



Antitrust

Manual of Procedures

Internal DG Competition working documents
on procedures for the application
of Articles 101 and 102 TFEU

March 2012

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The Antitrust Manual of Procedures does not contain binding instructions for staff, and the procedures set out in it may have to be adapted to the circumstances of the case at hand. It is oriented towards the practical needs of case teams. The practical guidance given in the Manual does not claim to be complete or exhaustive and not every question that might arise is dealt with, or dealt with in the same level of detail. The content of the Manual has not been adopted by the Commission. It is a practical working tool, which evolves through updates made on a regular basis to reflect new experience gained in applying the competition rules of the Treaty, and the Regulations, notices and other guidance adopted thereunder.

In case of divergences between these rules and the Antitrust Manual of Procedures, the former apply. Staff has been instructed that, in case of doubt, they should always seek instructions from their hierarchy regarding the precise course of action in a particular situation.

The main chapters of the Antitrust Manual of Procedures are being made public in order to provide greater transparency about the Commission's procedures in applying the competition rules.

The fact that the modules are in the public domain does not change their character as purely internal guidance to staff. The published modules therefore do not create or alter any rights or obligations arising under the competition rules of the Treaty. Updates to the modules will be made public at regular intervals. Developments since this version of the Antitrust Manual of Procedures was published (such as new case law) may therefore not yet be reflected.

Brussels, 2012

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1. General principles governing decision-making in the Commission

1.1. Sources

- (1) The way in which the Commission operates and takes decisions is set out
 - in the **Rules of Procedure of the Commission** of 24.2.2010 (C(2010)1200 final)¹ (hereinafter the ‘Rules of Procedure’); the Rules of Procedure set out the various procedures for adopting Commission acts, how those decisions are prepared and implemented and how the departments supporting the Commission are to be organized.
 - in the **Rules giving effect to the Rules of Procedure of the Commission**, also adopted on 24.2.2010 (C(2010)1200 final)(hereinafter the ‘Rules giving effect’); the Rules giving effect supplement the Rules of procedure and spell out in detail how the latter are to be applied in practice.
- (2) Explanations concerning the rules contained in those two basic documents, as well as useful information on their **application in practice** are accessible via the **Manual of Operating Procedures** on the Secretariat General’s intranet site.

1.2. The principle of collegiality and the decision making procedures

- (3) According to Article 17 (6) of the Treaty on European Union (ex. Art. 217(1) EC) and Article 1 of the Rules of Procedure decision-making in the Commission is based on the **principle of collegiality**. In other words, as a general rule, Commission **decisions must be taken collectively** by all Commissioners and all Commissioners are **collectively responsible** for those decisions. The delegation of decision-making powers to individual Commissioners or Directors General is regarded by the Treaty and the Rules of Procedure as an exception and is therefore subject to limitations.
- (4) Commission decisions are either taken at the Commission’s weekly meeting (‘oral procedure’), by written procedure, by empowerment (which includes the possibility of sub-delegation), or by direct delegation.

1.2.1. Decisions of principle: oral or written procedure

- (5) All **decisions of principle** involving a margin of political discretion or appreciation must be adopted by the College through oral or written procedure. Such decisions of principle cannot be delegated to individual Commissioners and even less to the Commission services.
- (6) The **oral procedure** (Articles 5 to 11 of the Rules of Procedure) reflects best the collegial nature of Commission decision making, since it provides for an opportunity for discussion between Commissioners. Commission acts are adopted during the weekly meeting (normally on

¹ OJ L 308, 8.12.2000, p.26, as amended by Commission Decision of 24 February 2010, (2010/138/EC, Euratom), OJ L55 of 05.03.2010, p. 60.

Wednesday) either without discussion (A point) or following discussion between Commissioners (B point).

- (7) The **written procedure** (Article 12 of the Rules of Procedure) aims to relieve the Commissioners of the need to debate matters the adoption of which are not controversial and have been discussed between the head of Cabinets at preparatory meetings on basis of the submitted documents for adoption, approved by the Legal Service and other department directly involved during the inter-service consultation.

1.2.2. Measures of management and administration: empowerment, sub-delegation and direct delegation

- (8) A category of measures to be distinguished from the decisions of principle are the so-called **measures of management or administration** ('mesures de gestion ou d'administration'). This category of measures includes measures which are
- of an investigatory or preparatory nature only, in view of a later final decision to be taken by the College, and/or
 - leave the Commission no or only a limited margin of appreciation or discretion, and/or
 - are routine matters, whose adoption by the College would entail a disproportionate demand on Commissioners' time.
- (9) Measures of management or administration can be:
- delegated by the College of Commissioners to individual Commissioners who then adopt the measure under the so-called **empowerment procedure** ('procédure d'habilitation', Article 13(1) of the Rules of Procedure); empowerments are either "general" (a Commissioner is empowered to adopt a given category of acts) or "ad hoc" (a Commissioner is empowered to adopt a specific act in a specific case);
 - sub-delegated, by a so empowered Commissioner to a Director-General or Head of Service who then adopts the measures under the **sub-delegation procedure** (Article 13(3) of the Rules of Procedure); or
 - exceptionally **delegated directly** by the College to Directors General or Heads of Service (e.g. Competition Hearing Officers) (direct delegation, Article 14 of the Rules of Procedure).
- (10) It follows from the principle of collegiality that before adopting a measure under the empowerment, sub-delegation or delegation procedure the empowered Commissioner, Director-General or Head of Service must always determine whether, on grounds of political sensitivity or because of its importance the matter must be brought before the full College (point 13/14-3.2 of the joint Rules giving effect to Articles 13 and 14 of the Rules of Procedure). Moreover, since empowerment / sub-delegations / delegations are exceptions to the general principle of collegiality, they must be construed narrowly (in principle, there is no "implicit" empowerment or empowerment "by analogy").

1.2.3. Measures of pure administration

- (11) A third category of measures are the so-called **measures of pure administration** ('mesures de pure gestion'). Measures of pure administration are routine measures of a technical nature and/or with no legal consequences and therefore not covered by the principle of collegiality, i.e. they

neither constitute acts which are reserved for adoption by the College, nor acts of management and administration open to empowerment and sub-delegation.

- (12) They can therefore be taken directly by the services of DG Competition according to the internal division of tasks without involvement of the Legal Service or other departments.

1.3. The involvement of other services

- (13) Before draft measures are adopted by the College under the **oral or written procedure** those draft measures must be submitted to an **inter-service consultation** of the “departments with a legitimate interest in the draft text” (Article 23(3) of the Rules of Procedure). The purpose of that consultation at services level is to prepare the decision of the College of Commissioners. Where one or more services disagree the measure must be adopted under the oral procedure. Otherwise it can be adopted under the written procedure.
- (14) An inter-service consultation must also take place before an individual Commissioner or Director General adopts a draft measure under the **empowerment, sub-delegation or delegation procedure**. Where a so-called **associated service** issues a negative opinion in the course of that inter-service consultation, the measure cannot any longer be adopted under the empowerment, sub-delegation or delegation procedure, but must be submitted to the oral procedure (Rules giving effect to Article 21, point 6). The prior agreement of the Legal Service is always required, other interested services are generally only informed and invited to provide comments within a given deadline. In the context of the empowerment, sub-delegation and delegation procedure the inter-service consultation acts thus as a safeguard for the principle of collegiality.
- (15) The rules on the involvement of other services are explained in more detail in Section 3 below.

2. Choice of the applicable decision-making procedure in antitrust cases

- (16) This section describes the rules governing the choice of the applicable decision-making procedure in an antitrust case. Sub-sections 2.1 to 2.5 explain who decides what and respectively deal with: the powers reserved to the College; the empowerments granted to the Competition Commissioner; the powers sub-delegated to the Director General of DG COMP; the powers delegated to the Hearing Officers; the possibility to take measures of pure administration.

2.1. Measures reserved to the College

- (17) All final decisions on substance (including interim measures) and/or decisions of principle implying a wide margin of appreciation are reserved to the College. Those acts cannot be delegated. To these Commission acts belong:
- all Commission decisions **finding and ordering the termination of an infringement** (Article 7 of Regulation 1/2003);
 - all Commission decisions ordering and renewing **interim measures** (Article 8(1)(2) of Regulation 1/2003);
 - all Commission **decisions making commitments binding** (Article 9(1) of Regulation 1/2003),
 - all Commission decisions finding the **inapplicability** of Articles 101 or 102 TFUE (Article 10 of Regulation 1/2003),

- all Commission decisions imposing **fin**es for breaches of procedural or substantive law (Article 23(1)(2) of Regulation 1/2003), as well as all related Commission decisions finally granting immunity or reduction of fines or rejecting immunity and leniency applications (1996, 2002 and 2007 Leniency Notices),
 - all Commission decisions on the **final amount of a periodic penalty payment** (Article 24(2)(sentence 1) of Regulation 1/2003);
 - all Commission decisions to **withdraw the benefit of a block exemption** regulation (Article 29(1) of Regulation 1/2003).
- (18) For the time being and until sufficient experience has been gained with the following measures, these measures are also reserved for adoption by the College:
- the issuing of **informal guidance letters** (Commission Notice on informal guidance relating to novel questions read in conjunction with recital 38 of the preamble of Regulation 1/2003);
 - the initiation of proceedings in the situation foreseen in Article 11(6) in combination with Article 11(4) of Regulation 1/2003;
 - decisions to launch an **inquiry into a particular sector of the economy or into a particular type of agreements** across various sectors (Article 17(1)(sentence 1) of Regulation 1/2003).

2.1.1. Oral procedure

- (19) If the Competition Commissioner considers, after having consulted the President of the Commission, that in view of their economic or political importance the measures in issue should be debated, the oral procedure is used.

2.1.2. Written procedure

- (20) The written procedure is generally used for all measures which must be adopted directly by the College itself, but which do not require a debate in the College.
- (21) Prior approval of the Legal Service and agreement of the Directorates-General with a legitimate interest in the draft text are required before a written procedure can be launched (Article 12(1) of the Rules of Procedure; see also points 12-3.3 and 23.6 of the Rules giving effect to the Rules of Procedure).

2.2. Empowerment of the Competition Commissioner

- (22) By various Commission decisions, the Competition Commissioner has been empowered to adopt a series of acts. When adopting acts by empowerment reference must be made to the empowerment decision which specifically refers to the act to be adopted². Subsections 2.2.1 to 2.2.3 describe the various decisions by which powers have been delegated to the Commissioner³. Subsection 2.2.4 deals with ad hoc empowerments.

² Since May 2008, all documents are adopted via e-Greffe within the Commission.

³ Before entry into force of Regulation 1/2003 and of the new empowerments the Commission decision-making procedures in the field of antitrust were governed by a complex set of empowerment and sub-delegation decisions from 1965, 1980, 1990, 1996, 2000 and 2002. Where those empowerment decisions concern measures to be taken under Regulation 17, they are no longer applicable and only of historical relevance. Some of the older empowerment decisions concern however measures not directly based on Regulation 17 and

2.2.1. Empowerment of the Competition Commissioner for the application of Regulation No 1/2003

2.2.1.1 General

- (23) On 28 April 2004 the Commission adopted a decision with a comprehensive set of empowerments (**PV(2004) 1655, SEC(2004) 520/2**) as extended by PV(2006) 1763, SEC(2006) 1368 for the Competition Commissioner for the application of Regulation No 1/2003 and implementing Commission Regulation No 773/2004. The introductory explanatory memorandum of the empowerment decision (hereinafter ‘the explanatory memorandum’) provides essential information about the rationale and functioning of the empowerments and the involvement of other services.
- (24) The Competition Commissioner has been empowered to adopt around 21 different measures (see the full list in Article 1 of the decision).
- (25) Most of those empowerments concern measures for which the Competition Commissioner **already held an empowerment under the former Regulation 17** such as for example:
- rejection of complaint by Commission decision (Article 7(2) of Regulation 1/2003 and Article 7(2) of Regulation 773/2004; Article 13(1)(sentence 2), 13(2) of Regulation 1/2003 and Article 9 of Regulation 773/2004; Article 29(1) of Regulation 1/2003);
 - Commission decision requesting information from undertakings and associations of undertakings (Article 18(3) of Regulation 1/2003);
 - Commission decision ordering inspections of undertakings and associations of undertakings (Article 20(4) of Regulation 1/2003);
 - determination and issuance of a statement of objections to undertakings or associations of undertakings and setting of a time-limit for reply (Article 27(1) of Regulation 1/2003 and Article 10(1)(2) of Regulation 773/2004).
- (26) Other empowerments listed in Article 1 of the decision concern **measures which have been created by the new enforcement system** such as for example:
- preliminary assessment (Article 9(1) of Regulation 1/2003) and decision to reopen proceedings after a commitment decision (Article 9(2) of Regulation 1/2003);
 - opinions for national courts and refusal to supply confidential information (Article 15(1) of Regulation 1/2003);
 - Commission decision ordering inspections of other premises (Article 21 of Regulation 1/2003).
- (27) It must be borne in mind that under Article 13(3) of the Rules of Procedure a Commissioner can sub-delegate the powers granted to him to a Director-General and Head of Service unless this is expressly prohibited in the empowerment decision. The empowerment decision of 28 April 2004 prohibits the sub-delegation only as regards the determination and issuance of a statement of objections. By decision of 27 May 2004 the Commissioner for Competition has therefore **sub-delegated a number of the above powers to the Director General of DG COMP** (see below).

- (28) As a result of those sub-delegations, in fact only the following measures listed in the empowerment decision of 28 April 2004 are directly adopted by the Competition Commissioner:
- **initiation of proceedings** (Article 2(1) of Regulation 773/2004 and Article 11(6) of Regulation 1/2003) except in the situation foreseen in Article 11(4) of Regulation 1/2003⁴;
 - determination and issuance of a **statement of objections** to undertakings or associations of undertakings (Article 27(1) of Regulation 1/2003 and Article 10(1)(2) of Regulation 773/2004); **comment: this empowerment must be exercised in agreement with the President of the Commission** (see below 2.2.1.2);
 - **preliminary assessment** in the procedure for the adoption of a decision making commitments binding (Article 9(1) of Regulation 1/2003);
 - publication of a summary of the case and request for comments on commitments (Article 27(4) of Regulation 1/2003);
 - Commission decision to re-open proceedings after a decision making commitments binding (Article 9(2) of Regulation 1/2003);
 - Commission **decision imposing (provisional) periodic penalty payments** for breach of substantive rules (if not yet imposed by a previous Commission decision ordering termination of these breaches, Article 24(1)(a)(b)(c) of Regulation 1/2003) or for breach of procedural rules (Article 24(1)(e) of Regulation 1/2003); **comment: the decision on periodic penalty payments in order to compel undertakings to supply complete and correct information requested by decision taken pursuant to Articles 17 or 18(3) of Regulation 1/2003 (Article 24(1)(d) is sub-delegated to the Director General (see below 2.3);**
 - **rejection of complaint by Commission decision** (Article 7(2) of Regulation 1/2003 and Article 7(2) of Regulation 773/2004; Article 13(1)(sentence 2), 13(2) of Regulation 1/2003 and Article 9 of Regulation 773/2004; Article 29(1) of Regulation 1/2003);
 - Commission **decision ordering inspections of other premises** (Article 21 (1) of Regulation 1/2003) except where the decision must be taken urgently and the Competition Commissioner cannot be reached in time; **comment: for the latter exceptional cases there is a sub-delegation to the Director General (see below 2.3);**
 - Commission decision requesting an NCA to undertake inspections (Art. 22(2) of Regulation 1/2003).
- (29) Under Article 3 of the empowerment decision the above empowerments granted to the Competition Commissioner are also applicable where the Commission, on the basis of the provisions of Regulations 1/2003 and 773/2004, applies Articles 53 and 54 of the **EEA Agreement**.
- (30) All those empowerments must be exercised in accordance with the general rules relating to the empowerment procedure. In particular, before taking a decision the Commissioner must determine whether on grounds of **political sensitivity or because of its importance**, the matter

⁴ The initiation of proceedings in the situation foreseen in Article 11(4) of Regulation 1/2003, i.e. after a competition authority of a Member State has informed the Commission that it will adopt a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption situation, should for the time being remain reserved for adoption at the level of the College. Practical experience will show whether it is necessary to maintain this exception.

should be brought before the full Commission. If there is any doubt, the President should be consulted. The services of DG Competition must draw the attention of the Commissioner to those circumstances which might convince the Commissioner to bring the matter before the full Commission.

2.2.1.2 *The special case of the statement of objections*

- (31) The empowerment for the determination and issuance of a **statement of objections** is the only empowerment which must be exercised in agreement with the President of the Commission. The explanatory memorandum gives the following explanation for this exceptional mechanism:

“44. For the statement of objections the proposed decision foresees a mechanism under which the President of the Commission intervenes as guarantor both of the principle of collegiality and of the credibility of the Commission as an impartial and objective enforcer of the law, which is also fully in line with the newly strengthened role of the President as foreseen in Article 217 EC as amended by the Nice Treaty [note: now Art. 17(6) TUE].

45. Under that mechanism, which is applied with success in the field of merger control for the adoption of decisions under Article 6(1)(c) of the EC Merger Regulation, the empowerment for the determination and issuance of a statement of objections can only be exercised in agreement with the President. If one of the other Commissioners involved has a serious concern about any aspect of the case he may request a meeting with the President and/or the Commissioner responsible for Competition. [...]

46. It must be borne in mind that the statement of objections is a preparatory step which closes the first phase of the investigation and opens the second phase at the end of which the Commission takes its final decision. It also determines the outer limits of the scope of that second phase. In the final decision the Commission can decide not to maintain some of the objections raised in the statement of objections.

47. Given the purely preparatory and provisional nature of a statement of objections [...] it would not be appropriate to subject its adoption to the prior approval of services other than the Legal Service. If individual departments other than the Legal Service were able to prevent the exercise of the empowerment to issue a statement of objections, the scope and content of that statement of objections could become the subject of negotiations between a department of the Commission responsible for a particular sector and DG Competition. Such negotiations could create the impression that non competition law considerations were able to disrupt a preparatory step in a law enforcement procedure which should be governed predominantly by considerations of equal treatment and legality.”

- (32) A footnote referred to at the end of paragraph 45 of the explanatory memorandum states:

“In view of the specificities of transport and given the fact that an ongoing process of liberalisation and market opening is being carried out, the Commission notes that it remains possible for the member of the Commission responsible for Transport to request the President, in accordance with the Commission's rules of procedure, that the Commission may examine any draft decision proposing a statement of objections in transport antitrust, if the political sensitivity or importance of the case would justify such an examination.”

- (33) Before adoption of the 2004 empowerment package DG TREN was the only DG, the prior approval of which was necessary in order to adopt a statement of objections. The 2004 empowerment package abolished that special right and introduced instead the footnote above. That footnote does however not add anything since it merely reiterates the rights which the Transport Commissioner has in any event under the general Rules of Procedure of the Commission.

2.2.2. Empowerments relating to the Leniency Notices

- (34) There exist three different Leniency Notices, adopted respectively in 1996, 2002 and 2006. Depending on the transitional rules they contain, all of them could still apply. As stated above [point (17)], all final decisions on immunity or leniency applications (accepting or denying such applications) are reserved to the College. On the contrary, for the preliminary steps provided for in the 2002 and 2007 Leniency Notices, a set of empowerment decisions has been adopted.

2.2.2.1 The 2002 Leniency Notice

- (35) The Competition Commissioner has been granted the following empowerments in relation to the application of the 2002 Leniency Notice:
- empowerment for **informing** the undertaking that the nature and content of the evidence that it proposes to disclose at a later stage **would fulfil the conditions for granting conditional immunity** (point 16, first sentence of the Leniency Notice) (PV(2002)1555, SEC(2002)119) **or, on the contrary**, that they **do not fulfil the conditions** for granting conditional immunity (PV(2006) 1733, SEC(2006)187 et /2);
 - empowerment to **grant conditional immunity** in writing to undertakings that fulfil the conditions laid down in point 15 and point 16 second sentence of the leniency Notice) (PV(2002)1555, SEC(2002)119) **or, on the contrary**, empowerment to **reject an application for conditional immunity** where it is found that the conditions laid down in point 15 and in the second sentence of point 16 have not been met (PV(2006) 1733, SEC(2006)187 et /2);
 - empowerment to inform, not later than the date when the statement of objections is issued, undertakings fulfilling the conditions for a **reduction in fines** in writing of the intention of the Commission to reduce the amount of the fine (point 26 of the leniency Notice) (PV(2002)1555, SEC(2002)119) **or, on the contrary**, to **reject**, no later than the date when the statement of objections is notified, **an application for reduction of fines** where it is found that the conditions laid down in points 21 and 22 of the Leniency Notice have not been met (PV(2006) 1733, SEC(2006)187 et /2).

2.2.2.2 The 2006 Leniency Notice

- (36) By decision of 4 April 2007 (PV(2007)1783, SEC(2007)439), the Commission empowered the Competition Commissioner to adopt the following decisions in relation to the application of the 2006 Leniency Notice:
- to inform the companies that the evidence described which they propose to disclose at a later date is of such a nature and content that it would meet the conditions to obtain conditional immunity from fines (point 19 of the Commission Notice);
 - to reject an application for conditional immunity where the evidence the undertaking proposes to disclose at a later date is not of such a nature and content that it meets the requirements for conditional immunity from fines to be granted, and to inform the undertaking accordingly in writing (point 19 of the Commission Notice);
 - to grant conditional immunity from fines in writing to the undertakings which meet the conditions set out in the Notice (points 18 and 19 of the Commission Notice);
 - to reject an application for conditional immunity from fines where it is found that the conditions laid down in the Notice have not been met, and to inform the undertaking accordingly in writing (point 20 of the Commission Notice);

- to inform in writing the undertakings which meet the relevant conditions of the Commission's intention to apply a reduction of a fine within a specified band (point 29 of the Commission Notice);
- to reject an application for reduction of fines where it is found that the conditions laid down in the Notice have not been met, and to inform the undertaking accordingly in writing (point 29 of the Commission Notice).

2.2.3. Empowerments relating to the co-operation with the United States and Canada

- (37) In the framework of the cooperation with the United States and Canada, the Competition Commissioner is empowered to adopt the following acts: (a) requests to the **competition authorities of the United States and of Canada** to investigate anticompetitive practices under their national laws and (b) decisions to investigate anticompetitive practices at the request of those authorities (see Article V of the agreement with the United States of 1995⁵, Article III of the second agreement with the United States of 1998⁶ and Article V of the agreement with Canada of 1999⁷) (PV (2002)1572, SEC(2002) 669).

2.2.4. Ad hoc empowerment

- (38) The empowerments listed in subsections 2.2.1 to 2.2.3 are “general”, in the sense that they apply to categories of acts. However, a Commissioner can also be empowered to adopt a specific act in a specific case.
- (39) Such “*ad hoc*” empowerments are systematically added when adopting commitment decisions based on Art. 9 of Regulation 1/2003 in order to facilitate the adoption of Commission decisions implementing commitments such as the setting or extending of deadlines, approval of a purchaser in case of divestiture or nomination of a trustee / independent auditor, for which no general empowerment of the Competition Commissioner has yet been requested, due to the novelty of Art. 9 decisions, when the general empowerment decision has been adopted in 2004. See further the Chapter on Commitment decision.

2.3. Measures sub-delegated by the Competition Commissioner to the Director General

- (40) By decision of 27 May 2004 (PH/2004/769)⁸ the Competition Commissioner has **sub-delegated to the Director General** the following powers which are granted to him in the empowerment decision of 28 April 2004:
- decision imposing (provisional) **periodic penalty payments** on undertakings or associations of undertakings in order **to compel them to supply complete and correct information** requested

⁵ Decision 95/145/EC, ECSC of the Council and the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ L 95, 27.4.1995, p. 45, corrigendum: OJ L 131, 15.6.1995, p. 38).

⁶ Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (OJ L 173, 18.6.1998, p. 28).

⁷ 1999/445/EC, ECSC: Council and Commission Decision of 29 April 1999 concerning the conclusion of the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L 175, 10.7.1999, p. 49).

⁸ The sub-delegation decision was signed on 27 May 2004 and entered into force on 3 June 2004.

by decision taken pursuant to Articles 17 or 18(3) of Regulation 1/2003 (Article 24(1)(d) of Regulation 1/2003; **comment:** The power to impose periodic penalty payments for breaches of substantive rules (Article 24(1)(a)(b)(c)) and under Article 24(1)(e) are not sub-delegated and remain therefore with the Competition Commissioner under the empowerment procedure;

- **closure of proceedings** (Article 2(1) of Regulation 773/2004 and Article 11(6) of Regulation 1/2003);
 - announcement by the Commission to the complainant that it **intends to reject the complaint** (Article 7(2) of Regulation 1/2003 and Article 7(1) of Regulation 773/2004);
 - refusal by the Commission to send confidential information to national courts (Article 15(1) of Regulation 1/2003);
 - determination of the content of an **opinion to be sent to a national court** (Article 15(1) of Regulation 1/2003);
 - **decision requesting information** from undertakings and associations of undertakings (Article 18(3) of Regulation 1/2003);
 - decision ordering inspections of undertakings and associations of undertakings (Article 20(4) of Regulation 1/2003);
 - decision to **order inspections of premises other than business premises** (Article 21 of Regulation 1/2003) limited to those cases in which the decision must be taken urgently and the Competition Commissioner cannot be reached in time; **comment:** In normal circumstances the decision to inspect premises other than business premises must thus be taken by the Commissioner under the empowerment procedure ;
 - written commitment by the Commission not to use information which a NCA obtained under a **national leniency programme**.
- (41) Those sub-delegations are also applicable where the Commission, on the basis of Regulations 1/2003 and 773/2004, applies **Articles 53 and 54 of the EEA agreement**.
- (42) Before taking a decision the Director General must always determine whether, on grounds of political sensitivity or because of its importance the matter must be brought before the Competition Commissioner.
- (43) Where the Director-General for Competition is prevented from exercising the sub-delegated powers for example during holidays, Article 27 of the Rules of Procedure of the Commission applies according to strict rules of seniority.

2.4. Measures delegated by the Commission to the Hearing Officers

- (44) In the framework of the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings⁹, the Commission has delegated, pursuant to Article 14 of the Commission's Rules of Procedure, to the **hearing officer in competition proceedings** and by way of a delegation

⁹ OJ, L, 275 of 20.10.2011.

decision of 19 November 2011¹⁰, **powers to adopt on the Commission's behalf and under its responsibility** the following measures relating to the implementation of Articles 101 and 102 TFEU, Council Regulation (EC) No 1/2003, Commission Regulation (EC) No 773/2004, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings:

- (a) refusal by the Commission to hear third persons for lack of a sufficient interest (Article 27(3) of Regulation (EC) No 1/2003, Article 13(1) of Regulation (EC) No 773/2004, Article 18(4) of Regulation (EC) No 139/2004 and Article 16(1) and (2) of Regulation (EC) No 802/2004);
- (b) Commission decision refusing a reasoned request by a party that has exercised its right of access to the file to obtain access to documents of the file that have not been disclosed by the Commission;
- (c) Commission decision refusing a reasoned request by other involved parties within the meaning of Article 11(b) of Regulation (EC) No 802/2004 claiming that they have not been sufficiently informed of the objections addressed to the notifying parties (Article 13(2) of Regulation (EC) No 802/2004);
- (d) Commission decision refusing a reasoned request by other involved parties within the meaning of Article 11(b) of Regulation (EC) No 802/2004 who have been informed of the objections addressed to the notifying parties to obtain access to documents of the file that have not been disclosed by the Commission (Article 17(2) of Regulation (EC) No 802/2004);
- (e) Commission decision refusing a reasoned request by a complainant who has been informed by the Commission of its intention to reject its complaint pursuant to Article 7(1) of Regulation (EC) No 773/2004 to obtain access to documents not disclosed by the Commission (Article 8(1) of Regulation (EC) No 773/2004);
- (f) Commission decision refusing a reasoned request by an interested third person claiming that it has not been sufficiently informed of the nature and subject matter of the procedure (Article 13(1) of Regulation (EC) No 773/2004 and Article 16(1) of Regulation (EC) No 802/2004);
- (g) Commission decision refusing a reasoned request by a complainant, in a case to which the settlement procedure applies, claiming that it has not been sufficiently informed of the nature and subject matter of the procedure (Article 6(1) of Regulation (EC) No 773/2004);
- (h) Commission decision refusing a reasoned request by a complainant claiming that it has not received a copy of the non-confidential version of the statement of objections or requesting to obtain information that has not been disclosed to it in the non-confidential version of the SO, with the exception of cases to which the settlement procedure applies (Article 6(1) of Regulation (EC) No 773/2004);
- (i) Commission decision that information acquired or exchanged pursuant to Regulation (EC) No 1/2003 or Regulation (EC) No 139/2004 does not constitute business secrets or other confidential information and thus can be communicated to other persons or undertakings (Article 28(2) of Regulation (EC) No 1/2003 and Article 15(2) of Regulation (EC) No

¹⁰ The current delegation of powers replaces the former sub-delegation decision (PH/2004/770) of 27 May 2004 and entered into force on 4 June 2004.

773/2004 and Article 18 of Regulation (EC) No 139/2004 and Article 18(1) of Regulation (EC) No 802/2004);

- (j) Commission decision that information acquired pursuant to Regulation (EC) Regulation (EC) No 1/2003 or Regulation (EC) No 139/2004 may constitute business secrets or other confidential information but that it be communicated where this is necessary with a view to prove an infringement or for other purposes of the procedure (Article 27(2) of Regulation (EC) No 1/2003 and Article 15 (3) of Regulation (EC) No 773/2004 and Article 17 and 18 (1) to (3) of Regulation (EC) No 139/2004 and Article 18(1) of Regulation (EC) No 802/2004);
 - (k) Commission decision that information which is in a Commission decision can be published because there is no legitimate interest with regard to the protection of business secrets in respect of such information (Article 30(2) of Regulation (EC) No 1/2003 and Article 20(2) of Regulation (EC) No 139/2004).
- (45) For the exercise of these delegated measures, the prior approval of the Legal Service is always required in accordance with Article 23(4) of the Rules of Procedure of the Commission.

2.5. Measures of pure administration (“de pure gestion”)

- (46) Measures of pure administration are not decisions, submitted to a formal adoption procedure, but are issued by the services of DG COMP according to the internal division of tasks without involvement of the Legal Service or other departments.
- (47) In practice, measures of pure administration are mostly routine measures of a technical nature and/or acts having no binding effect.
- (48) It is impossible to list all measures of pure administration since every measure which is not reserved to the full Commission or for decision under empowerment falls within that category.
- (49) The measures of pure administration undertaken by case-handlers are for example:
 - **simple requests for information** (Article 18(2) of Regulation 1/2003);
 - **simple inspection** based merely on written authorisation by the Director-General (Article 20(2));
 - access to file;
 - publication of the summary of the decision in the OJ (Article 30 of Regulation 1/2003);
 - **extension of time-limit for written reply to the statement of objections** (Article 9 of the Hearing Officer Terms of Reference); [in any case, is it useful to refer to the HO Mandate; the point we are dealing with here is where there is not recourse to the HO]
 - convening and chairing the Advisory Committee (Article 14(3) of Regulation 1/2003);
 - determining the summary of the case and the preliminary draft decision to be sent to the Advisory Committee (Article 14(3) of Regulation 1/2003);
 - **transmission to National Competition Authorities of the most important documents** with a view to applying Articles 7 to 10, 29(1) (Articles 11(2) sentences 1 and 2 of Regulation 1/2003);

- **transmitting information** in the Commission's possession **to national courts** (Article 15(1) first alternative, of Regulation 1/2003).

3. Involvement of other services

- (50) Article 23(1) of the Rules of Procedure foresees that the Commission departments work in **close co-operation and in coordinated fashion** from the outset in the preparation or implementation of Commission decisions. Article 23(2) specifies that effective cooperation between all the departments with a legitimate interest in the initiative by virtue of their powers or responsibilities or the nature of the subject shall be ensured from the beginning of the preparatory work.

3.1. Inter-service consultation prior to the adoption of measures reserved to the College

3.1.1. Choice of the departments to be consulted

- (51) Under Article 23(4) of the Rules of Procedure, the **Legal Service must always be consulted** on all drafts or proposals for legal instruments and on all documents which may have legal implications. Concretely, for DG COMP, it means that the Legal Service must be consulted on every act prepared by DG COMP to be adopted by the College or under the empowerment or sub-delegation procedures (see section 2.1 above).
- (52) Under Article 23(5) of the Rules of Procedure, **the Sec. Gen. must be consulted in specific circumstances**. The Sec Gen must be consulted on all initiatives that (a) are of political importance; or (b) are part of the Commission's annual work programme; or (c) concern institutional issues; or (d) are subject to impact assessment or public consultations. In concrete terms, with regard to DG COMP's activities, the Sec Gen will only be consulted in exceptional situations, for instance in relation to the preparation of legislative acts or policy statements (draft regulations, draft notices, etc).
- (53) Under Article 23(2) of the Rules of Procedure **other Directorates General with a legitimate interest in initiative shall also be formally consulted** on the drafts of all decisions which will be adopted by the College either in oral or written procedure. In practice, with regard to DG COMP's activities, Directorates General with a legitimate interest are mostly DGs ENTR, ECFIN¹¹, ENER, MOVE, INFSO, EAC, EMPL, MARKT, AGRI and SANCO. The list of DGs obviously depends on the subject matter of the act to be adopted.
- (54) Under Article 23(6) of the Rules of Procedure, **DG BUDG shall be consulted on documents which may have implications for the budget** and finances. Concretely, this means that the operative part of a prohibition decision with fines should be sent to DG BUDG (see Module on Prohibition).

¹¹ Pursuant to Article 23(5a) of the Rules of the Commission (amendment C(2011)9000): "*The Directorate-General responsible for economic and financial affairs must be consulted (for DG COMP by analogy to be understood as "prior information" concerning DL and PH adoptions) on all initiatives relating to or having a potential impact on growth, competitiveness or economic stability in the European Union or in the euro area.*"

3.1.2. Consultation procedure

- (55) DG COMP must allow the consulted the Legal Service and the Directorate Generals at least **10 working days** to respond - or **15 working days** if the main body of the text (minus annexes) is longer than 20 pages.
- (56) Departments unable to reply within the time limit for reasons beyond their control can ask for an **extension** provided they do so before the deadline. Any such requests should remain exceptional and must be duly substantiated.
- (57) If a department consulted does not respond within the time limit, in legal terms this is taken to signify **tacit approval** (Point 23-4 of the Rules giving effect to the Rules of Procedure).
- (58) Where the Legal Service or another consulted Directorate General disagrees the proposal cannot be adopted under the written procedure, but must be submitted to the oral procedure.

3.2. Involvement of other Services prior to the adoption of measures under the empowerment and sub-delegation procedures

- (59) With regard to measures adopted under the empowerment procedure granted in the field Competition, since the first empowerment decision of 1965 other Commission services than the Legal Service are **only prior informed** of and not consulted about certain envisaged measure.

3.2.1. Necessary prior approval of the Legal Service

- (60) For the exercise of **all** empowerments and sub-delegations the **prior approval** of the Legal Service is **always** necessary (Article 23(4), second paragraph, of the Rules of Procedure; point 13/14-3.3 of the Rules giving effect to the Rules of Procedure and empowerment decisions in the field of Competition). A formal inter-service consultation of the Legal Service is therefore required.

3.2.2. Involvement of services other than the Legal Service

- (61) The extent of the involvement of Services other than the LS depends on the type of acts to be adopted. Each decision having empowered the Commissioner for Competition to adopt certain acts specifies the involvement of Services other than the Legal Service (see in detail the empowerment decision).

3.2.2.1 *“Information” of “departments primarily responsible for the products, services or policy areas in issue”*

- (62) Prior to the exercise of the most important empowerments and sub-delegations COMP must **“inform”** the Directorates-General **“primarily responsible for the products, services or policy areas in issue”** and give those DGs the opportunity to state their views. The exercise of those empowerments and sub-delegation is however not subject to their prior approval.

- (1) **Who to inform?**

- (63) Most of the time there will only be one service “primarily responsible” (ENTR, INFISO, MARKT, EAG, EMPL, ENER, ECFIN or MOVE). Depending on the characteristics of the case there may however also be more than one other department involved. Footnote 14 of the explanatory memorandum states:

“Departments which have not been informed and which regard themselves as also primarily responsible for the products, services or policy areas in issue in a given case may be informed at all times upon making a reasoned request.”

(2) The meaning of “information”

- (64) The “information” procedure grants other DGs beyond a “right to know” a true “right to be heard”. Where prior information is required
- DG Competition must send the draft measure sufficient time prior to its adoption so as to give the other department an **effective opportunity to state its views**;
 - except in duly justified circumstances of urgency the other department will be given **10 working days** to state its views;
 - DG Competition will take the greatest possible account of the opinion expressed by the other departments; and
 - on request by one of the other departments an **inter-service meeting** will be held in good time.

(3) Measures for which prior information of other services is obligatory

- (65) The measures for which the prior information of services other than the LS is obligatory are:
- The **initiation of proceedings** (Article 2(1) of Regulation 773/2004 and Article 11(6) of Regulation 1/2003) except in the situation foreseen in Article 11(4) of Regulation 1/2003. **Comment:** In the latter case the decision is taken at the level of the College after normal inter-service consultation (see point (18) above).
 - Determination and issuance of a **statement of objections** to undertakings or associations of undertakings (Article 27(1) of Regulation 1/2003 and Article 10(1)(2) of Regulation 773/2004). **Comments:** (a) As explained above the Competition Commissioner must exercise the empowerment for sending the statement of objections **in agreement with the President** of the Commission. (b) Despite the involvement of the President at the College level the Secretariat General does not have to be involved at the level of the inter-service consultation. The SG is not a “service responsible for the products, services or policy areas in issue”. (c) Since the Competition Commissioner needs to obtain the agreement of the President it is essential that prior to the adoption of the statement of objection the **Commissioner is fully informed** about any possible disagreements during the inter-service consultation / information.
 - The **preliminary assessment** in the procedure for the adoption of a decision making commitments binding (Article 9(1) of Regulation 1/2003).
 - Publication of a summary of the case and request for comments on commitments (Article 27(4) of Regulation 1/2003).

- Commission decision to **reopen proceedings** after a decision making commitments binding (Article 9(2) of Regulation 1/2003).
- Commission decision imposing **(provisional) periodic penalty payments** for breach of substantive rules (if not yet imposed by a previous Commission decision ordering termination of these breaches, Article 24(1)(a)(b)(c) of Regulation 1/2003) or for breach of procedural rules of Article 24(1)(d)(e) of Regulation 1/2003). **Comment:** The decision to impose periodic penalty payments on undertakings or associations of undertakings in order **to compel them to supply complete and correct information** requested by decision taken pursuant to Articles 17 or 18(3) of Regulation 1/2003 (Article 24(1)(d) of Regulation 1/2003 is sub-delegated to the Director-General (see above 2.3). It is the only sub-delegated measure prior to the adoption of which services other than the Legal Service must be “informed”.
- **Rejection of complaint** by Commission decision for **insufficient grounds for acting by conducting a further investigation ("lack of EU interest")**. Comment: on the special case of rejections of complaints see below 3.2.2.3.

3.2.2.2 Acts for which no prior information of other services is required

- (66) For a number of measures to be adopted by empowerment or sub-delegation **no prior information of other services** is foreseen (with the exception of the Legal Service which must always be asked for prior approval).
- (67) Such is the case where (a) strict confidentiality is necessary such as in the case of unannounced inspections ordered by decision or the handling of leniency applications¹² or (b) the measure is a measure of technical case administration in respect of the conduct of the proceedings or in respect of the oral hearing, publication of Commission acts in the Official Journal or access to the file.
- (68) The regime of no information applies to the following measures:
- the **closure of proceedings** (Article 2(1) of Regulation 773/2004 and Article 11(6) of Regulation 1/2003);
 - announcement by the Commission to the complainant that it intends to reject his complaint (Article 7(2) of Regulation 1/2003 and Article 7(1) of Regulation 773/2004);
 - **rejection of complaint** by Commission decision (Article 7(2) of Regulation 1/2003 and Article 7(2) of Regulation 773/2004; Article 13(1)(sentence 2), 13(2) of Regulation 1/2003 and Article 9 of Regulation 773/2004; Article 29(1) of Regulation 1/2003) **except for rejections of complaints for lack of Community interest** which are subject to the normal prior information regime and for **rejections of complaints on substantive grounds** for which a special involvement regime applies (see below 3.2.2.3);
 - **refusal** by the Commission to **transmit confidential information** (Article 15(1)(alt.1) of Regulation 1/2003 and points 23-26 Notice on cooperation with National Courts);
 - Commission **decision requesting information** from undertakings and associations of undertakings (Article 18(3) of Regulation 1/2003);
 - Commission **decision ordering inspections** of undertakings and associations of undertakings (Article 20(4) of Regulation 1/2003);

¹²

See Commission decision of 13.2.2002, PV(2002)1555 adopting document SEC(2002)119

- Commission **decision to order inspections of other premises** (Article 21(1) of Regulation 1/2003);
 - Commission decision requesting an NCA to undertake an inspection (Art. 22(2) of Regulation 1/2003);
 - written **commitment by the Commission not to use certain information** exchanged in the European Competition Network (ECN) for imposing sanctions on a leniency applicant or certain other persons (point 41(2) of the Commission Notice on cooperation within the network of competition authorities);
 - The **refusal** by the Commission to allow the complainant to express his views at the oral hearing (Article 7(2) of Regulation 1/2003 and Article 6(2) of Regulation 773/2004);
 - **refusal** by Commission **to hear third parties** (other than addressees of a statement of objections or complainants) for lack of sufficient interest (Article 27(3) of Regulation 1/2003 and Article 13(1) of Regulation 773/2004);
 - **refusal** by Commission **to invite third parties** (other than addressees of a statement of objections or complainants) to develop their arguments at the oral hearing (Article 27(3) of Regulation 1/2003 and Article 13(2) of Regulation 773/2004);
- (69) The “no information” regime also applies with regard to the application of the empowerment on the **application of the 2002 and 2007 Leniency Notices**. Decisions to grant (or not to grant) conditional immunity or acts informing applicants of the Commission’s intent to grant a reduction of fines (or to reject it) (see above Section 2.2.2) can therefore be adopted without prior information of Services other than the LS (the prior approval of which remains necessary).
- (70) Finally, all decision-making powers delegated to the Hearing Officer do not require prior information of any other service but the LS, the agreement of which is always required.

3.2.2.3 *The special case of rejections of complaints on substantive grounds*

- (71) Rejections of complaints **on substantive grounds** are rejections of complaints by which the Commission considers after an assessment of the known facts that the conduct complained of does not infringe Articles 101 or 102 TFEU. They are to be distinguished from rejections of complaints on other grounds which include rejections of complaints for lack of sufficient EU interest, for procedural reasons (e.g. under Article 13 of Regulation 1/2003), or for lack of sufficient substantiation by the complainant of the allegations put forward.
- (72) For the exercise of the empowerment for rejections of complaints on substantive grounds the empowerment decision foresees exceptionally the need to obtain the prior approval of both the Legal Service and the Commission departments responsible for the products, services or policy areas in question.
- (73) This leads to the following complicated involvement regime for rejections of complaints:
- for rejections of complaints on substantive grounds the prior approval of the departments primarily responsible is necessary (exception to the normal prior information regime);
 - for rejections of complaints for insufficient grounds for acting by conducting a further investigation (“lack of EU interest”) the departments primarily responsible must be informed (normal prior information regime, see above 3.2.2.1);

- no prior information of services other than the LS is required for rejections of complaints on other grounds (see above [3.2.2.2](#));
- for Article 7 letters (announcement by the Commission to the complainant that it intends to reject his complaint, Article 7(2) of Regulation 1/2003 and Article 7(1) of Regulation 773/2004) no prior information of services other than the Legal Service is required (see above).

2 Relations with the Hearing officers

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1. General remarks

- (1) The Hearing Officers act independently from DG COMP and are therefore attached, for administrative purposes, to the Competition Commissioner. Their role and responsibilities are laid down in the Hearing Officer's Terms of Reference.¹
- (2) The Hearing Officers are assisted by several advisers and a secretariat. The services of DG Competition are to co-operate fully with them. The operational Directorates must keep the Hearing Officers informed about all important procedural steps. The Hearing Officers should receive copies of all documents relevant to the fulfilment of their functions. They also have access to any files relating to competition proceedings.
- (3) The Hearing Officers are responsible for ensuring the respect for the effective exercise of procedural rights. They have various functions and powers. First, they have decision making powers as regards certain procedural issues. In the exercise of such powers, they act as a dispute resolution mechanism over DG Competition's decisions. This means that, unless provided otherwise in the Terms of Reference, parties involved in the proceedings must first raise these issues with DG Competition. In case of disagreement, the parties may then refer the issue to the Hearing Officers. Second, the Hearing Officers have the power to make recommendations in relation to certain procedural issues. Third the Hearing Officers can report on any procedural incidents in their interim and final reports. They may also submit observations on any matter arising out of any proceedings to the Competition Commissioner at any point in time. Finally, the Hearing Officer are responsible for the organisation and conduct of oral hearings.
- (4) The Hearing Officers must be kept informed of developments in the procedure in antitrust, cartel and merger cases up to the stage of a final draft decision submitted to the College. This applies from the initiation of proceedings in antitrust and merger cases.
- (5) This includes the following:
 - All notes to Legal Service and the Competition Commissioner should be copied to the Hearing Officers
 - In commitment cases (Article 9 Reg 1/2003), copies of preliminary assessments should be forwarded and information provided on all major steps in the procedure leading to a draft Article 9 (commitment) decision
 - The Hearing Officers need to be fully informed of issues that might have an impact on the procedure and in particular on rights of defence. Letters of fact and/or supplementary statements of objections, for example, have a particular relevance for the Hearing Officers, as do any reorientations of a case.
 - Information on any material difference between the decision and the SO.
- (6) The Hearing Officers should be invited when panels are organized and should receive copy of the issue paper and the conclusions of the panel.

¹ Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29), which replaces Commission Decision of 23.5.2001 on the terms of reference of Hearing Officers in certain competition proceedings, OJ L 162, 19.6.2001, p. 21.

- (7) They should also be invited to all state of play and triangular meetings (as well as the Legal Service). The agenda of such meetings, when available, should be communicated to the Hearing Officers in advance of the meetings.
- (8) Of particular importance are the first state of play meetings in settlement and commitment (Article 9 Reg. 1/2003) cases. In settlement cases, the practice of Hearing Officers has been to always attend the first meeting to inform the parties of the possibility to contact the Hearing Officer in case there is disagreement with DG Competition over a procedural issue. In commitment cases, paragraph 119 of the Notice on Antitrust Best Practices² now foresees that a state of play meeting will be organized when the parties engage with DG Competition in discussions about possible commitments. The Hearing Officer and the Legal Service should be invited to such meetings (generally the Hearing Officer will not attend in person, but will be represented by one of the advisers).

2. Decision-making powers of the Hearing Officer

- (9) The Hearing Officer has been granted decision-making powers with regards to the following issues (other than issues relating to the oral hearing, for which reference is made to section 4 below):
 - in the investigation phase, decisions on extensions of time limits to respond to a decision requesting information pursuant to Article 18(3) of Reg 1/2003;
 - in the investigation phase, decisions ordering DG Competition to inform an undertaking which has been the addressee of an investigative measure of its procedural status;
 - decisions on whether to hear third persons showing sufficient interest;
 - decisions on the participation of complainants and interested third persons in oral hearings;
 - decisions on access to file requests by parties to proceedings;
 - decisions on access to documents and information by complainants and interested third persons, where they have a right to such documents and/or information;
 - decisions on disputes concerning the confidentiality of information which may constitute business secrets or other confidential information (the addressees of such HO decisions can appeal the decision before the General Court); and
 - decisions on extensions of time limits for parties to submit written comments on the statement of objections and for complainants and interested third persons to make known their views.
- (10) Except for decisions under (c) and (d) the undertaking(s) concerned must first raise the issue with DG Competition. In case of disagreement, they may then refer the issues to the Hearing Officers.
- (11) More details on the procedures applying to the decisions listed above are provided in the relevant thematic Modules.

² Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6) ("Notice on Antitrust Best Practices")

3. Hearing Officer's powers to make recommendations

- (12) The Hearing Officers can make recommendations in relation to two issues.
- (13) First, under Article 4(2)(a) of the Terms of Reference, the Hearing Officer can be asked to review claims concerning the legally privileged nature of documents withheld from DG Competition by an undertaking. The undertaking must consent that the Hearing Officer reviews the relevant document. After having discussed his or her preliminary assessment with the undertaking and DG Competition, the Hearing Officer may make a recommendation to the Competition Commissioner.
- (14) Second, under Article 4(2)(b), the Hearing Officer can be asked by an undertaking to make a recommendation on whether an addressee of a simple request for information pursuant to Article 18(2) may refuse to reply to a question by invoking the privilege against self-incrimination. The Hearing Officer may formulate a recommendation in appropriate cases, having regard to the need to avoid undue delay in the proceedings, and communicate his or her conclusions to DG Competition to be taken into account in case of any subsequent Article 18(3) decision. .

4. Conducting oral hearings

- (15) A core aspect of the Hearing Officer's functions consists of preparing, organising, chairing and conducting the oral hearing in antitrust, cartel and merger proceedings. If a party requests in its reply to the Statement of objections to be heard orally, the Hearing Officer:
- decides when oral hearings take place;
 - decides on whether or not complainants and third parties are to be heard and invites participants;
 - takes all appropriate steps to ensure the full effectiveness of the hearing; this may include consulting the case team on the key issues of a case, organising preparatory meetings with the parties together or separately with the case team, asking questions to the parties and the case team in advance of the hearing.

Upon the reasoned request of a party submitted before the hearing, the HO may allow the party to be heard separately in a closed session (*in camera*).

- (16) Operational units should coordinate their activities closely with the HO's team and take contact in good time, particularly on issues which may have an impact on the planning of hearings.
- (17) For more details, see modules on Access to file, Right to be Heard, Statement of Objection and Publications.

5. The Hearing Officer's reports

5.1. Interim report and observations

- (18) After the oral hearing, the Hearing Officer reports to the Commissioner on the hearing and the conclusions s/he draws with regard to the respect for the effective exercise of procedural rights (Article 14(1) of the Terms of Reference). The report covers all material procedural issues, including access to the file, confidentiality issues, time limits and the right to be heard. Procedural issues that arose in the context of the Commission's exercise of its investigatory powers (e.g., LPP,

protection against self-incrimination, right to be informed of one's procedural status) will also be covered in the report. The report is sent to the case team for comments only on the facts before being sent to the Commissioner, and is copied to the Director-general and the director responsible, as well as the Legal Service.

- (19) Separately from the interim report, the HO may also submit observations on the further progress and impartiality of the proceedings (Article 14(2) of the Terms of Reference). Such observations may relate among other things to the need for further reflection on certain aspects of the case, the need for further information, the withdrawal of certain objections, the formulation of further objections or suggestions for further investigative measures pursuant to Chapter V of Regulation 1/2003.
- (20) The case team should send its report on the hearing to the Hearing Officer before the Hearing Officer sends the interim report to the case team. The case team also should inform the Hearing Officer of the time frame they envisage for placing the case on the agenda of the Commissioner to discuss the reports on the hearing and the proposed next steps.

5.2. Final report

- (21) The Hearing Officer's final report, produced on the basis of the draft decision submitted to the Advisory Committee, must systematically be attached to the draft decision submitted to the College so that the latter is fully aware of all relevant information on the course of the competition procedure and the respect for the effective exercise of procedural rights. The Final Report also considers whether the final decision deals only with objections in respect of which the parties have been heard. It is therefore important for DG Competition, in the preparation of the final decision, to inform the Hearing Officer of any material change since the statement of objection (e.g. modification of the objections, new objection, use of new incriminating evidence, etc.).
- (22) The final report may be modified in the light of any amendments made to the draft decision prior to its adoption. The Hearing Officer should be kept informed of any change in the decision after the Advisory Committee.
- (23) In order to enhance the transparency of the procedure the final report must also be communicated to the addressees of the decision together with the decision itself, and to the competition authorities of the Member States and must be published in the OJ and on DG Competition's Website. Further information is available in the Module on Publications.

