EU ADMINISTRATIVE LAW

COMPETITION LAW ADJUDICATION

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1. Preliminary chapter: Substantive background

The EU rules on competition[2] are to be found, unlike in other jurisdictions, in the most fundamental constitutional text of the Union, the Treaty.[3] This is not affected by the recent Treaty for a Constitution for Europe.[4]

The basic competition rules are Articles 81 and 82 of the EC Treaty (EC).[5] Article 81(1) EC prohibits as incompatible with the common market all agreements between undertakings,[6] 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, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) 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 inapplicable in the case of such restrictive agreements, which have some competitive and economic advantages and which 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 which do not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

An agreement must first restrict competition under Article 81(1) EC, and only then will the beneficial countervailing effects be analyzed under Article 81(3). According to the European Court of Justice's case law, under the first paragraph of Article 81 EC, the agreement has to be examined in its legal and economic context, this entailing that a certain degree of

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

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

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

[5] Of relevance is also Article 86 EC that refers to the case of "public undertakings".

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

economic analysis is called for already at the stage of that provision.[7] However, this economic analysis should be seen more in the context of "reasonableness" rather than as a full-fledged balancing of pro- and anti-competitive effects. Such a balancing, together with the full examination of economic efficiencies accruing from an agreement takes place only in the third paragraph Article 81 EC.[8] Article 81(3) EC can be applied individually, i.e. to a specific agreement or practice, or collectively, in which case the Commission produces so-called "block exemption Regulations"[9] that apply the exception to defined categories of agreements.

Article 82 EC, on its part, 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. A few examples of abuse of dominant position can be found below:

a) Abuses on pricing: The imposition of unfairly high prices or predatory low prices may be considered to be abusive since they allow the company to achieve benefits that would be possible to achieve in a more competitive environment. The imposition of different prices for the same product in different areas without any justification is also considered to be anti-competitive.
b) Granting of fidelity rebates: Rebates granted by dominant companies in return for securing their customers is an infringement of Article 82 EC.
c) 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 the charging of excessive price for a product protected by intellectual property rights may be an abuse.
d) 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 to 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.
e) Other types of abuse: The imposition of discriminatory and unfair conditions by the dominant company, to 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 the notification to the European Commission of proposed concentrations (mergers). The Merger Regulation[10] contains the rules for notification of proposed transactions, establishes the timetable for the merger review proceedings and specifies the Commission's investigative powers and the rights of the parties. The Merger Regulation applies regardless of whether the parties are domiciled in the

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[7] Under the Art. 81(1) EC assessment of agreements falls also 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).

[8] See case T-112/99, *Métropole Télévision (M6) and Others* v. *Commission*, [2001] ECR II-2459, where the CFI, albeit admitting that a certain degree of a economic-based approach is called for 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).

[9] 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.

[10] *Regulation 139/2004 on the control of concentrations between undertakings*, OJ [2004] L 24/1 (the "Merger Regulation").

Community and whether 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 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*)[11] and with national courts (Community judges of general jurisdiction, *juges communautaires de droit commun*),[12] the European competition law enforcement system has been Brussels and Luxembourg-based. The Commission has been in all these years the basic public antitrust enforcement authority under the judicial control initially of the European Court of Justice and since 1989 of the European Court of First Instance in Luxembourg.[13] During the same 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.[14] The whole institutional system of antitrust enforcement in Europe has been fundamentally different from the equivalent US system because of the overwhelmingly central role of public enforcement. The foundational model of EC competition law centers on administrative decision-making as opposed to adjudication in the strict sense, i.e. enforcement in judicial fora.[15]

For this reason the term "adjudication" may not be entirely appropriate in order 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 secure consistency in the terminology of the current research project and, therefore, adopt the term "adjudication" albeit under the above provisos.

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[11] 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), p. 87 *et seq*.

[12] 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).

[13] 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), p. 41 *et seq*. The authors had argued for a more active role of national courts in competition enforcement. On the centrality of the then DG IV, now DG COMP, the Directorate-General responsible for competition law enforcement in the European Commission, from a political science point of view 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), p. 245 *et seq*.

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

[15] 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 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 direction 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.

It is conventional to argue that in the past forty years the European Commission has availed itself of a substantial degree of administrative discretion in the enforcement of the Treaty competition rules. According to this view, while its decisions are subject to judicial review by the European Courts,[16] that review has always been seen rather limited. At closer look, however, this does not seem an accurate statement. It is true that in some areas of economic regulation, such as in anti-dumping cases, the Commission has enjoyed "immunity" of rigorous judicial review, but in reality antitrust is an area where the Courts have not shied away from exercising a far-reaching control of legality, leaving only a limited margin of appreciation to the Commission.[17]

In the last two to four years, in particular, the Court of First Instance has applied a much tighter and stronger grip over Commission powers. This has happened primarily in merger cases, where for the first time Commission prohibition decisions were annulled,[18] and to a certain extent in antitrust cases.[19] One could also see in the same context the power increasingly exercised by the President of the CFI to suspend the application of Commission Decisions in high-profile cases involving new and challenging legal issues.[20]

Indeed, there has been talk of a "judicialisation" of EC competition law enforcement among the competition specialists in Europe and it is indicative that Fordham Corporate Law Institute dedicated in 2002 one whole session to this new phenomenon in EC competition law.[21] The "judicialisation" phenomenon seems not to be short-lived and there are good reasons to believe that the European Courts, especially the CFI, as it becomes increasingly specialised in EC antitrust law, will exercise its powers in a continuously rigorous manner. All the more so, for Commission decisions that deal with complicated, controversial and novel competition law theories, that impose upon the undertakings concerned particularly burdensome and freedom-restrictive measures (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 "abuse" system. Article 81 EC prohibits the *existence* itself of an agreement or concerted practice, while behaviour, as such, is in principle immaterial. On the other hand, Article 82 EC prohibits not the existence

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[16] According to Article 230(2) EC, Commission decisions may be challenged on grounds of 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*".

[17] 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.

[18] 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.

[19] 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*, Judgment of 6 January 2004, [2004] ECR I-nyr.

[20] Case T-184/01 R, *IMS Health Inc.* v. *Commission*, Orders of 10.8.2002 and of 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.

[21] 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), p. 369 *et seq*.

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 forty years, i.e. between 1962 and 2004, restrictive agreements that seemed to fall under Article 81(1) EC had to be notified to the European Commission, which had exclusive competence to immunise them by granting an "individual exemption decision" under Article 81(3) EC.[22] Alternatively, the agreement could fall under the benefit of a "block exemption Regulation" of the Commission, which is a regulatory instrument that exempts categories of agreements that fully comply with certain conditions therein. This system was known as the "administrative prior authorisation" or "notification system".

Notification of agreements was not obligatory but in practice it was an irresistible option, since it offered powerful benefits for companies, namely legal certainty that the agreement, even if illegal, would not lead to fines imposed by the Commission, at least for the period after the notification. In addition, notification had important positive consequences for the civil enforceability of the agreement, since national courts did not have the power to consider the agreement unlawful and thus void, because of the Commission's exclusive competence to grant an exemption.[23]

At the end of April 1999 the Commission embarked upon a most important policy change. The publication of the White Paper on the modernization of the EC competition law procedural framework[24] was the first episode of a course that was certain to lead to a "legal and cultural revolution" in EC antitrust.[25] The White Paper's aim was to propose a system of antitrust enforcement in the EU for the 21st century, thus marking the end of the "venerable" Regulation 17/1962,[26] which, as it has been justly pointed out, had existed for so long that it was almost impossible to imagine any other state of affairs.[27] The basic parameters of the proposed system was 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 allowing it to concentrate on the most serious infringements of Articles 81 and 82 EC. The projected reforms were known as "modernization" of EC competition law.

After a rather long period of reflection, discussions and negotiations, the Council adopted on 16 December 2002 the new "Regulation on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty", which became Regulation 1/2003.[28] The new

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[22] 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).

[23] This description is bound to be incomplete, but a fuller exposé lies outside the scope of this report.

[24] *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.

[25] See Ehlermann, *op.cit.*, p. 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), p. 545 *et seq*.

[26] The Commission had always been reluctant to consider amending Reg. 17, because of fears of opening "Pandora's Box". The basic fear 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.

[27] 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*".

[28] OJ [2003] L 1/1.

Regulation started to apply as of May 1st 2004.[29] Regulation 1/2003 was hailed by most actors in EC competition enforcement as a breakthrough, since it was breaking the Commission's monopoly on granting exemptions under Article 81(3) EC and it was placing national competition authorities and courts in the driving seat for much of 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 EC. In other words, there will no longer be a separation between paragraphs 1 and 3 of the former provision, but rather it will be enforced as a whole by the same enforcer or in the same forum. It will no longer be possible, therefore, to notify agreements to the Commission, since there will no longer be an exemption as such.

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

Notwithstanding the criticism that is sometimes heard, particularly from common law lawyers, that the Commission acts simultaneously as "*investigator, decision-maker, public prosecutor, judge and jury*",[30] a conviction that might explain the recent judgment of the US Supreme Court in *Intel* that considered the European Commission a foreign court for 28 U.S.C. § 1782 purposes,[31] proceedings before the Brussels-based body are in reality administrative and not judicial. This preliminary statement explains the primarily inquisitorial nature of the EC competition law enforcement proceedings. At the same time, one must remember that the Community administrative and judicial structure is influenced to a substantive extent by continental as opposed to common law models. The Communities started after all as a 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 by far more inquisitorial than the American or British models. 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" that are provided for in the antitrust area may be very different from those that occur in the US or Britain. Even though the concepts of "due process" or "natural justice" appear in descriptions of EU law and practice, these concepts may have quite a different meaning.
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 that is 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 cannot 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

[29] Art. 45 Reg. 1/2003.
[30] 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 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...*".
[31] *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S.Ct. 2466.

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 advocate 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, one must not underestimate the increasing trend to introduce many adversarial elements, particularly in Commission antitrust proceedings. The strengthening of the role of the hearing officer falls under this trend. This may be due to sociological reasons, most prominently to the dominance of British and US law firms in the Brussels legal scene. Secondly, one must never lose sight of the role of the European Courts, especially of the Court of First Instance, which is now recognised as the "competition natural judge" in Europe, and of the "judicialisation" phenomenon, described above.

3. Narrative

Atropine is a leading chemical manufacturer, based in Port Sulphur, 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. There are few alternatives technically 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 neighbouring 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 upon 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 licence 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 licence to use the technology. Atropine refuses to grant a licence to the new plants.

Mendoza says that refusing to grant a licence is a violation of Articles 81 and 82 EC. Atropine denies this, and to demonstrate its own confidence in the legal position files a notification with the European Commission, asserting that a "site licence" 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 respective 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 civil servant of the European Commission 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, for the sector of the economy that this case concerns. 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 was made director of Directorate X).

Charlotte the Dane decides that the complaint presents important points of principle, and agrees to meet Mendoza's counsel. He explains to her all the mysteries of technology and convinces her that the provision calling for the negotiation of a fresh licence is actually the prohibition of exploitation of 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 to issue a request for information addressed to Atropine, Charon, Gross and Mendoza. Charlotte has already prepared the necessary questionnaires and submits them together with her note to Ms. O'Sullivan, her head of unit. Since Ms. O'Sullivan agrees with Charlotte's analysis of the case she signs the questionnaires, which then go out to the companies.

After having received the information from the questionnaires Charlotte analyses the information submitted 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 further questions to Atropine and Gross. These were duly signed by Ms. O'Sullivan and sent to the companies. After having received the additional information Charlotte completes her analysis and comes to the conclusion that the Commission should issue a statement of objections because she is of the opinion that the refusal by Atropine to grant the license to Mendoza constitutes an infringement of Article 81 EC.

She therefore prepares a note to the Commissioner which shortly summarises 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 Charlotte and the Director General before it is send 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, also Charlotte's hierarchy needs to sign the so called "signataire" a kind of circular by which Charlotte's hierarchy is informed concerning the note in order to approve it before submission to the Director General and subsequently the Cabinet. As there were some questions concerning the concrete facts and Charlotte's approach by Mr. Ramirez and also the Director General's personal assistant, Charlotte needs to make some amendments to the note which means postponing it by one week.

Once the note is signed by the Director General and sent to the Cabinet a copy of it is also submitted to the Commission's Legal Service that also participates in the weekly meeting between the Commissioner and DG COMP. The Legal Service also has some questions concerning the note and therefore asks for it to be made a point for discussion, a so called "B-point".[33] In the meeting Mr. Ramirez assisted by Ms. O'Sullivan and Charlotte presents the case to the Commissioner. The Legal Service then explains that they have some concerns that the some of the arguments that Charlotte presents for issuing the statement may need to be formulated differently. The Commissioner therefore approves to issue the statement of objections under the conditions that Charlotte resolves the drafting issues in cooperation with the Legal Service before issuing the statement.

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[32] A meeting between the Commissioner and his services is held on weekly basis in order to discuss pending cases and seek his approval for the line that the services propose to take. The meeting is prepared by a note from the services to the Commissioner in which the proposed line or options are outlined

[33] The agenda for the weekly meeting foresees A and B-points. Only B-points, points where the participants of the meeting see a need for discussion with the Commissioner, are orally discussed in the meeting whereas A-points are considered to be approved by the Commissioner without further discussion

Charlotte then, after having consulted the Legal Service, prepares another "signataire" with the draft-statement of objections for the signature of the Commissioner. It must be approved by the Charlotte's hierarchy: Ms. O'Sullivan and Mr. Ramirez and the Director General in the same manner as the first draft, before it is presented to the Commissioner for her 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 Commission's statement of objections within the same period.

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

In the reply to the statement of objections, Atropine's lawyers raise a number of arguments undermining both 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 certain facts on which the Commission's objections are based and a legal opinion of 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 case law of the European Court of Justice. Atropine's lawyers request an oral hearing to be held.

Mendoza submits their comments to the Commission statement of objections and also request to participate in an oral hearing before the Commission. In addition, they submit an economic study from VERITAS, a reputable Brussels-based consultancy that provides advice on economic aspects of EC competition law. VERITAS 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 that buys ABC from Mendoza and Atropine, on the proceedings before the Commission. Matratzen GmbH decides to intervene in the case and sends to the Commission a letter stating that Atropine's refusal to license has adverse effects on the German mattresses market. In its submission, Matratzen GmbH requests an opportunity to present its arguments during the oral hearing.

The applications from the parties requesting an oral hearing are forwarded to Ms. Lopez, a hearing officer. Ms. Lopez had a 15 years long carrier with the Directorate General for Competition before she has been 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 it is in her discretion to invite other parties to the oral hearing. Ms. Lopez thinks that it would be helpful to hear Mendoza, but decides not to invite Matratzen GmbH to the oral hearing, as she deems it sufficient that their arguments are presented in writing. Ms. Lopez sets the date of the oral hearing in two months time. She sends a letter to Atropine and Mendoza informing them on the date of the hearing, asking to provide her with an overview of the arguments they want to present at the hearing and name any equipment they may like to use during the hearing. She also invites the parties to an informal meeting in two weeks time at which the schedule of the hearing will be discussed. At this informal meeting lawyers of Atropine and Mendoza and the representatives of the Commission agree on the schedule of the hearing.

At the day of the oral hearing, just before the hearing is commenced, Atropine asks Ms. Lopez to admit additional evidence to be presented at the hearing. Atropine explains that it is a crucial piece of evidence that they were not able to supply at an earlier stage. Ms. Lopez

agrees for the evidence to be presented at the hearing and Atropine provides the copy of the documents on which it relies to all parties participating in the hearing.

Ms. Lopez formally opens the hearing and invites Mr. Ramirez, who is representing the Commission together with Ms. O'Sullivan and Charlotte to present the Commission's case. After that Atropine's lawyers present arguments purporting to rebut allegations in the Commission's case as well as the new documentary evidence undermining 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 a German competition authority, present on the hearing raises certain points relating to the German mattresses market. The hearing continues for a second day during which Mendoza presents its arguments. The questions from the Commission's follows. After the questions from the Commission Ms. Lopez invites Atropine, the Commission and Mendoza to make concluding remarks.

