a concession by the Commission to undertakings, with the aim of compensating to some extent for the loss of legal certainty resulting from the abolition of the notification and prior authorization system. These informal channels of cooperation are most necessary in exceptional cases which raise particularly difficult questions regarding the interpretation of Article 81 EC. In its Regulation proposal of September 2000, the Commission declared that it would "*remain open to discuss specific cases with the undertakings where appropriate; in particular, it* [would] *provide guidance regarding agreements, decisions or concerted practices that raise*[d] *an unresolved genuinely new question of interpretation*".[37] It also expressed its intention of issuing such reasoned opinions in the public interest in its Joint Statement with the Council on the Network of Competition Authorities.[38]

Indeed, the Commission recently published a Notice on such informal guidance, and promises to issue guidance letters in exceptional circumstances of "*genuine uncertainty*"

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[34] See Venit, *op.cit.*, p. 546.

[35] Naturally, only if they produce effects in the territory of those Member States. While notification is optional in some Member States, i.e. it aims to confer a benefit on undertakings if they so wish, it may be an obligation in others, with failure to comply leading to fines.

[36] However, the laws of Member States that still follow the notification and authorization system may contain rules that disapply their national competition law when EU competition law applies. This is so for Italy (Art. 1(4) of the Italian Competition Act (L. 287 of 10 October 1990)). In this case, parties will not need to notify their agreements under that national competition law.

[37] See the Explanatory Memorandum to the Regulation proposal of September 2000, p. 10.

[38] See *Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities*, Doc. 15435/02 ADD 1 of 10 December 2002, in: http://register.consilium.eu.int/pdf/en/02/st15/15435-a1en2.pdf. See also Recital 38 of the new Regulation.

referring to "*novel or unresolved questions for the application of Articles 81 and 82*".[39] However, companies will not be entitled to obtain such opinions, and in no circumstances will this informal mechanism re-introduce a notification system by the back door. Guidance letters are without prejudice to the Commission's powers as to the subsequent assessment of the same issues and cannot bind national courts,[40] although it is presumed that they may have persuasive value before the courts, so that their legal effects will resemble those of the old comfort letters.

The Notice requires that for the Commission to exercise its discretion and issue a guidance letter, five cumulative conditions, three positive and two negative, must be satisfied:[41] (a) the question concerned cannot be clarified by reference to the existing EC legal framework, to the case-law, to publicly available Notices, Communications or Guidelines, to the decision-making practice or to previous guidance letters; (b) the question is novel and its clarification is useful, taking into account the economic importance from the point of view of consumers, and/or the possible correspondence of the practice in question to "*a more widely spread economic usage in the marketplace*", and/or the scope of the investments involved and whether the transaction affects structural operations (e.g. partial function joint ventures); (c) the guidance letter can be issued on the basis of the information provided to the Commission; (d) the questions involved are not identical or similar to questions with which the ECJ or the CFI is seized in a pending case; and (e) the specific practice concerned is not subject to proceedings pending before the Commission, a national competition authority, or a national court.

This mechanism is purely informal and should not be seen as a formal procedure under which companies may claim a benefit. It is, of course, a remnant of the old system of enforcement, but it is subject to the Commission's absolute and unchecked discretion, and therefore creates no rights for companies which have recourse to it.

In contrast to the application of Articles 81 and 82 EC, the EC merger control system is based on prior notification and authorization. Notification is required for mergers with a "Community dimension", i.e. mergers which reach specific thresholds.[42] The aim of notification is to obtain the Commission's clearance of the merger, i.e. a decision declaring that it is "compatible with the common market" and may be implemented. The application process starts with several pre-notification contacts with the Commission, followed by the filing of a notification form (Form CO for a normal merger: if the notifying parties would like the case to be referred to a national authority before formal notification to the Commission,

[39] *Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*, OJ [2004] C 101/78, para. 5. Note the extension of the possibility to issue such letters to Article 82 cases.

[40] Paras. 24 and 25 of the Notice.

[41] Para. 9 of the Notice.

[42] Notification to the Commission will be required when both companies sell worldwide more than approximately $6,427 Mio, and both together sell more than approximately $321 Mio in the Community, unless each company achieves more than two-thirds of its Community turnover within the same Member State (the "primary threshold"). If these criteria are not met, filing will still be compulsory when (i) both companies together sell more than approximately $3,213 Mio worldwide, (ii) in at least three Member States, each company sells combined more than approximately $128 Mio, and (iii) in each of at least three Member States each company sells more than approximately $32 Mio ("the secondary threshold"). See Article 1 of the Merger Regulation.

they would file a Form RS).[43] A notification must contain the information (including documents), specified in the appropriate application forms, which relates mainly to the parties (with specific information on turnover, subsidiaries, activities, ownership and control, any link between the parties, etc.) and to the "affected market".[44] It must normally be submitted by the merging parties or the parties acquiring joint control,[45] but may also be submitted by a person or company acquiring control of all or part of one or more companies.[46] If the notification is signed by representatives of persons or companies, the signatories must provide written proof that they are authorized to act.[47] In the case of joint notifications, a joint representative must be authorized to transmit and receive documents on behalf of all the notifying parties.[48]

One original and 35 copies of the Form CO and supporting documents (originals or copies of the originals) must be filed with DG COMP.[49] The notification must be submitted in one of the Community's official languages (which will be the language of the proceedings), except for original documents, which must be submitted in their original language (if they are not in an official language already, they will have to be translated into one of them).[50]

However, the parties will file the notification with a national competition authority rather than the Commission when the Commission decides before the formal notification is made to refer all or part of the transaction to a Member State, on the basis that it significantly affects competition in that Member State, which presents all the characteristics of a distinct market.[51]

If the Commission finds that the notified transaction falls within the scope of the Merger Regulation, it will publish the facts of the notification in the Official Journal, including information on the companies concerned (names, country of origin etc.) and the nature of the transaction and the economic sectors involved.[52]

Pre-notification contacts with the Commission take place in the vast majority of merger cases.[53] They normally consist of one or two meetings between DG COMP officials and the parties, usually two weeks before the notification form is filed.[54] To launch pre-notification contacts, the merging parties should provide the Commission with a memorandum which

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[43] Annex I, II, III of *Regulation 802/2004 of 7 April 2004 Implementing Council Regulation (EC) No 139/2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation)*, OJ [2004] L 133/1 (the "Implementing Regulation").

[44] Affected markets are defined as relevant product markets where the individual or combined market shares of the parties amount to 15% or more in a horizontal relationship, or 25% or more in a vertical relationship.

[45] This will be the case if the merger concerns (i) two or more previously independent companies or parts of companies, or (ii) the acquisition, by one or more persons already controlling at least one company, or by one or more companies, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other companies (Article 2(1) of the Implementing Regulation).

[46] This would apply in all cases other than those referred to in the previous footnote.

[47] Article 2(2) of the Implementing Regulation.

[48] Article 2(3) of the Implementing Regulation.

[49] Articles 3(2), 3(3), and 23(1) of the Implementing Regulation.

[50] Article 3(4) of the Implementing Regulation.

[51] Article 4(4) of the Merger Regulation.

[52] Article 4(3) of the Merger Regulation.

[53] Best practices on the conduct of EC merger control proceedings, http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf, paras. 5 *et seq.* The Best Practice Guidelines offer guidance for interested parties on the day-to-day conduct of EC merger control proceedings.

[54] Para. 10 of the Best Practice Guidelines.

gives a brief background to the transaction and some general information. The main aims of the meetings are to discuss jurisdiction and other legal issues, prepare for the Commission's investigation (if a notification form is actually filed) and prevent the filing of an incomplete notification form. In DG COMP's experience, when a notification is found to be incomplete, there have usually been no or very limited pre-notification contacts.[55] These contacts are always subject to strict confidence and secrecy. DG COMP advises holding them in an open and cooperative atmosphere, in order to have a fruitful pre-notification phase.[56] The first pre-notification meetings would normally need a draft Form CO in order to facilitate a detailed discussion.[57] In any event, whether or not there are pre-notification meetings, the merging parties should provide DG Competition with a substantially complete Form CO in draft before filing a formal notification.[58]

The period within which the Commission must decide on the transaction only starts when a formal notification is filed and the Commission considers it is complete. In any event, the Commission will require at least five working days to review the draft notification form submitted during the pre-notification contacts.[59] However, it must decide within 25 days of receipt on whether to agree to a reasoned submission from a Member State requesting the referral of the case.[60]

4.2 Applications - Investigatory phase: What happens to an application after it is filed? Please describe the process by which an application is processed and considered including referral to scientific committees.

As explained above, it is only in the context of merger control that companies apply to the Commission to be granted a certain benefit, and that this is followed by a formal procedure. Once the merging parties have filed a formal notification which the Commission considers is complete, the Commission will examine it "*as soon as it receives it*"[61] and start a Phase I investigation. The notification will be allocated to the appropriate merger unit of every Directorate in DG COMP, according to the industry sector concerned (energy, water, food and pharmaceuticals, information, communications and media, services, industry, or consumer goods), or the sector in which it is considered likely to have a major impact. The Commission will also publish a notice in the Official Journal, including the names of the parties and the nature of the transaction.

The Commission has a maximum of 25 working days in which to (i) conclude that the notified transaction is not subject to the Merger Regulation,[62] (ii) adopt a decision declaring that the transaction is compatible with the common market,[63] or (iii) conclude that there are serious doubts as to whether the transaction is compatible with the common market, and therefore initiate formal "Phase I" investigation proceedings.[64] These proceedings conclude

[55] Para. 7 of the Best Practice Guidelines.
[56] Para. 8 of the Best Practice Guidelines.
[57] Para. 14 of the Best Practice Guidelines.
[58] Para. 15 of the Best Practice Guidelines.
[59] Para. 15 of the Best Practice Guidelines.
[60] Article 4(4) of the Merger Regulation.
[61] Article 6(1) of the Merger Regulation.
[62] Article 6(1)(a) of the Merger Regulation.
[63] Article 6(1)(b) of the Merger Regulation.
[64] Article 6(1)(c) of the Merger Regulation.

with the adoption of a decision either clearing the merger, with or without conditions, or prohibiting it.

The initial 25 working days may be extended to 35 working days when (i) the competent authority in a Member State requests the referral of the case, or (ii) the parties offer commitments intended to make the transaction compatible with the common market and thus avoid the opening of Phase I proceedings.[65] The extension gives the parties time to discuss appropriately with the Commission the commitments they are offering with a view to making the transaction compatible with the common market. It is possible for a Member State to request the referral of a case which it considers "*threatens to affect significantly competition in the market within that Member State*" or competition in a market in that Member State, which presents all the characteristics of a "*distinct market*".[66] The Commission then has 25 working days, if it has not started Phase I proceedings, in which to decide whether to refer the case, or 65 working days if it has started them.

When the Commission takes any of the decisions listed above at the end of a Phase I investigation, it will publish a short notice in the Official Journal (together with a press release on the DG COMP website). If the notified transaction "*raises serious doubts as to its compatibility with the common market*", the Commission will open a Phase II investigation. It then has 90 working days in which to issue a decision either clearing the merger or prohibiting it. This can be extended to 105 days if the parties offer commitments before the 65th. day of the investigation. Moreover, within 15 working days after the initiation of Phase II the parties may request (once only) an extension of 20 working days.

As to the Commission's investigatory powers, these are similar to the ones the Commission enjoys in the context of the enforcement of Articles 81 and 82 EC. The Commission sends formal or informal requests for information both to the merging parties and to competitors, customers, etc. The Commission may also conduct on-the-spot investigations at the merging companies' premises, examine their books and records, request oral explanations and, in general, investigate the companies with the same kind of powers as when conducting antitrust investigations, except for the possibility for officials to enter private homes. However, the Commission is unlikely to use these powers: it will probably only issue requests for information.

If the Commission decides either to block the merger or impose a fine or periodic penalty payment (in case of violation of Regulation 139/2004), it must send the parties a statement of objections, usually one month after the initiation of Phase II, to which the parties may reply in writing. The statement of objections will form the basis of a future decision. After it has been issued, the merging parties may access the Commission's case file.[67] Later on the Commission may hold a hearing with the merging parties and any third parties who have played an active role in the proceedings. On the basis of the information thus obtained, the case team will reach a view on the transaction, report to the Competition Commissioner and give the parties a final chance to offer better commitments. Before it finally adopts its decision, the Commission must consult the Advisory Committee and take the "*utmost account*" of the Committee's opinion.[68] If an agreement on commitments is reached, the Commission will issue a decision approving the merger, either subject to commitments or

[65] Article 10(1) of the Merger Regulation.
[66] Article 2(a) of the Merger Regulation.
[67] Article 18(3) of the Merger Regulation.
[68] Article 19(3)-(7) of the Merger Regulation.

otherwise.[69] However, if no agreement can be reached, DG COMP will invite the Commission to block the deal as incompatible with the common market, and the parties may not proceed with the merger. This decision, which is taken by the College of all Commissioners, may be appealed to the CFI by the merging parties or by third parties with a legitimate interest.

4.3 Complaints - pre-complaint phase: If the administrative process you are describing begins with a complaint, is there a pre-complaint phase in which the representatives of private parties have an opportunity to discuss the matter with Commission staff before an investigation begins or a complaint is issued? What occurs at such meetings?

We should begin by clarifying a terminological issue. In US antitrust procedure, civil litigation begins when a "complaint" is filed with the clerk of the court having jurisdiction to decide the matter. A complaint formally initiates the antitrust procedure in the court and states the government's case against a company or an individual.

In the context of EU antitrust procedure, however, a "complaint" is a technical term that has a different meaning: it relates to a procedure whereby an interested party complains to the Commission, alleging that another party is engaged in conduct which violates the EU competition rules. We believe that the above question relates to the formal opening of proceedings, rather than to a complaint as understood in EC competition law. Our answer is therefore based on this premise.

Proceedings before the Commission have two stages: a fact-finding stage, and a hearing and decision stage that follows the adoption of charges against a company by the Commission. The Commission first investigates the facts. To exercise its investigative powers, the Commission does not need to open formal proceedings; it may request information from companies and individuals and inspect business records before formally opening proceedings and bringing charges against an undertaking. The Commission usually opens formal proceedings only after it has completed the investigatory stage of the procedure and considers that the evidence points to an infringement which should be the subject of a decision. It is at this stage that the Commission notifies the statement of objections to the companies concerned. The statement of objections contains a factual description and legal assessment of the allegedly illegal conduct; it is a written statement of the Commission's case against the company concerned. Thus the statement of objections is to some extent equivalent to a complaint in the US procedure.

Since the Commission investigation takes place before the official opening of proceedings and the serving of the statement of objections, the investigated companies generally have extensive formal and informal contacts with the Commission and are well aware of the investigation.[70] As well as these inevitable "contacts", companies may approach the Commission informally even before an investigation has begun. This may happen when a whistleblower takes advantage of the possibilities offered by the Leniency Notice and gives the Commission information on a cartel, with a view to avoiding a fine for having violated EC competition law. Under the 2002 Leniency Notice,[71] complete immunity or a reduction

[69] See below.
[70] See below.
[71] *Commission Notice on immunity from fines and reduction of fines in cartel cases,* OJ [2002] C 45/3.

in the amount of a fine may be granted to companies that provide the Commission with evidence on a cartel. Firms wishing to benefit from leniency in a cartel case apply to DG COMP, which will treat all information supplied confidentially. The Commission will then carry out a preliminary assessment of the situation and inform the company whether it would be entitled to immunity from fines for a suspected infringement.

Under the EC merger control system, as indicated above (see answer to question 4.1), the parties are encouraged to contact DG COMP at an early stage of the procedure, before any notification is submitted or the Commission investigation has begun, and long before the Commission sends a statement of objections to the parties.[72] Moreover, during both Phase I and Phase II investigations, the notifying parties usually have several meetings and other contacts with Commission staff, during which both sides can discuss the issues raised by the transaction. In particular, at any stage of the proceedings, including before the issuing of a statement of objections, the Commission may give the notifying parties the opportunity to express their views orally.[73]

During Phase II investigations, the Commission will also hold "State of Play" meetings with the parties, chaired by senior DG COMP officials,[74] to facilitate exchanges of information at key points in the procedure.[75] In practice, the parties would be invited to a first meeting within two weeks following the opening of proceedings, to a second meeting before the issuing of the statement of objections, and to a third meeting following their reply to the statement of objections and/or the oral hearing.[76]

4.4 Opening of investigation: The Commission may initiate an investigation of a possible violation of its laws or rules or a failure to comply with a previous order.

The Commission is the primary public antitrust enforcer in Europe and may pursue any possible violation of substantive EU competition law. While not formally bound by any legal principle to choose one case rather than another, the Commission is likely to act only in cases of infringements of the competition rules which in some way pertain to the Community public interest[77] and are considered to be serious, thus necessitating its intervention. In doing so, the Commission enjoys full discretion, which to a substantial degree is unchecked. Even in the case of formal complaints, the Commission is not bound to conduct an investigation into the alleged infringement of the competition rules. Its only obligation is to examine carefully the factual and legal particulars brought to its notice by the complainant, in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between the Member States (duty of vigilance).[78] If it decides to reject the complaint, all it must do is clearly set out appropriate reasoning for doing so.

[72] Paras. 5 to 25 of the Best Practice Guidelines.
[73] Article 14(1) of the Implementing Regulation.
[74] Para. 31 of the Best Practice Guidelines.
[75] Para. 30 of the Best Practice Guidelines.
[76] See Michael Kekelekis, "The "Statement of Objections" as an Inherent Part of the Right to Be Heard in EC Merger Proceedings: Issues of Concern", 25 ECLR 518 (2004), p. 525.
[77] The assessment of the Community public interest which a complaint may entail depends on the specific factual and legal circumstances, which may vary considerably from case to case, and not on predetermined criteria. See Case T-193/02, *Laurent Piau* v. *Commission*, not yet reported, para. 80.
[78] See e.g. Case T-24/90, *Automec Srl* v. *Commission (II)*, [1992] ECR II-2223, para. 35.

The Commission is also competent to pursue non-compliance with the procedural EU competition rules, i.e. cases where companies do not comply with Commission decisions requiring them to do or refrain from doing something. The Commission's basic instrument for ensuring compliance is the imposition of fines and/or periodic penalty payments.[79] In certain cases the Commission may adopt a new decision under Article 18 of Regulation 1/2003, requiring undertakings to submit information with a view to ensuring compliance.

4.4.1 How is an investigation triggered? Through a notification or application? By a third party complaint or information from another government agency or a court case? Or by information identified by the Commission staff itself?

In the context of the enforcement of Articles 81 and 82 EC, the Commission may commence proceedings (a) following a complaint,[80] (b) on its own initiative (*ex officio*),[81] or (c) as a result of a transfer from one or more national competition authorities which cooperate with the Commission in the framework of the European Competition Network.

Complaints can be lodged either by natural/legal persons or by Member States. A formal complaints procedure is available, but the Commission also receives and acts on informal complaints. If the complainant wishes to take advantage of certain procedural rights,[82] he must file the complaint using a special form (Form C) and follow the procedural requirements set out in Regulation 773/2004.[83] Complaints which do not conform with these requirements are considered by the Commission as general information and may trigger *ex officio* investigations. The Commission has issued a Notice on Complaints[84] setting out the arrangements available for submitting information informally and the procedure applicable to formal complaints.

Own-initiative actions begin when suspected infringements of Community competition law are brought to the Commission's attention. This may take place through a variety of channels, such as press articles or contacts with other antitrust enforcers. Article 17 of Regulation 1/2003 gives the Commission power to conduct investigations "*into a particular sector of the economy or into a particular type of agreement across various sectors*".[85]

The "transfer" of a case to the Commission by another national competition authority is not in reality an individual and separate triggering event: it is again an own-initiative action by the Commission, which retains full discretion when taking up a case. The mechanism for this cooperation between the Commission and national competition authorities is not based on a legislative text but on a soft law instrument, the Notice on Cooperation within the Network of Competition Authorities.[86] This fact alone means that the Commission's power to decide whether to investigate a case is totally discretionary and unchecked: in other words, there is

[79] Article 256 EC makes pecuniary obligations imposed by the Commission enforceable in terms of national procedural law.
[80] Art. 7(1) of Regulation 1/2003.
[81] *Ibid.*
[82] Such as a limited right of access to the Commission's file, the right to receive the statement of objections and comment on it, and the right to a hearing if the Commission decide not to act on the complaint.
[83] *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 [2004] L 123/18. Form C is an Annex to the Regulation.
[84] *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ [2004] C 101/65.
[85] For more details see answer to Question 5 below.
[86] *Commission Notice on cooperation within the Network of Competition Authorities*, OJ [2004] C 101/43, paras. 5 *et seq*.

no rule binding it to take up a case automatically. Indeed, the Notice only contains indicative guidance as to which competition authority is "*well placed*" to act.[87] According to the Notice, "[t]*he Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross border markets covering more than three Member States or several national markets). Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other Community provisions which may be exclusively or more effectively applied by the Commission, if the Community interest requires the adoption of a Commission decision to develop Community competition policy when a new competition issue arises or to ensure effective enforcement*".[88] The decision concerning the allocation of a case to an authority (including the Commission) is taken as a result of coordination between Network members, thus again involving a substantial degree of discretion.[89]

In the context of merger control, on the other hand, the investigation is triggered mainly by the merging parties' filing of a completed Form CO notification. When Form CO has been filed and the announcement of the filing has been published in the Official Journal, the Commission proceeds to Phase I. However, as mentioned above, the notification may have to be filed not with the Commission, but with the competition authorities of the Member States. This would be so when those authorities decide to refer the case to the Commission, even if the merger does not have a Community dimension.[90] If a proposed merger falls within the jurisdiction of three or more Member States, the merging parties may request the Commission, during the pre-notification phase, to take over the responsibility for examining it.[91] Equally, once a merger has been notified in one or more Member States, those Member States may request the Commission to conduct the examination of the transaction. In either of these two situations, the investigation will be triggered by the referral of the case to the Commission, either during the pre-notification phase or once it has been notified nationally.

Finally, there is one further situation which may trigger a Commission investigation: when the parties implement a merger with a potential Community dimension without having previously notified their intentions to the Commission. In this case the Commission will conduct an *ex-officio* investigation, and if it finds that the non-notified transaction indeed had a Community dimension, it will require the companies to dissolve the concentration.[92]

4.4.2 Are there checks on the investigation process? Any requirements that probable cause be established before investigations take place or any other protective

[87] See *ibid*, para. 7: "*Where re-allocation is found to be necessary for an effective protection of competition and of the Community interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible*".
[88] *Ibid*, paras. 14-15.
[89] *Ibid*, para. 18: "*Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months, starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation. During this period, competition authorities will endeavour to reach an agreement on a possible re-allocation and, where relevant, on the modalities for parallel action.*" (emphasis added).
[90] See above.
[91] Article 4(5) of the Merger Regulation.
[92] This will entail the dissolution of the merger or the disposal of all the shares or assets acquired, with the aim of restoring the situation prevailing prior to the implementation of the merger. If this is not possible, the Commission may take any other appropriate measure to restore the *status quo ante.* Article 8(4)(b) of the Merger Regulation.

requirements? How about requirements of approval (such as the requirement that lower level staff get higher-level approval in order to proceed)?

The Commission does not have to rely formally on the existence of a *prima facie* case in order to commence an investigation.