3 Cooperation with National Competition Authorities in EU and exchange of information in ECN

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1. Introduction

- (1) In the system of Regulation 1/2003, every case handler becomes involved in contacts and cooperation with Member States' National Competition Authorities (NCAs). Regular contacts at all levels, mutual trust and solidarity are of essence in the successful operation of the European Competition Network (ECN).
- (2) Articles 11 and 12 of Regulation 1/2003 create the basis for the cooperation and the exchange of information between the competition authorities interacting in the ECN with a view to efficient enforcement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Article 28 of this Regulation contains the professional secrecy rule meant to guarantee that the confidential information exchanged will be used by the Network members only as provided by the Regulation.
- (3) The Commission Notice on cooperation within the Network of Competition Authorities¹ sets out the main rules for cooperation and is obligatory reading for all case-handlers.
- (4) The Network uses an informatics application for recording the most important steps (opening of case, envisaged decision and closure) in enforcement cases dealt with by all Network members, including the Commission.²
- (5) This chapter explains the rules regarding the filling in and the follow-up to the information in the informatics application, including possible reallocation of cases and possible taking over by the Commission of a case dealt with by a NCA. It also describes the work sharing between the ECN Unit and the sectoral units.
- (6) This chapter furthermore explains the mechanism for the confidential transmissions of documents and information by way of a secure e-mail system operated by the Authorised Disclosure Officer. This means that case-handlers are not to make such transmissions themselves.
- (7) It should be pointed out that apart from the case-related information exchanges, there are also more general exchanges ranging from sectoral policy issues to a wide range of other issues. Besides public enforcement related and horizontal issues, information about intended or submitted *amicus curiae* briefs to national courts can be exchanged on a voluntary basis in order not to duplicate efforts.
- (8) The Network uses the Commission's CIRCA platform for other than case-related exchanges of information and for discussions. For access rights, contact the informatics unit or the ECN Unit.
- (9) The ECN has also opened its own website, accessible also to the public via the website of DG Competition. This is a useful portal to information about the Network and its basic texts in all available language versions, regularly updated figures on cases dealt with by different Network members and to NCA websites with their topical news.

¹ OJ C 101, 27.04.2004, pages 43-53.

² IT-application developed and centrally administered by the Commission (Unit COMP-R3).

2. Basic rules in relations with the ECN

2.1. Mission of the ECN Unit in Directorate A

- (10) The ECN unit gives guidance to case-handlers on all aspects of Regulation 1/2003, of the Commission implementing Regulation No 773/2004³ and of the related instruments, as regards the functioning of the Network.
- (11) In parallel, the mission of the ECN Unit comprises the coordination of the DGs relations with Member States in the field of antitrust, in particular with regard to the application of the antitrust rules by national competition authorities. The ECN Unit manages the ECN's general and horizontal activities. Apart from the networking on horizontal policy issues, this involves coordination work with regard to case allocation, the monitoring and scrutiny (in close cooperation with competent sectoral unit) of draft decisions/SOs from NCAs, advising on Article 11(6) measures (the initiation of procedures to ensure coherent application), the provision of informal assistance to NCAs (Help desk function) and the provision of assistance to sectoral units in DG Competition on ECN related issues. The ECN unit also ensures consistency across sectors in relations with the various Member States throughout the handling of DG Competition's own cases. It informs and where necessary consults within DG COMP on issues of relevance that come up in these contacts with the ECN.

2.2. Division of responsibilities in NCA cases

2.2.1. Introduction

- (12) Under the system created by Regulation 1/2003, national competition authorities are obliged to apply Articles 101 and 102 TFEU when an agreement/practice is capable of affecting trade between Member States. This requires and/or allows for contacts between all the competition authorities in the Network at various stages of the respective procedures:
- Case allocation discussions may take place at the initial phase of a case. Where 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. This will require the sectoral units to decide quickly whether or not they want to deal with certain cases (taking into account the priority setting mechanisms).
 - In order to maintain consistency in the application of European competition law, national authorities must inform the Commission before adopting certain types of decisions under Article 11(4). These “consultations” require an examination within a short deadline of 30 (calendar) days.
 - Assistance during the fact finding phase and in particular exchange of information pursuant to Article 12.
- (13) All DG Competition case-handlers have a direct access to the informatics application and its ECN case forms (“fiches”): a new case fiche, an envisaged decision fiche and a closed case fiche.

³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.04.2004, p. 18

- (14) DG Competition must monitor the fiches submitted to the informatics application, informing the Commission of a step taken in national procedures applying Articles 101 and 102 TFEU. Each sectoral unit needs an ECN responsible person, who regularly checks new fiches and, if appropriate, immediately draws the attention of the head of unit to cases of potential relevance to the unit (both with a view to avoiding duplication of efforts and ensuring consistency).

Case allocation monitoring on the basis of new case fiche

- (15) The ECN unit monitors the opening of cases within the network from a general allocation perspective. The ECN responsible person of each unit examines regularly all newly opened cases relevant to that unit. This monitoring aims at detecting multiple procedures and identifying cases where allocation criteria would normally favour action by the Commission.
- (16) Where more than three Member States have opened a case concerning the same infringement on their respective territories, this normally indicates that the Commission would be particularly well placed to deal with the case and that it should consider whether the enforcement priorities justify its intervention. If more than three authorities have opened investigations, this nevertheless does not mean that the Commission should systematically open investigations in such cases. The decision whether or not to investigate must be decided on the merits of the case.⁴
- (17) If a sectoral unit considers that the Commission should pursue a case first opened by an NCA, it should liaise with the ECN unit. For this type of reallocation from an NCA to the Commission, see below section 5. The follow-up of new case fiches may also indicate the possibility to apply Article 13 of Regulation 1/2003 allowing the Commission to suspend proceedings or reject a complaint. This procedure is explained in the Complaint handling module.

2.2.2. Consistency check on the basis of envisaged decision fiche and draft envisaged act

- (18) In parallel to the information received electronically via the informatics application, the Commission will receive from NCAs draft documents by secure electronic mail or by secure courier. The envisaged SO/draft decision arrives via encrypted mail at the antitrust registry, which decrypts it and uploads it into an internal database; the registry also sends an alert immediately to the ECN unit and the competent sectoral unit for follow-up. The registry provides the submitting NCA with an acknowledgement of receipt. The deadline set by Article 11(4) starts to run from the receipt of both the "envisaged decision fiche" in the informatics application and the text of the envisaged decision.
- (19) Given the very short timeframe within which the Commission has to examine envisaged decisions and, if so required, react, the information from NCAs on their SOs/draft decisions is dealt with by the ECN Unit as 'chef de file', in close cooperation with the operational units, depending on the language and economic sector involved. The ECN unit as 'chef de file' informs by note the competent sectoral unit of the arrival of a new envisaged decision from an NCA and indicates the name of the coordinator in the ECN unit responsible for the case. It also supplies an Excel calendar that assists with the planning of the work within the 30 day deadline.
- (20) The examination of the draft envisaged act is done both by the ECN Unit (from a horizontal coordination perspective) and by the competent sectoral unit(s) (from a sector perspective). The first step is to assess whether the NCA has submitted sufficient information for a proper

⁴ According to the Network Notice (paragraph 15), the Commission is particularly well placed if the case is closely linked to other European Union provisions which may be exclusively or more effectively applied by the Commission, if the interest of the European Union requires the adoption of a Commission decision to develop competition policy when a new competition issue arises or to ensure effective enforcement.

assessment. Where that is not the case, the sectoral unit informs the ECN unit which will take the matter up with the NCA concerned and keep the sectoral unit informed.

- (21) The ultima ratio for the Commission in this context is to initiate proceedings in accordance with Art. 11(6) of Regulation 1/2003. The Commission should use its power to initiate proceedings⁵ as a reaction to an envisaged decision received from a NCA only when the conditions in paragraph 54 of the Network Notice are met (Section 5 below). If a case raises very significant issues of coherent application, the timing must be observed closely: The 14th calendar day is the latest day for deciding within DG Competition on the possible initiation of proceedings under Article 11(6); this is the practical deadline by which DG Competition will have to send a note to the Commissioner requesting permission to launch this procedure.
- (22) For all cases that do not give rise to a recommendation to initiate proceedings, the examination proceeds during the 30 day period in the way initially agreed between the ECN unit and the sectoral unit, taking account of the time constraints arising due to, for example, absences in both services, exceptional requests from NCAs for early reaction, the need to consult the Legal Service etc. In this context, the dates indicated in the calendar prepared upon receipt of an envisaged decision serve as reminders of possibly needed actions to be able to complete the assessment within the given time; they are flexible but give an idea of where the assessment should be on these dates.
- (23) During the examination of the case, the ECN unit and the sectoral unit cooperate as agreed. Where appropriate, the case handlers meet. In general, the sectoral unit sends an e-mail or note setting out its position to the ECN unit when it has completed its examination. During the process, DG Competition can ask for additional information or clarification from the NCA in question (but not at this stage make observations). Such contacts with the NCA are made either by the ECN unit or by the sectoral unit, as agreed in the case at hand. Where appropriate, the ECN unit also calls on the policy unit in Directorate A for feedback where cases raise policy issues.
- (24) When setting up a team for scrutinising an envisaged decision, the ECN unit takes into account whether any linguistic help is needed. In cases where neither the coordinator in the ECN unit nor the case handler in the sectoral unit speak the language in question, this is done by calling upon a colleague from within DG Competition, who masters the language (language correspondent), or if this is not possible, by asking for DG Translation's help.
- (25) The results of the examination of the case are summarised in a case note that is normally prepared by the ECN unit, with the input from the sectoral unit. The case note summarises the contents of the envisaged decision, reflects the comments of the sectoral unit (if any), and sets out the proposed follow-up. The case note is addressed to the Legal Service for consultation before any observation is communicated to the NCA. The consultation is carried out by the ECN unit. The Legal Service has accepted to react within 3 days for notes without comments and oral comments, 5 days if a written note is proposed to be sent to the NCA. Only after the agreement of the LS is received can observations on the substance of the case be addressed to the NCA.
- (26) The reaction to the NCA will depend on the issues raised by the envisaged decision. When a case does not call for comments, the ECN Unit informs the NCA informally that the matter has been closed. When minor observations are made, the ECN unit will set up a conference call with the NCA, to which the sectoral case handler is invited. The line to be taken is determined by the case note and the corresponding reaction of the Legal Service. In cases which call for more fundamental observations, DG Competition's views can be set out in writing in a letter to the NCA. Any observations are to remain internal to the Network and are not disclosed to the parties.

⁵ The "initiation of proceedings for the adoption of a decision" must not be confused with "commencing the first formal investigative measure" within the meaning of Article 11(3).

- (27) In all cases, it is the final responsibility of the NCA how it responds to observations from DG Competition. As a rule, observations are left with the NCA to consider unless the NCA itself suggest another way of proceeding. In exceptional cases, DG Competition may ask for a further follow-up such as the communication of a revised draft, transmission of the decision as finalised etc.
- (28) In principle, the handling of envisaged decisions should be completed within the 30 day deadline. In practice, it can happen that due to the non-availability of the NCA case handler, telephone conferences are scheduled shortly after the 30th day. Exceptionally, it can be agreed with the NCA to continue discussions beyond the 30th day if time is available on the part of the NCA.
- (29) Should the Commission decide to open proceedings itself, the case would become the full responsibility of the sectoral unit in accordance with normal DG Competition procedures, as set out in the relevant parts of the ManProc.
- (30) The Commission can also request that a case dealt with by an NCA is discussed in an Advisory Committee. The Commission would put the case on the agenda after having informed the NCA concerned. This discussion will not lead to a formal opinion. This option will rarely be practicable due to the deadlines involved and has not so far been used.

2.2.3. Monitoring of cases on the basis of closed case fiche

- (31) The monitoring of cases which NCAs finally close is done jointly by the ECN unit and the sectoral unit concerned.
- (32) For cases closed after the submission of an envisaged decision, particular attention is given to the further development (court review) where appropriate.

2.2.4. Informal contacts

- (33) Some NCAs consult DG Competition already prior to the formal consultation obligations on their cases, e.g. in ECN sector subgroups or bilaterally. The ECN unit should always be kept informed about such discussions. If a policy line is to be taken in these informal contacts, the sectoral unit should speak to the ECN unit before agreeing with the NCA on that line. Where, in the context of informal contacts, the ECN unit obtains information on a given sector or on a particular case, it should keep the unit concerned informed.

2.3. Division of responsibilities in Commission cases

2.3.1. Issues of cooperation raised during/by a case dealt with by DG COMP

- (34) The Commission has undertaken to inform the other Network members on the important procedural steps in its cases by means of submitting new case 'fiches', envisaged decision 'fiches' (at the stage when the draft decision is sent to the Advisory Committee via encrypted mail) and closed case 'fiches'. Case teams are responsible for ensuring that these fiches are completed and submitted in the informatics application.
- (35) When a case dealt with by a sectoral unit raises an important issue of cooperation with the NCAs, the ECN Unit should be consulted so as to maintain consistency across sectors in the relationships with the various NCAs. This consistency should exist throughout the handling of cases by DG Competition and encompasses, for example

- legal issues with respect to assistance during inspections and other general questions concerning investigative powers;
- issues concerning information exchanges;
- discussions, in the context of an individual case, on important general/policy issues or on matters relating to the Advisory Committee.

2.3.2. Preparation and submission of ‘fiches’ in the informatics application

- (36) *New case fiche.* New ex officio cases opened should be reported before or without delay after commencing the first formal investigative measure. Articles 18 to 21 of the Regulation describe the Commission’s investigative powers, which are a request for information (simple or by decision), an interview of a natural or legal person, inspections of undertakings or other premises (simple or by decision). Note that if the first formal investigative measure is an unannounced inspection, the fiche is never submitted before the inspection but soon afterwards.
- (37) Complaints are reported only if there are investigative steps taken or envisaged and when the head of unit considers the reporting appropriate. By inserting a case in ECN Interactive, the Commission signals to the Network that in principle it intends to deal with the case.
- (38) *Updates and envisaged decision fiche.* An update must be provided in the IT-application where relevant changes occur in the case. In particular this must be done by submitting the envisaged decision fiche to mark that the Commission has reached the preliminary draft decision stage when the documents are sent to the Advisory Committee.⁶ Other updates can relate for instance to the parties, to the qualification of the practice under investigation, to the timeframe or to the indications of the relevant product and/or geographic market. In certain fields, up-dates will be marked as such.
- (39) *Closed case fiche.* The closed case fiche is submitted promptly after the closure of the case. An appeal against the decision does not prevent its submission. Should the appeal be successful, the closed case fiche can be updated accordingly.

2.3.3. Division of responsibilities in non-case related cooperation within the ECN

- (40) The ECN unit deals with ECN relations on general issues (ECN Plenary, general policy workshops and expert meetings, ...), putting in place of administrative arrangements with NCAs, assisting NCAs in adapting national legal frameworks and advising them on legal and policy issues. Within the ECN unit, the official responsible for the country in question serves as a contact for all issues of cooperation arising with a particular Member State.
- (41) Sectoral Directorates are responsible for the management and annual planning of sectoral ECN subgroups. The NCAs participate in the agenda setting and possibly the chairing or co-chairing of the meetings. Sectoral ECN subgroups can be set up after discussion in the ECN Plenary. The ECN unit should be regularly informed about their activities. The ECN unit has a contact person for each sectoral subgroup.
- (42) Planning of all ECN activities including sectoral subgroup questionnaires and meetings shall be made on an annual basis.

⁶ The ECN case statistics’ accuracy depends on the Commission also systematically submitting the information to the informatics application.

Synoptic Table A: Cooperation with NCAs, Division of tasks

	ECN Unit	Sectoral Units	Directorate R
<p>Case allocation</p> <p><i>Information pursuant to Article 11(3)</i></p>	<ul style="list-style-type: none"> - monitors the opening of cases by NCAs from a general case allocation perspective - has to be consulted before a sectoral unit contacts an NCA on case allocation (either reallocation from the Commission to the NCA or vice versa) 	<p>The ECN responsible within the sector concerned:</p> <ul style="list-style-type: none"> - detects duplication of proceedings; - assesses whether a given case requires Commission action. 	<p>Interface with the internal case management database</p>
<p>Consistency</p> <p><i>Information pursuant to Article 11(4)</i></p> <p><i>("NCA case consultation")</i></p>	<ul style="list-style-type: none"> - ECN unit is chef de file: - it examines the draft from a coordination perspective; - it prepares the response to the NCA. 	<ul style="list-style-type: none"> - Sector directorate examines the draft simultaneously with the ECN unit, from a sector perspective and provides input as necessary. 	<p>The draft decision /draft SO is addressed by the NCAs to the registry via secure e-mail. It is immediately decrypted and sent to the ECN unit as well as to the sectoral unit concerned.</p>
<p>Consistency</p> <p><i>Initiation of proceedings pursuant to Article 11(6)</i></p>	<p>Joint responsibility of the sectoral and the ECN unit.</p>		
<p>Monitoring of cases</p> <p><i>"Closed case fiche"</i></p>	<p>Joint responsibility of the sectoral and the ECN unit.</p>		
<p>Informal contacts</p>	<p>When getting information relating to a certain sector, the ECN should keep the sector unit informed.</p>	<p>Before taking a policy line in an informal contact, sector units should inform the ECN unit.</p>	

3. Reallocation of a case to an NCA

- (43) The steps to be followed to re-allocate a registered DG Competition case to a Member State competition authority are as follows. See also special instructions regarding Complaint handling in the relevant module.
- (44) The sectoral unit responsible for the case consults the ECN Unit on the basis of a short description of the case regarding the opportunity of re-allocating the case. As a matter of principle, re-allocation of a case to an NCA should only occur for cases which are considered worthwhile to be investigated.
- (45) If there is agreement on the reallocation, the sectoral unit contacts informally the NCA concerned, describes the case and inquires whether the NCA would be interested in taking it forward. However, if the sectoral unit does not know whom to address in the NCA, the ECN Unit can assist with the contact.
- (46) If the NCA is willing to take up the case, the sectoral unit prepares a letter transmitting the information pursuant to Article 12 with a copy of the file attached. The letter should:
- state the legal basis of the transmission (Article 12);
 - ask for confirmation on the part of the NCA that it will investigate the case;
 - as appropriate, draw the attention of the NCA on confidential information or other points for attention.

4. Transmission of information to national authorities

4.1. Role of the Authorised Disclosure Officer (“ADO”)

- (47) The Commission and all other ECN members have appointed Authorised Disclosure Officers (“ADO”) to ensure that confidential information is being transmitted in an appropriate way⁷. In the Commission the ADO holds the key to the secure e-mail system, and therefore is the person who receives/sends messages from/to NCAs where the use of this system is necessary.
- (48) For the Commission, the antitrust ADO is the Head of the antitrust registry. For the purposes of sending documents to the Advisory Committee, also the secretariat of the Advisory Committee

⁷ The ADO function is essentially linked to the cooperation mechanisms established by the antitrust modernisation under Regulation 1/2003 and more in particular to the Article 12 exchange of information and the Articles 20-22 investigation cooperation. Therefore, while many network members have organised their formal communication channels so that the ADO is the central entry and exit point between them and the Commission and also between all network members, the only communications which must pass by the ADO are those which in a strict sense relate to enforcement cooperation between network members. This means, for instance, that when the Commission informs or consults national authorities with a view to applying Articles 7, 8, 9, 10 and 29(1) of Regulation 1/2003, the participation of the ADO in this sense is not called for.

Whether or not the ADO intervenes in person, the confidentiality of documents sent out by the Commission must in any event be fully protected by the receiving authority, but the Commission cannot widen the agreed scope of intervention of the ADO. This is why the ECN members have asked that the Commission indicates in the transmissions what the legal basis is, so that they can easily assess whether the ADO must intervene in person.

can use the secure mailing system. Likewise, for the purposes of hearings, the team of the Hearing Officer can use this system.

- (49) When a Network member sends a communication to DG Competition, the ADO has the responsibility to ensure that it reaches the appropriate persons within DG Competition, in decrypted form, without delay.
- (50) When information should be sent to Network members, the case-handling unit is responsible for determining in each particular case if the nature of the information is so sensitive – business secrets or other confidential information, network- as well as internal communications – that it needs to be sent with encryption via the ADO.
- (51) When asking for an encrypted transmission to the NCAs to take place, the case-handling unit sends a message to the mailbox of the DG Competition ADO and furthermore indicates the subject line of the mail to be sent, as explained below. It is important to recall that this subject line is never encrypted and, therefore, must be worded with care. After adding encryption the registry will forward the unit's mail to the NCAs.
- (52) The NCA's ADOs have asked that they should not be the addressees of communications that do not require particularly confidential treatment. Instead, such communications can be sent to the general contact points of the NCAs. In case of doubt whom to send a communication to, please ask for advice from the ECN unit.

4.2. What information is transmitted?

4.2.1. Article 11(2) of Regulation 1/2003

- (53) Certain information and documents are sent to the competition authorities of the Member State without prior request. This rule applies to the “most important documents the Commission has collected with a view to applying Articles 7 to 10 and 29(1) of Regulation 1/2003”. The legal basis is Article 11(2) of Regulation 1/2003. This transmission is done, systematically and upon instruction of the case team or the responsible unit.
- (54) The documents which should systematically be transmitted to the Member States are:
 - a. all admissible complaints upon their registration as cases, subject to any redaction needed to respect request for anonymity;
 - b. formal fact-finding measures:
 - requests for information by decision pursuant to Article 18(3) are sent for information to the competition authority of the Member State on whose territory the undertaking is located and whose territory is affected (see Article 18(5)). If this undertaking has a mother company in another Member State, a copy can also be sent the latter Member State;
 - inspections based on a simple mandate (Article 20(3)): in good time before the inspection, the Commission must give notice of the inspection to the NCA of the Member State in whose territory it is to be conducted;
 - inspections ordered by decision (Article 20(4)): Advance consultation of the Member State in whose territory the inspection is to be conducted; in case the officials of the Member State in question did not assist the Commission, also information after the inspection;
 - sector inquiry decisions (Article 17): draft decision sent for Advisory Committee consultation;

- c. decisions imposing provisional periodic penalty payments : copy is sent to all Member States;
 - d. preparatory acts:
 - initiation of proceedings (Article 11(6)) : information is sent to all Member States;
 - statement of objections: copy is sent to all Member States;
 - preliminary assessment in Article 9 proceedings;
 - invitation to hearings: sent to all Member States;
 - Article 27(4) market test publication for the Official Journal : copy of draft to all Member States after approval of the Commissioner and before publication;
 - the tape recordings on hearings are sent to the Member States on case by case basis, but only if they make an explicit request;
 - the final report of the Hearing Officer⁸;
 - e. undertakings' replies to Statements of Objections and to Article 27(4) publications: copy to all Member States;
 - f. information about closure of a case where proceedings had been opened:
 - rejections of complaints pursuant to Article 13 of Regulation 1/2003 or Article 7 of Regulation 773/2004, subject to any redaction needed to respect request for anonymity;
 - decisions which must be published (in summary format) (Art. 30 Reg. 1/2004): first, SG sends the operative part by fax to all NCAs; then, the case-team instruct the Antitrust Register to send the full text of the decision (i.e. including confidential information and indication of figures on fines) to all NCAs in the languages available via the encrypted mail promptly (within two weeks) after the adoption of the decision;
 - every three months a list of all closed cases is drawn up for the Member States by the Antitrust Registry.
- (55) On the basis of Article 11(2), second sentence, the national authorities are also entitled to receive, upon request, copies of other existing documents necessary for the assessment of the case.

4.2.2. Article 12 of Regulation 1/2003

- (56) Article 12 allows the NCAs to ask the Commission to provide them with information. In principle, the Commission should accede to such request unless there are compelling reasons to refuse.
- (57) The request can refer to any kind of information: documents, statements, digital information. It is normally not necessary for the Commission to verify, assess and decide on the confidentiality of information before transferring it to another competition authority. The confidential nature of the information does not constitute an obstacle to its transmission to another Network member, with the exception of the specific rules and conditions applying to the treatment of information relating to leniency applications. In this latter respect, it must be remembered that the Commission can

⁸ See Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings, (OJ L 275 of 20.10.2011, p. 29), Art. 16

only transmit information received under a leniency programme if the conditions of paragraphs 40 and/or 41 of the Network notice are respected. For more information on the treatment of leniency cases, see also the relevant module.

4.2.3. Specific confidentiality safeguards

- (58) In exceptional cases where a risk exists that a Member State competition authority could not guarantee that commercially sensitive information is not used by another “arm of the State” for purposes other than the enforcement of Articles 101 and 102 TFEU, the Commission would need to take the necessary safeguarding measures respecting the ruling of the Court in the *SEP* case⁹. If it wishes to transmit a document to the competent national authorities, notwithstanding the claim that in the particular circumstances of the case that document is of a confidential nature with respect to those authorities, the Commission will have to adopt a reasoned decision amenable to judicial review by means of an action for annulment. It is through an action for the annulment of such a decision that the undertaking might effectively rely on its right to protection of its business secrets.
- (59) In those cases where the Commission has decided which information is to be treated confidentially – as the case could be with respect to requests for public access to documents under Regulation 1049/2001 or with respect to questions decided by the Hearing officer in the application of the *Akzo* procedure (very exceptionally, in the application of the *SEP* case law mentioned in previous paragraph) – the transmission should indicate which parts of the exchanged information are thus regarded as confidential.
- (60) Where the parties have provided a non-confidential version of the information, it is recommended to also include this version in the transmission pursuant to Article 12.

4.2.4. The reply to a transmission request

- (61) The following instructions start from the assumption that the Commission is in possession of the requested information. Where that is not the case, the case team should indicate this during the informal contacts to the other authority. If the case-handler realises after having informally agreed to the transmission that the Commission is not able to send the requested information, this should be briefly and without delay explained to the requesting authority. If need be, the impossibility of transmission can be confirmed in writing by the head of unit.
- (62) There could be such an impossibility to transmit the requested information in the Commission’s possession in the following situations:
- A leniency applicant does not consent to the forwarding of (some of) his submissions and the consent is needed. This follows from the Network Notice (cf. points 40 and 41);
 - The information was received from an informant having provided market information, as compared to a formal complainant, and the informant does not consent to the forwarding of the information. This is essential to respect the trust of the informant and to create a framework where potential informants are not inhibited from providing such information.
- (63) Other situations where the case-handler concluded on such impossibility should be communicated to the ECN unit for a common position.

⁹ See judgments in Cases *Samenwerkende Elektriciteits-Productiebedrijven (SEP) NV v Commission*, T-39/90 [1991] ECR II-1497 and C-36/92 P [1994] ECR I-1911.

- (64) The transmission of the requested information can be authorised by the responsible head of unit. Except in cases where no confidentiality issue exists, the exchange of information takes place in encrypted form via a secure e-mail system. Therefore, except in cases where no confidentiality issue could arise, case teams should not send the requested documents themselves but instead provide the necessary information and documents to the ADO of DG Competition, who takes care of the transmission.
- (65) Information should be sent to the person whose contact details are indicated in the request. However, if the other authority has given in the request a name other than the ADO, sensitive information should always be sent from the ADO of the Commission to the ADO of the requesting authority.
- (66) If the documents exist in electronic form preference should be given to an electronic transfer, unless deemed inappropriate.
- (67) If the language of the transmitted information is different from (one of) the official language(s) of the receiving authority and if the request does not lead to an unreasonable burden on the unit responsible for the transmission, it will in principle provide the receiving authority with an index of that information in a language understood by the latter.
- (68) The note accompanying the requested information should indicate:

- in which case the information was obtained (e.g. case x against party y) and the subject-matter for which it was collected;
- where, when and how the information was obtained (e.g. inspection, formal information request, informant or informal telephone conversation);
- whether there are any pending claims by the parties regarding this information;
- whether any of the information gathering measures were challenged before a court;
- whether, and at what stage, the Commission has any inquiries still pending;
- whether, to what extent and for which reasons, the parties claim confidentiality; it is possible to group together documents for which confidentiality is claimed.

- (69) The transmission should take place as soon as possible and no later than within one month from the date of receipt of the request.

4.3. Informing the providers of the information of the transmission

- (70) If the information was provided to the Commission by a complainant, the latter may be informed of the transmission, after contacting the receiving authority to make sure that such a measure would not jeopardise its investigations. The undertaking complained of and other parties, as suppliers of information, may also be informed if the responsible head of unit considers it appropriate and after contacting the receiving authority to make sure that such a measure would not jeopardise its investigations.

- (71) As regards leniency cases, if the leniency applicant has consented to the transmission and also where the consent of the leniency applicant is not necessary for the transmission of information, the case-handling unit will inform the leniency applicant of the transmission as soon as possible after the transmission, after contacting the receiving authority to make sure that such a measure would not jeopardise its investigations.

5. Opening of proceedings by the Commission to relieve an NCA of its competence

- (72) This section only concerns cases where the Commission wishes to initiate proceedings with a view to relieving an NCA of its competence in a pending case where the NCA is acting on the case and perhaps already envisages a decision and therefore has sent to the Commission information pursuant to Article 11(4).
- (73) After the initial allocation period the Commission will normally not open proceedings unless one of the following situations arises:
- Network members envisage conflicting decisions in the same case;
 - Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgments of the courts of the European Union and in previous decisions and regulations of the Commission should serve as a yardstick; concerning facts, only a significant divergence will trigger an intervention of the Commission;
 - Network member(s) is (are) unduly drawing out proceedings;
 - There is a need to adopt a Commission decision to develop European competition policy in particular when a similar competition issue arises in several Member States;
 - The national competition authority does not object.
- (74) Where the Commission decides to open proceedings with the effects of Article 11(6) as a follow-up to information by the NCA pursuant to Article 11(4) of Regulation 1/2003, it should do so as soon as possible. In practice, since the initiation of proceedings in cases where a national authority is dealing with the case must be adopted by the College (in the absence of an empowerment), it is unlikely that the formal steps can be taken before the last days of the deadline. However, as soon as there is an agreement of principle of the Cabinets, the imminent adoption of the act can be communicated to the NCA.
- (75) In these special cases where an NCA is to be relieved quickly of its competence, the initiation of proceedings is a stand-alone procedural act.
- (76) The decision to open proceedings is addressed and notified to the parties subject to the proceedings (for details, see module on opening of proceedings).
- (77) The initiation of proceedings is not made public before informing the parties concerned (Article 2 of Regulation 773/2004).

4 Cooperation between the Commission and national courts

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1. The legal framework for cooperation between the Commission and national courts

- (1) Article 4(3) of the Treaty on European Union, as interpreted by the Court of Justice (e.g. in Case C-2/88 – Zwartveld), obliges the Commission to cooperate with national courts in the application of Articles 101 and 102 TFEU.
- (2) Article 15 of Regulation 1/2003 renders this obligation concrete by providing tools for the cooperation between the Commission and national courts:
 - Article 15(1): the national court can ask the Commission for information in its possession or for its opinion concerning the application of Articles 101 and 102 TFEU;
 - Article 15(2) provides that national courts must forward to the Commission a copy of any written judgment on an application of Articles 101 or 102 TFEU;
 - Article 15(3): the Commission (and the NCAs) can submit written and, with permission of the court, oral observations to national courts.
- (3) The Notice on co-operation between the Commission and national courts (hereafter: the “Notice”) further explains how this co-operation is put in practice.¹ This chapter should be read in conjunction with that Notice, which sets out the policy of the Commission with regard to cooperation with national courts.

2. General principles of cooperation

- (4) The Notice explains in para. 19 the general principles underlying the Commission’s cooperation with national courts as follows: “It should be recalled that whatever form the co-operation with national courts takes, the Commission will respect the independence of national courts. As a consequence, the assistance offered by the Commission does not bind the national court. The Commission has also to make sure that it respects its duty of professional secrecy and that it safeguards its own functioning and independence. In fulfilling its duty under [Article 4(3) of the Treaty on European Union], of assisting national courts in the application of EC competition rules, the Commission is committed to remaining neutral and objective in its assistance. Indeed, the Commission's assistance to national courts is part of its duty to defend the public interest. It has therefore no intention to serve the private interests of the parties involved in the case pending before the national court. As a consequence, the Commission will not hear any of the parties about its assistance to the national court. In case the Commission has been contacted by any of the parties in the case pending before the court on issues which are raised before the national court, it will inform the national court thereof, independent of whether these contacts took place before or after the national court's request for co-operation.”
- (5) The obligation to assist national courts only exists when the latter apply EU law.

¹ OJ 2004 C 101/54. see <http://ec.europa.eu/competition/antitrust/legislation/courts.html>.

3. The most frequent types of cooperation and how they are dealt with in DG Competition

3.1. Requests for information (Article 15(1) of Regulation 1/2003)

- (6) The principles governing requests for information are explained in paras. 21 to 26 of the Notice. The following indications should be read in conjunction with the Notice.

3.1.1. What kind of information?

- (7) What kind of information can be requested by a national court is explained in paras. 21 to 22 of the Notice: the information requested will be mainly documents, but also information of a procedural nature can be requested (e.g. whether the Commission has initiated proceedings in a given case, or when a decision is likely to be taken).
- (8) Only information already in the possession of the Commission can be asked for. Consequently, no investigation should be carried out to get (further) information with the sole purpose of transmitting that information to the national court.
- (9) The request for information must be concrete. In case of a general request (e.g. for a whole file in a given case), the national court should be asked whether it can specify more precisely the information it seeks.
- (10) Where possible, the information transmitted should be in the language of the request. There is no obligation, though, to translate information with a view to transmission.
- (11) The basic philosophy of Article 4(3) EU Treaty (Art. 15(1) Reg. 1/2003) is that the Commission should transmit whatever information in its possession the national court asks for. There are however some exceptions based on the case law of the Courts which are spelt out in paras. 23 to 26 of the Notice. These principles can be summarised as follows:
- When the information requested is covered by professional secrecy (such as business secrets), DG Competition has to ask the national court whether it can and will guarantee protection of that information:
 - when the court gives such guarantee, the information should be transmitted, indicating which parts cannot be publicly disclosed;
 - when the court cannot give such guarantee, a non-confidential version of the information should be transmitted where possible.
 - The Commission may refuse in specific circumstances to transmit information for overriding reasons relating to the need to avoid interference with its functioning and independence, in particular by jeopardising the accomplishment of the tasks entrusted to it (see para. 26 of the Notice).
- (12) A national court should always receive the information that is publicly available via requests based on Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001, L 145/43).

3.1.2. When should the information be provided?

- (13) The Commission states in its Notice that it will endeavour to provide the information within one month from the date the Commission receives the request. In case DG Competition has to ask the national court for further clarification or where it has to consult those directly affected by the transmission (e.g. the undertakings that provided the information), the period starts to run from the moment DG Competition receives that additional information.
- (14) In order to respect the one month deadline, it is advisable that the sectoral unit chef de file contacts Unit A1 when the request arrives and not only before the transmission of the information (see subsequent point (20)).

3.1.3. How are requests for transmission of information dealt with in DG Competition?

a) Registration and allocation to competent unit

- (15) Requests arrive electronically (preferably via the dedicated functional mailbox COMP-AMICUS) or via traditional mail at the registry. If someone else in DG Competition receives a request for information from a national court, it should be passed on immediately to the registry for registration.
- (16) The registry assigns the request upon receipt to the competent sectoral unit as chef de file (with copy to Unit A1 for info) where the request concerns a sector-specific information. Unit A1 is put in copy. A1 is chef de file for non-sector specific requests.
- (17) If necessary, the competent unit will ask for the translation of the request for information.

b) Information covered by professional secrecy

- (18) If the information that is requested is possibly covered by professional secrecy, the competent unit will ask the national court whether it can and will guarantee protection of that information (see point (11) for the consequences of the court's reply.)
- (19) In order to inform the national court about which parts of the transmitted information cannot be publicly disclosed (in case the national court has given a confidentiality guarantee) or in order to make a non-confidential version of the requested information (in case the national court has not given a confidentiality guarantee), the competent unit should examine which (parts of the) documents are covered by professional secrecy. It may be necessary to consult the legal or natural person or authority from whom the information originates to determine whether or not the information is (still) covered by professional secrecy at the moment of transmission or if they have other grounds to oppose disclosure. In case of disagreement with the disclosure of the requested information (or the arrangements for the protection of its confidentiality), the AKZO-procedure would apply (see Module on Access to the file).

c) Consultation, translation and sending

- (20) The unit chef de file consults Unit A1 on the draft letter. The unit that is *chef de file* should consult the Legal Service ("LS"), e.g. where the transmission of the information could raise a significant legal issue. The LS must have at least 5 working days to give its opinion.

- (21) The letter accompanying the transmission of the requested information is signed by the Director of the competent unit. The letter should be drafted in the language of the request. A copy of this letter must be transmitted to A1 to enable accurate records to be kept.

d) Special case: the refusal to transmit information requested by a national court

- (22) The refusal to transmit information has to be duly reasoned. Unit A1 and the LS must be consulted on the refusal and must be given 5 working days to react. The letter of refusal has to be signed by the Director General.

3.2. Requests for an opinion on questions concerning the application of 101 or 102 TFEU (Article 15(1) of Regulation 1/2003)

- (23) The principles governing requests for opinions are explained in paras. 27 to 30 of the Notice. The following indications should be read in conjunction with the Notice.

3.2.1. What kind of opinion?

- (24) The kind of opinion which the Commission may be called upon to provide is spelt out in paras. 27 to 30 of the Notice: “When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification asked for, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of Community law by the Community courts, the opinion of the Commission does not legally bind the national court.”
- (25) Where guidance in the case-law of the EU courts or in Commission regulations, decisions, notices and guidelines applying Articles 101 and 102 TFEU would offer sufficient guidance to the national court, it should be reflected whether the opinion given could focus on a reference to the relevant pieces of EU law and an explanation thereof.
- (26) Where the request raises novel issues, the opinion may also suggest to the national court to have recourse to a preliminary ruling to the ECJ pursuant to Article 267 TFEU.
- (27) The opinion should be written in the language of the request.

3.2.2. When should the opinion be provided?

- (28) The Commission states in its Notice that it will endeavour to provide the opinion within four months from the date the Commission receives the request. In case DG Competition has to ask the national court for further clarification, the period starts to run from the moment DG Competition receives that additional information.
- (29) In order to respect the four months deadline, it is advisable that the sectoral unit chef de file contacts unit A1 when the request arrives and not only before the transmission of the information.

3.2.3. How are the requests for an opinion dealt with in DG Competition?

a) Registration and allocation to competent unit

- (30) Requests arrive electronically (preferably via the dedicated functional mailbox COMP-AMICUS) or via traditional mail at the registry. If someone else in DG Competition receives a request from a national court, it should be passed on immediately to the registry for registration.
- (31) The registry assigns the request upon receipt to the competent sectoral unit as chef de file (with copy to Unit A1 for info) where the request concerns a sector-specific information. Unit A1 is put in copy. A1 is chef de file for non-sector specific requests.
- (32) The sectoral unit will normally be considered to be chef de file whenever the request is closely related to and focused on specificities of the sector and/or closely linked to a case (being) dealt with by the sectoral unit (e.g. market definition). Where both non-sector specific policy issues and sectoral issues are at stake, the chef de file should be decided on a case-by-case basis, taking into account the relative weight of the issues involved. In that case, the other unit (non-chef de file) will be closely involved in the drafting of the opinion.
- (33) If necessary, the competent unit will ask for the translation of the request.

b) Consultation and sending: Procedure to be followed for a reply to a request for an opinion

- (34) The task of issuing an opinion of the Commission requested by a national court has been conferred by the College to the Competition Commissioner by empowerment, who has sub-delegated it to the Director General of DG Competition.
- (35) The Commission's reply to the request of a national court is composed of a letter of transmission and an opinion as an annex of this letter. The letter of transmission is signed by the Director General and the annex contains the text of the opinion itself. This means that the content of the letter of transmission is not part of the opinion.
- (36) The letter of transmission should draw the court's attention to the fact that the Commission may publish its opinions on its webpage and intends to do so in the relevant case once a judgment has been rendered. The letter should also give the court the opportunity to present any objections against such publication. If a working language version of the opinion exists in a more commonly understood language than the authentic version (for instance, where the opinion has internally been processed in EN or FR), it may be appropriate to publish also this working language version. If so, this should also be mentioned in the letter to the court.

3.3. The submission of written or oral observations to national courts (Article 15(3) of Regulation 1/2003) (*amicus curiae* intervention by the Commission)

- (37) The principles governing the submission of observations are explained in paras. 31 to 35 of the Notice. The following indications should be read in conjunction with the Notice.
- (38) Different from the requests for information or for an opinion, the submission of observations to a national court is done on the initiative of the Commission. Oral submissions can only be submitted with the permission of the national court.

3.3.1. Observations on what?

- (39) The Commission will only submit observations when the coherent application of Articles 101 or 102 TFEU so requires (see Court of Justice, Case C-429/07, *Inspecteur van de Belastingdienst*). The decision to submit observations should always be made with regard to the purpose of Article 15(3): the coherent application of Articles 101 or 102 TFEU. The Notice states in this respect: “The regulation specifies that the Commission will only submit observations when the coherent application of Articles [101] or [102] EC so requires. That being the objective of its submission, the Commission will limit its observations to an economic and legal analysis of the facts underlying the case pending before the national court.” Inter alia because also NCAs can submit observations to national courts, submissions by the Commission are more likely to be appropriate before last instance courts in the Member States.

3.3.2. When should observations be submitted?

a) *How will DG Competition know about a pending case?*

- (40) DG Competition may have knowledge about individual cases from different sources, notably
- because (one of) the parties inform(s) DG Competition (this does not oblige the Commission to act, though). Requests (e.g. by parties) to submit observations to a national court will be registered and passed to Unit A1;
 - because DG Competition receives a copy of the judgment under appeal pursuant to Art. 15(2) of Reg. 1/2003. Unit A1 or the competent sectoral unit may pro-actively wish to find out whether one of the parties seeks relief with the last instance court. Unit A1 unit or the competent sectoral unit will not contact the parties to this end, but it will consider whether information can be sought with the registry of the last instance court and may liaise with the LS in this respect.

b) *Timing*

- (41) It is advisable to coordinate the timing of submission of the intended amicus curiae observation at least informally with the addressee court.

3.3.3. How is the preparation of submissions dealt with in the Commission?

- (42) The DG Competition Policy Director (Director of COMP/A), upon the suggestion of Unit A1 and in co-operation with the competent sectoral unit, may propose that the Commission submit observations to the national court.
- (43) Unit A1, in co-operation with the competent sectoral unit, will solicit the views of the LS on whether it agrees with the proposal to submit written or oral observations. Unit A1, in co-operation with the competent sectoral unit, will liaise with the cabinet of the Member of the Commission with special responsibility for competition to ask for approval of such a submission.
- (44) The submissions made pursuant to Article 15(3) require approval by the College of Commissioners. The approval to lodge submissions is to be sought by a communication of the President of the Commission in agreement with the Member of the Commission with special responsibility for competition.
- (45) The LS is chef de file both for requesting the approval of the College and for the actual submission. It will draft the written observations and present the oral observations (possibly in the presence of an appropriate DG Competition official).

- (46) Depending on the nature of the issue at stake (e.g. horizontal issue or sector-specific issue), assistance on the substance will be given by Unit A1, or by the sectoral unit, after having consulted Unit A1. Procedural assistance (e.g. asking the national court to transmit or ensure the transmission of a copy of all documents that are necessary for the assessment of the case) will be given by Unit A1.
- (47) If no assistance is asked for by the LS, Unit A1 will ensure that DG Competition is duly consulted about the content of the observations.

5 International Relations: Cooperation with Competition Authorities in third Countries

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1. Agreements with third countries and other instruments of cooperation

- (1) The EU has concluded numerous agreements with third countries which lay down **provisions** on cooperation if the EU enforcement activities affect important interests of these countries. The provisions vary largely, depending on the type of agreement (notification obligations, cooperation etc.)¹.
- (2) Specific cooperation provisions have to be followed when the Commission applies the competition rules of the **EEA Agreement** (Agreement on the European Economic Area). Articles 53 and 54 of the EEA Agreement are virtually the same as Articles 101 and 102 of the TFEU. The EEA Agreement is applicable if trade between one or more EU Member States and one or more EFTA Member States parties to the Agreement (Norway, Iceland and Liechtenstein) is affected: Therefore, case handlers should always verify whether not only Articles 101 and 102 of the TFEU but also the equivalent provisions of the EEA Agreement (Articles 53 and 54) are applicable. This will generally be the case if the "competition problem" concerns the whole of the EEA. When the Commission applies Articles 53 and 54 of the EEA Agreement the provisions on cooperation with the **EFTA Surveillance Authority** (ESA) have to be followed (see section 2 hereunder).
- (3) **Dedicated cooperation agreements** in competition matters have been concluded with the United States, Canada, Japan and Korea. Principle elements are mutual information, co-ordination of enforcement activities and exchange of non-confidential information. The agreements contain furthermore provisions on the possibility for one party to request the other to take enforcement action (**positive comity**), and for one party to take into account the important interests of the other party in the course of its enforcement activities (**traditional comity**).
- (4) The European Union has also concluded numerous **Association, Economic Partnership and Free Trade Agreements**, in particular the EuroMed Agreements (Morocco, Algeria) and with Latin American Countries (Chile, Mexico, Caribbean Community, Central America, Colombia and Peru). These agreements usually contain basic provisions on cooperation in competition matters.
- (5) A **Customs Union Agreement** is in place with Turkey.
- (6) **Non-binding arrangements** have been concluded with China, Brazil and Russia. As regards China, the "*Terms of Reference of the EU-China Competition Policy Dialogue*" lay down provisions to exchange experiences and views on competition matters. A "*Memorandum of Understanding*" was signed with the competition agencies of Brazil establishing a framework for cooperation and exchange of information; a similar Memorandum has been signed with Russia.
- (7) **OECD:** Cooperation between the Commission and the competition authorities of other OECD member countries is carried out on the basis of a Recommendation² adopted by the OECD in 1995.

¹ See all provisions on international relations in the area of competition policy that are included in agreements between the EU and third countries or third country groupings at <http://ec.europa.eu/competition/international/legislation/legislation.html>

² Recommendation of 27 and 28 July 1995 concerning cooperation between member countries on anti-competitive practices affecting international trade.

2. The EEA agreement and co-operation with ESA

2.1. The EEA Agreement

- (8) Parties to the EEA Agreement are all EU Member States and the EFTA Members Iceland, Liechtenstein and Norway (Switzerland has not ratified the EEA Agreement). The objective of the Agreement, which entered into force on 1 January 1994, is to establish a dynamic and homogeneous European Economic Area, based on common rules and equal conditions of competition. The competition provisions of the EEA Agreement mirror those of the European Union. Articles 53, 54 and 59 of the EEA Agreement are virtually the same as Articles 101, 102 and 106 TFEU. The provisions are applicable if trade between one or more EU Member States and one or more EFTA Member States which have ratified the Agreement (Norway, Iceland and Liechtenstein) is affected.
- (9) The EEA Agreement is enforced by two surveillance authorities: by the Commission and by the EFTA Surveillance Authority (ESA). However, there is no concurrent competence between the Commission and ESA; the Agreement foresees only alternative jurisdiction ("one stop shop"). The division of jurisdiction between the two Authorities is laid down in Article 56 of the EEA Agreement (details see below). The basic rules for the division of jurisdiction in antitrust cases are: The Commission is always competent to apply the competition provisions of the EEA Agreement when to a given set of facts also Articles 101, 102 or 106 are applicable. In those cases where only the EEA Agreement is applicable (e.g. in a case when only trade between Sweden and Norway is affected), the division of competence is decided on 'centre of gravity basis' which is mainly based on turnover criteria.
- (10) The Commission and the ESA always decide for the whole of the EEA, i.e., for all Member States plus Iceland, Liechtenstein and Norway. It is evident that in case the EEA Agreement is applicable all documents drawn up by the Commission (requests for information, statements of objections, decisions, etc) should not only cite Articles 101 or 102 of the TFEU but also the respective provisions of the EEA Agreement.
- (11) When the Commission applies the competition provisions of the EEA Agreement it uses its existing procedural rules, i.e. Reg. 1/2003. The legal basis for this can be found in Article 5 of Council Regulation 2894/94.

2.2. Determination of competence

- (12) The division of competence between the Commission and the ESA is dealt with in Article 56 of the EEA Agreement, which reads as follows:

"1. Individual cases falling under Article 53 shall be decided upon by the surveillance authorities in accordance with the following provisions:

(a) individual cases where only trade between EFTA States is effected shall be decided upon by the EFTA Surveillance Authority;

(b) without prejudice to subparagraph (c), the EFTA Surveillance Authority decides, as provided for in the provisions set out in Article 58, Protocol 21 and the rules adopted for its implementation, Protocol 23 and Annex XIV, on cases where the turnover of the undertakings concerned in the territory of the EFTA States equals 33% or more of their turnover in the territory covered by this Agreement;

(c) the EC Commission decides on the other cases as well as on cases under (b) where trade between EC Member States is affected, taking into account the provisions set out in Article 58, Protocol 21, Protocol 23 and Annex XIV.

2. Individual cases falling under Article 54 shall be decided upon by the surveillance authority in the territory of which a dominant position is found to exist. The rules set out in paragraph 1(b) and (c) shall apply only if dominance exists within the territories of both surveillance authorities.

3. Individual cases falling under subparagraphs (c) of paragraph 1, whose effects on trade between EC State Members or on competition within the Community are not appreciable, shall be decided upon by the EFTA Surveillance Authority.

4. The terms 'undertaking' and 'turnover' are, for the purposes of this Article, defined in Protocol 22."

2.3. Commission competence

- (13) Therefore, in cases falling under Articles 101 of the TFEU and 53 of the EEA Agreement, the Commission will be competent for the case and take a decision for the whole of the EEA territory.
- (14) Where there is only affectation of trade between the EU and one or more EFTA States (and no appreciable affectation of trade between Member States), the competence will depend on the percentage of the combined EEA-wide turnover achieved by the companies concerned in the Community and in the EFTA territory respectively. If they achieve 33% or more of it in the EFTA territory, ESA will be competent. If they achieve 67% or more of it in the EU, it will be the Commission (for the definition of relevant turnover cf. Protocol 22 to the EEA Agreement).
- (15) In abuse of dominance cases (Article 54 of the EEA Agreement) the Commission will be competent where there is dominance within the EU and to the ESA where there is dominance in the EFTA territory. Only where there is dominance in both territories do the principles outlined above apply. If also article 102 is applicable, the Commission will always be competent.
- (16) The responsibility of the Commission can also follow pursuant to a transmission of a case from the ESA to it for reasons of competence. Member States must then be informed of the receipt of the case. Evidence already collected by the ESA can be used as well by the Commission.

2.4. ESA Competence

- (17) If a case needs to be transmitted to ESA for reasons of competence, a corresponding decision must be taken by the Commissioner, who has received an empowerment to this effect (Commission's decision of 6 April 1994, PV (1196) adopting SEC (94) 571, point 1.b). Once this decision is taken, the documents are sent to ESA, and Member States and undertakings concerned are informed hereof - as well as further comments on the case. The Commission will continue to be associated with further proceedings undertaken by ESA.
- (18) Such transmission of cases should take place as early as feasible in the course of proceedings. It cannot take place after the sending of a statement of objections or of the letter informing an applicant that there are insufficient grounds for pursuing his complaint. Once a case has been transmitted for reasons of competence, a retransmission may no longer take place.
- (19) It is conceivable that the ESA and the Commission disagree on the attribution of a case. If a solution cannot be found at working level, the issue must be brought before the Joint Committee of the EEA Agreement (for further contact Unit A 5/International Relations).

2.5. Cooperation between the surveillance authorities

- (20) The EEA Agreement obliges the competent enforcement authority to cooperate with the respective other authority when it applies the competition rules of the Agreement. Cooperation in general means information and consultation. As the Commission is dealing with the vast majority of cases where the competition provisions of the EEA Agreement are applied, it is usually the Commission which has to consult and to inform the ESA. The detailed rules on cooperation are set out in Protocol 23 of the Agreement.
- (21) The Commission has to inform ESA about complaints and ex-officio procedures, has to consult the ESA at certain steps of the procedure (in particular when publishing an article 27(4) notice or issuing a Statement of Objections)³ and to invite ESA and the EFTA national authorities to Hearings and the Advisory Committee. The Commission has to transmit a copy of administrative letters closing a file or rejecting a complaint (article 4 of Protocol 23).