After the hearing Ms. Lopez prepares an interim report on the hearing and on the observance of the right to be heard. The report also summarizes the Commission's case, arguments put forward by the parties and third parties as well as any developments at the hearing. In Ms. Lopez's view some of the legal arguments made by the Commission indeed are not supported by the case-law of the European Court of Justice. 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 Ms. Lopez's report has no binding force, it is taken very seriously by Charlotte in drafting the decision, who together with Ms. O'Sullivan 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 the 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 a license to Mendoza and imposing a fine of EUR 20 million on Atropine. Charlotte's hierarchy is informed of the draft decision and the note before submission to the Director General and subsequently the Commissioner's Cabinet. Before the draft decision is presented to the Commissioner for her approval, it must be endorsed by Ms. O'Sullivan, Mr. Ramirez and the Director General. In addition, Charlotte's senior colleague, Mr. Lewandowski from Directorate A is consulted. He raises some objections concerning the legal reasoning adopted in Charlotte's draft decision and Charlotte needs to make some amendments to the draft decision and the note. Finally, the note is signed by the Director General and sent to the Commissioner's Cabinet. A copy of it is also submitted to the Commission's Legal Service and to DG Enterprise that is responsible for industrial policy concerning ABC. Legal Services and DG Enterprise do not raise any objections as to the proposed decision. At this stage also 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 Commissions 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 the Member States competition authorities. The Advisory Committee suggest that certain amendments to be made to the draft decision. Charlotte drafts a new version of the draft decision including the amendments proposed by the Advisory Committee. The final draft of the decision, after the 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. The College of Commissioners adopts the decision after a short presentation of the case is given by Mr. Ramirez. The decision is sent to Atropine. A non-confidential copy of

the decision is forwarded to Mendoza. At the same time, the Commission services inform the public on the Commission decision in a short press-release.
Atropine lawyers decide to file an appeal from the Commission decision to the Court of First Instance of the European Communities. They are aware of the fact that it would probably take more than two years before the Court decides on the case. Thus, they apply to the President of the Court for an order suspending the implementation of the Commission's decision until the appeal is decided by the Court.

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 sees 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?

As far as the application of Articles 81, 82 EC is concerned, 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, with the exclusion of merger control which is treated 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 very idea of the new system of enforcement of Articles 81 and 82 EC is diametrically opposed to such an application and relies on rigorous "self-assessment".[34]
However, the system of notification and administrative authorization survives in the national competition laws in certain Member States, though the global trend in the EU Member States is to amend their competition laws and follow the EU example, by introducing a system of legal exception. Yet, for as long as the old system survives nationally, one must take into account that restrictive agreements or practices, even if affecting the common market, thus falling under EC competition law, may still have to be notified nationally.[35] This is true for those Member States that still follow the notification and authorization system.[36] Notification under national competition law would by no means lead to the prohibition of agreements under national law, if those agreements are permitted under EU competition law. This is so, pursuant to Article 3 of the new Regulation 1/2003 that has strengthened the supremacy of EC over national competition law.
Yet, even at the 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 of the latter to the former, aiming at compensating to a certain extent the loss of

[34] See Venit, *op.cit.*, p. 546.
[35] Naturally, only if they produce effects in the territory of such Member States. While in some Member States notification is optional, i.e. it aims to confer a benefit upon undertakings, if they so wish, in other Member States notification may be an obligation and failure to comply leads to fines.
[36] However, some Member States' laws that still follow the notification and authorisation system may contain rules that disapply their national competition law in case of application of EU competition law. This is the case of Italy (Art. 1(4) of the Italian Competition Act (L. 287 of 10 October 1990)). If this is the case, then parties will not need to notify their agreements under that national competition law.

legal certainty of companies as a result of the abolition of the notification and prior authorization system. These informal channels of co-operation are most necessary in exceptional cases of particularly difficult questions regarding the interpretation of Article 81 EC. In its Regulation proposal of September 2000 the Commission had 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 had also expressed its resolve to issue such reasoned opinions in the public interest in its Joint Statement with the Council on the Network of Competition Authorities.[38]

Indeed, the Commission published recently a Notice on such informal guidance and promises to issue guidance letters in exceptional circumstances of "*genuine uncertainty*" 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 from the back door. A guidance letter is 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 such Commission statements can be of persuasive value before the latter, their legal effects thus resembling those of the old comfort letters.

The Notice requires that in order for the Commission to exercise its discretion and proceed to a guidance letter, five cumulative conditions, three positive and two negative, must be satisfied:[41] (a) the question involved cannot be clarified by reference to the existing EC legal framework, to the case law, to publicly available Notices, Communications or Guidelines, to the desicion-making practice or to previous guidance letters; (b) the clarification of the novel question 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 information provided to the Commission; (d) the questions involved are not identical or similar to questions, with which the Court of Justice or the Court of First Instance are seised in a pending case; (e) the specific partice concerned is not subject to proceedings pending before the Commission, a national competition authority, or a national court.

The above informal mechanism should not be seen as a formal procedure under which a benefit is claimed by companies. It is of course a remnant of the old system of enforcement, but is subject to the Commission's total and unchecked discretion, therefore it creates no rights for the companies concerned.

In contrast to the application of Article 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. for mergers that reach the Community thresholds.[42] The aim of

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[37] See the Explanatory Memorandum of 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.

[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 EC 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 approx. $ 6427 Mio, and both together sell more than approx. $ 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

such notification is to obtain clearance of the merger from the Commission, i.e. a Commission decision declaring the merger compatible with the common market and allowing its implementation. The application process starts with several pre-notification contacts with the Commission, which come to an end with 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 is made to the Commission, they would then file a Form RS).[43] A notification must contain the information (including documents), specified in the appropriate application forms. It mainly refers 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] However, it may also be submitted by the 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, there must be a joint representative authorized to transmit and receive documents on behalf of all notifying parties.[48]

It will be necessary to submit one original and 35 copies of the Form CO and the supporting documents (originals or copies of the originals) to DG COMP.[49] The notification must be submitted in one of the official languages of the Community (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 the official languages).[50]

However, the parties will file the notification not with the Commission but with the national competition authorities when the Commission decides to refer the transaction to a Member State, in whole or in part, before the formal notification is made, on the basis that the concentration significantly affects competition in a Member State which presents all the characteristics of a distinct market.[51]

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

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these criteria are not met, filing will still be compulsory when (i) both companies together sell more than approx. $ 3,213 Mio worldwide, (ii) in at least three Member States, each of the companies' sells combined more than approx. $ 128 Mio, and (iii) in each of at least three Member States each company sells more than approx. $ 32 Mio ("the secondary threshold"). See Article 1 of the Merger Regulation.

[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 happen 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.

Pre-notification contacts take place with the Commission in the vast majority of merger cases.[53] They normally consist of one or two meetings (usually two weeks before the filing of the notification form)[54] between DG COMP and the parties. To launch pre-notification contacts, the merging parties should provide the Commission with a memorandum giving a brief background to the transaction and some general information. The meetings aim mainly at discussing jurisdiction and other legal issues, at preparing the upcoming Commission investigation (if a notification form is actually filed) and at preventing incomplete notification forms, since it is DG COMP's experience that when notifications are found to be incomplete, there were usually no or very limited pre-notification contacts.[55] Such contacts are always held in 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, irrespective of whether there have been pre-notification meetings or not, the merging parties should provide DG Competition with a substantially complete draft Form CO before filing a formal notification.[58]

The time-limit within which the Commission must decide on the concentration starts only once a formal notification is submitted and the Commission considers it as complete. In any case, once the Commission receives a draft notification form during the pre-notification contacts, it will require at least 5 working days to review it.[59] However, the Commission will have to decide within 25 days on a Member State's request for a referral of the case. This period starts to run once the Commission has received the reasoned submission from the Member State.[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 we explained above, it is only in the context of merger control that companies apply to the Commission for the conferral of a certain benefit and a formal procedure follows. Once the merging parties submit to the merger registry a "Form CO" (i.e. a formal notification) and if the Commission considers this complete, the latter will examine it "*as soon as it receives it*"[61] and start a Phase I investigation. The notification will be allocated with the appropriate merger unit inside every Directorate in DG COMP. The merger unit will be chosen based on the industry sector to which the merger notified corresponds to (energy, water, food and pharmaceuticals, information, communication and media, services, industry, or consumer goods), or where it is believed to cause a major impact. The Commission will also publish a notice in the Official Journal including the name of the parties and the nature of the concentration.

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

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

[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.

The Commission will have a maximum of 25 working days either (i) to conclude that the notified transaction does not fall within the Merger Regulation,[62] or (ii) to adopt a decision declaring the concentration as being compatible with the common market,[63] or (iii) to conclude that the concentration raises serious doubts as to its compatibility with the common market and therefore to initiate proceedings.[64] These proceedings will conclude with the adoption of a decision either clearing (with or without conditions) the merger or prohibiting it.

The initial period of 25 working days may be extended to 35 working days where (i) the competent authority in a Member State makes a request for referral of the case, or (ii) if the parties present commitments to the concentration in order to render the concentration compatible with the common market thus avoiding the initiation of proceedings.[65] This extension allows the parties to discuss in a more appropriate manner the commitments presented to the Commission in order to render the decision compatible with the common market. It is possible for a Member State to request a referral of the case if it considers that the "*concentration threatens to affect significantly competition in market within that Member State*", or the concentration affects competition in a market within that Member State, which presents all the characteristics of a "*distinct market*".[66] The Commission will then have, if it has not started proceedings, 25 working days to decide if it refers the case, or 65 working days if it has started proceedings.

During the Phase I investigation, the Commission will send formal or informal requests for information to the merging parties as well as to third parties (competitors, customers, etc). During this phase, the Commission may also conduct on-the-spot investigations in the premises of the companies, and has the possibility to examine the books and records of the companies, request for oral explanations, and in general, investigate the merging companies with the same kind of powers as when conducting antitrust investigations, exception made for the possibility of officials to enter into private homes. However, it is unlikely for the Commission to use these powers. Indeed, it will normally limit itself to requests for information.

When the Commission takes any of the decisions mentioned above at the end of a Phase I investigation, it will publish a short notice in the Official Journal (together with a press release in the DG COMP website). In case the notified concentration "*rises serious doubts as to its compatibility with the common market*", it will then start a Phase II investigation. The Commission will have to issue a decision within 90 working days, either clearing the merger or prohibiting it. This can be extended to 105 days if the parties present commitments before the 65th day of investigation. Moreover, within 15 working days after the initiation of Phase II the parties can request for an extension (only once) of 20 working days.

When the Commission decides to either block the merger, or impose a fine or periodic penalty payment, it must send the parties a statement of objections, usually one month after the initiation of Phase II, to which the parties have the possibility to respond in writing. This statement of objections will be the basis of a future decision. After the issuance of the statement of objections, the merging parties can access the file.[67] Later on, the Commission will hold a hearing with the merging parties and any third parties that have played an active role in the proceedings. On this basis the case team will reach a view on the transaction, report to the Competition Commissioner and give the parties a last chance to offer better

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

commitments. Finally, before adopting the final decision, the Commission must consult the Advisory Committee taking "*utmost account*" of the opinion of this Committee.[68] If an agreement on commitments is reached, the Commission will issue a decision approving the merger, with or without being subject to commitments.[69] However, if no agreement can be reached, DG COMP will propose that the Commission block the deal as being incompatible with the common market, and the parties may not proceed with the merger. This decision, which is taken by the "College" of the EU Commissioners as a whole, 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 complain, 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?

At the outset, a terminological issue should be clarified: in the US antitrust procedure, civil litigation begins with filing of the "complaint" with the clerk of the court that has 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 person complains to the Commission alleging that another person is engaged in conduct that violates EU competition rules. We believe that the above question relates to the formal opening of the proceedings rather than to a complaint as understood in EC competition law. Therefore, we will give our answer based on these premises.

Proceedings before the European 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. At first the Commission investigates the facts. It is not necessary for the Commission to formally open the proceedings to exercise its investigatory powers, thus, the Commission may request information from companies and individuals and inspect business records before formally opening a procedure and bringing charges against an undertaking. The Commission usually opens formal proceedings only after the investigatory stage of the procedure is completed and considers that the evidence points to an infringement which should be 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 of the allegedly illegal conduct and its legal assessment. It is a written statement of the Commission's case against the company concerned. In this way, the statement of objections is to a certain extend equivalent to the complaint in the US procedure.

Since the Commission investigation takes place before the official opening of the procedure and the serving of the statement of objections, the investigated companies in most cases have extensive formal and informal contacts with the Commission and are well aware of the Commission's investigation.[70]

Apart from these rather inevitable "contacts", companies may approach the Commission informally even at a stage before any investigation is carried out. This can be the case of whistleblowers that avail themselves of the possibilities offered by the Leniency Notice and give the Commission information on a cartel to avoid fines for violation of EC competition

[68] Article 19(3)-(7) of the Merger Regulation.
[69] See below.
[70] See below.

law. Under the 2002 Leniency Notice[71] complete immunity or a reduction 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 the Directorate-General for Competition, which will treat all information supplied confidentially. The Commission official will then proceed to a preliminary assessment of the situation and inform the company if immunity from fines would be available to it 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 Competition at an early stage of the procedure, before any notification is submitted and the Commission investigation has been initiated, and long before the Commission can send 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 arising from the transaction. In particular, at any stage of the procedure, including before the issuance of a statement of objections, the Commission may give the notifying parties the opportunity to express their views orally.[73]

The Commission will also hold during Phase II investigations "State of Play" meetings chaired by senior DG Competition management with the parties,[74] to facilitate exchanges of information between DG Competition and the notifying parties at key points in the procedure.[75] In practice, the first meeting would be offered to the parties within two weeks following the initiation of proceedings, a second meeting would be offered before the issuance of the statement of objections, and a third meeting is to be offered to the parties following their reply to the statement of objection 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 European 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 in lieu of another, the Commission is likely to act only in cases of infringements of the competition rules that pertain somehow to the Community public interest[77] and are considered to be serious, thus necessitating its intervention. In doing so, the Commission enjoys full discretion. That discretion is to a substantial degree unchecked. Even in case of formal complaints, the Commission is not bound to conduct an investigation into an alleged infringement of the competition rules. The only obligation upon the Commission 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] In this regard, the Commission must only set out with clarity an appropriate reasoning for the rejection of the complaint.

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[71] *Commission Notice on immunity from fines and reduction of fines in cartel cases*, OJ [2002] C 45/3.
[72] Para. 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 that a complaint may entail, depends of the specific circumstances of fact and law that may considerably vary from case to case, and not of predetermined criteria. See case T-193/02, *Laurent Piau* v. *Commission*, Judgment of 26 January 2005, 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 the non-compliance with the procedural EU competition rules. These are cases where companies do not comply with decisions of the Commission that impose certain action or inaction on them. The basic intstrument in the hands of the Commission in order to ensure compliance is through 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 intiative (*ex officio*),[81] or (c) as a result of a transfer from one or more national competition authorities which co-operate with the Commission in the framework of the European Competition Network.

Complaints can be lodged either by natural/legal persons or by Member States. There is a formal complaints procedure available, but the Commission also receives and acts upon informal complaints. If the complainant wishes to take advantage of certain procedural rights,[82] he must file the complaint in a special form (Form C) and follow the procedural requirements set out in Regulation 773/2004.[83] Complaints that 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] that sets out the arrangements available for the informal submission of information to the Commission and the procedure applicable to formal complaints.

Own initiative actions begin when suspected infringements of Community competition law are somehow brought to the Commission's attention. The Commission may have this kind of information through a variety of channels, such as through reading the press or through contacts with other antitrust enforcers. Article 17 of Regulation 1/2003 gives the Commission the power to conduct investigations "into a particular sector of the economy or into a particular type of agreements across various sectors". This power, which existed also under the old Regulation 17, has been used only rarely.