As already explained, the investigatory stage of the proceedings usually takes place before the Commission has formally opened the case. The decision to investigate is taken by a Head of Unit or Director General in DG COMP. At that stage, serious attention will be paid to administrative efficiency: the suspected infringement must be a priority from the enforcement perspective, because of its seriousness, the harm done to consumers, or its potential value as a precedent. The Commission also takes into account the resources that would have to be engaged in the investigation. A decision to start an investigation is also reviewed internally by a control unit within DG COMP. The factors taken into consideration are the implementation of the Commission's enforcement priorities and whether the case points to a *prima facie* infringement.

The Commission's initiation of proceedings in a specific case is to be seen in the context of the general priorities of EC competition policy determined by the Commission itself. EC competition law policy is also subject to more general policy guidelines set out by the European Council.[93] An example of such general policy guidelines which influence competition policy is the "Lisbon Strategy" adopted by the European Council in Lisbon in 2000. This is an ambitious ten-year strategy for stimulating economic growth and increasing employment in the EU. Competition policy complements and reinforces other Community policies that contribute to the Lisbon Strategy.[94]

After a decision is taken to open an investigation, the case is allocated to an individual case handler or a team of case handlers, depending on the complexity of the case. Case handlers initiate and conduct the investigation. They analyze the information already at the Commission's disposal, identify the next steps to be taken (interviews, requests for information, inspections) and propose them to their superiors for approval.

Following the information-gathering stage, the case handler will propose further actions to be taken (initiation of proceedings, statement of objections, preliminary assessment, interim measures). The Commission may initiate formal proceedings at any time, though in principle this will take place once the Commission has gathered sufficient evidence to support allegations of an infringement of competition law.

With regard to mergers, the Commission does not enjoy discretion as to whether or not to initiate proceedings. When a merger is considered to have a Community dimension, the Commission is bound to take up the case and issue a decision on the compatibility or otherwise of the merger with the common market (unless the notifying parties withdraw the notification).

[93] Compare Articles 2, 3 and 4 EC.

[94] See e.g. speech by Commissioner Neelie Kroes, "Building a Competitive Europe – Competition Policy and the Relaunch of the Lisbon Strategy", delivered at Bocconi University, Milan, 7th February 2005, available at: http://europa.eu.int/comm/competition/speeches/index_2005.html.

4.4.3 Are there ways by which a private party can push forward or expedite Commission action on an application or with respect to a complaint against a competitor? How about ways to slow down an investigation?

The speed at which the Commission's investigation proceeds depends largely on how cooperative are the companies involved in it. Thus in antitrust actions, investigated companies have plenty of opportunities to influence the speed of the proceedings. By cooperating and supplying the Commission with evidence, a company may considerably advance the Commission's action. Conversely, it is possible to slow down antitrust proceedings simply by cooperating with the Commission only insofar as is necessary to avoid being fined. For example, a company may give incomplete answers to the Commission's requests for information and use its privileges to withhold certain evidence from the Commission. Such simple means can considerably slow down the Commission's action.

With regard to complaints by third parties, Commission inaction may be challenged before the CFI by means of an action for failure to act under Article 232 EC. The Commission's failure to act must be illegal, i.e. it must be under a specific obligation to act in the circumstances. The general duty imposed on the Commission to ensure the application of EC competition law[95] does not confer on individuals an enforceable legal right to require the Commission to take certain measures, such as a decision to terminate an infringement. Such a right will arise only if the right conferred on individuals clearly requires specific action by the Commission. This is the case under Article 7 of Regulation 773/2004, which requires the Commission to give a complainant a provisional statement of its reasons when there are insufficient grounds for acting on the complaint.

Although there are no special rules or procedures on lobbying, Article 157(2) EC imposes a duty on the Commission to act in the general interest of the Community and be completely independent in the performance of its duties. The Commissioners may not accept instructions from any government or other body. Commission officials are also under an obligation to act objectively and impartially, in the Community interest and for the public good. While companies do, of course, engage in lobbying, political pressure is certainly far less evident in the antitrust than in the state aid field.

In the merger field, the Commission must decide on the case by strict deadlines. However, these deadlines may be extended when the merging companies offer commitments, or when they submit an incomplete notification or fail to provide the Commission with requested information by the set deadline. In addition, the merging companies may request an extension of the time limits provided for in the Merger Regulation. The Commission may only trigger such an extension with the consent of the parties.[96]

The only way in which the parties can expedite the proceedings before the Commission is through the pre-notification meetings. Before submitting the formal notification, the Commission and the parties very often have several pre-notification contacts (see answer to question 4.1). As a result of these contacts, the Commission may have gathered a great deal of information by the time it initiates Phase I proceedings. It would thus be able to assess the notified merger in greater detail from the very beginning and identify any competition issue at an earlier stage, thus also allowing the parties to submit commitments addressing these concerns earlier and favoring the possibility of clearance before the end of Phase I. Indeed,

[95] See Article 85 EC.
[96] See Article 10 of the Merger Regulation.

in a recent merger of two companies active in the production and distribution of industrial and medical gases,[97] the Commission was able to gather and analyze large quantities of market data from both the merging parties and third parties in a relatively short period of time. This allowed the Commission to assess and address various competition concerns, and the parties to submit remedies, within the time constraints of a Phase I procedure.

On the other hand, there are a few situations where the whole merger clearance procedure may slow down. This may happen if the investigation during Phase I or Phase II is suspended.[98] Suspension may take place when the Commission a) decides to require an individual, corporation or association of corporations to supply information by decision,[99] or b) the Commission issues a decision ordering an investigation of corporations and associations of corporations[100] on any of the following grounds:

- when information requested from one of the notifying parties is not provided or not provided in full by the deadline fixed by the Commission; or when a third party fails to provide such requested information and the reason for not having provided it involves one of the notifying parties,[101]

- when one of the notifying parties or another party involved refuses to submit to or cooperate with a Commission inspection[102] or

- when the notifying parties do not inform the Commission of material changes in the facts and information contained in the notification.[103]

In cases where the Commission decides to require the supply of information without first issuing a simple request for information, the time limits will also be suspended if the request is due to circumstances for which one of the merging parties is responsible.[104]

4.5 Personnel and Committees

4.5.1 Describe the organization of the staff on the Commission side during the application and the investigation phase. What is the division of responsibilities between staff members and supervisors?

The Commission consists of 25 Commissioners,[105] including the President and two Vice-Presidents. The Commission acts by majority vote.[106] Commissioners must be nationals of a

[97] Commission Decision of 15 March 2004 (COMP/M.3314-*Air Liquide/Messer Targets*).
[98] Article 9(1) of the Merger Regulation.
[99] Article 11(3) of the Merger Regulation.
[100] Article 13(4) of the Merger Regulation.
[101] Article 9(1)(a), (b) of the Merger Regulation. The time limits will be suspended for the period between the expiry of the time limit set in the simple request for information, and the receipt of the complete and correct information required by decision (Article 9(3)(a) of the Implementing Regulation).
[102] Article 9(1)(c) of the Merger Regulation. The time limits will be suspended for the period between an unsuccessful attempt to carry out an inspection and the completion of the inspection ordered by decision.
[103] Article 9(1)(d) of the Merger Regulation. The time limits will be suspended for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information.
[104] Article 9(2) of the Merger Regulation.
[105] Before the EU enlargement on 1 May 2004, there were 20 Commissioners. After enlargement the number of Commissioners rose to 30. Since 1 November 2004 there are 25 Commissioners. The number of Commissioners is certain to change again following further enlargement of the EU.

Member State. The EC Treaty obliges them to act independently of the Member States and any other body; in particular, they are not allowed to take instructions from the Member State whose national they are.[107] Each Commissioner is responsible for one or more Community policies. The Commission is divided into Directorates General covering a wide range of Commission policies. A specific Competition Directorate General (DG COMP) is responsible for the enforcement of competition and State aid policy. DG COMP is headed by a Director General, and there are also three Deputy Directors General and a Chief Competition Economist.[108]

DG COMP is divided into nine Directorates, most of which are responsible for wide-ranging sectors of the economy. They are headed by Directors. Five are operational Directorates responsible for processing cases;[109] it is with the staff of these Directorates that companies usually have contacts. Two Directorates are responsible for state aid policy.[110] Directorate A deals with general policy and strategic support, and Directorate R with strategic planning, and human and financial resources. Each Directorate of DG COMP is further divided into Units, and this division in most cases corresponds to a specific economic sector. A unit consists of a head of unit and case handlers responsible for conducting investigations and proposing measures to be taken by the Commission in individual cases. Each operational Directorate includes a merger unit.

Another important Commission body which becomes involved in competition cases is the Legal Service, which is the Commission's in-house legal department. It provides legal advice, assistance and representation on the whole range of Commission policies. The team of lawyers dealing with competition cases in the Legal Service cooperates with DG COMP throughout the proceedings in cases likely to result in a formal decision. The Legal Service acts independently of the Directorates-General and Commissioners, and is directly responsible to the President of the Commission. Its opinion is mandatory on any formal act to be taken by the Commission. If the Legal Service does not approve of the proposed measure, the matter must be decided by the College of Commissioners.[111]

Under the EC Treaty, the Commission as a collegiate body is responsible for implementing and enforcing EC competition policy: its tasks include the duty to investigate and penalize individual infringements. Though formal decisions in competition cases are taken by the College of Commissioners,[112] the Commission's workload means that the Commissioners

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[106] Article 219 EC.

[107] Article 213(2) EC.

[108] This post was created in 2003 to offer an independent economic assessment of competition policy developments and advise the Commission when a more complex economic analysis is necessary. The Chief Competition Economist (CCE) team is a specialized unit of DG COMP, consisting of the CCE and ten members. The unit is attached to the Director General, to whom the CCE reports directly. For more information see: A Discussion With Professor Lars-Hendrik Röller, Chief Economist, Directorate General for Competition, European Commission, available at: http://www.abanet.org/intlaw/divisions/regulation/intl_antitrust/abarollerreport.pdf.

[109] They are Directorate B: Energy, Water, Food and Pharmaceuticals, Directorate C: Information, Communication and Media, Directorate D: Services, Directorate E: Industry and Directorate F: Consumer Goods.

[110] Directorates G and H.

[111] See Christopher S. Kerse and Nicholas Khan, *EC Antitrust Procedure*, (London 2005), pp. 36-37.

[112] Compare Cases T-25/95, T-26/95, T-30/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-70/95, T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others* v. *Commission*, [2000] ECR II-491, paras. 759-760: "*The functioning of the Commission is governed by the principle of collegiate responsibility. The Court points out that, pursuant to that principle, decisions should be the subject of collective deliberation and all the Members of the College of Commissioners should bear*

cannot decide every procedural step personally. Thus some of the Commission's powers are delegated to the Commissioner for Competition, and then sub-delegated to the Director General and the Hearing Officers.[113] The ECJ has, however, limited the delegation of the Commission's powers to everyday measures of management or administration. In particular, the Court has held that decisions finding infringements of EC competition law may not be delegated to the Competition Commissioner.[114]

In practice, case teams of DG COMP officials deal with individual cases. A case team consists of a case manager who is a senior DG COMP official[115] and usually two or three case handlers. The case handlers conduct the investigation and propose measures to be taken by the Commission. Before a proposal is presented to the Competition Commissioner for approval, it is formally examined by the Commission's hierarchy. In particular, Directorate A of DG COMP monitors the measures proposed by case handlers before they are sent to the Legal Service for further consultation.

With regard to merger control, as part of the reform package which the Commission implemented during 2004, DG COMP underwent internal reorganization to make its handling of merger control more efficient. The reorganization sought to rationalize staff resources in view of the accession of the ten new Member States and an expected increase in the workload. It can also be seen in part as a consequence of recent CFI rulings which overturned Commission decisions prohibiting certain mergers on the grounds that the Commission's evidence to substantiate their anti-competitive effects was not sufficiently strong.

The main element in the reorganization was the integration of the Merger Task Force ("MTF") into the Directorates dealing with specific sectors of the economy. The reorganization was implemented in two main stages. During the first stage, the MTF was integrated into each of these sectoral Directorates. The second stage involved the MTF's total replacement by a coordination unit reporting to a Deputy Director General who oversees consistency of procedure and policy. This means that each unit in each sectoral Directorate will deal with any type of case in its allotted industrial sector, i.e. cartels, mergers, and abuses of dominance.

As a more direct attempt to improve its economic approach when assessing concentrations, the Commission appointed Professor Lars-Hendrik Röller[116] as Chief Economist in DG COMP. He is supported by a team of some 10 economists who provide case-handlers with economic and econometric input and conduct a critical examination of the case team's conclusions. He reports directly to the Director General for Competition. Professor Röller is said to have advised the Commission on the prohibited *General Electric/Honeywell* and

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collective responsibility at political level for all decisions adopted. Under the principle of collegiate responsibility, the information on which the Commission's decisions are based must be available to all the members of the college."

[113] The possibility for the Commission to delegate its powers is provided by Articles 13 and 14 of the Rules of Procedure of the Commission (OJ [2000] L 308/26).

[114] See Case 5/85 *AKZO Chemie BV and AKZO Chemie UK Ltd* v. *Commission*, [1986] ECR 2585, paras. 32-33.

[115] Depending on the circumstances it would be a head of unit, or if the case is important, a Director or a Deputy Director.

[116] Professor Röller is an eminent and internationally renowned economist. He is Professor of Economics at Humboldt University in Berlin, Director of the Institute for Competitiveness and Industrial Change at the *Wissenschaftszentrum Berlin für Sozialforschung* and Program Director of the Centre for Economic Policy Research in London, and also has academic experience of the United States.

approved *GE/Instrumentarium* mergers.[117] The Commission will also set up individual *ad hoc* panels, including officials from other DGs, to offer the case team an independent internal review and test its conclusions at different stages during the procedure.

4.5.2 Any requirement of consultation with advisory committees or other parts of the Commission? Does the comitology process come into play here? How about consultation with Member States or agencies of Member States?

As explained, each case team consists of case handlers and a case manager from a particular sectoral Directorate within DG COMP. In addition, the Chief Economist's team may become involved in individual cases which require a complex economic analysis. A Chief Economist team member becomes a member of the case team but reports back to the Chief Economist. The involvement of the Chief Economist's team in a particular case requires the approval of the Director General.

The Legal Service must give its opinion before a statement of objections is sent, a complaint formally rejected, a preliminary draft decision submitted to the Advisory Committee[118] or a draft decision placed before the Commission. Legal Service officials also in practice take part in certain procedural stages such as the hearing, and at the meeting of the Advisory Committee.

After the Legal Service has approved a proposed measure, it is formally endorsed by the Competition Commissioner. Other Directorates General are also consulted on a proposed decision (inter-service consultation), usually those responsible for some aspects of regulation of the product market concerned by the decision. In some cases, before the formal adoption of a decision, the Commission must consult the Advisory Committee on Restrictive Practices and Dominant Positions,[119] which is composed of representatives of the competition authorities of the Member States. Consultation with the Advisory Committee precedes the taking of all decisions on infringements, interim measures, commitments, inapplicability and withdrawal of a block exemption benefit. The requirement of consultation also applies to Commission decisions on investigations into sectors of the economy and into types of agreements.[120] The Commission must take "*utmost account of the opinion delivered by the Advisory Committee*" and inform it of how its opinion has been taken into account.[121] If the Committee's opinion is given in writing, it must be attached to the draft decision to be considered by the Commissioners.[122] The Commission publishes the Committee's opinion if the Committee so recommends.

In merger control proceedings too, the Commission is assisted by an Advisory Committee for the adoption of provisions implementing the Merger Regulation,[123] composed of representatives of the Member States. The Commission will consult it before adopting decisions ending Phase II proceedings or imposing fines and periodic penalty payments.

[117] Commission Decision 2004/134/EC of 3 July 2001 (M.2220-*General Electric/Honeywell*), OJ [2004] L 48/1; Commission Decision of 2 September 2003 (M.3083-*GE/Instrumentarium*).
[118] See just below.
[119] See Article 14 of Regulation 1/2003.
[120] See Article 17(2) of the Regulation 1/2003.
[121] See Article 14(5) of the Regulation 1/2003.
[122] See Article 14(6) of the Regulation 1/2003.
[123] See Recital 46 of the Merger Regulation.

These consultations must take place at meetings chaired and convened by the Commission, to be held no later than 10 days after a convocation notice has been sent. The Advisory Committee then delivers an opinion on the provision proposed by the Commission (if necessary, by voting), and the Commission will take full account of this opinion. In complex merger cases, DG COMP may also consult and debate with other DGs.

4.6 Notice

4.6.1 Is a complaint issued before an investigation begins or does investigation precede the complaint?

As explained above, in most cases the investigation precedes any formal act of "initiation of proceedings" or "complaint".[124] The initiation of proceedings is viewed by Regulation 773/2004, pursuant to earlier case-law, as a formal act which precedes any decision by the Commission that:

(a) orders the termination of competition law infringements (with or without fines)

(b) orders interim measures

(c) makes commitments binding on companies, or

(d) declares that the competition rules do not apply to particular conduct (positive decision).

According to Article 2 of the Regulation, proceedings are initiated no later than:

(a) the date when a statement of objections is issued, if the Commission contemplates taking an infringement or interim measures decision,

(b) the date of issuing a "preliminary assessment", when the Commission expresses concerns to companies which then offer commitments,

(c) the date of publication of a notice in the Official Journal under Article 27(4) of Regulation 1/2003, prior to a decision making commitments binding or declaring the inapplicability of the competition rules, whichever is earlier.

The initiation of proceedings is not really of paramount legal significance. Its function is basically two-fold. Firstly, it interrupts the limitation period for the imposition of fines and periodic penalty payments under Article 25(3)(c) of Regulation 1/2003. Secondly, it is at this point that other national competition authorities dealing with the same case are relieved of their competences pursuant to Article 11(6) of Regulation 1/2003. It is true that the legislative texts do not refer with clarity to a specific act that constitutes the initiation of proceedings. Indeed, the Court of Justice has considered the initiation of proceedings not as a challengeable act, but rather as a distinct procedural step towards the taking of a decision.[125]

Article 2(3) of Regulation 773/2004 provides that the Commission may exercise its powers of investigation before initiating proceedings. In practice investigations will almost certainly

[124] The US term "complaint" will not be used here. See above.
[125] Case 60/81, *International Business Machines Corporation* v. *Commission*, [1981] ECR 2639, paras. 10-11.

precede the initiation of proceedings, which usually takes place just before the statement of objections is served on the parties.[126]

As regards merger control, if during Phase II, and after the parties have presented commitments (assuming they have made use of this possibility), the Commission still thinks that the merger would significantly impede effective competition, it will issue a statement of objections, to which the parties may respond. Thus the statement of objections is only issued after the Commission's investigation has been initiated, and only in those cases where the investigation runs into a second phase. Indeed, it is usually sent around four weeks after Phase II begins.

4.6.2 What are the requirements of notifying the target of a pending investigation or of the decision to issue a complaint? What information is conveyed in the notice? How specific must the notice be?

The Commission is not formally bound to publicize or notify the initiation of proceedings to the companies concerned. According to Article 2(2) of Regulation 773/2004 "[t]*he Commission <u>may</u> make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.*"[127] The non-notification of the initiation of proceedings to a target of an investigation and future addressee of a Commission decision is not considered detrimental to his rights of defense. Notification is only necessary if the Commission intends to publicize that act. For all other purposes, it is only the statement of objections that matters.

Indeed, the ECJ distinguished in the *Dyestuffs* case between the statement of objections and the commencing of proceedings. According to the Court, "*it is the notice of objections and not the decision to commence proceedings which is the measure stating the final attitude of the Commission concerning undertakings against which proceedings for infringement of the rules on competition have been commenced*".[128] Therefore, the initiation of proceedings is not considered critical for the rights of defense.

Naturally, companies which are the target of a Commission investigation will already have direct knowledge about the case taken up by the Commission long before the initiation of proceedings, since the investigation measures usually precede this. Thus they may already have received requests for information or been subject to inspections.

The statement of objections is the most important document which a company under investigation receives up to that stage in the proceedings. In it, the Commission informs the parties concerned of the objections raised against them. It is duly notified to them and the Commission sets a deadline by which the parties may inform it in writing of their views. Their written submissions may set out all facts known to them which are relevant to their defense. The parties must also attach any relevant documents to support the facts set out, and may propose that the Commission hear evidence to corroborate the facts set out in their submission.[129]

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[126] See Kerse and Khan, *op.cit.*, p. 123.
[127] Emphasis added.
[128] Case 48/69, *Imperial Chemical Industries Ltd.* v. *Commission*, [1972] ECR 619, para. 17.
[129] Article 10 of Regulation 773/2004.

As regards merger control, there are two basic requirements regarding the notification to the parties of the Commission's statement of objections: (i) it must be made in writing, and (ii) DG COMP must set a deadline by which the notifying parties may provide the Commission with written comments.[130] In general, the statement of objections sets out the facts that led the Commission to conclude what the relevant markets are and how the notified transaction would significantly impede effective competition within the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.[131]

An important element to be included in the statement of objections is the documentary evidence the Commission has obtained through its own investigation or from third parties, and on which its objections are based. In any event, the Commission's future decision will be based only on information on which the parties have had the opportunity to submit comments. If the Commission wishes to raise further objections, therefore, it must do so in a separate statement of objections.[132]

4.6.3 Are third parties notified of such action? What public notice is provided? Are complaints confidential?

As explained above, Article 2(2) of Regulation 772/2004 does not require publication of the initiation of proceedings. However, the Commission usually publishes a very short notice describing the new case on the DG COMP website.[133] Article 2(2) provides that in such cases the target company must be informed in advance, presumably to give it the possibility of drawing the Commission's attention to confidentiality issues.

A copy of the non-confidential version of the statement of objections is communicated to the complainant, but not to the public. The Commission also gives the complainant a deadline by which to make its views known in writing.[134]

In the merger control procedure, third parties involved in the case are also informed in writing of the Commission's objections.[135] In the majority of cases they would not receive the statement of objections as such, but only information about the Commission's main objections. Once the Commission initiates Phase II proceedings or decides to send the parties a statement of objections, it will publish a notice in the Official Journal and a press release in its web site, giving information on the competition concerns that led it to initiate Phase II or issue the statement of objections. As to the confidentiality of the statement of objections, in general, any information and documents used during merger clearance proceedings that contain business secrets or other confidential information, as may be the case for the statement of objections, will not be made accessible when the Commission considers that their disclosure is not necessary.[136]

[130] Article 13(2) of the Implementing Regulation.
[131] Article 2(2) of the Merger Regulation.
[132] Article 18(3) of the Merger Regulation.
[133] http://europa.eu.int/comm/competition/whatsnew.html.
[134] Article 6(1) of Regulation 773/2004.
[135] Article 13(2) of the Implementing Regulation.
[136] Articles 18(1) of the Implementing Regulation.

4.7 Conduct of the investigation

4.7.1 Are there time limits on completing investigation? Where no time limits are specified, are there general requirements? What happens if time limits are exceeded?

Commission investigations in the context of Articles 81 and 82 EC are not subject to any time limit, and indeed are usually completed after a considerable amount of time. It is not infrequent for such investigations to drag on for years.

