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I. INTRODUCTION

In the area of competition law, the European Union (“EU”) adopts legislative acts in the form of Council and Parliament Directives, Commission Directives and Council Regulations and implementing measures in the form of Commission Regulations. Furthermore, guidance on the interpretation of procedural and substantive aspects of EU competition law is provided under the form of Guidelines or Notices (hereinafter also “Soft Law”).

Council and Parliament Directives, Commission Directives and Council Regulations are used to create rights and obligations, in addition, Council Regulations are also used to attribute powers to the Commission and set the limits in which they can be exerted.

Commission Regulations are adopted by the Commission following a delegation of powers by the Council. They specify the procedural rules necessary to give full application to Commission Regulations. When adopting implementing measures, the Commission is required to consult the Advisory Committee. The Advisory Committee is a body composed by representatives of the Member States, it participates to the legislative procedure by issuing non-binding opinions. Unlike the Regulatory Committee, which participates to the adoption of measures relating to the protection of the health or safety of humans, animals or plants, the Advisory Committee has solely a consultative function and does not have the power to bring to a halt the legislative procedure in case of contrast with the Commission.

In the area of competition law, implementing measures are not adopted following “new approach” procedures, i.e. procedures that imply the participation of trans-European or national bodies or authorities, as they are employed mainly in the definition of technical standards.

Finally, the Commission can adopt guidance documents under the form of Soft Law to expose its interpretation of specific issues. Whilst not binding on third parties, Notices and Guidelines

nevertheless determine the way in which the Commission analyses cases, as the principle of legitimate expectations requires the Commission to conform to its own Notices or Guidelines.

The aim of this paper is to describe the procedural steps that precede the presentation of draft legal acts and soft laws to the Council and/or the public, and briefly discuss the rules for their explanation, publication and review.

The procedures leading to the presentation of draft legal acts and Soft Laws are quite flexible. The Commission, in accordance with the principles of democracy and transparency, is under a general obligation to consult third parties before the proposal of legislative acts, but has great discretion in deciding when and how. In fact, the European Union's rules on the legislative procedure focus mainly on the adoption phase. This leaves the Commission a great appreciation margin to identify the most appropriate instruments to involve interested third parties in the legislative process.

Nevertheless, the preparation of Council Regulations and Council and Parliament Directives follows a rather settled procedure. In particular, the Commission when in the process of preparing legislative acts has tried to solicit a broad debate and involve interested parties in the procedure by publication of a discussion document and opening of public consultations.

On the contrary, when preparing implementing measures, the Commission has established on a case-by-case basis the most efficient procedure to attain its objectives. To date, the Commission has employed a wide range of instruments in order to ensure that at all stages of the procedure interested third parties had the opportunity to be involved in the process and of commenting on its proposals.

More limited is the participation of third parties to the adoption of Guidelines and Notices, as they are employed to express the Commission's interpretation of formal or substantive matters.

II. EUROPEAN COMMISSION: STRUCTURE AND FUNCTIONS

A. Structure

Effective competition is considered to be crucial to an open market economy as it cuts prices, raises quality and expands consumer choice, among others by fostering technological innovation. The task of ensuring the creation and maintenance of effective competition within the European Union (“EU”) is delegated to the European Commission (the “Commission”).

Within the Commission, the Directorate General (“DG”) assisting the Commissioner responsible for competition policy in the adoption of Decisions and new legislation is the Directorate General for Competition (“DG COMP”)¹. It is structured into Directorates as follows: A (Policy); B (Energy, Water, Food and Pharmaceuticals); C (Information, Communication and Media); D (Services); E (Industry); F (Consumer Goods); and G and H (State Aids). Directorates are then subdivided into units, guided by heads of unit, with specific competences.

B. Functions

The Commission has a central role in the legislative process as it holds the exclusive right to propose new legislation. Proposals prepared by the Commission are reviewed by the Council of Ministers (the “Council”) and the European Parliament (the “Parliament”) and then adopted either by the Council or directly by the Commission depending on the type of procedure followed². In the area of competition law, the Council normally adopts Regulations or Directives, while the Commission adopts implementing Regulations, Directives and soft law

¹ The Commissioner at the time of writing is Neelie Kroes.

² See introduction.

such as Guidelines or Notices. When adopting implementing Regulations, the Commission acts upon the delegation of the Council³.

Furthermore, the Commission holds the power to adopt individual Decisions, e.g. sanctioning violations of EU competition law. This last kind of act is discussed in a separate study.

³ Treaty Establishing the European Community [TEC] O.J. (C325) 33, 159 art. 202.

III. ACTS ESTABLISHING GUIDING PRINCIPLES

Acts establishing guiding principles in the area of competition law are adopted in the form of Council Regulations and Directives.

Council Regulations are used to create rights and obligations, attribute powers to the Commission and set the limits in which they can be exerted. Article 83 TEC establishes that Regulations giving effect to the principles set out in Articles 81 and 82 TEC must be laid down by the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, i.e., with the consultation procedure.

Directives are employed to harmonize Member States' legislation. Use of Directives is infrequent in the area of competition law and has been limited to measures concerning the liberalization of (ex) monopolistic markets such as electricity, gas and telecoms⁴. Directives in the area of liberalization are adopted either by the Council and the Parliament on a proposal from the Commission, i.e. with the "codecision procedure", or by the Commission.

A. Council Regulations

The main feature of a Regulation is its general application: it is a normative rather than an individual act, designed to apply to situations in the abstract⁵. Since it is binding in its entirety and directly applicable in all Member States, it does not require further implementation to take effect. It may give rise to obligations for States and individuals as it stands, and the rights

⁴ Council and Parliament Regulations are employed in the area of liberalization, in particular in the airspace sector.

⁵ Confédération Nationale des Producteurs de Fruits et Légumes v. Council, Joined Cases 16/62 &17/62, 1962 E.C.R 901.

bestowed by a Regulation cannot be subjected, at a national level, to implementing provisions diverging from those laid down by the Regulation itself⁶.

The two main Council Regulations relating to Competition law are the so-called Modernization Regulation⁷ and the Merger Regulation⁸. The Modernization Regulation sets out the rules for the application of Articles 81 and 82 TEC. The Merger Regulation establishes the power for the Commission to scrutinize mergers that have a Community dimension, sets down the substantive test applicable to said mergers and regulates the division between EU and national law in the area of merger control.

1. Initiation

At the very beginning of the legislative process are the decision to intervene in a defined area and the definition of the possible ways in which such intervention can take place. Both activities are internal to DG COMP, although they may be affected by third parties. The procedure during these early phases of the legislative process is quite flexible. The Commission, in accordance with the principles of democracy and transparency, is under a general obligation to consult third parties before the proposal of legislative acts, but has great discretion in deciding when and how⁹.

As discussed above, the power to initiate the legislative procedure lies in the hands of the Commission. In fact, the Commission is the only body that can propose the adoption of a new

⁶ Leonasio v. Ministero dell'Agricoltura e delle Foreste, Case 93/71, 1972 E.C.R 287.

⁷ Council Regulation 1/03, 2003 O.J. (L 1) 1, 25 (on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty).

⁸ Council Regulation 139/04, 2004 O.J. (L 24) 1, 22 (on the control of concentrations between undertakings).

⁹ See Protocol 7 of the Treaty of Amsterdam, 1997 O.J. (C 340) 140 (on the application of the principles of subsidiarity and proportionality) and Interinstitutional Declaration on Democracy, Transparency, and Subsidiarity, Bull. E.C. 10-1993 at 118.