As to the "transfer" of a case to the Commission from other national competition authorities, this is not in reality an individual and separate triggering event. It is again an own initiative action of the Commission, which retains full discretion when taking up a case. The mechanism for this co-operation between the Commission and national competition authorities is not based on a legislative text, but rather on a soft law instrument, the Notice on cooperation within the Network of Competition Authorities.[85] This fact by itself means that

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[79] Article 256 EC provides that pecuniary obligations imposed by the Commission are enforceable pursuant to 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 Commission's statement of objections and to 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 attached as an Annex to that 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] *Commission Notice on cooperation within the Network of Competition Authorities*, OJ [2004] C 101/43, para. 5 *et seq*.

the power to decide whether to investigate a case is totally discretionary and unchecked. In other words, the Commission is not bound by an automatic rule to take up a case. Indeed, the Notice only contains indicative guidance as to which competition authority is "*well placed*" to act.[86] 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 (crossborder 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*".[87]
Then the decision concerning the allocation of a case to an authority (including the Commission) is to be taken on as a result of coordination among the members of the Network, thus again entailing a substantial degree of discretion.[88]
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 occur when those authorities may decide to refer the case to the Commission, even if the merger does not have Community dimension.[89] 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.[90] 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 confirms that the transaction had a Community dimension and was not notified, it will require the companies to dissolve the concentration.[91]

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

[86] 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*".
[87] *Ibid*, paras. 14-15.
[88] *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).
[89] See above.
[90] Article 4(5) of the Merger Regulation.
[91] 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 formally rely upon the existence of a *prima facie* case in order to commence an investigation.

As already explained, the investigatory stage of proceedings usually takes place before the Commission has formally opened the case. The decision to investigate is taken at the level of Head of Unit or Director General in DG Competition. At this stage, administrative efficiency will seriously be taken into account. 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. The decision to start the investigation is also subject to internal review by a control unit within Directorate General for Competition. The factors taken into consideration are the implementation of the Commission's enforcement priorities as well as whether the case points to a *prima facie* infringement.

The initiation of proceedings in a specific case by the Commission is to be seen in the context of the general priorities of EC competition policy that are determined by the Commission itself. EC competition law policy is also subject to more general policy guidelines set out by the European Council.[92] An example of such general policy guidelines that influence competition policy is the Lisbon Strategy adopted by the European Council in Lisbon in 2000. The strategy sets out an ambitious ten-year strategy focusing on stimulating economic growth and increasing employment in the EU. Competition policy complements and reinforces other Community policies contributing to the Lisbon Strategy.[93]

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 analyse the information that is already at the Commission's disposal and identify the next steps to be taken (interviews, requests for information, inspections). They propose the next investigatory step to their hierarchy who needs to approve it.

Pursuant to 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 a formal opening of proceedings will occur if the Commission has gathered sufficient evidence to support allegations of an infringement of competition law.

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

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 that subject to investigation. Thus, in antitrust actions the

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

[93] 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.

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 push forward the Commission action. Conversely, it is possible to slow down antitrust proceedings simply by cooperating with the Commission only to the extent that it is necessary in order to avoid fines. 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 Court of First Instance by means of an action for failure to act under Article 232 EC. The Commission's failure to act must be illegal, i.e. the Commission must be under a specific obligation to act under the circumstances. The general duty imposed on the Commission to ensure the application of EC competition law[94] 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 right would arise only if the right conferred upon individual clearly required a specific action from the Commission. Such is the case under Article 7 of Regulation 773/2004, which requires the Commission to give a complainant a provisional communication of its reasons where there are insufficient grounds for acting upon his 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 of any other body. Commission staff is also under obligation to act objectively and impartially, in the Community interest and for the public good. While companies do indeed engage in lobbying, political presuure is certainly far less evident in the antitrust than in the state aid field.

In the merger field, the Commission is subject to strict deadlines to decide on the case. The merging companies may, however, agree on extending the deadline by offering commitments, or where the company involved submits incomplete notification or fails to provide the Commission with the requested information within the time limit set by the Commission. In addition the merging companies may request extension of the time limits provided for in the Merger Regulation. The Commission will only be able to trigger such extension with the consent of the parties.[95]

The only way in which the parties can expedite the proceedings before the Commission is through pre—notification meetings. Indeed, before submitting the formal notification, the Commission and the parties very often hold several pre-notificaiotn contacts (see answer to question 4.1). The result of these pre-notification contacts may result in that the Commission gathers a great amount of information by the time it initiates Phase I proceedings. This would allow the Commission to assess the notified merger in greater detail from the very beginning and to identify any competition issue at an earlier stage, thus also allowing the parties to submit commitments addressing these concerns earlier and favouring the possibility of a clearance before the end of Phase I. Indeed, in a recent merger case of two companies active in the production and distribution of industrial and medical gases[96] the Commission was able to gather and analyse large quanities of market data from both the merging parties and third paties in a relative 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.

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[94] See Article 85 EC.

[95] See Article 10 of the Merger Regulation.

[96] Commission Decision of 15 March 2004 (COMP/M.3314-*Air Liquide/Messer Targets*).

On the other hand, there are a few situations where the whole merger clearance procedure may slow down. Indeed, this would be possible when the investigation during both Phase I and Phase II is suspended.[97] This suspension may occur when a) the Commission decides to require an individual, corporation or association of corporations to supply information by decision,[98] or b) the Commission orders by decision to conduct an investigation of corporations and associations of corporations,[99] on any of the following grounds:

a) 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,[100] or
b) when one of the notifying parties or another party involved refuses to submit to or cooperate with a Commission inspection[101] or
c) the notifying parties do not inform the Commission of material changes in the facts and information contained in the notification.[102]

In cases where the Commission decides to require the supply of information, without first proceeding by way of a simple request for information, the time limits will also be suspended if such a request is owned to circumstances for which one of the merging parties is responsible.[103]

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 members,[104] including the President and two Vice-Presidents. The Commission acts by majority vote.[105] Commissioners must be nationals of the Member States; the EC Treaty obliges them to act independently of the Member States or of any other body, in particular they are not allowed to take instructions from a Member State whose nationals they are.[106] Each Commissioner is responsible for one or more Community policies. The Commission has a large staff, which is divided into Directorates General that cover a wide range of Commission policies. There is a separate Competition Directorate General (DG COMP), which is responsible for the enforcement of competition and state aid policy.

[97] Article 9(1) of the Merger Regulation.
[98] Article 11(3) of the Merger Regulation.
[99] Article 13(4) of the Merger Regulation.
[100] 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).
[101] Article 9(1)(c) of the Merger Regulation. The time limits will be suspended for the period between the unsuccessful attempt to carry out the inspection and the completion of the inspection ordered by decision.
[102] 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.
[103] Article 9(2) of the Merger Regulation.
[104] Before the EU enlargement on 1 May 2004, there were 20 Commissioners. After the enlargement the number of Commissioners rose to 30. As from 1 November 2004 there are 25 Commissioners. The number of Commissioners is bound to change following the future enlargement of the European Union.
[105] Article 219 EC.
[106] Article 213(2) EC.

DG COMP is headed by a Director General and consists of nine directorates. There are three Deputy Directors General and a Chief Competition Economist.[107]

DG COMP is divided into directorates, most of which have responsibility for generally-framed sectors of the economy. Directorates are headed by directors. Five of these directorates are operational directorates responsible for processing cases,[108] and it is the staff of these directorates that companies usually have contacts with. Two directorates are responsible for state aid policy.[109] Directorate A deals with general policy and strategic support, while Directorate R with strategic planning, and human and financial resources. Each Directorate within 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 that are responsible for conducting investigation and proposing measures to be taken by the Commission in individual cases. The operational Directorates include a merger unit.

Another important Commission's body that gets involved in competition cases is the Commission's Legal Service that acts as the Commission's in-house lawyer. It provides legal advice, assistance and representation over the range of the Commission's policies. The team of lawyers dealing with competition cases in the Legal Service cooperates with DG COMP throughout the entire procedure in a case likely to result to a formal decision. The Legal Service acts independently of Directorates-General and the Commissioners and is directly responsible to the President of the Commission. The opinion of the Legal Service 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.[110]

Under the EC Treaty the Commission as a collegiate body is responsible for implementation and enforcement of EC competition policy: the Commission's tasks include the duty to investigate and penalise individual infringements. Though formal decisions in competition cases are taken by the College of Commissioners,[111] due to the Commission's workload not every procedural step may be decided personally be the Commissioners. Thus, some of the Commission's powers are delegated to the Commissioner for Competition, and then subdelegated to the Director General and the Hearing Officers.[112] The European Court of Justice has, however, set limits on delegation of Commission's powers to everyday measures of management or administration. In particular, the Court held that decisions finding

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[107] This post was created in 2003 to offer an independent economic assessment of the competition policy development and advise Commission when a more complex economic analysis is necessary. The Chief Competition Economist (CCE) team is a specialized unit consisting of the CCE and ten members. It is placed within DG Competition, attached to the Director General to whom he 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.

[108] These 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.

[109] Directorates G and H.

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

[111] 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 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.*"

[112] The possibility of delegation of powers by the Commission is provided by Articles 13 and 14 of the Rules of Procedure of the Commission (OJ [2000] L 308/26).

infringement of EC competition law cannot be delegated to the Competition Commissioner.[113]

In practice, individual cases in DG competition are dealt with by case teams. A case team consists of a case manager, which is a senior DG Competition official[114] and usually 2-3 case handlers. The case handlers conduct the investigation and propose measures to be taken by the Commission. Before the proposal is presented to the Competition Commissioner for her approval, it is formally consulted within the Commission's hierarchy. In particular, internally within DG Competition, Directorate A acts monitors the measures proposed by case handlers before they are sent to the Commission's Legal Service for further consultation.

With regard to merger enforcement, as part of the merger control reform package which the Commission implemented during 2004, DG Competition underwent internal reorganization aimed at improving the efficiency of merger control handling. The reorganization responded to the rationalization of 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 the recent CFI rulings overturning Commission decisions prohibiting certain mergers on the grounds that the Commission's evidence was not sufficiently strong to substantiate their anti-competitive effects.

The main element in the reorganization is 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 has appointed Professor Lars-Hendrik Röller[115] as Chief Economist in DG COMP. He is supported by a team of some 10 economists who will 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 the approved *GE/Instrumentarium* mergers.[116] 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 the Commission's 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 Competition Economist (CCE) team may get involved in individual cases which require a complex economic analysis. A

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

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

[115] 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.

[116] 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*).

CCE team member becomes a member of the case team but reports back to the CCE. The involvement of the CCE team in an individual case requires the approval of the Director General.

The Legal Service must give its opinion before a Statement of Objections is sent, a complaint is formally rejected, a preliminary draft decision is submitted to the Advisory Committee[117] or a draft decision is placed before the Commission. Members of the Legal Service in practice also take part in certain procedural steps, such as in the hearing, and in the meeting of the Advisory Committee.

After the approval of the proposed measure by the Legal Service, that measure is formally endorsed by the Competition Commissioner. The proposed decision is also consulted with other Directorates General of the Commission (inter-service consultation), usually those that are responsible for some aspects of regulation of the product market that is subject to the decision. In some cases, before formal adoption of a decision, the Commission must consult the Advisory Committee on Restrictive Practices and Dominant Positions.[118] The Advisory Committee is composed of representatives of the competition authorities of the Member States. Consultation with the Advisory Committee precedes the taking of all infringement, interim measures, commitment, inapplicability, and withdrawal of a block exemption benefit decisions. The requirement of consultation applies also to decisions of the Commission on investigations into sectors of the economy and into types of agreements.[119] The Commission must take "*utmost account of the opinion delivered by the Advisory Committee*" and must inform the latter how its opinion has been taken into account.[120] If the opinion of the Committee is given in writing, it must be attached to the draft proposed decision to be considered by the Commissioners.[121] The Commission publishes the Committee's opinion if the Committee has recommended so.

In EC merger control proceedings, the Commission is also assisted by an Advisory Committee for the adoption of provisions implementing the Merger Regulation.[122] The Advisory Committee is composed of representatives of the Member States and the Commission will consult it before adopting decisions ending Phase II proceedings or imposing fines and periodic penalty payments. 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 Competition may also consult and set a 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 we explained above, in most cases the investigation precedes any formal act of "initiation of proceedings" or "complaint".[123] The initiation of proceedings is seen by Regulation

[117] See just below.
[118] See Article 14 of Regulation 1/2003.
[119] See Article 17(2) of the Regulation 1/2003.
[120] See Article 14(5) of the Regulation 1/2003.
[121] See Article 14(6) of the Regulation 1/2003.
[122] See Recital 46 of the Merger Regulation.
[123] The US term "complaint" will not be used here. See above.

773/2004, pursuant to earlier case law, as a formal act, that precedes any decision of the Commission that:

(a) orders the termination of competition law infringements (with or without fines)
(b) orders interim measures
(c) makes commitments binding upon companies, and
(d) declares the inapplicability of the competition rules to particular conduct (positive decision).

According to Article 2 of that Regulation initiation of proceedings takes place no later than:

(a) the date of the issuing of a statement of objections, when the Commission contemplates taking an infringement or an interim measures decision,
(b) the date of the issuing of a "preliminary assessment", when the Commission expresses concerns to companies that then offer commitments,
(c) the date of a 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 by the Commission under Article 25(3)(c) of Regulation 1/2003. Secondly, it is that 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 not considered the initiation of proceedings a challengeable act, but a rather a distinct procedural step towards the taking of a decision.[124]

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 precede the initiation of proceedings, which usually takes place just before the statement of objections is served on the parties.[125]

As regards merger control, if, during Phase II and after the parties have presented their commitments (if they have availed themselves 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 objection 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 publicise 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.*"[126] As far as the target of the investigation and future addressee of the Commission decision is concerned, the non notification of the initiation of the proceedings is not considered detrimental to his rights of defence.

[124] Case 60/81, *International Business Machines Corporation* v. *Commission*, [1981] ECR 2639, paras. 10-11.
[125] See Kerse and Khan, *op.cit.*, p. 123.
[126] Emphasis added.

Notification is only necessary if the Commission intends to publicise that act. For all other purposes, it is only the statement of objections that matters.

Indeed, the Court of Justice has 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*".[127] Therefore, the initiation of proceedings is not considered critical for the rights of defence.

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

As to the statement of objections, this represents the most important document that the company that is subject to a Commission investigation receives up to that stage of the proceedings. In this, the Commission informs the parties concerned in writing of the objections raised against them. It is duly notified to them and the Commission sets a time-limit within which these parties may inform it in writing of their views. The parties may, in their written submissions, set out all facts known to them which are relevant to their defence. They must also attach any relevant documents as proof of the facts set out and may propose that the Commission hear persons corroborating the facts set out in their submission.[128]

As regards merger control, there are two basic requirements regarding the notification to the parties of the Commission's statement of objections: that (i) this must be made in writing, and (ii) DG Competition shall set a time limit within which the notifying parties may provide the Commission with their comments in writing.[129] In general, the Commission will set out in the statement of objections the facts that led it 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.[130]

An important content to be included in the statement of objections is the documentary evidence that the Commission has obtained through its own investigation or from third parties, and on which it bases its objections. In any case, the future decision of the Commission will be based only on information on which the parties have had the opportunity to submit comments. Therefore, if the Commission desires to raise any other objections, this must be done through a separate statement of objections.[131]

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 that the initiation of proceedings be published. The Commission has however usually published a very short notice in its DG COMP website,[132] describing what the new case is about. Article 2(2) provides that in such cases the target company must be informed in advance. This presumably gives that company or companies the possibility to draw the Commission's attention to confidentiality issues.

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[127] Case 48/69, *Imperial Chemical Industries Ltd.* v. *Commission*, [1972] ECR 619, para. 17.
[128] Article 10 of Regulation 773/2004.
[129] Article 13(2) of the Implementing Regulation.
[130] Article 2(2) of the Merger Regulation.
[131] Article 18(3) of the Merger Regulation.
[132] http://europa.eu.int/comm/competition/whatsnew.html.

As far as the statement of objections is concerned, a copy of the non-confidential version of this is communicated to the complainant but not to the public. The Commission sets also a time-limit within which the complainant may make known its views in writing.[133]
In the merger control procedure, third parties involved in the case are also informed in writing of the Commission's objections.[134] However, in the majority of cases, third parties would not receive the statement of objections as such, but only information about the main objections of the Commission. Once the Commission initiates Phase II proceedings, or decides to send to 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 to issue the statement of objections. As to the confidentiality of the statement of objections, in general, any information, including 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 by the Commission when the Commission considers that their disclosure is not necessary.[135]

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, usually are 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,[136] general principles of Community law oblige the Commission to complete its investigations within the time limits of reasonableness.[137] An unduly unreasonable duration must be owed to some specific exceptional reasons for the Commission to escape the European Courts' censure.[138]

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[133] Article 6(1) of Regulation 773/2004.
[134] Article 13(2) of the Implementing Regulation.
[135] Articles 18(1) of the Implementing Regulation.
[136] It applies fully only to the 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.
[137] 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*, Judgment of 16 December 2003, not yet reported, para. 74 *et seq*.
[138] The Commission's undue delay in handling a proceeding may for example have consequences for the Commission's 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

Of relevance is also the right to good administration in Article 41 of the Charter of Fundamental Rights of the European Union,[139] now reflected in Article II-101 of the Treaty establishing a Constitution for Europe, which refers to the right of every person "*to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union*".[140]
As described above, in merger control proceedings, the Commission must complete its investigation within given time limits. These are possible to be extended in certain circumstances. If 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.[141] If the parties do not present their commitments within the time limits, the Commission will not take the commitments into account when deciding on the compatibility of the transaction with the common market.