2.6. Investigative measures

- (22) **Request for information** may be addressed directly to companies based in the EFTA territory. The same format as for companies inside the EU can be used. The ESA shall receive a copy of such request or decision.
- (23) The Commission can request the ESA to grant administrative assistance (article 8 of Protocol 23) and to conduct inspections in the EFTA territory. The ESA will organise such investigations/inspections in accordance with its own internal rules which mirror EU proceedings. Commission officials have the right to take an active part in these investigations. The Commission can fully use the evidence obtained in this inspection. The ESA can likewise ask the Commission to organise an inspection on its behalf.
- (24) The Commission must inform the ESA if it intends to carry out interviews pursuant to article 19 Reg. 1/2003 in the EFTA territory. The Commission shall also inform the ESA about inspections it intends to carry out in the EU (article 8 para. 5 of Protocol 23).
- (25) All information obtained in such investigations is immediately transmitted to DG Competition by ESA.

2.7. Languages

- (26) As regards languages, undertakings have the right to address the Commission, and be addressed by it, in any official language of the EU or the EFTA States which they chose.

³ Art 3 of Protocol 23 states that the "other surveillance authority may deliver its comments within the time limits set out in the abovementioned publication or statement of objections" and is interpreted as meaning the other authority receives the copy of the SO just after adoption rather than earlier. However, the Commission could always consult ESA earlier (and vice versa) in case they wanted to obtain the comments of the other.

3. Principles and procedures for cooperation with other third countries

- (27) The following guidelines for the implementation of international agreements need to be respected when assessing a case which has an international dimension:

3.1. Notification to third countries

- (28) A case officer should determine whether a third country, with which the EU has concluded an agreement has an interest in a case for which he/she is responsible. The case officer should consider whether any of the following criteria is met:
- (29) - in making an initial assessment of a case:
- (30) Is the case officer aware of a similar enquiry taking place in the third country?
- Does the case involve anti-competitive activities (other than a merger or acquisition) carried out in significant part on the territory of the third country?
 - Is one or more of the undertakings under investigation or party to the transaction, or a company controlling such undertaking(s), a company incorporated or organised under the laws of the third country?
 - Does the case involve conduct believed to have been required, encouraged or approved by the third country? or
- (31) - during the course of the investigation:
- Will DG Competition request information from any undertaking on the territory of the third country?
 - Will the enforcement activity involve remedies that would, in significant respects, require or prohibit conduct in the third country?
- (32) Where a case meets any of the above criteria, the case officer should verify if notification to the third country is obligatory and should inform Unit A5/International Relations. The relevant desk officer in Unit A5 will be available to provide assistance and advice.
- (33) In particular, Unit A5 should be informed in each of the following circumstances:
- a) before a statement of objections is issued;
 - b) before a decision or a settlement (remedies) is adopted;
 - c) in case the Commission intervenes in judicial proceedings in third countries (*amicus curiae* etc.)
- (34) Unit A5 is available to provide guidance if required.

3.2. Notification from third countries

- (35) When a notification is received from the authorities of a third country, Unit A5 shall forward it to the operational units concerned and to the Member States whose interests are affected.

3.3. Cooperation and coordination

- (36) If a case officer wishes to contact the authorities of a third country (request for assistance, material or clarification about a parallel investigation etc.), he/she can ask Unit A5 to arrange the initial contact.
- (37) If an authority of a third country requests assistance from DG Competition, Unit A5 will inform the operational unit concerned, and will facilitate the contacts with the third country authority.
- (38) Where, an operational Directorate believes that there are important EU interests which would necessitate an intervention by DG Competition with the authorities of the third country,
- to take action,
 - to modify a proposed action, or
 - (1) - to desist from taking action
 - (2) it should immediately consult with Unit A5 to determine the most appropriate course of action.
- (39) Likewise, where a third country requests DG Competition in a specific case
- to take action,
 - to modify a proposed action, or
 - to desist from taking action
- (3) based on the important interests of the third country, Unit A5 should immediately contact the operational Directorate concerned to determine the appropriate course of action.

3.4. Positive Comity Requests

- (40) **Positive comity** enables one side adversely affected by anti-competitive conduct carried out in the other's territory, to request the other side's competition authority to take enforcement action. There are general "positive comity" provisions in the Cooperation Agreements with the US (Article V 2), Canada (Article V 2), Japan (Article 5.1) and Korea (Article 6) according to which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour implemented on its territory and which affects the important interests of the requesting Party.
- (41) With regard to the US a special Positive Comity Agreement has existed since 1998. The Agreement clarifies both the mechanics of the positive comity co-operation instrument, and the circumstances in which it can be availed of. In principle, one party may request the other party to remedy anticompetitive behaviour which originates in its jurisdiction but affects the requesting party as well. The Commissioner for Competition has delegated powers to make a request under this agreement to the US or to respond to one from the US (Commission decision of 19 June, adopting SEC (2002)669).
- (42) In practice, the positive comity provisions are not used frequently as companies (i.e. complainants) prefer to address directly the competition authority they consider to be best suited to deal with the situation. If, however, a case of positive comity arises, the case handler should contact UnitA5 to determine the appropriate course of action.

6 Requests for Information

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1. Introduction

1.1. Informal fact-finding

- (1) Information about companies and industries, current and historical news, legal and economic literature as well as statistics can be obtained from external commercial databases or through DG Competition Library's collections and resources. If necessary, specific studies may be commissioned from external experts.
- (2) In order to gather information about a given economic sector, contacts may be taken with other Commission services (Eurostat, DG ENTR, ...).
- (3) Information may be obtained also through informal contacts with National Competition Authorities (hereafter NCA).
- (4) Informal meetings or phone-calls may be organised by the case-teams with undertakings.

1.2. Requests for information (Article 18)

- (5) Pursuant to Article 18 of Reg. 1/2003, the Commission is empowered to require undertakings and associations of undertakings to provide it with all necessary information. Information can be requested by simple letter ("simple request" (Article 18(2)) or by decision (Article 18(3)).
- (6) Requests for information are the main sources for gathering information on infringements of competition law. They are also widely used in the context of sector inquiries.
- (7) Undertakings are obliged to answer to requests by decision but can refuse to reply to requests by simple letter. If they reply to either type of request by submitting incorrect or misleading information, they are liable to fines (Article 23(1)(a) and (b)) in case they are located inside the EEA. When drafting a request for information, case handlers must respect the right of the undertakings not to incriminate themselves.

2. Request for information by letter (Article 18(2))

2.1. Information which can be requested¹

- (8) Pursuant to Article 18, the Commission may require undertakings and associations of undertakings to provide all necessary information. Information is necessary if it might enable the Commission to verify the existence of the alleged infringement referred to in the request which justified the initiation of the inquiry². The Commission enjoys a margin of appreciation in this respect³.

1 See the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6) ("Notice on Antitrust Best Practices"), paras. 33-35.

2 Case 374/87 *SEP v. Commission*, [1991] ECR II-1497 (para.25-29)

3 As regards the Commission's discretion in shaping the enquiry, see Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paragraph 110; Case T-9/99 *HFB and Others v Commission* [2002] ECR II-1487, paragraph 384; Case T-48/00 *Corus UK v Commission* [2004] ECR II-2325, paragraph 212. In exercising its discretion, the

- (9) It is for the Commission to define the scope and the format of the request for information. Where appropriate, DG Competition might however discuss with the addressees the scope and the format of the request for information. This may be particularly useful in cases of requests concerning quantitative data.⁴
- (10) When, in a reply to a request for information, undertakings submit manifestly irrelevant information (in particular documents which are clearly not related to the subject-matter of the investigation), DG Competition may, in order not to unnecessarily burden the often voluminous administrative file, return such information to the addressee of the request as early as possible after having received the reply. A short notice reporting this fact will be put in the file.
- (11) Requests for information should not include confidential information submitted by parties/third parties.

2.2. Addressees

Addressees inside the EEA

- (12) Article 18(1) empowers the Commission to request information from undertakings and associations of undertakings. Requests can be sent to any undertaking or association of undertakings. This includes not only the undertakings or associations of undertakings subject to the proceedings but also complainants or third parties.
- (13) Article 18(4) specifies that owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution should supply the information requested on behalf of the undertaking or the association of undertakings concerned. Article 18(4) adds also that lawyers duly authorised may supply the information on behalf of their clients. In that case the undertaking or the association of undertakings will still remain fully responsible if the information supplied is incomplete, incorrect or misleading.
- (14) If a duly authorised lawyer has been appointed (power of attorney in the file), a request for information can either be sent to the undertaking care of (c/o) its lawyer or be sent to the undertaking with a courtesy copy to the lawyer.
- (15) If no lawyer has been duly authorised, the request for information must be addressed directly to the undertaking or association of undertakings.
- (16) Pursuant to Article 11(2) of Regulation No 1/2003 DG Competition sends a copy of the request for information to the relevant NCAs of where the addressee of the request for information is located.

Addressees located outside the EU

- (17) Requests can be sent to undertakings and associations of undertakings in an EFTA country that is member of the European Economic Area (EEA), i.e. Norway, Iceland, Liechtenstein (but not including Switzerland). Such request can be drafted in the same way as requests to companies located within the EU including the possibility of imposing fines.

Commission is bound by the principle of proportionality and, in relation to Article 18(3) decisions, must respect the privilege against self-incrimination.

⁴ See the Best Practice on the submission of economic evidence.

- (18) The EFTA Surveillance Authority (ESA) must receive a copy of such requests (as well as of decisions under Article 18 (3) of Regulation 1/2003). This must be indicated on the stamp showing to whom copies of the request for information must be sent.
- (19) Requests for information may also be sent to undertakings / associations of undertakings outside the EEA. Where the undertaking has a subsidiary within the EEA, the request may be sent in addition to the subsidiary. If the request is sent to the undertaking located outside the EEA, the section relating to fines and periodic penalty payments as well as the relevant sections in the annex are not applicable.
- (20) The letters can be sent directly to the undertakings and do not need to be channelled through delegations of the EU in the respective countries.

2.3. Languages

- (21) Pursuant to Article 3(1) of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community⁵, addressees of requests for information are entitled to receive them in one of the languages of the Member States where they are located. As far as complainants are concerned, requests for information must be in the language of their complaint (as long as it is one of the EU official languages) even if this is not the language of the Member State where they are located (see further in the Module Use of languages).
- (22) As regards simple requests for information it is standard practice to send the cover letter in the language of the addressee's location or in English (including a reference to Article 3 of Regulation 1 of 15 April 1958) and to attach the questionnaire in English. The addressee is informed – in the language of the addressee's location – of its right to obtain a translation of the cover letter and/or questionnaire into the language of the addressee's location, as well as the right to reply in that language. This practice allows for more expeditious treatment of information request, while preserving the rights of addressees.

2.4. Drafting simple requests for information

- (23) A simple request for information (Art 18 (2)) contains a cover letter and generally four/five annexes.
- (24) The cover letter states the legal basis and the purpose of the request. It fixes the time-limit within which the information is to be provided, indicates the penalties provided for in Article 23 for supplying incorrect or misleading information, specifies the need of providing a non-confidential version and mentions the contact details of the case team.
- (25) Undertakings must be given a reasonable time-limit to reply to the request, according to the length and complexity of the request taking into account the requirements of the investigation. In general, this time limit will be at least two weeks from the receipt of the request. If from the outset, it is considered that a longer period is required, the time limit to reply to the request will be set accordingly. When the scope of the request is limited, for example if it only covers a short clarification of information previously provided or information readily available to the addressee of the request, the time limit will normally be shorter (one week or less). It is better to fix a date for the reply and not a period: e.g. "You are requested to ensure that your reply to the attached questionnaire reaches the Commission no later than [DATE FOR REPLY]."

- (26) The cover letter also requires the addressee to indicate whether it considers that information provided in the reply is confidential. In that case, in accordance with Article 16(3) of Reg. 773/2004, the addressee must substantiate its claims individually with regard to each item of information and provide a non-confidential version of the information. Such a non-confidential version should be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission. If undertakings fail to comply with these requirements, the Commission may assume that the documents or statements concerned do not contain confidential information pursuant to Article 16(4) of Reg. 773/2004.
- (27) When the first investigative measure is addressed to them, addressees are informed of the fact that they are subject to a preliminary investigation and of the subject-matter and purpose of such investigation. Addressees are also reminded that if the behaviour under investigation is found to have taken place this might constitute an infringement of Articles 101 and/or 102 TFEU.
- (28) The main annex is the questionnaire, being the list of questions which have to be answered by the addressee. To set the background for the questions, the questionnaire informs the addressee about the subject-matter and purpose of the investigation. Questions should not invite self-incriminatory replies (see further section 5).
- (29) Another important annex is the annex "Business secrets and other confidential information" explaining the concepts of business secrets and confidential information, which gives more practical guidance on confidentiality claims than the Notice on Access to file (notably including an example of a table for such claims).
- (30) If not explained in the cover-letter, one annex provides guidance on how to reply to the request for information in the most efficient manner.
- (31) One annex recalls the relevant legal provisions, namely the relevant provisions of Reg. 1/2003 i.e. Articles 18(1), (2) and (4) and Article 2(1)(a).
- (32) The annex "Acknowledgement of receipt" is enclosed, to be completed and returned by fax to DG Competition immediately upon receipt of the request for information. .
- (33) In certain cases DG Competition might discuss with the addressees the scope and the format of the request for information. This practice can be particularly useful in cases of requests which require quantitative data to be provided.⁶

2.5. Sending the requests for information

- (34) Requests for information are normally signed by or on behalf of the Head of Unit or case-manager.
- (35) It is advisable to send the request by fax or e-mail, if channels of communication with the addressee have already been established. If a large number of documents or handwritten documents in particular are attached to the request, it is advisable to send the request by registered post (see below). The addressee should be asked to return the acknowledgement of receipt attached to the letter.
- (36) Requests for information may also be sent by registered post with acknowledgement of receipt, or by courier. In this case, when setting the time-limit, account must be taken of the time necessary to deliver the letter.

⁶ See the Best Practices on the submission of economic evidence.

- (37) Requests for information can also be sent electronically through the eQuestionnaire application, which provides respondents with secure and efficient web-based workspace to submit their replies to the Commission.
- (38) Irrespective of the type of delivery chosen, the request must be registered and uploaded by the Registry in the case management application.
- (39) Pursuant to Article 18(5), a copy of the request should be sent to the NCA of the Member State where the addressee is located as well as to the NCA of the Member State whose territory is affected. The case team must indicate on the minute to which NCAs the request must be copied. The Registry takes care of sending the copy to the relevant NCA(s).

2.6. Follow-up of requests for information

Sending the reply to NCAs

- (40) The Commission services may provide NCAs with copies of replies to a request for information, but the provisions of Article 11(2) of Regulation No 1/2003 are not regarded as containing any obligation in this respect. If the undertaking concerned has claimed confidentiality in respect of certain parts of its reply, the NCA should be reminded of the fact that the provision of information is governed by Articles 11 and 28 of Regulation No 1/2003, and be informed about the undertaking's confidentiality claims. Alternatively, the case team and the NCA may agree that the latter receives the non-confidential version for the reply.

Reminders and requests for extension

- (41) If so requested by the addressee, an extension of the time-limit may be granted. The addressee should provide the reasons for the request for the extension of the time-limit, sufficiently in advance to the expiry of the time limit, in writing (letter or e-mail). If the Commission considers the request to be justified, additional time (depending on the complexity of the information asked and other factors) will be granted. The Commission may also agree with the addressee of the request that certain parts of the requested information that are of particular importance or easily available for the addressee will be supplied within a shorter time limit, whereas additional time will be granted for supplying the remaining information. In case an extension of the time-limit is granted, the new time-limit must be communicated to the addressee.
- (42) If undertakings replied to the request but did not send a non-confidential version of their reply or did not substantiate their claim for confidentiality and provide a concise description of each piece of deleted information, one or two reminder(s) are normally sent. If the undertakings do not comply with their obligations to provide a non-confidential version, particularly if reminded of them, the Commission may assume that the information provided is accessible (see Article 16 (4) Reg. 773/2004)⁷. Only if certain information is very obviously confidential, the Commission may draw up a non-confidential version itself.

Incorrect or misleading replies to the request for information

- (43) Fines may be imposed according to Article 23 (1)(a) by decision on undertakings and associations of undertakings where, intentionally or negligently they supply incorrect or misleading information in response to a simple request made pursuant to Article 18(2). See further section 4.

Absence of reply to the request for information

- (44) If the undertaking requested does not reply to the request for information, the Commission may choose to send a request for information by decision (Article 18(3)).

Privilege against self-incrimination

- (45) The questions should be framed so they do not solicit self-incriminatory replies.
- (46) Where the addressee of a request for information pursuant to Article 18(2) Reg. 1/2003 refuses to reply to a question in such a request invoking the privilege against self-incrimination, as defined by the case-law of the Court of Justice of the European Union⁸, it may refer the matter in due time following the receipt of the request to the Hearing Officer, after having raised the matter with DG Competition before the expiry of the original time limit set⁹. The addressee may also simply not reply to this question.
- (47) In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the Hearing Officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director responsible of the conclusions drawn, to be taken into account in case of any decision taken subsequently pursuant to Article 18(3) Reg.1/2003. The addressee of the request shall receive a copy of the reasoned recommendation. The addressee of an Article 18(3) decision will be reminded of the privilege against self-incrimination as defined by case law of the Court of Justice of the European Union¹⁰. This procedure allows discussions with the addressee on possibly self-incriminatory questions to be settled at an early stage, before issuing an Article 18(3) request (for details see section 5 below).

3. Decision requiring information (Article 18(3))

3.1. General principles and content

- (48) Pursuant to Article 18(3) of Reg. 1/2003, the Commission can directly adopt a decision requiring the information to be supplied by companies located in the EEA. It is not necessary to send a request for information according to Art 18 (2) before proceeding to the adoption of a decision according to Article 18 (3).
- (49) Requests for information by decision must be reasoned like any other act of the European Union (Article 296 TFEU). Lack of reasoning may lead to the decision being annulled on the basis of a challenge pursuant to Article 263 TFEU. The reasoning may however be very concise.
- (50) The decision must:
- state the legal basis and the purpose of the request;
 - specify what information is needed;

⁸ See for example Case C-301/04 P *Commission v SGL*, [2006] ECR I-5915, which specifies that addressees of an Article 18(3) decision may be required to provide pre-existing documents, such as minutes of cartel meetings, even if those documents may incriminate the party providing them.

⁹ Article 4(2)(b) of the terms of reference of the Hearing Officer and Notice on Antitrust Best Practices, para. 36.

¹⁰ See footnote 33.

- fix the day by which the requested information has to be provided;
 - indicate the possibility of imposing fines according to Article 23(1)(b) if the addressee supplies incorrect, incomplete or misleading information or does not supply information within the required time-limit;
 - indicate or impose the penalties provided for in Article 24(1)(d) if they supply incomplete or incorrect information;
 - indicate the right to have the decision reviewed by the General Court according to Article 263 TFEU and warn that such appeal does not have suspensive effect unless expressly accorded by the General Court (Article 278 TFEU).
- (51) The decision takes effect upon its notification to the undertaking (Article 297 of the Treaty).
- (52) In the context of decisions requiring information, addressees will be reminded of the privilege against providing self-incriminating information (see further below) and that if the behaviour under investigation is confirmed to have taken place this might constitute an infringement of Articles 101 and/or 102 TFEU.¹¹
- (53) The decision requiring information is addressed to the undertaking(s) concerned and follows the same rule of language as for the letter requesting information (Article 18(2) – see above 2.3). Note that if a language waiver has been given, it should be expressed in the decision itself, such as "The Commission notes that [ADDRESSEE] accepts that the decision be adopted in the [chosen language]".
- (54) Similar to simple requests for information, the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution must supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter must remain fully responsible if the information supplied is incomplete, incorrect or misleading.
- (55) Where the addressee of a decision requesting information pursuant to Article 18(3) Regulation (EC) No 1/2003 is unable to resolve its concerns about the time limit through the procedure outlined above, it may refer the matter to the Hearing Officer. Such a request should be made in due time before the expiry of the original time limit set¹². The Hearing Officer decides on whether an extension of the time limit should be granted, taking account of the length and complexity of the request for information and the requirements of the investigation.
- (56) Fines may be imposed according to Article 23(1)(b) by decision on undertakings and associations of undertakings where, intentionally or negligently in response to a request made by decision adopted pursuant to Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit. Fines according to Article 23(1)(b) can be combined with periodic penalty payments under Article 24 (1)(d).
- (57) If a decision pursuant to Article 18(3) is combined with a decision setting (the provisional amount of) periodic penalty payments pursuant to Article 24(1)(d), the Article 18 (3) decision will specify the provisional level of the daily penalty payments (up to 5% of the average daily turnover in the preceding business year). The final amount of the penalty will then be fixed in a second decision pursuant to Article 24(2) (see below and Module on Periodic penalty payments) based on the level of penalty payments per day fixed in the preceding Art 18 (3) decision. However, if the

¹¹ See Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, pt. 56-57.

¹² Article 4(2)(c) of the terms of reference of the Hearing Officer and Notice on Antitrust Best Practices, para. 40.

information has been provided, the Commission may calculate the penalty payment on the basis of a lower amount as fixed in the preceding Article 18 (3) decision (cf. Article 24 (2)).

3.2. Procedural steps

- (58) The Commissioner in charge of competition is empowered to adopt decisions pursuant to Article 18(3) and Article 24(1) on behalf of the Commission (empowerment decision of 28.04.2004, PV(2004)1655). The Commissioner has sub-delegated to the Director-General for Competition both a) the power to adopt a decision requesting information under Article 18(3) of Regulation 1/2003 and b) the power to adopt a decision imposing (provisional) periodic penalty payments on undertakings or associations of undertakings.
- (59) One has to distinguish:
- decisions requesting information pursuant to Article 18(3) (without imposing periodic penalty payments);
 - decisions requesting information and imposing (provisional) periodic penalty payments pursuant to Article 18 (3) and Article 24 (1)(d)/24(2).

Decision requesting information without periodic penalty payments

- (60) The decision is adopted by sub-delegation by the Director General of DG COMP after consultation of the Legal Service.
- (61) A copy of the decision should be forwarded to the competition authorities of the Member States concerned (i.e. in whose territory the addressee of the decision is located) and to ESA if an undertaking in an EFTA country party to the EEA agreement is concerned.
- (62) A decision under Art 18 (3) without the provisional imposition of periodic penalty payments has not to be published pursuant to Article 30 Reg. 1/2003.

Decision requiring information and imposing periodic penalty payments

- (63) The procedure is composed of two phases (for more details see also the Module on Periodic Penalty Payments):

First phase: first decision requiring information imposing (provisional) penalty payments in its operative part

- (64) The procedural steps are the following:
- Consultation of the Legal Service. The draft decision should set the provisional amount of the penalties (up to 5% of the average daily turnover in the preceding business year per day) and fix the starting date.
 - Information to the Commission departments primarily responsible for the products, services or policy areas in issue and giving those departments the opportunity to state their view. This information may be done in parallel with the consultation of the LS.
 - The AC is not consulted.

- Adoption by sub-delegation of the decision.
- (65) A copy of the decision should be forwarded to the competition authorities of the Member States concerned (i.e. in whose territory the addressee of the decision is located) and to ESA if an undertaking in an EFTA country party to the EEA agreement is concerned.
- (66) A decision under Art 18 (3) with the provisional imposition of periodic penalty payments has not to be published pursuant to Article 30, however the final decision Article 24(2) (see below).

*Second phase: second decision fixing the final amount of the penalties*¹³

- (67) Please consult the Module on Periodic Penalty Payments. The main procedural steps are as follows:
 - As soon as the time limit to supply information has expired, a letter signed by the Director is sent to the undertaking reminding the financial consequences of the non-compliance with the decision.
 - Once the information has been supplied (after the expiry of the deadline mentioned in the first decision, otherwise there is no second decision), a statement of objections (SO) indicating the calculation of the final amount of the penalties is drafted and sent for consultation.
 - Once having received the approval of the LS and having informed the other DGs concerned, the SO¹⁴ is adopted by empowerment procedure by the Commissioner in charge of Competition policy¹⁵ and notified to the undertaking by the Secretariat General (hereafter SG). The definitive amount of the periodic penalty payment may be fixed at a figure lower than that which would arise under the original decision (Article 24(2) of Regulation 1/2003).
 - Access to the file will be limited to the request for information which was at the origin of the envisaged decision and the subsequent correspondence on this matter with the undertaking concerned.
 - Oral hearing (if requested by the undertaking).
 - Preparation of the draft decision: approval of the LS and consultation of the DGs primarily responsible for the products, services or policy areas in issue; approval of the Commissioner.
 - Consultation of the AC on the draft decision.
 - Adoption of the decision by written procedure, generally.
 - Notification by SG to the addressees (together with the Hearing Officer's (hereafter HO) final report and AC opinion).
 - Communication of the decision to Member States and ESA if EEA-relevant case: A copy of the decision Article 24(2) should without delay be forwarded to the competition authority of the

¹³ For the necessity of a two step procedure with a first decision setting the level of the provisional daily penalty and the second decision imposing the final penalty see ECJ judgment of 22 September 1989, *Hoechst v Commission*, joint cases 46/87 and 227/88, ECR [1989] 2859. The Court confirmed in this judgment that the Commission does not need to send an SO and hold an oral hearing prior to the first decision fixing the provisional periodic penalty. However, before sending the second definitive decision on the final penalty, this obligation exists. The imposition of penalty payments is therefore procedurally burdensome. In order to shorten it, one should combine the Art 18 (3) decision with the first decision under Art 24 (1) d.

¹⁴ Issued pursuant to Article 27(1) of Regulation No 1/2003.

¹⁵ Empowerment decision of 28.4.2004, PV(2004)1655.

Member State in whose territory the seat of the undertaking is situated and the competition authority of the Member State whose territory is affected.

- Press release.
- Publication of the decision (Article 30 Reg. 1/2003) (see detailed instructions on this in the Module on Publication of Decisions).
- Recovery of the penalty payment (see relevant Module on Follow-up of decisions)
- The decision might be reviewed by the General Court, if appealed.

4. Decision imposing fines or penalties

- (68) It will depend on the individual situation whether it is more appropriate to adopt a decision imposing fines pursuant to Article 23(1)(b) or a decision imposing periodic penalty payments pursuant to Article 24(1)(d). Fines according to Article 23 can also be combined with period penalty payments according to Article 24. In setting the level of the fines one ought to take into account the periodic penalty payments already imposed and *vice versa*.
- (69) Fines may be imposed according to Article 23 by decision on undertakings and associations of undertakings where, intentionally or negligently:
- they supply incorrect or misleading information in response to a simple request made pursuant to Article 17 or Article 18(2) (Article 23 (1)(a)); or
 - in response to a request made by decision adopted pursuant to Article 17 or Article 18(3), they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit (Article 23(1)(b)).
- (70) Periodic penalty payments (Article 24(1)(d)) may be imposed by decision on undertakings and associations of undertakings in order to compel them to supply complete and correct information which has been requested by decision pursuant to Article 17 or Article 18(3).

5. Limits of the power to ask for information: the privilege against self-incrimination

5.1. The Basic Principle

- (71) The privilege against self-incrimination protects undertakings against the obligation to reply to self-incriminating questions, i.e. to admit the existence of an infringement of EU competition law (in which they participated).
- (72) According to the case law as established in *Orkem*¹⁶ an undertaking can only invoke the privilege against self-incrimination if two conditions are fulfilled: (1) the undertaking was asked to admit the existence of an infringement of EU competition law (in which it participated) and (2) it was compelled to answer the question. However, the Best Practice Guidelines and the Hearing Officer's Mandate foresee the possibility for undertakings to raise concerns with DG Competition

¹⁶ Case 374/87, *Orkem v. Commission* [1989] ECR 3283

and the Hearing Officer about self incrimination already when they are the addressees of request for information pursuant to Article 18(2), in order to settle discussions at the earliest stage.

- (73) The privilege against self-incrimination does not apply when answering questions asked in the context of requests made under Article 18(2) (simple requests for information, interviews, simple inspections). This is due to the fact that the undertaking is not compelled to answer these questions. It replies on a voluntary basis. If an undertaking replies in a self-incriminating manner to questions that it is not compelled to reply to (ie a reply which goes beyond the Commission's investigatory powers) that reply may be considered as spontaneous cooperation on the undertaking's part capable of justifying a reduction in a possible fine outside the scope of the Leniency Notice.

5.2. Definition of Self-Incrimination

- (74) In the *Orkem*-judgment (para. 34) the ECJ stated that the "Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove" The precise distinction between self-incriminating questions and lawful questions may sometimes be difficult to draw. However the following indications might be helpful.
- (75) Whether a question is of a self-incriminating nature or not should be assessed from an objective perspective (average and reasonable respondent) rather than the perspective of the individual addressee (subjective perspective). It is not relevant which information the Commission already has in its possession when asking a question. This approach ensures an objective interpretation of the law, consistent with the principle of legal certainty. It is recommended to assess whether a company can answer a question truthfully without an admission of guilt.

5.3. Categories of questions that are admissible

- (76) In line with the existing case law two types of questions are fully compatible with the privilege against self-incrimination (i.e. these types of questions are lawful).
- (77) The provision of documentary¹⁷ evidence already in the possession of the undertaking may always be requested without infringing the privilege against self-incrimination. This applies regardless of whether or not the documents at issue contain incriminating evidence which may be used against the addressee of the request or against any other third party.
- (78) Questions seeking purely factual information are normally admissible and do not infringe the privilege against self-incrimination

5.4. How to react if a company claims that a question is of a self-incriminating nature

- (79) Where the addressee of a request for information pursuant to Article 18(2) of Regulation 1/2003 refuses to reply to a question in such a request invoking the privilege against self-incrimination, as defined by the case law of the Court of Justice of the European Union¹⁸, it may raise the matter

¹⁷ It is submitted that "document" does not only mean written notes but in accordance with footnote 12 of the Commission Notice of 13 December 2005 on the Rules for Access to the Commission file "all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available."

¹⁸ See for example Case C-301/04 P *Commission v. SGL*, [2006] ECR I-5915, which specifies that addressees of an Article 18(3) decision may be required to provide pre-existing documents, such as minutes of cartel meetings, even if those documents may incriminate the party providing them.

with DG Competition before the expiry of the original time limit set¹⁹, otherwise it may simply not reply to this question and settle the discussion, if the questions infringe the privilege against self-incrimination, in the framework of an Article 18(3) decision.

- (80) If DG Competition is convinced that its questions were not of a self-incriminating nature, it should inform the addressee of the request for information of its position.
- (81) If, after having been informed of DG Competition's position, the undertaking still maintains that the questions addressed to it are self-incriminating, it may refer the matter in due time to the Hearing Officer. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the Hearing Officer may make a reasoned recommendation to the Competition Commissioner as to whether the privilege against self-incrimination applies and inform the director responsible of the conclusions drawn. The addressee of the request receives a copy of the reasoned recommendation.
- (82) If, following the undertaking's refusal to reply to the simple request for information, a decision pursuant to Article 18(3) is adopted, such decision should take into account the Hearing Officer's reasoned opinion. The addressee of the Article 18(3) decision will in any case be reminded of the privilege against self-incrimination as defined by case law of the Court of Justice of the European Union²⁰.

6. Request for and use of information from national competition authorities (Article 12 and 18 of Reg. 1/2003)

- (83) This section contains in brief the steps to take when the Commission wishes to obtain information from NCAs for the purposes of the enforcement of Articles 101 or 102 TFUE. Please see also the module dealing with cooperation within the Network.
- (84) Because requests may create additional work to the contacted NCA, it is recommended for the case-handlers to first explore informally what kind of information is in possession of the requested NCA. That would allow presenting focused requests.

6.1. Choosing the legal basis of the request

- (85) The Commission can formally request information and documents from the NCAs pursuant to Articles 12 and 18 of Regulation 1/2003.
- (86) The request should in principle be made pursuant to Article 12. These requests are addressed to the NCA or a particular contact person (Authorised Disclosure Officer, ADO) in that authority. They can be signed by the competent head of unit, as explained below.
- (87) A request pursuant to Article 18(6) can be addressed formally to the government or to the NCA of the Member State (see below).
- (88) Information can also be sought informally from the NCA, without making reference to Article 18 (or Article 12).

¹⁹ Article 4(2)(b) of the terms of reference of the Hearing Officer and Notice on Antitrust Best Practices, para. 36.

²⁰ See for example Case C-301/04 P *Commission v. SGL*, [2006] ECR I-5915, which specifies that addressees of an Article 18(3) decision may be required to provide pre-existing documents, such as minutes of cartel meetings, even if those documents may incriminate the party providing them.

6.2. Request based on Article 12

- (89) **WARNING:** For exchanges of information in leniency cases, some very strict safeguards apply. They are described in the Module on leniency. Before asking for information in a case where an NCA has received a leniency application, read carefully the leniency Module.

Contents of the request based on Article 12

- (90) Since the request itself should not impose a translation burden upon the requested NCA, one should use a language that is understood by the latter.
- (91) It is recommended that the request is submitted in writing (email/fax/letter). At the demand of the requested NCA, the request *should* be submitted in writing. There is a standard form for the Article 12 exchanges adopted by the Network.
- (92) At the demand of the requested NCA, the request *should* contain all or some of the elements provided for by the standard form:
- identification of the undertakings and entities concerned;
 - specification of the information requested as detailed as possible;
 - information as to why the exchange is requested with some detail as to:
 - the direction of the investigations (e.g. prohibition, imposition of fine);
 - the gravity or seriousness of the matter (e.g. hard core cartel or other restriction of competition – economic importance);
 - how it is intended to use the information and for what purpose (e.g. use as evidence to prove the infringement).

- (93) If the information is needed by a given date, that request should be substantiated.

- (94) The head of unit responsible for the investigation can sign such a request.

To whom should the request based on Article 12 be sent

- (95) There is no rule regarding to whom the request based on Article 12 should be sent. However, the NCA may recommend to other Network members that the requests are sent for example to its general contact point or to its Authorised Disclosure Officer (ADO).

Use of the received information

- (96) Information received from other Network members in accordance with Article 12 can be used in evidence by the Commission like any other information in the Commission's possession, with the following exceptions, limitations and procedural rules.
- (97) Article 12 requires that the use should take place *in respect of the subject-matter for which it was collected* by the transmitting authority.

- (98) According to the Court of Justice it is not necessary “to delimit precisely the relevant market, to set out the exact legal nature of the presumed infringement and to indicate the period during which those infringements were committed” in order to determine the subject matter of a case²¹.
- (99) Another limitation results from the specific rules relating to leniency applications. If the other Network member had obtained the information from a leniency applicant, the Commission cannot use it to start an investigation (see further Module on Leniency).
- (100) Information received from an NCA is covered by professional secrecy (Article 28 Reg. 1/2003).

6.3. Request based on Article 18

- (101) Pursuant to Article 18(6) of Regulation 1/2003, at the request of the Commission the governments and competition authorities of the Member States must provide the Commission with all the necessary information to carry out the duties assigned to it by this Regulation.
- (102) Formal requests for information under Article 18(6) are normally addressed to the competition authority of the Member State and signed by the Director-General.
- (103) In rare occasions it may be necessary to address a request to the government of a Member State. In such a situation, it is, depending on the circumstance (to be assessed in each case separately) signed either by the Commissioner or the Director-General. Formal requests addressed to a government are sent by the SG via the Permanent Representation of the Member State.
- (104) Requests for information under Article 18(6) should not make reference to Article 23(1)(a) (provisions on fines for an inaccurate reply), because this applies only to undertakings and associations of undertakings.
- (105) Requests can also be sent to competition authorities and government of third countries. They do not need to be channelled through the EU delegation in the country in question.

²¹ Judgment of the ECJ of 17 October 1989, *Dow Benelux NV*, Case 85/87, ECR [1989] p. 3137, paragraph 10.

8 Power to take Statements

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1. Introduction

- (1) Article 19 of Council Regulation 1/2003 provides the Commission with the possibility to interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation. Other procedural provisions on carrying out the interviews are provided in Article 3 of the Commission Implementing Regulation. For further guidance, see also the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU¹ (“Notice on Antitrust Best Practices”), section 2.5.6.
- (2) The information provided by interviewees can be used as evidence in the subsequent course of the procedure.
- (3) The interview is carried out on a voluntary basis. Accordingly, the interviewee can discontinue the interview at any moment. It is important to distinguish the possibility to conduct an interview pursuant to Article 19 of Council Regulation 1/2003 from the possibility to ask oral questions during an inspection pursuant to Article 20 (2) (e) of Council Regulation 1/2003. Only with respect to oral questions asked during inspections employees of an undertaking (be it representatives who have the authority to speak on behalf of the undertaking or other members of staff) are obliged to answer to questions. Only with respect to these questions may the Commission under certain conditions impose fines pursuant to Article 23 (1) (d) of Council Regulation 1/2003 if the answers are incorrect, incomplete, misleading or if the representative fails or refuses to reply.

2. Purpose and use of the interview

- (4) According to Article 19 of Regulation 1/2003, the Commission may carry out interviews for the purpose of collecting information relating to the subject matter of an investigation. Accordingly interviews are not an instrument merely to gather general information about the market without there being any link to an investigation. While Article 19 confirms previous Commission practice in leniency cases, it provides for the first time a possibility to conduct interviews and record statements in all other cases. This new instrument can be used in a proactive manner, by inviting natural/legal persons for an interview. Given the voluntary nature of the interview, however, no negative conclusions can normally be drawn from a refusal to be interviewed or to answer certain questions (except in the context of immunity applications, where this could amount to a failure to cooperate fully).
- (5) As concerns certainty about the subject matter of the investigation, at the time of the interview at least one case should be registered with a specific case number. The launching of further cases can be the result of the interview, but the interviewee should be asked to confirm that the information provided in the interview can also be used for such newly opened cases.
- (6) The Commission makes regular use of this instrument in leniency cases, in which companies provide on voluntary basis information that can be used in cartel investigations. However the instrument is not limited to leniency cases and can also be used to interview persons that are not themselves subject to an investigation.
- (7) It should be noted that information provided by an undertaking on a voluntary basis during an interview might justify a reduction in the fine, irrespective of a specific leniency request, particularly where it relates to self-incriminating information which assists the Commission in establishing the infringement. Particular attention needs to be paid to self-incriminating questions

¹ OJ C 308, 20.10.2011, p. 6.

which – apart from the fact that they need not be answered - could lead to problems of discrimination between applicants in the context of leniency cases.

- (8) Whilst it is not excluded that the interviewee supports his/her statements with further evidence (e.g. documents), it is recommended to limit the interview to oral statements. Other evidence should be transmitted either in the framework of a leniency application or following an information request (Article 18 of Council Regulation 1/2003) because in particular the latter provides the Commission with more guarantees as to the correctness and completeness of the information provided.
- (9) The procedure for taking statements pursuant to Article 19 of Regulation 1/2003 and Article 3 of the Implementing Regulation applies only when it is expressly agreed between the interviewee and DG Competition that the conversation will be recorded as a formal interview under Article 19. It is within the discretion of the Commission to decide when to propose interviews. A party may however also make a request to DG Competition to have its statement recorded as an interview. Such a request will in principle be accepted, subject to the needs and requirements of the proper conduct of the investigation.

3. Procedural and substantive requirements

3.1. Interviewer

- (10) Interviews should be carried out by at least two persons. At least one of the interviewers needs to be a representative of the Commission (official, national expert etc.). Participants who are not working for the Commission need to be authorised by the Commission to attend/conduct the interview (e.g. consultant, national regulator). It is recommended that one of the interviewers is at least a senior case handler, if not a case manager, deputy head of unit or head of unit.
- (11) When the interviews take place at the premises of the undertaking (located within the EU), the Commission has to inform the competition authority of the Member State in whose territory the interview takes place. In such a case the national competition authority can request that (one of) its officials participate(s) in the interview. National Competition Authorities should normally be informed at least 2 weeks in advance.

3.2. Interviewee

- (12) The interviewee can be a natural person or a legal person, which is duly represented by a natural person. Typical examples are a current or former member of staff of an undertaking (irrespective of their function in the undertaking), experts on specialised matters or a lawyer acting on behalf of a client. Employees of an undertaking need to be asked at the beginning of an interview whether they act on behalf of the undertaking (as legal person), or on their own behalf (as natural person). Unless there are no doubts in that regard, the interviewee should be asked to provide supporting documents concerning his identity and function.
- (13) The interviewee must explicitly consent to being interviewed. As explained above, the interviewee can withdraw its consent at any moment and without justification – wholly or in part (e.g. by not answering to certain questions).
- (14) Nobody can be prevented by its current or former employer from giving an interview, unless he/she acts on behalf of the undertaking. However when assessing the reliability of the statements made by the interviewee as evidence in the subsequent procedure the motives of the interviewee should be taken into account.

- (15) The interviewee may decide to be accompanied by a person of his/her choice, e.g. a lawyer. Apart from those who assist the interviewee or the interviewers, no third party can participate in the interview. In particular, if the employee does not act on behalf of the undertaking, employers have no right to be informed about and/or attend the meeting (unless the employee agrees to it).
- (16) The interviewee can choose the language used in the interview, provided that the language chosen is an official language of the European Union. If need be the Commission has to ensure appropriate translation.

3.3. Location

- (17) Normally, interviews will take place at the premises of the Commission, but they can also be carried out elsewhere, e.g. in the office of a national competition authority or the premises of the undertaking concerned. In the latter case the Commission needs – as indicated above – to inform the competition authority concerned and permit their presence in the interview.
- (18) Whilst interviews normally require the physical presence of the interviewee and the interviewer in the same room, interviews can also be carried by any means, e.g. by telephone or video conference.

3.4. Warnings at the beginning of the interview

- (19) Before the interview begins, the interviewer is obliged to draw the attention of the interviewee to the following issues (for example, by reading out the statement he is required to sign at the end of the interview):
- the legal basis of the interview (Article 19 of Regulation 1/2003 and Article 3 of the Implementing Regulation);
 - the voluntary nature of the interview (consent of the interviewee required);
 - the purpose of the interview (i.e. collecting information relating to the subject matter of an investigation);
 - the possibility to record the interview and the intention to do so in the case at question.
- (20) In addition, it is recommended to draw the attention of the interviewee to the facts that:
- he/she is entitled to be accompanied by a lawyer;
 - at a later stage it might be necessary to grant access to file. For this purpose it is recommended to discuss with the interviewee (in particular when it is a natural person that makes a statement without the knowledge of its current or former employer) whether he would prefer – to the extent possible – to remain anonymous.
 - some questions might be of a self-incriminatory nature. In this case the interviewer should also explain the legal consequences of answering to these questions. In case of immunity applicants, it should in particular be pointed out that not answering the questions can affect the Commission's assessment of continued cooperation on the part of the applicant. As regards leniency applicants, it could be mentioned in a neutral manner that such replies can affect the final determination of the reduction within the granted reduction range. For other *undertakings* interviewed, it should be mentioned that replying to such questions (on behalf of the undertaking concerned) might justify reduction of a fine later imposed by the Commission, if the information provided assists the Commission in establishing an infringement (for which the undertaking could be held

responsible). However, in any event it should be stated at the same time that there is no obligation whatsoever to answer such questions.

- That the information obtained can be provided to national competition authorities under Article 12 of Regulation 1/2003 and used in evidence for the application of Article 101 and 102 TFEU, including for the purpose of imposing (pecuniary) sanctions on natural persons where the conditions of national law of the receiving authority are fulfilled.

(21) To certify that the interviewers have fulfilled the legal obligations, it is recommended to make the interviewee sign a statement which confirms this. The statement should be presented to the interviewee's signature at the end of the interview (see model for such a statement).

3.5. Questions to be asked during the interview

(22) As explained above, all questions asked during the interview must relate to the subject matter of an investigation.

(23) Taking into account that the interviewee is not obliged to actively cooperate with the Commission and that no sanctions can be imposed in case of non-cooperation, in interviews it is permitted to ask self-incriminatory questions.

3.6. Recording and handling of statements

(24) The Commission is entitled to record the statements of the interviewee. This can be done by

- taking notes and preparing minutes;
- recording the entire interview on tape or any other medium and preparing a transcript (see Article 3 (2) of Commission Regulation 773/2004);
- allowing the interviewee to submit a written version of the statements provided.

(25) It is for the interviewers to decide which is the best type of recording for the case in question taking into account the need to use the statement as evidence in the subsequent procedure with the necessary authentication of the statement by the interviewee and the need of the interviewee to protect its legitimate interests (e.g. risk of disclosure procedure of leniency statements before national courts or risk of retaliation if the identity of the interviewee is revealed [voice on the tape can be recognised]).

(26) If the statement is recorded on a tape, the tape with the recording of the statement will be copied and the original placed in a sealed envelope. This will be done in the presence of the interviewed and immediately after he/she has finished the statement. The Commission services will also add a note for the file registering the identity of the person making the statement, the day and time of the recording and the fact that they have duly informed the interviewed of its rights and duties as mentioned in section 3.4 above.

(27) In order to enhance the accuracy of the statements, a copy of the recording and its transcript has to be made available to the interviewee for approval/rectification (Article 3(3) of Commission Regulation 773/2004). The Commission sets a time-limit within which the person interviewed may communicate to it any correction to be made to the statement (Article 3 (3) and recital 4 of the Commission Regulation 773/2004) and to the transcript. It is recommended to set a short deadline in order to have the final transcripts as quickly as possible.

- (28) The author of the statement, or the duly mandated lawyer, has to sign the final document/transcript as a true and accurate copy of his/her statements in order to be able to use the information in the subsequent procedure as evidence. Once the document is signed it, is inserted in the case file.
- (29) The interviewee can waive the right to obtain the written statement or recording and the transcript, notably for the purpose of avoiding disclosure procedures before courts. In this case the interviewee checks and authenticates the accuracy of the recording and transcript at the Commission's premises (see further in the Module Leniency Application).

3.7. Access to the file and protection of confidential information

- (30) When the Commission has to grant access to the file, it will also need to grant access to the recordings of any interviews carried out during the investigation and included in the file.
- (31) In this process the Commission must ensure the protection of business secrets or other confidential information. This may include protection of the identity of the interviewee (particularly if the employer is not aware that one of its employees gave an interview).
- (32) For details on preparing and granting access to the file, see relevant Module on Access to file.

3.8. Use of information provided in interviews

- (33) Information provided during interviews can be used as evidence in the subsequent procedure. The Commission should however carefully assess the credibility of the statements, in particular if it has received conflicting information or if there are reasons that put the credibility of the interviewee in question.
- (34) Where information gathered from statements is exchanged pursuant to Article 12 of Regulation 1/2003, it can only be used in evidence to impose sanctions on natural persons where the conditions set out in that Article are fulfilled.
- (35) According to Article 28 of Regulation 1/2003 information collected pursuant to Article 19 of Regulation 1/2003 may be used only for the purpose for which it was acquired. Accordingly the information provided in the framework of a particular case cannot be used for any other ongoing case, unless the interviewee agrees that the interview was also carried out with the view to this investigation. Written confirmation should be obtained.

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1. Introduction

- (1) This manual provides case-handlers with practical guidance for the **procedure** in dealing with immunity and reduction of fine applications (hereinafter jointly called as leniency applications). The manual is a living document which is frequently updated. As such, it can only be treated as a useful reference point rather than a set of binding instructions.
- (2) For guidance on the criteria and conditions for immunity and reduction of a fine, see the respective provisions in the relevant Leniency Notice (see Section 1.1. for guidance on which Notice to apply).

1.1. Legal basis

- (3) **2006 Leniency Notice:** The Commission's current policy on leniency applications is described in the 2006 Commission notice on immunity from fines and reduction of fines in cartel cases (the "2006 Leniency Notice")¹. The 2006 Leniency Notice applies to all new leniency applications made since the publication of the Notice on 8 December 2006. The only exception to this is where another undertaking had already made a leniency application in respect of the same case under the 2002 Leniency Notice, in which case the 2002 Notice will apply to the entire case, including any subsequent leniency applications.
- (4) **2002 Leniency Notice:** The 2002 Commission notice on immunity from fines and reduction of fines in cartel cases (the "2002 Leniency Notice")² applies to all cases where, prior to adoption of the 2006 Leniency Notice, an application for immunity or reduction of fines had been received. However, the section of the 2006 Notice on handling of corporate statements is applied from its publication on 8 December 2006 also to all applications made under the 2002 Notice.
- (5) As the procedure for dealing with leniency applications is for most parts similar under both Notices, with few exceptions (such as in particular the marker system that applies under the 2006 Notice), the guidance hereafter deals with all applications unless specifically mentioned that it only concerns applications made pursuant to one or the other Notice.

1.2. Types of applications

- (6) Each type of application - be it for immunity (either under point 8(a) or point 8(b) of the 2006 Leniency Notice) or for a reduction of fine - has its own procedure(see details below).
- (7) **Application for immunity or for reduction of a fine:** An undertaking may apply simultaneously both for immunity from fines and, in the alternative, for a reduction of fines. In the latter case, the application is firstly handled as an immunity application and only once it has been determined that it does not meet the conditions for immunity, as an application for a reduction of fines.
- (8) **Marker vs. formal immunity applications:** Under the 2006 Leniency Notice an undertaking may either initially apply for a marker (giving it time to gather the necessary information and evidence to qualify for immunity) or immediately make a formal application.
- (9) **Formal immunity applications:** An undertaking making a formal immunity application may either (a) provide all information and evidence immediately or (b) initially present this information and evidence in hypothetical terms. The latter are referred to as **hypothetical applications** and

¹ OJ C 298, 8.12.2006, pages 17 to 22.

² OJ C45, 19.2.2002, pages 3 to 5.

the procedure is different from and longer than that for applications where the evidence is submitted immediately. In applications for reductions of fines, the evidence cannot be submitted in hypothetical terms.

- (10) **Markers and hypothetical applications cannot be combined:** An undertaking which has been granted a marker cannot perfect it by making a formal application in hypothetical terms. The hypothetical application is available to allow undertakings to ascertain whether the evidence in their possession would meet the immunity threshold before disclosing their identity or the infringement. In a hypothetical application an undertaking must show the evidence liable to meet the relevant immunity threshold, although it can be done by means of edited copies where data that could identify the undertaking and the cartel is at that stage deleted. In contrast, a marker is granted to protect the place in the queue of an applicant to allow it time to gather all information and evidence needed to meet the immunity threshold.
- (11) **Written or oral applications:** Both in the case of applications for immunity and for a reduction of fines undertakings can submit their corporate statements either in writing or orally. Upon an applicant's request, the Commission may accept that corporate statements are provided orally, unless the applicant has already disclosed the content of the corporate statement to third parties. Hereinafter, applications in cases where oral statements are accepted are referred to as "oral applications" and other applications are referred to as "written applications".

1.3. Internal organization

- (12) All immunity applications should be addressed to and dealt with by the Cartels Directorate – Directorate G.

1.4. General principles in handling of the applications

1.4.1. Neutrality

- (13) The Commission services should maintain neutrality in their contacts with undertakings. They do not favour one undertaking over another in terms of the treatment given under the Leniency Notice. Undertakings can however be informed of the possibilities offered by the Leniency Notice.

1.4.2. Confidentiality

- (14) All information and evidence received in applications under the Leniency Notice are treated as confidential. This is especially so where the case is initiated as the result of such an application, as the application will in most cases be followed by surprise inspections. For such cases, special security measures apply until the inspections have taken place (or Article 18 letters have been sent, unless the confidential status is not released despite the latter measure).
- (15) All documents should remain at the Commission's premises and be placed on the case file following strict security treatment.

2. Initial contacts and inquiries

2.1. Dedicated fax and phone numbers

- (16) An undertaking wishing to apply for leniency is required to contact the Commission's Directorate-General for Competition. A dedicated fax number has been established for this purpose and it is published on the Commission's web-site

[\(<http://europa.eu.int/comm/competition/antitrust/leniency>\):](http://europa.eu.int/comm/competition/antitrust/leniency)

- (17) Leniency fax: +32-2-299 45 85
- (18) Before sending the actual submission by fax, undertakings are advised to seek assistance by calling the following dedicated telephone numbers, which are also published on the Commission's web-site:

Telephone numbers: +32-2-298 41 90 or +32-2-298 41 91.