While no specific time limits exist, and Article 6 of the European Convention on Human Rights, which speaks of the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal, is not directly transposable to the case of administrative proceedings before the Commission,[137] the general principles of Community law oblige the Commission to complete its investigations within reasonable time limits.[138] There must be specific exceptional reasons for an unduly lengthy duration if the Commission is to escape censure by the European Courts.[139]

Also relevant is the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union,[140] now reflected in Article II-101 of the draft Treaty establishing a Constitution for Europe, which refers to the right of everyone "*to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*".[141]

As described above, in merger control proceedings the Commission must complete its investigation within given time limits, which may be extended in certain circumstances. If

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[137] It applies fully only to judicial review proceedings before the CFI. See Case C-185/95 P, *Baustahlgewebe GmbH* v. *Commission*, [1998] ECR I-8417, paras. 20-21: "*It should be noted that Article 6(1) of the EHRC provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... The general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights and in particular the right to legal process within a reasonable period, is applicable in the context of proceedings brought against a Commission decision imposing fines on an undertaking for infringement of competition law*." See further Koen Lenaerts, "De quelques principes généraux du droit de la procédure devant le juge communautaire", in: Vandersanden & de Walsche (Eds.), *Mélanges en hommage à Jean-Victor Louis*, Vol. I (Bruxelles, 2003), pp. 241-242. See also Richard Wainwright, "Human Rights: What Have they to Do with European Competition Law?", in: Andenas, Hutchings & Marsden (Eds.), *Current Competition Law*, Vol. III (London, 2005), p. 476, who stresses that the "reasonable time" obligation runs from the notification of the statement of objections which is considered to be the time when "the person is charged" in terms of the European Convention of Human Rights. See, however, *contra* paras. 100-104 of the Opinion of AG Kokott of 8 December 2005 in Case C-113/04 P, *Technische Unie BV* v. *Commission*, judgment still pending.

[138] See Joined Cases T-5/00 and T-6/00, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV* v. *Commission*, not yet reported, paras. 74 *et seq*.

[139] The Commission's undue delay in handling proceedings may, for example, have consequences for its case in an interim measures application. In Case T-65/98 R, *Van den Bergh Foods Ltd.* v. *Commission*, Order of 7 July 1998, [1998] ECR II-2641, para. 69, the President of the CFI rejected the Commission's arguments as to the public interest in the immediate enforcement of the contested measure, pointing out that as the length of the administrative procedure which led to the decision was due in part to steps taken by the Commission itself, the Commission was not entitled to claim that immediate enforcement of the decision was a matter of urgency.

[140] OJ [2000] C 364/1.

[141] OJ [2004] C 310/1. On the bearing of the principle of good administration in this area, see also Rafael García-Valdecasas y Fernandez, "La protection des droits de la défense dans les procédures administratives de concurrence : Un regard européen", Paper Presented at the Conference "Droit de la concurrence et droits de l'homme" of the Ordre des avocats à la Cour de Paris and the École Nationale de la Magistrature (Paris, 7 October 2003), pp. 15-16.

the Commission does not take any decision within the time limits, the consequence is that the transaction will be deemed to be compatible with the common market.[142] If the parties do not present their commitments within the time limits, the Commission will not take the commitments into account when deciding whether or not to clear the transaction.

4.7.2 What are the techniques whereby the Commission can investigate private parties and learn the facts of disputed transactions? Required periodic reports? Subpoenas (or equivalent process such as Article 11) to compel persons to show up and give testimony? Subpoenas to require the submission of documents? Physical inspections of business premises or private homes? Inspection of required records? What are the consequences of failing to comply with compulsory process?

Regulation 1/2003 provides an array of investigatory measures which the Commission may take in the context of enforcing the Treaty competition rules.

Firstly, the Commission may seek to obtain information,[143] not only from the companies suspected of violating the competition rules, but also from third parties. The Commission may exercise this power either by making a simple request (Article 18(2)) or by adopting a formal decision requiring information (Article 18(3)). The new Regulation has simplified the procedure of requests for information by no longer requiring a two-step process; the Commission may now choose between a simple request or a formal decision at the outset.

A simple request for information must be made in writing, state the legal basis and its purpose (which in effect means that the Commission must identify a suspected infringement) and identify the information sought as precisely as the circumstances permit.[144] There is no legal obligation to reply to requests for information under Article 18(2) of Regulation 1/2003, but the recipients are subject to potentially substantial fines if they supply incorrect or misleading information.[145] At this stage the company may seek legal advice and/or contact the Commission directly to clarify the questions or the scope of information the Commission seeks to obtain.

The Commission may also adopt a formal decision requiring information from an undertaking under Article 18(3) of Regulation 1/2003. Such a decision may be challenged before the CFI. An addressee of such a decision who fails to provide the required information within the time limit set by the Commission may be subject to fines or periodic penalty payments.[146]

In most cases a request for information would follow on-the-spot inspections, which are likely to be the first contact a company will have with the Commission in the course of the proceedings. In some cases companies are informed of the inspection in advance, usually by phone or fax. The Commission will previously consult the national competition authority of the Member State on whose territory the inspection is to be conducted. Officials of national

[142] Article 10(6) of the Merger Regulation.
[143] Article 18 of Regulation 1/2003. This provision also entitles the Commission to require the disclosure of documents. See Case 374/87, *Orkem* v. *Commission*, [1989] ECR 3283, paras. 13-16, where the Court decided that a corresponding provision in the old Regulation 17 entitled the Commission to require the disclosure of documents.
[144] See Kerse and Khan, *op.cit.*, p. 134.
[145] Article 23(1)(a) of Regulation 1/2003 empowers the Commission to fine companies for supplying intentionally or negligently incorrect or misleading information in response to a request for information made under Article 18(2). The amount of the fine may reach 1% of the total turnover in the preceding business year.
[146] See Articles 23(1)(b) and 24 of Regulation 1/2003.

competition authorities may also assist Commission officials in carrying out these inspections. An inspection may include entering business premises, examining books and business records, taking copies and asking for oral explanations. Article 20 of Regulation 1/2003 also provides for the sealing of business premises and books or records, for asking representatives or members of staff of undertakings for explanations and for recording their answers.[147]

The old system's distinction between voluntary and mandatory investigations is retained. For a voluntary inspection, a simple authorization as provided by Article 20(3) of Regulation 1/2003 is sufficient, although the Commission may choose to arm itself with a formal decision adopted under Article 20(4), to which companies are required to submit. Article 20 of Regulation 1/2003 does not require the authorization of national judicial authorities for inspections of business premises, but such authorization is required for inspections of non-business premises. There are serious doubts, however, as whether this provision is compatible with the case-law of the European Court of Human Rights, which made it clear in a recent case that even business premises are protected.[148] It therefore seems that Article 20 will have to be read in accordance with that case-law.[149]

In the case of mandatory investigations, an undertaking's opposition to an inspection ordered by Commission decision also raises the delicate problem of cooperation with national judicial authorities. Article 20 integrates the principles established by the recent judgment of the Court of Justice in *Roquette Frères*.[150] According to the ECJ, the purview of national courts should be limited to checking whether the Commission decision is authentic and whether the coercive measures sought are arbitrary or excessive. For this purpose, national courts may address questions to the Commission. The ECJ also stated that when considering the matter, national courts may not substitute their own assessment of the need for the investigations ordered for that of the Commission. The lawfulness of the Commission's assessments of fact and law is subject to review only by the Community judicature.[151]

Failure to submit to a mandatory inspection may lead to fines and periodic penalty payments.[152] Fines may also be imposed when the companies concerned produce the required books or other records in incomplete form, are responsible for breaking seals affixed by Commission officials, or give incorrect or misleading answers or otherwise fail to provide complete answers on facts relating to the subject-matter and purpose of a mandatory inspection.[153]

Article 21 of the new Regulation for the first time gives the Commission power to order the inspection of non-business (domestic) premises. The conditions are quite strict, since the violation of Articles 81 and 82 EC must be "*serious*", and a "*reasonable suspicion*" must exist that books or other records related to the business and the subject-matter of the inspection are being kept "*in any other premises, land and means of transport, including the*

[147] See also Article 4 of Regulation 773/2004.
[148] ECHR, 2nd Section, judgment of 16-4-02 in Case n• 37971/97, *Stés Colas Est and Others* v. *France*.
[149] See also Jean Mischo, "*Hoechst*, *Colas*, *Roquette* : Illustration d'une convergence", in: Colneric, Edward *et al*. (Eds.), *Une Communauté de droit*, *Festschrift fur Gil Carlos Rodriguez Iglesias* (Berlin, 2003), p. 145, who speaks of the necessity to amend Article 20.
[150] Case C-94/00, *Roquette Frères SA* v. *Directeur Général de la Concurrence, de la Consommation et de la Répression des Fraudes*, [2002] ECR I-9011.
[151] *Ibid*, paras. 39 *et seq*.
[152] Articles 23(1)(c) and 24(1)(e) of Regulation 1/2003.
[153] Article 23(1)(c),(d),(e) of Regulation 1/2003.

homes of directors, managers and other members of staff of the undertakings". To that end a reasoned decision is required, along with the prior authorization of a national judicial authority. The latter's purview covers the authenticity of the Commission decision and the non-arbitrariness and non-excessiveness of the specific measure. The national court may ask the Commission for more detailed explanations, but once again, it may not substitute its own assessment for that of the Commission, and may not ask to have the whole file transmitted to it.

Finally, the Commission also has power under Article 19 of Regulation 1/2003 to take statements from any person who consents to be interviewed for the purpose of collecting information relating to the Commission's investigation. Although such power was absent from Regulation 17, the Commission has in the past used statements obtained outside the scope of on-the-spot inspections as evidence of infringements. Article 19 formalizes this practice, and Article 3 of Regulation 773/2004 further specifies the formalities for conducting an interview by the Commission. Conducting interviews will be a powerful tool for the Commission, especially as it will also be able to record them.[154] No fine or penalty is provided for offering incorrect or misleading information at an interview.

In EC merger control proceedings, the Commission will start very early on to gather details of the market affected by the transaction. This can be done in many different ways. As its first source of information on the facts of the transaction, the Commission will use the Form CO, but it will also request information from the merging parties and sometimes from other corporations or associations of corporations. The Commission may ask for this information by simple request or by decision.[155] The Commission may also request the governments and competent authorities of the Member States to provide it with all the information it needs to conduct the investigations,[156] and may interview any natural or legal person by telephone or other electronic means, if that person gives his consent.[157] The Commission may also investigate private parties, and may request the authorities in the Member States to conduct an investigation according to their national law.[158]

The Commission's specific powers of investigation under the Merger Regulation are very similar to its powers of investigation in antitrust proceedings, the main difference being that in merger proceedings, unlike antitrust proceedings, Commission officials cannot conduct searches in private homes. In general, the Commission is authorized to conduct all necessary inspections of business premises.[159] Its powers to investigate private parties include the possibility to (i) enter any premises, land and means of transport of undertakings or associations of undertakings, (ii) examine the books and other records related to the business, irrespective of the medium on which they are stored, (iii) take or obtain, in any form, copies of, or extracts, from such books or records, (iv) seal business premises and books of records for the period and to the extent necessary for the inspections, (v) ask any representative or member of staff of the corporation or association of corporations for explanations of facts or documents relating to the subject matter and purpose of the inspection, and record answers.[160]

[154] Article 3(3) of Regulation 773/2004.
[155] Article 11(1) of the Merger Regulation.
[156] Article 11(6) of the Merger Regulation.
[157] Article 11(7) of the Merger Regulation.
[158] Article 12(1) of the Merger Regulation.
[159] Article 13(1) of the Merger Regulation.
[160] Article 13(2) of the Merger Regulation.

The consequences for failing to comply with compulsory requests for information or submission to investigation are fines of up to 1% of the aggregate turnover of the undertaking or associations of undertakings.[161] In particular, the Commission may impose such fines when (i) the parties from whom information is requested by decision supply incorrect, incomplete or misleading information; or do not supply information within the required time limit,[162] (ii) the parties produce the required books or other records related to the business in incomplete form during inspections, or simply refuse to submit to an inspection ordered by decision,[163] (iii) the Commission asks a representative or member of the corporation for explanations of facts or documents relating to the investigation, and that person gives an incorrect or misleading answer, fails to rectify such an answer by a certain deadline, or just fails or refuses to provide a complete answer,[164] or (iv) seals fixed during the investigation by Commission officials or other authorized persons are broken.[165] The Commission may also impose periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertakings or associations of undertakings concerned for each working day of delay in cases (i) and (ii) above.

4.8 Rights and duties of target

4.8.1 What privileges are available to the target of investigation? Attorney client? Self-incrimination? Work product?

During the investigation of a competition law infringement, the target of the investigation enjoys certain rights and privileges. First and foremost, the Commission is bound to respect human rights, which are general principles of Community law and apply to any form of action or inaction by the Community institutions. Respect for human rights is therefore a condition of the lawfulness of Community acts.[166] Fundamental rights form an integral part of the general principles of law, whose observance is ensured by the Courts. For that purpose, the Courts draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, most notably the European Convention on Human Rights.[167]

In EC competition law proceedings, particular regard must be had to the rights of defense, a principle whose fundamental nature has been stressed on numerous occasions in the Courts' judgments.[168] More specifically, the Courts have pointed out that defense rights must be observed in administrative procedures which may lead to the imposition of penalties. That protection extends also to "*preliminary inquiry procedures including, in particular,*

[161] Article 14(1) of the Merger Regulation.
[162] Article 14(1)(c) of the Merger Regulation.
[163] Article 14(1)(d) of the Merger Regulation.
[164] Article 14(1)(e) of the Merger Regulation.
[165] Article 14(1)(f) of the Merger Regulation.
[166] Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759, para. 34.
[167] *Ibid*, para. 33.
[168] See in particular Case 322/81, *Michelin*, *op.cit.*, para. 7; Cases 97/87 to 99/87, *Dow Chemical Ibérica SA and Others* v. *Commission*, [1989] ECR 3165, paras. 11 *et seq*.

investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable".[169]

In addition, Commission action is subject to the principle of proportionality. Thus the Courts have held that inspections and requests for information must be necessary and proportionate to the objective pursued by the Commission.[170] Indeed, proportionality limitations are expressly provided for in the text of Regulation 1/2003.[171]

More specifically, the target of a Commission investigation is entitled to claim legal professional privilege, which covers lawyer-client communications made for the purpose and in the interest of the client's right of defense. The privilege covers only documents emanating from an independent lawyer, not those produced by in-house counsel.[172]

The target also has the right to avoid self-incrimination, although this is limited by the obligation for a company to cooperate with the Commission.[173] Thus the Commission is not entitled to require the target of its investigations to answer questions if the answer would be equivalent to the admission of an infringement.[174] On the other hand, the right to avoid self-incrimination does not mean that the Commission cannot reward companies that plead guilty by reducing their fine. As the Court of Justice has put it, "*while the Commission may not compel an undertaking to admit its participation in an infringement, it is not thereby prevented from taking account, when fixing the amount of the fine, of the assistance given by that undertaking, of its own volition, in order to establish the existence of the infringement*".[175]

4.8.2 Is there a duty on the part of private parties to cooperate in the investigation? What is the nature and source of this duty and does it vary as between sanction cases and application cases?

[169] Cases 97/87 to 99/87, *Dow Chemical*, *op.cit.*, para. 12.

[170] See e.g. Cases 97/87 to 99/87, *Dow Chemical*, *op.cit.*, paras. 16-17: "[I]*n all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognized as a general principle of Community law. In that regard, it should be pointed out that the Court has held that it has the power to determine whether measures of investigation taken by the Commission under the ECSC Treaty are excessive ... The nature and scope of the Commission' s powers of investigation under Article 14 of Regulation No 17* [equivalent to Article 20 of Regulation 1/2003] *should therefore be considered in the light of the general principles set out above* ."

[171] Articles 20(8) and 21(3) of Regulation 1/2003.

[172] See Case 155/79 *A.M. & S.* v. *Commission* [1982] ECR 1575, para. 27; Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd.* v. *Commission*, currently pending; for more details, see Themistoklis Giannakopoulos, *Safeguarding Companies' Rights in Competition and Anti-dumping/Anti-subsidies Proceedings* (The Hague/London/New York 2004), pp. 78-94.

[173] See below.

[174] Case 374/87, *Orkem*, *op.cit.*, paras. 28 *et seq.*; Case T-112/98 *Mannesmannröhren-Werke AG* v. *Commission* [2001] ECR II-729, paras. 62 *et seq.* See further Giannakopoulos, *op.cit.*, pp. 100-108; Bo Vesterdorf, "Legal Professional Privilege and the Privilege against Self-incrimination in EC Law: Recent Developments and Current Issues", in: Hawk (Ed.), *International Antitrust Law and Policy 2004, Annual Proceedings of the Fordham Corporate Law Institute* (New York, 2005), pp. 701 *et seq.*; Peter R. Willis, *The Privilege against Self-incrimination in Competition Investigations*, University of Oxford Centre for Competition Law and Policy Online Paper CCLP (S) 02/06.

[175] Joined Cases C-65/02 P and C-73/02 P, *ThyssenKrupp Stainless GmbH and ThyssenKrupp Acciai speciali Terni SpA* v. *Commission*, not yet reported, para. 50.

As explained above, companies that are the target of a specific investigatory measure by the Commission must cooperate fully. The Commission enjoys wide powers to make investigations and obtain information in order to bring to light infringements of Articles 81 and 82 EC, and it is for the Commission to decide whether particular information is necessary for the purposes of an investigation.[176] As the Court of Justice has held, the law "*imposes on the undertaking an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation*".[177] More particularly, in on-the-spot investigations, the company concerned must be responsive rather than passive. Merely making records available in a general way is insufficient. A company must cooperate in finding specific records when the Commission so requests.[178]

4.8.3 Must the target be notified when third parties are questioned regarding the target?

The target is not notified when third parties are questioned regarding it. In proceedings before the Commission, the target does not have the right to be present when third parties are questioned regarding it, or to cross-examine the witnesses. If the Commission relies on statements made by third parties as evidence against the target, such statements will be referred to in the statement of objections. Transcripts of oral submissions made by third parties are included in the Commission's file, and the parties are allowed to comment on such submissions during the hearing and/or in written submissions to the Commission in the course of the proceedings.

4.8.4 What are the mechanisms whereby the target can raise issues about pending investigations?

The situation of the target changes in the course of the proceedings. Certain defense rights relate only to the adversarial proceedings which follow the serving of the statement of objections, while others, such as the right to legal representation and the privileged nature of correspondence between lawyer and client, must be respected from the preliminary inquiry stage, i.e. before the statement of objections has been issued.[179] At the preliminary investigation stage the Commission obtains the information and documentation necessary to check the actual existence and scope of a specific factual and legal situation. To this end it exercises various investigation rights provided for in Regulation 1/2003, such as the right to request information or to search premises. When the preliminary investigation shows that there is enough evidence to form charges against particular companies, the Commission issues the statement of objections.

Before the statement of objections is issued, the investigated company has no particular rights other than those related to particular actions taken by the Commission in the course of the preliminary investigation. It may, for example, claim legal professional privilege, or invoke

[176] Case 374/87, *Orkem*, *op.cit.*, para. 15.
[177] *Ibid*, para. 27.
[178] See Kevin Coates, "Just Say No", Paper Presented at the Eighth Annual IBA Competition Conference (Fiesole, 17 September 2004), p. 4.
[179] See Joined Cases 46/87 and 227/88, *Hoechst AG* v. *Commission*, [1989] ECR 2859, para. 16.

its right to privacy with regard to premises or the right to necessary legal representation.[180] At this stage the Commission may take a number of actions without granting the target the right to be heard, or even giving it notice of its action. For example, the Commission is not obliged to hear the parties before issuing a decision to search company premises or a decision requiring information.[181]

A company which receives a statement of objections becomes a party to the proceedings and acquires a number of rights, such as the right to be informed of the objections raised against it or the right to access the Commission's file. It will have a number of formal and informal contacts with the Commission officials in the course of the proceedings, and will have an opportunity to raise issues about the pending investigation at this stage.

In EC merger control proceedings, the main mechanism whereby the notifying parties can raise issues about pending investigations is their response to a statement of objections from the Commission during a Phase II investigation. Indeed, parties to whom a statement of objections is addressed, or who have been informed of the objections in it, must submit written comments on the objections to the Commission. Their comments must set out all facts and matters known to them which are relevant to their defense, and include any relevant document as evidence of the facts set out. They may also suggest that the Commission should hear persons who can corroborate those facts.[182] The other main possibility for private parties to raise issues about the pending investigation is during the oral hearing, if so requested by the notifying parties in their written comments. However, it is also possible for the notifying parties to raise these issues orally at other stages of the investigation procedure.[183]

4.8.5 Are there any defenses against investigation? Harassment? Selective complaints (that is, Commission has picked on one party but not others)? Excessive burden of demand for information?

The case-law of the Community Courts indicates that the Commission has wide discretion as to how to conduct its investigation. Only final acts by the Commission are subject to appeal; acts adopted in the course of the procedure are not subject to judicial review. In particular, the ECJ has ruled that neither the initiation of proceedings nor a statement of objections may be challenged before the Community Courts.[184]

The Commission also has wide power of discretion as to the choice of the companies it makes subject to its enforcement actions. To ensure the effective application of the EC competition rules, it is entitled to give differing degrees of priority to the complaints filed with it, according to their Community interest.[185]

With respect to requests for information, it does not seem that the excessive burden of the request would be a valid argument to raise against the Commission. In the context of

[180] For more information, see Giannakopoulos, *op.cit.*, pp. 110-113.
[181] See Case 136/79, *National Panasonic (UK) Limited* v. *Commission*, [1980] ECR 2033.
[182] Article 13(3) of the Implementing Regulation.
[183] Article 14(1) of the Implementing Regulation.
[184] See Case 60/81, *International Business Machines Corporation* v. *Commission*, [1981] ECR 2639, para. 21.
[185] See Case C-119/97 P, *Ufex and Others* v. *Commission*, [1999] ECR I-1341, para. 88; and Case T-219/99, *British Airways plc* v. *Commission*, [2003] ECR II-5917, para. 69.

Commission investigations on company premises, the CFI has held that an excessive volume of documents copied by the Commission cannot in itself constitute a defect in the conduct of the investigation.[186] As explained above, a company to which the Commission addresses a simple request for information is not obliged to comply with the request. On the other hand, if the Commission issues a decision requiring information, the addressee is obliged to answer and may be fined for failing to do so.[187] A limited number of reasons such as legal professional privilege may be invoked for refusing to provide with the Commission with information it has requested by means of a formal request for information.

Complaints against administrative irregularities, unfairness, discrimination or violations of the Code of Good Administrative Behaviour by Commission officials may be addressed to the Ombudsman.[188] Defenses against investigation may also be raised in an appeal to the CFI if the Commission issues a final decision in the case.

4.9 Access to information in Commission files

4.9.1 What are the rights of access to information in the Commission's files by the target or a rejected applicant? Everything in the files or only selected information? If the latter, who decides what information is to be provided? Is access given to Member States but not private parties?

Access to the Commission's file is one of the procedural guarantees necessary for the effective exercise of the rights of the defense, in particular the right to be heard.[189] The CFI held in *Hercules*[190] and *Soda Ash*[191] that the Commission may not grant selective access to documents by removing documents which may be relevant to a company's defense. It has "*an obligation to make available to the undertakings involved in Article 85(1)* [now 81(1)] *proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation*".[192] These principles are also found in Regulation 1/2003, in Regulation 773/2004 and in the recently amended Commission Notice on Access to the File.[193] The new Notice does not introduce major changes, but adjusts the provisions on access to the Commission's file to the new regulatory framework and further clarifies Commission practice.