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 for an array of investigatory measures that the Commission can take in the context of the enforcement of the Treaty competition rules.
Firstly, the Commission may seek to obtain information.[142] Information may be sought not only from the companies suspected of violating the competition rules, but also from third parties. The Commission may exercise this power either my making a simple request (Article 18(2)) or alternatively by adopting a formal decision requiring information (Article 18(3)). The new Regulation has simplified the process of requests for information, by no longer requiring a two-step process. Now the Commission may choose between a simple request or a formal decision at the outset.
The simple request for information must be made in writing, state the legal basis and its purpose, which means in effect that the Commission must identify a suspected infringement and identify the information sought as precisely as the circumstances permit.[143] There is no legal obligation to reply to the Commission's request for information under Article 18(2) of Regulation 1/2003. The companies are, however, subject to potentially substantial fines in case of supplying incorrect or misleading information.[144] At this stage the company may seek

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Commission's arguments as to the public interest in the immediate enforcement of the contested measure, pointing out that, in view of the fact that the length of the administrative procedure which culminated in the decision was due in part to steps taken by the Commission itself, the latter was not entitled to claim that immediate enforcement of the decision was a matter of urgency.

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

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

[141] Article 10(6) of the Merger Regulation.

[142] 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.

[143] See Kerse and Khan, *op.cit.*, p. 134.

[144] Article 23(1)(a) of Regulation 1/2003 empowers the Commission to impose on companies fines 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.

legal advice and/or contact the Commission directly to clarify the questions or the scope of information that 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 is a challengeable act before the Court of First Instance. If the addressee of that decision fails to provide the required information within the time limit set by the Commission, it may be subject to fines or periodic penalty payments.[145]

In most cases a request for information would follow on-the-spot inspections, which is likely to be the first contact that the 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 in whose territory the inspection is to be conducted. Officials of national competition authorities may also assist the 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.[146]

The old system's distinction between voluntary and mandatory investigations is retained. For a voluntary inspection a simple authorisation as provided for in Article 20(3) of Regulation 1/2003 suffices, whereas the Commission may choose to arm itself with a formal decision, adopted under Article 20(4), to which companies are required to submit. In case of mandatory investigations, when an undertaking opposes an inspection ordered by Commission decision, the delicate problem of the co-operation with national judicial authorities arises. Article 20 integrates the principles established by a very recent judgment of the Court of Justice in *Roquette Frères*.[147] According to the Court of Justice, the national courts' purview should be limited to control of whether the Commission decision is authentic and whether the coercive measures sought are arbitrary or excessive. For this purpose the national courts can address questions to the Commission. The Court also stated that the competent national courts, when considering the matter, 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 only to review by the Community judicature.[148]

Failure by the companies concerned to submit to a mandatory inspection may lead to fines and periodic penalty payments.[149] Fines may also be imposed when the companies concerned produce the required books or other records in incomplete form, when they are responsible for breaking seals affixed by Commission officials, or when they 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.[150]

Article 21 of the new Regulation has for the first time given powers to the Commission 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 to the subject-matter of the

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[145] See Articles 23(1)(b) and 24 of Regulation 1/2003.

[146] See also Article 4 of Regulation 773/2004.

[147] 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.

[148] *Ibid*, para. 39 *et seq*.

[149] Articles 23(1)(c) and 24(1)(e) of Regulation 1/2003.

[150] Article 23(1)(c),(d),(e) of Regulation 1/2003.

inspection are being kept "*in any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings*". To that end a reasoned decision is required, along with the prior authorisation 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 for more detailed explanations of the Commission but once more it may not substitute its own assessment for that of the Commission and without requesting the whole file to be transmitted to it.

Finally, the Commission also has a power to take statements under Article 19 of Regulation 1/2003 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 used statements obtained outside the scope of on-the-spot inspections as evidence of infringements. Article 19 formalises this practice and Article 3 of Regulation 773/2004 further specifies 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 such interviews.[151] No fine or penalty is provided for incorrect or misleading information offered at an interview.

In EC merger control proceedings, the Commission will start very early in the procedure to gather details of the market affected by the transaction. This can be done in many different ways. As its first source of information, the Commission will use the Form CO to learn about the facts of the transaction, but it will also request information from the merging parties and sometimes from other corporations or associations of corporation. The Commission may ask for this information by simple request or by decision.[152] 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.[153] Moreover, the Commission may also interview any natural or legal person by telephone or other electronic means, if that person gives his consent.[154] 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.[155]

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 in antitrust proceedings, Commission officials cannot conduct searches in private homes. In general, the Commission is authorized to conduct all necessary inspections of business premises.[156] Its powers to investigate private parties include the possibility to (i) enter any premises, land and means of transport of corporations or associations of corporations, (ii) examine the books and other records related to the business, irrespective of the medium in 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 to record answers.[157]

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[151] Article 3(3) of Regulation 773/2004.
[152] Article 11(1) of the Merger Regulation.
[153] Article 11(6) of the Merger Regulation.
[154] Article 11(7) of the Merger Regulation.
[155] Article 12(1) of the Merger Regulation.
[156] Article 13(1) of the Merger Regulation.
[157] 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 undertakings or associations of undertakings.[158] 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,[159] or (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,[160] (iii) when 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,[161] or (iv) seals fixed during the investigation by Commission officials or other authorized persons have been broken.[162] 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 stage of investigation of a competition law infringement, the target of that 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 of the Community institutions. Respect for human rights is therefore a condition of the lawfulness of Community acts.[163] Fundamental rights form an integral part of the general principles of law, whose observance the European Court ensure. 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 from the European Convention on Human Rights.[164]

In EC competition law proceedings regard must be had in particular to the rights of defence, a principle whose fundamental nature has been stressed on numerous occasions in the Courts' judgments.[165] More specifically, the Courts have pointed out that the rights of defence 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, 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*".[166]

In addition, the Commission action is subject to the principle of proportionality. Thus, the Courts have held that inspections and requests for information must be necessary and

[158] Article 14(1) of the Merger Regulation.
[159] Article 14(1)(c) of the Merger Regulation.
[160] Article 14(1)(d) of the Merger Regulation.
[161] Article 14(1)(e) of the Merger Regulation.
[162] Article 14(1)(f) of the Merger Regulation.
[163] 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.
[164] *Ibid*, para. 33.
[165] 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, para. 11 *et seq*.
[166] Cases 97/87 to 99/87, *Dow Chemical*, *op.cit.*, para. 12.

proportionate to the objective pursued by the Commission.[167] Proportionality limitations are, indeed, expressly provided for in the text of Regulation 1/2003.[168]
More specifically, the target of the Commission's investigation is entitled to claim legal professional privilege, which covers lawyer-client communications made for the purpose an in the interest of the client's right of defence. The privilege covers only documents emanating from an independent lawyer – it does not cover documents produced by an in-house lawyer.[169] The target has also the right to avoid self-incrimination, which is, however, limited by an obligation on the part of a company to cooperate with the Commission.[170] Thus, the Commission is not entitled to require the target of its investigations to answer questions if an answer to the question would be equivalent to the admission of an infringement.[171] On the other hand, the right to avoid self-incrimination does not mean that the Commission cannot reward by reducing a fine companies that plead guilty. 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*".[172]

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?

As explained above, the companies that are the target of a specific investigatory measure by the Commission must cooperate fully with the latter. The Commission enjoys wide powers to make investigations and to obtain information, in order to bring to light infringements of Articles 81 and 82 EC and it is for it to decide, for the purposes of an investigation, whether particular information is necessary.[173] 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*".[174] 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

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[167] 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* ."
[168] Articles 20(8) and 21(3) of Regulation 1/2003.
[169] See Case 155/79 *A.M. & S.* v. *Commission* [1982] ECR 1575, para. 27, 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.
[170] See below.
[171] 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), p. 701 *et seq*.
[172] Joined Cases C-65/02 P and C-73/02 P, *ThyssenKrupp Stainless GmbH and ThyssenKrupp Acciai speciali Terni SpA* v. *Commission*, Judgment of 14 July 2005, not yet reported, para. 50.
[173] Case 374/87, *Orkem*, *op.cit.*, para. 15.
[174] *Ibid*, para. 27.

insufficient. A company must co-operate in finding specific records when the Commission requests so.[175]

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 the target. In the proceedings before the Commission, the target does not have the right to be present when third parties are questioned regarding the target 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 procedure.

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 rights of the defence relate only to the contentious proceedings which follow the delivery of the statement of objections, while other rights, such as the right to legal representation and the privileged nature of correspondence between lawyer and client must be respected as from the preliminary-inquiry stage, i.e. before the statement of objections has been issued.[176] 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 (such as the right to request information or to search premises) provided for in Regulation 1/2003. When the preliminary investigations show that there is enough evidence to form charges against individualised companies, the Commission issues the statements 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 preliminary investigation. It may, e.g. claim legal professional privilege, invoke its right for privacy with regard to premises, or the right to necessary legal representation.[177] At this stage the Commission may take a number of actions without granting the target the right to be heard or even giving it a notice of its action, e.g. the Commission is not obliged to hear the parties prior to issuing a decision to search company's premises or a decision requiring information.[178]

A company that received 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. Such company will have a number of formal and informal contacts with the Commission officials in the course of the proceedings. It will have an opportunity to raise issues about 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 the statement of objections sent them by the Commission during the Phase II investigation. Indeed, parties to whom the

[175] See Kevin Coates, "Just Say No", Paper Presented at the Eighth Annual IBA Competition Conference (Fiesole, 17 September 2004), p. 4.
[176] See Joined cases 46/87 and 227/88, *Hoechst AG* v. *Commission*, [1989] ECR 2859, para. 16.
[177] For more information see Giannakopoulos, *op.cit.*, pp. 110-113.
[178] See Case 136/79, *National Panasonic (UK) Limited* v. *Commission*, [1980] ECR 2033.

statement of objections is addressed, or who have been informed of the objections in the SO, must submit their comments on the objections to the Commission in writing. Their comments must set out all facts and matters known to them which are relevant to their defense, and must 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.[179]
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.[180]

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 European Community Courts indicates that the Commission has a wide sphere of discretion as to how to conduct its investigation. Only final acts of 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 a procedure nor a statement of objections may be challenged before the Community Courts.[181]
The Commission has also wide power of discretion as to the choice of the companies it subjects to its enforcement actions. It is entitled, in order effectively to ensure the application of Community competition rules, to give differing degrees of priority to the complaints brought before it by reference to their Community interests.[182]
With respect to requests for information it does not seem that excessive burden of the request could be a valid argument to raise against the Commission. In the context of Commission's investigations on company's premises, the CFI held that the excessive volume of documents which the Commission copied cannot in itself constitute a defect in the conduct of the investigation.[183] As it has been explained above, a company to which the Commission directed a simple request for information is not obliged to comply with this request. On the other hand, if the Commission issues a decision requiring an information, the addressee is obliged to answer and may be subject to fines if he fails to do so.[184] There are limited reasons, such as legal professional privilege, that may be invoked to refuse to provide with the Commission with information it has requested by means of a formal request for information.
Instances of administrative irregularities, unfairness, discrimination or violations of the Code of Good Administrative Behaviour by the Commission officials may be complained of to the Ombudsman.[185] Defences against investigation may also be raised in the appeal to the Court of First Instance, if the Commission issues a final decision in the case.

4.9 Access to information in Commission files

[179] Article 13(3) of the Implementing Regulation.
[180] Article 14(1) of the Implementing Regulation.
[181] See Case 60/81, *International Business Machines Corporation* v. *Commission*, [1981] ECR 2639, para. 21.
[182] 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*, Judgment of 17 December 2003, not yet reported, para. 69.
[183] 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.
[184] For more detail see section 4.7.2. above.
[185] For more details see answer to question 12.2 below.

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 that are necessary for the effective exercise of the rights of the defence and, in particular, of the right to be heard.[186] The European Court of First Instance held in *Hercules*[187] and *Soda Ash*[188] that the Commission may not grant selective access to documents, removing those which may be relevant to the defence of a company. The Commission had "*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*".[189] These principles are also found in Regulation 1/2003, in Regulation 773/2004 and in the Commission Notice on Access to File.[190] The Commission has recently published a new draft Notice on access to file (Draft Notice),[191] which does not introduce major changes, but adjusts the provisions on access to the Commission's file to the new regulatory framework and further clarifies the Commission practice. The future Notice will enter into force after consultations with interested parties.

Article 27 of Regulation 1/2003 obliges the Commission to respect the rights of defence of the parties in the proceedings. The scope of the right of access to the file is specified in Article 15 of Regulation 773/2004. The Commission is obliged to provide access to its file "*to the parties to whom it has addressed a statement of objections*". These parties must have access to all documents on the Commission's file with exception of the following:

(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 the competition authorities of the Member States or between the national competition authorities.

In principle the same rules apply to the statements made by applying for immunity from fines in exchange for providing the Commission with the evidence concerning cartel activity. The Leniency Notice[192] 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 application will be treated like other documents gathered by the Commission in the course of the proceedings. Oral statements are treated differently: they form part of the Commission's file, however, they are not included on the CD ROM with the remaining evidence and they can be only accessed at the Commission's premises.[193]

The addressees of the statement of objections (main parties) may also obtain access to other parties' replies, or at least to the relevant parts thereof, if these documents contain new

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[186] 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.

[187] Case T-7/89, *SA Hercules Chemicals NV* v. *Commission*, [1991] ECR II-1711.

[188] Case T-30/91, *Solvay SA* v. *Commission*, [1995] ECR II-1775.

[189] Case T-7/89, *Hercules*, *op.cit.*, para. 54.

[190] *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.

[191] *Communication from the Commission relating to the revision of the 1997 Notice on the internal rules of procedure for processing requests for access to the file*, OJ [2004] C 259/8.

[192] *Commission notice on immunity from fines and reduction of fines in cartel cases*, OJ [2002] C 45/03.

[193] For more details see section 4.9.2 below.

evidence pertaining to the allegations against them brought 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 European Commission may only use information which it has acquired under Articles 17 to 22 of the Regulation for the purpose for which such information was obtained. Article 28 of Regulation 1/2003 prohibits the Commission and the competition authorities of the Member States, their officials, servants and 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 for the enforcement of 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 in the same case and concurrently with Community competition law, and the former does not lead to a different outcome, information exchanged may also be used for the application of the former.

In the field of merger control, the Commission must grant to the parties to whom the SO is addressed access to the file, with the aim of enabling them to exercise their defense rights. Access is subject only to the legitimate interest of companies in the protection of their business secrets.[194] The procedure for access to the file in merger proceedings is very similar to the procedure followed under the application of Articles 81 and 82 EC.

The SO addressees may also review documents that 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 the Commission's objections, if this is necessary for those parties to prepare comments on the statement of objections.[195] 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.[196] Finally, the Commission must also grant access to the file to the authorities of a Member State to which the Commission has referred a case.[197]

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 file is granted after the notification of the statement of objections, at the request of the party that is the addressee thereof, so that it can exercise its rights of defense and reply fully and effectively to the Commission's allegations.

In the past, the Commission has often faced serious difficulties in identifying and retrieving documents from its files for the purpose of preparing documentation for the parties. An

[194] Article 18(3) of the Merger Regulation.
[195] Article 17(2) of the Implementing Regulation.
[196] Article 17(3) of the Implementing Regulation.
[197] Article 19(2) of the Implementing Regulation.

administrative burden, however, cannot be invoked by the Commission as a justification for not giving access to its file.[198] 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 is that firms would be invited to the Commission's premises to inspect the file,[199] in practice documents are scanned and digitally recorded by the Commission, thus permitting access to the file to be given on a CD-ROM. The Draft Notice gives the Commission a choice of a variety of methods in giving access to the file: by CD-ROM, paper copies or by examination of accessible documents at the Commission's premises. Where access to file is given at the Commission's premises, the right to inspect the file has to be exercised within the time specified for the delivery of a written reply to the Commission's statement of objections.