- (19) The above dedicated telephone numbers will put the undertaking (or its advisors) in contact with DG COMP for leniency applications. The contact persons for applicants are the Heads of Units (and Deputy Heads of Unit) of Directorate G.
- (20) Undertakings or their advisers seeking information on leniency should always be referred to the above contact numbers.

2.2. Inquiries on availability of immunity or marker

- (21) In accordance with the Leniency Notice DG COMP is required immediately to inform an undertaking wishing to apply for immunity if it becomes apparent that immunity from fines would not be available for the suspected infringement.
- (22) Potential applicants need not necessarily reveal their identity from the outset. They will always have to indicate the product or service concerned with sufficient precision for the Directorate-General to be able to indicate whether conditional immunity is available. The degree of precision required will vary from case to case depending on whether the Commission already has an investigation, or has received a prior application, in the product or service sector identified by the applicant.

3. Applications for a marker

3.1. Receiving the application

- (23) Under the 2006 Leniency Notice an undertaking applying for immunity may initially apply for a marker that protects its place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence to qualify for immunity. A marker is granted at the discretion of the Commission services.
- (24) **All inquiries to be handled by the Directorate G management:** Potential applicants are encouraged to contact the DG COMP contact persons for leniency applications beforehand to

discuss steps to be taken in a potential application and requirements in each step. All such enquires should be directed to the Heads of Unit (or Deputy Heads of Unit) of Directorate G.

- (25) **Information to be provided by the applicant:** Point 15 of the 2006 Leniency Notice specifies the information that an applicant needs to provide to secure a marker. In accordance with that provision, and to gather information needed to determine the possible marker period, the applicant should be asked to provide the following information when making the application:
1. Basic information on the alleged infringement:
 - name and address of the applicant,
 - parties to the alleged cartel,
 - affected product(s),
 - affected territory(-ies),
 - estimated duration of the alleged cartel and whether the cartel is still ongoing,
 - nature of the alleged cartel conduct.
 2. Information on other past or possible future leniency applications to other authorities in relation to the alleged cartel: Could the applicant provide a waiver to exchange information with such other authorities on the fact of the application outside the ECN? Special rules apply for discussions with other ECN members. No waiver is needed in order to discuss the fact of the application with another ECN member.³
 3. A justification for the request of a marker.
- (26) The information that the applicant provides on the alleged infringement should be sufficiently clear so that on the basis of that it can be assessed whether the marker application is likely to lead to the opening of a cartel case.
- (27) While providing a justification for a marker, the applicant should explain what kind of internal investigatory measures it intends to take during the marker period and to provide detailed information and reasoning for time needed for each such measure. This information, together with the information whether the cartel is still ongoing, is necessary to make an informed decision on time to be granted to perfect a marker, which would be granted when it appears that the applicant would be in a position to perfect it.
- (28) **Power of attorney:** In practice the marker applications are usually made by external legal counsels. When an external counsel makes a contact to submit an application, a power of attorney needs to be provided. No response to a marker application will be provided to an external counsel until an original of a power of attorney has been received.
- (29) **Oral applications:** See 4.1.1 below.

3.2. Registration of the case

³ If an application has already been made with another ECN member, also the content of the application can be discussed and exchanged, provided that the applicant can at that time no longer withdraw the information it has submitted to the concerned ECN members. This follows from para. 41 of the Commission Notice on Cooperation within the Network of Competition Authorities (see further Section 6 below).

- (30) After an application for a marker has been made, the case team should register a new case in the case management application.

3.3. Processing the marker application

- (31) **Taking position on the application:** It is recommended to check on receipt of the application that all information required has been provided and study the content of the application.
- (32) **Letter granting a marker:** A marker is granted by a letter signed by a Director. The letter can be addressed either to the applicant or, providing that the necessary power of attorney has been submitted, to its lawyer. When the letter is notified at the Commission premises, it is recommended to prepare minutes of such notification.
- (33) In addition to the provisions set in the letter, it is recommended to ask the applicant to provide evidence and information as soon as certain pieces of evidence are available or certain internal investigation steps have been completed. It is advisable to arrange the timing of the submissions by the applicant to perfect the marker. It is also recommended to request that the applicant informs the Commission services during the marker period immediately on any cartel contacts that the applicant receives from other cartel members, any upcoming cartel meetings or other cartel actions and what action other cartel members normally would expect from the applicant in such situations.
- (34) **Letter refusing a marker:** A marker is refused by a letter signed by a Director.

3.4. Perfecting the marker

- (35) A marker is perfected by submitting the information and evidence required for a formal application for immunity within the given deadline. If the undertaking perfects the marker within this deadline, the information and evidence will be **deemed to have been submitted on the date when the marker was granted**.
- (36) An undertaking may also ask for an extension of the marker period. Any extension request should be submitted formally and motivated in detail in order to allow for an informed assessment of the request. The extension requests are assessed on a case by case basis taking into account the need to keep the marker period short in order to ensure that evidence at any premises to be inspected remains intact. Any such extensions are approved by a Director.
- (37) **If a marker applicant does not perfect the marker** within the deadline granted, and the deadline is not extended, the undertaking can still present a formal application for immunity at any time. However, if the marker has not been perfected, **the applicant should be informed in writing that its place in the queue is no longer protected**.
- (38) From the moment when the undertaking submits a formal application for immunity, the procedure described in [Section 4](#) below applies.

4. Formal applications for immunity

4.1. Receiving the application

- (39) **Formal application required:** A mere letter or phone call announcing the undertaking's intention to apply for immunity is insufficient to constitute an immunity application. A formal immunity application must be submitted by either

- (1) providing **immediately** all information and evidence required to meet the immunity threshold (immediate application), or
 - (2) presenting a **descriptive list** of the evidence that the applicant proposes to disclose at a later agreed date (hypothetical application).
- (40) **Power of attorney:** In case the application is submitted by an external lawyer, representing the applicant, this must be a clearly identified person legally empowered to represent the applicant. For this purpose the lawyer needs to provide an original power of attorney signed by the undertaking it represents.
- (41) **Note the date of receipt of the evidence.** Where the evidence is provided in a meeting or otherwise than via the dedicated fax number referred to above, it is recommended that an internal note is made stating the date and time when the evidence was handed over. This should be reflected in the acknowledgement of receipt (see [Section 4.3.2](#) below).
- (42) In addition to any pre-existing evidence of the infringement the application will normally include a presentation of the undertaking's knowledge of the cartel. Such presentations are generally referred to as corporate statements and may be made either as a **written submission**⁴, signed by or on behalf of the undertaking, or as an **oral statement**.

4.1.1. Oral statements

- (43) The legal basis for the Commission to take statement is Article 19 of Regulation 1/2003 (Power to take statements)⁵. The procedure for corporate statements is set out in Section IV of the 2006 Leniency Notice (see paragraphs 31-35), according to which the Commission may accept that corporate statements are made orally unless the applicant has already disclosed the content of the corporate statement to third parties. From the moment of the publication of the 2006 Leniency Notice, this procedure applies to all pending and new applications.
- (44) The copy of the recorded oral statement; any comments provided by the applicant on it (when checking its technical accuracy and making any potential corrections to it); and the Commission transcript of it will be used in the proceedings.
- (45) In the following, the key elements in the oral corporate statement procedure are presented.
- (46) **Recording the statement and explaining the oral statements procedure to the applicant:** Oral corporate statements will be recorded. The Commission officials receiving the application should at the start of the meeting set out the procedure that will be followed (see also the Module on the Power to take statements). As part of the opening statement by the Commission official, it is recommended to remind the applicant about the following Leniency Notice provisions that the applicant should have already become familiar with before making the application:
- (47) 1) the possibility to **check technical accuracy of the recording** within a given time limit;
 - (48) 2) the possibility to **correct the substance of their oral statements** within a given time limit; and
 - (49) 3) the obligation to **check the accuracy of the transcript** made of the recording within a given time limit.

⁴ The notion of a "written statement" includes Commission transcripts of recorded statements that have been given orally where the applicant has signed the transcript to acknowledge its approval of the substance of the transcript.

⁵ For further information on the Commission's powers under Article 19, see module on the power to take statements (ManProc Chapter IV.4).

- (50) While the applicant can waive the first two rights (in which case the recording is deemed to have been approved), it has the obligation to check the accuracy of the transcript. It is recommended to remind the applicant that the **non-compliance with the last requirement may lead to the loss of any beneficial treatment under the Leniency Notice.**
- (51) The applicant should be reminded of the above described rights and formalities only once, at the first meeting where an oral statement is given.⁶
- (52) **Declaration on obligations of the leniency applicant.** The applicant should sign a declaration stating that it has been reminded of the obligations under point 32 of the 2006 Leniency Notice and that it is fully aware that corporate statements cannot contain any business secrets or other confidential information.
- (53) **Transcript of the statement:** After the recording, a Commission transcript of the oral statement will be prepared.
- (54) **Checking accuracy of the recording:** The undertaking making the oral statement has the opportunity, immediately or within a given time limit, to listen to a copy of the recording and to communicate to the Commission any comments regarding the accuracy of the recording (the technical accuracy of the recording). The undertaking may indicate to the Commission at any time before the expiry of the said time limit that it does not wish to make comments on the technical accuracy of the recording. At that point in time, the undertaking will be deemed to have approved the recording as accurate; alternatively, the recording will be deemed to be approved as accurate at the expiry of the said deadline.
- (55) Any comments made by the applicant's representatives regarding the technical accuracy of the recording of the oral statement may be made in writing or orally, at the choice of the undertaking. Any comments made in oral form will again be recorded. The same procedure as in case of the initial statement described above will be used. The undertaking will be given the opportunity to check the technical accuracy of this recording.
- (56) **Checking correctness of the substance:** The undertaking making the oral statement has the opportunity, immediately or within a given time limit to communicate to the Commission any corrections regarding the substance of the oral statement (correctness of the substance). The undertaking may indicate to the Commission at any time before the expiry of the said time limit that it does not wish to make any corrections on substance. At that point in time, the undertaking will be deemed to have approved the oral statement as correct on substance; alternatively, the oral statement will be deemed to be approved as correct on substance at the expiry of the said deadline.
- (57) Any corrections regarding the substance of the oral statement may be made in writing or orally, at the choice of the undertaking. Any corrections made in oral form will again be recorded. The same procedure as in case of the initial statement described above will be used. The undertaking will be given the opportunity to check the technical accuracy of this recording.
- (58) For the purposes of applying the Leniency Notice, the Commission will take corrections on substance into account as having been supplied on the day and at the time when they were submitted to the Commission.
- (59) The absence of any corrections on substance is without prejudice to the possibility to provide complementary information or evidence, including in the form of corporate statements.

⁶ Unless there are specific circumstances, such as a change in the legal representatives, in which case it is reasonable to inform on these rights and obligations once more.

- (60) **Checking accuracy of the transcript:** Following the explicit or implicit approval of the oral corporate statement or the submission of any corrections to it, the undertaking must check the accuracy of the transcript of the oral statement. For this purpose, the applicant must listen to the recording of the oral statement at the Commission's premises and check the accuracy of the transcript within a given time limit.
- (61) The undertaking has to ensure that the transcript is an exact literal reproduction of what has been stated orally. In practice the applicant has to listen to the tape and confirm that the transcript is accurate. Checking by means of any lawyer's notes is not allowed because the transcript must correspond to the tape and not the lawyer's notes.
- (62) It is recommended that the case-team verifies the accuracy of the transcript. They should preferably do so after the recording has been transcribed.
- (63) To certify that accuracy of the transcript has been checked by the applicant, the applicant or its representative should confirm in writing that the transcript is a true and accurate record of the oral statement.
- (64) If the undertaking or its representative does not agree to sign, it is recommended that an internal note is prepared for the file.
- (65) If there is a factual mistake in the oral statement found during checking of the transcript, a new oral statement correcting the mistake is necessary, and consequently a new transcript will be prepared. The undertaking should normally only dictate the correction in a separate statement, not the whole document.
- (66) **References to oral statements in SOs and Decisions:** When referring in an SO and in a Decision to the evidence provided in an oral statement, reference can be made to the page of the transcript (mentioning also the date of the statement).
- (67) **Interviews of applicant's employees and directors:** Under the 2006 Leniency Notice, to qualify for any immunity or reduction of a fine, a leniency applicant has an obligation to make its current (and, if possible, former) employees and directors available for interviews with the Commission.

4.1.2. Access to file procedure for corporate statements

- (68) Access to both written and oral statements will be made upon request and will be granted at the Commission's premises following the issuing of the SO. In the case of written corporate statements access will be granted by allowing the party to read the document at the Commission's premises and to take notes or make dictations. With respect to oral corporate statements, access will be granted by allowing the party to read the Commission transcript of the recording and to take notes. They will also, on request, be given the opportunity to listen to (relevant parts of) a copy of the original recording in case of doubts concerning the correctness of the statement. Any direct reproduction of the statements (or their recordings/transcripts) by mechanical or electronic means is prohibited.

4.2. Registration of the case

- (69) Unless the case file has already been opened (e.g. with a marker application), a new case file needs to be opened.

4.3. Processing the application: immediate applications⁷

4.3.1. Outline of the procedure

- (70) Once the application has been received, the first step should be to prepare a written acknowledgement of receipt (if the applicant so requests) (see [Section 4.3.2](#) below).
- (71) Second step is to verify whether the evidence submitted meets the conditions in points 8(a) or 8(b). If the conditions are met, this will be followed by the adoption of a Commission decision granting the undertaking conditional immunity from fines (see [Section \(87\)](#)).
- (72) If the conditions are not met, the undertaking will receive a Commission decision rejecting conditional immunity (see [Section \(88\)](#)) and it may either withdraw the evidence disclosed for the purpose of its application or request that the Commission considers the information for a possible reduction of a fine. The undertaking might alternatively have applied for a reduction of fines already in its application for immunity. In such case it will be acknowledged that such application was received and the undertaking will be informed that the Commission will verify whether the evidence meets the conditions set out in Notice, and will inform it accordingly (see [Section 5](#) below on applications for a reduction of a fine).
- (73) In some cases the undertaking may be informed via the acknowledgement of receipt that immunity is not available (see [Section 4.3.4](#)). Exceptionally, it may be possible to treat the case by way of a "non processing" or a "no action letter" (see [Section 4.3.8](#)).

4.3.2. Acknowledgement of receipt

- (74) **Timing:** After the immunity application has been filed and a case number has been obtained (see [Section 4.2](#) above), if so requested by the undertaking, DG Competition will acknowledge receipt of the application. This should preferably occur on the first working day after receipt of such request. In case of an oral application, it is recommended that the case team does not wait until the oral statement has been transcribed.
- (75) **Letter acknowledging receipt of the application:** The acknowledgement is made by a letter. The acknowledgement of receipt confirms the date on which the undertaking submitted the information and evidence and, where appropriate, the time of the application (e.g. if several applications have been received in a short interval).
- (76) **Addressee:** The acknowledgement can be addressed either to the applicant or, providing that the necessary power of attorney has been submitted, to its lawyer.
- (77) **Notification/sending of the letter in case of an oral application:** In case of an oral application, if so requested by the applicant, the acknowledgement of receipt will not be sent but will be notified to the applicant or its lawyer at the Commission's premises. The applicant or its lawyer will have to sign a minute stating that the undertaking has been duly notified⁸.
- (78) **A separate acknowledgement of receipt should be prepared for each supplement of evidence received.** If requested by the undertaking, an acknowledgment of receipt is prepared also for supplements of evidence it provides. If there are several new submissions made in a short

⁷ For hypothetical applications, see Section 4.4 below.

⁸ The same applies to the decision granting conditional immunity. See Section 4.4.2 below.

timeframe, the acknowledgement of receipt can cover such several submissions. In that case, it is recommended that the acknowledgement of receipt specifies the date of receipt for each submission.

4.3.3. Supplementing the application before a decision on conditional immunity

- (79) So long as no other immunity application has been received in respect of the same facts, the application may be supplemented by further evidence. The applicant bears the risk of not getting conditional immunity if another application is received in the meantime.
- (80) If during the period when decision on conditional immunity has not yet been taken a second immunity application is received, the Commission evaluates the application from the first applicant on the basis of the information it had received up to the moment when the second application was received (see [section 4.3.5](#)).

4.3.4. Informing the applicant in acknowledgement of receipt that immunity is not available

- (81) If it is possible to determine immediately and without assessing the evidence submitted by the applicant that immunity is not available, for instance because conditional immunity has already been granted to another undertaking in respect of the same alleged cartel, the acknowledgement of receipt (if requested by the applicant) can indicate that immunity is not available for the alleged infringement. This does not require the approval of the Commissioner. If the applicant has applied, in the alternative, for a reduction of fines, the same acknowledgement of receipt (if requested by the applicant), which informs that immunity is not available, will also acknowledge receipt of the reduction of fines application pursuant to point 28 of the Notice. Refusing immunity on other grounds requires a decision by the Commission (see [Section 4.3.5](#) below).

4.3.5. Taking position on immunity application and establishing first priority assessment - a note to the Commissioner

- (82) **Timing:** The Commission will endeavour to take position on an immunity application in a short timeframe. However, the time needed will depend on the complexity of the case. For instance if the application is being considered under point 8(b) of the 2006 Leniency Notice and the Commission already has a significant amount of evidence or in a border-line case, where it is not clear whether the threshold is met. More time may also be needed in the case of oral applications (when a transcript of an oral corporate statement needs to be prepared).
- (83) **Internal Note to the Commissioner:** The Commissioner must be informed whether in DG Competition's view the conditions of point 8(a) or, as the case may be, 8(b) of the 2006 Leniency Notice are fulfilled.
- (84) **Granting conditional immunity and asking for an agreement to inspections:** In case it is proposed to grant conditional immunity, where appropriate, the Commissioner should normally be asked in the same internal note to agree in principle to the carrying out of surprise inspections. If such inspections are not proposed, the Commissioner should be informed of the reasons for this. When inspections (or other forms of investigative measures) are proposed, the internal note to the Commissioner should also contain a first priority assessment. The priority assessment can be kept fairly short and concise.
- (85) **Rejecting conditional immunity:** If the evidence submitted with the application is clearly insufficient to meet the conditions of points 8(a) or 8(b) of the Leniency Notice, it is recommended that the Commission services should, as long as no other application has been

received, advise the applicant of this informally and give it the opportunity to supplement the evidence.

- (86) As mentioned above, an application for immunity may exceptionally be refused in the acknowledgement of receipt if it is clear that immunity is no longer available. In most cases, however, whether the application meets the criteria of points 8(a) or 8(b) of the Notice will require a substantive assessment. If, in such cases, the Directorate-General proposes to reject the application, the approval of the Commissioner should be sought.

4.3.6. Draft Decision

- (87) **Decision granting conditional immunity:** The Commissioner has been empowered by the College to issue Decisions granting conditional immunity on behalf of the Commission. A Draft decision on conditional immunity is therefore attached to the note to the Commissioner. The Decision is addressed to the applicant undertaking (never to a particular person in the undertaking). It should never be addressed to the lawyer. The lawyer may receive a copy (or, if explicitly requested by the undertaking in writing, the original), but this should not be mentioned on the face of the Decision.
- (88) **Decision rejecting conditional immunity:** The Commissioner has also been empowered to issue Decisions rejecting conditional immunity. The procedure for rejecting immunity is the same as for the granting of conditional immunity.
- (89) Before asking the Commissioner for approval, the **Legal Service** should have given their agreement on the draft decision.
- (90) The matter should be put on the agenda of the first possible **weekly meeting** with the Commissioner.
- (91) The minutes of the weekly meeting are recommended to be kept in the file to prove, if necessary, that the Commissioner has approved the decision and the inspection, as the case may be.

4.3.7. Withdrawal of evidence after rejection of immunity

- (92) **Request to retrieve evidence:** According to point 20 of the Leniency Notice, in case of a rejection of an immunity application the applicant may withdraw the evidence it has submitted to the Commission for the purposes of its immunity application or to request the Commission to consider the evidence and information submitted as a reduction of fines application. In case the applicant does not apply or has not applied for a reduction of fines in alternative to immunity it can withdraw the evidence submitted. In case of oral applications this is of course possible only with regard to the documents that the applicant has submitted whereas the oral recordings and their transcripts will be deleted. The applicant's request to withdraw evidence should be made in writing.
- (93) **Return of documents and deletion from case management application (CMA):** In practice, following such a written request the case team will give back the originals of the documents received from the applicant and delete any copies it has made of those documents, in particular in the CMA.

4.3.8. No action / non-processing letter (unmeritorious cases)

- (94) **Non-processing letters: Case dealt with a NCA:** When a national competition authority has received a parallel application in a case that is national in scope and is willing to pursue the case, a “non-processing” letter could be considered.

- (95) **No position taken: infringements covered by limitation period:** Under the 2006 Leniency Notice the Commission can refrain from taking a position on whether or not to grant a conditional immunity, if it becomes apparent that the application concerns infringements covered by the five years limitation period under Article 25(1)(b) of Regulation 1/2003, as such applications would be devoid of purpose (point 36 of the Notice). In such cases, DG Competition can close the case with a letter stating that no position is taken on the application.
- (96) **No action letters:** Only **exceptionally** a "no action" letter could be considered. The following situations could justify closing the case with a no-action letter:
- (97) The application is manifestly lacking in substance and the applicant cannot provide further information or evidence. Such applications would often merely aim at testing if the authority would consider the matter to be a cartel or to be likely to raise any cartel investigation.
- (98) The application gives some information on an alleged cartel, but the information is non-corroborated and too vague to meet the point 8(a) criteria, but still detailed enough to give reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned⁹.
- (99) Such a "no action" letter states that in the absence of further evidence, the Commission services do not currently intend to investigate the matter further but may change their stance at a later stage.
- (100) **Non-eligibility letters:** The case is closed with a non-eligibility letter where the conduct reported falls outside the Leniency Notice. A non-eligibility letter represents a *de facto* rejection of immunity and is distinct from a non-processing or no-action letter where immunity can still be considered in the event that the case is reopened.

4.4. Processing the application: hypothetical applications¹⁰

4.4.1. Introduction

- (101) **Two decisions:** The Commission will need to issue two decisions when dealing with a hypothetical application. The first decision concludes that the nature and content of the evidence described in the list will meet the conditions set out in points 8(a) or 8(b) of the 2006 Leniency Notice. The second decision concludes that the evidence provided corresponds to the description made in the list and grants conditional immunity.
- (102) **Requirements as to the content of the descriptive list:** The substantive evaluation of the value of the evidence is made in the first decision. If the evidence then supplied corresponds to the list, the second decision granting conditional immunity is automatic.
- (103) In cases where the Commission already has considerable evidence in its possession, a hypothetical application may not be possible, because the Commission would not be able to evaluate from the hypothetical list whether the evidence was new or already in its possession.

⁹ Following the judgment of the Court of Justice in Case C-94/00 *Roquette Frères* (ECR[2002] I-9011, paragraphs 61, 100) the Commission can carry out an investigation under Article 20(4) of Regulation 1/2003 if it is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned.

¹⁰ For immediate applications, see Section 4.3 above.

4.4.2. Granting conditional immunity

- (104) **First stage: Decision on basis of the hypothetical list of evidence:** The procedure is the same as in the case of an immediate application (see [Section 4.3](#) above). At this stage the name of the applicant may or may not be known. In the latter case, the decision should be sent to the lawyer representing the applicant.
- (105) **Second stage: Decision granting conditional immunity:** The procedure is the same as for a decision in the case of an immediate application (see [Section 4.3](#) above).

4.4.3. Rejecting conditional immunity

- (106) **Informing that immunity is not available:** Exceptionally, a hypothetical application can already be rejected in the acknowledgement of receipt, for instance because immunity has already been granted for the same infringement (see [Section 4.3.4](#) above).
- (107) **Rejection at the first stage:** If a hypothetical application is to be rejected for the reason that the evidence does not meet the conditions of points 8(a) or 8(b) of the 2006 Leniency Notice, this should be done in the first stage of the procedure, i.e. in reaction to the submission of the descriptive list.
- (108) The procedure is the same as in the case of granting conditional immunity. See Sections 4.3 and (104) above.
- (109) **Rejection at the second stage:** After the decision taken on the first stage to grant conditional immunity, the application may still be rejected if the evidence disclosed does not correspond to the description made in the list and the difference is such that the first decision would not have been taken if the evidence had been accurately described.
- (110) It is advisable to inform the applicant **first informally** and give it the opportunity to provide the evidence as described in the list, **unless a second application has been received**.
- (111) If the necessary evidence is still not forthcoming, the Directorate-General should propose to the Commissioner the rejection of the application. The applicant should then be informed by a letter from the Director of Directorate G that the condition stipulated in the first decision, namely that the evidence disclosed must correspond to the description made in the list, has not been fulfilled. The procedure to be followed is the same as in the case of granting conditional immunity. See [Sections 4.3](#) and [point \(105\)](#) above.

4.4.4. No action / non-processing letter

- (112) As in the case of an immediate application, it may in exceptional circumstances be appropriate to send a non-processing or a no action letter (See [Section 4.3.8](#) above).

5. Applications for a reduction of a fine

5.1. Introductory: special features of the procedure for reductions of fines

- (113) Evidence submitted by successive applicants is examined in the order in which it has been submitted. The largest band of reduction is awarded to the first undertaking to provide evidence representing significant added value with respect to the evidence already in the Commission's possession. In applications under the 2006 Notice the applicant must have made a formal

application and disclosed its participation in an alleged cartel affecting the Union. The applicant must identify any voluntary submissions it wishes to submit under the Leniency Notice. It must also meet the cumulative conditions on cooperation with the Commission set out in point 12 of the Notice.

- (114) If the Commission comes to the preliminary conclusion that the evidence submitted by the first applicant for a reduction of fines - prior to another applicant for reduction submits evidence - qualifies as significant added value, it will inform the applicant of its intention to apply the band of 30 to 50% reduction. If the applicant subsequently submits further evidence, this co-operation can have a positive influence on the level of reduction awarded within that band. Subsequent applicants can only qualify for the lower bands corresponding to the order of receiving from them information and evidence that provides significant added value.
- (115) If the initial evidence submitted by the first applicant does not (yet) qualify as significant added value, this does not mean that the application will be rejected (as would be the case with an application for immunity). Until such time as the Statement of Objections is issued, applications for a reduction of fines may always be further supplemented in order to qualify for a reduction (at a minimum the lowest band).
- (116) The Commission will evaluate the final position of each applicant at the end of the administrative procedure in any final decision finding an infringement.
- (117) Markers and hypothetical applications are not possible.
- (118) Under the 2002 Notice the Commission has an obligation to inform the applicant only if its preliminary conclusion is that the applicant qualifies for a reduction of a fine. However, under the 2006 Notice the Commission must inform the applicant in the same timeframe also if it comes to the preliminary conclusion that the applicant does not qualify for a reduction of a fine. The Commissioner has empowerments for a such a negative decision under both the 2002 and 2006 Notice.

5.2. Initial contacts and receiving the evidence/application

- (119) The 2002 Leniency Notice does not prescribe how an undertaking must apply for a reduction of a fine. It is sufficient that the undertaking provides the Commission with evidence of significant added value. However, the 2006 Notice specifies that any submissions for a reduction of fines have to be clearly identified as being part of a formal application for a reduction of a fine.
- (120) Often this will be done in the context of an application for immunity. If so, the application may from the outset be expressed to be made “in the alternative” for a reduction of a fine. In such cases the procedures for contacting the Commission and providing the evidence will be as set out in [Section 4.1](#) above (save for the fact that there is no provision for the making of hypothetical applications).
- (121) As in the case of an immunity application, an undertaking may provide both pre-existing written evidence available to it and a corporate statement, which may be given either in writing or orally. The procedures for the taking and recording of an oral statement will be the same as those which apply in the case of an application for immunity (see [Section 4.1.1](#) above).
- (122) As in the case of immunity applications, where the evidence is provided in a meeting or otherwise than via the dedicated fax number referred to above, the applicant will need to declare that it has been reminded of the obligation under point 32 of the 2006 Leniency Notice and that it is fully aware that corporate statements cannot contain any business secrets or other confidential information (see (52) above).

5.3. Processing the application

5.3.1. Outline of the procedure

- (123) The procedural handling is similar to that for immediate applications for immunity (see [Section 4.3](#) above).
- (124) As in the case of immunity applications, the Leniency Notice provides that the Directorate-General for Competition will issue an acknowledgement of receipt of the application recording the date of the application, if requested by the applicant.
- (125) Then, if the Commission comes to the preliminary conclusion that the evidence submitted constitutes significant added value, the Commission will issue a decision setting out its intention to apply a reduction of a fine within a specified band.
- (126) The Commission must give a preliminary positive conclusion no later than the date on which a Statement of Objections is notified.

5.3.2. Acknowledgement of receipt

- (127) **Timing:** After the application has been filed, if so requested by the undertaking, DG Competition will acknowledge receipt of the application for a **reduction** of fine and of any subsequent submissions of evidence. The acknowledgement will be made either to the applicant or its lawyer (check that a power of attorney has been received).
- (128) **The letter and its notification:** The acknowledgement is made by a letter signed by the responsible Director and it will confirm the date and, where appropriate, time of each submission. In case of an oral application, the procedure for notification of the acknowledgement of receipt is the same as for oral applications (see [paragraph \(83\)](#) above).

5.3.3. Decision indicating the Commission's intention to grant a reduction of fines

- (129) Once a preliminary conclusion has been reached that the evidence submitted constitutes significant added value, the Commission will issue a decision informing the applicant of its intention to apply a reduction of a fine within a certain band.

6. EEA and international cooperation

- (130) Under Article 2(1) of Protocol 23 to the EEA Agreement the Commission and the EFTA Surveillance Authority (“ESA”) are required to inform each other when opening ex officio procedures in cases that are of EEA relevance (see Module on Relations with third countries). This requirement applies also to cases that have been initiated as a result of a leniency application.
- (131) Under Article 9(3) of Protocol 23, however, where the information transmitted by the Commission to ESA (or vice-versa) concerns a case which has been initiated as a result of a leniency application, the receiving authority is prevented from using the information as the basis for starting an investigation on its own behalf. It is therefore crucial when informing ESA of the opening of a new case to make clear that the case has been initiated as the result of a leniency application.
- (132) Under Article 9(1) of Protocol 23 the Commission and ESA may also, for the purpose of applying Articles 53 and 54 of the EEA Agreement, exchange information and use it in evidence. As in the

case of the exchange of information within the ECN under Article 12 of Regulation 1/2003, Article 9(4) and (5) places restrictions on the circumstances in which protected leniency information may be exchanged between the Commission and ESA. These provisions exactly mirror those which apply to Article 12.

10 Opening of proceedings

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1. Reason for opening proceedings

- (1) The opening (or "initiation") of proceedings is a formal act of the Commission.¹
- (2) The Commission will open proceedings under Article 11(6) of Regulation 1/2003 when the initial assessment leads to the conclusion that the case merits further investigation and where the scope of the investigation has been sufficiently defined.
- (3) The opening of proceedings creates clarity as regards the allocation of the case within the ECN² and in relation to the parties and the complainant, if applicable. It also signals a commitment on the part of the Commission to further investigate the case as a matter of priority. DG Competition will thus allocate resources to the case and will endeavour to deal with the case in a timely manner.

2. Timing: when to Open proceedings?

- (4) Pursuant to Article 2 of Regulation 773/2004 the Commission may decide to open proceedings with a view to adopting a decision pursuant to Chapter III (Article 7 to 10) of Regulation 1/2003 at any point in time, but no later than the date on which it issues a Statement of Objections, a Preliminary Assessment as referred to in Article 9(1) of Regulation 1/2003 or a Notice pursuant to Article 27(4) of Regulation 1/2003 (for instance in an Article 10 procedure), whichever is the earlier. The Notice on Antitrust Best Practices further provides that the Commission will open proceedings under Article 11(6) of Regulation 1/2003 when the initial assessment leads to the conclusion that the case merits further investigation and where the scope of the investigation has been sufficiently defined.³ In cartel cases, the opening of proceedings normally takes place simultaneously with the adoption of the Statement of Objections, though it may take place earlier⁴. Also in other cases, if by conducting limited further investigations the appropriate scope of the case can be determined with more certainty, it may be advisable to carry out such further investigation before proposing to open proceedings.

3. Conditions for opening of proceedings

- (5) The conditions for opening proceedings are twofold:
 - Proceedings are opened "**with a view to adopting a decision**" under Articles 7 to 10 of Regulation 1/2003.⁵ It follows that proceedings cannot be opened if at the material point in time the Commission does not intend to adopt a decision. However, the opening of proceedings does not prejudice in any way the existence of an infringement.

¹ See Case 48/72 *Brasserie de Haecht* [1973] ECR 77, para. 16 and pt.52 of the Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004,,p.43), ("Network Notice"). On the opening of proceedings in general, see the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6) ("Notice on Antitrust Best Practices").

² The opening of proceedings relieves the national competition authorities of their competence to apply Articles 101 and 102 TFEU, see Article 11(6) of Regulation 1/2003.

³ See Notice on Antitrust Best Practices, paragraph 17.

⁴ See Notice on Antitrust Best Practices, paragraph 24.

⁵ See Article 2 of the Implementing Regulation.

- Given the legal consequences attached to the opening of proceedings the Commission's view must be underpinned by a certain number of objective factors. There must be **reasonable indications of a likely infringement**.⁶

4. ECN obligations

- (6) If a National Competition authority (NCA) already informed that they are acting on a given case (i.e. the ECN data base contains information of an NCA case)⁷, Article 11(6) of Regulation 1/2003 requires that the Commission consults in writing with the authority in question before opening of proceedings. In this regard two situations need to be distinguished:
- (7) If the opening is envisaged during the indicative case-allocation period⁸, a simple bilateral consultation will suffice. The other authorities are given an opportunity to react within 2 weeks.
- (8) If the opening is envisaged after the indicative case-allocation period, it is in principle limited to the situations mentioned in point 54 of the Network Notice⁹. Further to what is stipulated in Article 11(6), paragraphs 54 to 56 of this Notice require that the Commission:
 - formally consults the authority or authorities concerned, explaining the reasons for the opening in writing to the NCA(s) concerned and also to other network members, and
 - announces the intention to open proceedings in due time, so that network members have the possibility of asking for an Advisory Committee meeting.
- (9) The consultation must contain a specific reasoning as to why the Commission finds that it is appropriate for it to open proceedings. This can be done by explaining why one or more of the scenarios described in paragraph 54 of the Network Notice is at stake. The consultation document is signed by the Director-general and copied to the other network members, and a period of 2 weeks is given for replies.
- (10) The Commission must set out to the competition authority concerned its reasons for opening proceedings. In case of no disagreement this reasoning can be succinct. The Member State competition authority has a period of two weeks for making comments.

⁶ In the case of Article 10 decisions there must be indications that the adoption of a non-infringement decision would be in the EU public interest.

⁷ For further details see Module on Cooperation with National competition Authorities in EU and Exchange of Information in ECN.

⁸ In principle this case-allocation period is 2 months from the date when either the Commission or an NCA first informed the network of an investigation, but in case of a disagreement it is implicitly extended until a solution is found. An initiation decision is the ultimate way to end extended case-allocation discussions, but an agreement is by far a preferred solution to a unilateral de-seizure.

⁹ Network Notice, pt; 54: "[...] After the allocation phase, the Commission will in principle only apply Article 11(6) of the Council Regulation if one of the following situations arises:

(a) Network members envisage conflicting decisions in the same case.

(b) Network members envisage a decision which is obviously in conflict with consolidated case law; the standards defined in the judgements of the Community courts and in previous decisions and regulations of the Commission should serve as a yardstick; concerning the assessment of the facts (e.g. market definition), only a significant divergence will trigger an intervention of the Commission;

(c) Network member(s) is (are) unduly drawing out proceedings in the case;

(d) There is a need to adopt a Commission decision to develop Community competition policy in particular when a similar competition issue arises in several Member States or to ensure effective enforcement;

(e) The NCA(s) concerned do not object."

5. Drafting the decision opening proceedings

- (11) The decision opening proceedings should be kept short. Since the decision as such is notified to the parties it has to be drafted in the authentic language. In essence the decision states that it has been decided to open the proceedings pursuant to Article 11(6) of Regulation 1/2003 and Article 2 of Regulation 773/2004 in the case at stake and that the NCAs are relieved of their competence to apply Articles 101 and 102 of the TFEU to the same case.
- (12) The decision to open proceedings identifies the parties subject to the proceedings and briefly describes the scope of the investigation. In particular, it sets out the behaviour constituting the alleged infringement of Articles 101 and/or 102 TFEU to be covered by the investigation and normally identifies the territory and sector(s) where that behaviour takes place.
- (13) It has to be underlined that the opening of proceedings does not prejudice in any way the existence of an infringement. The opening of proceedings merely indicates that DG Competition will further pursue the case as matter of priority. This important distinction is made clear in the decision notified to the parties, as well as in all public communications concerning the opening of the case.

6. Adoption and notification of the decision

- (14) The Commissioner in charge of Competition has been empowered by the College to adopt the decision to open proceedings, except in cases in which the Commission wishes to relieve an NCA of its competence following a consultation by the NCA on its envisaged decision pursuant to Art. 11(6) of Regulation 1/2003.
- (15) The decision to open proceedings is notified to the parties subject to the proceedings.

7. Informing the NCA/ESA

- (16) After the notification of the decision of opening of proceedings, the case team prepares a short information note to the ECN and instruct the Antitrust Registry to send the note to the NCAs, mentioning Article 11(6) of Regulation 1/2003 and the case-number (but no case-name in the subject line) and, if appropriate, to ESA by mentioning Art. 2 of Protocol 23 to the EEA Agreement.

8. Publication of the Opening of proceedings

- (17) Pursuant to Article 2 of Regulation 773/2004 the Commission may make the opening of proceedings public. The Commission's policy is to publish a standard notice (in EN) about the adoption of the decision to open proceedings on the website of DG Competition and issue a press release, unless such publication may harm the investigation (e.g. if unannounced inspections are envisaged). The parties subject to the investigation are informed orally or in writing of the opening of proceedings sufficiently in advance before the opening of proceedings is made public so as to enable them to prepare their own communication (in particular in relation to shareholders, the financial institutions and the press)¹⁰.
- (18) The publication of the press release and of the website notice should take place after the notification of the decision of opening of proceedings. The case-team has to await the

¹⁰ Notice on Antitrust Best Practices, paragraphs 20 and 21.

acknowledgement of receipt of the notification (DHL slip signed by the addressee(s) of the decision) and only thereafter inform the Spokesperson to trigger the communication as well as launch the publication on the DG COMP website within a time-period of 1 to 2 days depending on whether or not the addressee was aware of the intention of opening proceedings and could therefore prepare its own communication (in particular in relation to shareholders, the financial institutions and the press).

- (19) See more details on how to insert the standard (word) document to be published on the website and on how to prepare the press release and standard Memo in the Module Publication.

9. Possibility to change the scope of the investigation after opening of proceedings

- (20) The opening of proceedings does not limit the right of the Commission to extend (or reduce) the scope and/or the addressees of the investigation at a later point in time; e.g. the in-depth investigation or a reorientation of the case may imply taking up and investigating new aspects, or dropping some existing aspects of the case¹¹. Where the investigation is extended, it is necessary to open proceedings in respect of additional infringements at the latest at the stage of the Statement of Objections or the Preliminary Assessment.

10. State of play meeting

- (21) DG Competition endeavours to give, on its own initiative or upon request, parties subject to the proceedings ample opportunity for open and frank discussions and to make their points of view known throughout the procedure.¹²
- (22) In this respect, DG Competition will offer a State of Play meeting (in principle, although not normally in the context of cartel proceedings) shortly after the opening of proceedings informing the parties subject to the proceedings of the issues identified at this stage and of the anticipated scope of the investigation¹³.
- (23) This meeting provides the parties with an opportunity to react initially to the issues identified and may also serve to assist the Directorate General for Competition in deciding on the appropriate framework for its further investigation.
- (24) This meeting may also be used to discuss with the parties any relevant language waivers that may be appropriate for the conduct of the investigation.
- (25) DG Competition may at this stage indicate a tentative timetable for the case. Such tentative timetable will, if appropriate, be updated at following State of Play meetings.
- (26) State of Play meetings are normally conducted at the Commission's premises, but if appropriate, they may be held by telephone or videoconference. Senior DG Competition management (Director or Deputy Director General) will normally chair the meeting. However in cases involving multiple parties, the meeting may be chaired by the responsible head of unit. The Legal

¹¹ In deciding whether to include new elements the trade-off between scope and duration of the investigation must be taken into account.

¹² See Chap. 2.9 of the Notice on Antitrust Best Practices.

¹³ See Notice on Antitrust Best Practices, paragraph 63(1). Further State of Play meetings will be offered at a sufficiently advanced stage in the investigation as well as after the parties' reply to the Statement of Objections or after the Oral Hearing (see Notice on Antitrust Best Practices, paragraphs 63(2) and 64).

Service and the Hearing Officer will be invited to the State of Play meetings and may decide to participate.

- (27) For fuller details, reference is made to Chapter 2.9 of the Notice on Antitrust Best Practices.

11. Triangular meeting

- (28) In addition to bilateral meetings between DG Competition and each individual party such as the State of Play meetings, the Commission may exceptionally decide to invite the parties subject to the proceedings, and possibly also the complainant and/or third parties, to a so-called "triangular" meeting.¹⁴ Such a meeting will be organised if DG Competition believes it to be in the interests of the investigation to hear the views on, or to verify the accuracy of, factual issues of all the parties in a single meeting. Such a meeting could be useful to the investigation, for example, where two or more opposing views or information have been put forward as to key data or evidence.
- (29) Any triangular meeting would normally take place at the initiative of the Commission and on a voluntary basis. Triangular meetings are normally chaired by Senior management of DG Competition (Director or Deputy Director General). The Legal Service and the Hearing Officer will systematically be informed of and invited to triangular meetings.
- (30) Where triangular meetings are held, this should be done as early as possible during the investigatory phase (after the opening of proceedings and before any issuing of Statement of Objections) in order to help the Commission reach a conclusion on substantive issues before the Commission decides whether to issue a Statement of Objections, although the holding of such meetings after the issue of the Statement of Objections in appropriate cases is not excluded. Triangular meetings should be prepared on the basis of an agenda established by the DG Competition after consulting all parties that agree to attend the meeting. The preparation of the meeting may include a mutual exchange of non-confidential submissions between the attending parties sufficiently in advance of the meeting.

12. Review of key submissions

- (31) In the spirit of encouraging an open exchange of views the Commission will¹⁵, in cases based on formal complaints, provide the parties subject to the proceedings, at an early stage (unless such is considered to likely prejudice the investigation) and at the latest shortly after the opening of proceedings, with the opportunity of commenting on a non-confidential version of the complaint¹⁶. However, this may not be the case where the complaint is rejected at an early stage without further in-depth investigation (e.g. based on "insufficient grounds for acting by conducting a further investigation", also known as "lack of European Union interest").
- (32) Early access to the complaint may allow the parties to provide useful information at an early stage of the procedure and facilitate the assessment of the case.
- (33) In the same spirit, the Commission's objective will be to provide the parties subject to the proceedings shortly after the opening of proceedings with the opportunity to review non-confidential versions of other "key submissions" already submitted to the Commission. This would include significant submissions of the complainant or interested third parties, but not, for

¹⁴ See Chap. 2.10 of the Notice on Antitrust Best Practices.

¹⁵ See Chap. 2.10 of the Notice on Antitrust Best Practices.

¹⁶ A non-confidential version of the reply of the party subject to the investigation to the complaint may thereafter be provided to the complainant.

example, replies to requests for information. The review of key submissions does not replace the formal procedure of access to the file.

- (34) After this early stage, submissions submitted later on will only be shared with the parties if this is in the interest of the investigation and would not risk unduly slowing down the investigative phase. The Commission will respect justified requests by the complainant or interested third parties for non-disclosure of their submissions prior to the issuing of a Statement of Objections where they have genuine concerns regarding confidentiality, including fears of retaliation and the protection of business secrets.
- (35) The review of key submissions will not be offered in the context of cartel proceedings.

11 Drafting of Statement of Objections (SO)

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1. Purpose of a Statement of Objections

- (1) A Statement of Objections (“SO”) must be used in procedures in which the Commission intends to adopt a decision adverse to the interests of the addressees, i.e. finding an infringement of Article 101 or 102 TFEU and ordering its termination and/or imposing behavioural or structural remedies on the parties (Article 7 of Regulation 1/2003 and Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU¹ (“Best Practices Notice”), paragraph 83), ordering interim measures (Article 8 of Regulation 1/2003), imposing fines (whether for procedural or substantive infringements) (Article 23 of Regulation 1/2003) or periodic penalty payments (Article 24 of Regulation 1/2003), as well as withdrawing in an individual case the benefit of a block exemption (Article 29(1) of Regulation 1/2003).
- (2) The purpose of the SO is to inform the parties concerned of the objections raised against them with a view to enabling them to exercise their rights of defence in writing and orally (at the hearing).² The undertakings concerned must be provided with all the information they need to defend themselves effectively and to comment on the allegations made against them.
- (3) The SO is therefore an essential procedural safeguard ensuring that the right to be heard is observed in all proceedings.³
- (4) As far as it is possible, an SO should be issued when the fact-finding is considered complete. If new elements appear after the issuing of the SO, a supplementary SO or letter of facts (see section 8 of the current module) may have to be sent, which may considerably delay the conclusion of the investigation.⁴
- (5) According to the Best Practices Notice, the parties should be offered a State of Play meeting “at a sufficiently advanced stage in the investigation”, i.e. in any event before an SO is issued. This meeting gives the parties an opportunity to understand the Commission’s preliminary views on the status of the case following its investigation and on the competition concerns identified. The meeting may also be used by DG Competition and by the parties to clarify certain issues and facts relevant for the outcome of the case⁵.
- (6) From the procedural perspective, an SO is not an act or a decision within the meaning of Article 263 TFEU. It thus cannot be separately challenged by an action for annulment. Rather, it is a preparatory procedural measure preceding the formal decision, and therefore any arguments concerning the legality of an SO must be raised in the context of an appeal against the final Commission decision.⁶

¹ OJ C 308, 20.10.2011, p. 6.

² Article 27(1) of Regulation 1/2003; Articles 10 to 14 of Regulation 773/2004.

³ Case C-395/96 P, *CMB e.a./Commission* 2000 [ECR] I-1365, paragraph 142, with reference to Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others v Commission* [1983] ECR 1825, paragraphs 10 and 14.

⁴ Case C-167/04 P *JCB Service v. Commission*, [2004] ECR II-49, paragraph 52.

⁵ Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6) (“Best Practices Notice”), paragraph 63(2).

⁶ See Case 60/81, *International Business Machines Corporation v Commission*, [1981] ECR 2639, paragraphs 10-21; Case T-475/08R *Intel v Commission* [2009] ECR II-12.

2. Structure and contents of SO

2.1. Formal Conditions

- (7) The SO should be prepared in view of the nature and structure of the final decision that might be adopted. Its length is directly related to the nature of the case and its complexity. As a rule, it should be kept as concise as possible.
- (8) The document must clearly indicate that it constitutes an SO within the meaning of Article 27(1) of Regulation 1/2003. If proceedings have not been formally opened before, a decision to initiation of the proceedings (see Article 11(6) of Regulation 1/2003 and Article 2 of Regulation 773/2004) will be notified in parallel to the addressee of the SO.
- (9) An SO may concern more than one infringement provided that it relates to facts presenting sufficient connections. The Commission may also establish in one SO facts derived from separate complaints. The Commission is entitled to join related cases without any formal requirement to adopt a reasoned decision for that purpose⁷.

2.2. Substantive Conditions

2.2.1. General rules and citation of evidence

- (10) Article 27(1) of Regulation 1/2003 provides that the Commission must base its decisions only on objections on which the parties concerned have been able to comment.⁸ Hence, the objections must be exhaustive and couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to take cognizance of the conduct complained of by the Commission.⁹ The undertakings concerned must be informed of all the facts and documents on which the Commission intends to rely in its final decision, even if they are known to the undertaking.¹⁰
- (11) The SO must also clearly set out the legal assessment of the facts raised against each undertaking so that the undertaking concerned has an opportunity to contest the legal conclusions concerning the alleged infringements.¹¹ In practice, the linkage between the factual part and the legal assessment can be done by cross-references from the legal analysis to the relevant recitals in the description of the facts; it is not necessary to repeat the facts in the legal part. In this context, it is also important to keep in mind that if a document is mentioned in the factual part of the SO but no conclusion is drawn from it in the legal assessment, it may be more difficult to rely on it as evidence of the conduct with which an undertaking is charged.¹²

⁷ Joined Cases 209/78 and 218/78, *Heintz van Landewyck SARL and others (FEDETAB) v Commission of the European Communities*, [1980] ECR 3125, paragraphs 29 and 32.

⁸ See also case C-62/86, *AKZO*, paragraphs 15 to 24, Rec. I-3444-3445 ; and joint cases T-10, 11, 12 et 15/92, *CBR ea, (Ciments)*, paragraph 33, Rec. 1992 II-1571.

⁹ Joined Cases T-5/00 and T-6/00, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v Commission*, [2003] ECR II-5761 paragraph 33; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 42.

¹⁰ Case 85/76 *Hoffmann-La Roche v Commission*, [1979] ECR 461, paragraphs 9 and 11; Case T-7/89 *Hercules v Commission*, [1991] ECR II-1711, paragraph 53.

¹¹ Case C-62/86 *Akzo v Commission* [1991] ECR I-3359, paragraph 29; see also joint cases T-10, 11, 12 et 15/92, *CBR ea, (Ciments)*, paragraph 33, Rec. 1992 II-1571.

¹² Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and others v Commission ("Woodpulp")*, [1993] ECR I-1307, paragraph 153.

- (12) Personal data, that is any information relating to an identified or identifiable natural person (such as names of representatives of the undertaking referred to in minutes of meetings, letters etc) should for reasons of personal data protection only be mentioned in the SO if this is necessary to support the objections against the undertaking concerned¹³ or to allow parties to properly exercise their rights of defence. Where possible the natural person should not be identified in the SO by name but rather a description of the person's function should be given in general terms (example: marketing manager of undertaking A, employee of undertaking B).
- (13) SOs (and prohibition decisions) should identify the documents used as evidence in support of the objections. This should be done by way of reference to documents in the file. Any precise quotations of passages of the document in the file should be accompanied by a translation done in the language of the procedure of the undertaking, indicating that it is an unofficial translation of the original document. In general, each time an objection is based on a document, the document should be clearly cited so that the undertaking in question will be able to identify and find it easily when access is given to the file, as well as to give its view on the evidential value of the document.
- (14) Only documents cited or mentioned in the SO (or in a supplementary SO or letter of facts) constitute valid evidence. The important point is not the documents as such but the conclusions that the Commission draws from them. If certain documents, even where they are known to an undertaking (e.g. when they came from its offices), are not mentioned in the SO, this undertaking may consider that these documents are of no importance for the purposes of the case and the Commission may have to indicate them to the parties (for instance, in a letter of facts) before relying on them in the final decision.¹⁴ However, documents appended to the SO, but not mentioned therein, may be used in the decision against a party, if the addressee of the decision could reasonably deduce from the SO the conclusions which the Commission intended to draw from them¹⁵, but it is always preferable to make express reference to any document that may be used.

2.2.2. Indication of sanctions and remedies

- (15) The SO must also clearly indicate whether the Commission intends to impose fines (Article 23 of Regulation 1/2003), a periodic penalty payment (Article 24) or other remedies (structural or behavioural), should the objections be upheld, referring to the evidence and facts supporting such measures.¹⁶
- (16) In case of imposition of fines pursuant to Article 23 of Regulation 1/2003, the SO will refer to the relevant principles laid down in the Guidelines on setting fines.
- (17) The Commission must indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement involved, as well as whether the infringement was committed intentionally or by negligence.¹⁷ It will also mention in a sufficiently precise manner that certain facts may give rise to aggravating circumstances, and to the extent possible, to attenuating circumstances.

¹³ Regulation (EC) No 45/2001 (OJ L 8, 12.1.2001, page 1) protects individuals with regard to the processing of personal data by EU institutions.

¹⁴ Case 107/82, AEG [1983] ECR 3193, paragraphs 26 and 27. By not informing the applicant that the documents in question would be used in the decision, the Commission prevented AEG from putting forward its view of the probative value of such documents.