Regulation or the modification of an existing one¹⁰. Therefore, in order for the decision-making process to start, it is necessary for the Commission, and in particular for DG COMP, to be aware that an issue needs to be regulated and to decide to take action. Awareness may be the result of internal discussions or studies, but may also be result of external influences. In practice, the Commission tends to intervene either when it is confronted with certain gaps in the existing legislation or on a “critical mass” of analysis, suggestions, interventions and criticisms on a certain topic.

External influence may come either from European Institutions¹¹ or from interested third parties.

a. Influence from European Institutions

The Council, the Parliament, other DGs within the Commission, the European Court of Justice (“E.C.J.”) and Court of First Instance (“C.F.I.”) all have the ability to bring to DG COMP’s attention issues that might require a legislative intervention. Whilst an invitation to act is not binding, the Commission cannot disregard it easily or without appropriate justification.

The Council

Article 208 TEC empowers the Council to request the Commission to undertake any study it considers desirable for the attainment of the objectives of the European Community and to submit to it any appropriate proposals. The Council relies more and more on this power to influence the application of the Commission’s power of legislative initiative. Furthermore, the

¹⁰ The rule suffers very few exceptions, none of which in the area of competition.

¹¹ The concept of European Institutions comprises, amongst others, the European Commission, the Council, the Parliament, the Court of Justice and Court of First Instance.

Council may adopt Recommendations or Opinions that can induce the Commission to present a proposal¹². To date, the above-mentioned acts have not been used in the area of competition law.

The Parliament

Article 83 TEC limits the role of the Parliament in the adoption of Council Regulations in the field of competition to a merely consultative one. At the same time, outside the scope of the formal legislative process, the role of the Parliament has significantly increased over the years.

Article 192 TCE establishes that the Parliament may, acting by a majority of its Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Community act is required.

Besides formal invitations to act, a committee, a political group or at least thirty-seven Members of the Parliament have the right to present questions to the Commission, relating to its area of activity, and to obtain oral or written answers¹³. This is a useful means of pressure on the Commission and is often used to bring issues to the Commission's attention¹⁴.

The E.C.J. and the C.F.I.

Judgments of the E.C.J. or the C.F.I. might bring to light the need for the Commission to establish new rules in a defined area, set parameters for future initiatives and shape expectations. In recent years, for instance, several Commission decisions prohibiting mergers have been

¹² Recommendations and Opinions are formal statements issued by the Council, the Commission or the Parliament. Article 249 TEC establishes that they cannot have binding force.

¹³ TEC art. 208 and Rules of procedure of the European Parliament, 2005 O.J. (L 44) 1, 140 art 108 and ss.

¹⁴ The complete list of parliamentary questions relating to competition law is available at the EUR-Lex web site (<http://europa.eu.int/eur-lex/lex/en/index.htm>).

overruled by the Community Courts¹⁵. This was one of the factors that led to an internal reorganization of DG COMP and reinforced the need for a modification of the rules applicable to mergers.

Policy Strategy

Strategic changes and evolution in EU policies or modifications of the Treaties might raise the need for modifications of the rules applicable to the field of Competition law. A good example is the decision to make the principle of subsidiarity one of the cornerstones of EU policy¹⁶. This, along with the workload of DG COMP, influenced the decision to modernize the EU antitrust rules, ultimately leading to the adoption of Regulation 1/2003¹⁷. In fact, the decision to limit the intervention of the EU, and thus of the Commission in cases where this was necessary, had a significant impact on the debate concerning the new Regulation applying to Article 81 and 82 TEC. One of the main innovations of Regulation 1/2003 was to involve to a greater extent the authorities of the Member States in the application of EU competition law, while limiting the scope of Commission intervention¹⁸.

¹⁵ Airtours Plc v. Commission, Case T-342/99, 2002 E.C.R II-2585. Schneider Electric v. Commission, Case T-310/01, 2002 E.C.R II-4071. Commission v. Tetra Laval, Case C-12/03 (E.C.J Feb. 15, 2005) (not yet reported).

¹⁶ The principle of subsidiarity is intended to ensure that the EU takes action (except in the areas which fall within its exclusive competence) only when an objective cannot be sufficiently achieved by the Member States (TEC art. 5). The principle was implicit in the Treaties since the foundation of the European Community, but only with the Edinburgh European Council of 1992 were the guidelines for its application laid. In a Protocol on the application of the principles of subsidiarity and proportionality, the Treaty of Amsterdam introduced the systematic analysis of the impact of legislative proposals on the principle of subsidiarity. When proposing new legislation, the Commission has to justify the measure in terms of subsidiarity and amendments by the Council or the European Parliament have also to be justified in the light of the principle. Each year the European Commission produces a report ("Better lawmaking") for the Council and the Parliament, which is devoted mainly to the application of the subsidiarity principle.

¹⁷ Council Regulation 1/03, supra note 8.

¹⁸ Ibid. at 12. art.3, art.11, art.15.

b. Influence from interested third parties

Input may also come from criticism from the business, legal or scientific communities as expressed in meetings, conferences, articles or books. Associations of undertakings, lawyers or customers, lobbying groups as well as single undertakings and individuals often participate to or solicit the debate over specific policy issues. If an issue is widely raised and criticized, this might well lead the Commission to consider it a possible area of intervention. National Competition Authorities (“NCAs”) can also play a role in bringing issues to the attention of the Commission as they are in constant contact with the Commission both for cooperation on single cases and for discussion on policy matters¹⁹.

When several sources raise the same issues and point out similar problems, the Commission is likely to consider the matter and to start a legislative procedure.

2. Notice

The EU’s legislative process is characterized by great transparency. Information on the legislative process are available at all stages of the procedure. At first, the Commission will make known its intention to start a legislative process in relation to a certain matter. Then it will release a Green or White Paper (potentially both), supplying information on the issues on the table. Finally, the Commission will present a draft Regulation, in some cases followed by an amended draft Regulation. Furthermore, it is possible that at various stages of the procedure

¹⁹ The Commission and the NCAs are members of the International Competition Network (“ICN”) and the European Competition Network (“ECN”). The International Competition Network is a network of antitrust agencies from developed and developing countries. It addresses practical antitrust enforcement and policy issues. It facilitates procedural and substantive convergence in antitrust enforcement through a results-oriented agenda and informal, project-driven organization.

The European Competition Network has been created to facilitate close co-operation between the NCAs of the Member States and the European Commission. Its aim is to ensure an effective and consistent application of Articles 81 and 82.

select people might receive copies of a draft Regulation “informally”, i.e. drafts that are not yet publicly released, and be asked to comment on it.

a. Annual Management Plan

Once the Commission is aware of the existence of an issue that might require legislative intervention, the first formal step it usually takes is to place that issue on DG COMP’s agenda. DG Comp adopts an Annual Management Plan (the “Plan”) that indicates the priorities for the current year.

The setting of the agenda fulfills two needs. On the one hand, it establishes the Commission’s priorities, and on the other, it informs the public of the areas in which the institution has an interest in intervening. The latter aspect is of crucial importance for the Commission as it allows the business, academic and, especially, legal communities to participate in the debate on the upcoming legislation and thus to offer useful elements for the Commission’s action. The Commission is normally eager to receive comments and observations on its legislative initiatives as they are an important source of ideas. The Commission has only a limited amount of staff actually doing policy work (about 55% of the total), the rest being divided between translators, secretaries and technical staff. This percentage is significantly lower in DG COMP, as most of the staff is employed in the process of making individual decisions. Therefore, external comments normally contribute to and stimulate the internal debate.