In the context of leniency applications, the Commission 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 it is most probably not uniformly applied. The current practice followed by the Commission is that oral statements made by leniency applicants (which the Commission tries to keep short, and exclude business secrets and confidential information to avoid the need for editing) are routinely recorded by the Commission, transcribed and signed by leniency applicants (or at least the Commission requests a signature but considers it immaterial whether the transcipt 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 the transcripts of the tape-recorded presentations in the file. The need for some kind of "investigation privilege" for such statements has been raised, but not accepted by the Commission to date. Some officials believe the Commission no longer will routinely make transcripts of tape recordings (the number of leniency applications has doubled in the past year, and DG Competition is under-resourced to deal with these) – but the tape recordings will still be made available as part of the file, and other parties can listen to them and make notes.

The Draft Notice specifies the practical arrangements for giving the parties access to the Commission's file, the classification of the documents for disclosure purposes, rules relating to resolution of disputes relating to the extent of access to the file given in a particular case. Further access to file, i.e. subsequently to the statement of objections, may be given, when 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 that includes a request for access to the file.[200] Other parties involved in the procedure that have been informed of the Commission's objections[201] must request access to the file if that 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 it will grant access to "*key documents*" obtained by the Commission as soon as Phase II of the investigation is initiated,[202] i.e. before notifying 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

[198] Case T-36/91, *Imperial Chemical Industries plc* v. *Commission*, [1995] ECR II-1847, para. 112.
[199] Notice on Access to the File, *op.cit.*, at II.C.
[200] Article 17(1) of the Implementing Regulation.
[201] Article 17(2) of the Implementing Regulation.
[202] Best Practice Guidelines, para. 45.

objections is issued.[203] 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.

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 "parties" for access to file purposes.[204] Indeed, Chapter VI of Regulation 773/2004 does not mention any other person than the addressee of the statement of objections. The law sees the rights of complainants in terms of "access to documents" rather than of "access to the file".[205] Complainants may obtain limited access to documents in the Commission's file. Thus, complainants 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 bases its assessment.[206] The scope of the complainant's right of access to documents is limited: complainants cannot claim access on the same basis as companies under investigation.[207] The complainant may likewise 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*[208] in which the Court stated that Regulation 17 gave complainants a right to be heard and not a right to receive confidential information. The same principles are endorsed by the Draft Notice. Finally, Article 8(2) of Regulation 773/2004 provides that documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 EC may only be used by the complainant 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 (so-called "interveners"), if they have shown a "sufficient interest".[209] In this case the Commission informs them in writing of the nature and subject matter of the procedure and sets a time limit within which they may make known their views in writing.[210] Such natural or legal persons may also avail themselves of the possibility to rely upon general Community legislation on access to documents held by the EU institutions. Thus, Regulation 1049/2001 lays down the general framework for such access to information.[211] Under these

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

[204] Compare case 43/85, *Associazione nazionale commercianti internazionali dentali e sanitari (Ancides)* v. *Commission*, [1987] ECR 3131, para. 7.

[205] Notice on Access to the File, *op.cit.*, para. 3.

[206] Article 8 of Regulation 773/2004.

[207] 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.

[208] Cases 209/78 to 215/78 and 218/78, *Heintz van Landewyck SARL and Others* v. *Commission*, [1980] ECR 3125, para. 46.

[209] 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), p. 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), p. 104 *et seq*.

[210] Article 13(1) of Regulation 773/2004.

[211] *Regulation 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*, OJ [2001] L 145/43.

rules, an EU institution may refuse access to such documents, only when this would undermine the protection of:

(a) the public interest as regards public security, defence and military matters, international relations, or the financial, monetary or economic policy of the Community or a Member State;
(b) privacy and the 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.[212]

When disclosure of a document in its enirety is not possible, the Regulation provides for a right of partial access. In a recent case third parties tried to rely on that Regulation in order to have access to the Commission's file in a cartel proceeding. Access to that information would enable those parties to bring civil claims for damages against the cartel members in Member States courts. The Commission resisted this request mainly because allowing third parties access to such information would deter firms from cooperating with the Commission and would 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 content of the documents referred to in the request in order to determine whether partial access was possible. The Court added that it is only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that derogation from that obligation to examine the documents may be permissible.[213]

In EC merger control proceedings, the Commission must in certain limited cases grant access to file to third parties on request, when such parties have been informed of its objections and if this is necessary for them to prepare their comments.[214]

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 will not be revealed. Where the business secret or other confidential information is necessary to prove the 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 file Notice. Business secrets are defined as information (documents or parts of documents) for which an undertaking has claimed protection, and which are recognised as secret and non-communicable by the Commission. 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.

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[212] Article 4 of Regulation 1049/2001.
[213] Case T-2/03, *Verein für Konsumenteninformation* v. *Commission*, Judgment of 13 April 2005, not yet reported, para. 65 *et seq*.
[214] Article 17(2) of the Implementing Regulation.

The Draft Notice appears to define "business secrets" more narrowly, 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]",[215] and makes a clear distinction between business secrets and "*other confidential information*", defined as information where disclosure would "*significantly harm a person or undertaking*". According to the Draft 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.[216] The 1997 Notice also mentions, as an example of a business secret, information about the internal organization of a company.

The definition of other confidential information currently includes information that would make it possible to identify those who supplied it, when the latter 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 Draft 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 on their trading partners, customers or suppliers. The European Courts have acknowledged that it is legitimate to refuse to reveal to such companies certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures.[217] Therefore, the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those 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 in the case of information relating to the parties' turnover, sales and market share data.

The procedure for identifying confidential information is laid down in Regulation 773/2004 and in the Commission Access to file Notice. It is for the companies that submit information to the Commission in the course of the proceedings to indicate materials which they consider to be confidential, with reasons, and to provide a separate non-confidential version of the information.[218] In addition, the Commission may itself require companies to identify confidential information in documents which 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 Draft Notice, the non-confidential versions and the descriptions of the deleted information must be such as to enable any party who has access to the Commission's file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to

[215] Case T-353/94, *Postbank NV* v. *Commission*, [1996] ECR II-921, para. 87.
[216] Draft Notice, *op.cit.*, para. 17.
[217] Case T-65/89, *BPB Industries Plc and British Gypsum Ltd* v. *Commission*, [1993] ECR II-389, para. 33.
[218] 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 AG's Opinion in case 53/85, *AKZO*, *op.cit.*).

the information claimed to be confidential.[219] 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.[220] However, 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 such information, the party from which confidential 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 in order to prove an alleged infringement (inculpatory documents), or if 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 which is the subject of a non-disclosure request by the provider may be declared confidential only if the following four conditions are met:

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

(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;[221]

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

Disputes relating to access to certain documents on the Commission's file are resolved by the Hearing Officer.[222]

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 the latter or between the latter must not be disclosed to any party during access to the file.[223] Further, the Commission must not grant access to any information, including documents, that contains business secrets or other confidential information, if the Commission does not consider its disclosure necessary for the purposes of the procedure.[224]

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 on the Commission's file will not always result in the annulment of the Commission decision in question.[225] The annulment of Commission's decision is possible in cases where the access to the file has been insufficient to enable the

[219] Draft Notice, *op.cit.*, para. 37.
[220] Draft Notice, *op.cit.*, para. 46.
[221] 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.
[222] Article 8 of the Commission Decision on the terms of reference of hearing officers.
[223] Article 17(3) of the Implementing Regulation.
[224] Article 18(1) of the Implementing Regulation.
[225] Case T-25/95 *et seq.*, *Cimenteries CBR*, *op.cit.*, para. 156.

defendant to exercise the right to be heard. Thus, the consequences of the Commission's failure to give the party access to its file depend on the specific circumstances of a particular case.[226]

The Court of First Instace has ruled that the Commission decision is not necessarily required to be an exact replica of the statement of objections.[227] The Commission is permitted in its decision to take account of the responses of the companies concerned to the statement of objections. It is able not only to accept or reject the arguments of the companies concerned, but also to carry out its own assessment of the facts put forward by those companies in order either to abandon such complaints as have been shown to be unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintains. Thus, it is only if the final decision alleges that the companies concerned have committed infringements other than those referred to in the statement of objections or takes into consideration different facts, that there will be an infringement of the rights of the defence. That is not the case where the alleged differences between the statement of objections and the final decision do not concern any conduct other than that in respect of which the companies had already submitted observations and are therefore unrelated to any new complaint.[228]

In asserting that there was an infringement of the rights of the defence 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*".[229] According to the case-law, an infringement of the rights of the defence must be examined in relation to the specific circumstances of each particular case, since it depends essentially on the objections raised by the Commission in order to prove the infringement which the companies concerned are alleged to have committed.

In this respect, the Community Courts draw distinction between inculpatory and exculpatory documents. With respect to inculpatory documents the failure to communicate a document constitutes a breach of the rights of the defense only 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*".[230] The same burden is not imposed on the company concerned if the document that 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 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*".[231]

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[226] Case T-36/91, *ICI* v. *Commission*, *op.cit.*, para. 70.

[227] See e.g. cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB and Others* v. *Commission*, Judgment of 30 September 2003, not yet reported, para. 191.

[228] *Ibid*.

[229] *Ibid*, para. 192.

[230] 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*, Judgment of 7 January 2004, not yet reported, para. 73.

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

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 was done informally, since 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 that companies had met its concerns by taking certain positive or negative measures or by giving certain 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 an company whose conduct is under investigation. Such commitments meet the Commission's concerns as expressed in its preliminary assessment.[232] Subsequently, the Commission may adopt a decision making the commitments binding on a 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.[233]
Commission decisions making commitments binding are neither applicability nor inapplicability decisions.[234] They merely close the administrative proceedings and they state that as a result of the commitments offered - which are rendered binding - the Commission has no longer an interest to pursue the case.[235] As such, these decisions do not bind national

[232] The "preliminary assessment" is a document which replaces in this context the Statement of Objections. For examples of the new procedure see case COMP/C.2/37.214-*Joint selling of the media rights to the German Bundesliga* (proposed commitments published in OJ [2004] C 229/13); case COMP/39.116-*Coca-Cola* (proposed commitments published in the Commission's website on 19 October 2004); case COMP/B-1/38.348-*Repsol CPP SA* (proposed commitments published in OJ [2004] C 258/7); case COMP/38.381-*ALROSA/DBCAG/City and West East* (proposed commitments published in OJ [2005] C 136/32); case COMP/ 37.749-*Austrian Airlines/SAS cooperation agreement* (proposed commitments published in OJ [2005] C 233/18). In the first two cases the Commission adopted formal Decisions rendering legally binding the commitments concerned: Commission Decision of 19 January 2005 (*Joint selling of the media rights to the German Bundesliga*), OJ [2005] L 134/46; Commission Decision of 22 June 2005 (*Coca-Cola*). In the other cases the Commission intended to proceed to a formal Decision after inviting interested third parties to submit their comments.

[233] Recital 13 of Regulation 1/2003.

[234] Since such Commission decisions will leave open the question whether there was an infringement of Articles 81 or 82 EC, and since they will incorporate commitments that were given by the parties themselves, the latter will not be able to seek 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.

[235] Note that Article 9 of Regulation 1/2003 does not allow for the Commission to formally accept commitments and to make them binding upon the undertakings concerned, when the commitments are given in order for the former to reduce a fine for an infringement of 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. See to that extent a recent public communication of 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 in Commission 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.

authorities[236] and courts as to the applicability or non-applicability of Articles 81 and 82 EC and the latter remain free to decide that there has been or not an infringement or non-infringement of Community competition law.[237]

The Commission has a wide discretion in accepting the commitments from companies. These commitments may be of different nature and duration, e.g. they can be behavioural or structural, and limited or unlimited in time. Companies not in compliance with their commitments, which have been declared binding upon them by Commission decision, will face fines up to 10% of their total worldwide turnover in the preceding business year and periodic penalty payments up to 5% of their average daily turnover.[238] In addition, in case of breach of commitments the Commission may reopen proceedings.[239]

While Article 9 of Regulation 1/2003 does not expound on the duties of the Commission, it can certainly be adduced that the latter must conduct settlement negotiations in good faith. Indeed, companies may seize the Court of First Instance in case of infringement of essential procedural requirements and of misuse of powers.[240] Third parties' interests are safeguarded through the publication of a notice in the Official Journal that informs third parties of the Commission's intention to take a decision under Article 9(1) of Regulation 1/2003 declaring commitments binding.[241] To this end, it invites interested third parties to submit their comments. If such third parties think that the Commission decision accepting commitments does not adequately take their interests into account, they may seize the Court of First Instance with an application for annulment. It has to be noted, however, that in this area the Commission's discretion is wide.

In the merger control field, the Commission can attach to its decision declaring a concentration compatible with the common market conditions and obligations intended to ensure that the companies concerned comply with commitments that they have offered.[242] This possibility exists both for the first phase and for the second phase of the procedure.[243]

The legal consequences of a breach or non-fulfillment of 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 in an alternative way. Gradually the distinctiveness of conditions and obligations has been clearly affirmed in the Commission decisional practice and more importantly in its Notice on Remedies.[244] Conditions usually refer to measures contained in commitments that structurally change the market (structural remedies), whereas obligations refer to implementing measures that aim to fulfill the commitments relevant to basically behavioral measures.

In case the undertakings concerned commit a breach of an obligation attached to the compatibility decision, the Commission, if the breach is serious, may revoke its decision.

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[236] The question of the effect of such decisions to national competition authorities is more complicated, since the latter will have already been debarred from opening proceedings, as the Commission proceeding 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 intervene *after* the termination of the Commission proceedings under Article 9 of Regulation 1/2003.

[237] 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.

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

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

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

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

[242] Conditions and obligations may also be used by the Commission, when the latter grants a derogation from the obligation to suspend putting into effect a merger under Article 7. See Article 7(3) of the new Merger Regulation.

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

[244] *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.

This is applicable to both first and second phase decisions.[245] If, on the other hand, the commitment has been taken up by the Commission and has been transformed to a condition for the clearance of the merger, any breach of this condition means that the authorization decision will no longer be valid, thus, the merger will be considered prohibited *ab initio*.[246] Heavy fines under Article 14(2)(b) of the Merger Regulation may also be imposed.[247] Alternatively, the Commission may by decision require the undertakings or assets brought together to be separated or the cessation of joint control or any other action appropriate in order to restore conditions of effective competition.[248]

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 of its Decision to commitments given by the parties without, however, making such commitments obligatory upon them.[249] In such cases the commitment in question does not have the character of a condition or of an obligation and the Commission usually simply "takes notice" thereof.[250]

In the EC merger control field, the Commission can attach to its decision declaring a concentration compatible with the common market conditions and obligations intended to ensure that the companies concerned comply with commitments that they have offered.[251] This possibility exists both for the first phase and for the second phase of the procedure.[252] The legal consequences of a breach or non-fulfillment of 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 in an alternative way. Gradually the distinctiveness of conditions and obligations has been clearly affirmed in the Commission decisional practice and more importantly in its Notice on Remedies.[253] Conditions usually refer to measures contained in commitments that structurally change the market (structural remedies), whereas obligations refer to implementing measures that aim to fulfill the commitments relevant to basically behavioral measures.

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[245] Respectively Articles 6(3)(b) and 8(6)(b) of the Merger Regulation. In case of breach of an obligation attached to a first phase clearance decision the Commission may alternatively order the commencement of the second phase (Article 6(4) of the Merger Regulation).

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

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

[248] 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.

[249] 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), p. 509 *et seq*.

[250] The question whether a commitment has legal effects, in the sense that a breach of its terms can affect in some way the authorisation decision of the Commission, 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 of the authorisation decision may yet entail legal effects. Thus, according to the CFI, in order 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).

[251] Conditions and obligations may also be used by the Commission, when the latter grants a derogation from the obligation to suspend putting into effect a merger under Article 7. See Article 7(3) of the new Merger Regulation.

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

[253] *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.