Article 27 of Regulation 1/2003 requires the Commission to respect the defense rights of the parties to the proceedings. The scope of the right of access to the file is specified in Article

[186] See Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV and Others* v. *Commission*, [1999] ECR II-931, para. 425.
[187] For more details see section 4.7.2. above.
[188] For more details see answer to question 12.2 below.
[189] See Cases T-10/92 to T-12/92 and T-15/92, *Cimenteries CBR SA and Others* v. *Commission*, [1992] ECR II-2667, para. 38.
[190] Case T-7/89, *SA Hercules Chemicals NV* v. *Commission*, [1991] ECR II-1711.
[191] Case T-30/91, *Solvay SA* v. *Commission*, [1995] ECR II-1775.
[192] Case T-7/89, *Hercules*, *op.cit.*, para. 54.
[193] *Commission Notice of 13 December 2005 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004*, OJ [2005] C 325/7. Attention is drawn also to the previous Notice: *Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89*, OJ [1997] C 23/3.

15 of Regulation 773/2004. The Commission is obliged to provide "*the parties to whom it has addressed a statement of objections*" with access to all documents in its file, except for:

(a) business secrets and other confidential information;

(b) internal documents of the Commission or the competition authorities of the Member States; and

(c) correspondence between the Commission and national competition authorities, or between the national competition authorities.

In principle, the same rules apply to statements made when applying for immunity from fines in exchange for providing the Commission with evidence concerning cartel activity. The Leniency Notice[194] provides that *"[a]ny written statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81*." Written statements made in leniency applications will be treated like other documents obtained by the Commission in the course of the proceedings. Oral statements are treated differently: they form part of the Commission's file, but are not included on the CD ROM with the other evidence and can only be accessed on the Commission's premises.[195]

The addressees of the statement of objections (the main parties) may also obtain access to other parties' replies, or at least the relevant parts thereof, if these documents contain new evidence relating to the allegations made against them by the Commission in the statement of objections. Normally the Commission includes such evidence in a supplementary statement of objections.

Under Article 28 of Regulation 1/2003, the Commission may only use information which it has acquired under Articles 17 to 22 of the Regulation for the purpose for which that information was obtained. Article 28 of Regulation 1/2003 prohibits the Commission and the competition authorities of the Member States, their officials, servants or other persons working under the supervision of those authorities, and officials and civil servants of other authorities of the Member States, from disclosing information of the kind covered by the obligation of professional secrecy (i.e. business secrets and other confidential information) which they have acquired or exchanged pursuant to Regulation 1/2003.

Nevertheless, the Commission may exchange confidential information with the competition authorities and courts of the EU Member States in the context of their cooperation in enforcing the EU competition rules. Under Article 12 of Regulation 1/2003, the Commission and the competition authorities of the Member States may provide one another with, and use in evidence, any matter of fact or law, including confidential information. Such information may only be used in evidence for the purpose of applying Articles 81 or 82 of the Treaty, and in respect of the subject matter for which it was collected by the transmitting authority. When national competition law is applied concurrently with Community competition law in the same case, and does not lead to a different outcome, the information exchanged may also be used for the application of national law.

[194] *Commission notice on immunity from fines and reduction of fines in cartel cases*, OJ [2002] C 45/03.
[195] For more details see section 4.9.2 below.

In the field of merger control, the Commission must grant the parties to whom a statement of objections is addressed access to the file, in order to enable them to exercise their defense rights. Access is conditional only on the legitimate interest of companies in the protection of their business secrets.[196] The procedure for access to the file in merger proceedings is very similar to the procedure followed for the application of Articles 81 and 82 EC,[197] indeed the new Notice on access to file applies to both the antitrust and the merger areas.

Addressees of statements of objections may also review documents the Commission did not attach to the statement of objections, such as observations from competitors or customers. The Commission must also grant such access to other parties involved who have been informed of its objections, if this is necessary to enable those parties to prepare comments on the statement of objections.[198] However, the right to access the file does not extend to (i) confidential information, (ii) internal documents of the Commission or the competent authorities of the Member States, or (iii) correspondence between the Commission and the competent authorities of the Member States or between the latter authorities.[199] Finally, the Commission must also grant access to the file to the authorities of a Member State to which it has referred a case.[200]

4.9.2 How is this right exercised and when must it be exercised? When must the information be provided?

According to Article 15(1) of Regulation 773/2004, access to the file is granted after the notification of the statement of objections, at the request of the addressee, so that it can exercise its rights of defense and reply fully and effectively to the Commission's allegations.

In the past the Commission often faced serious difficulties in identifying and retrieving documents from its files for the purpose of preparing documentation for the parties. However, the Commission may not invoke the administrative burden as justification for not giving access to its file.[201] Nowadays this is no longer a major problem for the Commission. Uniform recording of the documentation is made, and documents containing business secrets and other confidential information are sorted out. Although the basic rule under the 1997 Notice was that firms would be invited to the Commission's premises to inspect the file,[202] in practice the Commission scans and records documents digitally, thus permitting access to the file to be given on a CD-ROM. The new Notice gives the Commission the choice of a variety of methods of giving access to the file: CD-ROM, paper copies or examination of accessible documents on the Commission's premises.[203] When the file is accessed on the

[196] Article 18(3) of the Merger Regulation.
[197] See Case T-221/95, *Endemol Entertainment Holding BV* v. *Commission*, [1999] ECR II-1299, para. 68: "[T]*he same principles are applicable to access to the files in concentration cases examined under Regulation No 4064/89, even though their application may reasonably be adapted to the need for speed, which characterises the general scheme of that regulation*". See also Case T-210/01, *General Electric Company* v. *Commission*, not yet reported, para. 631: "*the rights of the defence are not to be applied with a standard of protection which is different or more extensive in merger control cases than in proceedings involving infringements of Community competition law.*"
[198] Article 17(2) of the Implementing Regulation.
[199] Article 17(3) of the Implementing Regulation.
[200] Article 19(2) of the Implementing Regulation.
[201] Case T-36/91, *Imperial Chemical Industries plc* v. *Commission*, [1995] ECR II-1847, para. 112.
[202] 1997 Notice on Access to the File, *op.cit.*, at II.C.
[203] 2005 Notice on Access to the File, *op.cit.*, para. 44.

Commission's premises, the right to inspect it must be exercised within the time specified for submitting a written reply to the statement of objections.

In the context of leniency applications, the Commission has developed the practice of taking oral statements, primarily in order to try and limit the documents which would be available for discovery purposes in private action litigations in the US, in particular. The Commission's practice in this area is clearly evolving, and is most probably not applied uniformly. Currently the Commission routinely records oral statements by leniency applicants (trying to keep them short and excluding business secrets and confidential information, to avoid the need for editing), which are then transcribed and signed by the applicants. (At least, the Commission requests a signature but considers it immaterial whether the transcript is signed or not; the danger of signing a transcript is that this document could potentially be seen as an admission of liability by the company). The Commission has to date always relied on these tapes in the statement of objections, and included the tapes and transcripts of the tape-recorded presentations in the file. The Commission has very recently published a draft of an amended Leniency Notice in order to formalize this practice,[204] which is also followed in the context of certain national leniency programs.[205]

The new Notice on access to file specifies the practical arrangements for giving the parties access to the Commission's file, the classification of the documents for disclosure purposes and rules relating to resolution of disputes relating to the extent of access to the file given in a particular case. Further access to the file, i.e. following the statement of objections, may be given, if the Commission obtains additional documentary evidence that is placed in the file after the oral hearing.

In EC merger control proceedings, once the notifying parties receive the statement of objections, they must prepare a written response which includes a request for access to the file.[206] Other parties involved in the procedure who have been informed of the Commission's objections[207] may request access to the file if this is necessary for the preparation of their observations. The procedure for obtaining access to the file is supervised by the Hearing Officer. Although the Commission's Best Practice Guidelines state that access to "*key documents*" obtained by the Commission will be granted as soon as Phase II of the investigation is initiated,[208] i.e. before issuing the statement of objections and granting formal access to the file, the Implementing Regulation refers to access to the file only after the statement of objections is issued.[209] The Commission has been much criticized on this point, as it would substantially improve the parties' defense rights if they had access to the file before they receive the statement of objections.

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[204] *Draft Amendment of the 2002 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, in: http://europa.eu.int/comm/competition/antitrust/legislation/leniency.html. The public consultation period expired on 20 March 2006 and a new formal text is expected soon. Compare also Option 28 of the Green Paper on damages.

[205] This is the case in France. See further Lasserre, "Propos introductifs", in: *Clémence et transaction en matière de concurrence, Premières experiences et interrogations de la pratique*, 125 GP n• 287-288 7 (2005), p. 14.

[206] Article 17(1) of the Implementing Regulation.

[207] Article 17(2) of the Implementing Regulation.

[208] Best Practice Guidelines, para. 45.

[209] Article 17(1) of the Implementing Regulation.

4.9.3 Can affected third parties such as competitors have access to Commission's files? How about people representing the public interest?

Formally speaking, persons who have lodged a formal complaint are not considered as "parties" for access to file purposes.[210] Indeed, Chapter VI of Regulation 773/2004 mentions no one other than the addressee of the statement of objections. The law sees the rights of complainants in terms of "access to documents" rather than "access to the file".[211] Complainants may obtain limited access to documents in the Commission's file. Thus they may ask for a non-confidential version of the statement of objections. In addition, a complainant who has been informed of the Commission's intention to reject his complaint may request access to the documents on which the Commission's assessment is based.[212] The scope of complainants' right of access to documents is limited: they cannot claim access on the same basis as companies under investigation.[213] Likewise, they may not obtain access to business secrets or confidential information in the Commission's file. The Notice stresses the importance of the principle of confidentiality in these cases and quotes the ECJ judgment in *Fedetab*,[214] where the Court stated that Regulation 17 gave complainants a right to be heard and not a right to receive confidential information. Finally, Article 8(2) of Regulation 773/2004 provides that a complainant may only use documents to which he has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 EC for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

Natural or legal persons other than the main parties to the proceedings and the complainants, while not enjoying formal rights of access to the Commission's file, may yet be admitted to the proceedings as so-called "interveners" if they have shown a "sufficient interest".[215] In this case the Commission informs them in writing of the nature and subject matter of the procedure, and sets a deadline by which they may make their views known in writing.[216] They may also make use of the possibility to rely on the general Community legislation on access to documents held by the EU institutions. Regulation 1049/2001 lays down the general framework for such access to information.[217] Under these rules, an EU institution may only refuse access to such documents when access would undermine the protection of:

(a) the public interest as regards public security, defense and military matters, international relations or the financial, monetary or economic policy of the Community or a Member State;

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[210] Compare Case 43/85, *Associazione nazionale commercianti internazionali dentali e sanitari (Ancides)* v. *Commission*, [1987] ECR 3131, para. 7.
[211] 2005 Notice on Access to the File, *op.cit.*, paras. 3-4.
[212] Article 8 of Regulation 773/2004.
[213] See Case 53/85, *AKZO Chemie BV and AKZO Chemie UK Ltd* v. *Commission*, [1986] ECR 1965, paras. 27-28; Case T-17/93, *Matra Hachette SA* v. *Commission*, [1994] ECR II-595, para. 34.
[214] Cases 209/78 to 215/78 and 218/78, *Heintz van Landewyck SARL and Others* v. *Commission*, [1980] ECR 3125, para. 46.
[215] See e.g. Calvin P. Jellema, "The Redheaded Stepchild of Community Competition Law: The Third Party and its Right to Be Heard in Competition Proceedings", 20 BUInt'lLJ 211 (2002), pp. 267 *et seq*.; Jan Peter Heidenreich, *Anhörungsrechte im EG-Kartell- und Fusionskontrollverfahren, Zugleich ein Beitrag zu Aufgaben und Kompetenzen des Anhörungsbeauftragten der Europäischen Kommission* (Baden-Baden, 2004), pp. 104 *et seq*.
[216] Article 13(1) of Regulation 773/2004.
[217] *Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*, OJ [2001] L 145/43.

(b) the privacy and integrity of the individual;

(c) commercial interests of a natural or legal person, including intellectual property;

(d) court proceedings and legal advice;

(e) the purpose of inspections, investigations and audits.[218]

When disclosure of a document in its entirety is not possible, the Regulation provides for a right of partial access. In a recent case, third parties tried to rely on the Regulation to obtain access to the Commission's file in a cartel case. Access to that information would enable those parties to bring civil claims for damages against the cartel members in national courts. The Commission resisted this request, mainly because allowing third parties access to such information would deter firms from cooperating with the Commission and be detrimental to inspections and investigations in future cases. The CFI disagreed, and rendered a nuanced judgment, in which it held that the Commission is required in principle to carry out a concrete individual assessment of the contents of the documents referred to in the request, in order to determine whether partial access is possible. The Court added that only in exceptional cases, and only when the administrative burden entailed by a concrete, individual examination of the documents is particularly heavy, thereby exceeding the limits of what may reasonably be required, may a derogation from that right to examine the documents be permissible.[219]

In EC merger control proceedings, the Commission must in certain limited cases grant third parties access to the file on request, when they have been informed of its objections and if this is necessary for them to prepare their comments.[220]

4.9.4 What information in the files is unavailable, for example because of trade secrets [Article 287]? Unavailable because of confidentiality, informant protection, or state secrets? Unavailable because they are staff advisory memos or preliminary decisional documents? (These questions may overlap the project on transparency and data protection).

The Commission must ensure that business secrets and other confidential information are not revealed. When a business secret or other confidential information is necessary to prove an infringement, the Commission assesses whether the need to disclose the information is greater than the harm that might result from disclosure. Business secrets and other confidential information are defined in the Commission's Access to the File Notice. Business secrets are defined as information (documents or parts of documents) for which an undertaking has claimed protection, and which the Commission has recognized as secret and non-communicable. The non-communicability of business secrets is intended to protect the legitimate interests of companies in preventing third parties from obtaining strategic information on their essential interests, as well as the operation and development of their business. Business secrets must be internal, i.e. not known outside the company, and commercially important.

[218] Article 4 of Regulation 1049/2001. The new Notice on Access to the File clearly distinguishes this possibility from the more competition law-specific access to file rules.
[219] Case T-2/03, *Verein für Konsumenteninformation* v. *Commission*, not yet reported, paras. 65 *et seq.*
[220] Article 17(2) of the Implementing Regulation.

The new Notice appears to define "business secrets" more narrowly than previously, as information where disclosure "*could result in serious harm to the same undertaking*", i.e. the company whose business activity is described in the information.[221] It makes a clear distinction between business secrets and "*other confidential information*", defined as information whose disclosure would "*significantly harm a person or undertaking*". According to the Notice, examples of information that may qualify as business secrets include technical and/or financial information relating to a company's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure, and sales strategy.[222]

The definition of other confidential information currently includes information that would make it possible to identify those who supplied it, when they wish to remain anonymous to the other parties. It also covers certain types of information communicated to the Commission on condition that confidentiality is observed, such as documents obtained during an investigation which form part of a company's property and are the subject of a non-disclosure request (e.g. a market study commissioned by the company).

Under the Notice, the category of "other confidential information" includes information about companies which are able to place very considerable economic or commercial pressure on their competitors or their trading partners, customers or suppliers. The European Courts have acknowledged that it may be legitimate to refuse to reveal letters received from their customers to such companies, as their disclosure might expose the authors to the risk of retaliatory measures.[223] Thus the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties who have a justified wish to remain anonymous.

The new Draft Notice also specifies the general rule, applicable to all confidential information including business secrets, that information will be considered to have lost its commercial importance due to the passage of time if it is more than five years old, at least when it relates to the parties' turnover, sales and market share data.

The procedure for identifying confidential information is laid down in Regulation 773/2004 and the Access to the File Notice. It is for the companies which submit information to the Commission in the course of proceedings to indicate the materials they consider to be confidential, with reasons, and to provide a separate non-confidential version of that information.[224] In addition, the Commission itself may require companies to identify confidential information in documents they have produced pursuant to Regulation 1/2003, and to identify the undertakings with regard to which that information is to be considered confidential. Pursuant to Article 16(4) of Regulation 773/2004, if companies fail to identify confidential information, the Commission may assume that the documents concerned do not contain confidential information.

Under the Notice, the non-confidential versions and descriptions of the deleted information must be such as to enable any party who has access to the Commission's file to determine

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[221] Case T-353/94, *Postbank NV* v. *Commission*, [1996] ECR II-921, para. 87.
[222] Notice on Access to the File, *op.cit.*, para. 18.
[223] Case T-65/89, *BPB Industries Plc and British Gypsum Ltd* v. *Commission*, [1993] ECR II-389, para. 33.
[224] Article 16 of Regulation 773/2004. Not all information which an undertaking may not wish to disclose can be regarded as confidential. The criterion is an objective one and the opinion of the company concerned is not decisive (see Advocate General's Opinion in Case 53/85, *AKZO*, *op.cit.*).

whether the information deleted is likely to be relevant for its defense, and therefore whether there are sufficient grounds for requesting the Commission to grant access to the information claimed to be confidential.[225] If the Commission considers a request for disclosure of additional information justified, it may exercise its power to reverse its decision on confidentiality, in whole or in part. If a request for disclosure is not granted by the Commission, it may be submitted to the Hearing Officer at the oral hearing stage.[226] Should the Commission or the Hearing Officer take the view that the information identified by a party as confidential is in fact not confidential, and intend to disclose it, the party from which that information originated will be given the opportunity to express its views.

As a rule, the confidential nature of documents is not a bar to their disclosure if the information in question is necessary to prove an alleged infringement (inculpatory documents), or the papers invalidate or rebut the Commission's reasoning in the statement of objections (exculpatory documents). When deciding whether to grant confidential treatment, the Commission must, as in the case of business secrets, reconcile the legitimate interest of the company in protecting its assets with the public interest in terminating a breach of competition rules, and with the rights of defense. Thus any document or other information belonging to a company for which the provider requests non-disclosure may be declared confidential only if the following four conditions are met:

(a) the company must have a legitimate interest in its non-disclosure;

(b) confidential treatment will not adversely affect the public interest in the termination of breaches of the competition rules; in making this assessment, the Commission must respect the principle of proportionality;

(c) defense rights are not infringed;[227]

(d) the documents (inculpatory or exculpatory) are not relevant for the outcome of the proceedings.

Disputes relating to access to documents in the Commission's file are resolved by the Hearing Officer.[228]

In merger proceedings, access to the file will be granted subject to the legitimate interest of the protection of third parties' business secrets and other confidential information. In particular, any confidential information, internal documents of the Commission or national competition authorities, and correspondence between the Commission and those authorities, or between those authorities, must not be disclosed to any party during access to the file.[229] Nor may the Commission grant access to any information, including documents, that contains business secrets or other confidential information, if it does not consider disclosure necessary for the purposes of the procedure.[230]

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[225] Notice on Access to the File, *op.cit.*, para. 38.
[226] Notice on Access to the File, *op.cit.*, para. 42.
[227] Protecting the confidentiality of information provided by one party may be detrimental to another party if, as a result, the other party is unable to defend its case.
[228] Articles 8 and 9 of the Commission Decision on the terms of reference of Hearing Officers.
[229] Article 17(3) of the Implementing Regulation.
[230] Article 18(1) of the Implementing Regulation.

4.9.5 Consequences if Commission fails to provide access to information? Does it make the subsequent decision illegal? Only if the failure to provide information was prejudicial?

Failure to disclose documents in the Commission's file will not always result in the annulment of the decision in question.[231] Annulment of a decision is possible in cases where access to the file was insufficient to enable the defendant to exercise the right to be heard. Thus the consequences of the Commission's failure to give a party access to the file depend on the specific circumstances of a particular case.[232]

The CFI has ruled that a Commission decision does not necessarily have to be an exact replica of the statement of objections.[233] The Commission is permitted to take account in the decision of the responses of the companies concerned to the statement of objections. It may not only accept or reject the arguments of the companies concerned, but also make its own assessment of the facts put forward by those companies, in order either to abandon complaints shown to be unfounded, or to supplement and redraft its arguments in fact and law which support the complaints it maintains. Thus defense rights will only be infringed if the final decision alleges that the companies concerned have committed infringements other than those referred to in the statement of objections, or takes different facts into consideration. This is not the case when the alleged differences between the statement of objections and the final decision do not concern conduct other than that in respect of which the companies have already submitted observations, and are therefore unrelated to any new complaint.[234]

When claiming that defense rights have been infringed with regard to the complaints made in the contested decision, "*it is not sufficient for the undertakings concerned to point to the mere existence of differences between the statement of objections and the contested decision without explaining precisely and specifically why each of those differences constitutes, in the circumstances, a new complaint upon which they were not given the opportunity to comment*".[235] According to the case-law, whether defense rights have been infringed must be examined in relation to the specific circumstances of each particular case, as this depends essentially on the objections raised by the Commission to prove the infringement which the companies concerned are alleged to have committed.

In this respect, the Community Courts distinguish between inculpatory and exculpatory documents. Failure to communicate an inculpatory document only constitutes a breach of the rights of the defense if the company concerned shows that "*the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that company and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence*".[236] The same burden is not imposed on the company concerned if the document the Commission failed to disclose was exculpatory. According to the Court, "*where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the*

[231] Cases T-25/95 *et seq.*, *Cimenteries CBR*, *op.cit.*, para. 156.
[232] Case T-36/91, *ICI* v. *Commission*, *op.cit.*, para. 70.
[233] See e.g. Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB and Others* v. *Commission*, [2003] ECR II-3275, para. 191.
[234] *Ibid.*
[235] *Ibid*, para. 192.
[236] Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others* v. *Commission*, [2004] ECR I-123, para. 73.

decision of the Commission ... It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine".[237]

4.10 Settlement or compromise. What opportunities exist to settle or compromise a dispute before formal proceedings are instituted or after they are instituted but before decision? What obligation is imposed on the Commission to conduct settlement negotiations in good faith? If there are conflicting private parties, what is the process whereby complaints by private parties are settled or compromised?

It has always been possible for companies to settle their case with the Commission by amending or abandoning the agreement or practice under investigation. This took place informally, as Regulation 17 did not expressly provide for settlement mechanisms. The Commission would close the file, as indeed it had the power to do at any time, if it was satisfied the companies had met its concerns by taking positive or negative measures or giving commitments. The new Regulation 1/2003 establishes a formal procedure for negotiating settlements and offering commitments to the Commission. Article 9 provides that the Commission may accept commitments offered by a company whose conduct is under investigation, when they meet the Commission's concerns as expressed in its preliminary assessment.[238] Subsequently, the Commission may adopt a decision making the commitments binding on the company that was subject to the investigation: in other words, the commitments are integrated in the decision, which simply finds that there are no longer grounds for action by the Commission.[239]

[237] *Ibid*, paras. 74-75.