Although not binding, the Plan usually gives quite a clear idea of the areas in which the Commission intends to intervene. Directorate A of DG COMP, the Directorate responsible for the definition of policies, is in charge of preparing the Plan. The Plan is based on the issues brought to the attention of the Commission in at least one of the ways described in the previous section. The draft Plan is discussed at the level of the directors, the heads of the individual

directorates which comprise DG COMP. Once agreement is reached, the draft Plan is presented to the Commissioner in order to obtain his or her approval and eventually discuss the necessary modifications. When a common text is agreed within DG COMP, the draft is sent out for inter-service consultation. In this phase, the draft is circulated within the Commission through the DGs that have or might have an interest in the application of competition law. There is no obligation to perform an intra-service consultation. Nevertheless, the involvement in the procedure at an early stage of the DGs that will be called to participate in the adoption of the legislative acts enables the adoption of a common Plan. Moreover, it reduces the likelihood of dissent at the point of actual application of the Plan. Once the Plan has reached its final form, it is sent to the Parliament for information and, at about the same time, it is made available to the public²⁰.

b. Annual Policy Strategy and Legislative and Work Program

The Commission's priorities are also exposed in the Annual Policy Strategy; this document is adopted at the beginning of each year and defines the policy priorities for the following year. Indication on future legislative procedures can be found in the Commission's Legislative and Work Program, a document also adopted at the beginning of each year and laying out how, where and when the Commission will act in pursuit of strategic priorities over the current year.

Both documents are discussed with the Council and the Parliament and then adopted. This process gives the opportunity for an early inter-institutional debate about specific proposals and

²⁰ The Annual Management Plan is available on DG COMP's web site at the address:
<http://europa.eu.int/comm/competition/publications>.

legislative changes contemplated by the Commission. After their adoption, the Annual Policy Strategy and Legislative and Work Program are published in the Commission's web site²¹.

c. Green Papers

Once a possible area of intervention has been identified, the Commission will generally publish either a Green or a White Paper. Green Papers are documents intended to stimulate debate and launch a process of consultation at a European level on a particular topic. Green Papers usually offer analyses and possible alternative solutions to issues in a certain area and solicit comments from third parties. Due to the large amount of work required to elaborate a Green Paper, the Commission has declared its intention to use "Short Green Papers" in the future. The Commission hopes that the preparation of Short Green Papers will be less time-consuming than a normal Green Paper, while allowing similar results to be reached.

d. White Papers

White Papers are documents containing proposals for Community action in a specific area. Whilst Green Papers set out a range of ideas presented for public discussion and debate, White Papers contain an official set of proposals in specific policy areas and are used as vehicles for their development.

Both Green and White Papers are published in the Commission's web site²².

²¹ See: europa.eu.int/comm/off/work_programme/index_en.htm.

²² See: http://europa.eu.int/yourvoice/consultations/index_en.htm.

e. Draft Regulation

Once an issue has been discussed internally and eventually externally, the Commission prepares a draft text that is published in the Official Journal of the European Union (“O.J.”) series C and in the Commission’s web site²³.

f. Other forms of notice

Besides the means described above, notice of upcoming or current legislative procedures can be found in the Competition Policy Newsletter, a quarterly policy focused magazine published by DG COMP²⁴. Moreover, speeches and articles by DG COMP’s officials or Commissioner help identify issues the Commission will focus on or to which it will attend in the near future. These can be found either on DG COMP’s web page,²⁵ or in the Commission’s press releases database²⁶.

Furthermore, new legislative proposals from the Commission are usually discussed thoroughly in articles and conferences.

Finally, in some cases, before making a draft public, the Commission may request select people, usually from the legal community, to review and comment on a draft Regulation in order to obtain a qualified and technical opinion.

²³ See: http://europa.eu.int/comm/competition/index_en.html.

²⁴ The Competition Policy Newsletter is available in the Commission’s web site at the following address: <http://europa.eu.int/comm/competition/publications/cpn>.

²⁵ See: <http://europa.eu.int/comm/competition/publications>.

²⁶ See: http://europa.eu.int/comm/competition/press_releases.

3. Participation

Once the Commission has set its agenda by identifying the sector(s) in which an action is necessary or could be necessary, the type, form and content of the intervention must be decided. The final decision on if and how to intervene depends on several elements and the Commission will look for input from outside its own ranks. In response to the frequent allegations of insufficient democratic legitimacy of the European Institutions, the Treaty of Amsterdam stated that the Commission should consult widely before proposing legislation and, wherever appropriate, publish consultation documents²⁷. Lacking mandatory procedural steps, and being subject only to a generic obligation to consult, the Commission can search for external opinions at various stages in the drafting of a text.

The chances of actually influencing DG COMP's moves depend not only on the quality of the comments submitted but also on having a broad consensus on a certain issue or position. A single company or group of companies, unless highly representative, cannot as such influence the Commission's decision-making process. Whilst the Commission has to take into account the submissions it receives, at the same time it must consider whose interests the commenting parties represent, how inclusive this representation is and how accurately it reflects those interests. This is particularly true for cross-industry legislation that will apply to all companies operating in Europe rather than sector specific legislation. For instance, the opinion of a single air carrier is more likely to be taken into account if it refers to a Regulation in the air transportation business, rather than a cross industry Regulation.

²⁷ Protocol 7 of the Treaty of Amsterdam on the application of the principles of subsidiarity and proportionality, supra note 10.

Several methods are available to the public to make its opinions heard in the various phases of the procedure.

a. Public consultations

As mentioned, the first phases of the legislative procedure are mainly internal to DG COMP. Institutions and bodies outside the Commission are consulted during the setting of priorities and the definition of the agenda. Formal participation or consultation of the public is not normally part of the procedure.

Before drafting the text of a legislative proposal, however, the Commission may launch public consultations to obtain opinions on certain issues. Consultations are preceded by the release of a discussion document that explains the issues at stake and may involve the compilation of questionnaires²⁸. The time frame for responses is usually a few months and generally not more than one year²⁹. The Commission has the power to extend the deadline. Comments may be submitted in paper copy or e-mail. Discussion documents relating to Council Regulations take the form of White or Green Papers.

When the Commission initiated the discussion on the modernization of its antitrust rules it presented a White Paper in April 1999 with an invitation to submit comments within a four-month period. In response to its request for comments on the White Paper the Commission received over 100 submissions.

²⁸ The latest consultations launched by the Commission are available on the Commission's web site: http://europa.eu.int/comm/competition/general_info/consultation.html.

²⁹ In its Consultation document, 'Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards for consultation of interested parties by the Commission COM (2002) 277', the Commission points out that its services should always allow sufficient time for planning and responses to invitations and contributions. 'Sufficient time' was considered to be not less than 6 weeks for responses from the public and 20 days' notice for meetings.

The adoption of the new Merger Regulation was preceded by the publication of a Green Paper in December 2001, which was followed by a three-month period for comments to be made.

Again DG COMP received over 100 comments, these were published on DG COMP's web site both individually and collectively in a report prepared by DG COMP's officials (the authors of the submissions were requested to submit non-confidential versions of their comments for publication).

b. Other forms of participation

Publishing articles, organizing conferences or establishing direct contact with the management of DG COMP, e.g. the director general and directors, are all activities that may draw the Commission's attention to certain issues.

Furthermore, in the early phases of the legislative process, the Commission usually forms a team of officials that will work on the preparation of the Regulation and follow the procedure until the end. It is regularly possible (and done) to contact individual members of the team in order to discuss or present issues. Outside of DG COMP, it is also possible to submit comments to other services that participate in the procedure such as the legal service.