¹⁵ Joined Cases T-5/00 and T-6/00 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v Commission* [2003] ECR II-5761 paragraph 34

¹⁶ Case C.-176/99 P *ARBED SA v Commission*, [2003] ECR I-10687P, paragraph 21; Case T-395/94, *Atlantic Container Line AB and Others v Commission*, [2002] ECR II-00875, paragraphs 417-420.; Case 322/81, *Michelin v Commission*, [1983] ECR 3461, paragraph 20.

¹⁷ Case 322/81, *Michelin v Commission* [1983] ECR 3461, paragraphs 19 and 20); Case C-289/04P *Showa Denko KK* [2006] ECR I-5859, paragraph 69; Joined Cases T-109/02 e.a. *Bolloré e.a.* [2007] ECR II-947, paragraphs 396-404.

- (18) The Best Practices Notice states that, although under no legal obligation in this respect, the SO will endeavour to include (using information available) further matters relevant to any subsequent calculation of fines, including the relevant sales figures to be taken into account and the year(s) that will be considered for the value of such sales. Such information may also be provided to the parties after the Statement of Objections. In both cases, the parties will be provided with an opportunity to comment¹⁸.
- (19) In the SO the Commission should also inform the parties that in exceptional cases, it may, upon request, take account of the undertaking's inability to pay and reduce or cancel the fine that might otherwise be imposed if that fine would irretrievably jeopardise the economic viability of the undertaking.¹⁹
- (20) Regarding structural or behavioural remedies, the SO should be as detailed as possible and indicate the envisaged remedies. The information given in the SO should be detailed enough to allow the parties to defend themselves as to the necessity and proportionality of the remedies envisaged. If structural remedies are envisaged, in accordance with Article 7(1) of Regulation 1/2003 the SO should spell out why there is no equally effective behavioural remedy or why any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy²⁰.

3. Language regime

- (21) The addressee of an SO has the right to receive all the correspondence, including the SO and the final decision, in the language or one of the languages of the Member State of its location following the general rules of the national legislation in question.²¹
- (22) This language rule can be changed, if the parties wish to opt for another (EU) language on the basis of a "language waiver". A representative of every addressee of an SO or decision (regardless of the fact that two or more companies/legal entities belong to the same group) should sign the formulation as stated in the language waiver.

4. Adoption Process

4.1. Drafting the SO

- (23) The case team is in charge of drafting the SO. It may request support from the Antitrust and Merger Case Support Unit and, if relevant, the Chief Economist Team.

¹⁸ Best Practices Notice, paragraph 85.

¹⁹ Best Practices Notice, paragraphs 85 et seq.

²⁰ See Best Practices Notice, paragraph 83.

²¹ Article 3 of Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 06.10.1958, p. 385.

4.2. Consultation of Legal Service

- (24) The LS receives the draft SO, with a cover note signed by the relevant Director for consultation.
- (25) In accordance with Article 23-4.2 of the Implementing Rules giving effect to the Rules of Procedure of the Commission, the LS should be granted at least 10 working days when the document is up to 20 pages and at least 15 working days where it exceeds 20 pages.

4.3. Information to other DGs concerned

- (26) After approval by the Legal Service, the relevant Directorate Generals for the product or service concerned should be informed²² and - except in duly justified circumstances of urgency - they will be given 10 working days when the document is up to 20 pages and at least 15 working days otherwise to state their views. Normally, their remarks should be limited to factual matters, whereas the assessment is for DG COMP. However, the 2004 empowerment decision states that DG COMP “will take the greatest possible account of the opinion expressed by the other departments” and that an inter-service meeting will be held “in good time” if so requested by one of these departments. For details see module on decision-making procedure.
- (27) The empowerment for issuance of an SO must be exercised in agreement with the President of the Commission.

4.4. Adoption by the Commissioner

- (28) The SO is adopted by the Competition Commissioner under the empowerment procedure, once the agreement of the LS and of the President have been obtained.

5. Notification and transmission of the SO

5.1. Notification of SO to addressees

- (29) An SO is addressed and notified individually to each party by the Secretariat General (“SG”) together with the cover letter explaining the rights of the addressees (see further here below [Section 6](#)).
- (30) The SG sends the SO only to the undertakings, not to their lawyers. Therefore, if regarded as useful, a courtesy copy to the lawyers can be sent by the Head of Unit responsible.²³
- (31) While the subject of the competition rules is an “undertaking”, each legal entity that may be liable for the infringement within the undertakings must individually receive, as an addressee, an SO, specifying which elements of the infringement it is held responsible for and whether a fine is liable to be imposed on it.²⁴ It is therefore important to make sure that the SO is addressed to all possible legal entities (parent companies and subsidiaries) that may be held jointly and severally liable for the infringement, indicating clearly why the Commission considers each of them to be liable for the infringement. The final decision cannot be addressed to legal entities which, although they may be considered to be responsible for the infringements, were not an addressee of the SO.

²² Commission decision of 28.4.2004 PV(2004)1655, SEC(2004)520, Article 2

²³ Article 10(1) of Regulation 773/2004.

²⁴ Joined Cases C-395/96 P and C-396/96 P, *Compagnie maritime belge*, [2000] ECR I-1365, paragraphs 142 to 147

- (32) As regards associations of undertakings, it is normally sufficient to send a single SO to the association rather than addressing individually its members,²⁵ unless its members are also held liable for the infringement.
- (33) In case a language waiver has been agreed by the parties modifying the basic language rules contained in Regulation No 1 (see above section 3 Language regime), this must be submitted to the SG to ensure that the SG is prepared to send out an SO or a decision to an undertaking in a language other than the language of the Member State in which that undertaking is based.

5.2. Transmission of SO to addressees outside EU

- (34) It often happens that undertakings having their registered offices and/or headquarters outside the EU/EEA, also have subsidiaries or branches in the territory of the EU/EEA. In such cases the SO can be notified to the undertaking concerned **at the address (“c/o”) of a subsidiary in the EU/EEA representing the business activities** if the registered office and/or headquarters outside the EU/EEA has agreed to it. The case-team should request such agreement, in order that the SG can duly notify it to the mandated subsidiary.
- (35) If an undertaking has no establishment in the EU/EEA, the letter communicating the SO must be sent directly to the registered office or headquarters located outside the EU/EEA.
- (36) If clarification is needed, the Unit for International Relations will be available to provide assistance and advice to the case team.

5.3. Transmission of SO to complainants and other third parties

- (37) Pursuant to Article 6 of Regulation 773/2004, "where the Commission issues an SO relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the SO and set a time-limit within which the complainant may make known its views in writing". This can naturally be done only after a non-confidential version has been produced. Before sending the non-confidential version of the SO, the complainant should have received and returned a confidentiality declaration referred to in paragraph 40 below. A deadline of maximum one month is given for comments on the SO by the complainants.
- (38) If other third parties request to be heard and show a sufficient interest, the Commission must inform them in writing of the nature and subject matter of the procedure (Article 13(1) or Regulation 773/2004). This means a summary of the facts and of the legal assessment set forth in the SO. Exceptionally, if deemed appropriate, a copy of the non-confidential version of the SO can be provided to them the same way as to the complainants.²⁶ When there are several third parties, the principle of equal treatment must be respected and the same form of communication should be used.
- (39) In order to avoid that the complainant or the other third parties justifying a sufficient interest uses this document for other purposes, they will be requested to sign a confidentiality declaration before

²⁵ Joined Cases T-39/92 and T-40/92 *Carte Bleu v Commission* [1994] ECR II-49, paragraph 139.

²⁶ Joint Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG/Commission* [2006] ECR II-1601, summary point 4, paragraphs 71-72, 78: "Any applicant or complainant who has shown a legitimate interest thus has the right to receive a non-confidential version of the statement of objections. As regards third parties having a sufficient interest, it cannot be ruled out that the Commission might, without being required to do so, transmit to them a non-confidential version of the statement of objections so that they are in a proper position effectively to send it their comments on the alleged infringements forming the subject-matter of the proceeding in question. Beyond those two scenarios, provision is not made in Regulation No 17 and Regulation No 2842/98 for the Commission to transmit the statement of objections to legal or natural persons other than undertakings against which those objections have been raised."

receiving the non-confidential version of the SO or the summary thereof. It is also important to highlight in the cover letter that the document is communicated only for the purpose of judicial or administrative proceedings for the application of Art. 101/102 TFEU, including proceedings before national courts²⁷.

- (40) The observations received from the complainants and other third parties justifying a sufficient interest are submitted to the addressees of the SO, subject to the deletion of business secrets and other confidential information. The purpose of this obligation is to ensure the respect of the rights of defence.

5.4. Transmission of SO to Member States and ESA

- (41) Via secure e-mail connection an encrypted copy of the SO and the cover letter addressed to the undertakings are transmitted, without delay, to all NCAs. Before the transmission, remember to add the date of the SO given by the SG to the electronic version of the SO.
- (42) There is no need to send translations of the SO to NCAs and/or to ESA. However, if different language versions of the SO are sent to companies, every language version of the SO should be sent to all NCAs and/or to ESA (by secure-mail or via CD-ROM/DVD).
- (43) Where the Commission decides to initiate proceedings in a case with EEA relevance ("mixed case") by means of sending an SO, it should be noted that this decision must include the finding that it is a case to which the EEA provisions apply. ESA must be informed and receive a copy of the SO. When the SO and the initiation of proceedings coincide, it should be remembered that ESA has at least forty working days to react. This time will be longer if the companies concerned have been granted a longer time limit. In all other cases of transmission of a copy of the SO, ESA has to respect the same time limits as the companies concerned.
- (44) In order to ensure good cooperation it is recommended to take up informal contacts with the ESA before the Statement of Objection is issued.

5.5. Notification of SO to competition authorities outside EEA

- (45) If the case concerns a non-EEA-country, the case-team should check if there is an obligation to inform the third country competition authority about the fact that an SO has been notified to a company in its jurisdiction (see guide on "Notification Obligations"). In case of doubt, the Unit for International Relations within Directorate A will provide assistance.
- (46) When there is an obligation to notify, inform the Unit for International Relations, fill-in the template and send it to their functional mailbox. The Unit for International Relations will take care of the notification to the competition authorities in third countries.

²⁷ See Article 8(2) of Regulation 773/2004; Case T-12/07 R *Polimeri v Commission* [2007] ECR II-38, paragraphs 53 and 54; "... the transmission is made for the only purpose of the proceedings under Regulation 17 [now Regulation 1/2003], without prejudice to the case-law of the Courts (in particular case T-353/94 *Postbank*)"] In Case T-353/94 *Postbank* [1996] ECR II-945, the General Court ruled that Article 20(1) of Regulation No°17 [now Article 28(2) of Regulation 1/2003] does not oblige that the Commission prohibits the complainants, to whom it has transmitted certain documents of the administrative procedure (in particular the non-confidential version of the SO), from producing them in a national judicial procedure for assessment of possible existence of violations of Articles 101 and/or 102 of the Treaty (paragraph 63).

6. Cover letter

- (47) The cover letter sending the SO to the parties will be signed by the Director-General of DG COMP, but the SG adds the date and notifies to the addressees. The cover letter should contain the following:
- a deadline for the reply²⁸;
 - modalities for the reply;
 - information on the parties' access to file²⁹;
 - information on the right to request an oral hearing³⁰ and indication on its timing;
 - the name, phone number and e-mail address of the Hearing Officer in charge;
 - an indication of the possibility to ask for business secret protection for any part of the SO and a deadline for making such claims³¹;
 - an indication of the possibility to make reasoned requests for confidentiality treatment for any material provided in a view expressed on the SO (see section 6.5)³².

6.1. Deadline for reply

6.1.1. Initial time-limit

- (48) **The deadline to reply to the SO** starts when the parties have received the most important documents from the Commission's file (i.e. the CD-ROM/DVD)³³ and time begins to run as from the day after the receipt of these documents³⁴.
- (49) In practice, the deadline to reply begins either:
- the day after the parties collect the CD-ROM/DVD at DG COMP's premises; or
 - the day after the parties receive the CD-ROM/DVD by mail; or
 - after five working days from the reception of the notification of the SO, if the parties expressed in writing that they decline access to the file or did not react to ask for the CD-ROM/DVD within these 5 working days.

²⁸ Article 10(2) of Regulation 773/2004, according to which "The Commission shall, when notifying the statement of objections to the parties concerned, set a time-limit within which these parties may inform it in writing of their views". The Commission is not obliged to take into account written submissions received after the expiry of that time-limit. See also XXIII Annual Report (1993 - n° 207).

²⁹ Article 27(2) of Regulation 1/2003 and Article 15 of Regulation 773/2004.

³⁰ Article 27(1) and (3) of Regulation 1/2003; Articles 11 to 14 of Regulation 773/2004.; see also Article 6 of the Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings ("Hearing Officer Terms of Reference"), OJ L 275, 20.10.2011, p. 29.

³¹ Article 16(3) of Regulation 773/2004.

³² Article 16(2) of Regulation No 773/2004

³³ Case T-44/00, *Mannesmannröhren-Werke*, of 8 July 2004, para. 65.

³⁴ Art 3 Reg. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

- (50) Access to corporate statements at DG Competition's premises does as such not modify the deadline for reply to the SO, but normally a longer deadline will be allowed in order to take into account the additional time needed for organizing the access to corporate statements at DG Competition premises.
- (51) The time limit for the reply to the SO will take into account both the time required for the preparation of the submission and the urgency of the case. The parties have a right to at least a period of four weeks to reply to the SO.³⁵ A longer period (normally, a period of 2 months, although this may be longer or shorter depending on the circumstances of the case) will be granted, taking into account *inter alia* the size and complexity of the file, and/or whether the addressee of the SO making the request has had prior access to the information, and/or any other objective obstacles faced by the addressee of the SO (see Best Practices Notice, paragraph 100).
- (52) For a supplementary SO the above rules on setting the time limit for the reply to the SO apply, although a shorter time limit will typically be set in this context (see Best Practices Notice, paragraphs 100 and 110).

6.1.2. Extension

- (53) If a party considers that the deadline is too short, it can seek an extension, within the initial time-limit, by making a reasoned request to DG Competition at least 10 working days before the expiry of the original time limit.³⁶
- (54) If the extension is refused or in case of disagreement on the length of the extension granted, the requesting party is entitled to refer the matter for decision to the Hearing Officer by way of a statement explaining the reason why an extension is considered necessary and indicating the length of time required. The legal situation in this respect is laid down in Articles 10(2) and 17(2) of Regulation 773/2004, and Article 9 of the Hearing Officer's Terms of Reference³⁷. The Hearing Officer will hear the Director responsible for the case before taking his/her decision and will inform the undertaking and DG Competition in writing.³⁸
- (55) The criteria applied by the Hearing Officer in taking the decision are listed in Article 9(1) of the HO Terms of Reference:
- the size and complexity of the file (for example, the number of infringements, the alleged duration of the infringement(s), the size and number of documents and/or the size and complexity of expert studies);
 - whether the addressee of the statement of objection making the request has had prior access to information; and/or
 - any other objective obstacles which may be faced by the addressee of the statement of objection making the request in providing its observations.
- (56) Failure to reply within the fixed deadline does not affect the pursuit of the procedure. Pursuant to Article 10(2) of Regulation 773/2004 "*[t]he Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit*".

³⁵ Article 17(2) of Regulation 773/2004.

³⁶ Best Practices Notice, paragraph 101.

³⁷ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29).

³⁸ *Id.*, Article 9(1).

6.2. Modalities for submission of the reply

- (57) The modalities for submission of the reply are set out in Article 10(3) of Regulation No 773/2004, which contains the following provisions:

“The parties may, in their written submissions, set out all facts known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out.

They shall provide a paper original as well as an electronic copy or, where they do not provide an electronic copy, 28 paper copies of their submission and of the documents attached to it.

They may also propose that the Commission hear persons who may corroborate the facts set out in their submission.”

6.3. Information on access to file

- (58) The cover letter sending the SO should mention that the parties have a right to access to the file³⁹ and the arrangements proposed for that (see detailed description in the Module Access to File).
- (59) In the cover letter the parties are informed that if they want to have access to the file, they have to make a written request within 5 working days after receipt of the SO, in order to:
- collect the CD-ROM/DVD at DG COMP premises or receive the CD-ROM/DVD by registered letter with receipt of delivery and/or
 - have access to corporate statements in case of leniency cases.
- (60) The cover letter should also mention that pursuant to Article 15(4) of Regulation 773/2004, “documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 of the Treaty”.

6.4. Possibility to request a oral hearing

- (61) The cover letter should further indicate that the parties have the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions.⁴⁰
- (62) The case-team should provide the Hearing Officer with the relevant powers of attorney, and keep him/her informed about the parties' change of counsel or appointment of additional lawyers.
- (63) The Hearing Officer should be contacted in good time in advance (at least six weeks before the envisaged hearing date) to discuss a tentative date of the hearing. The Hearing Officer, after consultation with the Director responsible, determines the precise date(s), duration and place of the oral hearing. He is also in charge of informing the parties accordingly (see further in the Module Right to be heard).

6.5. Possibility to request confidentiality

- (64) The undertakings or associations of undertakings should be required to identify any part of an SO adopted by the Commission which in their view contains business secrets (Article 16(3) of Regulation

³⁹ Article 15(1) of Regulation 733/2004 and paras. 26 and 27 of the Notice on access to file.

⁴⁰ Article 12 of Regulation n° 773/2004.

No 773/2004). The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

- substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement;
 - provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted,⁴¹
 - provide a concise description of each piece of deleted information.
- (65) The letter submitting the SO to a party should also remind that any person which makes known its views pursuant to Article 10 (2) of Regulation No 773/2004 or subsequently submits further information to the Commission in the course of the same procedure must clearly identify any material in its reply to the SO, or in any other document it submits, which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known (Article 16(2) of Regulation No 773/2004).
- (66) If undertakings or associations of undertakings fail to comply with the above, the Commission may assume that the documents or statements concerned do not contain confidential information (Article 16(4) of Regulation No 773/2004).
- (67) However, the Commission should be prudent about the use of personal data in the SO (see section 2.2.1 above) and if such data are considered to be essential evidence in (the non-confidential version of) the SO and the (association) of undertakings concerned does not mark them as confidential information such data should as a rule be deleted in the non-confidential version of the SO.

7. Withdrawal of objections and the closing procedure

- (68) It may happen that as a result of the analysis of a party's reply to the SO and/or other information obtained after it, the objections will be withdrawn and the procedure against the addressee in question stopped.
- (69) When the objections (or the complaint; see module on Handling of complaints) are withdrawn, the procedure initiated pursuant to article 11(6) of Regulation 1/2003 should be closed. For details see module on closure of procedure.

8. New facts or evidence after the SO

8.1. Supplementary SOs

- (70) Due observance of the rights of defence requires that the undertakings and associations of undertakings concerned be afforded the opportunity to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission.⁴² If, after the SO has been issued, new facts or evidence appear as a result of the addressees' replies, investigation measures taken separately or a new complaint, the undertakings in question have to be given an

⁴¹ Article 16(3) (b) of Regulation 773/2004.

⁴² Case 85/76 *Hoffman-La Roche v Commission* [1979] ECR 461; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *SA Cimenteries CBR and Others v Commission*.

opportunity to give their explanations on these new aspects. If the undertakings have not had the opportunity to present their observations on such new aspects, they cannot be relied on in the final decision.

- (71) If these new elements justify raising supplementary objections in substance, or they imply a modification in the intrinsic nature of the infringement with which an undertaking is charged, they have to be communicated to the undertakings concerned by a supplementary SO in due form⁴³. A supplementary SO can also be issued to correct any omissions of the first SO⁴⁴.
- (72) The due form is not respected if the Commission simply dispatches a copy of an SO sent to another party and solely for the purposes of information, when the supplementary SO alters the intrinsic nature of the infringement with which an undertaking is charged and widens the scope of the objections presented against it.⁴⁵ Failure to do so constitutes violation of the rights of defence. This is particularly true where it cannot be excluded that the procedure might have had a different result if the Commission had properly notified a supplementary SO to the undertaking in question and if it had prescribed a period of time for that undertaking to submit its observations with respect to the new elements included in that SO.⁴⁶
- (73) It is not necessary to repeat all the objections in the supplementary SO; it suffices to simply state what is new with regard to the previous SO and what has not been submitted to the undertaking previously.
- (74) Before issuing a supplementary SO, a State of Play meeting will normally be offered to the parties. The rules on setting the time limit for the reply to an SO apply, although a shorter time limit will typically be set in this context⁴⁷.

8.2. Letter of facts

- (75) On the other hand, if new information only corroborates the objections already raised against the undertaking(s), i.e. if further evidence is brought forward in support of the objections already set out in the SO, it is sufficient to bring them to the attention of the parties by a simple letter (letter of facts), giving them a possibility to provide written comments on the new evidence within a fixed deadline⁴⁸. Parties may ask for an extension of this deadline by first submitting a request in due time within the original deadline to the case team. In case of refusal or disagreement about the length of the extension, the matter can be referred to the Hearing Officer, by means of a reasoned request.⁴⁹
- (76) Where, for instance, there is a new complaint containing facts other than those already communicated, but that corroborate the objections already communicated to the undertaking, a supplementary SO is not formally necessary; it is sufficient that the undertaking in question be informed of the contents of such complaint and that its reaction be recorded in writing.⁵⁰ Similarly, where the conclusions drawn earlier in the SO will not be altered, the Commission may forward evidential documents to the

⁴³ Case C-167/04 P, *JCB Service*, [2004] ECR II-49, paragraph 52. See also Best Practices Notice, paragraph 110.

⁴⁴ Case C-167/04 P, *JCB Service*, [2004] ECR II-49, paragraphs 100-101.

⁴⁵ Joint cases T-39/92 et T-40/92, *Groupement des cartes bancaires 'CB' et Europay International*, in particular paragraph 58.

⁴⁶ *Ibid*, paragraphs 46 to 60, in particular paragraphs 46, 52, 55, 58 et 60, Rec. p. II-72.

⁴⁷ See Best Practices Notice, paragraph 110.

⁴⁸ Case T-23/99 *LR af 1998 v Commission* [2002] ECR II-1705, paragraphs 188-190, Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, paragraphs 28-37 and Best Practices Notice, paragraph 110; see also Commission Report on Competition Policy [2004], SEC (2005) 805 final, 10 in relation to Commission Decision COMP/C-3/37.792 of 24.3.2004, *Microsoft*, paragraph 15.

⁴⁹ Article 3(7) of the Hearing Officer Terms of Reference.

⁵⁰ Joined Cases 209-215 and 218/78 *Van Landewijck e.a* [1980] ECR 3243, paragraphs 29-35.

undertakings so that they may make their observations on them.⁵¹ This ensures that the parties will be given due access to the file, without, however, the necessity to organise a new hearing. When the Commission merely communicates to a party a non-confidential version (or specific excerpts thereof) of the other parties' written replies to the Statement of Objections and gives it the opportunity to submit their comments (see above), this does not constitute a letter of facts.

⁵¹ Joined Cases T-236/01, T-239/01, T-244/01-T-246/01, T-251/01 and T-252/01 *Tokai Carbon Co Ltd and others v Commission* [2004] ECR II-1181, paragraph 45.

12 Access to file and confidentiality

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1. Introduction

- (1) Access to file work requires legal and procedural knowledge and implies notably a substantive assessment of confidentiality claims. This is often a complex exercise given the tension between two fundamental interests, i.e. on the one hand, the rights of defence of the parties subject to the investigation and, on the other hand, the protection of confidential information by the author of the document.
- (2) Preparing the file for access to file is also a very time consuming exercise that should be started well in advance. The proper management of access to file is an integral part of case-handling. Case managers, case handlers, case assistants and case secretaries organise access to the file according to the highest standards.
- (3) The present Module gives guidance on the practical modalities of managing access to file and dealing with confidentiality claims.

1.1. Legal framework

- (4) The right of the parties to have access to the file is laid down in Article 27(1) and (2) of Regulation No 1/2003 and Article 15(1) of Commission Regulation No 773/2004.
- (5) The rules defining the scope of the **identification and protection of confidential information** are laid down in Article 16 of Commission Regulation No 773/2004. Article 28 of Regulation No 1/2003 defines the **professional secrecy**, which obliges the Commission not to disclose confidential information.
- (6) The **Commission Notice on access to file**¹ explains the principles relating to access to file as well as the treatment of confidential information.

1.2. To whom is access to file granted?

- (7) In cases under Articles 101 and 102 TFEU, access to file is only granted to the undertakings or associations of undertakings (“the parties”) to whom the Commission has addressed a Statement of Objections (“SO”).
- (8) Access to the file is distinct from the access to information contained in the file for a complainant where the Commission intends to reject a complaint² and distinct from the access to key documents under the Notice on Antitrust Best Practices³ and access to relevant information in settlement procedures⁴. It is also distinct from public access to documents under Regulation No 1049/2001⁵.

¹ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7; hereafter “Notice on access to file”.

² In the latter case, pursuant to Article 7(1) of Regulation No 773/2004, the complainant may request access only to the documents on which the Commission bases its provisional assessment in the Article 7(1) letter. See module on Handling of complaints.

³ See Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6) (“Notice on Antitrust Best Practices”), para. 73.

⁴ Art. 10 a (2) and 15(1)(a) of Regulation No 773/2004

⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43. For access to documents under Regulation No 1049/2001 in the context of competition proceedings see the internal guidelines.

1.3. Who grants access to file?

- (9) Access to file is a measure of pure administration, involving no other Commission services. The case team organises the access to the file.

1.4. When is access to file granted?

- (10) Access to file is granted upon request and, normally, on a single occasion, **following notification of the SO**.⁶

2. Scope of the Access to File

2.1. Definition of the file

- (11) The "Commission's file" in a competition investigation consists of all documents obtained, produced and/or assembled by DG Competition during the investigation that has led the Commission to raise its objections. The term "documents" includes all forms of information media.
- (12) **Documents submitted to or in possession of other Commission services** other than the submissions during the inter-service consultation of the concerned case are not part of the file, as they have not been obtained, produced and/or assembled by DG Competition during the investigation using the powers provided for in Regulation 1/2003.
- (13) **Documents without an objective link to the investigation** should be returned to the sender as soon as possible and be removed from the file. Only a standard letter by which the documents are returned, describing the type of document (e.g. report, market study, or a reference to the inspection number) and the reason for the return ("non case-related document") is kept in the file.
- (14) **Documents allegedly protected by legal professional privilege** should be avoided to include in the file before their status has been determined. Claims for legal professional privilege are treated on the spot during the inspection where possible. In case of disagreement companies cannot oppose to the Commission taking the documents in a sealed envelope to the Commission premises for further treatment⁷.
- (15) All precautions need to be taken to protect the identity of an informant who has expressed the wish to remain anonymous.

⁶ Article 15(1) of Regulation 773/2004; Notice on access to file para. 26 and 27.

⁷ See Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*.

File overview

In the file				
Accessible documents	Non-accessible documents			EC premises
	Non-accessible documents	Internal documents		
	Business secret	Other confidential information	Internal Commission documents	Correspondence with MS
NOT part of the file				
Non-related documents	Documents from other Commission services other than ISC		Documents protected by legal privilege	

2.2. Definition of accessible / non-accessible documents

- (16) According to the principle of equality of arms, all documents, whether inculpatory or exculpatory evidence and other information, which have been obtained by, produced to and/or assembled by DG Competition in the Commission's file need to be rendered accessible.⁸
- (17) There are only two exceptions:
- internal documents from the Commission or from the NCAs, including correspondence between them; and
 - confidential documents, including business secrets and other confidential information⁹.

2.2.1. Internal documents

- (18) Internal documents can be neither incriminating nor exculpatory. They do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Given their lack of evidential value, this restriction on access to internal documents does not prejudice the proper exercise of the parties' right of defence.

⁸ Notice on access to file, para. 7-10.

⁹ Notice on access to file, para. 10.

- (19) Internal documents are documents, such as drafts, opinions, memos or notes from the Commission or from the NCAs, including correspondence between them.
- (20) **Minutes of meetings**, if they contain also internal assessment, are to be treated as internal documents. According to the case law, the right to access to file does not require the Commission departments to draft any minutes of meetings with any person or undertaking¹⁰.
- (21) According to the Notice on Antitrust Best Practices¹¹, DG Competition may hold informal meetings (or conduct phone calls) with the parties subject to the proceedings, complainants, or third parties during the investigative phase. When a meeting takes place at the request of the parties, complainants or third parties, they should submit in advance a proposed agenda of topics to be discussed at the meeting, as well as a memorandum or a presentation covering these issues in more detail. The parties, complainants or third parties are invited after meetings or phone calls on substantive issues to substantiate their statements or presentations in writing. A non-confidential version of any written documentation prepared by the undertakings which attended a meeting held by DG Competition, together with a brief note prepared by the services of DG Competition, will be made accessible. Subject to requests for anonymity this note will mention the undertaking(s) attending the meeting, (or participating in the phone call relating to substantive issues) and the time and topic(s) covered by the meeting (or such a phone call). DG Competition may, after a meeting or other informal contact with the parties, complainants or third parties, request them to provide information in writing pursuant to Article 18 of Regulation 1/2003 or invite them to make a statement pursuant to Article 19 thereof.
- (22) **When external experts are commissioned** in connection with proceedings, correspondence between the Commission and the external expert constitutes, in principle, internal documents¹². These include correspondence containing evaluation of the contractor's work, including the draft of the report, or relating to financial aspects of the study. Such correspondence will thus not be accessible¹³. However, the results of a study commissioned in connection with proceedings with a view to be used as evidence as well as documents that are necessary to understand the methodology applied in the study or to test its technical correctness are accessible.
- (23) Information obtained at the DG Competition library from external paid databases should not be made available if copyrighted.
- (24) A particular case of internal documents is the Commission's **correspondence with other public authorities and the internal documents received from such authorities**, whether from EU Member States or third countries. Examples of such non-accessible documents include:
- a) correspondence between the Commission and NCAs, or between the latter;

¹⁰ Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others v Commission* (TACA) [2003] ECR II-3275, para. 349-359.

¹¹ Notice on Antitrust Best Practices, para 42 seq.

¹² Cf. 2005 Annual Report, para 21, in the section on the new Notice on access to file.

¹³ See Notice on access to file para.14 and Case T-210/01 *General Electric v Commission* [2005] ECR II-5575: In relation to Professor Choi's report, which was the basis of the Commission's theory on mixed bundling, the Court noted that the Commission's refusal, founded on a request for confidentiality made by Rolls-Royce, to grant access to the data on which the Choi model was based had no effect on the outcome of the administrative procedure. The Court considered that the Commission is entitled to seek different opinions, including the opinions of external experts, in order to check the accuracy of its analysis. To the extent that the Commission does not rely on the opinion of such an expert in its SO and its final decision as evidence substantiating its case against an undertaking, the opinion remains no more than a view expressed by a single person and assumes no particular significance in the context of the administrative procedure. Such a view, even though expressed by an expert, cannot therefore be regarded as either favourable or adverse evidence (para 671). If the documents in question had been regarded as forming part of the Commission's actual case-file, they would have been classified as internal documents, given their status and content, and the applicant would therefore not have had access to them (para. 672).

- b) correspondence between the Commission and other public authorities of Member States;
 - c) correspondence between the Commission, the EFTA Surveillance Authority and public authorities of EFTA States;
 - d) correspondence between the Commission and public authorities of third countries, including their competition authorities, in particular where the European Union and a third country have concluded an agreement governing the confidentiality of the information exchanged.
- (25) In certain exceptional circumstances, access may be granted to documents originating from Member States, the EFTA Surveillance Authority or EFTA States, after deletion of any business secrets or other confidential information. The Commission will consult as appropriate the entity submitting the document prior to granting access to identify business secrets or other confidential information.
- (26) This is the case where the documents originating from Member States contain allegations brought against the parties, which the Commission must examine, or form part of the evidence in the investigative process, in a way similar to documents obtained from private parties. These considerations apply, in particular, as regards:
- documents and information exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, and information provided to the Commission pursuant to Article 18(6) of Regulation (EC) No 1/2003;
 - complaints lodged by a Member State under Article 7(2) of Regulation (EC) No 1/2003.
- (27) Access will also be granted to documents originating from Member States or the EFTA Surveillance Authority in so far as they are relevant to the parties' defence with regard to the Commission's jurisdiction.¹⁴

2.2.2. Confidential information

- (28) **Confidential information** comprises business secrets and other confidential information.
- (29) **Business secrets** are confidential information about an undertaking's business activity the disclosure of which could cause serious harm to that undertaking.¹⁵ Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking'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.¹⁶
- (30) **Other confidential information** is information other than business secrets, insofar as its disclosure would significantly harm a person or undertaking.¹⁷ Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. The General Court and the Court of Justice have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the

¹⁴ Notice on access to file, para. 15-16.

¹⁵ Case T-353/94, *Postbank NV v Commission*, of 18.9.1996, para. 87.

¹⁶ Notice on access to file, para. 18.

¹⁷ Notice on access to file, para. 20, includes explicitly military secrets in the category of other confidential information.

risk of retaliatory measures¹⁸. 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.¹⁹

- (31) By way of example, the Commission does not normally accept the following type of information as business secrets and other confidential information:
- data from or about another company (such as price announcements, sales data etc. other than received pursuant to a contract with that company), unless confidentiality has been claimed (e.g. to prevent revelation of the knowledge of this information);
 - information made known outside the company concerned (such as price targets, increases, dates of implementation and customer names, if made known to third parties);
 - facts relating to an application for immunity or a reduction of fines, where these facts aim at providing evidence of an alleged infringement, unless the disclosure of such facts could harm the Commission's leniency policy;
 - names and positions of employees or other persons involved in an infringement.
- (32) Business secrets and other confidential documents lose their classification as confidential documents if they:
- are already known outside or
 - have lost their commercial importance, for instance due to the passage of time (as a general rule, parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential).²⁰
- (33) **Personal data** has to be processed in accordance with Regulation (EC) No 45/2001.²¹
- (34) **Correspondence on confidentiality** relating to the granting of confidentiality (including the cover emails etc.) is so closely interrelated to the issue of confidentiality that it need normally not be disclosed to the parties. It is advisable to clearly indicate in the file index that the document concerned constitutes "correspondence on confidentiality claims", so that the parties can understand why the document is not accessible.

2.3. Scope for confidentiality claim

- (35) Information will be classified as confidential where the information provider has substantiated its confidentiality claim and provided a non-confidential version that has been provisionally accepted by the Commission.

¹⁸ The Court of Justice of the European Union have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 102 TFEU) (Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389; and Case C-310/93P, *BPB Industries and British Gypsum* [1995] ECR I-865), and in merger cases (Case T-221/95 *Endemol v Commission* [1999] ECR II-1299, para. 69, and Case T-5/02 *TetraLaval v. Commission* [2002] ECR II-4381, para. 98 et seq.).

¹⁹ Notice on access to file, para. 19-20.

²⁰ Notice on access to file, para. 23.

²¹ Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1.

- (36) Dealing with requests for confidentiality generates substantial workload and case teams should deal with them as early as practicable. These claims must be settled before the SO is notified and access to file granted.

2.3.1. Legal Framework

- (37) The protection of confidential information is in principal assured by the classification itself pursuant to Article 27(2) Reg. 1/2003 and Article 15(2) and 16(1) Reg. 773/2004 as well as by the obligation of professional secrecy, which obliges the Commission not to disclose information in its possession covered by the obligation of professional secrecy pursuant to Article 28 of Reg. 1/2003 and Art. 339 TFEU.²²

2.3.2. Professional secrecy

- (38) The provisions on **professional secrecy** apply also to the competition authorities of the Member States, their officials, civil servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States (including their representatives and experts attending the Advisory Committee meetings).²³
- (39) According to the General Court²⁴ in order to fall under the obligation of professional secrecy the information must:
- be known only to a limited number of persons,
 - if disclosed, be liable to cause serious harm to the person who provided it or to third parties and
 - if disclosed, the interests liable to be harmed by disclosure must, objectively, be worthy of protection.

The General Court has also confirmed that the concept of professional secrecy is broader than that of business secret and therefore documents protected by the principle of professional secrecy can be disclosed when granting access to the file for the purpose of the rights of defence, provided they do not contain business secrets²⁵.

2.3.3. Disclosure of confidential information

- (40) The provisional qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement (“inculpatory”) or could be necessary to exonerate a party (“exculpatory document”).²⁶
- (41) In this case, the need to safeguard the rights of defence of the parties through the provision of the widest possible access to the Commission file may outweigh the obligation to protect confidential information of other parties.²⁷

²² Neither Article 339 TFEU nor Regulation 1/2003 explicitly indicates what information apart from business secrets is covered by the obligation of professional secrecy, but see case-law below.

²³ Reference could also be made to Regulation 45/2001, which obliges the Commission to ensure that the processing of personal data relating to natural persons is done in a fair and lawful way.

²⁴ Case T-198/03 *Bank Austria Creditanstalt AG v Commission* [2006] ECR II-1429, para. 71; also Case T-474/04, *Pergan v Commission* [2007] ECR II-4225, para 65 *et seq.*

²⁵ Case T-198/03 *Bank Austria Creditanstalt AG v Commission*, para. 29.

²⁶ See Art. 27(2) Reg. 1/2003; Art. 15(3) Reg. 773/2004, Notice on access to file, para. 24.

²⁷ Case T-30/91 *Solvay v Commission* [1995] ECR II-1775, para. 81: "In the defended proceedings for which Regulation No 17 provides it cannot be for the Commission alone to decide which documents are of use for the

- (42) However, information may be disclosed pursuant to Article 12 Reg. 1/2003 for the exchange of information between the Commission and the competition authorities of the Member States and pursuant to Article 15 Reg.1/2003 for the exchange of information between the Commission and national courts (See Module Cooperation with National Competition Authorities).
- (43) **Assessment of disclosure:** It is for the Commission to assess whether the need to prove an infringement or the right of the defence of the parties may outweigh the protection of confidentiality, in any specific situation. The case team should make this assessment as soon as possible. **The following factors, even if potentially conflicting, can play a role:**
- the relevance of the information in determining whether or not an infringement has been committed, and its probative value;
 - whether the information is indispensable;
 - the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the person or undertaking in question)
 - the preliminary view of the seriousness of the alleged infringement.

The public interest in proving an infringement of competition law, the parties' interest in having exculpatory information in the file at their disposal for the preparation of their defence and the information providers' interest in protecting his confidential information must be considered. The latter interest depends on the damage that the disclosure could cause in the individual case. For example, if information is to be divulged to companies with significant market power, the danger of retaliation against the information providers needs to be taken into account.²⁸ Information provided by individuals who request confidentiality/anonymity should be treated with utmost care.

- (44) **Practical guidance:** The case team can choose to provide the information providers with a draft non-confidential version of their documents. However, depending on the characteristics of the individual case, it can prove useful for reconciling conflicting interests to reveal the confidential information (only) partially or in an anonymous manner.²⁹

The Commission may:

- Use information against the addressee of the final decision in a non-confidential or anonymous manner. According to the case-law³⁰, the Commission is entitled to use in its final decision confidential information that has only been revealed in a non-confidential or anonymous manner. The General Court has acknowledged that the Commission may make use of an element of evidence even if it does not disclose the identity of the informer to the addressee of the Statement of objections.
- Oblige the information providers to (partially) reveal information which is to be used in the final decision or which could be of exonerating value. According to Regulation 1/2003 and 773/2004, the confidential nature of a document is not a bar to its disclosure in these cases. Pursuant to Art.

defence. The Commission must give the advisers of the undertaking concerned the opportunity to examine documents which may be relevant so that their probative value for the defence can be assessed".

²⁸ Case T-65/89 *BPB Industries and British Gypsum* [1993] ECR II-389; Case C-310/93 P *BPB Industries and British Gypsum* [1995] ECR I-865.

²⁹ This should only be done if it is indeed impossible for the companies to which the information is disclosed to directly or indirectly identify the provider of the information. This will depend on the circumstances of each case.

³⁰ Case T-44/00, *Mannesmann Röhrenwerke* [2004] ECR II-2223, para.84.

27, the Commission is not prevented from disclosing and using information necessary to prove an infringement (See further below Section 2.4.2 on the "Akzo procedure").

- Many disputes can be avoided if it is made clear to the parties that the acceptance or refusal of a confidentiality claim is done with a view to establishing a Statement of Objections and in no way precludes a later assessment of the confidentiality of the information in the public version of the decision that will be published on the Internet.

2.4. Treatment of confidentiality claims

2.4.1. Informing companies how to lodge confidentiality requests

- (45) The case-team requires systematically the provider of information for a non-confidential version of the original documents, when requesting or receiving information (Art. 18(2) letters or 18(3) decisions, when receiving complaints, reply to SO, during hearings etc. see relevant module on each topic).
- (46) After inspections and the unsolicited submission of information, the case-team should clarify which documents can be returned as not objectively linked to the investigation and request immediately the confidentiality status of the remaining documents by sending a letter to the parties asking them a non-confidential version of those documents, enclosed to the sending by copying them on a CD-ROM, if appropriate.
- (47) How to submit a non-confidential version and this way submit claims for non-confidentiality is set out in the annex on business secrets and other confidential information, based on Article 16 of Regulation 773/2004 and the para. 39 to 43 of the Notice on access to file, sent together with the Commission's request of information or request for non-confidential versions.
- The case-team may/will ask the provider of information to provide draft non-confidential versions of the documents in which the provider should first only highlight the information considered confidential or a business secret so that it remains legible.
- The information that the provider of information considers confidential can then be readily identified by the case-team. The highlighted text together with the table of confidentiality claims, providing the reason for the confidentiality claim and, if necessary, a non-confidential summary of the confidential, will form the basis of any discussions on the treatment of the content.
- At the latest once the case-team is preparing access to file, it will assess the claims for confidential treatment and review the documents submitted accordingly.
- Once the claims for confidentiality are accepted, the case-team asks to produce a final, blacked out version of the document (including annexes).
- In general, confidentiality cannot be claimed for the entire or whole sections of the document as it is normally possible to protect confidential information with limited redactions.
- The non-confidential document should keep the same format as the original version. So, if the provider of information claims confidentiality for only some parts of a document, the provider is requested to provide an accessible non-confidential version of the ENTIRE document i.e. if a five page document has been submitted, the non-confidential version of that document must also contain 5 pages. Headings of the documents and/or the headings of the columns should not be redacted, nor columns or spaces in tables and/or pictures left empty.

- (48) If information providers do not respond or fail to comply with the provisions setting out how to submit confidentiality claims (in particular with the obligation to properly justify the claim and submit a meaningful summary for the redacted information), the Commission may assume that the documents or statements concerned do not contain confidential information and that the undertaking has no objections to the disclosure of the documents or statements concerned in their entirety. The standard confidentiality annex explicitly reminds companies of these consequences (see also Art. 16(4) Reg. 773/2004).
- (49) Article 16 of Reg. 773/2004 does not contain any legal obligation to send a reminder to an information provider if the request is not answered within the time limit. In particular in cases where an information provider is represented by an external lawyer, it can be presumed that they are aware of the legal provisions and their consequences.

2.4.2. Dealing with confidentiality claims

- (50) It is preferable to settle all claims for confidentiality before the notification of the SO to the parties, in order to ensure a complete access to file.
- (51) According to para. 42 of the Notice on access to file: "Where the Directorate General for Competition does not agree with the confidentiality claim from the outset or where it takes the view that the provisional acceptance of the confidentiality claim should be reversed, and thus intends to disclose information, it will grant the person or undertaking in question an opportunity to express its views. In such cases, the Directorate General for Competition will inform the person or undertaking in writing of its intention to disclose information, give its reasons and set a time-limit within which such person or undertaking may inform it in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the matter will be dealt with by the Hearing Officer according to the applicable Commission terms of reference of the Hearing Officers".
- (52) In practice, the case team usually tries first to solve issues of unjustified confidentiality claims informally with the information provider. DG Competition informs the information provider in writing that
- it will provisionally accept those claims which seem justified. In any event, the information provider should be reminded of the Commission's right to reconsider its initial evaluation at a later stage of the handling of the case³¹, or
 - it does not agree with the confidentiality claim in whole or in part, provides reasons for the intention of disclosing this information and sets a time limit within which the information provider may inform the Commission in writing of its views.
- (53) If, following the submission of the information provider's views, a disagreement on the confidentiality claim persists, DG Competition will inform the company concerned in writing that their information will be disclosed, unless a reasoned request for confidentiality is lodged with the Hearing Officer (HO) within a given deadline. This letter should be sent with acknowledgement of receipt with a copy to the HO.
- (54) **If the information provider maintains its position**, the HO will address the issue and, if necessary, apply **the Akzo Procedure**,³² in accordance with Article 8 of the HO Terms of Reference³³.

³¹ One should keep in mind that the Notice on access to file explicitly foresees the possibility to provisionally accept substantiated confidentiality claims accompanied by non-confidential versions, while reserving the possibility to reverse a provisional acceptance at a later stage (see para 42 of the Notice on access to file).

³² As first set out by the Court of Justice in Case 53/85 *Akzo v Commission* [1986] ECR p. 1965.

- In practice, the HO may send a "pre Article 8" letter.
 - If the company concerned still objects to the disclosure of this information, but the Commission finds that the information should not be protected and may therefore be disclosed, that finding must be stated in a reasoned decision of the HO (Article 8 Decision).
 - This decision is adopted by delegation procedure by the HO and notified to the concerned company.
 - The company concerned is thereby given the opportunity to bring an action before the General Court with a view to having the Commission's assessment reviewed.
 - The company concerned must inform the HO within a given time limit from the day of notification of the Article 8 Decision whether they intend to lodge an appeal with the General Court and to apply for interim measures.
 - If the company concerned has lodged an appeal and applied for interim measures before that deadline, the Commission cannot disclose the relevant information until the Court has taken a decision on the request for interim relief.
- (55) According to the result of the decision, include the decision and classify the document pursuant to the decision (confidential or non-confidential) in the file.
- (56) If information providers misuse the procedure to delay the Commission's investigation, they should be reminded that the Commission may consider this an event of non-cooperation and take it into account as an aggravating factor when setting a possible fine against the information providers.

3. Procedure for implementing access to file

3.1. Constitution of the file

- (57) The preparation of access to file and the processing of requests for confidentiality that flow from such preparation generate substantial workload and require adequate staffing and realistic planning.

3.1.1. When and how access to file has to be prepared?

- (58) The case teams should start the preparation as soon as possible.
- (59) Each time a document relevant for the investigation is received or produced, it should be as soon as possible classified in the case management application ("CMA") by defining the document as accessible (A) or non-accessible (NA), or "internal", "EC premises" (for all corporate statements and immunity/leniency related decisions or correspondence only accessible at DG Competition premises) or by default, before determining the right classification, as "undefined".

- (60) **Where it is not clear** upon receipt whether a document is accessible or not, case teams should no longer provisionally accept confidentiality claims but address the issue without undue delay (see above section 2.4 Dealing with confidentiality claims).
- (61) At the moment of preparing the Statement of Objections (SO), the classification should be **double-checked** for all documents. This is necessary not only to minimise risks of inadvertent disclosure of non-accessible documents but also to minimise risks of not respecting rights of defence (ensure that all documents that prove the infringement or which are exculpatory are accessible).

3.1.2. Documents to put in the file

- (62) The preparation for access to file entails the following:
- Documents that upon examination are not objectively linked to the investigation or do not respond to the question asked in a request for information can be **returned** (see paragraph (13) above). This should be done **without undue delay**³⁴. The decision whether to return such documents is within the full discretion of the Commission (i.e. no standing of an information provider to request the returning of documents).
 - **Multiple versions** of the identical document sent by e-mail, fax, normal mail, etc. are uploaded by the Registry into the case file and may be deleted by the case team only if they are identical. These documents are deleted with the following reason for deletion "duplicate of IDxxx". As a matter of principle, data entries and scanning carried out by the Registry should be checked on a continuous basis by the Registry and the case team. Multiple non-finalised, non-confidential versions of the same document should be avoided. Keep only the final version as accessible and mark the previous versions as non-accessible.
 - **Non-confidential versions** have to be systematically requested from the information providers and put in the file (see above section 2.4.1 Informing companies how to lodge confidentiality requests).

3.2. Organisation of the access to file

- (63) The access to file is prepared using the CMA.

3.2.1. Electronic access to file via the CMA

- (64) The CMA enables automatic processing of the accessible file.
- A functionality in the CMA allows automatic downloading of the accessible documents with original filenames masked in a compressed (zip) file;
 - This file can then be burned on a CD-ROM/DVD together with the Excel list, named "Access to file final table" and an explanatory note on how to use the CD-ROM/DVD.
- (65) The access to file should be prepared as follows:
- The file, that is **the electronic case file kept by the Registry**, should be complete. Documents received directly by the case team should be immediately sent to the Registry for registration and

³⁴ Even if information appears to be not relevant at a later stage, there should be possibilities to return the documents, to be assessed on a case by case basis and in close co-operation with the Hearing Officers.

insertion in the CMA. Also documents sent by the parties to or by the Chief Economist's team, the Hearing Office, the Deputy Director General or the Director General, as well as documents sent to a cabinet that are forwarded to DG Competition should be included in the file once they are forwarded to the case team or the Registry.

- **Names for internal and external parties** are pre-defined in the integrated registration tool. The Registries are responsible of managing parties' names, stored in the integrated registration tool database common for all instruments. When registering a bundle, the Registry adds systematically the name of the sender as "correspondent"³⁵ and adds the name in the database, if not yet registered. This name is then copied automatically to the field entity of all documents contained in the bundle. The name of the "correspondent" is managed by the Registries, but the name of the "entity"³⁶ can be changed by the case team to suit the case file. The "entity" name would usually be the name of the company, rather than the law firm representing them, who sent the bundle.
- A standardised naming convention for documents in the file should be used. This will allow the case team, but also the Registry and other colleagues searching for particular information to easily find this information in spite of the restrictions of the CMA. The list below gathers suggested naming conventions of documents. As a suggested rule, names of documents should be kept as simple as possible in order to avoid increasing workload for encoding data and keeping in mind that each document has already some information attached to it in the integrated registration tool (in/out, correspondent, category) which already gives indication on the content of the document.

³⁵ Displayed in "advanced" tab of the document in the CMA.

³⁶ Displayed in "main" tab of the document in the CMA.

Type of document	Naming convention	Information
RFI (art.11 request for information)	RFI of dd/mm/yyyy (registration number)– cover letter, questionnaire & Excel annexes <i>Alt. if separate documents:</i> RFI of dd/mm/yyyy (registration number) – cover letter RFI of dd/mm/yyyy (registration number) – questionnaire RFI of dd/mm/yyyy (registration number) – Excel annexes	outgoing
Reply to RFI – cover letter	Reply to RFI of dd/mm/yyyy (registration number) – cover letter [or cover email, cover fax]	The sender of the cover letter determines the main External party
Reply to RFI	Reply to RFI of dd/mm/yyyy (registration number) – reply Q29, Q34 – "the original name of the file" Reply to RFI of dd/mm/yyyy (registration number) - Q1-5, Q20, Q22	– main reply to all questions or specify to which questions; - if questions replied to are mentioned in cover letter, add also to document name;
Annexes to reply to RFI	Reply to RFI of dd/mm/yyyy (registration number) - Annex to Q1 "sales 2005.pdf"	if annex = .xls or .pdf file, copy the file name given by the company and add to the name in brackets (i.e. "sales 2005.pdf" <u>do not translate the name</u> of the document)
Clarifications on answer	E-mail requesting clarifications reply to RFI of dd/mm/yyyy (registration number) – Q3	This makes reference to the original RFI because it's a part of the answer
Supplementary reply to RFI	Supplementary reply to RFI of dd/mm/yyyy (registration number) – Q3	This is when Q3 has already been partially answered.
Request for extension of deadline	Reply to RFI of dd/mm/yyyy (registration number) - request to extend the deadline	
RFI asking for clarification or supplementary answers referring to other RFI	RFI of dd/mm/yyyy (registration number) (Questions about RFI "registration number" and "registration number")	When it's possible, specify to which questions it is about.
Acknowledgement of receipt to a RFI	AR to RFI of dd/mm/yyyy (registration number)	
Acknowledgement of receipt to mail about confidentiality matter	AR to reminder for non-confidential documents (registration number(s) and/or inspection documents)	Specify the RFI number and type tree
Asking for non-confidential document	Reminder for non-confidential version answers to RFI of dd/mm/yyyy (registration number)	Refer to the RFI number
Letter introducing an answer to a request for non-confidential document	Reply to reminder for non-confidential documents (registration number(s) and/or inspection documents) - cover letter	The same as for answer to RFI (lawyers, company, RFI number and type of document.