In case the undertakings concerned commit a breach of an obligation attached to the compatibility decision, the Commission, if the breach is serious, may revoke its decision. This is applicable to both first and second phase decisions.[254] If, on the other hand, the commitment has been taken up by the Commission and has been transformed to a condition for the clearance of the merger, any breach of this condition means that the authorization decision will no longer be valid, thus, the merger will be considered prohibited *ab initio*.[255] Heavy fines under Article 14(2)(b) of the Merger Regulation may also be imposed.[256] Alternatively, the Commission may by decision require the undertakings or assets brought together to be separated or the cessation of joint control or any other action appropriate in order to restore conditions of effective competition.[257]
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 of its Decision to commitments given by the parties without, however, making such commitments obligatory upon them.[258] In such cases the commitment in question does not have the character of a condition or of an obligation and the Commission usually simply "takes notice" thereof.[259]

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?

The cases of Commission generalised action in the antitrust field are the adoption of block exemption Regulations, the adoption of soft law instruments, such as Notices, Guidelines and Communications, and the investigation into sectors of the economy and into types of agreements.
Competition is one of the few areas of Community competence where the Commission enjoys extensive legislative powers. The Commission has been given the power by the Council to adopt secondary legislation not only in the procedural field, but also substantively.

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[254] Respectively Articles 6(3)(b) and 8(6)(b) of the Merger Regulation. In case of breach of an obligation attached to a first phase clearance decision the Commission may alternatively order the commencement of the second phase (Article 6(4) of the Merger Regulation).
[255] See Stoffregen, in: Schröter, Jakob & Mederer (Eds.), *Kommentar zum Europäischen Wettbewerbsrecht* (Baden-Baden, 2003), pp. 1638-1639.
[256] If a condition is breached or not fullfilled and, as result, the merger authorisation decision becomes void, then the prohibition of Article 7(1) of the Merger Regulation resurrects and the merged undertakings can be fined under Article 14(2)(b) for having put into effect a concentration in breach of Article 7(1).
[257] 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.
[258] See D'Ormesson and Kerjean, "Le developpement de la pratique des engagements en matière de contrôle communautaire des concentrations", 34 *Revue Trimestrielle de Droit Européen* 479 (1998), p. 509 *et seq*.
[259] The question whether a commitment has legal effects, in the sense that a breach of its terms can affect in some way the authorisation decision of the Commission, 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 of the authorisation decision may yet entail legal effects. Thus, according to the CFI, in order 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).

As to substance, the Commission has been adopting block exemption Regulations under specific *vires* Council Regulations ever since 1965.[260] In Article 28 of its September 2000 Regulation proposal,[261] the Commission had attempted to have a wide and general empowerment (*vires*) provision inserted into the new procedural Regulation. This would have empowered the Commission to adopt block exemption regulations, however this attempt was strongly resisted by the Member States in the Council and, therefore, failed.

The nature of block exemption Regulations has been extensively debated under the new system of legal exception.[262] Essentially these are acts that apply Article 81(3) EC to categories of agreements, thus "circumscribing a portion of the field where Article 81 is not applicable".[263] Usually, the adoption of a block exemption Regulation by the Commission, which is a rather dramatic event that acquires 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, so long as it remains within the *vires* of the Council Regulations, is absolute.

The Commission's powers appear much more substantial, if one takes into account the vast soft law instruments that the Commission has been adopting, especially since the second half of the 1990s.[264] The proliferation of Notices, Communications, Guidelines, Green and White Papers is not identified only in the competition law field, but the Commission uses these

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[260] 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 (refers to exclusive distribution, exclusive purchasing, and franchising agreements); Regulation 1400/2002 on vertical agreements in the motor vehicle sector, OJ [2002] L 203/30; 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 specialisation 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, Commission Regulation 358/2003 on agreements in the insurance sector has been adopted (OJ [2003] L 53/8). There are also some sectoral Commission block exemption Regulations: 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 has been 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 and baggage and of freight on scheduled air services, as well as agreements on slot allocation at airports and airport scheduling.

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

[262] See above.

[263] 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 block exemption Regulations 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. See, however, John D. 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 block exemption Regulations.

[264] 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.

instruments in other areas of EU law, sometimes drawing criticism for this "unauthorised extension" of its powers.[265] Although they are not considered 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 block exemption Regulations which historically preceded them, their effect in reality is different. The soft law effect of Guidelines and Notices is likely to be muscular, robust, constraining, not very soft at all. Not infrequently, the European Courts refer to them, and Commission decisions will surely invoke them as will national authorities and courts.

In the context of modernisation, as a result of the need to review existing Notices on co-operation with national courts and national competition authorities,[266] and with a view to providing guidance on the application of Articles 81 and 82 EC, the Commission has very recently published six Notices, making part of the so-called "Modernisation Package", which are not very different from "heavy" pieces of new legislation.[267] The Notices on inter-state trade effect and on Article 81(3) in particular bear a remarkable resemblance to legislation. While the Commission purports to do no more than present in a compact way the principles arising out of the European Courts' case law and of its own administrative practice, one cannot deny that the Commission has also inserted into these texts its own views, exigencies and priorities, exactly as a legislator would do.[268]

Like block exemption Regulations, the Commission proceeds to public consultations always before adopting these soft law instruments. In practice they are published in draft form in the C series of the Official Journal, while third parties submit their comments, which are usually published in the website of DG COMP.

The third instance of generalised action by the Commission is the investigation into sectors of the economy and into types of agreements, as prescribed by Article 17 of Regulation 1/2003. This instrument was rarely used by the Commission, though very recently the Commission decided to proceed to such sector enquiries in the gas and electricity, business insurance, retail banking and financial services sectors. According to Article 17, the Commission may request companies to supply information and may carry out any inspections necessary for that purpose. The Commission may in particular request companies to communicate to it all agreements, decisions and concerted practices. In this case, there is no target of proceedings as such, although the companies that are the addressees of a request for information and

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

[266] *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.

[267] *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.

[268] In a recent conference on EU competition law, there were voices of concern heard as to the proliferation of "legislation through the back door". Yet, a well-respected former Director General for competition strongly countered such criticism defending the Commission's pro-activeness by reference to its leading role in competition law enforcement in Europe. Even more interestingly, this view was fully shared by a former Advocate General of the Court of Justice, according to whom the Court of Justice surely welcomed the intellectual lead of the Commission, the specialised antitrust enforcer.

subject to investigations are under the same duties as those that are the specific target of an antitrust proceeding.

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 Court of Justice has ruled that the Commission is under an obligation to observe the rights of defense during administrative proceedings leading to imposition of fines for violation of EC competition law.[269] The rights of defense comprise the right to be heard, the right of access to the file and the principle of sound administration.[270] Observance of the right to be heard is obligatory in all proceedings which are initiated against a person and are liable to culminate in 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.[271] The substance of the right to be heard is about 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 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.[272]

The provisions of Regulations 1/2003 and 773/2004 give substance to the right to be heard. Article 27(1) of Regulation 1/2003 obliges the Commission to give the companies an opportunity to be heard on the matters to which the Commission has taken objection, before taking a decision on finding of infringement, interim measures, imposition of a fine or a periodic penalty payment. This list is non-exhaustive and a hearing is obligatory, under the general principles of Community law, in other types of proceedings that are likely to result in a decision adversely affecting a party or parties in the Commission proceedings.

In most cases there would be one hearing that follows the adoption of a statement of objections by the Commission. However, the statement of objections is not final: it can be amended, parts of it may be dropped or additions may be made by the Commission in the light of evidence that transpires at a later stage. If, as a result of inquiries conducted by the Commission after the adoption of the statement of objections, 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.[273] Similarly, where the Commission has left out of the statement of objections an objection which it wishes to include later in its decision, or it wishes to impose on the parties a fine that has not been mentioned in its original

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

[270] The European Court of Justice has made it clear that the Commission is not regarded a "tribunal" for the purpose of application of Article 6 of the European Convention on Human Rights. The Court 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; case T-347/94, *Mayr-Melnhof Kartongesellschaft mbH* v. *Commission*, [1998] ECR II-1751, paras. 310-312.

[271] 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.

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

[273] 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.

statement of objections, it should serve a supplementary statement of objections and give the parties an opportunity to be heard.[274]

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

(i) when the Commission intends to take a decision declaring a proposed merger incompatible with the common market; or

(ii) when, after deciding that the 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) the decision 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; or

(iii) when the Commission orders the parties to dissolve a concentration that has been implemented by the parties 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;

(iv) when the Commission takes interim measures appropriate 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 to a condition in a clearance decision, or when the merger has been declared incompatible with the common market.[275]

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 before adopting such a decision, though it may also give them the opportunity to express their views orally at other stages in the proceedings.[276]

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 the "triangular meetings" between the notifying parties and third parties.[277] The purpose of voluntary triangular meetings is that the parties submit information and comments they consider relevant for the assessment of a given transaction or to clarify specific issues raised. In any case, granting the opportunity to hold an oral hearing does not depend on the type of dispute, 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 is 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?

[274] See case T-25/95 *et seq., Cimenteries CBR, op.cit.*, para. 486.
[275] Article 14(1), (2) of the Implementing Regulation.
[276] Article 14(3) of the Implementing Regulation.
[277] Section 5(3) of the Best Practice Guidelines.

The addressees of a decision[278] are always entitled to an oral hearing before the Commission. Article 27 (1) of Regulation 1/2003 obliges the Commission to give an opportunity to be heard to companies that are subject of the proceedings with respect to the matters to which the Commission has taken objections. Article 12 of Regulation 773/2004 further clarifies that the Commission must provide the addressees a statement of objections with an opportunity to present their arguments at an oral hearing, if they request so in their written submissions given in response to the Commission's 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 to the statement of objections.

As explained above, Article 27(3) of Regulation 1/2003 provides that the Commission may hear such third persons, as the Commission deems necessary or as the competition authorities of the Member States request. The Commission has a margin of discretion with respect to hearing third parties.[279] Such third parties may include witnesses that could give an account of the infringement, or evidence relating to the 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 that has a sufficient interest in the outcome of the proceedings would be a consumer association, where the proceedings concern products or services used by the end-consumer or products or services that constitute a 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 giving written submissions.[280] The right to be heard is exercised in writing. The Commission has a discretionary power to invite these third-parties to present their arguments at the oral hearing of the parties to whom a statement of objections has been addressed.[281]

In addition, Article 14 of Regulation 773/2004 provides that competition authorities of the Member States, as well as 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:

(i) the notifying parties,

(ii) other individual parties (parties to the proposed concentration other than the notifying parties, such as the seller and the corporation which is the target of the concentration), and

(iii) third parties, i.e. natural or legal persons, including customers, suppliers and competitors that 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.[282]

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

[278] Excluding of course decisions under Articles 17, 18, 19 and 20 of Regulation 1/2003 (see below).
[279] See case 209/78 *et seq*., *Van Landewyck*, *op.cit.*, paras. 16-18.
[280] Article 13(1) of Regulation 773/2004.
[281] Article 13(2) of Regulation 773/2004.
[282] Article 11 of the Implementing Regulation.

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.[283]
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 an 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. If third parties are invited to attend the oral hearing, they are entitled to present their arguments at the hearing.
In EC merger control, if the Commission or other competent authorities of the Member States deem it necessary, they may also hear other natural or legal persons. 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.[284] 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 must set a time limit within which they may make known their views.

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 the proposed decision is addressed are given the opportunity to be heard after the Commission has adopted the statement of objections, and before the Commission formally adopts a decision in the case. Article 11 of Regulation 773/2004 provides that the Commission should provide 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 provide for a hearing in case of a Commission decision withdrawing the benefit of a block exemption.[285] 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.[286]

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

[283] Article 14(6) of Regulation 773/2004.
[284] Article 18(4) of the Merger Regulation.
[285] Article 29 of Regulation 1/2003.
[286] Article 16(2) of the Implementing Regulation.

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 proposed Commission's 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 such right is provided for in secondary legislation. Thus, as we just mentioned, in addition to the situations where a right to be heard is guaranteed by Regulation 773/2004, other proceedings resulting in a decision adversely affecting 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. The Court denied the parties the right to be heard in such cases. Though, undeniably, the interests of a company may 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 latter change the status of the party.[287] 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 when it 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 entails that parties have an opportunity to make known their views on the truth and relevance of 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, indeed, constrain its discretionary powers by adopting generally applicable rules, though not of 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. Likewise, the Notice on access to file has limited the Commission's discretion. Such soft law instruments bind the Commission by creating legitimate expectations and the European Courts have recognised that the

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

Commission may not depart from rules which it has imposed on itself.[288] In particular, whenever the Commission adopts guidelines for the purpose of specifying, in accordance with the Treaty, the criteria which it proposes to apply in the exercise of its discretion, there arises a self-imposed limitation of that discretion inasmuch as it must then follow those guidelines.[289]
In the merger control field, the oral hearing is a right for the parties and does not depend on the issues to be discussed. However, when a third party asks the Commission for an oral hearing, the Commission will grant the hearing if it considers it appropriate. The issues to be raised during an oral hearing concern mainly the arguments of the parties on objections raised by the Commission.

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 a guardian of the procedural rights of the parties in the proceedings before the Commission. The role of the hearing officer is described in the detailed provisions of the Mandate for the Hearing Officer.[290] The powers of the hearing officer were significantly strengthened in 2001, when the Commission adopted the current Mandate.
Hearing officers are appointed solely to serve as such. The Mandate contains special rules governing the appointment and tenure of the hearing officer. At present, there are two hearing officers,[291] who, before their appointment as hearing officers, held positions as high-ranking officials in DG Competition. There is one hearing officer 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. The independence of the hearing officer is also stressed in the Mandate. The hearing officer is not a member of DG COMP and, for administrative purposes, responds directly to the Competition Commissioner.[292] He has also 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' rights of defense are respected in the course of the administrative proceedings before the Commission.[293] The primary responsibility of the hearing officer is to be the guarantor of the proper conduct of the oral

[288] 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.
[289] 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.
[290] *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.
[291] Serge Durande and Karen Williams.
[292] Article 2(2) of the Mandate.
[293] Article 1 of the Mandate.

hearing.[294] In addition, he intervenes whenever legitimate due process issues are at stake[295] and exercises a variety of functions relating to the right of defense, such as deciding on the applications by third parties to be heard[296] or resolving disputes between the parties and the Commission concerning access to file[297] and confidentiality[298] issues. He can also serve as mediator between DG COMP staff and the parties. Senior members of DG COMP are obliged to keep the hearing officer informed about the developments in the case up to the point when a draft decision is submitted to the Competition Commissioner.
The hearing officer reports to the Director General for Competition and to the director responsible on the procedural issues of the case and on whether the right to be heard has been respected. In addition, he may make observations and suggestions on the further progress of the proceedings.[299] On the basis of the draft decision the hearing officer prepares a final report assessing whether parties' rights of defense have been respected and whether due account has been taken in the draft decision of all the relevant facts, whether favourable or unfavourable to the parties concerned. The final report is submitted to the Competition Commissioner, the Director General for Competition, and the director responsible.[300] It is attached to the draft decision submitted to the Commission for consideration. The final report is also delivered with the decision to the addressees of the decision.[301]

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 decisionmakers 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?

There are no specific rules that apply to Commission officials making decisions in competition cases and this is an area where the law is not developed. Commission officials are, however, subject to Code of Good Administrative Behaviour[302] that applies to all members of the Commission staff. The Code obliges Commission staff to always act objectively and impartially, in the Community interest and for the public good, while their decisions should not be influenced by personal or national interest or political pressure. It is also always possible for decisionmakers to disqualify themselves in cases of conflict of interests or any other instance that impairs or might seen to impair their objectivity.

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[294] 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, p. 24 *et seq*.
[295] See European Commission, *Commission XXXIIIrd Report on Competition Policy - 2003* (Brussels/Luxembourg, 2004), para. 21.
[296] Article 6 of the Mandate.
[297] Article 8 of the Mandate.
[298] Article 9(3) of the Mandate.
[299] Article 13 of the Mandate.
[300] Article 15 of the Mandate.
[301] Article 16 of the Mandate.
[302] OJ [2000] L 267/63. The Code is annexed to the Commission's Rules of Procedure and it is binding on all members of Commission staff.

If the Commission official fails to act objectively during the procedure, the party concerned may lodge a complaint with the Secretariat General of the Commission. The complaint will be forwarded to the Director General or Head of Department whose conduct is questioned. They have two months to answer to the complaint. Afterwards the complainant has one month to apply to the Secretary-General of the Commission to review the outcome of the complaint. In addition, bias on part of the decisionmaker may constitute a reason to invalidate the decision for misuse of powers in the appeal to the Court of First Instance.