Thus, individual comments may also be directed to the other players who have a say in the process. In particular, NCAs' opinions are carefully considered by the Commission during the whole legislative procedure and they may be contacted to voice their concerns or opinions on the subject.

As the Parliament is consulted at several stages of the procedure, it can also be useful to contact the *rapporteur*, i.e. the member of the Parliament responsible for writing a Report on the

Commission draft Regulation on behalf of the relevant Committee³⁰ in order to raise concerns relating to the Commission's draft. If the concerns are well founded, they may well be included in the *rapporteur's* report.

The European Economic and Social Committee ("EESC")³¹ may also intervene in the debate over a Draft Regulation by adopting an opinion. Therefore, getting issues to the attention of this body may be another way of influencing the Commission.

4. Explanation

Whilst in several Member States, including, for example, France, not all legislative acts require an explanation, Article 253 TEC imposes a general obligation on EU institutions to explain the motivation behind their Regulation Directives and Decisions (hereinafter referred to as "acts"). Thus, explanation is a requirement of the validity of all EU legislation. The objective of the explanation is to present in a clear and non-equivocal way the reasoning of the institution that adopted the act³². The explanation fulfills two purposes in the EU's system. Firstly, it allows third parties to verify whether or not a law is justified. At the same time, the explanation allows the E.C.J. to exercise control over the lawfulness of the act. In particular, the obligation to explain the motivation behind EU acts allows verification of whether the principles of subsidiarity and proportionality have been respected, as it allows the reasoning behind the act to

³⁰ As established in the Rules of procedure of the European Parliament, supra note 14 art. 42 and ss. , the Committee on Economic and Monetary Affairs of the Parliament, is in charge of following all the procedures relating to antitrust, mergers and state aid and is responsible for preparing the Parliament's opinion on proposals from the Commission.

³¹ The European Economic and Social Committee is an advisory body representing organizations from civil society (for instance, trade unions, employers and consumer groups). The members are appointed by the Council for four years, each country having a specific number of members. In some instances the EESC must be consulted by the Council, the Commission or the Parliament.

³² Belgium v. Commission, Case C-56/93, 1996, E.C.R I-723.

be followed. The annex to the Amsterdam protocol on subsidiarity and proportionality thus gives special importance to the obligation of explanation.

The extent of the obligation to explain the motivation of an act depends on the nature of the act and of the legal context in which it is adopted. The E.C.J. considers that the explanation need not concern the reasons for each technical choice as long as the objectives pursued are mentioned, nor it is necessary to indicate all the relevant elements in fact and in law. It is acceptable to require a degree of interpretative effort from concerned parties³³. The obligation is less stringent when the act contains established legal principles. If a third party participates in the adoption of an act, the explanation need not go through all the issues raised during the process as long as it presents the facts and the juridical considerations relevant to its adoption³⁴.

In contrast, the explanation must be extremely developed when the act derogates from existing legislation. Even when an institution has a wide discretion, the explanation must present all the elements which will allow the judge to examine the factual and legal elements of the act³⁵. Under these conditions it is clear why the EU legislature places great importance on the quality and development of the explanation that in some cases can be larger than the text of the law itself. Nevertheless, the inter-institutional agreement concerning the quality of legislation recalls that recitals have to explain the motivation behind the text in a synthetic way, and that they should not include normative dispositions or political exhortations³⁶. This limitation is very relevant, as recitals, under the justification that they are not binding, often contain elements on

³³ Van Mengon Sports Group v. Commission, Case T-49/65, 1996 E.C.R II-1799.

³⁴ Asia Motor France and others v. Commission, Case T-387/94, 1996 E.C.R II-961.

³⁵ Bernard Michel v. European Parliament, Case 195/80, 1981 E.C.R. 2861.

³⁶ Inter-institutional Agreement, 1999 O.J. (C 73) 1, 4 (on common guidelines on the quality of drafting of Community legislation), § 10.

which no agreement was reached. This practice can lead to confusion regarding the actual text of the law as the recitals are often used to interpret the text.

5. Publication

The publication of an act is a condition for its entry into force. The method of publication depends on the nature of the act. Article 235 TEC imposes an obligation to publish Regulations of the Council in the O.J.. Regulations and Directives are effective 20 days after their publication in the O.J. (Article 254 TEC), unless a different date is specified in the text of the Regulation. The legislator thus has a margin of appreciation that allows him to decide when the law should produce its effects in order to allow third parties to adjust to the new legislation. For this purpose, in some acts a distinction is made between the date in which they become valid, i.e. the date of publication, and the date in which their application starts, i.e. the date set in the Regulation.

Furthermore, EU legislative acts are published in “www.europa.eu.int”, the web site of the EU.

6. Review

The E.C.J. and the C.F.I. are the judicial organs of the Community legislative branch. The E.C.J. was established in 1957 by the Treaty of Rome, the C.F.I. in 1988 by a Decision of the Council³⁷. Judgments from the C.F.I. are appealed before the E.C.J..

The E.C.J. and the C.F.I., each within its jurisdiction, ensure that in the interpretation and application of the Treaties the law is observed³⁸. The E.C.J. and C.F.I.’s main task is to review the legality of Community acts. Only the E.C.J. and the C.F.I. can declare a Community act

³⁷ Council Decision 88/591/ESC, EC, Euratom, 1988 O.J. (L 391) 1, 8 (establishing a Court of First Instance of the European Communities).

³⁸ TEC art. 220.

illegal. National Courts are obliged to apply Community rules but they cannot declare them unlawful³⁹.

Article 230 TEC lists the Community acts that can be submitted for review. The list includes the acts adopted jointly by the Parliament and the Council, acts of the Council, of the Commission and of the European Central Bank. The E.C.J. has held, however, that this list is not exhaustive and that it can review any Community act that has binding force or produces legal effects.⁴⁰ The E.C.J. and the C.F.I. therefore will review Regulations, Directives and Decisions but also other acts that, while not binding as such, could in specific cases produce legal effects.

Regarding the grounds for review, Article 230 TEC lists those that can be brought before the E.C.J. and the C.F.I.: lack of competence, infringement of an essential procedural requirement, infringement of the Treaty and any rule of law relating to its application or misuse of powers.

The E.C.J. and the C.F.I. can pronounce upon the unlawfulness of a Community act, either as a result of an action brought directly in front of them by an Institution, Member State or individual or as part of the preliminary ruling process triggered by a judge from one of the Member States.

³⁹ Firma Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, 1987 E.C.R. 4199.

⁴⁰ Commission v. Council, Case 22/70, 1971 E.C.R. 263.

B. Directives

As to the result to be achieved, a Directive is binding upon each Member State to which is addressed, but it allows State discretion as to the form and method of implementation⁴¹. Thus, it is a measure intended to be addressed to and binding on States, either individually or collectively, but requiring implementation by States before it can be fully effective in law. Member States are obliged to enact measures implementing the Directive rather than rely on the fact that pre-existing law or administrative practice comply with the requirements of the Directive.

Directives are normally employed to harmonize the legislations of Member States. Harmonization does not require that Member State rules be made absolutely uniform but only similar, a result that can often be efficiently achieved by Directives, as they set basic principles to which Member States must conform.

Use of Directives is infrequent in the area of competition and is limited to measures concerning the liberalization of (ex) monopolistic markets such as electricity, gas and telecoms. Depending on the legal basis, they are adopted either by the Council and the Parliament or by the Commission.