[238] The "preliminary assessment" is a document which in this context replaces the statement of objections. For examples of this new procedure see case COMP/37.214-*Joint selling of the media rights to the German Bundesliga* (proposed commitments published in OJ [2004] C 229/13); case COMP/38.173-*The Football Association Premier League Limited (FAPL)* (proposed commitments contained in an Art. 19(3) Reg. 17 Notice, published at OJ [2004] C 115/3, and subsequently amended); case COMP/39.116-*Coca-Cola* (proposed commitments published in the Commission's website on 19 October 2004); case COMP/38.381-*De Beers/ALROSA* (proposed commitments published in OJ [2005] C 136/32); case COMP/38.348-*Repsol CPP SA* (proposed commitments published in OJ [2004] C 258/7); cases COMP/39.152-*BUMA* and COMP/39.151-*SABAM* (*Santiago Agreement*-COMP/38.126) (proposed commitments published in OJ [2005] C 200/11); case COMP/ 37.749-*Austrian Airlines/SAS cooperation agreement* (proposed commitments published in OJ [2005] C 233/18); case COMP/38.681-*Universal International Music BV/MCPS and others (The Cannes Extension Agreement)* (proposed commitments published in the Commission's website on 23 May 2006 and reported in OJ [2006] C 122/2). In the first five cases the Commission adopted formal Decisions rendering legally binding the commitments concerned: Commission Dec. 2005/396/EC of 19 January 2005 (*Joint selling of the media rights to the German Bundesliga*), OJ [2005] L 134/46; Commission Dec. of 22 March 2006 (*Joint selling of the media rights to the FA Premier League*); Commission Dec. of 22 June 2005 (*Coca-Cola*); Commission Dec. of 22 February 2006 (*De Beers/ALROSA*); Commission Dec. of 12 April 2006 (*Repsol CPP SA*). In the other cases the Commission intended to proceed to a formal Decision after inviting interested third parties to submit their comments.

[239] Recital 13 of Regulation 1/2003.

Commission decisions making commitments binding are neither applicability nor inapplicability decisions.[240] They merely close the administrative proceedings and state that as a result of the commitments offered, which are rendered binding, the Commission no longer has an interest in pursuing the case.[241] As such, these decisions do not bind national authorities[242] and courts as to the applicability or non-applicability of Articles 81 and 82 EC, thus leaving them free to decide whether or not Community competition law has been infringed.[243]

The Commission has wide discretion when accepting commitments from companies. Commitments may differ in nature and duration; for example, they can be behavioral or structural, and limited or unlimited in time. Companies which do not comply with their commitments made binding on them by a Commission decision face fines of up to 10% of their total worldwide turnover in the preceding business year, and periodic penalty payments of up to 5% of their average daily turnover.[244] In addition, if commitments are breached, the Commission may reopen the proceedings.[245]

While Article 9 of Regulation 1/2003 does not expound on the Commission's duties, they certainly require the Commission to conduct settlement negotiations in good faith. Indeed, companies may seize the CFI in cases of infringement of essential procedural requirements and misuse of powers.[246] Third parties' interests are safeguarded through the publication of a notice in the Official Journal, which announces that the Commission intends to take a decision under Article 9(1) of Regulation 1/2003 declaring commitments binding[247] and invites interested third parties to submit their comments. Third parties who consider that the decision accepting commitments does not take their interests properly into account may file an application for its annulment with the CFI. However, it should be noted that in this area the Commission has wide discretion.

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[240] Since such decisions leave open the question of whether Article 81 or 82 EC has been infringed, and since they incorporate commitments given by the parties themselves, the parties may not request their annulment before the CFI. See further Riccardo Celli, "Modernisation of Competition Rules in the EU: What Will Change in Practice?", Paper Presented at the Sixth Annual IBA Competition Conference (Fiesole, 20 September 2002), p. 10.

[241] Article 9 of Regulation 1/2003 does not allow the Commission to accept commitments formally and make them binding on the undertakings concerned, when they are given to win a reduction of a fine for infringing the competition rules. According to Recital 13 of Regulation 1/2003, commitment decisions are not appropriate in cases where the Commission intends to impose a fine. In this context, see a recent public statement by the Commission: *Commitment Decisions (Article 9 of Council Regulation 1/2003 Providing for a Modernised Framework for Antitrust Scrutiny of Company Behaviour), Frequently Asked Questions and Answers*, MEMO/04/217, 17 September 2004, in: http://europa.eu.int/comm/competition. Such commitments have been informally accepted in the past (see Decision 85/202/EEC of 19 December 1984 (*Wood pulp*), OJ [1985] L 85/1). It seems, however, that outside the context of Regulation 1/2003, and in an informal manner, the Commission could still use this possibility.

[242] The question of what effect such decisions have for national competition authorities is more complicated, as they will already have been debarred from opening proceedings because the Commission proceedings will essentially have relieved them of their competence under Article 11(6) of Regulation 1/2003. However, it is conceivable that a national competition authority might intervene *after* the termination of the Commission proceedings under Article 9 of Regulation 1/2003.

[243] Recital 13 of Regulation 1/2003. See on this point Emil Paulis and Céline Gauer, "La réforme des règles d'application des articles 81 et 82 du Traité", 11 JdT (Eur.) 65 (2003), p.68.

[244] Articles 23(2)(c) and 24(1)(c) of Regulation 1/2003.

[245] Article 9(2)(b) of Regulation 1/2003.

[246] See Paulis and Gauer, *op.cit.*, p. 68.

[247] See Article 27(4) of Regulation 1/2003.

In the merger control field, the Commission can attach conditions and obligations intended to ensure that the companies concerned comply with commitments they have offered to a decision clearing a transaction.[248] This possibility exists for both Phase I and Phase II of the procedure.[249] The legal consequences of breaching or not fulfilling obligations and conditions differ, although in the early stages of EC merger control the distinction was not clear enough and the two instruments were used as alternatives of one another. The distinction between conditions and obligations gradually came to be clearly affirmed in the Commission's decisional practice and, more importantly, in its Notice on Remedies.[250] Conditions usually refer to measures contained in commitments which structurally change the market (structural remedies), whereas obligations refer to implementing measures that aim to fulfill commitments relevant to basically behavioral measures.

If an undertaking commits a breach of an obligation attached to a merger clearance, the Commission may, if the breach is serious, revoke its decision. This is applicable to both Phase 1 and Phase II decisions.[251] If, on the other hand, the Commission has taken up the commitment and transformed into a condition for the clearance of the merger, any breach of this condition means that the authorization decision will no longer be valid, so that the merger will be considered as prohibited *ab initio*.[252] Heavy fines under Article 14(2)(b) of the Merger Regulation may also be imposed.[253] Alternatively, the Commission may by decision require the separation of the undertakings or assets brought together, or the cessation of joint control, or any other appropriate action to restore conditions of effective competition.[254]

Apart from these "formal" types of commitments integrated in conditions or obligations, it should be noted that in certain cases the Commission refers in the grounds for a decision to commitments given by the parties, but without making those commitments binding on them.[255] In such cases the commitment in question does not have the character of a condition or an obligation, and the Commission usually simply "takes notice" of it.[256]

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[248] The Commission may also use conditions and obligations when it grants a derogation from the obligation to suspend putting a merger into effect under Article 7: see Article 7(3) of the new Merger Regulation.

[249] Respectively Articles 6(2)(b) and 8(2)(b) of the Merger Regulation.

[250] *Commission Notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98*, OJ [2001] C 68/3.

[251] Respectively Articles 6(3)(b) and 8(6)(b) of the Merger Regulation. For a breach of an obligation attached to a Phase I clearance decision, the Commission may alternatively order the opening of Phase II (Article 6(4) of the Merger Regulation).

[252] See Katrin Stoffregen in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), pp. 1638-1639.

[253] If a condition is breached or not fulfilled, and as a result the merger authorization decision becomes void, the prohibition of Article 7(1) of the Merger Regulation is revived and the merged undertakings can be fined under Article 14(2)(b) for having put a concentration into effect in breach of Article 7(1).

[254] Article 8(4) of the Merger Regulation. Again, if the undertakings fail to comply with such measures they are subject to fines and periodic penalty payments under Articles 14(2)(c) and 15(1)(d) respectively.

[255] See Olivier D'Ormesson and Stéphane Kerjean, "Le developpement de la pratique des engagements en matière de contrôle communautaire des concentrations", 34 *Revue Trimestrielle de Droit Européen* 479 (1998), pp. 509 *et seq.*

[256] Whether or not a commitment has legal effects in that a breach of its terms may in some way affect the Commission's authorization decision is not always obvious. The fact that such a commitment may not formally be the subject of a condition or obligation within the meaning of the Merger Regulation may not be decisive. Commitments that are merely mentioned in the grounds for the authorization decision may yet entail legal effects. Thus, according to the CFI, to determine whether a commitment produces legal effects, "*it is necessary to consider whether the declaration that the notified operation is compatible was affected by it in the sense that, in the event of breach of its terms, the Commission could revoke its decision*" (Cases T-125/97 and T-127/97, *The Coca-Cola Company and Coca-Cola Enterprises Inc.* v. *Commission*, [2000] ECR II-1733, para. 97).

5. The individualized/generalized (or adjudicative-legislation) distinction. Are there procedural distinctions between situations in which an individual party is affected on grounds particular to that party (individualized or quasi-adjudicative action) and situations in which a large number of different persons are affected in the same way (generalized or quasi-legislative action)? For example, in the case of generalized action, are the rules relating to investigation, hearings, and decisions different than in the case of adjudication? If there are such distinctions, how is this line between individualized and generalized action drawn in practice?

Generalized Commission action in the antitrust field consists of the adoption of block exemption Regulations, the adoption of soft law instruments such as Notices, Guidelines and Communications, and investigations into sectors of the economy and types of agreements.

Competition is one of the few areas of Community competence where the Commission enjoys extensive legislative powers. The Council has given it the power to adopt secondary legislation, not only in the procedural field, but also substantively. As to substance, the Commission has been adopting Block Exemption Regulations ("BER") under specific *vires* Council Regulations since 1965.[257] In Article 28 of its September 2000 Regulation proposal,[258] the Commission attempted to have inserted in the new procedural Regulation a wide and general empowerment (*vires*) provision which would have empowered it to adopt BER. However, the Member States in the Council strongly resisted this attempt, which therefore failed.

The nature of BER has been extensively debated under the new system of legal exception.[259] Essentially they are acts which apply Article 81(3) EC to categories of agreements, thus "*circumscribing a portion of the field where Article 81 is not applicable*".[260] The

[257] Under *vires* provided for by the Council in Regulation 19/65, as subsequently amended by Regulation 1215/1999, the following Regulations have been adopted by the Commission in the area of vertical restraints: Regulation 2790/1999 on vertical agreements, OJ [1999] L 336/21 (exclusive distribution, exclusive purchasing and franchising agreements); Regulation 1400/2002 on vertical agreements in the motor vehicle sector, OJ [2002] L 203/30; and Regulation 772/2004 on technology transfer agreements, OJ [2004] L 123/11. Under *vires* of Council Regulation 2821/1971 the Commission has adopted Regulation 2658/2000 on specialization agreements, OJ [2000] L 304/3, and Regulation 2659/2000 on research and development agreements, OJ [2000] L 304/7. Under *vires* of Council Regulation 1534/1991, the Commission has adopted Regulation 358/2003 on agreements in the insurance sector (OJ [2003] L 53/8). There are also some sectoral Commission BER: Regulation 823/2000 (OJ [2000] L 100/24), as amended by Regulation 463/2004 (OJ [2004] L 77/23) applies to liner consortia agreements and was adopted under Council *vires* in Regulation 479/92. Finally, under *vires* of Council Regulation 3976/1987 the Commission has adopted Regulation 1617/1993 (OJ [1993] L 155/18), as subsequently amended, exempting consultations on tariffs for the carriage of passengers, baggage and freight on scheduled air services, as well as agreements on slot allocation at airports and airport scheduling.

[258] COM(2000) 582 final, OJ [2000] C 365E/284.

[259] See above.

[260] See Giuliano Marenco, "Does a Legal Exception System Require an Amendment of the Treaty?", in: Ehlermann & Atanasiu (Eds.), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford/Portland, 2001), p. 173; Koen Lenaerts, "Modernisation of the Application and Enforcement of European Competition Law: An Introductory Overview", in: Stuyck & Gilliams (Eds.), *Modernisation of European Competition Law, The Commission's Proposal for a New Regulation Implementing Articles 81 and 82 EC* (Antwerp/Oxford/New York, 2002), p. 17. Former Director-General Alexander Schaub has stressed that these BER should not be considered as legislation (*Gesetzgebung*), but rather as application of the law (*Rechtsanwendung*). See Alexander Schaub, "Die Reform der Europäischen Wettbewerbspolitik", in: Baudenbacher (Ed.), Neueste *Entwicklungen im europäischen und internationalen Kartellrecht, Achtes St. Galler Internationales Kartellrechtsforum 2001* (Basel/Genf/München, 2002), p. 8. However, see also John D.

Commission's adoption of a BER, which is a rather dramatic event accompanied by a substantial degree of publicity, is preceded by an extensive stage of public consultations. Nevertheless, the Commission's discretion in the adoption of those instruments is absolute, provided it remains within the *vires* of the Council Regulations.

The Commission's powers appear much more substantial if one takes into account the vast number of soft law instruments it has adopted, especially since the second half of the 1990s.[261] The proliferation of Notices, Communications, Guidelines and Green and White Papers is not only striking in the competition law field; the Commission also uses these instruments in other areas of EU law, sometimes drawing criticism for this "unauthorized extension" of its powers.[262] Although they are not considered as legally binding acts, they have proved quite influential in practice. These texts purport to be codes of conduct, not prescriptive rules, but like the old BER which historically preceded them, their real effect is different. The "soft law effect" of Guidelines and Notices is likely to be muscular, robust, constraining, not very soft at all. The European Courts not infrequently refer to them, and Commission decisions will surely invoke them, as will national authorities and courts.

In the context of modernization, as a result of the need to review the existing Notices on cooperation with national courts and national competition authorities,[263] and with a view to providing guidance on the application of Articles 81 and 82 EC, the Commission very recently published six Notices which form part of the so-called "Modernization Package" and are not very different from "hard" pieces of new legislation.[264] This is particularly true of the Notices on inter-state trade effect and on Article 81(3). While the Commission claims to be doing no more than presenting in a compact way the principles arising from the European Courts' case law and its own administrative practice, it has manifestly also inserted into these texts its own views, exigencies and priorities, exactly as a legislator would do.[265]

Cooke, "General Report", in: Cahill (Ed.), *The Modernisation of EU Competition Law Enforcement in the European Union, FIDE 2004 National Reports* (Cambridge, 2004), p. 630, referring to the Commission's "*legislative function*" in proposing BER.

[261] For example, *Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty*, OJ [1998] C 9/3; *Commission Notice - Guidelines on vertical restraints*, OJ [2000] C 291/1; *Commission Notice - Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements*, OJ [2001] C 3/2; *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)*, OJ [2001] C 368/13; *Commission Notice on immunity from fines and reduction of fines in cartel cases*, OJ [2002] C 45/3.

[262] See Silvère Lefevre, "Interpretative Communications and the Implementation of Community Law at National Level", 29 *European Law Review* 808 (2004).

[263] *Commission Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty*, OJ [1993] C 39/5; *Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty*, OJ [1997] C 313/3.

[264] *Commission Notice on cooperation within the Network of Competition Authorities*, OJ [2004] C 101/43; *Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC*, OJ [2004] C 101/54; *Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty*, OJ [2004] C 101/65; *Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)*, OJ [2004] C 101/78; C*ommission Notice - Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty*, OJ [2004] C 101/81; *Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty*, OJ [2004] C 101/97.

[265] In a recent conference on EU competition law, concerns were expressed regarding the proliferation of "legislation by the back door". However, a well-respected former Director General for competition strongly countered such criticism, and defended the Commission's pro-activeness by referring to its leading role in

As for BER, the Commission always undertakes public consultations before adopting these soft law instruments. In practice they are published in draft form in the C series of the Official Journal, and third parties submit their comments, which are usually published on the website of DG COMP.

The third instance of generalized action by the Commission is investigations into sectors of the economy and types of agreements, as prescribed by Article 17 of Regulation 1/2003. The Commission in the past had rarely used this instrument, although it recently decided to conduct such sector enquiries in the gas and electricity, business insurance, retail banking, financial services and New Media (3G) sectors. According to Article 17, the Commission may request companies to supply information and carry out any inspections necessary for these investigations. In particular, it may request companies to communicate all agreements, decisions and concerted practices to it. These proceedings have no target as such, although the companies which are sent a request for information and are subject to investigations are under the same duties as those which are the specific target of antitrust proceedings.

6. Hearing phase

6.1 Rights to an administrative hearing

6.1.1 Is there a right to one or more hearings in your sector? In which type of dispute is an opportunity for hearing provided?

The ECJ has ruled that the Commission is under an obligation to observe defense rights during administrative proceedings which may lead to imposition of fines for violating EC competition law.[266] The rights of defense comprise the right to be heard, the right of access to the file and the principle of sound administration.[267] Observance of the right to be heard is obligatory in all proceedings which are initiated against a person and are liable to lead to a measure adversely affecting that person. This is a fundamental principle of Community law, which must be guaranteed even in the absence of rules governing the procedure in question.[268] The substance of the right to be heard involves making the Commission's case known to the companies concerned, and giving them the right to make known their views on the truth and relevance of the facts and circumstances alleged, and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.[269]

The provisions of Regulations 1/2003 and 773/2004 give substance to the right to be heard. Article 27(1) of Regulation 1/2003 requires the Commission to give companies an

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competition law enforcement in Europe. Even more interestingly, this view was fully shared by a former Advocate General of the ECJ, according to whom the Court surely welcomed the intellectual lead by the Commission, the specialized antitrust enforcer.

[266] Case 322/81, *NV Nederlandsche Banden Industrie Michelin* v. *Commission*, [1983] ECR 3461, para. 7.

[267] The ECJ has made it clear that the Commission is not a "tribunal" for the purposes of application of Article 6 of the European Convention on Human Rights. The Court has held, however, that the Commission is obliged to respect general principles of Community law which comprise fundamental rights. See Cases 100/80 to 103/80, *SA Musique Diffusion française and Others* v. *Commission*, [1983] ECR 1825, para. 8; Case T-11/89, *Shell International Chemical Company Ltd* v. *Commission*, [1992] ECR II-757, para. 39; and Case T-347/94, *Mayr-Melnhof Kartongesellschaft mbH* v. *Commission*, [1998] ECR II-1751, paras. 310-312.

[268] See Case 40/85, *Kingdom of Belgium* v. *Commission*, [1986] ECR 2321, para. 28; Case 259/85, *French Republic* v. *Commission*, [1987] ECR 4393, para. 12.

[269] See Cases 100/80 to 103/80, *Musique Diffusion, op.cit.*, para. 10.

opportunity to be heard on the matters to which the Commission has raised objections before it takes a decision finding an infringement or on interim measures, imposition of a fine or a periodic penalty payment. This list is non-exhaustive, and under the general principles of Community law, a hearing is obligatory in other types of proceedings likely to result in a decision which adversely affects parties in Commission proceedings.

In most cases there would be one hearing following the Commission's adoption of a statement of objections. However, the statement of objections is not final: it can be amended, parts of it may be dropped, or the Commission may make additions in light of evidence that emerges at a later stage. If, as a result of inquiries conducted by the Commission after the statement of objections is adopted, there is a material alteration in the evidence of the contested infringements, the Commission must give the companies concerned an additional opportunity to be heard.[270] Similarly, when the Commission has left out of the statement of objections an objection which it wishes to include later in its decision, or wishes to impose on the parties a fine that was not mentioned in its original statement of objections, it should serve a supplementary statement of objections and give the parties an opportunity to be heard.[271]

In EC merger control proceedings, the Commission must grant notifying parties and other parties involved who so request in their written comments the opportunity to develop their arguments at a formal oral hearing, at least in the subsequent stages of the procedure:

- when it intends to take a decision declaring a proposed merger incompatible with the common market;

- when, after deciding that a proposed merger did not fall within the scope of the Regulation or was not incompatible with the common market, the Commission decides to revoke that decision on the basis that a) it was based on incorrect information for which one of the companies is responsible, or b) the companies concerned do not comply with an obligation attached to the decision;

- when the Commission orders the parties to dissolve a concentration that has been implemented and the merger has been declared incompatible with the common market, or the parties have implemented a concentration in contravention of a condition attached to a clearance decision; or

- when the Commission takes appropriate interim measures to restore or maintain conditions of effective competition against a concentration that has been implemented before a decision as to its compatibility with the common market has been taken, or in contravention of a condition in a clearance decision, or when the merger has been declared incompatible with the common market.[272]

The parties may also be given the opportunity to express their views orally at other stages in the proceedings.

The Commission must also grant the parties on which it proposes to impose a fine or periodic penalty payment the same opportunity to develop their arguments in a formal oral hearing

[270] See Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG* v. *Commission*, [1983] ECR 3151, para. 29; Case T-23/99, *LR AF 1998 A/S* v. *Commission*, [2002] ECR II-1705, para. 190.
[271] See Cases T-25/95 *et seq*., *Cimenteries CBR*, *op.cit.*, para. 486.
[272] Article 14(1), (2) of the Implementing Regulation.

before adopting such a decision, though it may also give them the opportunity to express their views orally at other stages in the proceedings.[273]

Although, as explained above, there is a right to only a single formal oral hearing at the end of the investigation process, it is possible for the parties (notifying parties and third parties) to express their views orally during other stages of the procedure at informal hearings, for example at the "State of Play" meetings (see answer to question 4.3 above), or during "triangular meetings" between the notifying parties and third parties.[274] The purpose of voluntary triangular meetings is for the parties to submit information and comments they consider relevant for the assessment of a given transaction, or to clarify specific issues raised. In any event, granting the opportunity to hold an oral hearing does not depend on the type of issue, but only on a written request by the parties to the Commission.

6.1.2 Who is entitled to a hearing in the case of a prospective adverse decision? In addition to parties who would be subject to sanctions, or parties whose applications are denied, is anyone else entitled to a hearing? Competitors who would be harmed by the grant of favorable treatment by the Commission to an applicant? Persons claiming to protect the public interest?

The addressees of a decision[275] are always entitled to an oral hearing before the Commission. Article 27(1) of Regulation 1/2003 requires the Commission to give companies that are the subject of proceedings an opportunity to be heard with respect to the matters to which the Commission has made objections. Article 12 of Regulation 773/2004 further clarifies that the Commission must provide the addressees of a statement of objections with an opportunity to present their arguments at an oral hearing, if they so request in their written submissions in response to the statement of objections.

Under Article 6(2) of Regulation 773/2004, where appropriate, complainants may also be heard at the oral hearing, if they have so requested in their written comments on the statement of objections.

As explained above, Article 27(3) of Regulation 1/2003 provides that the Commission may hear such third parties as it deems necessary or as the competition authorities of the Member States request. Thus it has a margin of discretion with respect to hearing third parties.[276] They may include witnesses who could give an account of the infringement or evidence relating to facts about the relevant market. Third parties may also apply to be heard, and their applications will be granted if they show a sufficient interest. An example of a third party who has a sufficient interest in the outcome of the proceedings would be a consumer association, when the proceedings concern products or services used by end consumers, or products or services that constitute direct input into such products or services. The Commission informs such persons in writing of the nature and subject matter of the procedure, and sets a time-limit for making written submissions.[277] The right to be heard is exercised in writing. The Commission has discretionary power to invite these third parties to present their arguments at the oral hearing of the parties to whom a statement of objections

[273] Article 14(3) of the Implementing Regulation.
[274] Section 5(3) of the Best Practice Guidelines.
[275] Excluding, of course, decisions under Articles 17, 18, 19 and 20 of Regulation 1/2003 (see below).
[276] See Cases 209/78 *et seq*., *Van Landewyck*, *op.cit.*, paras. 16-18.
[277] Article 13(1) of Regulation 773/2004.

has been addressed.[278] In addition, Article 14 of Regulation 773/2004 provides that the competition authorities of the Member States and officials and civil servants of other authorities of the Member States may be invited to participate in the hearing.