- **For each document the "accessibility" field has to be completed** (mark as "accessible" ("A") or "non-accessible" ("NA"), "internal", "EC premises" (for all corporate statements, written and oral) or by default "undefined" (see also the Definition of classification of documents (internal/accessible/non-accessible/EU premises)).
 - **For each non-accessible document** (except for internal documents), an accessible version should be made available, or, if not possible, a succinct description should be provided. This indication should allow the parties to understand the nature of the document and enable them to put forward arguments as to why the document needs to be disclosed in spite of its confidential character.
 - **For each accessible document** to be transmitted to the party an "Access to file" version is prepared and made available in the system, **in PDF format and with pages numbered**.
 - **For "internal documents"**, no description of the document is provided. The document is simply referred to as "internal document".
 - **For documents marked "EC premises"**, no description of the document is provided. The document is simply referred to as "EC premises" and can be seen at the DG Competition premises (see further under 3.2.2).
 - The **index of documents** is produced from the CMA in the form of an Excel file. The index for the parties contains the following information: ID (reference number of the document), type of accessibility, accessible version ID, description (at least for non-accessible documents for which no accessible version exists) and number of pages of the PDF document.
- (66) The index of documents is not an inventory of the documents in the file but aims at allowing parties to understand the correspondence between confidential and non-confidential versions of a document or, in the case of a completely non-accessible document, to give a short description, in order to enable them to assess whether it is appropriate to request access to particular documents which might be useful for their defence³⁷.

3.2.2. Access to file in Leniency cases

- (67) In cartel cases, in addition to the CD-ROM/DVD, access to **corporate statements** (and immunity/leniency decisions and their notification) made orally by leniency applicants is only given at DG Competition's premises, normally on a single occasion. Any corporate statement as well as any pre-existing document or other annex to the leniency and the immunity application are part of the file.
- (68) Neither the addressees of the SO nor their lawyers are allowed to make any copy by mechanical or electronic means of oral corporate statements, but they can take notes or dictate them.³⁸
- (69) By nature, oral corporate statements should not contain any business secrets or other confidential information that cannot be disclosed, because they should contain only relevant information pertaining to the cartel conduct.

³⁷ See Case C-110/10 P *Solvay v Commission* [1995] ECR II-1775, para. 66.

³⁸ See Commission notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17), para. 7, 31-35.

3.3. Provision of access to file

- (70) Access to the file is granted to the parties after an SO has been notified.³⁹
- (71) The access to file should be ready at the date of notification of the SO.
- (72) **In the cover letter of the SO** (See Module Statement of Objections), **the parties are usually informed** that if they want to have access to the file, they have to make a written request within 5 working days after receipt of the SO, in order to:
- collect the CD-ROM/DVD at DG Competition's premises or receive the CD-ROM/DVD by express courier and/or
 - obtain access to corporate statements in case of leniency cases.
- (73) The parties (or their duly mandated lawyer) have to **sign an acknowledgement of receipt**⁴⁰
- when they collect the CD-ROM/DVD at the DG Competition's premises,
 - when they obtain access to the corporate statements at the DG Competition's premises.
- (74) The case team may inform the addressees who receive the CD-ROM/DVD that pursuant to Article 15(4) of Regulation (EC) 773/2004, any information that they have solely obtained through access to the Commission file can only be used for the purposes of judicial or administrative proceedings for the application of Article 101 or 102 TFEU, including proceedings before national courts. They should ensure that no further use will be made of this information. Should the information be used for a different purpose, at any point in time, with the involvement of an outside legal counsel, the Commission may, for example, consider reporting the incident to the bar of that counsel.
- (75) Parties who want to consult the corporate statements should contact the case team to arrange a date with the Commission and are asked to provide in advance their identity information. Ideally, the case team will have planned access to file at the Commission premises and discussed this prior to the notification of the SO (see further under 3.2.2).
- (76) If a party does not want to receive the CD-ROM/DVD with the file, alternative form of access may be arranged (see further under section 6).
- (77) **The deadline to reply to the SO** starts when the parties have received the most important documents from the Commission file⁴¹ and as from the day after the receipt of these documents⁴².
- (78) In practice, the deadline to reply begins usually either (whichever event is the earliest):
- the day after the parties collect the CD-ROM/DVD at DG Competition's premises; or

³⁹ Article 15(1) of Regulation 773/2004 and para. 26 and 27 of the Notice on access to file.

⁴⁰ In case a driver is committed by the law-firm to pick-up the CD-ROM/DVD, the duly mandated lawyer has to sign a mandate for his driver to collect the CD ROM/DVD on his behalf. The driver signs the acknowledgement of receipt, delivers the CD ROM/DVD to the duly mandated lawyer who in his turns signs the acknowledgement of receipt, scans it and sends it to DG Competition for the file.

⁴¹ Case T-44/00, *Mannesmannröhren-Werke* [2004] ECR II-2223, para. 65.

⁴² Art 3 Reg. 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits.

- the day after the parties receive the CD-ROM/DVD by mail; or
 - in any event after five working days, if the parties express in writing that they decline access to the file or do not ask for the CD-ROM/DVD within 5 working days after the notification of the SO.
- (79) Access to corporate statements at DG Competition's premises does normally not modify the deadline for reply to the SO, if the parties have been given access to the most important documents from the file by the CD-ROM/DVD.

4. Handling of further access to the file after the SO has been issued

- (80) Access to file is in principle only granted on a single occasion, following the notification of the Commission's objections to the parties.⁴³
- (81) In practice further access to file must be given when additional incriminating (if the Commission intends to use them in the final Decision) and/or potentially exonerating pre-existing documents are placed in the file subsequent to the reply to the SO and the oral hearing or further investigation. This new round of access to file will require handling new confidentiality issues.
- (82) Should a party after receipt of the SO and its revision of the accessible documents consider that it needs further access to specific undisclosed information in the file (confidential information, business secrets or internal documents), it is required to send a reasoned request for further access to this information to the case team. DG Competition assesses the request according to the same rules for access to the file as described above.

4.1. Access to Parties' replies to the SO

- (83) The Notice on access to file specifically provides for that as a general rule no access will be granted to other parties' replies to the Statement of Objections⁴⁴. The EU Courts have confirmed that there is no general right to access to other parties' defences in their replies to the Statement of Objections.
- (84) According to the Notice on Antitrust Best Practices (point 103): "Where required by the rights of defence (...), or where it may in the Commission's view help to further clarify factual and legal issues relevant for the case, the Commission may give parties a copy of the non-confidential version (or specific parts thereof) of other parties' written replies to the Statement of Objections. This would normally be done prior to the oral hearing, so as to allow parties to comment on them at the oral hearing. The Commission may also decide to do so in appropriate cases with respect to complainants and admitted third parties. If access to other parties' replies is granted because it is required for the rights of the defence parties are also entitled to have sufficient additional time to comment on these replies."
- (85) Point 27 (second paragraph) of the Notice on access to file states that "[a] party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, where such documents may constitute new evidence — whether of an incriminating or of an exculpatory nature —, pertaining to the allegations concerning that party in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence."

⁴³ Notice on access to file, para. 27.

⁴⁴ Point 27.

- (86) It is apparent from the case law that in order to determine the exact scope of the Commission's obligation to grant access to the file a distinction must be drawn between documents forming inculpatory evidence and documents forming exculpatory evidence. According to settled-case law, with regard to inculpatory evidence, "the obligation to allow access to the file relates merely to the evidence ultimately relied on in the decision and not to all the complaints which the Commission may have expressed at any stage of the administrative procedure". Moreover, "[a] document can be regarded as a document that incriminates an applicant only where it is used by the Commission to support a finding of an infringement in which that party is alleged to have participated"⁴⁵. As the General Court pointed out in BPB "[...] if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other undertakings involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question from a reply to the statement of objections or the document annexed thereto constitutes evidence against the various parties alleged to have participated in the infringement (...)"⁴⁶.
- (87) As concerns exculpatory documents, access to documents after the notification of the objections can be granted upon a specific request of a party, where such documents may constitute new evidence and pertain to the allegations concerning that party, which are ultimately relevant for the Commission's final decision. The exculpatory nature of such documents should be such that the documents could be useful for the undertakings' defence⁴⁷. In particular, the case law has referred to the situation where an undertaking, "had it been able to rely on them during the administrative procedure, [...] 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"⁴⁸.
- (88) In order for the Commission to be able to properly consider a request for further access, the request must be sufficiently specified and express and be duly motivated. It is not sufficient to request access to categories of documents described in a general and abstract way. In addition, when access is requested after the notification of objections, normally such evidence shall not be readily available to the requesting party by other means.
- (89) The Commission is obliged to grant access to documents received after issuance of the Statement of Objections to companies against which such documents are to be used as inculpatory evidence in the final decision.
- (90) The Commission is always allowed to take into account arguments put forward by a party during the administrative procedure even without giving it further opportunity to be heard, provided that this does not alter the nature of the objections against that company. Where the company has had an opportunity to express its view on the position adopted by the Commission in the Statement of Objections, it can expect that its own explanations may lead the Commission to alter its opinion.⁴⁹

⁴⁵ See Case T-53/03 *BPB v Commission* [2008] ECR II-1333, para. 32.

⁴⁶ See Case T-53/03 *BPB v Commission* [2008] ECR II-1333, para. 41.

⁴⁷ See Case C-110/10 P *Solvay v Commission*, para. 52.

⁴⁸ Joined Cases C-204/00 P e.a. *Aalborg Portland e.a. v Commission* [2004] I-123, para.75.

⁴⁹ Notice on access to file, para. 27; Case T-228/97, *Irish Sugar*, 7 October 1999

4.2. Access to file in case of Supplementary Statement of Objections (SSO) or Letter of facts

- (91) The procedural rights which are triggered by the sending of the initial Statement of Objections apply *mutatis mutandis* in case a Supplementary Statement of Objections is issued. Access to the evidence gathered after the initial Statement of Objections up to the date of the Supplementary Statement of Objections will also be provided. In case a letter of facts is issued, supplementary access will in general be granted to evidence gathered after the Statement of Objections up to the date of the said letter of facts. However, in cases where the Commission only intends to rely upon specific evidence that concerns one or a limited number of parties and/or isolated issues (in particular those regarding the determination of the amount of the fine or issues of parental liability), access will be provided only to the parties directly concerned and to the evidence upon which the Commission intends to rely.

5. Specific situations

5.1. Access to information outside the Commission's investigation file

- (92) Access to file only extends to accessible documents emanating from the investigation conducted against the addressee(s) of the Statement of Objections. Normally, only documents in the Commission's investigation file are accessible.⁵⁰ Furthermore, the scope of the principle of equality of arms only applies in respect to the documents in the Commission's investigation file.
- (93) It is not for the Commission alone to determine whether the documents are of use for the defence of the parties. The Commission is not required to make available, on its own initiative, documents which are not in the investigation file and which it does not intend to use against the parties in the final decision.
- (94) Nevertheless, the parties may make a reasoned request to have access to documents that, although not part of the investigation file, may in their view be relevant for preparing their defence.⁵¹ The case team is not obliged to ascertain that there are no other documents relating to the case within DG Competition or other parts/services of the Commission. Whether documents are sufficiently closely linked with the investigation and may therefore be relevant for the defence of the parties will have to be examined in relation to the specific circumstances of each particular case.

⁵⁰ The Commission file in a competition investigation consists of all documents which have been obtained, produced and/or assembled by the DG Competition during the investigation that has led the Commission to raise its objections. Therefore, all pieces of information acquired during the investigation against a company form part of the investigation file. Moreover, all information that the Commission uses in its final decision are part of the investigation file (Joined Cases T-25/97 e.a. *Cimenteries CBR* e.a. [2000] ECR II-491, para. 382). Documents sent by the parties or others to other DGs of the Commission which the latter did not communicate to DG Competition are not part of the file. (see also above section 2).

⁵¹ Joined Cases T-25/95 e.a. *Cimenteries CBR* e.a. [2000] ECR II-491, para. 383.

5.2. Documents emanating from a different case file

- (95) According to Article 28 (1) Regulation 1/2003, the information collected may be used only for the purpose for which it was acquired.
- (96) Investigations which are conducted on different markets or against different companies and which are not related (i.e. investigations into distinct infringements) lead normally to **different case files** set up under distinct case numbers.
- (97) For extending the use of information for another purpose than for which it was originally acquired, the case-team may ask the provider of information for supplying the information for this other identified purpose.
- (98) Companies concerned by an investigation may sometimes request access to information acquired in the course of a different investigation. Access is however denied if a document has no relevance for an addressee of the Statement of Objections because it is objectively unrelated to the objections addressed to it.⁵²

5.3. Settlement procedure (Article 15 Reg. 773/2004): Access to relevant information

- (99) According to Article 15(1a) of Regulation 773/2004: "After the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 and in order to enable the parties willing to introduce settlement submissions to do so, the Commission shall disclose to them the evidence and documents described in Article 10a(2) upon request and subject to the conditions established in the relevant subparagraphs. In view thereof, when introducing their settlement submissions, the parties shall confirm to the Commission that they will only require access to the file after the receipt of the statement of objections, if the statement of objections does not reflect the contents of their settlement submissions."
- (100) Article 10a (2) of Regulation 773/2004 stipulates:

"Parties taking part in settlement discussions may be informed by the Commission of:

- (a) the objections it envisages to raise against them;*
- (b) the evidence used to determine the envisaged objections;*
- (c) non-confidential versions of any specified accessible document listed in the case file at that point in time, in so far as a request by the party is justified for the purpose of enabling the party to ascertain its position regarding a time period or any other particular aspect of the cartel; and*
- (d) the range of potential fines.*

This information shall be confidential vis-à-vis third parties, save where the Commission has given a prior explicit authorisation for disclosure.

Should settlement discussions progress, the Commission may set a time limit within which the parties may commit to follow the settlement procedure by introducing settlement submissions reflecting the results of the

settlement discussions and acknowledging their participation in an infringement of Article 81 of the Treaty as well as their liability. Before the Commission sets a time limit to introduce their settlement submissions, the parties concerned shall be entitled to have the information specified in Article 10a(2), first subparagraph disclosed to them, upon request, in a timely manner. The Commission shall not be obliged to take into account settlement submissions received after the expiry of that time limit."

5.4. Commitment decision (Art. 9 Reg. 1/2003)

- (101) Neither Regulation 1/2003 nor Regulation 773/2004 expressly provide a right of access to the file in the context of Article 9 proceedings⁵³.

5.5. Rejection of complaints: access to information on which the Commission has based the preliminary view

- (102) The General Court has ruled⁵⁴ that complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the file on the same basis as parties under investigation.
- (103) Nevertheless, the complainant has a right of access to information on which the Commission has based the preliminary view set out in the letter rejecting the complaint⁵⁵.
- (104) Complainants do not have a right of access to business secrets or other confidential information which the Commission has obtained in the course of its investigation.
- (105) The Notice on complaints⁵⁶ explains that access to the information on which the Commission has based its rejection will normally be provided by annexing to the letter a copy of the relevant documentation⁵⁷.

6. Different procedural practices of access to the file

- (106) According to the Notice on Antitrust Best Practices (paragraphs 95 et seq.), further to the possibilities contemplated in the Notice on access to file, there are two additional procedural practices that may be used for the purpose of alleviating the burden on the parties to redact their submissions in relation to confidential information. These procedural practices may be offered by DG Competition where it considers it to be useful, and are typically conducted in cases where there is only a limited number of undertakings. Both procedural practices can be beneficial not only for the party being granted access to file but also for the information providers since they would not have the burden of redacting their confidential material.

⁵³ See however Notice on Antitrust Best Practices, para. 73.

⁵⁴ See Case T-17/93 *Matra-Hachette SA v Commission* [1994] ECR II-595, para. 34. The Court ruled that the rights of third parties, as laid down by Article 19 of Regulation No 17 (now replaced by Article 27 of Regulation (EC) No 1/2003), were limited to the right to participate in the administrative procedure.

⁵⁵ Article 8(1) of Reg 773/2004.

⁵⁶ Commission Notice on the handling of complaints by the Commission under Article 81 and 82 of the EC Treaty, OJ C 101, 27.04.2004, p. 65.

⁵⁷ Notice on complaints, para. 69.

6.1. The negotiated disclosure procedure

- (107) In certain cases, especially those with a very voluminous file or which raise serious concerns about the full disclosure of information to addressees of the SO, DG Competition may accept that the parties agree voluntarily to use a negotiated disclosure procedure. Under this procedure, the party entitled to access to file agrees bilaterally with the information providers claiming confidentiality to receive all or some of the information they have provided to the Commission and is contained in the Commission's file including confidential information (instead of only being given access to the redacted version of their submissions).
- (108) The party being granted access to the file limits access to the information to a restricted circle of persons (to be decided on a case-by-case basis, if requested, under the supervision of DG Competition).
- (109) To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, it must waive its right to access to the file vis-à-vis the Commission.
- (110) Normally, the party would receive the information subject to the negotiated disclosure procedure directly from the information provider. However, if the information that is subject to such an agreement would, exceptionally, be provided to the restricted circle of persons by the Commission, the information providers would have to waive their rights to confidentiality vis-à-vis the Commission.

6.2. Rules governing access to confidential information in a data room

- (111) Exceptionally, the Commission may also grant access to file through a "data room" procedure organised by DG Competition. This procedure is typically used for the disclosure of quantitative data relevant for econometric analysis.
- (112) The purpose of this procedure is to provide access under strict rules to sensitive data constituting business secrets from third parties in order to verify the Commission's methodology and conclusions drawn from the data, economic or otherwise underlying the reasons behind the Statement of Objections whilst still maintaining the necessary confidentiality.
- (113) Empirical analysis sometimes requires the Commission to review highly confidential data provided by different market participants that in principle includes both the methodologies applied by the Commission and the general structure and nature of the data itself. Thereby, depending on the type of data used, this can raise difficult confidentiality issues. In such a case, a "data room" is organised that allows a restricted group of persons, i.e. the external legal counsel and/or the economic advisers of the addressee(s) of a Statement of Objections, to access within DG Competition's premises confidential information constituted from third parties through the course of the investigation so as to verify the Commission's analysis and to advise the parties as regards this confidential information whilst maintaining the necessary confidentiality. The advisers may make use of the information contained in the data room for the purpose of defending their client but may not disclose any confidential information to their client. This has been applied several times to quantitative data, most often in relation to an econometric exercise.
- (114) Whether and in what form third parties need to be contacted before their data is used for a data room is very case-specific, i.e. depending on the type of data room procedure and the type of data involved. It is recommended in this respect to discuss the appropriate arrangements beforehand with the Hearing Officer's team.

- (115) To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, the procedural guarantees provided for in Article 8 of the Hearing Officer Terms of Reference (the so-called "Akzo procedure") apply. Equally, the Hearing Officer may decide pursuant to Article 8(4) of the Hearing Officer Terms of Reference that the data room procedure should be used in those limited cases where access to certain confidential information is indispensable for a party's rights of defence and where the Hearing Officer considers that, on balance, the conflict between respect for confidentiality and the rights of defence is best solved in this way. The Hearing Officer will not take such a decision if he considers that the data room is not appropriate and that access to the information should be given in a different form (e.g. following the standard procedure through non-confidential versions).
- (116) The data room rules need to be adjusted to the specifics of each case. The Commission provides the advisers of the addressee(s) of a decision with access to several PC workstations in a "data room" on the Commission's premises, equipped with the necessary software, if relevant the necessary data sets and a log of the regressions used to support the Commission's case. There is no network connection and no external communication is allowed. The advisers are permitted to remain in the room during normal working hours and if justified, access should be provided for consecutive days (typically two to three days). The advisers are strictly prohibited from taking copies, notes or summary of the documents and may remove from the data room only a final report, which is verified by the case team in order to ensure that it does not contain any confidential information. Each adviser signs a Confidentiality Agreement and is presented with the Conditions of Special Access to the Data Room before entering the data room.
- (117) The PCs or notebooks are provided by DG Competition's IT Service (contact: Local system administrators of Unit R3). This Unit should be alerted as soon as the approximate date of the data room is known. The DG Comp PCs/ notebooks are not normally equipped with econometrics software and installation on several machines takes some time. The IT Services will provide memory sticks to move data between PCs. Advisers must not use any of their own storage devices. WIFI, Bluetooth and similar connections must be disabled. Secretaries book the data room via the normal meeting room procedures. Early booking is advised because the room may be required for several days (e.g. two to three days) and only meeting rooms that can be properly locked are suitable.
- (118) The advisers' final report is intended to enable them to verify the veracity and accuracy of the Commission's analysis and the nature of the underlying data. However, it must not reveal any business secrets. What constitutes a business secret must be assessed carefully in each case.
- (119) The data room procedure can be a useful procedural tool reconciling confidentiality requirements with considerations relating to the right to be heard in a pragmatic fashion, especially in cases where empirical analysis plays a key role.

13 Right to be heard

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1. Introduction

- (1) Article 27 of Regulation 1/2003 expressly provides that undertakings must be given the opportunity to be heard. The proceedings consist of both written (reply to the SO) and oral stages. The oral stage, called the oral hearing, which supplements the written procedure, is governed with regard to proceedings under Articles 101 and 102 TFEU, by Article 6(2), Article 12, Article 13(2), (3) and Article 14 of Regulation 773/2004. An oral hearing may only be organised upon request from the parties subject to the proceedings.

2. Written phase: the reply to the SO

2.1. Undertakings and other persons that can submit their observations on the Statement of objections (SO)

2.1.1. "Parties concerned" have a right to be heard

- (2) Article 27(1) of Reg. 1/2003 provides that "the Commission shall give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection".

2.1.2. "Complainants" may make known their views in writing

- (3) Pursuant to Article 6(1) of Reg. 773/2004, "Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing".
- (4) There are two conditions for a person to qualify as a complainant in antitrust proceedings. First, such person must file a formal complaint pursuant to Article 5(1) of Regulation No 773/2004. Second, the person must have a legitimate interest.¹
- (5) The *Österreichische Postsparkasse* judgment² clarified the requirements that a person needs to meet in order to qualify as a "complainant" in antitrust proceedings. First, the General Court confirmed that applicants qualify as complainants if they justify their "legitimate interest" by demonstrating that the alleged infringement might harm their economic interests. The Commission is obliged to establish whether persons claiming to be complainants might indeed be harmed in their economic interests.³ By contrast, it is not for the Commission to examine whether the person pursues motives other than the termination of the infringement.⁴ In the case at hand the banks' claim that the complainant pursued political interests rather than its interests as a consumer was therefore deemed to be irrelevant. Second, the fact that the Commission has already initiated the antitrust investigation the complaint refers to, either on its own ("ex officio")

¹ See the Module on Handling of Complaints.

² Joined Cases T-213 and T-214/01 *Österreichische Postsparkasse e.a.* [2006] ECR II-1601.

³ Joined Cases T-213 and 214/01, *Österreichische Postsparkasse e.a.* [2006] ECR II-1601, para.124-129.

⁴ *Ibid.*, para. 118.

or due to another complaint, is not a bar to the applicant's qualification as a complainant.⁵ Irrespective of whether the complainants submit substantial new evidence, they can always "jump on the bandwagon" of a pending Commission investigation, even at a late stage. In this context the General Court has also confirmed that complainants may ask for a non-confidential version of the SO even after an oral hearing has taken place and up until the very moment the Advisory Committee convenes to decide on the draft decision imposing fines⁶⁷. The applicants' counter-argument that the provision of an SO to a complainant after the hearing was purposeless did not convince the General Court, which pointed to a lacuna in the secondary legislation with regard to the point in time after which a complaint becomes inadmissible.

- (6) Any person claiming the status of "complainant" but not satisfying the above conditions may only be heard if they have a sufficient interest in the outcome of the proceedings, i.e., if they have been granted the status of "interested third party" by the Hearing Officer (see Section 2.1.3 below).
- (7) Except in cartel settlement cases, the Commission must make available to complainants a non-confidential version of the SO. The "non-confidential version of the SO" must not contain business secrets and "other confidential information". This implies that, for instance, references to leniency statements and other admissions may be deleted. The complainant may raise issues about the extent of the deletions in the non-confidential version of the SO sent to it, and may refer the matter for decision to the Hearing Officer (HO) in case of disagreement with the case team (pursuant to Article 7(2)(c) of the HO Terms of Reference⁸).
- (8) The Hearing Officer may, where appropriate and after consulting the Director responsible, decide to afford complainants the opportunity to express their views at the oral hearing⁹.

2.1.3. Third parties can be heard only if they show "sufficient interest" (Article 27(3) of Regulation 1/2003)

- (9) Other natural or legal persons, who have shown sufficient interest, must be informed in writing of the nature and subject matter of the procedure and set a time-limit within which they may make known their views in writing (Article 13 of Reg. 773/2004).
- (10) Decisions as to whether third parties are to be heard are taken by the Hearing Officer after consulting the Director responsible for the case.¹⁰ Any third party applying directly to the case team should be told to address its application, including a statement explaining the applicant's interest in the outcome of the procedure, to the Hearing Officer. If the Hearing Officer accepts the application, the case team will inform third parties in writing of the nature and subject matter of the procedure and afford them the opportunity to make known their views in writing (do not forget to request a non-confidential version of the reply), pursuant to Article 13 (1) of Regulation 773/2004.

⁵ *Ibid.*, para. 92.

⁶ Point 149 : "Therefore, as long as the Advisory Committee on Restrictive Practices and Dominant Positions has not delivered the opinion provided for in Article 10(6) of Regulation No 17 on the preliminary draft decision transmitted by the Commission, the applicant or complainant's right to receive the objections and to be heard cannot be regarded as time-barred. Until the advisory committee has delivered its opinion, there is nothing to prevent the Commission examining the comments made by third parties and then modifying its position in the light of those comments".

⁷ *Ibid.*, at 148 and 149.

⁸ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29).

⁹ Article 6(2) of the HO Terms of Reference. The HO Terms of Reference provide that certain decisions are taken by the HO after consultation of the Director responsible for the case. In practice, the HO team will also seek the views of the case team directly, copying the Director.

¹⁰ Article 5 of the HO Terms of Reference.

- (11) Third parties have no right as such to obtain a non-confidential version of the SO. In practice, third parties can be informed by way of a concise letter setting out the "nature and subject-matter" of the case, or by a summary, or a non-confidential version of the SO (case specific). Third parties may complain to the case team about the appropriateness of the information they received for the purposes of making known their views, and refer the matter for decision to the Hearing Officer in case of disagreement with the case team¹¹.
- (12) The Hearing Officer may, where appropriate and after consulting the Director responsible, decide to afford interested third parties the opportunity to express their views at the oral hearing¹².

2.2. Time-limits and extension

- (13) The cover letter, signed by the Director General and sent with the SO, fixes a time-limit within which the undertaking must deliver its written reply (Article 10(2) of Reg. 773/2004). It also offers the undertaking the opportunity to be heard orally and indicates that such a hearing would be likely to take place about a month following the reply.
- (14) The time limit for the reply to the SO will take into account both the time required for the preparation of the submission and the urgency of the case. The parties have a right to a period of at least four weeks to reply to the SO.¹³ A longer period (normally, a period of 2 months, although this may be longer or shorter depending on the circumstances of the case) will be granted, taking into account *inter alia* the size and complexity of the file (e.g. number of infringements, the alleged duration of the infringement(s), the size and number of documents and /or size and complexity of expert studies), and/or whether the addressee of the SO making the request has had prior access to the information (e.g. key submissions, leniency applications), and/or any other objective obstacles faced by the addressee of the SO (cf. Best Practices Notice, paragraph 100).
- (15) For a supplementary SO the above rules on setting the time limit for the reply to the SO apply, although any extension of time granted will normally be shorter (cf. Best Practices Notice, paragraphs 100 and 110).
- (16) **The deadline to reply to the SO** cannot start running before the parties have received the most important documents from the Commission file.¹⁴ Deadlines start to run as from the day after the receipt of the CD/DVD containing all non-confidential documents. In case access has to be granted to corporate statements made under the leniency programme, the calculation of the deadline takes into account additional time necessary for organizing the access to be provided at DG Competition premises. The deadlines are calculated pursuant to Article 3 of Council Regulation No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits.¹⁵
- (17) **For extension of the deadline:** If a party considers that the deadline is too short, it can seek an extension, within the initial time-limit, by making a reasoned request to DG Competition at least 10 working days before the expiry of the original time limit.¹⁶
- (18) If the extension is refused or in case of disagreement on the length of the extension granted, the requesting party is entitled to refer the matter for decision to the Hearing Officer by way of a

¹¹ Article 7(2) of the HO Terms of Reference.

¹² Article 6(2) of the HO Terms of Reference.

¹³ Article 17(2) of Regulation 773/2004.

¹⁴ Case T-44/00, *Mannesmannröhren-Werke v Commission* [2004] ECR II-2223, paragraph 65.

¹⁵ OJ L 124, 8.6.1971, p. 1.

¹⁶ Best Practices Notice, paragraph 101.

statement explaining the reason why an extension is considered necessary and indicating the length of time required. The legal situation in this respect is laid down in Articles 10(2) and 17(2) of Regulation 773/2004, and Article 9 of HO Terms of Reference. The Hearing Officer will hear the Director responsible for the case before taking his/her decision and will inform the undertaking and DG Competition in writing.¹⁷

- (19) The criteria applied by the Hearing Officer in taking the decision are listed in Article 9(1) of the HO Terms of Reference:
- the size and complexity of the file (for example, the number of infringements, the alleged duration of the infringement(s), the size and number of documents and/or the size and complexity of expert studies);
 - whether the addressee of the statement of objection making the request has had prior access to information; and/or
 - any other objective obstacles which may be faced by the addressee of the statement of objection making the request in providing its observations.
- (20) Failure to reply within the fixed deadline does not affect the pursuit of the procedure. Pursuant to Article 10(2) of Regulation 773/2004 "*[t]he Commission shall not be obliged to take into account written submissions received after the expiry of that time-limit*".

2.3. Identification and protection of confidential information in the replies

- (21) Pursuant to Article 16(2) of Regulation 773/2004, "any person which makes known its views pursuant to Article 6(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, must clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known".
- (22) If they do not identify any confidential material, the Commission may assume that the documents or statements concerned do not contain confidential information. It is recommended, however, to verify this with the persons concerned, before giving their replies to the parties or any other natural or legal persons. (For detailed explanations, see Module on Access to file).

2.4. Distribution of parties' replies

2.4.1. Commission's services and Member States

- (23) A copy of the parties' replies has to be encoded in the case management application.
- (24) Copies of the confidential version of the reply must be sent without delay to:
- the Hearing Officer (notably so that the Hearing Officer is informed as soon as possible if the parties have requested a hearing in their reply to the SO),
 - the Legal Service,

¹⁷ *Id.*, Article 9(1).

- the National Competition Authorities,
- ESA and NCAs of the EEA concerned (if the case is EEA relevant).
- departments primarily responsible for the products, services or policy areas in issue (e.g. DG ENTR, MOVE, INFSO, EAC, EMPL, MARKT, AGRI and SANCO)

2.4.2. Parties, third parties and complaints

- (25) According to the Best Practices Notice¹⁸, where required by the rights of defence¹⁹, or where it may in the Commission's view help to further clarify factual and legal issues relevant for the case, the Commission may give parties a copy of the non-confidential version (or specific parts thereof) of other parties' written replies to the Statement of Objections. This would normally be done prior to the oral hearing, so as to allow parties to comment on them at the oral hearing. The Commission may also decide to do so in appropriate cases with respect to complainants and admitted third parties. If access to other parties' replies is granted because it is required for the rights of the defence parties are also entitled to have sufficient additional time to comment on these replies.
- (26) The parties' replies to the SO and observations made by other persons in accordance with Article 13 of Regulation 773/2004 constitute information which does not form part of the investigation file to which access to file is granted. In principle, the Commission terminates the investigation when the SO is issued. Accordingly, information received after this point in time does not form part of the investigation file. Otherwise, the proceedings could be delayed significantly by requests to comment on new documents submitted belatedly and subsequent requests to submit further remarks on such comments, with the result that the exercise would never end.
- (27) Further access to file only needs to be granted if the Commission receives new documents which contain inculpatory or exculpatory information which could alter the allegations contained in the SO (see in more detail Module on Access to file).

3. Oral hearing

3.1. Legal provisions

- (28) The Commission shall give the parties to whom it addresses an SO the opportunity to develop their arguments at an oral hearing if they so request in their reply to the SO (Article 12(1) of Reg. 773/2004).
- (29) Pursuant to Article 6(2) and Article 13(2) of Reg. 773/2004 respectively, complainants and interested third parties may request to be heard at the oral hearing of the parties subject to the proceedings. The decision to admit such persons is taken by the Hearing Officer after consultation of the Director responsible for the case (see Article 6 (2) of the HO Terms of Reference).

¹⁸ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6).

¹⁹ See Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] ECR II- 3275; Case T-54/03 *Lafarge v Commission* [2008] ECR II-120, paragraphs 69-73; Case T-52/03 *Knauf v Commission* [2008] ECR II-115, paragraphs 41-47, 67-79; Case C-407/08P *Knauf v Commission*, judgment of 1 July 2010 (not yet reported), paragraphs 23-28.

- (30) The Commission may also decide to invite any other person to express its views in writing and to attend the oral hearing of the parties (Article 13(3) of Reg. 773/2004).

3.2. The oral hearing – Organisation

- (31) Oral hearings are conducted by the Hearing Officer in accordance with Articles 10-13 of the HO Terms of Reference and with Article 14(1) of Regulation 773/2004.
- (32) The following principles apply:
- The oral hearing is not public.
 - The oral hearing takes place only if a party concerned expressly requests to be heard orally in its reply to the SO. If they do not do so, complainants and third parties do not have the right to request the organisation of an oral hearing.
 - After consulting the Director responsible for the case, the Hearing Officer fixes the date of the oral hearing. The hearing normally takes place between six to eight weeks after the parties' replies to the SO.
 - The Hearing Officer determines the agenda for the hearing and the order of the proceedings.
 - The Hearing Officer decides upon any requests that undertakings may make to be heard separately (in camera session).

3.3. Representation at the oral hearing

- (33) Article 14(4) of Reg. 773/2004 provides that persons invited to attend shall either appear in person or be represented by legal representatives (e.g. board members) or by representatives authorised by their constitution.
- (34) The Hearing Officer decides after consultation with the Director responsible for the case whether or not interested third parties are to be heard orally (Article 6(2) of the HO Terms of Reference). In case the Hearing Officer refuses a third party request to be heard orally, s/he informs the party concerned by way of a substantiated letter.
- (35) The Commission may also invite any other person to express its views at the oral hearing (Article 13(3) of Regulation 773/2004).

3.4. Officials and Member States

- (36) In view of the importance of the oral hearing, it is the practice of DG Competition to ensure the continuous presence of senior management (*Director or Deputy Director General*) in oral hearings in antitrust cases, together with the case team of Commission officials responsible for the investigation. The relevant member(s) of the cabinet of the Competition Commissioner, the Chief Economist's team, and principally concerned Commission services, including the Legal Service, are also invited to attend by the Hearing Officer.
- (37) The Commission invites the competition authorities of the Member States to take part in the oral hearing. It may likewise invite officials and civil servants of other authorities of the Member States (Article 14(3) of Regulation 773/2004). In practice the invitations are sent by the Hearing Officer. When appropriate, the Hearing Officer invites the EFTA Surveillance Authority (ESA) and National Competition Authorities of the EEA States concerned to attend the oral hearing.

- (38) Finally, the Hearing Officer may admit to the oral hearing as observers representatives of competition authorities of third countries in accordance with agreements concluded by the EU and such third countries (e.g., USA, Canada). Normally in such cases the Hearing Officer will ask the parties if they do not object to the admission of observers.

3.5. Hearing preparation

3.5.1. Information to be provided to the Hearing Officer

- (39) **When the SO is issued**, the case team needs to provide the Hearing Officer secretariat with the following information:
- the names and positions of the persons representing the companies concerned and/or their legal advisers (with their powers of attorney) and their complete addresses, fax numbers and e-mail addresses;
 - languages of the procedure, participation or not by ESA and estimated number of participants (for booking meeting room);
 - electronic versions of the SO in the available languages and replies, as soon as available (the Hearing Officer secretariat will transmit to the interpreters) ;
 - a copy of the DVD sent to the parties for access to file, as well as any access to corporate statements at DG Competition's premises at their request.
- (40) The case-team should double-check carefully the material prepared for the hearing in order to avoid any inadvertent disclosure of information covered by professional secrecy (note that the confidential version of all documents should however be made accessible to the Hearing Officer).

3.5.2. Preparatory steps

- (41) Invitations are sent by the Hearing Officer.
- (42) Article 11 of the HO Terms of Reference provides that the Hearing Officer shall take all appropriate measures to ensure the proper preparation of the hearing.
- (43) In this respect, the Hearing Officer may, after consulting the Director responsible, supply in advance to the parties invited to the hearing a list of the questions on which s/he wishes them to make known their views. The Hearing Officer may also indicate to the persons invited to the hearing the focal areas for debate, having regard in particular to the facts and issues that the addressees of an SO want to raise.
- (44) In addition, after consulting the Director responsible, the Hearing Officer may hold a meeting with the parties invited to the hearing and, where appropriate, the Commission staff, in order to prepare for the hearing itself.
- (45) The Hearing Officer may also ask for prior written notification of the essential contents of the intended statement of persons, whom the parties invited to the hearing have indicated will speak.
- (46) The Hearing Officer may set a time limit for all persons invited to the hearing to provide a list of participants who will attend the hearing. The list should be made available by the Hearing Officer in due time before the hearing.

3.6. Procedure at the oral hearing

- (47) The Hearing Officer opens the hearing and invites DG Competition to summarise the facts and principal arguments of the Commission (usual time allocated around 20 minutes).
- (48) The party(ies) and third parties are given the opportunity to be heard.
- (49) The Hearing Officer decides whether new documents should be admitted during the hearing.
- (50) The Hearing Officer allows the parties, complainants and third parties, the Commission services and the representatives of the Member States to ask questions during the hearing to all attendees. If, exceptionally, a party cannot answer a question at the hearing, the HO may allow such party to give an answer in writing within a set time limit. Such answer should normally be distributed to all participants unless the Hearing Officer decides otherwise.²⁰
- (51) Where appropriate, in view of the need to ensure the right to be heard, the Hearing Officer may, after consulting the Director responsible, afford the parties concerned, other involved parties, complainants or interested third persons the opportunity of submitting further written comments after the oral hearing and fix a date by which such submissions may be made. Those submitting the information are asked to provide non-confidential versions of the supplementary comments to be made available to all attendees.
- (52) Before closing the oral hearing the Hearing Officer invites the parties to make final remarks.
- (53) During the hearing, the case-team/secretary should take all necessary precautions in order to avoid any inadvertent disclosure of information covered by professional secrecy.

3.7. Recording of the hearing

- (54) Article 14(8) of Reg. 773/2004 provides that the statements of each party heard must be recorded and upon request the recording has to be made available to those who attended the oral hearing by the Hearing Officer. This is done by way of audio recording (no written minutes are prepared).
- (55) After the hearing, the Hearing Officer sends a copy of the audio recording to the Antitrust Registry, who encodes it in the case management application. Parties who attended the hearing and have requested the audio recording may collect it at the Hearing Office. Parties who did not attend the hearing do not have a right to obtain a copy of the recording.

4. State of Play meeting

- (56) According to the Best Practices Notice²¹, where an SO is issued, the parties will also be offered a State of Play meeting after their reply to the SO or after the oral hearing, if any. The parties will at this moment normally be informed of the Commission's preliminary view on how it intends to pursue the case further.
- (57) In the context of cartel proceedings, (only) one State of Play meeting will be offered after the oral hearing²².

²⁰ See Article 12(3) of the HO Terms of Reference.

²¹ Paragraph 64.

²² Best Practices Notice, paragraph 65.

5. Hearing Officer's reports

5.1.1. Interim report and observations

- (58) The Hearing Officer's reports to the Commissioner on the hearing and the conclusions he/she draws from it in his/her interim report with regard to the respect for the effective exercise of procedural rights, including disclosure of documents, access to the file, time-limits and the proper conduct of the oral hearing (Article 14(1) of the HO Terms of Reference).
- (59) In addition to, and separately from, the interim report, the Hearing Officer may also make observations on the further progress and impartiality of the proceedings (Article 14(2) of the HO Terms of Reference). Such observations may concern, among other things:
- (a) whether due account is taken of all the relevant facts;
 - (b) the need for further information;
- the withdrawal of certain objections;
 - the formulation of further objections; or
 - suggestions for further investigative measures pursuant to Chapter V of Reg. 1/2003 (e.g., request for information, interview of natural or legal persons).
- (60) The Hearing Officer sends his draft interim report and observations to the case team for information and comments on the facts before sending it to the Competition Commissioner, after having seen the case team's report on the hearing.

5.1.2. Final report

- (61) The following information is required by the Hearing Officer for drafting the final report:
- (a) copies of all versions of the draft decision should be sent to the HO during inter-service consultations;
 - information on whether the draft decision includes any material deviation in the objections (e.g., new or modified objection) or in the evidence used as compared to the SO (e.g. new incriminating evidence introduced).
- (62) The final report considers (Article 16(1) of the HO Terms of Reference):
- (a) whether participants in antitrust proceedings have been able to effectively exercise their procedural rights;
 - (b) whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.
- (63) The final report is drafted in EN, FR, DE and all the authentic languages of the case and submitted to the competent member of the Commission, the Director General for Competition and the Director responsible, and is communicated to the competent authorities of the Member States and, in accordance with the provisions on cooperation laid down in Protocol 23 of the EEA Agreement, to the EFTA Surveillance Authority (Article 16(2) of the HO Terms of Reference).
- (64) It is notified to the parties and published together with the final decision.

- (65) Timing:
- (a) Member States must have the draft final report when discussing the draft decision at the Advisory Committee (AC).
- The draft final report is sent by the Hearing Officer to the DG, the Cabinet and the NCAs before the AC Meeting.
 - According to Article 17 of the HO's Terms of Reference, the final report has to be attached to the draft decision submitted to the College, in order to ensure that, when it reaches a decision on an individual case, the College is fully apprised of all relevant information as to the course of the procedure and that the effective exercise of procedural rights has been respected throughout the proceedings.
 - After the AC Meeting, the HO's secretariat personally delivers the original final report (in all necessary linguistic versions) to the SG and a copy to the case team for the file.
- (66) The report may be modified by the Hearing Officer in the light of any amendments to the draft decision up to the time the Commission adopts the decision.

6. Relations with the Hearing Officer in commitment and cartel settlement proceedings

- (67) Parties to the proceedings which offer commitments may call upon the HO at any time in order to ensure the effective exercise of their procedural rights (Article 15(1) of the HO Terms of Reference)
- (68) In order to allow the Hearing Officer to assess the need for such reporting, operational directorates should systematically:
- (a) inform the Hearing Officer when a market test is being carried out in any given case; and
- provide the Hearing Officer with copies and with the summary of the market test.
- (69) Parties which engage in settlement discussions in cartel cases may call upon the Hearing Officer at any time in order to ensure the effective exercise of their procedural rights (Article 15(3) of the HO Terms of Reference).

14 Advisory Committee on Restrictive Practices and Dominant Positions

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1. Legal Basis

- (1) **Article 14(1) of Regulation No 1/2003** provides that the Commission should consult an “Advisory Committee on Restrictive Practices and Dominant Positions” prior to the adoption of certain types of decisions, i.e.:
 - prohibition decisions (Article 7 of Regulation No 1/2003)
 - interim measures decisions (Article 8 of Regulation No 1/2003)
 - commitment decisions (Article 9 of Regulation No 1/2003)
 - findings of inapplicability (Article 10 of Regulation No 1/2003)
 - decisions imposing fines (Article 23 of Regulation No 1/2003)
 - decisions imposing definitive periodic penalty payments (Article 24(2) of Regulation No 1/2003)
 - decisions withdrawing the benefit of a block exemption regulation (Article 29(1) of Regulation No 1/2003).
- (2) According to Article 17(2), Article 14 applies *mutatis mutandis* where the Commission conducts a sector inquiry.
 - The Advisory Committee is moreover consulted on draft Commission regulations as provided for in the relevant Council Regulations¹.
- (3) Section 4 of the Commission Notice on cooperation within the Network of Competition Authorities (“Network Notice”)² further describes the role and functioning of the Advisory Committee under Regulation 1/2003. Within this legal framework, the working modalities of the Advisory Committee have developed in practice over time.

2. Composition of the Advisory Committee

- (4) For the discussion of individual cases, the Advisory Committee is composed of representatives of the national competition authorities (NCAs) of the Member States. For meetings in which issues other than individual cases are being discussed, an additional Member State representative competent in competition matters may be appointed.
- (5) In order to prepare, the national competition authorities (NCAs) must be sent a copy of the most important documents in the case.
- (6) Upon request by an NCA, the latter shall be sent a copy of other existing documents necessary for the assessment of the case.

¹ Cf. Article 33 of Regulation 1/2003, Council Regulation 19/65, Council Regulation 2821/71, Council Regulation 3976/87 and Council Regulation 479/92.

² OJ C101, 27.4.2004, p.43.

- (7) DG Competition's directorate in charge of the investigation is represented, in general, by the Director, the relevant Head of Unit and the case team. Meetings are normally chaired by the Policy & Strategy Director (A) or by a Head of Unit or Deputy Head of Unit of Directorate A, depending on the subject matter of the meeting. The Legal Service as well as other interested Commission services are also invited. The secretariat of the Advisory Committee takes care of the organisation of the meeting.

3. Participation of EFTA Surveillance Authority (ESA) and EFTA Member States

- (8) When an Advisory Committee meeting is convened in a case with EEA relevance, the invitation to attend this meeting is extended to the ESA³.
- (9) ESA and EFTA States have the right to participate and make observations. They however do not have the right to vote (they do not sign the Opinion of the Advisory Committee). In practice, ESA often produces a separate opinion (“EFTA views”), following the same model as the Opinion of the Advisory Committee.

4. Purpose of the meeting

- (10) Three types of topics can be discussed:
- draft Commission decisions (as listed above) in individual cases (Article 14(1) of Regulation No 1/2003); for individual cases in which fines are imposed, there will often be two Advisory Committees, one discussing the substance of the case, and the other discussing the amount of the fines to be imposed;
 - individual cases that are being dealt with by a competition authority of a Member State under Articles 101 or 102 TFEU (Article 14(7) of Regulation No 1/2003);
 - general issues of EU competition law (Article 14(7), last sentence).

5. Form of the consultation

- (11) The consultation of an Advisory Committee can take place either by oral procedure in a meeting convened by the Commission (Article 14(3) of Regulation 1/2003) or by written procedure (Article 14(4)), unless any Member State objects to the latter.

5.1. Oral procedure

- (12) The oral procedure takes the form of a meeting of the Advisory Committee. Where the written procedure has not been explicitly decided upon, the oral procedure will be organized by default.

³ And the EFTA States, who are, however, informed by ESA.

5.1.1. Date of the meetings

- (13) The consultation may take place at a meeting convened and chaired by the Commission, held not earlier than 14 days (a shorter period can be set in the absence of an objection by any Member State) after dispatch of the notice convening it, together with:
- a summary of the case,
 - an indication of the most important documents and
 - a preliminary draft decision.
- (14) In respect of decisions pursuant to Article 8, the meeting may be held seven days after the dispatch of the operative part of a draft decision.

5.1.2. Meeting itself

- (15) During the meeting, case teams should be prepared to reply to any point raised by the members of the Advisory Committee.
- (16) The case-team should brief the interpreters about the case.
- (17) At least one case secretary should attend in order to assist the Secretariat of the Advisory Committee in the preparation of the meeting.
- (18) The Commission, as Chair, should determine the general structure of, and format for, the discussion to take place in the meeting.
- (19) If necessary, the case team may give some additional explanation.

5.1.3. Member States may make comments on the preliminary draft decision and ask questions to the Commission. Follow up of meetings

- (20) At the end of the meeting, the Advisory Committee adopts an opinion (in English generally), normally signed by the nominated NCA representatives present. The Secretariat of the Advisory Committee distributes a copy to the representatives of the Member States before the conclusion of the meeting. The case team assures the translation in the two other working languages and keeps the signed original of the Opinion.
- (21) According to Article 14(5) of Regulation No 1/2003, the Commission shall take the utmost account of the opinion delivered by the Advisory Committee.
- (22) If the Advisory Committee so recommends, its opinion will be published in the OJ along with the decision (Article 14(6) of Regulation No 1/2003). Where, in cases where fines are imposed, a second Advisory Committee meeting takes place (see paragraph (13)(10) above), a second opinion may be published in the OJ.

5.2. Written procedure

- (23) Consultation may also take place by written procedure. However, if any Member State so requests, the Commission has to convene a meeting. In case of written procedure, a time-limit should be determined of not less than 14 days within which the Member States are to put forward their

observations for circulation to all other Member States. In case of decisions taken pursuant to Article 8, the time limit of 14 days is replaced by seven days. Where shorter time limits for the written procedure are being proposed, they will be applicable in the absence of an objection by any Member State (see below section 5.2.2.).

5.2.1. Deciding whether to propose the written procedure

- (24) The Commission shall assess whether or not to propose to NCAs a written procedure, taking account of the likely efficiency gains for both NCAs and the Commission, having regard to the nature of the case, the type of draft decision being considered and the likely nature of the comments if a meeting were held.
- (25) The launching of the consultation under a written procedure is done by a notice from the Commission to the Advisory Committee, within the deadline prescribed in Article 14(4) of Regulation 1/2003 and together with the documents set out in Article 14(3) of Regulation 1/2003.
- (26) If any Advisory Committee member considers that a case where the Commission has proposed an oral procedure would be suitable for a written procedure, he/she may communicate his / her opinion to the Commission. The Commission can follow up this suggestion by a notice to all Advisory Committee members, proposing that the consultation should take place by way of a written procedure.
- (27) Pursuant to Article 14(4) of Regulation 1/2003, the Commission may set shorter deadlines than those provided in Article 14(3) and (4). Members should endeavour to indicate to the Commission as early as possible if they object to the shorter deadline. In case of an objection, the deadlines foreseen in Article 14(3) and (4) of Regulation 1/2003 would apply, counting from the dispatch of the documents.

5.2.2. The written consultation process

- (28) In a consultation conducted under the written procedure, it would be sufficient to submit to the Advisory Committee a simple list of key questions.
- (29) The Advisory Committee members may make any observations in writing. These observations, or at least a summary thereof, should be provided in a commonly understood and accepted language for the convenience of other Committee members.
- (30) If the nature of the requests for explanations is such that an open-to-all discussion is warranted, the Commission may:
 - either organise a conference call/videoconference to deal with the questions and then restate the deadline for the written replies; or
 - if the complexity of the issues justifies it or any member so requests, “switch” to the oral procedure by organising a meeting on the date specified in the original invitation. The consultation would then be concluded in this meeting (in which written replies already made would not be binding upon the members of the Committee).
- (31) In both cases, this procedure will be considered the continuation of the same consultation launched.

15 Adoption of a prohibition Decision

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1. Drafting of the decision / consultation process

1.1. Drafting of the draft decision

- (1) The draft decision should be drafted within a reasonable time after the hearing.
- (2) The draft decision must be drafted in English or French (languages for interservice consultation). If not, the draft will have to be translated before it is sent for consultation to other services.

1.2. Consultation on the draft decision

- (3) The Competition Commissioner has been empowered to decide on behalf of the Commission to send the draft decision to the Advisory Committee. This requires to seek the prior agreement of the Legal Service and to give other interested services the opportunity to make known their views.

1.2.1. Consultation of the LS

- (4) The LS receives the draft decision for consultation.
- (5) In accordance with Article 23-4.2 of the Implementing Rules Giving Effect to the Rules of Procedure of the Commission, the LS should be granted at least 10 working days when the document is up to 20 pages and at least 15 working days where it exceeds 20 pages.

1.2.2. Seeking the views of other DGs

- (6) In line with the Rules of Procedure of the Commission, DG Competition shall also give “*other departments with legitimate interest*” in the draft decision the opportunity to express their views.
- (7) The relevant services are the same as those which have received the SO and/or have been invited to the hearing.