1. Council and Parliament Directives

The Council and the Parliament have the power to adopt with the codecision procedure Directives in the area of liberalization. In the past, this power has been used to adopt Directives concerning, [among other], electricity, gas and post markets. With Directive 2003/55/EC, the European Union gave significant impulse to the liberalization of the European gas markets by

⁴¹ TEC art. 249.

setting principles for cross border sales between Member States⁴². Directive 2003/54/EC lays down the criteria for homogeneous and non-discriminatory access regimes for cross-border flows of electricity between Member States⁴³.

Council and Parliament Directives are adopted with a similar procedure as Council Regulations. Please refer to section III, A.

2. Commission Directives

Article 86 TEC submits public undertakings and undertakings to which Member States grant special or exclusive rights to the rules of the Treaty and entrusts the Commission with a specific surveillance duty over them. Under Article 86 TEC, the Commission has the power to address Directives or Decisions to Member States that enact or maintain in force any measure contrary to the rules contained in the Treaty.

Article 86 has been used as juridical base for the adoption of Directives to render transparent the financial relations between the Member States and their public companies and to liberalize the telecommunication market⁴⁴. These Directives specify the obligations of the Member States resulting from the Treaty in the relevant area, without creating, in principle, new substantive obligations.

Commission Directives are adopted with a similar procedure as Commission Regulations.

Please refer to section IV, A.

⁴² Council and Parliament Directive 2003/55/EC, O.J. (L 176) 57, 78 (concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC). Directive 2003/55/EC repealed Directive 98/30/EC also concerning the gas market.

⁴³ Council and Parliament Directive 2003/54/EC, O.J. (L 176) 37, 56 (concerning common rules for the internal market in electricity and repealing Directive 96/92/EC). Directive 2003/54/EC repealed Directive 96/92/EC also concerning the electricity market.

⁴⁴ Commission Directive 2002/77/EC, 2002 O.J. (L 249) 21, 26 (on competition in the markets for electronic communications networks and services).

IV IMPLEMENTING MEASURES

Commission Regulations specify the procedures and modalities of the application of powers established by Council Regulations⁴⁵. Commission Regulations are adopted by the Commission after consultation with the Advisory Committee⁴⁶, i.e. with the Advisory procedure.

A. Commission Regulations

Whilst in some sectors of EU law the Commission has the primary power to adopt legislation, i.e. a power deriving directly from the TEC, in the area of competition law the Commission's rulemaking powers are delegated by the Council⁴⁷. The TEC expressly grants to the Council the power to lay down the appropriate legislative acts to give effect to the principles set out in Articles 81 and 82 TEC⁴⁸ and calls upon the Council to delegate to the Commission the power to adopt implementing Regulations⁴⁹. Moreover, Article 83 TEC empowers the Council to lay down rules for the application of Article 81(3), e.g. block exemption Regulations, however, the Council has normally deemed preferable to delegate this power to the Commission⁵⁰.

⁴⁵ TEC art. 211.

⁴⁶ The Advisory Committee is a body composed by representatives of the Member States that participates in the legislative process with consultative functions.

⁴⁷ With the exception of the provisions of Article 86 TEC. See above III, B, 2.

⁴⁸ TEC art. 83.

⁴⁹ TEC art. 202.

⁵⁰ See, among other, Council Regulation 19/65/EEC, 1965 O.J. (36) 533, 535 (on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices).

Commission Regulations are employed to specify the procedures and modalities of the application of rules set by the Council⁵¹. Even though all implementing in nature, Commission Regulations are usually either implementing Regulations *strictu sensu* (“Implementing Regulations”) or block exemption Regulations. Implementing Regulations specify the procedural rules for the Regulation to which they refer, whereas block exemption Regulations set out the conditions under which categories of agreements can be considered to be compatible with EU competition law.

In the first category, i.e. Implementing Regulations, we find Regulation 773/04⁵² and Regulation 802/2004⁵³ implementing Regulation 1/03⁵⁴ and Regulation 139/04⁵⁵ respectively.

In the second category fall, amongst others, the block exemption Regulations for vertical agreements⁵⁶, technology transfer agreements⁵⁷, specialization agreements⁵⁸, research and development agreements⁵⁹, agreements in the insurance sector⁶⁰ and agreements in the motor vehicle distribution sector⁶¹.

⁵¹ TEC art. 211.

⁵² Commission Regulation 773/04, 2004 O.J. (L 123) 18, 24 (relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty).

⁵³ Commission Regulation 802/04, 2004 O.J. (L 133) 1, 39 (implementing Council Regulation 139/2004 on the control of concentrations between undertakings).

⁵⁴ Council Regulation 1/03, *supra* note 8.

⁵⁵ Council Regulation 139/04, 2004 O.J. (L 24) 1, 24 (on the control of concentrations between undertakings).

⁵⁶ Commission Regulation 2790/99, 1999 O.J. (L 336) 21, 25 (on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices).

⁵⁷ Commission Regulation 772/04, 2004 O.J. (L 123) 11, 17 (on the application of Article 81(3) of the Treaty to categories of technology transfer agreements).

⁵⁸ Commission Regulation 2658/00, 2000 O.J. (L 304) 3, 7 (on the application of Article 81(3) of the Treaty to categories of specialisation agreements).

⁵⁹ Commission Regulation 2659/00, 2000 O.J. (L 304) 7, 12 (on the application of Article 81(3) of the Treaty to categories of research and development agreements).

1. Initiation

The first step in the procedure for the adoption of Commission Regulations is an act of the Council, i.e., a Council Regulation, that empowers the Commission to legislate and sets the boundaries in which this power is to be exerted.

The power to adopt Implementing Regulations is set out in the Council Regulation that the Commission has to implement⁶². The decision to adopt this kind of Regulation is taken during the preparation of the Regulation it refers to and is not subject to external influences due to its technical nature.

The decision to adopt a block exemption Regulation is mainly internal to DG COMP and is based on the day-to-day experience of the application of EU competition law and in particular of Article 81 TEC. As seen in relation to Council Regulations, comments and articles may stimulate the internal debate, but the Commission will rely mainly on its own experience in order to decide when and if to adopt a block exemption Regulation.

2. Notice

The intention to adopt a Commission Regulation will be made public in the Council Regulation empowering the Commission to do so; moreover, it will be mentioned in the Annual Policy Strategy, in the Legislative and Work Program and in DG COMP's Annual Management Plan. Furthermore, as will be explained below, the adoption of block exemption Regulations may be preceded by the publication of reports and discussion papers in DG COMP's web site. The text

⁶⁰ Council Regulation 1534/91, 1991 O.J. (L 143) 1, 3 (on the application of Article 85(3) [*now 81(3)*] of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector).

⁶¹ Commission Regulation 1400/02, *supra* note 61.

⁶² Council Regulation 1/03, *supra* note 8 art.33.

of the draft Regulation will be made available to third parties by the means of publication in DG COMP's web site and in the O.J. series C. As seen for Council Regulations, information on upcoming Commission Regulations can be found in the Competition Policy Newsletter, in articles and speeches by DG COMP's officials or Commissioner, conferences and articles by third parties. Finally, it is possible that select people may be requested to comment on the text of draft Regulations before their publication.

3. Participation

The possibility of participating in the process that leads to the adoption of Implementing Regulations is rather limited. Implementing Regulations contain mainly procedural rules. Due to their technical nature, the Commission considers of limited use to organize various consultations before their adoption. Therefore, when preparing Implementing Regulations, the Commission does not go through the wide range of forms of consultation previously described for Council Regulations, instead developing the draft Regulation internally. Once the draft is ready, it is published in the Commission's web site and the O.J. and a consultation procedure is opened. The consultation period following the publication of Implementing Regulations can be significantly shorter than the ones for other kind of acts⁶³.