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 decisionmakers and by parties outside the Commission. The Code of Good Administrative Behaviour provides some general guidelines as to the scope and contents of communications with the Commission. In addition, the Commission is obliged to protect 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 play exclusively the role of the hearing officer in the proceedings. Their participation in the proceedings 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, obliges the Commissioners to be completely independent in the performance of their duties. The Commissioners may not take instructions from a government, the Council or any other body. They may not 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 the Members of the Commission in the performance of their tasks.[303]
The Code of Good Administrative Behaviour imposes similar duties on the members of the 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 the procedure before the Commission in antitrust cases is predominantly a written procedure, the importance of the oral hearing must not be underestimated. The oral hearing gives the companies subject to Commission investigation as well as third parties the opportunity to present their arguments before the Commission. It is an opportunity to clarify certain matters not settled in the written procedure and to emphasise the main line of the case.

[303] Article 213 EC.

It also enables the parties to comment on written replies of other parties. It is not infrequent after the oral hearing for the Commission to change its mind and this explains the occasional divergences between the statement of objections and the actual final Commission decision in many cases.

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 during the hearing is not established by the law, but, typically, the procedural steps in an oral hearing are the following:

1) Presentation of the Commission's case by the DG COMP case handler; in practice this is often a short and formal step.
2) The parties are heard and third parties are given the opportunity to speak on the subject-matter of the case; the statements of the companies may deal with any factual, legal or economic point raised by the Commission's statement of objections.
3) The hearing officer invites the representatives of the competent authorities of the Member States to ask questions to the parties present at the hearing; normally this will be at the end of a party's presentation; if a presentation is particular long, questions may be invited after each speaker.
4) The hearing officer or members of the Commission staff present at the hearing ask their questions; these questions usually relate to the arguments made during the oral presentation, the Commission may invite the party to clarify or expand points an argument it used.
5) The hearing officer may invite the present parties to make concluding remarks before he formally closes the hearing; the closing remarks should be concise and, in principle, address only the issues that have arisen since the party made its own presentation.

The agenda of the hearing in practice is discussed beforehand by the hearing officer with the lawyers representing the parties to be heard. In preparation for the hearing the hearing officer may, after consulting the director responsible for the case, hold a meeting with the parties participating in the hearing.[304] If no agreement on co-ordination 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 witness testimony is part of the right to be heard. It is for the parties to select the witnesses and to frame the issues that will be subject to the witnesses' testimony. Witnesses may be called upon to confirm the line of argument made during the hearing. Expert witnesses may also be used to respond to the questions put by the members of Commission staff after they have an opportunity to consider the evidence.

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

[304] Article 11 of the Mandate.

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; it is discussed and agreed on with the hearing officer. If a party has any special requirements for its presentation, such as the use of a video recorder, an overhead projector or a beamer, it 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, if the party claims the benefit of exemption under Article 81(3) it is for this party to prove that all requirements for application of Article 81(3) have been fulfilled. Article 2 did nothing more than to codify the case law of the Court of Justice.[305] An intriguing issue is the burden of proof in Article 82 EC. While it would seem from the letter of Article 2 of Regulation 1/2003 that the Commission has the burden to prove all the conditions of Article 82 EC, it is submitted by Commission officials that the effectiveness of competition law enforcement requires that the defendant should at least prove those facts that are on his own sphere of influence and that tend to exculpate him. Thus, this should be the case of efficiency defences or of defences based on objective justification.[306]

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 presentation of the summary 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. In most cases an oral hearing takes one or two days, but in more complex cases it may go on for more than two weeks.

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, after the presentation, question the parties with respect to their oral submissions. The Commission is by no means obliged to comment on the parties' arguments immediately; the final assessment of the parties' arguments during the hearing is reflected in

[305] 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.
[306] Response of Emil Paulis to a question in a recent antitrust conference.

the Commission decision, which represents the final pronouncement of the Commission 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 were actually taken by the college of Commissioners and correspond exactly to its intention. The college of Commissioners alone is responsible for adopting both the operative part and the statement of reasons, in accordance with that principle. The Court has also confirmed that Commission decisions finding infringement of EC competition rules cannot, without violating the principle of collegiate responsibility, be the subject of a delegation, under Article 27 of the Commission's Rules of Procedure, given to the Member of the Commission responsible for competition policy.[307]

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,[308] yet for a fine to be imposed, at least showing of negligence is required.[309] There is no requirement of a certain standard of proof, as such, to be satisfied by the Commission, although this is a theme that is constantly debated in common law Member States.[310] The European Courts refer quite often to the "*requisite legal standard*",[311] yet this term does not seem to indicate a predetermined legal standard of proof, at least in the sense used in common law systems.

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

[308] With regard to Article 81 EC 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 the parties subjectively aimed at this. In Article 82 EC, again, 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 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 raising unreasonably their costs.

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

[310] 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 Panayiotou* v. *Sony Music Entertainment Ltd.*, [1994] EMLR 229. 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 UK Competition Act. See *Napp Pharmaceutical Holdings Ltd.* v. *DGFT*, [2002] ECC 177. 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).

[311] See e.g. case T-56/02, *Bayerische Hypo- und Vereinsbank AG* v. *Commission*, Judgment of 14 October 2004, 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)*".

As regards EC merger control, the CFI in *Tetra Laval*,[312] 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.*"[313]

Moreover, in *Airtours*,[314] 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.*"[315]

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 its 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 parallel from the case law of the European Court of Justice that has on occasions examined the long duration of the judicial review proceedings before the Court of First Instance. Although the administrative proceedings before the European Commission cannot be equalled to the judicial proceedings before a Community Court, the Court's guidance is still valid. Thus, the Court 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*".[316] In this respect, the Court of Justice has considered numerous precedents of the European Court of Human Rights, albeit "*by analogy*".[317]

Of relevance is also the right to good administration in Article 41 of the Charter of Fundamental Rights, which refers to one's right to have one's affairs handled within a reasonable time.[318]

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

[312] Case T-5/02, *Tetra Laval* v. *Commission*, [2002] ECR, II –4381.
[313] Para. 155.
[314] Case T-342/99, *Airtours* v. *Commission*, [2002] ECR, II-2585.
[315] Para. 63.
[316] Case C-185/95 P, *Baustahlgewebe*, *op.cit.*, para. 29.
[317] *Ibid*.
[318] See also above.

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 statements of each party made during a hearing must be recorded and shall be made available, upon request, to the parties attending the oral hearing. The record of the oral hearing is made in an audio recording. The Commission used to prepare written minutes of the oral hearing. This procedure, however, gave rise to problems resulting from delays in transcription or translation and in number of instances the 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 proceeding culminates with the adoption of a decision, which is 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 Court of First Instance, while an appeal to the Court of Justice 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 solely responsible for organising the hearing and ensuring that the parties' rights of defense are respected during the proceedings before the Commission. The hearing officer 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 in the draft decision. In particular, after the oral hearing, the hearing officer prepares an interim report on the hearing and on 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, summarising 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. He may also 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 to the director of the operational directorate of DG Competition responsible for handling the case.[319] Although it has no binding force, this report is taken very seriously by the case handlers drafting the decision, in particular if the report 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. This report is sent to the Commissioner, the Director General for Competition and the director of the directorate that handled the case.[320] 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. Subsequently, it is presented for consultation to the Advisory Committee, where representatives of the

[319] See Article 13(1) of the Hearing Officer Mandate.
[320] See Article 15 of the Hearing Officer Mandate.

Member States' competition authorities discuss the proposed decision and make comments thereupon. On the basis of this consultation, the Commission officials will proceed to the adoption of a final draft decision that is then placed together with the final report of the hearing officer and the opinion of the Advisory Committee 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 obliges the Commission to state reasons on which its decisions are based. The European Courts' jurisprudence clarifies the scope of this duty: the statement of the reasons must make it possible for the Court to exercise its 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.[321] 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.[322]

The Court has held that the statement of reasons should include both factual and legal grounds on which the Commission bases its decision.[323] There is a line of case law indicating that if a Commission adopts in its decision a new legal interpretation, the decision may need to be more fully reasoned.[324] 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.[325] The same is true when the Commission departs from its own Guidelines or Communications, such as in the case of fines.[326]

The Commission bears the burden of proving the infringements[327] so it must mention in its decision sufficiently precise and coherent proof to support its allegations. The Commission may rely on hearsay evidence, and may prove a course of conduct by sufficiently clear and numerous examples.[328]

The Court has always stressed the importance of the statement of reasons: without the statement of reasons the full effects of the decision may be difficult to ascertain. Thus, failure to include adequate reasoning will result in the decision being annuled.[329] The requirement of reasoning covers not only final decisions bringing the proceedings to an end,

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[321] See e.g. case T-311/94, *BPB de Eendracht NV* v. *Commission*, [1998] ECR II-1129, para. 65.

[322] 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.

[323] Case 24/62, *Germany* v. *Commission*, [1963] ECR 131.

[324] Case 73/74, *Groupement des fabricants de papiers peints de Belgique and Others* v. *Commission*, [1975] ECR 1491, para. 31.

[325] See case C-344/01, *Federal Republic of Germany* v. *Commission*, Judgment of 4 March 2004, not yet reported, para. 70.

[326] 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*, Judgment of 29 April 2004, not yet reported, para. 231, that concern the Commission Guidelines on the method of the setting of fines. According to the Court, where the Commission "*departs from them it must set out expressly the reasons justifying such a departure*".

[327] On the burden of proof see above.

[328] 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.

[329] Case T-5/93, *Roger Tremblay and Others* v. *Commission*, [1995] ECR II-185, para. 42.

but also decisions on procedural matters, such as on requests for information and investigations.[330] 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*".[331]

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 duty of the Commission to comment on both inculpatory and exculpatory evidence, as well as 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.[332] Neither is it required to refute all the arguments made by the parties.[333]

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 Court of First Instance 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 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 appraisal or misuse of powers.[334]

The standard applied to review Commission's discretionary decisions, in particular its economic assessment of the case, is whether the Commission committed a manifest error of assessment. This applies not only to Article 81(3) EC[335] but also to Article 81(1) and 82 EC 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*

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[330] See e.g. Article 18(3) of Regulation 1/2003.

[331] 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*, Judgment of 11 December 2003, not yet reported, para. 44.

[332] Cases T-346/02 and T-347/02, *Cableuropa SA and Others* v. *Commission*, Judgment of 30 September 2003, not yet reported, para. 232.

[333] Case 6/72, *Europemballage Corporation and Continental Can Company Inc.* v. *Commission*, [1972] ECR 215, para. 6.

[334] 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.

[335] 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.

of assessment or a misuse of powers".[336] In *Airtours*, a merger case, the Court also reviewed whether the decision was based on convincing evidence and whether the Commission proved its case to the requisite legal standard.[337] This suggests that the Commission may be reversed in its findings, not only in the case of clear contradictions or ignoring of evidence, but also of less serious errors.

Misuse of powers, understood as the exercise of powers for improper purpose rather than lack of power to act, has never been successfully invoked in any competition case. The CFI standard to annul the decision on this ground is that it would have to be apparent o the basis of objective, relevant and consistent factors that the sole or main purpose of the decision was other than stated.[338]

The Court's competence to review Commission decisions is broader with respect to fines. Article 31 of Regulation 1/2003 gives the Court unlimited jurisdiction to review Commission decisions imposing fines or periodic penalty payments, in particular the Court may cancel, reduce or increase the fine or periodic penalty payment.[339] Thus, in reviewing the fines imposed by the Commission, the Court 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, yet substantively interconnected, objectives.[340] The first one 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 that 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 one is penal,[341] i.e. to punish the perpetrator of the illegal acts in question and also to deter him and others from future transgressions.

Public enforcement, in particular, may well pursue - directly or indirectly - all three objectives. The injunctive objective is served with 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.[342] Finally, public enforcement is predominant in the pursuing the penal objective.

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[336] Case T-65/98, *Van den Bergh Foods Ltd.* v. *Commission*, Judgment of 23 October 2003, not yet reported, para. 80.

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

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

[339] The Court's jurisdiction is based on Article 229 EC providing that Regulations made by the Council under the provisions of the EC Treaty may give the Court unlimited jurisdiction to review decisions imposing penalties provided for in such Regulations.

[340] See Christopher Harding and Julian Joshua, *Regulating Cartels in Europe, A Study of Legal Control of Economic Delinquency* (Oxford, 2003), p. 229 *et seq*.

[341] The term "penal" is used here in its generic-punitive sense. It does not necessarily correspond to criminal law.

[342] There are cases where the public agency enforcing the competition rules may take into account the injury of specific victims of the anti-competitive practice and may impose upon the perpetrator the obligation to compensate those persons. This may, indeed, be pursued by the public agency informally, for example through an informal settlement. In addition, there are competition regimes that provide also for a role of the public authority in claiming damages, acting on behalf of the victims. This is not the case of EU competition law, though some Member States have adopted such a system (e.g. Article L442-6 of the French *Code de Commerce*).

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

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.[343] Such a decision may be of use to litigants before national courts adjudicating damages claims for antitrust injury.

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 behavioural or structural remedies that are necessary to bring the infringement to an end.[344] 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 of contract. The Court of First Instance was confronted with this issue in *Automec II*.[345] There, the complainant had been refused an injunction by the Commission requiring BMW to supply it with vehicles. Freedom of contract was according to the Court the basic rule, therefore 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*".[346] In the Commission's view such purely positive measures may be more justifiable in Article 82 EC cases.[347] Indeed, in Article 82 EC refusal to supply cases, ordering the party to enter into certain contractual relationships often is appropriate remedy allowing to bring the infringement to an end. Thus, for example in *Commercial Solvents*, the Court upheld the Commission's decision ordering a company that enjoyed a dominant position on the market to supply certain quantities of raw material its competitor in the downstream market.[348]

As far as intellectual property rights are concerned, the Commission has no right to decide on their validity. The Court has held, however, that the Commission may in exceptional cases control the way intellectual property rights are exercised. In *Magill*, the ECJ upheld the Commission's decision requiring certain broadcasting companies to make available their TV listings and to permit their reproduction subject to payment of reasonable royalties.[349] In *IMS Health*, which was a preliminary reference case, the Court again confirmed that the exercise

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[343] This power of the Commission was confirmed also under the old system in case 7/82, *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* v. *Commission*, [1983] ECR 483, paras. 16-28.

[344] 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.

[345] 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 right-hand drive cars. However, this happened as a result of procedural irregularities and not because such a positive measure cannot be ordered in principle in Article 81 EC 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.

[346] *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.

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

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

[349] 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.

of intellectual parties was not immune from antitrust.[350] 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. [351]

Article 7 of Regulation 1/2003 empowers also the Commission to impose structural remedies, albeit under more stringent conditions than the Commission had initially proposed in its draft regulation of September 2000. Thus, for a structural remedy to be imposed, there must basically be no equally effective behavioural remedy possible. Although the Commission has always considered that it could impose structural remedies also under Regulation 17, if that was the only manner to ensure that an antitrust infringement be brought to an end, the express provision of Article 7 along with the specific in-built condition of proportionality and necessity must be approved both from a legal certainty and from a human rights point of view.

Interim Measures: In Regulation 17 there had been no explicit reference to the possibility of the Commission to take interim measures. This gap was filled by the Court of Justice in the *Camera Care* case.[352] The Commission could adopt interim or interlocutory measures in urgent cases, in order to avoid a situation likely to cause serious and irreparable damage to a complaining party or to harm to the public interest. This power of the Commission is now expressly provided for in 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. There is instead only a reference to "*serious and irreparable damage to competition*". Interim measures with the sole aim 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 respectively. Of course, it is likely for an anti-competitive practice that damages a specific person still to harm competition in general and, thus, the public interest.[353]

Fines: Article 23(2) of Regulation 1/2003 empowers the Commission to impose fines on companies who 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 both to the gravity and the duration of the infringement in fixing the amount of the fine. The Commission has issued Guidelines[354] that set out the methodology used by the Commission in setting the amount of fines. Of particular importance is also the Commission's Leniency Notice that provides for no fines for cartel whistleblowers and for reduced fines for companies that co-operate with the Commission in unearthing cartels.[355] Regulation 1/2003 breaks with Regulation 17, which was more aimed at prevention rather than at punishment and deterrence, and undoubtedly furthers the efficiency of these sanctions, especially in

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[350] Case C-418/01, *IMS Health GmbH & Co. OHG* v. *NDC Health GmbH & Co. KG*, Judgment of 29 April 2004, not yet reported.