Under EC merger control proceedings, the persons entitled to an oral hearing are:

- the notifying parties,
- other individual parties (parties to the proposed concentration other than the notifying parties, such as the seller or the corporation which is the target of the concentration), and
- third parties, i.e. natural or legal persons, including customers, suppliers and competitors who can demonstrate a sufficient interest, in particular a) members of the administrative or management bodies of the corporations concerned or the recognized representatives of their employees; and b) consumer associations, when the proposed concentration concerns products or services used by final consumers.[279]

6.1.3 If several private parties are involved, will there be separate hearings or just one hearing?

In principle there would be one oral hearing for all co-defendants and other interested parties (including complainants). It is possible for the parties attending the oral hearing to be heard *in camera* when business secrets are under discussion.[280]

In EC merger proceedings the Commission may grant the opportunity to hold separate oral hearings depending on the parties involved, i.e. there might be one oral hearing for the merging parties and another for third parties. This makes it possible to raise confidential information during the oral hearings.

6.1.4 Can other interested parties intervene in the hearing? How else can they participate (for example, is there a practice of filing amicus briefs?)

As already explained, the right to be heard afforded in Regulations 1/2003 and 773/2004 is primarily exercised in writing. Third parties invited to attend the oral hearing are entitled to present their arguments at the hearing.

In EC merger control, if the Commission or other competent authorities of the Member States deems it necessary, other natural or legal persons may also be heard. Indeed, on application, natural or legal persons showing a sufficient interest, especially members of the administrative or management bodies of the corporations concerned or the recognized representatives of their employees, are entitled to be heard.[281] Once these third parties apply in writing to be heard, the Commission must inform them in writing of the nature and subject matter of the procedure, and set a time limit within which they may make their views known.

[278] Article 13(2) of Regulation 773/2004.
[279] Article 11 of the Implementing Regulation.
[280] Article 14(6) of Regulation 773/2004.
[281] Article 18(4) of the Merger Regulation.

6.1.5 At what point in time is a private party entitled to a hearing? Before or after the Commission has taken legally effective action? At any point during the investigatory process? Before a benefit is terminated or after it has been terminated?

The parties to whom a proposed decision is addressed are given the opportunity to be heard after the Commission has adopted the statement of objections, and before it formally adopts a decision in the case. Article 11 of Regulation 773/2004 provides that the Commission should grant these parties the right to be heard before consulting the Advisory Committee on Restrictive Practices and Dominant Positions. It appears that neither Regulation 1/2003 nor Regulation 773/2004 provides for a hearing in the case of a Commission decision withdrawing the benefit of a block exemption.[282] This gap is, however, filled by reference to the general principle of Community law, referred to above, that individuals should be heard before any adverse decision is taken.

In EC merger control proceedings, a private party is entitled to a formal hearing after the issuing of the statement of objections, but always before the Commission adopts a final decision in the sense explained in the answer to question 6.1.1. However, it is common practice for the formal oral hearing to take place a few working days after the deadline for responding to the statement of objections. In any event, the Commission may if appropriate grant the opportunity for informal oral hearings (see answer to question 6.1.1) at any time during the merger clearance proceedings.[283]

6.1.6 How serious does the proposed action have to be to trigger a right to a hearing? (We note different adverbs being used such as "perceptibly affected" or "gravely affected"). Is there a right-privilege distinction? Doctrine of legitimate expectations? Are discretionary decisions treated differently from non-discretionary decisions? Are decisions to take away an existing benefit (or to prohibit certain actions) treated differently from applications for a new benefit or for permission to take action?

The right to be heard is triggered irrespective of the seriousness of the Commission's proposed action. Under the general principles of Community law, a right to be heard exists in all proceedings that are likely to result in a decision adversely affecting a party or parties, whether or not that right is provided for in secondary legislation. Thus, as just noted, in addition to the situations where a right to be heard is guaranteed by Regulation 773/2004, other proceedings resulting in a decision that adversely affects a party give rise to the right to be heard.

The ECJ seems to treat somewhat differently decisions taken by the Commission in the exercise of its investigatory powers, e.g. a decision ordering an inspection or requesting information from a company, and has denied parties the right to be heard in such cases. Though the interests of a company may undeniably be adversely affected by such decisions, the Court held that a distinction should be drawn between decisions relating to the gathering of information by the Commission, and those relating to the substance of the case. Only the

[282] Article 29 of Regulation 1/2003.
[283] Article 16(2) of the Implementing Regulation.

latter change the party's status.[284] Similarly, companies under investigation are not entitled to be heard before the Commission adopts a statement of objections against them.

In EC merger control, the right to an oral hearing does not depend on the seriousness of the proposed action (though it would normally take place during Phase II investigations). It depends exclusively on whether the Commission either intends to adopt a decision as explained above (see answer to question 6.1.1), or considers it appropriate for a third party to have an oral hearing (in both cases if so requested).

6.1.7 As to what issues is person entitled to a hearing? Only if there are disputed facts? Is there a distinction between "adjudicatory facts" (that is, facts about the parties) and "legislative facts" (that is, generalized facts that don't concern the specific parties)? Where discretionary action is at stake? Where party wishes to argue for a new legal interpretation or for an exception to existing precedents? How about the situation in which a rule (delegated legislation) has already resolved the issue that the person wishes to raise? Is there still entitlement to a hearing? Where Commission has discretionary powers, can it constrain that power by adopting generally applicable rules?

These distinctions are not entirely relevant under EC antitrust procedure. The parties may make written and oral submissions relating to all aspects of the case. The exercise of the right to be heard means the parties must have an opportunity to make known their views on the truth and relevance of the facts and circumstances alleged, and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty.

The Commission may in fact constrain its discretionary powers by adopting generally applicable rules, though they are not of a legislative nature in the strict sense. Thus the Commission has limited its discretion in setting the amount of fines in antitrust cases by adopting the Fining Guidelines and the Leniency Notice. The Notice on Access to the File also limits the Commission's discretion. Such soft law instruments bind the Commission by creating legitimate expectations, and the European Courts have recognized that the Commission may not depart from rules it has imposed on itself.[285] In particular, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria it proposes to apply in the exercise of its discretion, it effectively imposes a limit on its discretion, inasmuch as it must then follow those guidelines.[286]

In the merger control field, the oral hearing is a right for the parties and does not depend on the issues to be discussed. When a third party asks the Commission for an oral hearing, the Commission will grant the request if it considers this appropriate. The issues raised during an oral hearing mainly concern the arguments of the parties on the objections made by the Commission.

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[284] Case 136/79, *National Panasonic (UK) Limited* v. *Commission*, [1980] ECR 2033, para. 21.

[285] Case T-7/89, *Hercules Chemicals* v. *Commission*, [1991] ECR II-1711, para. 53, confirmed on appeal in Case C-51/92 P, *Hercules Chemicals* v. *Commission*, [1999] ECR I-4235; Case T-223/00, *Kyowa Hakko Kogyo Co. Ltd. and Kyowa Hakko Europe GmbH* v. *Commission*, [2003] ECR II-2553, para. 62.

[286] Case T-380/94, *AIUFFASS and AKT* v. *Commission*, [1996] ECR II-2169, para. 57; Case T-214/95, *Vlaams Gewest* v. *Commission*, [1998] ECR II-717, para. 89; Case T-223/00, *Kyowa Hakko Kogyo*, *op.cit.*, para. 62.

6.2 Hearing Officer or Officers

6.2.1 Who is the Hearing Officer or Officers? How are those persons qualified and trained? Is the person a full-time Hearing Officer or does he/she have other tasks? How many Hearing Officers are present at a hearing (that is, is there just one Hearing Officer or is there a panel of Hearing Officers)?

A Hearing Officer is a high-ranking Commission official who serves as guardian of the procedural rights of the parties in proceedings before the Commission. His/her role is described in the detailed provisions of the Mandate for the Hearing Officer.[287] His/her powers were significantly strengthened in 2001 when the Commission adopted the current Mandate. Hearing Officers are appointed solely to serve in that role. The Mandate contains special rules governing their appointment and tenure. At present there are two Hearing Officers,[288] who were previously high-ranking officials in DG COMP. One Hearing Officer is present at a hearing.

6.2.2 What is the role of the Hearing Officer or officers? To serve as independent administrative judges (as would occur in an adversarial system) or as officials gathering information as part of an administrative investigation (as would occur in an inquisitorial system). Or do they serve some other function or functions?

Article 14(1) of Regulation 773/2004 provides that the Hearing Officer should conduct the hearing in full independence. His independence is also stressed in the Mandate. He is not a member of DG COMP, and for administrative purposes is directly answerable to the Competition Commissioner.[289] He also has direct access to the Competition Commissioner and can comment on any aspect of a case at any time.

The role of the Hearing Officer is to make sure that the parties' defense rights are respected in the course of the administrative proceedings before the Commission.[290] His primary responsibility is to guarantee the proper conduct of the oral hearing.[291] In addition, he intervenes whenever legitimate due process issues are at stake,[292] and exercises a variety of functions relating to the right of defense, such as deciding on applications to be heard by third parties,[293] or resolving disputes between the parties and the Commission concerning access to the file[294] and confidentiality[295] issues. He can also serve as mediator between DG COMP staff and the parties. Senior members of DG COMP are required to keep the Hearing Officer informed of developments in a case up to the point when a draft decision is submitted to the Competition Commissioner.

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[287] *Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings* ("the Mandate"), OJ [2001] L 162/21.
[288] Serge Durande and Karen Williams.
[289] Article 2(2) of the Mandate.
[290] Article 1 of the Mandate.
[291] See further Serge Durande and Karen Williams, "The Practical Impact of the Exercise of the Right to Be Heard: A Special Focus on the Effect of Oral Hearings and the Role of the Hearing Officers", (2005-2) *EC Competition Policy Newsletter* 22, pp. 24 *et seq*.
[292] See European Commission, *Commission XXXIIIrd Report on Competition Policy - 2003* (Brussels/ Luxembourg, 2004), para. 21.
[293] Article 6 of the Mandate.
[294] Article 8 of the Mandate.
[295] Article 9(3) of the Mandate.

The Hearing Officer reports to the Director General for Competition and the Director responsible on the procedural issues of the case and whether the right to be heard has been respected. In addition, he may make observations and suggestions on the further progress of the proceedings[296] and at times he may even alert the Commissioner on a substantive issue raised by the case, where he considers this would enhance the quality of the final decision.[297] On the basis of the draft decision, the Hearing Officer prepares a final report assessing whether the parties' rights of defense have been respected and whether the draft decision takes due account of all the relevant facts, whether favorable or unfavorable to the parties concerned. The final report is submitted to the Competition Commissioner, the Director General for Competition, and the Director responsible.[298] It is attached to the draft decision submitted to the Commission for consideration, and is also delivered with the decision to the addressees.[299]

6.2.3 In adversarial systems, there are various rules intended to safeguard the independence of Hearing Officers in administrative proceedings. Perhaps none of these rules apply to the inquisitorial proceedings conducted by the Commission. Is there any law or practice in your sector that provides protection to private interests similar to the following:

6.2.3.1 Could decision makers be disqualified for any form of bias? For example, what about a financial conflict of interest? Is there a transparency system in which officials must disclose any financial interests? How about clear evidence that a decisionmaker has prejudged the issues? If any such bias issues can be raised, how do you raise them and when must you raise them?

No specific rules apply to Commission officials making decisions in competition cases; this is an area where the law is not developed. Commission officials are, however, subject to a Code of Good Administrative Behavior,[300] which applies to all Commission staff and requires them always to act objectively and impartially, in the Community interest and for the public good. Their decisions should not be influenced by personal or national interest or political pressure. It is also possible for decision-makers to disqualify themselves in cases of conflict of interests or any other instance which impairs or might be seen to impair their objectivity.

If a Commission official fails to act objectively during proceedings, the party affected may lodge a complaint with the Secretariat General of the Commission. The complaint will be forwarded to the Director General or Head of the Department whose conduct is questioned, who has two months in which to answer the complaint. The complainant then has one month in which to request the Secretary-General to review the outcome of the complaint. In addition, bias on part of the decision-maker may constitute a reason for the CFI to invalidate a decision for misuse of powers.

[296] Article 13 of the Mandate.
[297] See *Commission XXXIVth Report on Competition Policy – 2004* (Brussels/Luxembourg, 2005), p. 20.
[298] Article 15 of the Mandate.
[299] Article 16 of the Mandate.
[300] OJ [2000] L 267/63. The Code is annexed to the Commission's Rules of Procedure and is binding on all Commission staff.

6.2.3.2 Are there any limitations on off-the-record ("ex parte") communications between the decisionmakers and by parties outside the Commission?

There are no specific limitations on off-the-record communications between the decision-makers and by parties outside the Commission. The Code of Good Administrative Behavior provides some general guidelines on the scope and contents of communications with the Commission. In addition, the Commission must protect the confidential information it has obtained from the parties in the course of the proceedings.

6.2.3.3 Is there any separation of functions of Commission staff members? In other words, can persons who have played roles as investigators, prosecutors, or advocates serve as Hearing Officers or advisers to Hearing Officers?

As already explained, the Hearing Officers are independent of DG COMP and act exclusively in the context of the proceedings, where their participation is limited to the functions described above.

6.2.3.4 Are there any rules prohibiting or relating to legislative or political pressure on decisionmakers?

There are no explicit rules that apply to lobbying. The EC Treaty, however, requires Commissioners to be completely independent in the performance of their duties. They may not take instructions from a government, the Council or any other body. Nor may they behave in a manner that would be incompatible with their duties. Member States are obliged to respect this principle, and not to seek to influence Commissioners in the performance of their tasks.[301]

The Code of Good Administrative Behavior imposes similar duties on Commission staff.

6.3 Conduct of hearing

6.3.1 Hearing or conference? Is the "hearing" a meaningful step in the decisionmaking process or merely a relatively useless informal conference with Commission officials? Please explain.

Although proceedings before the Commission in antitrust cases are predominantly written, the importance of the oral hearing should not be under-estimated. It enables companies subject to Commission investigations and third parties to present their arguments before the Commission, and gives an opportunity to clarify matters not settled in the written proceedings and emphasize the main lines of the case. It also enables the parties to comment on written replies by other parties. The Commission not infrequently changes its mind after an oral hearing, and this explains the divergences between the statement of objections and the final Commission decision in many cases.

[301] Article 213 EC.

6.3.2 What is the order of events at the hearing? For example, does the prosecution open with a statement of its position?

The hearing is opened by the Hearing Officer. The basic order of the procedure to be followed at the hearing is not established by law, but it is typically as follows:

- Presentation of the Commission's case by the DG COMP case handler; in practice this is often a short and formal step.

- The parties are heard and third parties are given the opportunity to speak on the subject-matter of the case; the statements by the companies may deal with any factual, legal or economic point raised by the statement of objections.

- The Hearing Officer invites the representatives of the competent authorities of the Member States to ask the parties present at the hearing questions. Normally this will be at the end of a party's presentation; if a presentation is particularly long, questions may be invited after each speaker.

- The Hearing Officer or Commission staff present ask questions, which usually relate to the arguments made during the oral presentation. The Commission may invite a party to clarify or expand points it has made in an argument.

- The Hearing Officer may invite the parties to make concluding remarks before formally closing the hearing. Closing remarks should be concise, and in principle address only issues that have arisen since the party made its presentation.

In practice the agenda for the hearing is discussed beforehand between the Hearing Officer and the lawyers representing the parties to be heard. The Hearing Officer may, after consulting the Director responsible for the case, hold a meeting to prepare for the hearing with the parties who will participate.[302] If no agreement on coordination of the procedure is made, the Hearing Officer allocates and polices time-limits for the parties making their submissions.

6.3.3 Do witnesses present testimony at the hearing? If so, who selects the witnesses - the Hearing Officer or the lawyers? Who frames the issues? Who decides on the order in which witnesses testify? Who puts questions to the witnesses? Can Hearing Officer engage his own experts? If he does, can the parties present their own experts?

The right to submit testimony is part of the right to be heard. It is for the parties to select witnesses and frame the issues on which they will testify. Witnesses may be called on to confirm the line of argument made during the hearing. Expert witnesses may also be used to respond to questions put by Commission staff after they have had an opportunity to consider the evidence.

[302] Article 11 of the Mandate.

If witnesses or expert witnesses are produced, the companies in principle provide the Commission in advance with a statement of what they will say and details of their qualifications.

6.3.4. Presentation of proof. Assuming that the hearing is more than an informal conference but is actually an opportunity to present proofs, how are proofs presented? Oral or written? Audio-visual? Expert testimony? Qualification of experts? Any rules of evidence? Burden of proof rules?

There are no specific rules relating to the presentation of proof; this is discussed and agreed on with the Hearing Officer. A party who has special requirements for a presentation, such as the use of a video recorder, an overhead projector or a beamer, should inform the Hearing Officer beforehand. In addition, copies of documents that will be referred to during the hearing should be supplied in advance, either with the reply to the statement of objections, or in good time before the hearing.

According to Article 2 of Regulation 1/2003, in antitrust proceedings before the Commission, the Commission bears the burden of proving all elements of an infringement of Article 81(1) EC. However, it is for a party who claims the benefit of exemption under Article 81(3) to prove that all the requirements for application of Article 81(3) are fulfilled. Article 2 does nothing more than codify the case-law of the Court of Justice.[303] One intriguing issue is the burden of proof in Article 82 cases. While it would seem from the letter of Article 2 of Regulation 1/2003 that the Commission has the burden of proving all the conditions of Article 82, Commission officials argue that the effectiveness of competition law enforcement requires the defendant at least to prove the facts in his own sphere of influence and that tend to exculpate him. This would be the case for efficiency defenses or defenses based on objective justification.[304]

6.3.5 Does the Commission staff present evidence or argument or only the private party or parties?

As explained above, the hearing starts with a summary presentation of the Commission's case. The Commission may also ask questions relating to the evidence and arguments presented by the parties during the hearing.

6.3.6 Is there one continuous hearing or are the proceedings carried on discontinuously from time to time?

There is one continuous hearing. It usually takes a day or two, but in complex cases it may go on for more than two weeks.

[303] Case T-34/92, *Fiatagri and New Holland Ford* v. *Commission*, [1994] ECR II-905, para. 99; Case T-112/99, *Métropole Télévision*, *op.cit.*, paras. 130-131.
[304] Response of Emil Paulis to a question in a recent antitrust conference.

6.3.7 Confrontation. Can one side (private or Commission) contradict the proofs or arguments introduced by the other side? How? Cross-examination?

The principal purpose of the hearing is to allow the parties to present their case and comment on the evidence used by the Commission in the statement of objections. The parties do not have the right to cross-examine the Commission, other parties (co-defendants) or third persons whose testimony is heard at the hearing. The Commission does not cross-examine the parties, but it may question them after the presentation with respect to their oral submissions. It is not obliged to comment on the parties' arguments immediately; its final assessment of their arguments during the hearing is reflected in its decision, which constitutes the Commission's last word on the case.

6.3.8 Is there any requirement that persons responsible for making a decision have achieved personal familiarity with the issues or can the decision be purely institutional in nature?

As explained above, the Court of Justice has ruled that compliance with the principle of collegiate responsibility requires that decisions are actually taken by the College of Commissioners and correspond exactly to its intention. The College of Commissioners is solely responsible for adopting both the operative part of the decision and the statement of reasons, in accordance with that principle. The Court has also confirmed that Commission decisions finding infringements of EC competition rules may not, without violating the principle of collegiate responsibility, be delegated under Article 27 of the Commission's Rules of Procedure to the Competition Commissioner.[305]

6.3.9 To what extent are criminal law standards followed in cases of serious sanctions such as a requirement that the Commission prove fault or intent? Is there a requirement that legal standards be clearly defined? How does one distinguish whether the administrative law or criminal law standards are applied?

The Commission proceedings are not considered to be criminal in nature. No proof of fault or intent is necessary to find a violation of Articles 81 or 82 EC,[306] but for a fine to be imposed, at least a showing of negligence is required.[307] There is no requirement for the Commission to satisfy a certain standard of proof as such, although this is a theme constantly debated in common law Member States.[308] The European Courts refer quite often to the

[305] Case C-137/92 P, *Commission* v. *BASF AG and Others*, [1994] ECR I-2555, para. 71.

[306] With regard to Article 81, the critical factor is the objective meaning and purpose of the agreement in its economic context, while the subjective intention of the parties is immaterial. *Vice versa*, an agreement might not have as its object the restriction of competition merely because that was the parties' subjective aim. In Article 82 too, abuse is an objective concept and the intention of the dominant undertaking is irrelevant. However, exceptionally, intention may play a role in establishing an abuse of a dominant position in predatory pricing cases, and in cases where the abuse takes the form of vexatious litigation which is part of a systematic campaign or strategy of the dominant undertaking to intimidate, harass, and exhaust competitors by unreasonably raising their costs.

[307] Article 23(1) of Regulation 1/2003.

[308] In England the High Court has suggested that a high degree of probability should be required in Article 81 EC cases. See *Shearson Lehman Hutton Inc.* v. *Maclaine Watson & Co. Ltd.* (QB), [1989] 3 CMLR 429; *contra Georgios Panayiotou (George Michael) et al.* v. *Sony Music Entertainment (U.K.) Limited* (Ch.D), [1994] ECC

"*requisite legal standard*",[309] but this term does not seem to indicate a predetermined legal standard of proof, at least in the sense used in common law systems.

As regards EC merger control, the CFI in *Tetra Laval*,[310] a recent judgment involving a conglomerate merger, referred in some detail to the requisite legal standard:

"*Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for competition on the markets concerned, as is recognized in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings, the proof of anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects.*"[311]

Moreover, in *Airtours*,[312] a judgment involving a merger leading to a dominant position, the CFI also referred to the legal standard to be adopted by the Commission by stating:

"*It is also apparent from the judgment in Kali and Salz that, where the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.*"[313]

6.3.10 Time limits on making the decision? How long is a "reasonable time"?

Apart from merger cases, where the Commission is subject to strict time limits for making a decision, there are no particular time limits for the Commission to adopt a decision in Article 81 and 82 EC cases. The Commission is, however, bound by general principles of Community law to bring its proceedings to an end and produce its decision within a reasonable time. The reasonableness criterion is rather fluid. It may be useful to draw a

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395. The Competition Commission Appeals Tribunal, as it then was, has confirmed, however, that the balance of probabilities remains the applicable standard in cases of infringements of the Competition Act. See *Napp Pharmaceutical Holdings Ltd.* v. *DGFT*, [2002] ECC 177. See also *Attheraces Ltd & Anr* v. *The British Horseracing Board & Anr* (Ch.D), [2005] EWHC 3015. In interlocutory proceedings the balance of convenience remains the required test (see *Easyjet* v. *British Airways* (QB), [1998] EuLR 350). In Ireland the standard of proof is the balance of probabilities (see Imelda Maher, *Competition Law: Alignment and Reform* (Dublin, 1999), p. 81). On the standard of proof in competition cases see generally Bo Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts", 1 ECJ 3 (2005), p. 6.