In contrast, the participation of interested parties in the procedure for the adoption of block exemption Regulations is of key importance for the Commission. By setting the criteria under which specific categories of agreements comply with Article 81 TEC, block exemption Regulations have a significant impact on the way undertakings conduct their business. The Commission, therefore, will search for external opinions in order to adopt Regulations that, while

⁶³ When presenting the draft Regulation 802/2004 for comments, the consultation period was only one month, i.e. from February to March 2004.

preserving effective competition in the EU, do not restrict in an unnecessary way the ability of the undertakings to cooperate and enter into agreements.

Several formal consultations will be opened and interested parties will normally have the possibility of commenting, starting at the early stages of the process.

When preparing block exemption Regulations, the Commission has shown great flexibility in its choice of methods used to stimulate a debate over its proposals.

This is clearly exemplified by the different procedural steps that were used in the adoption of the new block exemption Regulation for technology transfer agreements (“Technology Transfer Regulation”)⁶⁴. Before starting the procedure that led to the adoption of the new Technology Transfer Regulation, in 2001 the Commission published an evaluation Report of the Technology Transfer Regulation in force at the time and opened a public consultation in order to receive comments on the Report and on the possibility of adopting a new Technology Transfer Regulation. The Commission received over thirty submissions from public bodies, undertakings and law firms, most of which indicated that a new Regulation was necessary.

Whilst working on the draft for the Technology Transfer Regulation, the Commission hired a consultancy firm to prepare a report on multiparty licensing. The report, which was published in April 2003, analysed the main theoretical issues of multiparty licensing and competition law.

Furthermore, the Commission was in regular contact with American ___ in order to benefit from the hearings___.

⁶⁴ Commission Regulation 772/04, supra note 49.

At the end of 2003, the Commission published in the O.J. and on DG COMP's web site a draft Technology Transfer Regulation and opened a public consultation for third parties to be able to comment on the draft.

The procedure that led to the adoption of the new block exemption Regulation for the distribution of motor vehicles ("Motor Vehicles Distribution Regulation")⁶⁵ has been even more widely articulated.

In August 1999, the Commission sent out a questionnaire to selected interested parties to obtain comments on the current Motor Vehicles Distribution Regulation. In November 2000, an evaluation report was published along with two studies concerning the car distribution sector and a public consultation on the report was opened. In January 2001 the deadline to submit comments on the Report expired and in February the Commission organized a hearing to meet with interested parties, the minutes of which were then published in the Commission's web site. In February 2002, the Commission published the text of the draft Regulation and opened a new public consultation. The Motor Vehicles Distribution Regulation was adopted in July 2002.

As described above, the Commission when preparing Regulations does not follow a standardized procedure but seems to decide on a case-by-case basis the best way to proceed. This allows the Commission to solicit comments on the issues at stake in the most appropriate way in order to achieve the best possible result.

Furthermore, as for Council Regulations, it may be useful to bring to the attention of the other players involved in the procedure, such as the Parliament, the other services of the Commission or the NCAs, comments or observations. In particular, representatives of the NCAs sit in the

⁶⁵ Commission Regulation 1400/02, 2002 O.J. (L 203) 30, 41 (on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector).

Advisory Committee, and are called to express opinions over draft Commission Regulations. Although such opinions are not binding the Commission is bounded to “take the utmost account of the opinion delivered by the committee”⁶⁶.

4. Explanation

Commission Regulations are subject to the same requirements of explanation as Council Regulations. Please refer to section III, A, 4.

5. Publication

Commission Regulations are published with the same modalities as Council Regulations. Please refer to section III, A, 5.

6. Review

Commission Regulations are reviewed with the same modalities as Council Regulations. Please refer to section III, A, 6.

⁶⁶ Council Decision 1999/468/EC, 1999 O.J. (L 184) 23, 23 (laying down the procedures for the exercise of implementing powers conferred on the Commission), art. 3.

V. SOFT LAW

A. Notices and Guidelines

DG COMP can adopt Notices or Guidelines in order to provide guidance to undertakings on the application of competition law. As the title suggests, Notices are not binding documents. They are issued with the purpose of expressing DG COMP's view on the interpretation of legislation or practices. Whilst not binding on third parties, Notices nevertheless determine the way in which the Commission analyses cases, as the principle of legitimate expectations requires the Commission to conform to its own Notices⁶⁷.

Notices can be of a general nature⁶⁸ or specific to a particular area such as mergers, antitrust or State aid. Examples of this sort of Notice are, e.g., the Guidelines on Vertical Restraints,⁶⁹ the Notice on the Application of Article 81(3) of the Treaty⁷⁰ or the Horizontal Merger Guidelines⁷¹. Furthermore, Notices can provide guidance on the implementation of substantive rules or focus on procedural aspects (for instance the Notice on cooperation within the Network of Competition

⁶⁷ Association Internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT) v. Commission, Case T-380/94, 1996 E.C.R. II-2169.

⁶⁸ See: Commission Notice, 1997 O.J. (C 372) 5, 13 (on the definition of the relevant market for the purposes of Community competition law), Commission Notice, 2002 O.J. (C 45) 3, 5 (on the non-imposition or reduction of fines).

⁶⁹ Commission Notice, 2000 O.J. (C 291) 1, 44 (Guidelines on Vertical Restraints).

⁷⁰ Commission Notice, 2004 O.J. (C 101) 97, 118 (Guidelines on the application of Article 81(3) of the Treaty).

⁷¹ Commission Notice, 2004 O.J. (C 31) 5, 18 (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings).

Authorities⁷² or the Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty⁷³).

1. Initiation

The Commission can consider the drafting of Notices while preparing a Regulation. In such cases Notices are usually adopted shortly after the Regulation⁷⁴. The need for guidance on particular issues may be raised by the application of a Regulation, and the adoption of Notices take place years after the Regulation they refer to entered into force⁷⁵. As Notices express the Commission's view on the interpretation and application of competition law, it is difficult for third parties to influence the creation of a Notice as such. However, following comments received during the preparation of a Regulation, the Commission could consider that a particular point has to be clarified and therefore decide to issue guidance on that aspect. Moreover, articles pointing out uncertainties in the application of specific rules may stimulate the internal debate.

2. Notice

Prior to the publication of the draft Notice, the intention of the Commission to issue guidance on a certain issue will be made public in the Legislative and Work Program and in DG COMP's Annual Management Plan. Furthermore, the texts of draft guidance documents are made

⁷² Commission Notice, 2004 O.J. (C 101) 43, 53 (on cooperation within the Network of Competition Authorities).

⁷³ Commission Notice, 2004 O.J. (C 101) 65, 77 (on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty).

⁷⁴ For instance, the adoption of Council Regulation 1/03 was followed closely by the publication of, among other, Commission Notice, 2004 O.J. (C 101) 97, 118 (on application of Article 81(3) of the Treaty).

⁷⁵ For instance, Commission Notice, 2001 O.J. (C 68) 3, 11 (on remedies acceptable under Council Regulation 4064/89 and under Commission Regulation 447/98) was adopted over ten years after Council Regulation 4064/89, 1989 O.J. (L 395) 1, 12 (on the control of concentrations between undertakings).

available to third parties, by the means of publication in the O.J. and on DG COMP's web site and public consultations are opened to elicit comment and stimulate discussion⁷⁶.