1.3. Translations

- (8) At the adoption stage, the draft decision will have to be available in the 3 working languages of the Commission and, where applicable, in the other authentic languages of the case.
- (9) The translation service should therefore be asked to translate the draft decision into all these languages.

2. The adoption process

2.1. Meeting(s) of the Advisory Committee

- (10) Before the adoption of a prohibition decision, the Commission has to consult the Advisory Committee on restrictive practices and dominant positions. Where the prohibition decision does not include the imposition of fines, there will be only one meeting. Where the prohibition decision provides for the imposition of fines, there will normally be two meetings, the first one discussing the substance of the case, the second one discussing only the level of fines.

- (11) The consultation of the Advisory Committee normally takes place at a meeting held in Brussels. Regulation No 1/2003 also allows the possibility of a written consultation (see further Module on Advisory Committee).

2.1.1. Invitations and file to be sent to the Advisory Committee

- (12) The invitation to the Advisory Committee meeting and of the agenda of the meeting, as well as the file, are sent to:
- the Member States;
 - the EFTA Surveillance Authority, if the draft decision affects the EEA.

2.1.2. Timing for the sending of the file

- (13) The file must be sent at the latest 14 calendar days before the meeting is held (if the draft decision is long, the case team should make every effort to send the text three working weeks in advance). The file has to be sent to the secretariat of the Advisory Committee at least 24 hours before this deadline.
- (14) Meetings may be convened within a shorter deadline than these 14 days, if no Member State objects to it (Article 14(3) of Regulation No 1/2003); this option should be avoided, where possible.

2.1.3. Meeting of the Advisory Committee

- (15) The meeting is chaired by Directorate A (either at Director or Head of Unit level). The case team must be available 15 minutes before the meeting in order to brief the interpreters about the case.
- (16) The Chairman chairs the debate. Member States may make comments on the draft decision and ask questions to the Commission or to the other Member States.
- (17) Once the debate is closed and once every participant has expressed its opinion, the Advisory Committee delivers its opinion, even if some Member States are not represented. The opinion is drafted on the spot (usually in English) and signed by all representatives that are present. A copy is distributed to the Member States representatives.
- (18) A list of all attendees is prepared by the secretariat of the Advisory Committee and signed by each attendee.
- (19) The opinion of the Advisory Committee will later be published in the Official Journal, if the Advisory Committee so recommends.

2.1.4. Follow-up of the Advisory Committee's opinion if changes required

- (20) Pursuant to Article 14(5) of Regulation No 1/2003, “the Commission shall take the utmost account of the opinion of the Advisory Committee” and “inform the Committee of the manner in which its opinion has been taken into account”.
- (21) In case the decision is revised following the opinion of the Advisory Committee, the new version should promptly be transmitted to the Member States.
- (22) If the draft decision is substantially amended, the Legal Service must be consulted on these changes.

2.1.5. Second Advisory Committee on fines

- (23) The purpose of this second Advisory Committee is to present the proposals of DG Competition on the level of fines, as agreed by the Commissioner. The invitation has to be sent out 14 days in advance, but without communication of the proposal on fines.
- (24) The case team describes and explains DG Competition's proposal on the level of fines, and, if relevant, also on a revised version of the draft decision following the first Advisory Committee). Once the debate is closed, the secretariat of the Advisory Committee drafts the opinion of the second Advisory Committee. Where Member States so recommend, opinion will also later be published in the OJ (along with the decision, the final report of the Hearing Officer and the opinion of the first Advisory Committee).

2.2. Adoption of the Decision

- (25) The case-team sends the adoption file to the Cabinet of the Competition Commissioner for their approval and to the SG in charge of the adoption process of the decision by the College. It is therefore essential that they receive the proper documents in accordance with the formal requirements in due time.
- (26) The College can adopt the decision either by oral procedure (meeting of the College) or by written procedure (providing Cabinets generally with 5 days for raising comments before adoption by expiration of the set deadline). Decisions for which an oral discussion is necessary or for which information should not be disclosed long before its adoption (concerning notably adoption of fines) are adopted by oral procedure.

3. Post-adoption process

3.1. Notification of the decision

- (27) The SG is in charge of the notification process, which will take place in two rounds:
- in a first stage, immediately after the decision has been adopted by the College, the SG notifies by fax the operative part of the decision (“*dispositif*”) to the parties (not to their external legal counsel, except if parties waived the notification rights to their empowered attorney); the SG also notifies the operative part of the decision to the National Competition Authorities;
 - in a second stage, the SG notifies a certified copy of the decision to the parties as well as a copy of the final report of the Hearing Officer by express courier service (DHL or the like).
- (28) The case team is in charge of the following:
- to inform immediately, after the decision has been adopted and finalized by the SG (adding the date and the decision number to the adopted decision), the addressee of the decision, by sending a courtesy copy¹, and send the text of the opinion(s) of the Advisory Committees to the parties when the Advisory Committee has recommended the publication of its opinion(s);
 - to instruct the Antitrust Registry to send the full text of the decision (i.e. including confidential information and indication of figures on fines) to Member States and ESA, where it is EEA

¹ See the Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6), paragraph 146.

relevant, in the languages available via encrypted mail promptly (within two weeks) after the adoption of the decision;

- to send, if appropriate, by courtesy, to the legal counsel of the parties a copy of the decision;
- to send, if possible, a non-confidential version of the decision to the complainant (such a version may however not yet be available at this stage);
- to check if the case concerns a non-EEA-country, if there is an obligation to inform the third country competition authority about the fact that a decision has been notified to a company in its jurisdiction; in case of doubt, the Unit for International Relations will provide assistance.

3.2. Publication

- (29) The press conference is held and the press release is published after the sending of the operational part of the decision to the parties.
- (30) The case team should also get in touch in advance with the spokesperson in order to check if she/he needs assistance before the press conference or at the press conference
- (31) The adoption of the decision will be followed by a series of publications of various documents (from the text of the decision itself to a summary in the Annual Report).
- (32) Pursuant to Art. 30(1) Reg. 1/2003, a summary of the decision, the Hearing Officer's Report as well as the Advisory Committee opinion(s), if recommended to be published, have to be published in the OJ in all official languages, with the exception of Irish.
- (33) In addition, DG Competition endeavours to publish the non-confidential full version of the decision on its website in the authentic language and in the drafting languages, if different from the authentic language (see further Module Publication).

16 Commitment Decisions

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1. Introduction

- (1) Article 9 of Council Regulation 1/2003 provides the Commission with the possibility to conclude cases by means of a “commitment decision”, in which the commitments offered by the undertaking are rendered binding on it. Such a decision concludes that there are no longer any grounds for action by the Commission.
- (2) Following this introduction, section 2 addresses some general policy considerations as to when commitment decisions are appropriate. In section 3, the substantive requirements for commitment decisions are described.
- (3) This Module should be read together with the section on commitment decisions in the Notice on Antitrust Best Practices¹ which takes priorities in all respects.
- (4) During the whole procedure, support from Unit 02 may be requested at any moment. It is recommended to keep all relevant services (Unit 02, and if policy relevant Strategy Director (A), the Chief Economist, if involved, and Legal Service) informed of the progress of commitment discussions, so that their comments can be taken on board during the commitment discussions. If necessary organise a meeting with the relevant services to agree on the line to take.

2. Considerations and main objectives

- (5) The advantages and disadvantages of a commitment decision have to be weighed carefully in each individual case.
- (6) Similar to decisions under Article 7 of Regulation 1/2003, commitment decisions are an enforcement instrument primarily designed to restore effective competition. They should be used only in cases in which the commitments meet the competition concerns identified by the Commission. Unlike "informal settlements" (such as practised before Regulation 1/2003 came into force), commitment decisions render commitments offered by companies legally binding, which creates legal certainty and ensures that effective competition is continuously preserved. Commitment decisions also serve to clarify the Commission's competition policy since a non-confidential version of the decision is published. Other market participants can learn from the decision and the commitments what was considered by the Commission sufficient to remove the competition concerns.
- (7) Commitment decisions are not based on full investigations and do not reach definitive conclusions on the facts of a case or the application of the law. In addition, commitment decisions involve less procedural steps (and therefore less resources) than a final decision under Article 7 (e.g. Preliminary Assessment instead Statement of Objections; no access to the file is expressly foreseen, no hearing; usually a shorter decision). As a result, the "commitment path" can bring a swifter change to the market, without necessarily being less effective.
- (8) The fact that the commitments are not imposed by the Commission but voluntarily submitted and implemented only after discussions with the parties *as well as* a market test may also facilitate the later implementation of the commitments.
- (9) From a company's perspective, faster proceedings and the absence of a finding of an infringement may be important reasons to offer commitments². Also the fact that the remedies can be discussed

¹ Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6); ("Notice on Antitrust Best Practices").

² See Case C-441/07 P *Commission v Alrosa*, paragraph 48.

and are not imposed and that the procedure can give faster legal certainty may be taken into account by companies.

- (10) The option to enter into commitment discussions can, however, also have important disadvantages. Since commitments may be withdrawn until the adoption of the commitment decision and since a market test may show that the commitments are not appropriate, there is always a risk that antitrust investigations are significantly delayed by (unsuccessful) commitment discussions. It is therefore crucial to ascertain the willingness of the parties to settle before engaging into an Article 9 procedure and that the commitments appear sufficiently likely to resolve the identified competition problems (this is why a Preliminary Assessment is only submitted after first commitment discussions).
- (11) Another aspect which may militate against the "commitment path", from a policy point of view, is the different precedent value of commitment decisions compared to final decisions under Article 7. Commitment decisions do not actually find an infringement, and the factual and legal assessment may be shorter than in decisions under Article 7. The more limited risk of an appeal may also reduce the Commission's chances to have contentious legal issues clarified by the Court. If the Commission therefore wants to establish an important precedent, it may prefer the path of an Article 7 decision.
- (12) Similar considerations apply to the more limited deterrent effect of commitment decisions on other undertakings. The absence of a finding of an infringement may also render private litigation against anti-competitive practices more difficult.
- (13) Legally, a commitment decision is not appropriate when the Commission considers that the nature of the infringement calls for the imposition of a fine.³ Consequently, the Commission does not apply the Article 9 procedure to secret cartels that fall under the Notice on immunity from fines and reduction of fines in cartel cases.⁴
- (14) In cases, in which the Commission sent a Statement of Objections announcing its intention to impose a fine it would be preferable for the commitment decision to explain why a fine was no longer necessary.
- (15) A commitment decision is usually intended to bring an apparent on-going infringement to an end and restore competition in the market. However, commitments can still be appropriate if the undertakings have discontinued their presumed anti-competitive practice prior to, or during, the investigation. This is to ensure that the undertakings will continue also in the future abiding by the EU competition rules which in itself would constitute a legitimate interest for taking a formal Article 9 decision.⁵
- (16) These considerations need to be kept in mind when evaluating a company's request to enter into commitments discussions. Attention should be paid to attempts by companies to (mis)use commitment proceedings to obtain some form of legal certainty for contracts brought to the attention of the Commission in return for - possibly some minor - commitments ("notification through the back door"). Commitment decisions neither find an infringement, nor do they find

³ See Recital 13 of Regulation 1/2003.

⁴ OJ C 298, 8.12.2006, p.17.

⁵ If there is no longer need for a formal Article 9 decision the proceedings need to be formally closed.

that a behaviour has not infringed competition law⁶. Undertakings are by no means entitled to a commitment decision, even if the Commission previously settled a similar case.

- (17) As concerns the legal effects of a prohibition decision pursuant to Article 7 and a commitment decision pursuant to Article 9 of Regulation 1/2003, the main difference is that the former contains a finding of an infringement while the latter makes the commitments binding without concluding on whether there was or still is an infringement. A commitment decision therefore just describes the concerns found in the investigation and merely concludes that there are "no longer grounds for action" by the Commission.
- (18) The required level of detail of a commitment decision may be lower than in the case of a "prohibition" decision or "imposed" remedy decision under Article 7 (e.g. facts pointing at a potential infringement is usually sufficient for a commitment decision, and some elements of the theory of harm – such as objective justifications - may not be discussed in detail). However, the Commission must have at its disposal sufficient facts to make an informed and sound assessment of the relevant competition concerns. In other words, the Commission must have reached the conclusion – even if only on a preliminary basis – that there may be or may have been an infringement of EU competition law which should be addressed. Often the preliminary assessment will contain considerably more detail than the commitment decision itself.

3. Commitment Decisions

3.1. Initiation of commitment discussions

- (19) Undertakings may contact DG Competition at any point in time to explore its readiness to enter into commitment discussions. DG Competition encourages undertakings to signal at the earliest possible stage their interest in discussing commitments. However, even in a case where a Statement of Objections has already been sent to the parties, commitments may still be accepted.

3.1.1. State of Play Meeting

- (20) A State of Play meeting will be offered to parties which signal an interest in discussing commitments. At this meeting to which the Legal Service and Hearing officer team will be invited and may decide to participate, DG Competition will present the preliminary competition concerns arising from the investigation. Since the description of the case in the State of Play meeting is, in practice, the main basis for the company under investigation to decide whether to submit commitments or not (it will only receive a written "preliminary assessment" after it states its initial readiness to offer commitments), this summary of the competition concerns should be prepared with great care. Even if the Commission's competition concerns are only presented orally to the parties, the Commission's presentation should be well-structured and allow the parties to understand exactly the theory of harm and the underlying factual evidence. The parties should also be given the opportunity to ask questions regarding the competition concern in order to be able to report the Commission's concerns clearly to their internal decision-making bodies. The Commission will also indicate to the undertaking the timeframe within which the discussions on potential commitments should be concluded.
- (21) The case team should clarify that the State of Play meeting is without prejudice to the decision of the Commissioner for Competition whether to proceed along the commitment decision track. In addition, it is important for the case team to bear in mind that ultimately it is for the College to

⁶ The inapplicability of Article 101 and Article 102 TFEU can, in exceptional cases only, be stated in decisions pursuant to Article 10 of Regulation 1/2003.

decide whether to adopt a commitment decision. It is therefore also essential that during the ensuing discussions on potential commitments, no final position is taken by the case team on their appropriateness.

3.1.2. Submission of an informal commitments offer

- (22) Should the parties, after being confronted with the Commission's concerns in the State of Play meeting, decide to offer commitments, they need to convince the Commission that this offer is serious and credible⁷. For this purpose, the parties should outline the main elements of the - at this stage informal - commitment proposal. This may, in practice, happen by submitting a "term sheet" describing the main elements of the commitments, but sometimes already with a first draft of a commitment text.
- (23) Once the case team is convinced that the commitments informally proposed by the undertaking may address the competition concerns and that the undertaking is seriously interested in submitting adequate formal commitments, it should propose to draft a Preliminary Assessment.

3.2. Preparation of Preliminary Assessment

- (24) Article 9 of Council Regulation 1/2003 provides that the Commission must have informed the undertakings of the competition concerns by a document which is called Preliminary Assessment (a Statement of Objections may also constitute a Preliminary Assessment, as explained further below). The Preliminary Assessment summarises the main facts of the case and identifies the competition concerns that would warrant a decision requiring that the infringement is brought to an end.
- (25) The Preliminary Assessment serves as an important basis for the parties to formulate appropriate commitments fully addressing the competition concerns expressed by the Commission or to define previously discussed commitments better⁸.
- (26) The Preliminary Assessment is a Commission act adopted by the Competition Commissioner by way of empowerment. It does not require the same length and level of detail as a Statement of Objections⁹. The length of a Preliminary Assessment may vary from case to case¹⁰, depending, for example, on the complexity of the case or the Commission's interest to set a precedent case in the later commitment decision (which will, in turn, be based on the Preliminary Assessment).
- (27) The case team should explore whether the undertaking under investigation may be ready to waive its rights to receive the text of the Preliminary Assessment (and the final commitment decision) in the authentic language and to opt for another language ("language waiver"). Such language waiver should be given in writing and should be signed by a representative (or lawyer with due power of attorney) of every addressee.

⁷ See the Best Practices Notice, at paragraph 121: "Once the Commission is convinced of the undertakings' genuine willingness to propose commitments which will effectively address the competition concerns, a Preliminary Assessment will be issued".

⁸ As explained in the previous section, the undertaking will usually have already submitted a first outline of the commitments it intends to submit.

⁹ Article 27 (1) of Council Regulation 1/2003 requires a Statement of Objections only for proceedings pursuant to Article 7 and 8 of Council Regulation 1/2003.

¹⁰ In previous decisions the lengths of the Preliminary Assessment varied from around 10 to around 70 pages.

- (28) In case a Statement of Objections was already issued in a case, no additional Preliminary Assessment needs to be sent, because the Statement of Objections can also constitute a Preliminary Assessment. This is because a Statement of Objections contains a summary of the main facts as well as an assessment of the competition concerns identified.
- (29) Taking into account that the Preliminary Assessment is a Commission act adopted by empowerment procedure, it requires consultation of the Legal Service (10 working days for comments and at least 15 working days when the document exceeds 20 pages, save in "genuine emergencies").
- (30) In addition, DG Competition must inform the Commission department(s) primarily responsible for the product/service/policy area in issue and give them the opportunity to state their views¹¹ (10 working days for comments and at least 15 days when the document exceeds 20 pages, save in "genuine emergencies").

3.3. Approval of the Preliminary Assessment

- (31) The approval of the Preliminary Assessment constitutes a Commission act adopted by empowerment by the Commissioner for competition.
- (32) The Commissioner therefore needs to give his/her approval to adopt the Preliminary Assessment and to engage in formal commitment discussions with the parties.
- (33) The note seeking approval of the Preliminary Assessment should not only describe the previous informal commitment discussions and the commitments offered (informally) by the parties, but also specify the main elements required to meet the competition problems identified and outline which issues are still in discussion with the parties.
- (34) If proceedings have not been initiated before, the adoption of the Preliminary Assessment should be combined with the initiation of the proceedings.
- (35) After receiving the Preliminary Assessment, the undertaking under investigation has – in contrast to an Article 7 decision - no right to request a hearing pursuant to Article 12. Neither Regulation 1/2003 nor Regulation 773/2004 expressly provide for access to file in the context of Article 9 proceedings.
- (36) For complainants the issuing of a Preliminary Assessment does not trigger any special procedural rights either. The complainant has no right to a hearing or to receive a (non-confidential) copy of the Preliminary Assessment or to have access to information. The complainant is in a similar position to any other undertaking which is informed when the public market test takes place. The sole purpose of the Preliminary Assessment is to inform the undertaking under investigation formally of the competition concerns. It will not be published and not be made available to third parties.
- (37) However, it may – in specific cases - be advisable to inform the complainant about the main content of the Preliminary Assessment. The case team could in particular make use of this possibility if it can be expected that the complainant is able to provide important input for the subsequent discussions on the exact scope of the commitments. This advantage needs to be balanced against the risk that the commitment discussions are undermined by providing this information; third parties should also not be discriminated by providing information on the content of the Preliminary Assessment beyond what is summarised in the market test.

¹¹ Empowerment decision, PV(2004)1655, Article 2(1).

- (38) Prior to the issuing of the Preliminary Assessment, the parties will be offered an additional State of Play meeting.

3.4. Submission of a commitment text for the market test

3.4.1. Procedural framework / format of commitment decisions

- (39) After receiving the Preliminary Assessment, the undertaking under investigation will have normally one month to react and to submit a text of a commitment proposal that can be market tested.
- (40) Although there is no specific standard text for antitrust commitments, the Standard Model for Divestiture Commitments, originally developed for merger remedies, can be an appropriate “base text” for antitrust commitments. Even where no pure divestiture commitment (such as licences or other non-structural/behavioural remedies) is proposed, the model text may still constitute a useful starting point. However, certain amendments to the merger model text are necessary to take into account that antitrust commitments are based on Art. 9 of Regulation 1/2003. Examples of previous antitrust commitments may provide useful guidance on which formulation may be appropriate in the individual case. Proposals for changes to the model put forward by the parties should, however, be carefully verified and only accepted if appropriate in the individual case.
- (41) The undertaking may submit a written reply to the Preliminary Assessment. Unless the reply contains new evidence that materially affects the Commission position set out in the Preliminary Assessment, there will be no further discussion or meeting on the reply to the Preliminary Assessment. The reply will, however, be taken into account when drafting the final commitment decision (e.g. concerning corrections of factual errors etc.).
- (42) It should be discussed with the parties whether they agree to submit the commitment proposal in English, since this will not only facilitate the market test but also avoid internal delays which may be caused by the need for internal translations.
- (43) As the undertakings may try to limit the offered commitments as much as possible, the Commission may ask the company to modify the text before a market test. The discussions at this stage are crucial for the success of the remedies. Although the commitments are voluntarily submitted by the parties, the Commission can make proposals during discussions on how to modify certain elements of the text, and may even provide concrete drafting proposals on specific issues. It is up to the parties to decide whether to accept such proposals.
- (44) The parties might want to discuss the Commission’s assessment. If the case team considers it necessary to drop certain concerns expressed in the Preliminary Assessment and limit the commitment discussions to the remaining concerns it should solicit the approval of senior management within DG Competition before continuing the discussion with the parties.

3.4.2. The content of the commitments

- (45) The commitments should address the competition concerns identified. Commitments which are not related to the concerns or do not meet them will not be accepted by the Commission. The parties can offer commitments of a behavioural (e.g. a supply obligation) or structural nature (e.g.

divestiture of a part of a company)¹². Behavioural commitments usually have the disadvantage that they require long-term monitoring.

- (46) In principle, the commitments offered should be proportionate, *i.e.* not go beyond what is needed to remedy the competition concern. However, the ECJ has clarified that the proportionality test is less strict than in case of an imposed remedy under Article 7¹³. This is because Article 7 and Article 9 have different objectives and use different mechanisms¹⁴, and in addition, because commitments are submitted voluntarily by the parties and not imposed by the Commission.¹⁵ The Commission should however verify that: (a) the commitments are sufficient to address its competition concerns; and (b) the undertakings have not offered less onerous commitments that also address the concerns adequately.
- (47) Moreover, it is essential for the implementation that the commitments are unambiguous and self-executing. This means that the implementation must not be dependent on the will of a third party. Moreover, the implementation process should be designed in such a way that the company has an incentive to properly implement the commitments. The model text for divestiture commitments for mergers as published on the DG Competition's website¹⁶ which contains an in-built mechanism to ensure such incentive¹⁷ should be followed as closely as possible as far as it is applicable for the commitments offered in a specific antitrust case. Contradictory or incomplete commitments may result in a failure to remove the competition concerns and can hardly be corrected at a later stage. Pursuant to Article 9(2)(b) of Regulation 1/2003, the Commission may re-open proceedings if an undertaking acts contrary to the commitments.
- (48) If need be, a trustee can be appointed to assist the Commission in their implementation (monitoring and/or divestiture trustee)¹⁸. Furthermore, when commitments cannot be implemented without the agreement of third parties (e.g. pre-emption right of an undertaking that would not be a suitable buyer under the commitments), the undertaking should submit evidence that such agreement can be achieved at the latest when the commitments are formally submitted.
- (49) It is of particular importance to keep sufficient records on the discussions, taking into account in particular that the enforcement of the commitments at a later stage might require an interpretation of the commitment text, for which such records can be useful. This is all the more true for commitments which are of a behavioural nature, as they may run for many years and might require long-term monitoring.
- (50) The final commitments should be signed by the undertaking concerned.

¹² The boundaries between both commitment types are not always entirely clear. See e.g. Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, Official Journal C 267, 22.10.2008, p. 1-27, para. 22 et seq.

¹³ Case C-441/07 P *Commission v Alrosa*.

¹⁴ Case C-441/07 P *Commission v Alrosa*, para. 37-38 and 46-47.

¹⁵ See also Advocate General Kokott, Opinion of 17 September 2009 in Case C-441/07P *Commission v Alrosa*, paragraph 51: "*voluntary commitments*".

¹⁶ <http://ec.europa.eu/competition/mergers/legislation/commitments.pdf>

¹⁷ The model text foresees a certain deadline for the divestiture procedure and ultimately gives to a trustee the right to divest the respective business at no minimum price if the company does not comply with this deadline. It is, therefore, in the interest of the company to divest the business in a timely manner. No specific action by the Commission is needed to accomplish the divestiture process in case the company fails to do so since the necessary steps are already foreseen in the Commitments text.

¹⁸ For further details see the Commission's model text for (merger) trustee mandates: http://ec.europa.eu/competition/mergers/legislation/trustee_mandate.pdf

3.4.3. Duration of the commitments – review clause

- (51) The duration of commitments may be limited in time. Article 9 of Council Regulation 1/2003 refers to a “specified period”. Commitments should provide that a lasting improvement of the market structure is achieved within a foreseeable timeframe. This can vary significantly from market to market, depending on the reactivity of the markets or the investments needed for certain improvements. Again, the principle of proportionality should be taken into account, i.e. the seriousness of the infringement and the need to remedy the adverse effects appropriately.
- (52) Review clauses, including clauses extending deadlines of the commitments should normally be limited to exceptional circumstances, as provided in the model text for divestiture commitments¹⁹. Circumstances which are likely or at least possible to occur during the time of the implementation of the commitment should normally be addressed in the commitments themselves and not be left to the review clause. It is worth noting that, in an antitrust case, a review clause as foreseen in the model text would be in addition and without prejudice to the possibility of Article 9(2)(a) of Regulation 1/2003 according to which the addressee can request a re-opening of the proceedings where a material change in the facts has occurred.

3.4.4. Approval to market test the commitments

- (53) Once the case team considers the commitments offered are adequate to address the competition concerns, it should draft a note to the Competition Commissioner to ask for his/her approval to market test the commitments pursuant to Article 27(4) of Regulation 1/2003. The note should explain why the commitments are considered sufficient and also if any competition concerns are not addressed and why (e.g. because the case team had suggested to drop these concerns). The note should also draw attention to any areas where doubts remain as to the appropriateness of the commitments that the market test is envisaged to clarify.
- (54) The Commission is also entitled to informally "market test" / discuss the offered commitments with specific third parties prior to publishing a notice pursuant to Article 27(4).
- (55) If the case team is not convinced that the commitments offered *prima facie* address the competition concerns identified, it should not proceed with the preparation of the market test but discuss internally the procedure further.

3.5. The market test

3.5.1. Form of the Market Test

- (56) The Commission is obliged to publish a concise summary of the case and the main content of the commitment proposal and give third parties a chance to submit their observations before it can adopt an Article 9 decision.²⁰ This is the so-called "market test."
- (57) To this end a “market test notice” needs to be published in the *Official Journal* containing a concise summary of the case (suspected behaviour and suspected infringement of competition law) and

¹⁹ See standard clause 34 of the Commissions model text for divestiture commitments, paragraph 34: <http://ec.europa.eu/competition/mergers/legislation/commitments.pdf>

²⁰ Article 27 (4) of Council Regulation 1/2003.

the main content of the commitment proposal, respecting the obligations of professional secrecy²¹. The summary should allow third parties to understand the essential elements of the commitments and how they are intended to meet the competition concerns identified by the Commission.

- (58) The market test notice usually invites interested third parties to “submit their observations” on the proposed commitments. The case team is, however, free to add specific questions should it wish to verify certain contentious issues.
- (59) The full text of the commitment proposal in its non-confidential version is to be published on the website of DG Competition. The undertaking submitting the commitment should be encouraged to also provide DG Competition with a translation of the full text of the commitments in English – otherwise it is published only in the authentic language. If provided in a timely manner, such translation will, for convenience, be published together with the version in the authentic language²².
- (60) In order to enhance transparency of the process and to inform third parties of the market test, the Commission will usually also publish a press release, announcing the market test and setting out the key issues of the case and the proposed commitments.
- (61) If the case is based on a complaint, the market test should be sent to the complainant. The Commission is also entitled to send the publication in the OJ directly to other interested third parties known to be potentially concerned by the outcome of the case (e.g. third parties admitted to the procedure, consumer associations etc.) and explicitly asking for their comments. This ensures full involvement of those undertakings most concerned.
- (62) The case team might also decide to discuss the draft commitments orally with market participants (if appropriate also in triangular meetings). This may be done to clarify certain answers. In such a case the respondents should either be asked to summarise their comments in written form, or the case team should draft minutes which it can then send for approval²³.
- (63) In the market test the Commission needs to invite interested third parties to submit their observations within a fixed time-limit which may not be less than one month.²⁴

3.5.2. Information and further discussion

- (64) The undertakings offering commitments should be informed of the results of the market test. This can either be done orally or in writing. The identity of third parties may not be disclosed to ensure that they are not subject to retaliation.
- (65) In addition, after receipt of the replies to the market test, a State of Play meeting should be organised with the parties.
- (66) The obligation to carry out a market test should not be misunderstood as requiring the approval of the market for the commitments. The market test is not an opinion poll which determines the fate of the remedies. The Commission can take a commitment decision even in cases in which participants in the market test requested to reject the commitment offer. On the other hand, the

²¹ Article 28 of Regulation 1/2003.

²² In case of differences between the text in the authentic language and the translation, the version in the authentic language prevails.

²³ If the companies do not return the signed version of the minutes, the case-team should make a note to the file explaining why (e.g. the company does not want to leave any traces in the market test for fear of retaliation).

²⁴ Article 27(4) of Regulation 1/2003.

market test often provides the Commission with useful indications on how the commitments could be improved.

- (67) Depending on the case, significant or less significant modifications may become necessary to the proposed commitment text after the market test. These changes should be discussed with the parties. Smaller (“technical”) changes to the commitment text do not require new procedural steps. In particular, no new market test is usually required in case of revised commitments, unless the revision of the commitments is substantial. A change is only substantial if the very nature or scope of the commitments changes. If, for instance, the parties originally offered to reduce the duration of non-compete obligations in contracts with third parties from 5 to 2 years and following the market test such duration is further reduced to 1 year, there is no need to repeat the market test.

3.5.3. Complainants

- (68) In cases of a formal complaint, a letter pursuant to Article 7(1) of Regulation 773/2004 has to be issued at this stage and, in any event, before the adoption of the Article 9 decision, informing the complainant that the Commission has obtained what it considers adequate commitments and therefore considers that if the commitments were accepted by the Commission, there would be no longer grounds for the Commission to pursue the case.

3.5.4. Internal approvals

- (69) The case team should solicit approval within DG Competition on the issue of whether to proceed with a commitment decision. After agreement, the case team should draft a note to the Commissioner informing her/him of the results of the market test and explicitly asking for approval to prepare the commitment decision and to consult the Advisory Committee, after the Legal Service's approval has been received.

3.6. Adoption of the Decision

3.6.1. Content of the commitment decision

- (70) The case team drafts a commitment decision on the basis of the Preliminary Assessment²⁵. The commitment decision should contain a summary of the facts of the case and the Commission's legal assessment. In particular, the Commission needs to explain in its decision that it had identified competition concerns without going so far as to find an infringement²⁶. The text should therefore systematically use the conditional form (“*X may have infringed...*”). The decision should also describe the commitments submitted by the undertaking(s) and explain why the commitments resolve the identified competition concerns in a proportionate manner.

²⁵ In principle, no substantially new elements (facts or theories of harm) should be introduced in the decision that were not mentioned in the Preliminary Assessment.

²⁶ This is due to the fact that recital 13 of Regulation 1/2003 sets out that “commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement”. The reason for this is that the Commission is not in a position to make formal findings of infringement and non-infringement in a decision that is not based on a complete investigation and does not set out in detail the factual background and the legal and economic analysis underlying such conclusions.

- (71) In cases where the Commission may initially have intended to impose a fine, a brief statement on why this is no longer appropriate may be useful.
- (72) A commitment decision will usually be shorter than a decision under Article 7 of Regulation 1/2003. However, the actual length of the commitment decision may vary from case to case, depending, for example, on the complexity of the case or the Commission's interest to provide information on its assessment of certain anticompetitive practices.

3.6.2. Adoption process

- (73) Commitment decisions are adopted by the College. The Advisory Committee is consulted on draft commitment decisions prior to adopting them.
- (74) The adoption process for an Article 9 decision is similar to the one for an Article 7 prohibition decision (see module). It is complex and involves manifold procedural steps (and signatures). The Legal Service has to be consulted for all procedural steps. The adoption process should therefore be planned carefully, taking account of all relevant minimum periods for the different consultations (other Commission services, Member States' competition authorities, Cabinets, etc.).
- (75) In the summary of the case which is prepared for the Advisory Committee, Member States' competition authorities should also be informed of the results of the market test.

3.6.3. Complaint cases: Information of Complainant

- (76) In cases where a complaint was lodged to the Commission against the agreement or practice for which the undertakings have offered commitments, the Commission needs to adopt two different decisions (unless the complaint is withdrawn): one rejecting the complaint (Article 7(2) Reg. 773/2004) and one declaring the commitments binding (Article 9 Reg. 1/2003). This is due to the fact that the commitment decision does not find an infringement as requested in the complaint.
- (77) The fact that two decisions have to be taken requires some vigilance as to the timing. In particular it should be avoided that the commitment decision is already adopted and the Commission is confronted with new arguments in the rejection procedure requiring a reassessment of the case. It is therefore necessary that following the market test, the Commission issues a letter pursuant to Article 7(1) of the Commission Implementing Regulation 773/2004 (see para.(68) above).
- (78) If the complainant does not make any comments, the complaint is deemed to have been withdrawn pursuant to Article 7(3) of the Commission Implementing Regulation 773/2004. If the complainant does make comments, but these comments are not so substantial that it is necessary to reassess the commitments²⁷, the Article 9 procedure can be continued without any changes to the commitments and the complaint will have to be rejected pursuant to Article 7(2) of the Commission Implementing Regulation 773/2004.
- (79) The rejection decision should follow soon after the Article 9 decision outlining that, following the commitments, there are no longer grounds for the Commission to pursue the case. It is recommended to annex a non-confidential version of the commitment decision. If the complaint raised more issues than addressed in the commitment decision, adequate reasoning needs to be added in the Article 7(2) rejection decision.

²⁷ This is unlikely given the fact that the complainant has been invited to submit comments during the market test.

3.6.4. Closure of the file

- (80) The file should be closed as soon as the Decision has been sent out for the parties. See the relevant Module on Administrative closure of the file.

3.6.5. Publication of the Decision

- (81) Commitment decisions need to be published according to Article 30 (1) of Regulation 1/2003.

3.7. Implementation of the Commitments

- (82) The work on a case involving a commitment decision is not over with the adoption of the commitment decision. From a competition point of view, the successful implementation of the commitment after the adoption of the decision is crucial for the ultimate success of the Commission's intervention. For this reason, careful monitoring of the implementation process is essential.
- (83) The exact monitoring requirements will depend on the nature of the commitments. In most cases and, in particular, when divestiture remedies are concerned, the commitments should foresee that a trustee will be suggested by the addressee of the Article 9 decision shortly after the adoption of the proposed decision. The Trustee should be independent of the addressee of the decision and qualified for the monitoring task. After approval by the Commission, the trustee (and its team) can be appointed by the addressee of the decision. It will monitor in detail the different steps of implementation of the commitments and regularly report on this to the Commission.
- (84) In cases of divestiture commitments, the case team in particular needs to verify that the purchaser fulfils all the criteria set out in the commitments. The case-team has to supervise this process and stay in regular contact with the trustee team in order to be able to avoid or address any potential problems which could render the commitments less effective than foreseen. Reference is made again to the model texts for divestiture commitments for mergers and for trustee mandates²⁸.

²⁸ <http://ec.europa.eu/competition/mergers/legislation/commitments.pdf>.

17 Interim Measures

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1. Introduction

- (1) Regulation 17 did not directly address the issue of whether the Commission had power to adopt interim measures in relation to a suspected infringement of Article 101 and 102. However, in its 1980 order in the *Camera Care* case, the Court of Justice held that Article 3(1) of that regulation conferred on the Commission the power to take interim measures¹.
- (2) The Court held that there might be a need to adopt interim measures:

"when the practice of certain undertakings in competition matters has the effect of injuring the interests of some Member States, causing damage to other undertakings, or of unacceptably jeopardising the Community's competition policy".
- (3) Article 8(1) of Reg. 1/2003 explicitly empowers the Commission to adopt interim measures. It provides that:

"In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures".
- (4) In addition, the Commission has been expressly granted the power to order interim measures by specific regulation, such as Regulation (EC) 659/1999², on the application of rules on State aids control, and Regulation (EEC) 3975/87 concerning the application of competition rules to the air transport sector³.

2. Ex Officio Action

- (5) Article 8(1) of Regulation 1/2003 explicitly confirms that the Commission may issue an interim order 'acting on its own initiative'.
- (6) While it can be expected that undertakings being harmed by anti-competitive conduct will request the Commission to impose interim orders, Regulation 1/2003 does not formally acknowledge undertakings' right to make such requests. Complainants or third parties who can demonstrate sufficient interest to be heard may encourage the Commission to adopt such measures. However, under Article 8(1) of Regulation 1/2003, the Commission acts *ex officio*. This means that

¹ Case 792/79 R *Camera Care* [1980] ECR 119.

² Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83/1, 27. 3. 1999), recital 12: "Whereas in cases of unlawful aid, the Commission should have the right to obtain all necessary information enabling it to take a decision and to restore immediately, where appropriate, undistorted competition; whereas it is therefore appropriate to enable the Commission to adopt interim measures addressed to the Member State concerned; whereas the interim measures may take the form of information injunctions, suspension injunctions and recovery injunctions; whereas the Commission should be enabled in the event of non-compliance with an information injunction, to decide on the basis of the information available and, in the event of non-compliance with suspension and recovery injunctions, to refer the matter to the Court of Justice direct, in accordance with the second subparagraph of Article 93(2) of the Treaty".

³ Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ L 374, 31.12.1987, p. 1–8), as amended by Council Regulation (EEC) No 1284/91 of 14 May 1991 (OJ L 122/2, 17.5.1991), Article 4a "Interim measures against anticompetitive practices": "Without prejudice to the application of Article 4(1), where the Commission has clear prima facie evidence that certain practices are contrary to Article 85 or 86 of the Treaty and have the object or effect of directly jeopardizing the existence of an air service, and where recourse to normal procedures may not be sufficient to protect the air service or the airline company concerned, it may by decision take interim measures to ensure that these practices are not implemented or cease to be implemented and give such instructions as are necessary to prevent the occurrence of these practices until a decision under Article 4(1) is taken."

complainants do not have a right to ask for interim measures under Regulation 1/2003, and the Commission is therefore no longer⁴ obliged to decide on any (informal) request for interim measures and, if necessary, to reject it by decision. However, the Commission's decision to adopt interim measures is subject to appeal before the EU Courts.

- (7) Complainants can on the other hand seek interim measures before national courts⁵ pursuant to national procedural rules.

3. Conditions

- (8) According to case law⁶ previous to Regulation 1/2003, interim measures could only be granted provided the following conditions were fulfilled:

- the impugned practices had to be prima facie breaches of the EU competition rules that could be sanctioned by a final decision of the Commission; and, secondly,
- it was likely that serious and irreparable damage to the party applying for the adoption of interim measures, or intolerable damage to the public interest⁷ would be caused ("proven urgency")⁸.

- (9) According to Regulation 1/2003, however, the objective of Articles 101 and 102 TFEU is the protection of competition on the market⁹, and interim measures are only to be granted in the public interest, not in the interest of individual undertakings. Potential damage to an individual undertaking is therefore only to be considered where it coincides with damage to competition, in which case the interests of an undertaking may be protected by implication.

- (10) In *Camera Care*¹⁰, the ECJ indicated that the Commission can order interim measures where the following conditions are satisfied:

- the measure is ‘indispensable’ for the effectiveness of any future decision bringing the conduct to an end;
- the measure must be ‘urgent in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest’;
- it must be of a ‘temporary and conservatory nature and restricted to what is required in the given situation’¹¹;
- it must be adopted through a decision that is subject to judicial review by the EU Court.

⁴ Under Regulation No. 17, according to the case law parties had a right to request interim measures, and the Commission was obliged to adopt a formal appealable decision on such a request.

⁵ See paragraph 16 of the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C 101/05).

⁶ Cases T-184/01 R *IMS Health* [2001] ECR II-3193 and 792/79 R *Camera Care* [1980] ECR 119.

⁷ As held in *Camera Care*, the concept of ‘public interest’ related to the preservation of the EU competition policy objectives, as well as the interest of Member States and their citizens.

⁸ Case T-184/01 R *IMS Health* [2001] ECR II-3193, paragraph 53.

⁹ See Recital 9 of Regulation 1/2003.

¹⁰ Case C-792/79 R *Camera Care*, [1980] ECR 119.

¹¹ The measures must be kept within the limits and not exceed what is strictly necessary to remedy a situation. The measures must aim at safeguarding the interests of the applicant or the public interest. The measures must be temporary or interim and can only be valid until a decision is adopted on the substance or until a higher instance annuls them.

- (11) In *La Cinq*¹², the General Court recalled the conditions which must be fulfilled in order to grant interim measures. The General Court annulled the decision of the Commission that had rejected the application for interim measures made by La Cinq, and set forth the criteria to be applied when considering an application for interim measures.

3.1. Prima facie case

- (12) The practices focused on by the action for interim measures must *prima facie* be likely to constitute an infringement of competition rules.
- (13) According to the General Court in *La Cinq*¹³, and contrary to the Commission's assumption in its decision in that case that the infringement in question had to be “clear and flagrant”, the General Court only required the probability of a ***prima facie* infringement**.

3.2. Urgency

- (14) Regulation 1/2003 provides that interim measures should only be granted in cases of urgency due to the risk of serious and irreparable harm to competition.
- (15) In order to qualify as “urgent”, the case must call for immediate action on the part of the Commission, in order to avoid either a “serious and irreparable damage” to the party seeking the adoption of interim measures, or to avoid a situation that is intolerable for the public interest.
- (16) In order to establish whether “serious” damage may be caused, a case-by-case analysis has to be carried out, bearing in mind the particular circumstances of the individual case.
- (17) The ECJ has stated that damage is deemed to be “irreparable” if it can no longer be remedied by a subsequent decision during the administrative procedure *before the Commission*. Therefore, “irreparable” damage may be deemed to exist even in a scenario where the damage in question may be repaired by a judgment before either a national or European Court¹⁴. Financial loss is not regarded as irreparable unless the survival of the undertaking concerned is threatened. But damage will be regarded as irreparable if it leads to market developments that will be very difficult to reverse¹⁵.
- (18) In *Port of Roscoff*¹⁶, following a complaint of the Irish Continental Group (“ICG”) seeking access to the port of Roscoff (Brittany) for the purpose of commencing a ferry service between Ireland and Brittany in the summer of 1995, the Commission ordered interim measures, obliging CCI Morlaix to take the necessary steps to grant such access until the end of the summer season. The Commission took into consideration the special circumstances involving the holiday period for the provision of these ferry services.
- (19) Likewise, in *Mars/Langnese-Iglo* and *Schoeller Lebensmittel*¹⁷, the Commission imposed interim measures following a complaint by Mars, based on the allegation that its access to the German

¹² Case T-44/90 *La Cinq SA v. Commission*, [1992] ECR II-1, paragraph 32.

¹³ T-44/90 *La Cinq SA*, [1992] ECR II-1, paragraphs 60 ff. The Court stated that, “the requirement of a finding of a *prima facie* infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfy” (paragraph 61).

¹⁴ *Ibid*, paragraph 80.

¹⁵ Case T-184/01 R *IMS Health* [2001] ECR II-3193, paragraphs 121, 128 and 129.

¹⁶ *Irish Continental Group v. CCI Morlaix*, IP 1995/05/16.

¹⁷ *Mars / Langnese-Iglo and Schoeller Lebensmittel*, Case IV/34.072, OJ 1993 L 183/19.

market for single-item ice-cream was illegally barred. The urgency¹⁸ of this case was mainly related to the seasonal nature of the product concerned (ice cream).

4. Timescale for granting of interim measures

- (20) Although in certain cases interim measures have been adopted within a relatively short period of time (ten weeks in *ECS/AKZO*¹⁹), the practice of the Commission shows that the average period required for granting interim measures may vary to a certain extent, and in the approximate range of **three to eight months**. This can be explained by the procedural requirements which need to be fulfilled before adopting a decision taking interim measures (see further below).

5. Application of interim measures

- (21) The Commission cannot take interim measures "*without having regard to the legitimate interests of the undertaking concerned*"²⁰. In other words, the Commission must respect the right to be heard of the prospective addressee of the decision.
- (22) In order to adopt interim measures, the Commission must open proceedings pursuant to Article 2 of Regulation 773/2004.
- (23) Article 27 of Regulation 1/2003 applies to interim measure cases so the undertaking against which interim measures may be adopted must, where the case permits, have the right to be heard and reply in writing to the Commission's objections. This means that the Commission must send a statement of objections to the prospective addressee of the interim measures (see also Article 10 of Regulation No 773/2004).
- (24) Furthermore, under Article 27 of Regulation 1/2003, the undertaking has to be granted an oral hearing upon prior request, but in view of the urgency, Article 17(2) of the Implementing Regulation 773/2004 foresees shortened time-limits. Likewise, third parties who show sufficient interest to be heard should also be taken into consideration, and the Advisory Committee will also be consulted.
- (25) Article 8(2) of Regulation 1/2003 expressly stipulates that interim measures should apply "for a specified period of time". However, this does not impose any absolute constraint on the Commission, since unlike the rules governing investigative power in other fields, Article 8(2) also provides that interim measures "may be renewed in so far as this is necessary and appropriate".
- (26) The Commission decision ordering interim measures must be reasoned, and may be appealed before the European Courts.
- (27) Furthermore, should the undertakings concerned fail to comply with the Commission decision ordering interim measures, the Commission may be entitled to impose periodic penalty payments.

¹⁸ In *IMS*, the President of the General Court considered that "if a risk of serious and irreparable harm exists urgency is inevitably simultaneously established" (paragraph 54).

¹⁹ OJ 1983 L 252/13, [1983] 3 CMLR 694.

²⁰ Case C-792/79 R *Camera Care*, [1980] ECR 119. paragraph 19.

18 Decision finding inapplicability (Article 10 Decision)

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1. Introduction

1.1. General background

- (1) A declaratory decision finding inapplicability of the prohibitions laid down in Articles 101 or 102 TFEU can be proposed in exceptional cases where a Commission decision is needed, on a specific issue, in order to avoid or solve a problem of coherence resulting from divergent interpretations by national courts in different Member States or by members of the European Competition Network (ECN). Such circumstances can justify allocating the Commission's resources to the preparation of this type of "positive" decision.
- (2) The Commission has exclusive competence and, within the limits set out in Article 10 of Regulation 1/2003 (Article 10 Decision) as interpreted in the light of Recital 14, substantial discretion to take this type of decisions.

1.2. 'European Union public interest' justifying intervention

- (3) According to its terms, Article 10 can be applied where "the Community [i.e., European Union¹] public interest relating to the application of Articles 81 and 82 of the Treaty [i.e. Articles 101 and 102 TFEU]" so requires. The objective of competition policy is to benefit consumers and the economy as a whole, in the framework of the internal market. The notion 'Community public interest' in Article 10 refers to the **fundamental commitment of the European Union to a system of undistorted competition as a common public goal**².
- (4) The notion 'EU public interest' is strictly linked to the implementation of Articles 101 and 102 TFEU. It follows that other public policy considerations (e.g. industrial interests) cannot be invoked to establish that there is 'EU public interest' in the sense of Article 10.
- (5) Moreover, Article 10 decisions are not intended to replace negative clearance or exemption decisions under the previous enforcement system. Neither can they be legally "applied for" by undertakings nor should they be envisaged as a reaction to such requests. It is important to note that under the legal exception system, undertakings have the primary responsibility to assess the compatibility of their agreements and practices with EU competition rules. Thus, the risk of having to defend their case before a national court is in principle the same for all undertakings. Therefore, the existence of that responsibility/risk in itself cannot be invoked as a valid reason for assuming a problem of consistent application of EU competition law possibly giving rise to the adoption of an Article 10 decision.
- (6) A simple letter will usually suffice as reply, indicating that the Commission does not issue Article 10 decisions upon request.

1.2.1. The notion of 'EU public interest'

- (1) The term 'public' included in the notion of 'EU public interest' has been introduced to underline the public policy dimension and discretionary nature of the Commission's intervention on the

¹ Terminology according to the Treaty of Lisbon.

² See Commission Staff Working Paper SEC(2001) 1828 "The notion of 'Community public interest' in Article 10" of 13.11.2001, p.5, section II, paragraph 11. This notion should be clearly distinguished from the (lack of) "EU interest" concept developed in connection with the *Automec* case law and governing the rejection of complaints.

basis of Article 10 and, conversely, the implicit judgment that individual interests of companies are not sufficient to activate the Commission decision-making process in this context. This is further confirmed by the fact that Article 10 specifies that the Commission acts ‘on its own initiative’ rather than on application (further stressing the Commission’s discretion).

- (2) The term ‘Community’ [i.e., European Union] constitutes the second important facet of the notion ‘EU public interest’. It underlines that Commission decisions pursuant to Article 10 are designed to serve exclusively the common public goal of undistorted competition within the internal market and, accordingly, the development of EU competition policy to safeguard that public goal.
- (3) In accordance with the Union dimension of the notion of ‘EU public interest’ and given the exceptional nature of Article 10 decisions in a legal exception system, the problem of inconsistent application of the law (see Recital 14) needs to have a substantial impact on the functioning of competition within the internal market. Inconsistent application of the competition rules, in particular if sustained over a long period of time, may lead to discrimination between economic operators and unequal opportunities to compete. The market process itself, which the competition rules are designed to protect, may be substantially impeded.
- (4) The risk of divergence in the application of competition rules, entailing a substantial impediment to competition within the internal market may, exceptionally, also arise in the context of novel and unresolved questions, in so far as they trigger parallel proceedings before national competition authorities and courts, so that clarification by way of an Article 10 decision may be appropriate. However, recourse to an Article 10 decision in such a situation should normally only be had if other means of preventing the risk of divergence, such as an *amicus curiae* intervention of the Commission in proceedings before national courts, will likely not be sufficient.
- (5) On the other hand, minor divergences of interpretation of the rules with only a minimal impact on the functioning of competition within the internal market should not give rise to the adoption of Article 10 decisions.

1.3. Overview of the main procedural steps

- (6) The following section provides an overview of the main procedural steps leading to the adoption of an Article 10 decision:
 - Starting the investigation on an *ex-officio* basis – no “request” required, but not excluded either (from a party or an NCA);
 - Early information indicating that an Article 10 decision is being considered in a specific case and stating the reasons for such consideration;
 - Investigation and consultation on priority assessment (see Chapters IV and V respectively);
 - Initiation of formal proceedings as laid down by Article 11 (6) Regulation 1/2003 and Article 2 Regulation 773/2004;
 - Publication of a notice according to Article 27 (4) Regulation 1/2003 with a summary of the case and proposed course of action;

- Consultation of the Advisory Committee pursuant to Article 14 of Regulation 1/2003;
- Adoption of a Commission decision, notification to addressees, transmission of copies to competition authorities of the Member States;
- Publication in accordance with Article 30 of Regulation 1/2003.

2. Administrative Start

- (7) The case will normally be opened “ex officio”. In principle, no “request” is necessary, but it is not excluded either (from a party or an NCA).

3. Initiation of Proceedings

3.1. When to initiate the proceeding

- (8) Pursuant to Article 2 of Regulation 773/2004, the initiation of the proceeding can not be done later than the date on which the Article 27(4) Notice is published.
- (9) If the initiation of proceedings is a reaction to an envisaged decision communicated by a NCA to the Commission pursuant to Article 11(4), the proceedings need to be opened without delay. The procedural steps to follow in this case are explained in the chapters describing this procedure.

3.2. Effects

- (10) It is only after this initiation of proceedings that all other competition authorities are relieved, in accordance with said Article 11(6) and Articles 35(3) and 35(4), of their competence to apply Articles 101 and 102 TFEU to the same case.
- (11) It is also only thereafter that, pursuant to Article 16 of Regulation 1/2003, all national courts must avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated.

3.3. Procedural steps

- (12) The initiation of the proceedings is immediately notified to the undertakings concerned. Pursuant to Article 2(2) Regulation 773/2004, the initiation of proceedings is to be communicated to the parties concerned prior to its making public in the appropriate way.
- (13) The competition authorities of the Member States are to be informed of the initiation.
- (14) If the case has EEA relevance, the EFTA Surveillance Authority (ESA) should be informed on the initiation of the proceedings.