[309] See e.g. Case T-56/02, *Bayerische Hypo- und Vereinsbank AG* v. *Commission*, not yet reported, para. 77: "*In those circumstances, it must be accepted, in the light of the application, that the applicant has succeeded in demonstrating that the Commission has not established to the requisite legal standard that there was an agreement on the way of charging for currency exchange services. In the absence of proof of a meeting of wills on that point, Article 1 of the contested decision must be annulled in so far as it refers to an agreement whose object was to fix ... the way of charging for the exchange of in-currency banknotes (i.e. a percentage commission)*".

[310] Case T-5/02, *Tetra Laval* v. *Commission*, [2002] ECR, II –4381.

[311] Para. 155.

[312] Case T-342/99, *Airtours* v. *Commission*, [2002] ECR, II-2585.

[313] Para. 63.

parallel from the case-law of the Court of Justice, which has on occasions examined the long duration of judicial review proceedings before the CFI. Although administrative proceedings before the Commission cannot be equated to judicial proceedings before a Community Court, the Court's guidance is still valid. Thus it has held that "*the reasonableness of such a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities*".[314] In this respect, the ECJ has considered numerous precedents of the European Court of Human Rights, albeit "*by analogy*".[315]

Also relevant is the right to good administration under Article 41 of the Charter of Fundamental Rights, which refers to the right to have one's affairs handled within a reasonable time.[316]

6.3.11 How is the record of the hearing maintained? Is there a verbatim transcript? What goes into the record and to what degree can decisionmaker rely on material outside the record? Can decisionmaker rely on his/her own expertise? Can decisionmaker rely on material in Commission's files? Can the decisionmaker take official notice of facts that have not been proved and what is the procedure for doing so?

Article 14(8) of Regulation 773/2004 provides that the statements made by each party during an oral hearing must be recorded and made available on request to the parties attending the hearing. The record of the hearing is made in audio format. The Commission used to prepare written minutes of oral hearings, but this procedure gave rise to problems resulting from delays in transcription or translation, and in a number of instances parties challenged the Commission decision on the grounds of some error in the production of the minutes. The new procedure does not give rise to such problems.

7. Decisional phase

The Commission proceedings culminate with the adoption of a decision, which is a Community measure addressed to specific persons. Decisions are enforceable under national procedural law. The decision represents the Commission's final pronouncement on the case and is challengeable before the CFI, while a further appeal to the ECJ is only possible on points of law.

7.1 Are we correct in assuming that the officials who conducted the hearing do not write a "proposed" decision? Our assumption is that there is only a single final decision at the conclusion of the process, not a series of tentative decisions.

The proposed decision is drafted by the case handlers, and is approved by senior Commission officials, who may suggest changes. The Hearing Officer is responsible solely for organizing the hearing and ensuring that the parties' rights of defense are respected during the

[314] Case C-185/95 P, *Baustahlgewebe, op.cit.*, para. 29.
[315] *Ibid.*
[316] See also above.

proceedings before the Commission. He is not involved in drafting the Commission decision in the case, although he is one of the senior officials who comment on it, which may result in changes to the draft. In particular, after the oral hearing, the Hearing Officer prepares an interim report on the hearing and the procedural issues with respect to the observance of the right to be heard. The observations in this report may deal also with questions of substance, summarizing the main arguments made by the Commission in the statement of objections, arguments put forward by the parties and third parties, as well as any developments at the hearing. The Hearing Officer may also give his own legal assessment of the case and his provisional conclusions from the hearing and make suggestions relating to the further progress of the proceedings. This interim report, which is not disclosed to the parties, is given to the Director General for Competition and the Director of the operational directorate of DG COMP responsible for handling the case.[317] Although it has no binding force, this report is taken very seriously by the case handlers drafting the decision, in particular if it identifies shortcomings in the Commission's case.

After a preliminary draft of the decision is ready, the Hearing Officer prepares his final report, which is shorter, and is sent to the Commissioner, the Director General for Competition and the Director of the directorate that handled the case.[318] In this report he comments solely on the observance of the right to be heard.

The preliminary draft decision is then sent to the Legal Service for review. It is subsequently presented for consultation to the Advisory Committee, where representatives of the Member States' competition authorities discuss and comment on it. On the basis of these consultations, the Commission officials will proceed to the adoption of a final draft decision, which is then, with the final report of the Hearing Officer and the opinion of the Advisory Committee, submitted to the College of Commissioners for approval.

7.2 What is the nature of the decision-maker's obligation to find facts (how detailed must fact findings be)? Must the decisionmaker provide and justify legal interpretations and conclusions? Must the decision-maker furnish reasons for discretionary decisions? How detailed a statement of reasons must be provided? [Article 253] Must the statement of reasons cover all of the factors that the agency is required to consider?

Article 253 EC requires the Commission to state the reasons on which its decisions are based. The case law of the European Courts clarifies the scope of this duty: the statement of reasons must make it possible for the Courts to exercise their supervisory function, and for the parties to ascertain the matters justifying the measure adopted, so that they can defend their rights and verify whether the decision is well founded.[319] Whether the statement of reasons is sufficient must be assessed in the circumstances of a particular case, including the context of a particular decision and the interests of the addressee in obtaining an explanation.[320]

The ECJ has held that the statement of reasons should include both the factual and legal grounds on which the Commission bases its decision.[321] There is a line of case-law indicating

[317] See Article 13(1) of the Hearing Officer Mandate.
[318] See Article 15 of the Hearing Officer Mandate.
[319] See e.g. Case T-311/94, *BPB de Eendracht NV* v. *Commission*, [1998] ECR II-1129, para. 65.
[320] Case C-367/95 P, *Commission* v. *Chambre syndicale nationale des entreprises de transport de fonds et valeurs (Sytraval) and Brink's France SARL*, [1998] ECR I-1719, para. 63.
[321] Case 24/62, *Germany* v. *Commission*, [1963] ECR 131.

that if the Commission adopts a new legal interpretation in a decision, that decision may need to be more fully reasoned.[322] This is also the case when the Commission departs from an administrative practice followed over many years. For reasons of proper administration, foreseeability and transparency, it must give full reasons for that change in its administrative practice.[323] The same is true when the Commission departs from its own Guidelines or Communications, such as in the case of fines.[324]

The Commission bears the burden of proving infringements,[325] so it must refer in its decision to sufficiently precise and coherent evidence supporting its allegations. It may rely on hearsay evidence, and may prove a course of conduct by sufficiently clear and numerous examples.[326]

The Courts have always stressed the importance of the statement of reasons: without it, the full effects of the decision may be difficult to ascertain. Thus failure to include adequate reasoning will result in the decision being annulled.[327] The requirement of reasoning covers not only final decisions bringing the proceedings to an end, but also decisions on procedural matters such as requests for information and investigations.[328] The Commission must state reasons by specifying the subject-matter and purpose of the measures ordered. As the Courts have held, "*this is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable the undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence*".[329]

7.3 Is there a duty of care imposed on decisionmaker to consider and respond to all relevant submissions by the parties (a dialogue requirement)?

The requirement that the decision should be adequately reasoned implies the Commission's duty to comment on both inculpatory and exculpatory evidence, and to address all major arguments made by the parties. The Commission is not, however, required to discuss all the matters of fact and law raised by every party or dealt with during the proceedings.[330] Nor is it required to refute all the arguments made by the parties.[331]

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[322] Case 73/74, *Groupement des fabricants de papiers peints de Belgique and Others* v. *Commission*, [1975] ECR 1491, para. 31.
[323] See Case C-344/01, *Federal Republic of Germany* v. *Commission*, [2004] ECR I-2081, para. 70.
[324] See e.g. Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon Co. Ltd and Others* v. *Commission*, [2004] ECR II-1181, para. 231 concerning the Commission Guidelines on the method of setting fines. According to the Court, when the Commission "*departs from them it must set out expressly the reasons justifying such a departure*".
[325] On the burden of proof, see above.
[326] Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, *Coöperatieve Vereniging "Suiker Unie" UA and Others* v. *Commission*, [1975] ECR 1663, para. 164. See further Peter M. Roth (Ed.), *Bellamy and Child European Community Law of Competition* (London 2001), p. 981.
[327] Case T-5/93, *Roger Tremblay and Others* v. *Commission*, [1995] ECR II-185, para. 42.
[328] See e.g. Article 18(3) of Regulation 1/2003.
[329] See e.g. Cases 46/87 and 227/88, *Hoechst AG* v. *Commission*, [1989] ECR 2859, para. 29; Case T-65/99, *Strintzis Lines Shipping SA* v. *Commission*, [2003] ECR II-5433, para. 44.
[330] Cases T-346/02 and T-347/02, *Cableuropa SA and Others* v. *Commission*, [2003] ECR II-4251, para. 232.
[331] Case 6/72, *Europemballage Corporation and Continental Can Company Inc.* v. *Commission*, [1972] ECR 215, para. 6.

7.4 Is there a reasonableness requirement imposed on discretionary decisions? If so, how is it stated? Misuse of power? Failure to consider all relevant factors? Manifest error? Is there a requirement of proportionality? How defined?

Article 230 EC entitles the CFI to review Commission decisions "*on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers*". The ECJ has held that its role is to verify whether the relevant rules on procedure and the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.[332]

The standard applied to review discretionary Commission decisions, in particular the economic assessment of the case, is whether the Commission has committed a manifest error of assessment. This applies not only to Article 81(3)[333] but also to Article 81(1) and 82 cases. Thus in *Van den Bergh Foods* the Court stressed with regard to the Commission's assessments on the basis of Article 81(1) EC: "*Judicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers*".[334] In *Airtours*, a merger case, the Court also reviewed whether the decision was based on convincing evidence and whether the Commission had proved its case to the requisite legal standard.[335] This suggests that the Commission's findings may be reversed not only in the case of clear contradictions or ignoring of evidence, but also for less serious errors.

Misuse of powers, understood as the exercise of powers for improper purposes rather than lack of power to act, has never been successfully invoked in any competition case. The CFI standard for annulling a decision on this ground is that it would have to be apparent on the basis of objective, relevant and consistent factors that the sole or main purpose of the decision was other than stated.[336]

The Courts' competence to review Commission decisions is broader with respect to fines. Article 31 of Regulation 1/2003 gives the Courts unlimited jurisdiction to review Commission decisions imposing fines or periodic penalty payments and, in particular, to cancel, reduce or increase the fine or periodic penalty payment.[337] Thus in reviewing fines

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[332] Case 42/84, *Remia BV and Others* v. *Commission*, [1985] ECR 2545, para. 34; Cases 142/84 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc.* v. *Commission*, [1987] ECR 4487, para. 62; Case C-194/99 P, *Thyssen Stahl* v. *Commission*, [2003] ECR I-10821, para. 78.

[333] See e.g. Case C-234/89, *Stergios Delimitis* v. *Henninger Bräu AG*, [1991] ECR I-935, para. 44: "*It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations. The performance of that task necessarily entails complex economic assessments, in particular in order to assess whether an agreement falls under Article 85(3) [now 81(3)]*". See also Case T-131/99, *Michael Hamilton Shaw and Timothy John Falla* v. *Commission*, [2002] ECR II-2023, para. 38.

[334] Case T-65/98, *Van den Bergh Foods Ltd.* v. *Commission*, [2003] ECR II-4653, para. 80.

[335] Case T-342/99, *Airtours plc* v. *Commission*, [2002] ECR II-2585, para. 294. On the requisite legal standard, see also above.

[336] See *Bellamy and Child*, *op.cit.*, p. 983.

[337] The Court's jurisdiction is based on Article 229 EC, which provide that Regulations adopted by the Council under the provisions of the EC Treaty may give the Court unlimited jurisdiction to review decisions imposing the penalties provided for in those Regulations.

imposed by the Commission, the Courts may take into account all relevant aspects of the case and all relevant questions of law and fact.

7.5 What remedies are available to the Commission? Cease and desist orders? Divestiture? Invalidation of intellectual property? Declaratory relief? Civil money penalties? Restitution? License revocation? Other sanctions?

Antitrust enforcement pursues three schematically different but substantively interconnected objectives.[338] The first is injunctive, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from certain delinquent conduct, but also positive ones ensuring that the conduct ceases in the future. The second objective is restorative or compensatory, i.e. to remedy the injury caused by the anti-competitive conduct. The third is penal,[339] i.e. to punish the perpetrator of the illegal acts in question and deter him and others from future transgressions. Public enforcement, in particular, may well directly or indirectly pursue all three objectives. The injunctive objective is served by cease and desist orders and negative or positive injunctions. The restorative-compensatory objective is primarily served by private enforcement, although public enforcement may still have a role to play.[340] Finally, public enforcement is predominant in pursuing the penal objective.

Regulation 1/2003 allows the Commission to adopt a variety of measures/remedies when it finds an infringement of EC competition rules. A brief summary of those measures follows.

Declaratory relief: Article 7(1) *in fine* of Regulation 1/2003 provides that the Commission may declare that an infringement has been committed in the past without imposing fines, if it has a legitimate interest in doing so.[341] Such a decision may be of use to litigants claiming damages for antitrust injury before national courts.

Cease and desist orders (injunctions): Under Article 7(1) of Regulation 1/2003, the Commission may order the companies concerned to terminate the infringement. This power of the Commission is quite broad and may extend to any behavioral or structural remedies that are necessary to bring the infringement to an end.[342] Article 7(1) of Regulation 1/2003 expressly empowers the Commission to use behavioral remedies that are "*proportionate to the infringement committed and necessary to bring the infringement to an end*". An important limitation on the Commission's power stems from the freedom to contract. The

[338] See Christopher Harding and Julian Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency* (Oxford, 2003), pp. 229 *et seq*.
[339] The term "penal" is used here in its generic-punitive sense. It does not necessarily correspond to criminal law.
[340] There are cases where the public agency enforcing the competition rules may take into account the injury to specific victims of the anti-competitive practice and impose upon the perpetrator the obligation to compensate those persons. This may be pursued informally by the public agency, for example through an informal settlement. In addition, there are competition regimes which also give the public authority a role in claiming damages, acting on behalf of the victims. This is not the case with EC competition law, though some Member States have adopted such a system (e.g. Article L442-6 of the French *Code de Commerce*).
[341] This power of the Commission was also confirmed under the old system in Case 7/82, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* v. *Commission*, [1983] ECR 483, paras. 16-28.
[342] Cases C-241/91 and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP)* v. *Commission (Magill)*, [1995] ECR I-743, para. 90.

CFI was confronted with this issue in *Automec II*,[343] where the Commission had refused to grant the complainant's request for an injunction requiring BMW to supply it with vehicles. According to the Court, freedom to contract was the basic rule, so the Commission could not order a party to enter into a contractual relationship "*where as a general rule the Commission has suitable means at its disposal for compelling an enterprise to end an infringement*".[344] In the Commission's view, such purely positive measures may be more justifiable in Article 82 cases.[345] Indeed, in Article 82 refusal to supply cases, ordering the party to enter into certain contractual relationships is often an appropriate remedy allowing the infringement to be brought to an end. Thus in *Commercial Solvents*, for example, the Court upheld the Commission's decision ordering a company which enjoyed a dominant position on the market to supply certain quantities of raw materials to its competitor in the downstream market.[346]

The Commission has no right to decide on the validity of intellectual property rights, but the Courts have held that it may in exceptional cases control the way they are exercised. In *Magill* the ECJ upheld the Commission's decision requiring certain broadcasting companies to make their TV listings available and permit their reproduction, subject to payment of reasonable royalties.[347] In *IMS Health*, which was a preliminary reference case, the Court again confirmed that the exercise of intellectual property rights was not immune from antitrust law.[348] Most recently, the Commission obliged Microsoft to disclose to its competitors detailed descriptions of the communications protocols by which Microsoft's operating systems communicate with one another (referred to as "specifications"), and then to license competitors to use those specifications for the purpose of developing their own products.[349]

Article 7 of Regulation 1/2003 also empowers the Commission to impose structural remedies, albeit under more stringent conditions than the Commission initially proposed in its draft regulation of September 2000. Thus, basically, for a structural remedy to be imposed, no equally effective behavioral remedy must be possible. Although the Commission always considered that it could impose structural remedies under Regulation 17 if that was the only way of ensuring that an antitrust infringement was brought to an end, the express provision of

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[343] An argument against the possibility of an injunction ordering the continuation of a contractual agreement under Article 81 EC is sometimes derived from the ECJ judgment in Cases 228/82 and 229/82, *Ford of Europe Incorporated and Ford-Werke Aktiengesellschaft* v. *Commission*, [1984] ECR 1129, where the Court quashed the Commission's interim measures decision (Commission Decision 82/628/EEC of 18 August 1982 (*Distribution system of Ford Werke AG - interim measure*), OJ [1982] L 256/20) ordering Ford to supply its distributors in Germany with right-hand drive cars. However, this happened as a result of procedural irregularities and not because such a positive measure cannot in principle be ordered in Article 81 cases. See further on this case Laurence Idot, "Les mesures provisoires en droit de la concurrence : Un nouvel exemple de symbiose entre le droit français et le droit communautaire de la concurrence", 29 RTDE 581 (1993), p. 595.

[344] *Automec II*, *op.cit.*, para. 51. The other means are presumably the prohibition of an agreement, the withdrawal of the benefit of an individual or block exemption and fines and/or periodic penalty payments.

[345] See the Commission's arguments in *Automec II*, *op.cit.*, para. 43.

[346] Cases 6/73 and 7/73, *Commercial Solvents* v. *Commission*, [1974] ECR 223.

[347] Case T-69/89, *Radio Telefis Eireann* v. *Commission*, [1991] ECR II-485, upheld on appeal by the ECJ in Cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd. (ITP)* v. *Commission*, [1995] ECR I-743.

[348] Case C-418/01, *IMS Health GmbH & Co. OHG* v. *NDC Health GmbH & Co. KG*, [2004] ECR I-5039.

[349] Commission Decision in case COMP/37.792–*Microsoft*, currently under appeal (Case T-201/04). According to Article 1(2) of the Commission Decision, "*protocol*" means "*a set of rules of interconnection and interaction between various instances of Windows Group Server Operating Systems and Windows Client PC Operating Systems running on different computers in a Windows Work Group Network.*"

Article 7, along with the specific in-built condition of proportionality and necessity, must be approved from the point of view of both legal certainty and human rights.

Interim Measures: In Regulation 17 there was no explicit reference to the possibility for the Commission to take interim measures. This gap was filled by the Court of Justice in *Camera Care*.[350] The Commission could adopt interim or interlocutory measures in urgent cases, to avoid a situation likely to cause serious and irreparable harm to a complaining party or to harm the public interest. This power is now expressly provided by Regulation 1/2003. However, the letter of Article 8(1) of Regulation 1/2003 excludes the protection of private interest as such from the scope of Commission-ordered interim measures; instead, there is only a reference to "*serious and irreparable damage to competition*". Interim measures whose sole aim is to protect the private interest of a complainant or plaintiff can only be adopted either by national competition authorities, if their national law so provides, or by national courts. Of course, it is likely that an anti-competitive practice which harms a specific person will also harm competition in general, and thus the public interest.[351]

Fines: Article 23(2) of Regulation 1/2003 empowers the Commission to impose fines on companies which intentionally or negligently infringe EC competition law. The fine may not exceed 10% of the total turnover of the fined company in the business year preceding the decision. Article 23(3) of Regulation 1/2003 requires the Commission to have regard to both the gravity and the duration of the infringement in fixing the amount of the fine. The Commission has issued Guidelines[352] that set out the methodology it uses in setting the amount of fines. Also of particular importance is the Leniency Notice, which provides for no fines for cartel whistleblowers and reduced fines for companies which cooperate with the Commission in unearthing cartels.[353] Regulation 1/2003 breaks with Regulation 17, which aimed at prevention rather than at punishment and deterrence, and undoubtedly furthers the efficiency of these sanctions, especially with regard to fines for procedural infringements, which under the old Regulation were "laughable".[354] Such fines may now reach up to 1% of the undertaking's total turnover in the preceding business year.[355] Fines for both substantive and procedural infringements are now to be calculated on the basis of "total" annual turnover, which means that it will not be necessary to calculate the turnover only in the relevant product and geographical markets.

Periodic penalty payments: After a decision finding an infringement of EC competition law has been issued, the Commission may impose a periodic penalty payment (modeled on the French "*astreinte*") to compel the company concerned to terminate the infringement. The penalty may not exceed 5% of the firm's average daily turnover in the preceding business year. Periodic penalty payments have also been modified in Regulation 1/2003 in order to strengthen deterrence, and are applicable to both substantive and procedural infringements.

In the merger control area the proceedings are of a different nature; thus the very idea of remedies is not transposable from the antitrust field. In merger control proceedings the term

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[350] Case 792/79, *Camera Care Ltd.* v. *Commission*, [1980] ECR 119, para. 19.

[351] For a critical comment on this restriction of the conditions under which the Commission may grant provisional measures, see Laurence Idot, *Droit communautaire de la concurrence, Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE* (Paris/Brussels, 2004), pp. 125-126.

[352] OJ [1998] C 9/3.

[353] OJ [2002] C 45/3.

[354] See Alan J. Riley, "EC Antitrust Modernisation: The Commission Does Very Nicely - Thank You! Part One: Regulation 1 and the Notification Burden", 24 *European Competition Law Review* 604 (2003), p. 609.

[355] Article 23 of Regulation 1/2003.

"remedies" is used to refer to modifications in the merger agreement, proposed through commitments given by the merging parties which are intended to satisfy the Commission's concerns as to the compatibility of the proposed merger with the common market.[356] The remedies proposed may be "structural", i.e. measures giving rise to a structural change in the market such as the divestiture of a business; or "behavioral", i.e. measures undertaken by the merging parties which represent some kind of action or inaction that does not affect the market structurally for example, a promise to grant a license on fair and reasonable terms. These remedies are not imposed unilaterally by the Commission; it is the merging parties who propose them to the Commission, which may accept or reject them. When the Commission accepts them, it may further transform them into conditions or obligations in its clearance decision.

With this caveat in mind, the Commission can take the following measures unilaterally in the context of its merger enforcement powers.

Dissolution of the merger: If the Commission issues a decision declaring a merger incompatible with the common market, and the parties have already implemented the merger, the Commission may order the dissolution of the merger, the disposal of all the shares or assets acquired, or any other appropriate measure. The Commission has the same powers when the parties implement the merger in contravention of a condition imposed on them in the clearance decision.

Interim Measures: According to Article 8(5) of the Merger Regulation, the Commission may take appropriate interim measures to restore or maintain conditions of effective competition when a concentration (a) has been implemented in contravention of the standstill obligation enshrined in Article 7 of the Merger Regulation, and a decision as to its compatibility with the common market has not yet been taken; (b) has been implemented in contravention of a condition attached to a decision under Articles 6(1)(b) or 8(2); or (c) has already been implemented but is declared incompatible with the common market.