3. Participation

Participation by contributors is invariably expected and welcomed by DG COMP before it adopts soft law. As with legislation, the Commission will open public consultations on draft Notices. Submissions are reviewed and published.

Comments can be submitted formally in advance of the deadline in writing, by paper copy or e-mail, and there is often scope for interested parties to meet with DG COMP to discuss or present issues during the consultation procedure. The Commission is generally receptive to informal contacts, written submissions, and will hear oral submissions on a topic.

Submissions are not generally published by DG COMP (on its website) until after the proposal is sent for consultation to the other institutions. Many organisations and trade bodies actively publicize their involvement⁷⁷.

There is no formal obligation on the part of DG COMP to consider and/or respond to comments. Nevertheless, DG COMP tends to take into account the views of interested third parties and normally make public a summary document of the submissions in which it indicates the proportion of submissions following a certain line of argument or in agreement on a given issue.

In some cases, is also possible for NCAs to be successful in provoking guidance on particular issues. NCAs are called upon to apply EU competition law and may request the Commission to

⁷⁶ For the latest public consultations opened by the Commission on draft Notices see: http://europa.eu.int/comm/competition/general_info/consultation.html.

⁷⁷ See, for example: www.iccwbo.org/home/statements_rules/statements/2003/ec_draft_horizontal_mergers.asp.

issue guidance on specific issues in order to ensure a consistent application of Community law. This may provide a fruitful route for third parties to lobby.

4. Explanation and Publication

Unlike what happens in the case of legislation, there is no obligation for the Commission to explain its guidance documents. Notices are written in plain non-legalistic English, and are relatively clear and concise when examined in conjunction with the legislation and/or rules they try to explain.

Notices are published in the O.J. series C both as paper and electronic versions. Moreover, they are made available via DG COMP's website and publicized with a press release. Notices are available in paper form from the Publications office. Contrary to 'hard laws', publication in the Official Journal is not a condition for Notices to deploy their effects.

5. Review

Notices are not legally binding and as such should not be subject to the review of the Community Courts. Nevertheless, it is possible that Notices might have *de facto* a normative content and create new rights and obligations. In such cases the Community Courts will review them, limiting their effect or invalidating them⁷⁸.

⁷⁸ See: France v. Commission, Case C-303/90, 1991 E.C.R I-5315.

BIBLIOGRAPHY**Articles**

Bo Bjurulf; Ole Elgström, “Negotiating transparency: the Role of institutions.” *Journal of Common Market Studies*, Vol. 42, no. 2, June 2004. pp. 249-269.

Bouwen Pieter, “A comparative study lobbying in the European Parliament, the European Commission and the Council of Ministers.” *Max-Planck-Institut Für Gesellschaftsforschung*, 2002. p. 41.

G. J. Buitendijk, M.P.C.M van Schendelen, “Brussels Advisory Committees: a channel for influence?” *European Law Review*, Vol. 20, no.1, 1995. pp. 37-56.

Michelle Cini, “From Soft Law to Hard Law?: Discretion and Rulemaking in the Commission’s State Aid Regime.” *European University Institute Working papers* 2000/35.

Hakon A. Cosma; Richard Whish, “Soft Law in the Field of EU Competition Policy.” *European Law Review*, Vol. 14, no.1, 2003. pp. 25-56 (32).

Frank Fine, “The EU’s new antitrust rules for technology licensing: a turbulent harbour for licensors.” *European Law Review*, Vol. 29, no. 6, 2004. pp. 766-787.

Johan From, “Decision-making in a complex environment: a sociological institutionalist analysis of competition policy decision-making in the European Commission.” *Journal of European Public policy*, Vol. 9, no. 2, April 2002. pp. 219-237.

Laurence Idot, “ Une facette de la modernisation du droit communautaire de la concurrence : les nouveaux règlements d’exemption.” *Les Petites Affiches*, Vol. 394, no. 22, 1^{er} Février 2005. pp. 5-13.

Julien Jorda, “La modernisation du droit communautaire des concentrations.” *L’Actualité Juridique de Droit Administratif (A.J.D.A)*, Année 61, no. 4, 31 janvier 2005. pp. 179-185.

William T. Lifland et al, “European Commission competition policy.” *Annual Proceedings of the Fordham Corporate Law Institute*, Vol. 30, 2004. pp. 439-462.

Pierre-manuel Louis, “Le nouveau règlement d’exemption par catégorie des accords de transfert de technologie : une modernisation et une simplification.” *Cahiers de droit européen*, Vol. 40, no. 3-4, 2004. pp. 377-404.

Philip Lowe, “DG Competition’s review of the policy on abuse of dominance.” *Annual Proceedings of the Fordham Corporate Law Institute*, Vol. 30, 2004. pp. 163-173.

Ma. Del Rosario Tomás Roldán, “La nueva decisión sobre ‘Comitología’ : Algunos comentarios a la Decisión del Consejo 1999/468/CE de 28 de Junio de 1999.” *Revista de Estudios Europeos*, no. 25, 2000. pp. 89-96.

Stefan Voigt, André Schmidt, “The Commission’s guidelines on horizontal mergers: improvement or deterioration?” *Common Market Law Review*, Vol. 41, no. 6, December 2004. pp. 1583-1594.

Wolfgang T. Wessels, “Comitology: Fusion in action. Politico-administrative trends in the EU system.” *Journal of European public policy*, Vol. 5, no. 2, 1998. pp. 209-234.

Books

Anthony Arnall, Daniel Wincott, *Accountability and legitimacy in the European Union* (Oxford University Press ed., 2002)

Laurence W. Gormley, Paul J.G Kapteyn, P. VerLoren van Themaat, Introduction to the law of the European Communities: from Maastricht to Amsterdam (The Hague: Kluwer Law International, 1998)

Justin Greenwood, Interest representation in the European Union, The European Union series (Basingstoke: Palgrave Macmillan ed., 2003)

Sacha Prechal, Directives in EC law, Oxford EC Law Library (Oxford University Press ed., 2005)

Claudio M. Radaelli, The open method of coordination: a new governance architecture for the European union (Swedish Institute for European Policy Studies (SIEPS), 2003)

Josephine Steiner, Lorna Woods, Christian Twigg-Flesner, Textbook on EC Law (Oxford University Press ed., 2003)

Marc Tenbücken, Corporate lobbying in the European Union: strategies of multinational companies (European university Studies, Series XXXI, Political Science 446, 2002).

Andreas Warntjen; Arndt Wonka, Governance in Europe: the role of interest groups (Baden-Baden, Nomos, Andreas Warntjen; Arndt Wonka ed., 2004)

Official Publications

Saverio Baviera; Lehman Wilhelm, Lobbying in the European Union: current issues and practices, European Union (Luxembourg: EP ed., 2003).

Communications

Commission of the European Communities, Consultation document: Toward a reinforced culture of consultation and dialogue- Proposal for general principles and minimum standards for consultation of interested parties by the Commission, COM (02) 276 final (June 2002).

Legislation

Treaties

Treaty Establishing the European Community [TEC] O.J. (C 325) 33, 159.

Treaty on European Union [TEU] O.J. (C 325) 5, 32.

Single European Act [SEA] O.J. (L 169) 1,29.