[351] Commission Decision in case COMP/37.792–*Microsoft*, currently under appeal (case T-201/04). A "*protocol*" means according to Article 1(2) of the Commission Decision "*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.*"

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

[353] For a critical comment of this restriction of the conditions for the granting of provisional measures by the Commission 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.

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

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

regard to fines for procedural infringements that under the old Regulation were "risible".[356] Such fines may now reach up to 1% of the undertaking's total turnover in the preceding business year.[357] 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 market.

Periodic penalty payments: The Commission may impose on a company a periodic penalty payment (which follow the model of the French "*astreinte*") to compel it to terminate an infringement in accordance with the decision finding an infringement of EC competition law. The penalty may not exceed 5% of the average daily turnover in the preceding business year. Periodic penalty payments have also been modified in Regulation 1/2003 in order to enhance deterrence and are applicable both to substantive and to 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. Indeed, the term "remedies" in merger control proceedings is used to refer to modifications in the merger agreement, proposed through commitments given by the merging parties to the Commission, that are intended to satisfy the Commission's concerns about the compatibility of the proposed merger with the common market.[358] Such commitments may propose "structural remedies", i.e. measures giving rise to the structural change of the market, for example that a business is to be divested, or "behavioural remedies", i.e. measures undertaken by the merging parties that represent some kind of action or inaction that does not affect structurally the market, for example a promise to license somebody on fair and reasonable terms. All these remedies are not imposed by the Commission unilaterally but are rather proposed by the merging parties to the Commission which may accept or reject them. When the Commission accepts such remedies, it may further transform them into conditions or obligations in its clearance decision.

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

Dissolution of the merger: In case of a Commission decision declaring a merger's incompatibility with the common market, if the parties have already implemented the merger, the Commission may order the dissolution of the merger or the disposal of all the shares or assets acquired, or any other appropriate measure. The same powers has the Commission, when the parties implement the merger in contravention to a condition imposed upon them in the merger clearance decision.

Interim Measures: According to Article 8(5) of the Merger Regulation, the Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration (a) has been implemented in contravention of the suspension obligation enshrined in Article 7 of the Merger Regulation, and a decision as to the compatibility of the concentration 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); (c) has already been implemented and is declared incompatible with the common market.

Fines: As in the antitrust field, the Commission may also impose fines up to 10% of the aggregate turnover of the undertakings concerned where, either intentionally or negligently, they (a) fail to notify a merger to the Commission; (b) implement a merger before it has been declared compatible with the common market by the Commission; (c) implement a merger

[356] 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.

[357] Article 23 of Regulation 1/2003.

[358] 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.

that has been declared incompatible with the common market or do not comply with an order of dissolution issed by decision of the Commission; (d) fail to comply with a condition or an obligation imposed by decision pursuant to Articles 6(1)(b), Article 7(3) or Article 8(2)(b) of the Merger Regulation.[359] Lower fines up to 1 % of the aggregate turnover of the undertakings concerned may be imposed for procedural infringements, basically for not complying with a Commission request for information, taken by decision, for supplying incorrect or misleading information, or for refusing to submit to an inspection ordered by decision.[360]

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 (a) to supply complete and correct information which it has requested by decision; (b) to submit to an inspection which it has ordered by decision; (c) to 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) to comply with any measures of dissolution ordered by decision.[361]

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 publication requirement covers decisions finding an infringement, ordering interim measures, making commitments binding, inapplicability decisions, and decisions imposing fines and periodic penalty payments.[362] The published decision must state the names of the parties, the main content 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.[363]

The Commission is not obliged and does not publish its procedural decisions, such as decisions ordering on-site inspections or requesting information. The Commission is also not obliged to publish its decision on withdrawal of a block exemption in an individual case.[364]

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, whereas the full text of the decision is made available in an electronic format at the Commission's website. The full version of the decision is made available only in the authentic language of the decision and in the Commission's working languages (English and French, sometimes German).[365]

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 publication shall state the names of the parties and the main content of the decision and shall 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. These are published in the web site of DG-COMP.[366]

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[359] Article 14(2) of the Merger Regulation.
[360] Article 14(1) of the Merger Regulation.
[361] Article 15 of the Merger Regulation.
[362] Decisions under Articles 7 to 10 and Articles 23 and 24 of Regulation 1/2003.
[363] Article 30(2) of Regulation 1/2003.
[364] 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).
[365] See further Kerse and Khan, *op.cit.*, pp. 353-355.
[366] 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.*"

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 exception of sector investigations under Article 17 of Regulation 1/2003, proceedings before the Commission always result in an individualized decision. Commission 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 or a group of companies, but extend to a particular sector of an economy or particular type of agreements. Following such investigations, the Commission may issue a report presenting the results of the Commission's inquiry. Sector investigations may disclose particular violations of EC competition law, in which case the Commission commences procedure against a particular company or a 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 it has been mentioned above the previously binding Regulation 17 required notifications of the agreements to the Commission in order to obtain an exemption under Article 81(3), unless it did not fall within one of the block exemptions issued by the Commission. Article 8 of Regulation 17 provided that the Commission decisions granting such individual exemption were issued for a specified period of time and allow the Commission to withdraw or to amend its decision if specified conditions were met.
Regulation 1/2003 abolished the notification system. Consequently, is does not address the subject of administrative reconsideration. Such situation is however still possible under Regulation 1/2003 with respect to interim measures, which can only be granted by the Commission for a specified period of time. The 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 adoption of the decision. Similarily, 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 where there has been a material change in the facts on which the decision was based, the companies concerned acted contrary to their commitments or where 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 its final decision[367], in principle the only recourse against the Commission's decision is to appeal it to the Court of First Instance. If this is not done, the decision becomes definitive against its addressee. Even if the proceedings brought by the parties at a later stage result in a finding that the Commission's decision has been adopted in error, the Commission is not under an obligation to withdraw the decision as against parties which failed to challenge it.[368]
In the mergers field,
As regards EC merger control, the Commission's decision on the compatibility or incompatibility of a proposed merger with the common market is definitive. The merging parties, in case of an incompatibility decision must abide by the Commission decision and the only possibility for them is to challenge the decision before the CFI. It is possible, however, that the same parties resubmit a proposed merger agreement to the Commission after the lapse of some time, when the conditions of competition may have changed and there are valid hopes that the Commission might take a more favorable view of their agreement. 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 to the Commission commitments that the Commission may attach to an eventual clearance decision as conditions or obligations (if no commitments had been previously offered) or they may submit new commitments (if commitments had already been offered but were 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 of the EC Treaty Commission Decisions imposing a pecuniary obligations on persons other than States are enforceable. Enforcement is governed by the rules of civil procedure of the State in which the enforcement is carried out. Consequently, disputes relating to collecting fines imposed by the Commission are governed by national civil procedures.
The order of enforcement is appended to the Commission Decision by the national authority which the Government of the Member State has designated for that purpose. No other formality than verification of the authenticity of the decision is envisaged. Where the Commission issued a decision imposing non-pecuniary obligations, i.e. making structural or behavioral commitments binding on the parties, the Commission may reopen the proceedings if it concludes that the company concerned acts contrary to its commitments. In such case the procedure before the Commission will not be different than that in the original proceedings.

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[367] 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 different remedies than those imposed in the first decision. More recently, in case COMP/E-1/36.756-*Sodium Gluconate/PO*, the Commission withdrew its earlier Decision of 2 October 2001 to the extent that it was addressed and notified to one of the addressees of that earlier decision.
[368] See to this effect case C-310/97 P, *AssiDomän Kraft Products AB* v. *Commission*, [1999] ECR I-5363.

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 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 have naturally an "legitimate interest" to raise a new plea. While the Commission ought not to be able to add new elements that the applicant did not have the 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 be by definition 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 equal to imposing a duty upon 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 the participation in the proceedings by companies that are the target of an investigation only as the exercise of a right and not as the compliance to a duty. Indeed, this seems to be the approach of the Court of First Instance in *Hilti*, where the Court rejected the argument of the Commission that new pleas that Hilti had made 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.*"[369]

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?

[369] Case T-30/89, *Hilti AG* v. *Commission*, [1991] ECR II-1439, para. 34 *et seq*.

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 obligation to prove its case, in particular it must produce sufficiently precise and coherent proof to support its allegations and must sufficiently show the facts and assessment on which the decision is based.[370] Both inculpatory and exculpatory evidence must be considered in the Commission's decision and the Commission may not conceal exculpatory evidence from the parties. Commission's duty does not include full and impartial discovery of all relevant facts.

11.4 Is there a principle of *res judicata*?

The principle of *ne bis in idem* is one of the fundamental principles of Community law.[371] 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.[372] However, it does not preclude the resumption of proceedings in respect of the same conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged. In such case a fines imposed in the new decision replace the fines imposed in the annulled decision.[373]

The Commission is must also observe the prohibition on double jeopardy if the procedure before the Commission commences after a competition authority or a court in a Member State decided on the same matter and imposed fines. In such case, the sanction imposed by the Commission must take into consideration any prior sanction in order to respect the principle of proportionality.[374] In such cases the Commission may, however, draw inferences from evidence it has gathered and it is not bound by the conclusions reached at the national level.[375]

The position of the ECJ is different in respect of third country regulatory action. The ECJ said in particular that antitrust proceedings before the American authorities and those before the European Commission were essentially different as regards both their object and their geographical emphasis.[376] Thus, the Court concluded that in such situation 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 decline, for the purpose of fixing the fine, to take into account fines imposed in parallel third country proceedings or payment of damages in civil-law actions in third country jurisdictions.[377] This was confirmed in the recent *Amino Acids* case by the CFI.[378] The Court acknowledged that *non bis in idem* is a

[370] 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.
[371] *Limburgse Vinyl*, *op.cit.*, para. 59.
[372] *Ibid*, para. 61.
[373] *Ibid*, para. 62.
[374] Case 14/68, *Walt Wilhelm* v. *Commission*, [1969] ECR 15, para. 11.
[375] Case T-141/89, *Trefileurope Sales* v. *Commission*, [1995] ECR II-791, paras. 191-192.
[376] Case 7/72, *Boehringer Mannheim* v. *Commission*, [1972] ECR 1281, paras. 3-4.
[377] See Kerse and Khan, *op.cit.*, p. 433.
[378] 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*

general principle of Community law. It then recalled the case-law to the effect that while concurrent sanctions resulting from two sets of parallel proceedings, at EU 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.[379] 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?

In the case of Notices/Guidelines/Communications published by the Commission and describing the Commission's policy in certain areas, parties will be able to rely threupon and resist any subsequent action by the Commission that departs from its statements, as contained in those Notices or Communications. This has been accepted by the Commission itself[380] and has been expressly confirmed by the European Courts. Thus, the Court of First Instance has held that such Notices are not devoid of any binding legal obligation. The Commission is bound such instruments, provided they do not depart from the rules in the Treaty and from secondary legislation.[381] As explained also above, the Commission may not depart from rules which it has imposed on itself.[382] This is particular the case when the Commission limits its discretion.[383]

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

The Commission is obliged to follow the jurisprudence of the European Court of Justice and the Court of First Instance. The Commission is not bound by the interpretation adopted in its own decisions, although it is required to reason its decision carefully where it has adopted a new legal interpretation[384].

11.7 Are hearings or other proceedings open to the public?

The hearings before the Commission are not open to the public. Members of the public are entitled to attend hearings before the Court of First Instance and the European Court of Justice.

Ingredients Ltd v. Commission, [2003] ECR II-2597; Case T-230/00, *Daesang Corp. v. Commission*, [2003] ECR II-2733.

[379] *Kyowa*, para. 98.

[380] See e.g. para. 4 of the vertical restraints Guidelines and para. 16 of the horizontal co-operation agreements Guidelines, which state that the Guidelines are without prejudice to the European Courts case law. Presumably, the absence of any reference to the Commission means that the latter would be bound.

[381] Case T-119/02, *Royal Philips Electronics NV* v. *Commission*, [2003] ECR II-1433, para. 242.

[382] *Ibid*, para. 242; case T-223/00, *Kyowa Hakko Kogyo*, *op.cit.*, para. 62.

[383] 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.

[384] See answer to question 7.2 above.

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 Guidelines/ Notices/Communication which state the Commission's understanding of substative law or procedural rules that the Commission will apply. These documents include, *inter alia*, the Guidelines on the method of setting fines[385] and the Leniency Notice[386]. The Commission 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 a Commission decision being quashed by the CFI or ECJ. Article 230 of the EC Treaty that specifies grounds for an appeal against a Commission decision refers to '*infringement of an essential procedural requirement*' and to infringement of '*any rule relating to the application of the Treaty*.'
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 must be able to show at least the possibility that the result would have been different, had the Commission did not commit an 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 serve exactly 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 European Courts that have always employed to fill gaps in the judicial protection of individuals.

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

Cases of alleged mal-administration may be complained of to the Ombunsman (see 12.2 below).

12.2 Ombudsman

[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 e.g. para. 4 of the vertical restraints Guidelines (*op.cit.*) and para. 16 of the horizontal co-operation agreements Guidelines (*op.cit.*), which state that the Guidelines are without prejudice to the European Courts case law. Presumably, the absence of any reference to the Commission means that the latter would be bound.
[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 to be heard of one of the companies fined by the contested decision has been violated, but considered that this infringement of procedural requirements was not sufficient to annul the decision.

EU citizens and companies are entitled to complain to the European Ombudsman with respect to maladministration in the activities of the Community institutions or bodies. Thus, it is possible to complain to the European 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 Behaviour by the 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 Union may complain to the European Ombudsman. Before filing the complaint with the European Ombudsman, the complainant must approach the institution or body concerned.[389] Complaints may be filed only by persons individually affected by the maladministration. The person lodging the complaint may request his complaint to be confidential, but the complaint must allow the identification of the person lodging the complaint and the object of the complaint.[390]
The Ombudsman investigates if the complaint is well grounded. If the Ombudsman establishes an instance of maladministration, he informs the institution concerned and makes a draft recommendation. The institution concerned has three months 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 such inquiries.[391]

12.3 Quashing evidence

As it has been explained in 4.8.1. above, target of the Commission's investigation may claim attorney-client privilege and refuse to submit to the Commission a protected document. If a decision of the Commission denying professional privilege for one or more documents is annulled by the Community judicature, the Commission may not rely on such documents for the purpose of proving its case.[392]
Similarily, if a decision by the Commission to order an investigation is annulled by the Community judicature, the Commission is prevented from using, for the purposes of proceeding in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature.[393]

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 of the Community's extracontractual liability to arise are very stringent. This cause of action is independent of the Article 230 EC action for annulment, unless the action for damages is designed in reality only to obtain the withdrawal of an individual act (reviewable under Article 230), of which the applicant is an addressee and which has become definitive, and not to obtain separate damages. The possibilities of

[389] *Statute of the European Ombudsman*, OJ [1994] L 113/15, as subsequently amended.
[390] *Ibid*, Article 2(3).
[391] Article 195 EC.
[392] Case C-7/04 P(R), *Commission* v. *Akzo Nobel Chemicals and Akcros Chemicals*, Order of 27 September 2004, not yet reported, paras. 37-38.
[393] See Case C-94/00, *Roquette Frères* v. *Commission*, [2002] ECR I-9011, para. 49.

success of damages actions are rather meagre and in the past forty years cases where applicants were successful against a Community institution have been rare indeed.

The test to meet, in order to be successful, is very demanding. There are three basic requirements: (a) there must be a wrongful act or omission on behalf of the Community institution (here the Commission), (b) a damage suffered by the applicant, and (c) a causal link between the two. When the Commission enjoys discretion, as the case here, a sufficiently flagrant violation of a superior rule of law for the protection of the individual must have occurred. Causality must be direct, immediate and exclusive. The damage suffered must be certain and specific, proven and quantifiable. The interpretation of those conditions by the European Courts is very restrictive.

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 indispensable to the exercise of its discretion.[394] Especially when the Commission enjoys a wide margin of appreciation, respect of procedural guarantees conferred by the law upon individuals is of fundamental importance and may lead to an action for damages against the Commission.

[394] Case T-285/03, *Agraz SA and Others* v. *Commission*, Judgment of 17 March 2005, not yet reported.