Fines: As in the antitrust field, the Commission may also impose fines of up to 10% of the aggregate turnover of the undertakings concerned when, either intentionally or negligently, they (a) fail to notify a merger to the Commission; (b) implement a merger before the Commission has declared it compatible with the common market; (c) implement a merger that has been declared incompatible with the common market or do not comply with an Commission decision ordering its dissolution; or (d) fail to comply with a condition or obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2)(b) of the Merger Regulation.[357] Lower fines of up to 1% of the aggregate turnover of the undertakings concerned may be imposed for procedural infringements, i.e. basically not complying with a Commission request for information taken by decision, supplying incorrect or misleading information, or refusing to submit to an inspection ordered by decision.[358]

Periodic penalty payments: The Commission may also impose periodic penalty payments not exceeding 5% of the average daily aggregate turnover for each working day of delay, in order to compel an undertaking to (a) supply complete and correct information which it has requested by decision; (b) submit to an inspection which it has ordered by decision; (c)

[356] See Commission Notice on Remedies Acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98, OJ [2001] C 68/3.
[357] Article 14(2) of the Merger Regulation.
[358] Article 14(1) of the Merger Regulation.

comply with an obligation imposed by decision pursuant to Article 6(1)(b), Article 7(3) or Article 8(2)(b) of the Merger Regulation; or (d) comply with any measures of dissolution ordered by decision.[359]

7.6 Is the full decision publicly available? How is it publicized?

Article 30 of Regulation 1/2003 specifies that Commission decisions must be published. The requirement covers decisions finding an infringement, ordering interim measures or making commitments binding, inapplicability decisions, and decisions imposing fines and periodic penalty payments.[360] The published decision must state the names of the parties, the main contents of the decision and the penalties imposed. The public version of the decision is purged of business secrets of the parties and other confidential information.[361]

The Commission is not obliged to and does not publish its procedural decisions, such as decisions ordering on-site inspections or requesting information. Nor is the Commission obliged to publish a decision to withdraw a block exemption in an individual case.[362]

Publication of the decision takes place in the Official Journal of the European Union (in the L series). Nowadays the Commission publishes only abridged versions of the decisions in the Official Journal, but the full text of the decision is made available in electronic format on the Commission's website. The full version of the decision is made available only in the authentic language of the decision and the Commission's working languages (English and French, sometimes German).[363]

In the merger control area, according to Article 20 of the Merger Regulation, the Commission must publish in the Official Journal all Phase II decisions and all decisions imposing fines and periodic penalty payments, ordering the dissolution of an unduly implemented merger, or ordering interim measures. The opinion of the Advisory Committee must also be published in the Official Journal. The announcement must state the names of the parties and the main contents of the decision, and must have regard to the legitimate interest of undertakings in the protection of their business secrets. Phase I decisions, however, are not published in the Official Journal, but are published on the web site of DG-COMP.[364]

7.7 Process resulting in a rule: We recognize that Commission proceedings sometimes result in an individualized decision and sometimes in a rule of general application. Does the process in your sector sometimes result in adoption of a rule rather than a decision? If so, please provide additional information about when and how this might occur.

With the exception of sector investigations under Article 17 of Regulation 1/2003, proceedings before the Commission always result in an individualized decision. Commission

[359] Article 15 of the Merger Regulation.
[360] Decisions under Articles 7 to 10 and Articles 23 and 24 of Regulation 1/2003.
[361] Article 30(2) of Regulation 1/2003.
[362] In these cases, however, the Commission has discretion whether to publish its decision, if the general interest so requires (see Kerse and Khan, *op.cit.*, p. 353).
[363] See further Kerse and Khan, *op.cit.*, pp. 353-355.
[364] Compare Recital 42 of the Merger Regulation: "*For the sake of transparency, all decisions of the Commission which are not of a merely procedural nature should be widely publicized.*"

decisions are binding on the addressees of these decisions, but have no binding effects on any third parties.

Sector investigations are not limited to the activities of any one company or group of companies, but extend to a particular sector of an economy or particular type of agreement. Following such investigations, the Commission may issue a report presenting its findings. Sector investigations may disclose particular violations of EC competition law, in which case the Commission will commence proceedings against a particular company or group of companies.

8. Administrative reconsideration

8.1 Is there an opportunity to seek reconsideration of the Commission's decision? If so, how is reconsideration requested? Please describe the process of reconsideration. For example, who considers the reconsideration decision and how is the decision to reconsider made?

As stated above, the previously binding Regulation 17 required notification of an agreement to the Commission in order to obtain an exemption under Article 81(3), unless it fell within one of the block exemptions issued by the Commission. Article 8 of Regulation 17 provided that a Commission decision granting an individual exemption was issued for a specified period of time and allowed the Commission to withdraw or to amend its decision if specified conditions were met.

Regulation 1/2003 abolished the notification system. Consequently, it does not address the subject of administrative reconsideration. However, this is still possible under Regulation 1/2003 with respect to interim measures, which the Commission may only grant for a specified period of time. A decision to renew interim measures is an opportunity for the Commission to reconsider its case and take into account changes that took place after the decision was adopted. Similarly, a Commission decision making commitments binding on a company may be adopted for a specified period of time. The Commission is entitled to reopen the proceedings in a case concluded by a decision on commitments when there has been a material change in the facts on which the decision was based, the companies concerned have failed to respect their commitments, or the decision was based on incomplete, incorrect or misleading information supplied by the parties. While Regulation 1/2003 is silent on the matter, it must also be accepted that the addressee of a decision making commitments binding may eventually seize the Commission with an application to vary or even to withdraw the binding effect of the previously-given commitments. Typically, this will be the case after some time has lapsed and the conditions of competition in the market have changed, so that the commitments no longer correspond to the exigencies previously identified.

Although, there have been cases in which the Commission has amended or withdrawn a final decision,[365] in principle the only recourse against Commission decisions is an appeal to the

[365] For example Commission Decision 71/224/CEE of 2 June 1971 (*GEMA*), JO [1971] L 134/15 and Commission Decision 72/268/CEE of 6 July 1972 (*GEMA No. 2*), JO [1972] L 166/22: In the second decision, the Commission applied remedies different from those imposed in the first decision. More recently, in case COMP/E-1/36.756-*Sodium Gluconate/PO*, the Commission withdrew an earlier decision of 2 October 2001 with reference to one of the addresses of that decision to whom it had been addressed and notified.

Court of First Instance. If this is not done, the decision becomes definitive with regard to its addressee. Even if proceedings brought by the parties at a later stage result in a finding that the decision was adopted in error, the Commission is not under an obligation to withdraw it as against parties who have failed to challenge it.[366]

As regards EC merger control, the Commission's decision on the compatibility or incompatibility of a proposed merger with the common market is definitive. If the decision is unfavorable, the merging parties must nevertheless abide by it unless they choose to challenge it before the CFI. It is also possible, however, for the same parties to re-notify a proposed merger agreement after some time has elapsed, when the conditions of competition may have changed and it is reasonable to hope that the Commission might take a more favorable view of the transaction. Regulation 139/2004 is silent on this matter, but there is no reason to deny such a possibility. In such a case, the parties may also notify commitments which the Commission may attach to an eventual clearance decision as conditions or obligations (if no commitments were previously offered), or they may submit new commitments (if commitments had already been offered but rejected by the Commission).

8.2 Administrative appeal: is there any opportunity to appeal the decision to another administrative decisionmaker before seeking judicial review in court (CFI or ECJ)?

There is no such possibility in the EU competition law enforcement system.

9. Enforcement actions: When the dispute arises out of enforcement by the Commission of a previous decision or order, are there differences in the process of investigation, hearing or decision from cases not arising out of the enforcement of a previous decision or order?

Under Article 256 EC, Commission decisions imposing a pecuniary obligation on persons other than States are enforceable. Enforcement is governed by the rules of civil procedure of the State in which enforcement is carried out. Consequently, disputes relating to collection of fines imposed by the Commission are governed by national civil procedures.

The enforcement order is appended to the Commission decision by the national authority which the Government of the Member State has designated for that purpose. No formality is envisaged other than verification that the decision is authentic. When the Commission has issued a decision imposing non-pecuniary obligations, i.e. making structural or behavioral commitments binding on the parties, it may reopen the proceedings if it concludes that the company concerned is acting contrary to its commitments. In such cases the proceedings before the Commission will be the same as in the original proceedings.

10. Strategic concerns: If not discussed elsewhere, this is the place to discuss strategy and tactics. For example, do you have a choice of which country to file in or which language to employ? How do you make this decision? Are there ways to speed up a

[366] See to this effect Case C-310/97 P, *AssiDomän Kraft Products AB* v. *Commission*, [1999] ECR I-5363.

process or slow it down? To preempt Commission action with a declaratory judgment action in a member state? To use public relations tactics?

N.A.

11. Related questions

11.1 Is there a doctrine of exhaustion of administrative remedies so that a party must raise all issues at the agency level in order to raise them on judicial review? Must a party request reconsideration of decision before seeking judicial review?

The law on the question of exhaustion of administrative remedies is not developed. There is no absolute rule as such regarding the raising of new pleas in the time between the Commission decision and the CFI judicial review. The parties must naturally have a "legitimate interest" in raising a new plea. While the Commission ought not to be able to add new elements which the applicant had not had a chance to rebut, the position of private parties does not appear to be so rigid. Especially in Article 82 EC cases (and in mergers), where Commission-ordered remedies will by definition be onward-looking and positive, applicants should have a right to produce new evidence that discredits the Commission's approach.

Besides, admitting a principle of exhaustion would in essence amount to imposing a duty on companies to reply to the Commission's accusations during the administrative stage of the proceedings, which is not really the case. Both Regulation 1/2003 and Regulation 773/2004 view participation in the proceedings by companies that are the target of an investigation as only the exercise of a right, and not as compliance with a duty. Indeed, this seems to have been the approach of the CFI in *Hilti*, where the Court rejected the Commission's argument that new pleas made by Hilti in the judicial review proceedings were inadmissible because it had not put them forward in the administrative proceedings. The Court held that the applicable rules of procedure "*cannot be construed as compelling the undertaking concerned to reply to the statement of objections sent to it ... Although* [these rules] *seem to be based on a presumption of cooperation on the part of undertakings, cooperation which is desirable from the point of view of compliance with competition law, no obligation to reply to the statement of objections may be inferred in the absence of any express legal provision to that effect. It should be added that such a duty would, at least in the absence of any legal basis, be difficult to reconcile with the fundamental principle of Community law safeguarding the rights of litigants. The approach for which the Commission argues would in practice create difficulties for an undertaking which, having failed for whatever reason to reply to a statement of objections, wished to bring an action before the Community courts.*"[367]

There may be, however, instances, where a party must raise a plea or make a request at the administrative stage and not later during judicial review. Thus, a request to have access to certain documents in the Commission's file must be made only during the administrative stage.[368]

[367] Case T-30/89 *Hilti AG* v. *Commission* [1991] ECR II-1439, paras. 34 *et seq*.
[368] Case T-38/02 *Groupe Danone* v. *Commission*, not yet reported, para. 79.

As explained above, there is no procedure of administrative reconsideration under EU competition law.

11.2 If a party raises an argument during the investigation or the hearing and the Commission fails to respond to it, could this failure be an issue on judicial review?

See answer to question 7.3. above.

11.3 Is a duty of care imposed on the Commission to fully and impartially discover all of the relevant facts?

The Commission is under an obligation to prove its case; in particular, it must produce sufficiently precise and coherent evidence to support its allegations and must sufficiently demonstrate the facts and assessment on which the decision is based.[369] Both inculpatory and exculpatory evidence must be considered in the Commission's decision, and it may not conceal exculpatory evidence from the parties. However, its duty does not include full and impartial discovery of all relevant facts.

11.4 Is there a principle of *res judicata*?

Non bis in idem is one of the fundamental principles of Community law.[370] In the context of EC competition law, this principle precludes commencing proceedings against a company anew, if such proceedings would result in the imposition of either a second penalty in addition to the first, in the event that liability is established a second time, or a first penalty, in the event that liability not established by the first decision is established by the second.[371] However, it does not preclude the resumption of proceedings in respect of the same conduct when the first decision has been annulled for procedural reasons without a ruling on the substance of the facts alleged. In this case any fine imposed in the new decision replaces the fines imposed in the annulled decision.[372]

The Commission must also observe the prohibition on double jeopardy if its proceedings are initiated after a competition authority or court in a Member State has decided on the same matter and imposed fines. In such cases the sanction imposed by the Commission must take into consideration any prior sanction, in order to respect the principle of proportionality.[373] However, the Commission may in such cases draw inferences from evidence it has gathered, and is not bound by the conclusions reached nationally.[374]

The ECJ takes a different position in respect of third-country regulatory action. In particular, it has stated that antitrust proceedings before the US authorities are essentially different from

[369] Cases 29-30/83, *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH* v. *Commission*, [1984] ECR 1679, para. 20; Case 27/76, United Brands v. Commission, [1978] ECR 207, para. 267.
[370] *Limburgse Vinyl*, *op.cit.*, para. 59.
[371] *Ibid*, para. 61.
[372] *Ibid*, para. 62.
[373] Case 14/68, *Walt Wilhelm* v. *Commission*, [1969] ECR 15, para. 11.
[374] Case T-141/89, *Trefileurope Sales* v. *Commission*, [1995] ECR II-791, paras. 191-192.

those before the Commission as regards both their object and their geographical emphasis.[375] Thus the Court concluded that in such situations two sets of proceedings against the same person for the same infringement were justified, as long as they pursued different ends. Consequently, the Commission may, for the purpose of fixing the fine, decline to take into account fines imposed in parallel third country proceedings, or payments of damages in civil-law actions in third country jurisdictions.[376] The CFI recently confirmed this in the *Amino Acids* case.[377] The Court acknowledged that *non bis in idem* is a general principle of Community law, but then recalled the case-law to the effect that while concurrent sanctions resulting from two sets of parallel proceedings, at Member State and Community level, are in principle acceptable because those proceedings pursue different ends, the Commission must, when determining the amount of a fine in such cases, take account of any penalties already imposed under national cartel law on the company in question for the same conduct.[378] The Court reasoned that *a fortiori*, the principle did not preclude concurrent procedures and penalties in the EU and the US, since the two legal systems clearly pursued different ends.

11.5 Is there a principle of equitable estoppel? For example, assume a Commission staff member gave a private party erroneous advice which caused the private party to detrimentally rely on the advice. Any relief in such a case?

The parties will be able to rely on Notices/Guidelines/Communications published by the Commission which describe the Commission's policy in certain areas, and resist any subsequent action by the Commission which departs from the statements contained in those documents. This has been accepted by the Commission itself[379] and expressly confirmed by the European Courts. Thus the CFI has held that Notices are not devoid of any binding legal obligation: the Commission is bound by such instruments, provided they do not depart from the rules in the Treaty and from secondary legislation.[380] As also explained above, the Commission may not depart from rules it has imposed on itself.[381] This is particularly the case when the Commission limits its discretion.[382]

11.6 Is there an obligation of consistency, meaning the Commission must follow existing precedent or explain why it has been departed from?

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[375] Case 7/72, *Boehringer Mannheim* v. *Commission*, [1972] ECR 1281, paras. 3-4.
[376] See Kerse and Khan, *op.cit.*, p. 433.
[377] Case T-220/00, *Cheil Jedang Corp.* v. *Commission*, [2003] ECR II-2473; Case T-223/00, *Kyowa Hakko Kogyo Co. Ltd and Kyowa Hakko Europe GmbH* v. *Commission*, [2003] ECR II-2553; Case T-224/00, *Archer Daniels Midland Company and Archer Daniels Midland Ingredients Ltd* v. *Commission*, [2003] ECR II-2597; Case T-230/00, *Daesang Corp.* v. *Commission*, [2003] ECR II-2733.
[378] *Kyowa*, para. 98.
[379] See e.g. para. 4 of the Vertical Restraints Guidelines and para. 16 of the Horizontal Cooperation Agreements Guidelines, which state that the Guidelines are without prejudice to the case-law of the European Courts. Presumably the absence of any reference to the Commission means that the latter would be bound.
[380] Case T-119/02, *Royal Philips Electronics NV* v. *Commission*, [2003] ECR II-1433, para. 242.
[381] *Ibid*, para. 242; Case T-223/00, *Kyowa Hakko Kogyo*, *op.cit.*, para. 62.
[382] Case T-214/95, *Vlaams Gewest*, *op.cit.*, para. 89; Case T-223/00, *Kyowa Hakko Kogyo*, *op.cit.*, para. 62. See further Gunnar Pampel, "Rechtsnatur und Rechtswirkungen von Mitteilungen der Kommission im europäischen Wettbewerbsrecht", 16 *Europäische Zeitschrift für Wirtschaftsrecht* 11 (2005), p. 12.

The Commission is obliged to follow the case-law of the European Courts. It is not bound by the interpretation adopted in its own decisions, although it is required to reason its decision carefully when it has adopted a new legal interpretation.[383] In the recent *General Electric* judgment, the CFI made, however, clear that the duty for the Commission to give reasons for its decision by reference to the case-file to which the decision relates, does not extend to a higher standard when the Commission reaches a different conclusion than in a previous case concerning similar or identical situations or the same market participants. In that case, the Court held that General Electric could not maintain a plea of legitimate expectation on the ground that the Commission had defined markets in a particular way in a previous merger decision. The Commission was not bound by such findings of its own.[384]

11.7 Are hearings or other proceedings open to the public?

Hearings before the Commission are not open to the public. Members of the public are entitled to attend hearings before the European Courts in Luxembourg.

11.8 Is the Commission obliged to follow its procedural rules even if those rules were not otherwise legally required?

The Commission has issued a number of Guidelines/ Notices/Communications which set out its understanding of substantive law or procedural rules that it will apply. These documents include the Guidelines on the method of setting fines[385] and the Leniency Notice.[386] The Commission has accepted that it is bound by these documents[387] and this has been expressly confirmed by the European Courts (see 11.5 above).

11.9 Is there a "harmless error" rule with regard to all of the various procedural requirements discussed above? (A "harmless error" rule means that a court will not overturn the administrative decision even though procedural errors were committed if those errors did not affect the result)

Only certain procedural irregularities will result in the quashing of a Commission decision by the CFI or ECJ. Article 230 of the EC Treaty, which specifies the grounds for an appeal against a Commission decision, refers to "*infringement of an essential procedural requirement*" and infringement of "*any rule relating to the application of the Treaty*".

[383] See answer to question 7.2 above.
[384] Case T-210/01 *General Electric Company* v. *Commission*, not yet reported, paras. 120, 513, 514.
[385] Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, OJ [1998] C 9/3.
[386] Notice on the non-imposition or reduction of fines in cartel cases, OJ [1996] C 207/4.
[387] See answer to question 11.5 and footnote 73 above.

It is also settled case-law that a decision will be annulled only if a party appealing a decision on the grounds of procedural irregularity can show at least the possibility that the result would have been different had the Commission not committed the error complained of.[388]

12. Other remedies for private parties

The principle of effective judicial protection is a general principle of Community law. Private parties' rights of judicial review exactly serve this general principle. This is also a specific manifestation of the rule of law, and indeed, Article 220 EC provides that the European Courts "*shall ensure that in the interpretation and application of this Treaty the law is observed*". This has been a guiding principle for the Courts, which have always employed it to fill gaps in the judicial protection of individuals. As the Court of First Instance puts it,

"*The European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.*"[389]

12.1 What remedies exist in the case of alleged mal-administration aside from judicial review?

Complaints of alleged maladministration may be made to the Ombudsman (see 12.2 below).

12.2 European Ombudsman

EU citizens and companies are entitled to complain to the Ombudsman with respect to maladministration in the activities of the Community institutions or bodies. Thus it is possible to complain to the Ombudsman about instances of administrative irregularities or unnecessary delay in the work of DG COMP, unfairness, discrimination or violations of the Code of Good Administrative Behavior by Commission staff.

Only citizens of EU Member States, persons residing in those States and businesses, associations or other bodies with a registered office in the EU may complain to the Ombudsman. Before filing a complaint, the complainant must approach the institution or body concerned.[390] Complaints may be filed only by persons individually affected by the

[388] Kerse and Khan, *op.cit.*, p. 482-483, quoting AG Warner's opinion in Case 30/78 *Distillers* v. *Commission* [1980] ECR 2229 and Case 107/82 *AEG-Telefunken* v. *Commission* [1983] ECR 3151, where the Court accepted that the right of one of the companies fined by the contested decision to be heard had been violated, but considered that this infringement of procedural requirements was not sufficient to annul the decision.
[389] Case T-141/03, *Sniace SA* v. *Commission*, not yet reported, para. 39.
[390] *Statute of the European Ombudsman*, OJ [1994] L 113/15, as subsequently amended.

maladministration. The complainant may request confidential treatment of the complaint, but the complaint must enable the complainant and the object of the complaint to be identified.[391]

The Ombudsman investigates whether the complaint is well grounded. If he establishes an instance of maladministration, he informs the institution concerned and makes a draft recommendation. The institution concerned has three months in which to give its detailed opinion on the issues raised by the Ombudsman. The Ombudsman then forwards a report to the European Parliament and the institution concerned. The person lodging the complaint is informed of the outcome of the inquiries.[392]

12.3 Quashing evidence

As explained in 4.8.1. above, targets of Commission investigations may claim attorney-client privilege and refuse to submit a protected document to the Commission. If the Community Courts annul a decision by the Commission denying professional privilege for documents, the Commission may not rely on those documents for the purpose of proving its case.[393] Similarly, if the Courts annul a decision by the Commission to order an investigation, the Commission may not use any documents or evidence it may have obtained in the course of that investigation for the purposes of proceeding in respect of an infringement of the Community competition rules, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community Courts.[394]

12.4 Damages

Under Article 288(2) EC, "*the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties*". The European Courts' case-law in this area is rather conservative and the conditions under which the Community's extra-contractual liability may arise are very stringent. This cause of action is independent of the Article 230 EC action for annulment, unless the action for damages is only designed in reality to obtain the withdrawal of an individual act (reviewable under Article 230) of which the applicant is an addressee and which has become definitive, rather than to obtain separate damages.

The likelihood of a successful action for damages is rather low, in the past 40 years, cases where applicants have won against a Community institution have been rare indeed. The test to be met in order to succeed is very demanding. There are three basic requirements: (a) a wrongful act or omission on behalf of the Community institution (here the Commission), (b) harm suffered by the applicant, and (c) a causal link between the two. When the Commission enjoys discretion, as is the case here, a sufficiently flagrant violation of a superior rule of law for the protection of individuals must have occurred. Causality must be direct, immediate and exclusive. The harm suffered must be certain and specific, proven and quantifiable. The European Courts interpret these conditions very restrictively. However, the CFI has recently held that the Commission may enjoy a margin of appreciation, but this does not mean that it is not bound by the duty to act with due care and the principle of good or sound administration. In particular, it must duly take into account all relevant facts that are

[391] *Ibid*, Article 2(3).
[392] Article 195 EC.
[393] Order of 27 September 2004 in Case C-7/04 P(R), *Commission* v. *Akzo Nobel Chemicals and Akcros Chemicals*, not yet reported, paras. 37-38.
[394] See Case C-94/00, *Roquette Frères* v. *Commission*, [2002] ECR I-9011, para. 49.

indispensable to the exercise of its discretion.[395] Especially when the Commission enjoys a wide margin of appreciation, respect of procedural guarantees conferred by the law on individuals is of fundamental importance and may lead to an action for damages against the Commission.

[395] Case T-285/03, *Agraz SA and Others* v. *Commission*, not yet reported.