Protocols

Protocol 7 of the Treaty of Amsterdam, 1997 O.J. (C 340) 140 (on the application of the principles of subsidiary and proportionality)

Regulations

Council Regulation 19/65, 1965 O.J. (P 36) 533, 536 (on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices)

Council Regulation 4056/86, 1986 O.J. (L 378) 4, 13 (on the application of Articles 85 and 86 [*now 81 and 82*] of the Treaty to maritime transport)

Council Regulation 4064/89, 1989 O.J. (L 395) 1, 12 (on the control of concentrations between undertakings)

Council Regulation 1534/91, 1991 O.J. (L 143) 1, 3 (on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector)

Council Regulation 1/03, 2003 O.J. (L 1) 1, 25 (on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty)

Council Regulation 1882/03, 2003 O.J. (L 284) 1, 53 (adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty)

Council Regulation 139/04, 2004 O.J. (L 24) 1, 24 (on the control of concentrations between undertakings)

Commission Regulation 2790/99, 1999 O.J. (L 336) 21, 25 (on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices)

Commission Regulation 2658/00, 2000 O.J. (L 304) 3, 7 (on the application of Article 81(3) of the Treaty to categories of specialisation agreements)

Commission Regulation 2659/00, 2000 O.J. (L 304) 7, 12 (on the application of Article 81(3) of the Treaty to categories of research and development agreements)

Commission Regulation 1400/02, 2002 O.J. (L 203) 30, 41 (on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector)

Commission Regulation 358/03, 2003 O.J. (L 53) 8, 16 (on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector)

Commission Regulation 772/04, 2004 O.J. (L 123) 11, 17 (on the application of Article 81(3) of the Treaty to categories of technology transfer agreements)

Commission Regulation 773/04, 2004 O.J. (L 123) 18, 24 (relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty)

Commission Regulation 802/04, 2004 O.J. (L 133) 1, 8 (implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings)

Directives

Council and Parliament Directive 2003/54/EC, O.J. (L 176) 37, 56 (concerning common rules for the internal market in electricity and repealing Directive 96/92/EC)

Council and Parliament Directive 2003/55/EC, O.J. (L 176) 57, 78 (concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC)

Commission Directive 2002/77/EC, 2002 O.J. (L 249) 21, 26 (on competition in the markets for electronic communications networks and services)

Decisions

Council Decision 88/591/ESC, EC, Euratom, 1988 O.J. (L 391) 1, 8 (establishing a Court of First Instance of the European Communities)

Council Decision 1999/468/EC, 1999 O.J. (L 184) 23, 26 (Procedure for the exercise of implementing powers conferred on the Commission)

Rules of procedure of the Commission, 2000 O.J. (L 308) 26, 34.

Rules of Procedure of the European Parliament, 2005 O.J. (L 44) 1, 140.

Notices

Commission Notice, 1997 O.J. (C 372) 5, 13 (on the definition of the relevant market for the purposes of Community competition law)

Commission Notice, 2001 O.J. (C 68) 3, 11 (on remedies acceptable under Council Regulation 4064/89 and under Commission Regulation 447/98)

Commission Notice, 2000 O.J. (C 291) 1, 44 (Guidelines on Vertical Restraints)

Commission Notice, 2002 O.J. (C 45) 3, 5 (on the non-imposition or reduction of fines)

Commission Notice, 2004 O.J. (C 31) 5, 18 (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings)

Commission Notice, 2004 O.J. (C 101) 2, 42 (Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements)

Commission Notice, 2004 O.J. (C 101) 43, 53 (on cooperation within the Network of Competition Authorities)

Commission Communication, 2004 O.J. (C 101) 97, 118 (Guidelines on the application of Article 81(3) of the Treaty)

Commission Notice, 2004 O.J. (C 101) 65, 77 (on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty)

Communications

Commission of the European Communities, Consultation document: Toward a reinforced culture of consultation and dialogue- Proposal for general principles and minimum standards for consultation of interested parties by the Commission, COM (02) 276 final (June 2002)

Commission Communication, 2004 O.J. (C 101) 97, 118 (Guidelines on the application of Article 81(3) of the Treaty)

Declarations

Inter-institutional Declaration on Democracy, Transparency, and Subsidiarity, Bull. E.C. 10-1993 at 118.

Case Law

Court of First Instance

Airtours Plc v. Commission, Case T-342/99, 2002 E.C.R II-2585.

Asia Motor France and others v. Commission, Case T-387/94, 1996 E.C.R II-961.

Association Internationale des utilisateurs de fils de filaments artificiels et synthétiques et de soie naturelle (AIUFFASS) and Apparel, Knitting & Textiles Alliance (AKT) v. Commission, Case T-380/94, 1996 E.C.R II-2169.

Campo Ebro Industrial SA, Levantina Agrícola Industrial SA (LAISA), Case T- 472/93, 1995 E.C.R II-421.

Commission v. Tetra Laval, Case C-12/03 (E.C.J Feb. 15, 2005) (not yet reported).

Schneider Electric v. Commission, Case T-310/01, 2002 E.C.R II-4071.

Stitching Greenpeace Council (Greenpeace International) and Others v. Commission, Case T-585/93, 1995 E.C.R II-2205.

Van Megen Sports Group v. Commission, Case T- 49/65, 1996 E.C.R II-1799.

Court of Justice

A.E. Piraiki-Patraiki and others v. Commission, Case 11/82, 1987 E.C.R 207.

Belgium v. Commission, Case C-56/93, 1996 E.C.R I-723.

Bernard Michel v. European Parliament, Case 195/80, 1981 E.C.R. 2861.

Buralux SA, Satrod SA and Ourry SA v. Council, Case 209/94, 1996 E.C.R I-615.

Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission, Joined Cases 789/79 & 790/79, 1980 E.C.R 1949.

Cerestar Ibérica SA v. Council, Case C-138/95, 1997 E.C.R I-2027.

Confédération Nationale des Producteurs de Fruits et Légumes v. Council, Joined Cases 16/62 & 17/62, 1962, E.C.R 901.

Commission v. Council, Case 22/70, 1971 E.C.R 263.

Commission v. Jégo-Quééré & Cié SA, Case C-263/02, (E.C.J. 2004) (not yet reported).

France v. Commission, Case C-303/90, 1991 E.C.R I-5315

Firma Foto-Frost v. Hauptzollamnt Lübeck-Ost, Case 314/85, 1987 E.C.R 4199.

Leonesio v. Ministero dell' Agricoltura e delle Foreste, Case 93/71, 1972 E.C.R 287.

Plaumann & Co. v. Commission, Case 25/62, 1963 E.C.R 95.

Simmenthal Spa v. Commission, Case 92/78, 1979 E.C.R 777.

TWD Textilwerke Deggendorf GmbH v. Germany, Case C-188/92, 1994 E.C.R I-833.

Unión de Pequeños Agricultores v. Council, Case C-50/00, 2002 E.C.R I-6677.

Rules of procedure

Rules of procedure of the European Parliament, 2005 O.J. (L 44) 1, 140 art 108 and ss.

Speeches

The substantive standard for merger control, and the treatment of efficiencies in merger analysis: an EU perspective, Philip Lowe, Fordham Annual Antitrust Conference, Fordham, USA.

Internet resources

<http://www.europa.eu.int>

http://www.europa.eu.int/comm/competition/index_en.html

http://www.europa.eu.int/comm/competition/general_info/consultation.html

<http://www.europa.eu.int/comm/competition/mergers/review/contributions.html>.

http://www.europa.eu.int/comm/competition/press_releases/

<http://europa.eu.int/comm/competition/publications>

http://www.europa.eu.int/comm/off/work_programme/index_en.htm

<http://europa.eu.int/eur-lex/lex/en/index.htm>

http://www.europa.eu.int/yourvoice/index_en.htm

http://www.iccwbo.org/home/statements_rules/statements/2003/ec_draft_horizontal_mergers.asp