4. Article 27(4) Publication

- (15) Where there is an intention to adopt an Article 10 decision, pursuant to Article 27(4) of Regulation 1/2003, the Commission must publish a concise summary of the case and the main content of the proposed course of action (Article 27(4) Notice).

- (16) Interested third parties may submit their observations within a time-limit which is fixed in the publication. That time-limit may not be less than one month.
- (17) The decision to publish a summary of the case pursuant to Article 27(4) is taken by the Commissioner responsible for competition by empowerment.
- (18) The Article 27(4) Notice is not a decision which can be the object of an action for annulment (Article 263 TFEU)³.

4.1. Structure and contents

- (19) The main points to mention in a Article 27(4) Notice are:
- summary of the facts;
 - the parties;
 - the relevant market;
 - the agreement/practice ;
 - the proposed course of action;
 - invitation for third party observations, including an explicit request for a non-confidential version of those observations;
 - deadline for observations: the deadline will usually be, and should not be less than, one month.
- (20) Business secrets must not be included.

4.2. Approval and Publication of the Notice

4.2.1. Inquiry on business secrets to the parties

- (21) A copy of the draft Article 27(4) Notice is to be sent to the parties, asking them to identify business secrets (pursuant to Article 16 of Regulation 773/2004), and to rectify any material errors of fact. The parties are not consulted on the wording of or assessment in the Article 27(4) Notice.
- (22) In case of disagreement between the Commission and the parties as to whether the text of the Article 27(4) Notice contains business secrets, the Hearing Officer is competent to decide.

4.2.2. Translation

- (23) The Article 27(4) Notice is to be submitted for translation for all EU languages.

³ For the reasoning, see Case T-74/92 *Ladbroke* [1995] ECR II-115, paragraph 72, concerning notices published pursuant to Article 19(3) of Regulation 17.

4.3. Publication and information

- (24) Before publication, the text of the Article 27(4) Notice is sent to the parties. At the same time, parties are informed of the formal initiation of proceedings.

4.3.1. Information to the Member States

- (25) The competition authorities of the Member States are to be informed of the initiation of proceedings.
- (26) In addition, the initiation of proceedings will be made public on DG COMP's Website. Parties are to be informed prior to publication pursuant to Article 2(2) of Regulation 773/2004.

4.4. Follow-up

- (27) Observations can be received from companies, private citizens or Member States.
- (28) For each submission received, an acknowledgment of receipt will be sent.
- (29) The case team should examine the observations received, and determine whether any of the third party observations calls into question the overall orientation of the case.

5. Preliminary Draft Decision

5.1. Effects of Article 10 Decisions

- (30) Although an Article 10 Decision is declaratory in nature (as a corollary of the legal exception system), it is nonetheless capable of producing the legal effects laid down in Article 16 of Regulation 1/2003.
- (31) It results from the *Masterfoods*⁴ judgment of the Court of Justice and of its codification in Article 16 of Regulation 1/2003 that Commission decisions have EU-wide legally binding effect. This binding effect is equally extended to decisions based on Article 10. In concrete terms, when national courts rule on agreements or practices which are the subject of a Commission decision, they cannot take decisions running counter to that decision, unless they first refer to the Court of Justice for a preliminary ruling on the validity of that decision. They must also avoid decisions which would conflict with a decision contemplated by the Commission.
- (32) The Article 10 Decision is of a declaratory nature, and based on the circumstances known to the Commission at the moment of its adoption and explained in some detail in the decision. If the circumstances change to an extent that materially affects the findings set out in the decision, it does not need to be revoked, but simply may no longer be invoked by the parties to their benefit, and will no longer block national proceedings within the meaning of Article 16 of Regulation 1/2003.

⁴ Judgement of 14 December 2000, C-344/98 *Masterfoods*, [2000] ECR I-11369, paragraphs 51 ss.

5.2. Content of Article 10 Decision

- (33) The Article 10 Decision states that Article 101 TFEU is not applicable to an agreement, a decision by an association of undertakings or a concerted practice, either because the conditions of Article 101(1) are not fulfilled, or because the conditions of Article 101(3) are satisfied. In practice, this means that an agreement or a particular clause is not void under Article 101(2). It can likewise state that the conditions of Article 102 TFEU are not fulfilled and that an agreement, a particular clause or a practice does not constitute an abuse of a dominant position.

5.3. Preparation of the preliminary draft Article 10 Decision

- (34) The drafting of EU acts must comply with numerous formal rules, for reasons of legal certainty, clarity, precision, or simply uniformity and in order to comply with the duty to state reasons for EU acts. In general, the rules and guidelines for the drafting of an Article 10 Decision follow those for drafting of a formal negative decision.

5.3.1. Addressees

- (35) The decision is addressed to the undertaking(s) and/or associations of undertakings whose practices or agreements are examined and to which Articles 101 or 102 are found to be inapplicable.
- (36) In cases of distribution agreements with one supplier and numerous distributors, the decision can be addressed to the supplier only. The publication of the decision in full text will ensure that the other parties' rights can be sufficiently protected and that they have the necessary information to seek judicial review if they deem it necessary.

5.3.2. Motivation of a decision

- (37) According to Article 296 TFEU, Commission decisions must state the reasons on which they are based. Failure to give reasons for a decision can be sanctioned on the basis of Article 263 TFEU and could entail the annulment of the decision by the General Court.
- (38) In its statement of reasons, the decision should take into account, when appropriate, relevant third parties' arguments submitted following the publication of the Article 27(4) Notice.

5.3.3. Transmission to the Hearing Officer

- (39) A copy of the draft Article 10 Decision has to be sent to the Hearing Officer in all cases in which a draft decision is being submitted to the Advisory Committee, because the Hearing Officer has to prepare a final report. Given that the Hearing Officer is also guarantor of the right to be heard of third parties, his final report cannot be omitted even in cases of adoption of Article 10 decisions.

6. Procedure for Adoption of a Decision

- (40) In general, the procedure to follow in the case of an Article 10 Decision is the same as that for an Article 9 decision.

6.1. Consultation of the Advisory Committee

- (41) Pursuant to Article 14 of Regulation 1/2003, prior to taking a decision under Article 10, the Advisory Committee must be consulted.
- (42) Consultation may also take place by written procedure (ref. Article 14(4) of Regulation 1/2003), but in case any Member State so requests, the Commission has to convene a meeting.

6.2. Adoption of the decision by the Commission

- (43) It needs to be noted that in the case of Article 10 Decisions, the internal procedure to follow for adoption by the Commission could in principle be the written procedure.

6.3. Notification to addressees and transmission of copies to competition authorities of Member States

- (44) The decision has to be notified to the addressees, and a copy should be transmitted to the competition authorities of the Member States and ESA.

7. Publication of the Decision

- (45) Decisions finding inapplicability of Articles 101 and 102 have to be published as provided for in Article 30 of Regulation 1/2003. The publication must state the names of the parties and the main content of the decision. It must have regard to the legitimate interest of undertakings in the protection of their business secrets. The legal basis of the decision should also be indicated.

20 Periodic Penalty Payments

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1. Legal framework

- (1) Pursuant to Article 24(1) of Regulation No 1/2003, the Commission may, by decision, impose on undertakings or associations of undertakings periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision, in order to compel them:
 - to put an end to an infringement of Article 101 or Article 102 TFEU, in accordance with a decision taken pursuant to Article 7;
 - to comply with a decision ordering interim measures taken pursuant to Article 8;
 - to comply with a commitment made binding by a decision pursuant to Article 9;
 - to supply complete and correct information which it has requested by decision taken pursuant to Article 17 or Article 18(3);
 - to submit to an inspection which it has ordered by decision taken pursuant to Article 20(4).
- (2) An Article 24(1) decision announces the intention of the Commission to impose provisional periodic penalty payments from a specified date in the future *if* by that date the undertaking concerned has not complied with an obligation. An Article 24(1) decision is a preliminary act; it is not challengeable before the EU Courts under Article 263 TFEU.¹
- (3) The final amount of the payment is only calculated at a later stage, at the time of the Article 24(2) decision. An Article 24(2) decision does have legal effects and is therefore attackable before the EU Courts. Accordingly, the undertaking concerned has the right to be heard (i.e. it should receive a statement of objections, been given access to file and given the opportunity to express its views in writing and at an oral hearing) before the Article 24(2) decision can be adopted.
- (4) Article 24 of Regulation 1/2003 therefore creates a two stage proceeding whereby a first decision is taken to set the (provisional) amount of the daily periodic penalty payment and the starting date for the calculation and a second decision fixes the final amount.

2. Procedure for the adoption of an Article 24(1) decision

- (5) Article 24(1) decisions are considered to be measures of management and administration. The Competition Commissioner is empowered to adopt them². Article 24(1) decisions taken to enforce compliance with a decision requesting information (Article 18(3)) are subject to a sub-delegation to the Director-General.
- (6) Since the Article 24(1) decision is an intermediate step and does not adversely affect the rights of the parties there is no need at this stage to issue a statement of objections, nor grant access to file and no need to hear the parties.³

¹ See Case 46/87 Hoechst v Commission [1989] ECR, 2859 para. 55. An action for annulment would be inadmissible due to the fact that, *inter alia*, the Article 24(1) decision does not in itself impose any obligations on the undertaking concerned, but only announces an intention to fine in case of non-compliance.

² PV(2004) 1655, SEC (2004) 520/2.

³ A contrario Article 27(1) of Regulation 1/2003.

- (7) The imposition of periodic penalty payment can be initiated by adopting an Article 24(1) decision on a stand-alone basis or by including the provisions relating to the imposition of a penalty in another decision (normally the decision that the periodic penalty payments are intended to enforce, such as an Article 18(3) decision).
- (8) Since usual practice is to combine an Article 24(1) decision with the decision that the periodic penalty payments are intended to enforce, please refer to the relevant modules for such decisions regarding the detailed procedure for adoption.

3. Procedure for the adoption of an Article 24(2) decision

- (9) As soon as the time-limit for complying with the first decision has expired, a letter signed by the Director is sent to the undertaking reminding it of the financial consequences of the non-compliance with the decision.
- (10) The second decision, fixing the definitive amount of the periodic penalty payment, may be taken after the undertaking has not complied with the first decision.
- (11) The penalty set in the Article 24(1) decision is the maximum amount which the Commission could impose under Article 24(2). If the addressee has satisfied the obligation which the periodic penalty payments was intended to enforce, the definitive amount of the periodic penalty payment will be fixed for the period of non-compliance. The Commission also has the discretion to reduce the fine amount, e.g. it may reduce the amount if the undertaking has taken some steps towards compliance or if, having heard the undertaking concerned, the Commission is persuaded that a lower amount than that set in the Article 24(1) decision was appropriate for any reason.
- (12) Before the Article 24(2) decision can be adopted, the undertaking concerned must receive a Statement of objections, informing it of the objections retained against it with a view to enabling it to exercise its rights of defence in writing and orally (hearing).⁴
- (13) The same procedural rules apply for the Statement of objections as in a substantive case. After having received the approval of the LS and having informed the other DGs concerned, the Statement of objections is adopted by empowerment procedure by the Competition Commissioner and notified to the undertaking by the SG.
- (14) The deadline for replying to a Statement of objections is usually two months. Given however that objections raised in an Article 24 proceeding do normally not require an in depth analysis by the undertakings concerned it is normally appropriate to set the time limit at four weeks.
- (15) The procedure for the drafting and the adoption of the Statement of objections is set out in detail in the Module on Statement of Objections.
- (16) The final Article 24(2) decision is adopted by the College of Commissioners, normally in written procedure. The procedural rules set out in the Module Decision-making procedure apply.

⁴ Article 27(1) of Regulation 1/2003.

21 Handling of complaints

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1. Initial assessment

1.1. Admissibility

- (1) Citizens and undertakings are encouraged to inform the Commission about suspected infringements of competition rules. There are two ways: market information, and a complaint under Article 7(2) of Regulation No 1/2003.
- (2) Citizens and undertakings who wish to inform the Commission about suspected infringements of Articles 101 or 102 are invited to write to the Commission. This information can be the starting point for a Commission investigation, but it does not trigger the formal complaints procedure.
- (3) Formal complaints formulated on the basis of Article 7(2) of Regulation No 1/2003 oblige the Commission to react in specific ways. [Commission Regulation No 773/2004](#), in its Articles 5 to 9, lays down specific rules concerning the handling of such complaints. In addition, a Commission Notice on the handling of complaints by the Commission under Articles 101 and 102 of the Treaty¹ (“[Notice on Complaints](#)”) provides guidance on the subject.
- (4) A formal complaint can only be made about an alleged infringement of Article 101 and/or 102 of the Treaty by undertakings.² In addition, the complainant must show a legitimate interest. Finally a complaint has to comply with Form C that is annexed to Regulation 773/2004.³
- (5) Where a submission does not concern Articles 101 and/or 102 TFEU at all, the sender is informed accordingly. If applicable, the sender is informed of the transfer of the matter to the competent DG.⁴
- (6) The following are considered to, in principle, have a legitimate interest⁵:
 - undertakings (themselves or through associations entitled to represent their interests⁶) can claim a legitimate interest where they are operating in the relevant product market or where the conduct complained of is liable to directly and adversely affect their interests;⁷
 - consumer associations can also lodge complaints with the Commission;⁸

¹ OJ C 101, 27.4.2004, p. 65.

² No formal complaint can be made under Regulation No 1/2003 about infringements by Member States. Sometimes a complaint also concerns a state measure caught by Article 106 TFEU or by Article 4(3) TEU. In such circumstances, the different aspects of the complaint will be handled separately.

³ Article 5(2) of Regulation 773/2004. Also explained in [Notice on Complaints](#), paragraph 29.

⁴ It may also be appropriate to point the sender to other bodies that might be of assistance (e.g. consumer protection bodies, Ombudsman etc.).

⁵ Cf. also the explanations in the [Notice on Complaints](#), paras 33 *et seq.*

⁶ Joined Cases T-133/95 and T-204/95, *International Express Carriers Conference (IECC) v Commission*, [1998] ECR II-3645, paragraphs 79-83. As confirmed in Joined cases T-213 and 214/01 (Austrian Banks) paragraph 112.

⁷ This confirms the established practice of the Commission according to which a legitimate interest can, for instance, be claimed by the parties to the agreement or practice which is the subject of the complaint, by competitors whose *interests* have allegedly been damaged by the behaviour complained of or by undertakings excluded from a distribution system. Cf. Article 36 of the [Notice on Complaints](#).

⁸ Case T-37/92, *Bureau Européen des Unions des Consommateurs (BEUC) v Commission*, [1994] ECR II-285, para 36.

- individual consumers are considered to be in a position to show a legitimate interest when their economic interests have been harmed or are likely to be harmed as a result of the restriction of competition in question;⁹
- local or regional public authorities may be able to show a legitimate interest in their capacity as buyers or users of goods or services affected by the conduct complained of;
- Member States are deemed to have a legitimate interest for all complaints they choose to lodge.

1.2. Initial assessment

- (7) The initial assessment serves the purpose of screening the admissible complaints for those which seem most to merit being further investigated by the Commission.
- (8) The Commission will endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the receipt of the complaint.¹⁰ This is, however, subject to the circumstances of the individual case and is, in particular, dependent on whether DG Competition has received sufficient information from the complainant or third parties, notably in response to its requests for information, in order for it to decide whether or not it intends to investigate the case further.
- (9) The Commission can undertake preliminary investigations in order to assess whether the case should be a priority. The investigations could look for example for *prima facie* indications of the alleged infringement and try to determine a possible theory of harm.
- (10) As a result of the initial assessment, a clear direction should be found on whether the complaint:
 - is a potential case for further investigation by the Commission;
 - should be re-allocated to an NCA;
 - contains insufficient grounds for acting.

1.3. Further investigation

- (11) If the intention is to investigate the case further the complainant should be informed. A short letter by the Head of Unit is sufficient. The complainant should also be informed of the initiation of proceedings, unless such information is inappropriate.
- (12) In the spirit of encouraging an open exchange of views the Commission will, in cases based on formal complaints, provide the parties subject to the proceedings, at an early stage (unless such is considered likely to prejudice the investigation) and at the latest shortly after the opening of proceedings, with the opportunity of commenting on a non-confidential version of the complaint¹¹.
- (13) According to Article 27 of Regulation 1/2003, before the Commission takes decisions as provided for in Article 7, 8, 23 and Article 24(2), complainants should be associated closely with the

⁹ Joined cases T-213 and T-214/01 *Österreichische Postsparkasse e.a. v Commission* [2006] ECR II-1601, paragraph 114.

¹⁰ Notice on the handling of complaints, paragraph 61.

¹¹ Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6) ("Best Practices Notice"), paragraph 71.

proceedings. The complainant can help the Commission in supplying evidence of the anti-competitive practice and thus in establishing the infringement. However, the formal complainant has less extensive procedural guarantees than the company subject to the investigation.

- (14) Where appropriate, documents such as replies to requests for information can be provided to the complainant insofar as business secrets are duly protected and the suppliers of the information have been informed.
- (15) A non-confidential version of the reply of the party subject to the investigation to the complaint may be provided to the complainant. However, this may not be the case where the complaint is rejected at an early stage without further in-depth investigation¹².
- (16) According to Article 6(1) of [Regulation 773/2004](#), the Commission provides the complainant with a copy of the non-confidential version of the Statement of Objections and sets a time-limit within which the complainant may make known its views in writing. A deadline of a maximum of one month is given for comments. The transmission is made for the sole purpose of the proceedings under Regulation 1/2003, without prejudice to the case-law of the Courts¹³.
- (17) Where appropriate, non-confidential versions of the replies to the Statement of Objections can be given to the complainant, provided that business secrets are not disclosed and that the suppliers of the information have been consulted.
- (18) Where appropriate, non-confidential versions of the complainants' comments may be sent to the undertaking(s) complained of.
- (19) Pursuant to Article 6 of [Regulation 773/2004](#), the Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a Statement of Objections has been issued, if complainants so request in their written comments. See further in the Module Right to be heard.

2. Cooperation with NCAs

- (20) The Commission informs the ECN of the existence of the complaint as soon as formal investigative measures are taken, such as a formal request for information or any other measure based on Articles 18 to 21 of Regulation 1/2003. By submitting this information, the Commission signals to the ECN that it intends in principle to deal with the case revealed by the complaint.
- (21) This information allows NCAs also to contact the Commission and possibly discuss case-allocation.

2.1. Re-allocation of case to a NCA

- (22) In most instances the authority that receives a complaint (or starts an ex-officio procedure) will remain in charge of the case. Re-allocation of a case would only be envisaged at the outset of a procedure where either this authority considered that it was not well placed to act or where other authorities also considered themselves well placed to act.¹⁴ A copy of the complaint can be transmitted for the NCA to assess whether they want to take up the case. See further the ECN Module and the Notice on handling of complaints.

¹² Best Practices Notice, paragraph 71.

¹³ See e.g. Case T-353/94 *Postbank* [1996] ECR II-921

¹⁴ See Commission Notice on cooperation within the Network of Competition Authorities (OJ C 101, 27.4.2004, p. 43) ("Network Notice"), paragraphs 5-15.

- (23) Where re-allocation is found to be appropriate for an effective protection of competition and of the EU interest, network members will endeavour to re-allocate cases to a single well placed competition authority as often as possible. In any event, re-allocation should be a quick and efficient process and not hold up ongoing investigations.
- (24) The Network Notice notes that an authority can be considered to be well placed to deal with a case if the following three cumulative conditions are met:
- (25) the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory;
- (26) the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately;
- (27) it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.¹⁵
- (28) The above criteria indicate that a material link between the infringement and the territory of a Member State must exist in order for that Member State's competition authority to be considered well placed. It can be expected that in most cases the authorities of those Member States where competition is substantially affected by an infringement will be well placed provided they are capable of effectively bringing the infringement to an end through either single or parallel action unless the Commission is particularly well placed to act.
- (29) It follows that a single NCA is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory.
- (30) Furthermore single action of an NCA might also be appropriate where, although more than one NCA can be regarded as well placed, the action of a single NCA is sufficient to bring the entire infringement to an end.
- (31) Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately.
- (32) The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.
- (33) The Commission is particularly well placed if one or several agreement(s) or practice(s), including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).
- (34) The Court has held that even if the national authorities and courts are well placed to address the possible infringements complained of that consideration alone is insufficient to support a final

¹⁵ See Network Notice , paragraph 8.

conclusion that there is no sufficient Community interest. Action at European Union level could on occasion be more effective than various actions at national level.¹⁶

- (35) Moreover, the Commission is particularly well placed to deal with a case if it is closely linked to other EU provisions which may be exclusively or more effectively applied by the Commission, if the EU interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises or to ensure effective enforcement¹⁷.

2.2. Rejection or suspension in light of a NCA case

- (36) Pursuant to Article 13 of Regulation 1/2003, the Commission may reject a complaint or suspend proceedings on the grounds that a competition authority of a Member State is dealing or has dealt with the same case. A rejection pursuant to Article 13 is not a referral decision¹⁸, it merely closes the complaint procedure by the Commission.
- (37) The NCA should be asked to confirm that they are actively dealing/have actively dealt with the case by way of a standard form. The forms do not need to be translated. The NCA should also be asked when the complainant can be informed (possibility of an embargo, if a surprise inspection is planned).
- (38) If the Commission comes to the conclusion that it should not pursue the case for the reasons mentioned above, it will first inform the complainant in a meeting or by phone that it has come to the preliminary view that the case may be rejected. Once informed, the complainant may decide to withdraw the complaint. Otherwise, if the complainant upholds the complaint, prepare a formal rejection pursuant to Article 13, in accordance with Article 9 of Regulation 773/2004. The rejection contains explanations on the following points:
- It identifies the agreements or practice complained of.
 - It states that the same case is or has been dealt with by the NCA. To the extent necessary, it specifies why the cases are identical (see above).
 - It specifies the NCA's proceedings by reference to the national case number(s), dates of measures taken, national rejection decision or equivalent identifiers.
- (39) The rejection does not contain any substantive explanations.
- (40) Article 13 creates a possibility to reject, not an obligation. It may happen that an NCA is already dealing with a complaint that could equally be a priority for the Commission. This situation is not covered in the current chapter, but in the ECN Module.

3. Rejection of complaints

3.1. Grounds for rejection of complaints

¹⁶ Case T-427/08 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v Commission*, judgment of 15 December 2010, paragraph 176.

¹⁷ See Network Notice, paragraph 15.

¹⁸ In the antitrust area, the Commission and the NCAs have parallel competences to deal with cases under Articles 101 and 102 of the Treaty (as long as the Commission does not formally initiate proceedings). "Re-allocation" in the ECN implies that one authority goes ahead with a case while another abstains from acting or closes its file. There is no need to "transfer" the case or, *a fortiori*, to "transfer" the competence to deal with the case.

- (41) Complaints can be rejected on the basis that there are insufficient grounds for acting.¹⁹ In particular, there can be insufficient grounds for acting if conducting a further investigation into the alleged infringement would, in view of the public interest and the circumstances of the individual case, not constitute a sufficiently high degree of priority for the Commission (also known as ‘lack of European Union interest’). There can also be insufficient grounds for acting if the complaint is not substantiated or if there is no evidence to establish the existence of an infringement.

3.1.1. Insufficient grounds for acting by conducting a further investigation (‘lack of European Union interest’)

- (42) The ECJ has ruled that the right to complain entails a right to receive a reasoned decision of the Commission that can be appealed to the European Union Courts.²⁰ Notwithstanding, the case law has recognised that the Commission is entitled to give differing degrees of priority to the complaints that it receives, taking into account the duration and extent of the infringements complained of and their effect on the competition situation in the European Union. It is therefore entitled to reject complaints when there are insufficient grounds for acting by conducting a further investigation into the alleged infringement (also known as ‘lack of European Union interest’).²¹
- (43) The Court has held that in order to assess the European Union interest in further investigating a case, the Commission must take account of the circumstances of the case and, in particular, of the matters of law and fact set out in the complaint referred to it. In particular, it must weigh the significance of the alleged infringement as regards the functioning of the internal market against the probability of it being able to establish the existence of the infringement and the extent of the investigative measures necessary in order to fulfil, under the best possible conditions, its task of ensuring compliance with Articles 101 and 102 TFEU.²²
- (44) Under the case law, the Commission must take into consideration all the relevant matters of law and of fact in order to decide on what action to take in response to a complaint. More particularly, it must consider attentively all the matters of fact and of law which the complainant brings to its attention.²³ The case team may contact complainants in order to explore the background and facts underpinning the complaint and to gain a fuller understanding of the matter.
- (45) The Commission may not, under the case law, exclude *a priori* and in general certain situations from its task as enforcer of the competition rules. A rejection for lack of European Union interest must therefore be based on the specific circumstances of the individual case, reflect a thorough examination of the facts and be based on a consistent set of reasons.
- (46) The Commission has publicly identified the elements it looks at for determining whether a complaint submitted to it contains sufficient grounds for acting.²⁴ Under the case law, the Commission is not limited to the criteria already accepted by the Court.²⁵ It is therefore not excluded that new grounds for rejection may still arise in individual cases.

¹⁹ Article 7(2) of Regulation 773/2004. See also Best Practices Notice, paragraph 135. For rejections pursuant to Article 13 of Regulation 1/2003, see section 2.2 above.

²⁰ Case C-282/95 P *Guérin automobiles v. Commission* [1997] ECR I-1503, paragraph 36.

²¹ Cf. in particular Case T-24/90 *Automec II* [1992] ECR II-2223 and Case C-119/97 P *Ufex* [1999] ECR I-1341.

²² Case T-427/08 *Confédération européenne des associations d’horlogers-réparateurs (CEAHR)/Commission*, judgment of 15 December 2010, paragraph 158.

²³ Case C-119/97 P *Ufex* [1999] ECR I-1341, paragraph 86; Case T-427/08 *Confédération européenne des associations d’horlogers-réparateurs (CEAHR)/Commission*, judgment of 15 December 2010, paragraph 28.

²⁴ See the Annual Report on Competition Policy 2005 and Notice on the handling of complaints, paragraph 44.

²⁵ Cf. previous footnote.

- (47) When deciding whether there is a sufficient degree of European Union interest for acting, the Commission will normally look at the following criteria referred to above:
- (48) the extent or complexity of the investigation required, the likelihood of establishing an infringement and whether in light of these elements it is proportionate to conduct an in-depth investigation;
- (49) the significance of the impact on the functioning of competition in the internal market, as indicated in particular by:
- the geographic scope of the conduct complained of, or the economic significance of the conduct complained of, or the size of the market, or the importance for end consumers of the products concerned or of the conduct complained of; or
 - the market position of the undertakings targeted by the complainant or the overall functioning of the market in question;
- (50) the possibility of the complainant to bring the case before a national court, in particular taking into account whether the case is or has already been the subject of private enforcement or is of a type that can appropriately be dealt with by national courts;
- (51) the appropriateness of acting on an individual complaint that concerns (a) specific legal issue(s) which the Commission is already in the process of examining in one or several cases or which it has already examined and/or which is the subject of proceedings before European Union courts;
- (52) the cessation or modification of the conduct complained of, in particular where commitments have been made binding by a Commission decision pursuant to Article 9 of Regulation 1/2003 or where the undertaking(s) complained of has/have changed its/their behaviour for other reasons, provided that neither significant persisting anti-competitive effects nor the seriousness of the alleged infringement(s) constitute sufficient grounds for conducting a further investigation in spite of the cessation or modification; and
- (53) the importance of other areas of European Union or national law affected by the conduct complained of, compared to the importance of the competition concerns raised by the complainant. This criterion relates for example to issues that contain some competition law elements but that would primarily and more appropriately be dealt with under the rules governing the functioning of the internal market.
- (54) The Commission is under an obligation to state reasons if it declines to continue with the examination of a complaint, and those reasons must be sufficiently precise and detailed to enable the Court effectively to review the Commission's use of its discretion to define priorities. The General Court verifies whether this condition has been complied with.²⁶
- (55) Complaints may contain a range of allegations. Sometimes part of a complaint gives rise to a priority investigation, while the remainder is not considered a priority. If the 'remainder' is a separate alleged infringement, it will in principle be treated as a complaint in its own right and may hence need to be rejected separately. In these cases, contacts with the complainant in view of withdrawal are particularly recommended.

²⁶ Case T-427/08 Confédération européenne des associations d'horlogers-réparateurs (CEAHR)/Commission, judgment of 15 December 2010, paragraph 28.

3.1.2. Rejection for lack of substantiation

An admissible complaint (i.e., a complaint that contains the information required by Form C) may also be rejected for lack of substantiation, when it fails to submit even a minimum of *prima facie* evidence necessary to substantiate one or several conditions for an infringement of Article 101 or 102 TFEU.²⁷ There is no need for DG Competition to inform associated or concerned DGs. The Article 7 letter and rejection decision should be carefully worded and point out why the complaint fails to provide a minimum of indications.

3.1.3. Rejection on substantive grounds

- (56) A rejection on substantive grounds will normally be based on the absence of evidence for an appreciable infringement. The conclusion is that there are insufficient grounds for acting on the complaint, in accordance with Article 7 of [Regulation 773/2004](#).

3.2. Procedure for rejection of complaints

- (57) If the Commission, after careful examination of the case, comes to the preliminary conclusion that it should not pursue the case for any of the reasons mentioned above, it will first inform the complainant in a meeting or by phone that it has come to the preliminary view that the complaint may be rejected. Once informed, the complainant may decide to withdraw the complaint. If the complainant withdraws, the file will be closed.
- (58) If the complainant upholds the complaint, the Commission will inform the complainant by a formal letter pursuant to Article 7(1) of [Regulation 773/2004](#) of its preliminary conclusion that there are insufficient grounds for acting and set a time limit for its written observations.
- (59) If in the course of its examination of the complaint, the Commission has opened proceedings pursuant to Article 11(6) of Regulation 1/2203, a State of Play meeting will be offered to the complainant prior to sending the Article 7(1) letter²⁸.

3.2.1. First step: Article 7(1) letter

- (60) The Article 7 letter sets out the Commission's provisional position on the complaint, subject to the observations that the complainant may submit in reply to the letter.²⁹ The drafting should be based on the template(s), which needs to be adapted to the circumstances of the case.
- (61) The Article 7 letter is a formal Commission act adopted by the Director General, by sub-delegation.³⁰ The Legal Service must be consulted and give its approval before the Article 7 letter is adopted by the Director General. It makes explicit reference to Article 7 of [Regulation 773/2004](#), indicates a time limit for written observations (at least four weeks³¹) and refers to the legal consequences if no reply is received within the deadline³².

²⁷ Case 298/83 *Comité des industries cinématographiques des Communautés européennes (CICCE) v Commission* [1985] ECR 1105, paragraphs 21-24; Case T-198/98 *Micro Leader Business v Commission* [1999] ECR II-3989, paragraphs 32-39.

²⁸ See Best Practices Notice, paragraph 139.

²⁹ Cf. also [Notice on Complaints](#), paras 53 *et seq.* for an overview of the complaint procedure published by the Commission.

³⁰ Empowerment decision of 28.4.2004, PV (2004)1655); sub-delegation decision of 3.6.2004, PH/2004/769.

³¹ Cf. Article 17 of [Regulation 773/2004](#).

³² Article 7(1) 2nd sentence and Article 7(3) of [Regulation 773/2004](#).

- (62) If the complainant does not react to the Article 7 letter within the time limit, the complaint is deemed to have been withdrawn (Article 7(3) of [Regulation 773/2004](#)) and the case is closed. The complainant should be informed accordingly of the administrative closure of the case.
- (63) If the complainant requests an extension of the time limit to respond, such extension can be granted via a letter signed by the Head of Unit. An extension should be granted if appropriate and provided that there is an explicit and sufficiently reasoned request by the complainant, containing a compelling justification.
- (64) In the context of the Article 7 letter, the complainant has a right to request access to the documents on which the Commission bases its provisional assessment (Article 8 of [Regulation 773/2004](#)). The complainant has no right of access to file. The practical handling is as follows:
- If the file does not contain any documents on which the Commission bases its provisional assessment that are not already in the complainant's possession no further access needs to be given.
 - If the file contains documents on which the Commission bases its provisional assessment that are not already in the complainant's possession copies of the documents are attached to the Article 7 letter.
- (65) If the Commission considers adopting an Article 9 commitment decision or an Article 10 finding of inapplicability decision, the procedure for the rejection of the complaint should be done in parallel with the Article 10 or Article 9 decision procedure.
- (66) As a commitment decision is only adopted when the commitments offered reduce the alleged competition concerns in such a way that there are no longer grounds for action by the Commission this will normally also entail that there are insufficient grounds for acting by conducting a further investigation into the alleged infringement ('lack of European Union interest'). In cases where the Commission intends to adopt a commitment decision the Commission will also inform the complainant about the market test and invite the complainant to submit comments.
- (67) The complainant will be informed by way of an Article 7(1) letter in which the Commission will inform the complainant about its intention to reject the complaint should the commitments be formally accepted. This letter should be sent before the Article 9 commitment decision is adopted.
- (68) If the complainant replies within the time limit and maintains the complaint but does not submit any elements that would change the assessment of the complaint, a rejection decision must be prepared.

3.2.2. Second step: Article 7(2) Decision

- (69) The rejection decision is a formal decision by the Commission. It is adopted by the Commissioner under empowerment. It can be appealed before the European Union Courts.
- (70) The rejection decision is limited to rejecting the complaint, it does not 'bless' the agreement or practice complained of. Rejection of a complaint by the Commission is without prejudice to NCAs or national courts acting regarding the same case.
- (71) According to case law, the statement of reasons of the Commission's rejection decision must disclose the reasoning followed so as to enable the complainant to ascertain the reasons for rejection and to enable the competent European Union Court to exercise its power of review. The

Commission is not obliged to adopt a position on all the arguments raised but only needs to set out the considerations which are decisive for the rejection of the complaint.³³

- (72) In practice, the rejection decision is developed from the Article 7 letter, taking into account any additional elements or arguments brought forward by the complainant in its reply.
- (73) If the Commission has adopted an Article 10 or Article 9 decision, that decision can be referred to in the rejection and serve as reasoning³⁴.

³³ Settled case law, cf. i.a. Case T-114/92 *BEMIM*, [1995] ECR II-147, paragraph 41; cf. also [Notice on Complaints](#), para 75.

³⁴ Cf. also [Notice on Complaints](#), para 76.

22 Informal guidance

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1. Introduction

- (1) Under the Commission Notice on Informal Guidance relating to novel questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) that arise in individual cases (hereafter: "Notice on Informal Guidance"), undertakings¹ can ask the Commission for a guidance letter on a novel issue of interpretation of Articles 101 or 102 TFEU. Guidance letters are based exclusively on the Notice, as they are not explicitly foreseen by Regulation 1/2003. They are nonetheless indirectly referred to in recital 38 of Regulation 1/2003, which recognises that the Commission may provide informal guidance to individual undertakings where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of EU competition rules.
- (2) Such guidance is issued at the Commission's discretion and subject to its other enforcement priorities. Providing guidance to individual companies is not the principal business of the Commission under Regulation 1/2003, which is to ensure effective enforcement of EU competition law. Indeed, a main principle introduced by Regulation 1/2003 is that, as a rule, undertakings have to self-assess their compliance with EU competition law. Therefore, the criteria for the issuing of a guidance letter, set out in the Notice, must be carefully respected. Issuing a guidance letter should remain exceptional.
- (3) Requests by individual undertakings for guidance should be clearly distinguished from suggestions by interested undertakings to the Commission to adopt a decision within the meaning of Article 10 of Regulation 1/2003 (see relevant module on Decision Finding Inapplicability). Both Article 10 decisions and guidance letters are to be adopted very exceptionally, but Article 10 decisions are taken on the Commission's own initiative and exclusively in the EU public interest relating to the application of Articles 101 and 102 TFEU. The latter notion refers to the need for the Commission to act in order to solve a problem of coherent application or to set policy², whereas guidance letters are designed in the first place to serve the interest of the individual undertakings in obtaining guidance that should assist them for the assessment of their actions in case of a novel question. In order not to blur the distinction between both situations, guidance letters should not refer to the concept of EU public interest relating to the application of Articles 101 and 102 TFEU or otherwise use terminology from the Article 10 Regulation 1/2003 context.
- (4) A request for a guidance letter is without prejudice to the power of the Commission to open proceedings in accordance with Regulation 1/2003 with regard to the facts presented in the request. Therefore, information provided by means of guidance requests submitted by undertakings can in principle also serve as a starting point for ex officio procedures under Article 7, 9 and 10 of Regulation 1/2003 provided the respective requirements for opening a case and the relevant priority setting criteria are fulfilled.

2. Contacts between DG Competition and market players

- (5) Over and above requests for guidance in the format of a guidance letter, DG Competition receives numerous informal solicitations for guidance, for example:

¹ Requests by Member States' governments or administrations do not fall under the Notice on Informal Guidance and are to be dealt with by different means than guidance letters. Member States' courts can request information or an opinion from the Commission, cf. in this respect the 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 C 101, 27.4.2004, p. 54).

² Cf. Recital 14 of Regulation 1/2003.

- Undertakings send information about and/or the text of their agreements and solicit a reaction from DG Competition;
 - Undertakings ask for a meeting to discuss an agreement or practice;
 - Undertakings ask for specific information or clarification on a competition law issue (in writing / orally).
- (6) Moreover, undertakings may seek informal contacts with a view to discussing the possibility of obtaining a guidance letter. They will want to describe the case and the issue for which they would envisage a request.
- (7) On the part of DG Competition, it should be made clear from the outset that:
- DG Competition does not object to an exchange of views about market developments and may provide general indications about its case practice and policy;
 - No definitive views can be given on a particular agreement, decision or practice;
 - An informal discussion with DG Competition cannot be construed as the Commission giving any form of ‘clearance’; and
 - The fact of meeting DG Competition does not confer any rights or expectations.

3. Guidance Letters

3.1. Conditions required for issuing a Guidance Letter

3.1.1. Formal conditions to request a Guidance Letter

- (8) A request can be presented by an undertaking or undertakings or associations of undertakings within the meaning of Articles 101 and 102 TFEU which have entered into or intend to enter into an agreement or practice that could fall within the scope of Articles 101 and/or 102 TFEU with regard to legal issues raised by such agreement or practice.
- (9) There is no form. A memorandum should be presented which clearly states:
- the identity of all undertakings concerned as well as a single address for contacts with the Commission;
 - the specific questions on which guidance is sought;
 - full and exhaustive information on all points relevant for an informed evaluation of the questions raised, including pertinent documentation;
 - detailed reasoning, explaining why the request presents a novel question;
 - all other information that permits an evaluation of the request in the light of the aspects explained in the Notice, including in particular a declaration that the agreement or practice to which the request refers is not subject to proceedings pending before a Member State court or competition authority;

- where the request contains elements that are considered business secrets, a clear identification of these elements;
 - any other information or documentation relevant to the individual case.
- (10) An undertaking can withdraw its request at any point in time. In any case, information supplied in the context of a request for guidance remains with the Commission and can be used in subsequent procedures under Regulation 1/2003.

3.1.2. Conditions of substance to issue a Guidance Letter

- (11) According to the Notice on Informal Guidance (paragraphs 8-10), issuing a guidance letter may only be considered if the following cumulative conditions are fulfilled:
- The substantive assessment of an agreement or practice with regard to Articles 101 and/or 102 TFEU, poses a question of application of the law for which there is no clarification in the existing EU legal framework including the case law of the EU Courts, nor publicly available general guidance or precedents in decision-making practice or previous guidance letters.
 - A prima facie evaluation of the specificities and background of the case suggests that the clarification of the novel question through a guidance letter is useful, taking into account the following elements:
 - the economic importance from the point of view of the consumers of the goods or services concerned by the agreement or practice, and/or
 - the extent to which the agreement or practice corresponds or is liable to correspond to more wide spread economic usage in the marketplace and/or
 - the extent of the investments linked to the transaction in relation to the size of the companies concerned and the extent to which the transaction relates to a structural operation such as the creation of a non-full function joint venture.
 - It is possible to issue a guidance letter on the basis of the information provided, i.e. no further fact-finding is required.
 - Furthermore, the Commission will not consider a request for a guidance letter in either of the following circumstances:
 - the questions raised in the request are identical or similar to issues raised in a case pending before the General Court or the European Court of Justice;
 - the agreement or practice to which the request refers is subject to proceedings pending with the Commission, a Member State court or Member State competition authority.
 - The Commission will not consider hypothetical questions and will not issue guidance letters on agreements or practices that are no longer being implemented by the parties. Undertakings may however present a request for a guidance letter to the Commission in relation to questions raised by an agreement or practice that they envisage, i.e. before the implementation of that agreement or practice. In this case the transaction must have reached a sufficiently advanced stage for a request to be considered.

3.2. The effects of Guidance Letters

- (12) Guidance letters are in the first place intended to help undertakings carry out, by themselves, an informed assessment of their agreements and practices.
- (13) A guidance letter cannot prejudge the assessment of the same question by the EU Courts.
- (14) Where an agreement or practice has formed the factual basis for a guidance letter, the Commission is not precluded from subsequently examining that same agreement or practice in a procedure under Regulation 1/2003, in particular following a complaint. In that case, the Commission will take the previous guidance letter into account, subject in particular to changes in the underlying facts, to any new aspects raised by a complaint, to developments in the case law of the European Courts or wider changes of the Commission's policy.
- (15) Guidance letters are not Commission decisions and do not bind Member States' competition authorities or courts that have the power to apply Articles 101 and 102 TFEU. However, it is open to Member States' competition authorities and courts to take account of guidance letters issued by the Commission as they see fit in the context of a case.

3.3. Processing of the request

3.3.1. Analysis of the request against criteria, priorities and facts

- (16) The Commission, seized of a request for a guidance letter, will consider whether it is appropriate to process it or not. A first reply should be sent by the unit dealing with the request to the applicant(s) within fifteen working days following the receipt of the request. Two answers are possible at that stage:
 - A letter directly rejecting the request: this will allow immediate rejection of requests which obviously (i) do not fulfil the criteria or (ii) are not considered as a priority. The letter rejecting the request will not refer to the substance but only to the fact that the Commission does not consider it as a priority. It should also state that Commission is not precluded from subsequently examining that same agreement or practice in a procedure under Regulation 1/2003.
 - A holding reply, if the request seems to fulfil the criteria detailed above and merits to be further analysed. The letter will indicate that the Commission services are currently analysing the request and that the final evaluation (issuance of a guidance letter or refusal) will follow.
- (17) In order to make this first assessment of the request, the unit should:
 - make a first assessment of the request against the conditions set out in the Notice;
 - check the facts set out by the undertakings;
 - make a first assessment whether it is appropriate to prepare a Guidance letter in the light of DG Competition's enforcement priorities.

3.3.1.1 Analysis against the Notice

- (18) The Notice on Informal Guidance provides that the issuing of a guidance letter may only be considered if the cumulative conditions listed above are fulfilled.

- (19) If one condition fails, the request should be rejected.

3.3.1.2 Checking of facts

- (20) The Notice on Informal Guidance provides that the Commission will in principle evaluate the request on the basis of the information provided by the undertakings. It follows that a request that does not set out the facts in a conclusive manner should be rejected.
- (21) The Commission may use additional information at its disposal from public sources, former proceedings or any other source and may ask the applicant(s) to provide supplementary information.

3.3.1.3 Assessment against priorities

- (22) The unit in charge of the request should also make a first assessment of whether the issuing of a guidance letter is appropriate in the light of the enforcement priorities. For this purpose the priority-setting principles can be applied correspondingly.
- (23) A request that is not considered as a priority in the light of the enforcement policy should be rejected.

3.3.2. Refusal to issue a Guidance Letter

- (24) The Notice on Informal Guidance provides that where no guidance letter is issued, the Commission should inform the applicant(s) accordingly. In practice, this will normally be done by a letter signed by the competent Director.

3.4. Adoption of a Guidance Letter

- (25) If it is decided to issue a guidance letter, it might be necessary to collect supplementary information, including by informal enquiries (while respecting the normal rules on professional secrecy with regard to the information supplied by the applicant(s)).
- (26) According to the Notice on Informal Guidance, a guidance letter sets out:
- a summary description of the facts on which it is based;
 - the principal legal reasoning underlying the understanding of the Commission on novel questions relating to Articles 101 and/or 102 TFEU raised by the request.
- (27) According to the Notice on Informal Guidance, a guidance letter may be limited to part of the questions raised in the request. It may also include additional aspects to those set out in the request.
- (28) The Commission may share the information submitted to it with the Member States' competition authorities and receive input from them.
- (29) According to the Notice on Informal Guidance, the guidance letter will be posted on the Commission's web-site, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before issuing a guidance letter, the Commission will agree with the applicants on a public version. It follows that the service in charge of the preparation should ask the undertakings at an early stage for a definitive position on whether their request contains business secrets or other confidential information that they would not wish to see used in the published guidance letter. The case-handling unit should explore with the undertaking the possibilities to protect the information for which confidentiality is claimed while making public meaningful guidance. If the contacts with the undertakings on this matter lead to the conclusion

that useful guidance could only be issued (and made public) if certain information is revealed that the undertakings do not wish to see disclosed, the request for a guidance letter should be rejected.

- (30) Before the draft guidance letter is submitted for adoption, the Competition Commissioner should be asked to give his/her approval. The guidance letter is adopted by the College (normally by written procedure), following an inter-service consultation. Once adopted, the guidance letter is sent by the Secretariat general to the applicant(s).

3.4.1. Publication on DG Competition website

- (31) According to the Notice on Informal Guidance, the Guidance letter will be posted on the Commission's web-site, having regard to the legitimate interest of undertakings in the protection of their business secrets. Before issuing a guidance letter, the Commission will agree with the applicant(s) on a public version.
- (32) DG Competition will consequently send a letter to the applicant(s) to ask them a non-confidential version of the guidance letter in order to publish it on DG Competition website.
- (33) It should be indicated on the website that the publication is for information purposes only and should not be considered as an official publication.

23 Closure of Proceedings

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- (1) The present module only relates to the “closure of proceedings”, which is distinct from the administrative “closure of the file”. It is important to keep in mind the distinction between the two:
 - the **closure of proceedings**, which mirrors the decision of opening of proceedings in a given case, under Art. 11(6) Reg. 1/2003 and Art. 2(1) Reg. 773/2004. This is done by the adoption of a decision by the Director General for Competition on the basis of powers that have been subdelegated to him/her;
 - the **closure of the file**: this is a purely administrative closure (which implies that the case, which bears a case management application number, does not remain endlessly “open” in this database) (see the module on administrative closure of the file).

1. Introduction

- (2) Normally at the end of the initial assessment phase (i.e. once the case has been considered to merit further investigation) or at a later stage (at the latest when a SO is adopted), proceedings are initiated by a Commission decision (to exercise this competence the Competition Commissioner has received an empowerment) (see Module Opening of proceedings).
- (3) It is possible that such a proceeding will end with the adoption of, for instance, a prohibition decision, a commitment decision or/and a decision to reject a complaint.
- (4) However, it may be that in the end no such decision is adopted, for instance if it appears that there is not sufficient evidence to find an infringement or if a complaint has been withdrawn. It may also be that a prohibition decision is adopted against some of the parties, but that the case needs to be closed against others, for instance because of the lack of evidence of their involvement in the infringement (partial closure).
- (5) In such situations, the proceedings, that have been opened¹, have to be closed (in full or in part) by a formal Commission decision (sub-delegated to the Director General for Competition) since proceedings were also initiated by Commission decision (taken by the Competition Commissioner under empowerment). This closure decision will be brief, giving no details as to the substance, but will simply state the fact of closure.

2. Consultation process

2.1. Legal Service

- (6) The Legal Service should be consulted on the proposal to close the case on the basis of the draft decision.
- (7) In cases of partial closure, the consultation may be done at the same time as the consultation on the rest of the case. In other words, if proceedings are to be closed against one company, while a prohibition decision is proposed against others, the consultation on the proposal to close and on the preliminary draft prohibition decision may be done simultaneously.

¹ In cases where no proceedings have been opened such as in many complaint cases, a closure of proceedings is obviously not necessary.

2.2. Other DGs

- (8) In accordance with Article 2 of the Commissioner's empowerment decision, no prior information of other services is required on the closure of the proceedings.

3. Adoption of the decision to close

- (9) The power to adopt the decision to close proceedings (in full or in part) has been sub-delegated to the Director General for Competition, by decision of the Commissioner of 27 May 2004.

4. Notification to the party/ies

- (10) Once the decision to close proceedings has been adopted, the decision has to be notified to the parties in the authentic language.

5. Information of the Member States

- (11) Member States are informed of the decision to close proceedings.

6. Publication

- (12) When closing proceedings in relation to one or several parties at an early stage after proceedings have been formally opened and this has been made public, the Commission will normally note the closure on its website (by a short standard text) and, if appropriate, issue a press release ².

² See para. 76 of the Commission Notice on Best practices on the conduct of proceedings in Articles 101 and 102 TFEU.

24 Administrative closure of the file

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1. Introduction

- (1) The present module only relates to the administrative “closure of the file”, which is distinct from the official and formal “closure of proceedings”. It is important to keep in mind the distinction between the two:
 - **closure of proceedings**, which mirrors the decision to initiate proceedings in a given case, under Article 11(6) of Regulation No 1/2003 and Art. 2(1) Reg. 773/2004. This is done by the adoption of a decision by the Director General for Competition on the basis of powers that have been sub-delegated to him/her (see the module on closure of proceedings);
 - **closure of the file**: this is a purely administrative closure (which implies that the case, which bears a case management application number, does not remain “open” in this database).
- (2) Once a case has been attributed a number by the Antitrust Registry of DG Competition (and accordingly loaded in the case management application), the case is “ongoing” as long as it has not been closed. Therefore, and whatever the motive for concluding the case (prohibition decision, commitment decision, rejection of complaint, withdrawal of the complaint, DG Competition decides not to investigate the case further, decision to close proceedings, etc), the case needs to be administratively closed in the case management system.
- (3) This closure of the file is a purely administrative act, which allows DG Competition to keep its files (and databases) in order and to inform Member States of the state of play of DG Competition cases.

2. Closure of the file

- (4) In order to close the file, the relevant Head of Unit signs and sends a “note de classement” to the Registry, with an indication of the “closure motive” and “closure type”. This must be done even if it is expected that there may be an appeal against the decision adopted by the Commission in this case (prohibition decision, commitment decision, rejection of complaint, etc).
- (5) The Head of Unit ensures that the case file is properly managed and that the file is complete at the stage of the administrative closure. A case is complete once all relevant documents to the case are uploaded into the case management application, which represents the master file for the case. This is mainly done during the case life for all incoming and outgoing documents, no matter the format and the sender. Clearly non-related documents and doubles should be taken out (see detailed information on the Intranet page of the Antitrust Registry on filing and closing a file).
- (6) The file must then be archived. For cases numbered 39268 or more, the Registry holds the file via the case management application (the paper file does not any more constitute the original file).
- (7) The case-team should inform the Registry whether the closure is definitive or whether an appeal or needs of monitoring are likely.

3. Information about the closure of the case

- (8) Whenever there had been a formal initiation of proceedings or a submission of a formal complaint, parties and/or complainants will be informed of the outcome of the case (for example by receiving a prohibition decision, a commitment decision, a decision to reject the complaint, a closure of proceedings decision etc.). There is therefore no need to inform them in addition of the administrative closure of the file (see relevant chapters per decision types on the information and publication process).
- (9) However, where this has not been the case, the companies subject of the investigation, notably if involved earlier in the proceedings, should be informed by informal letter of the administrative closure of the case (e.g. when a company has been informed of investigations about it due to a complaint, which finally has been withdrawn or rejected or when finally solely an association remains the addressee of the decision, but not the members of that association subject to the investigation).
- (10) In case inspections or other investigative measures involving companies have taken place and been confirmed on the DG Competition website and/or through a press release, but not led to a final decision, the closure of these investigations and case should normally be made public via the same means¹.

¹ See para. 76 of the Commission Notice on best practices on the conduct of proceedings in Articles 101 and 102 TFEU (OJ C308, 20.10.2011, p. 6).

25 Follow-up of decisions

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The adoption of a decision is not necessarily the end of the case. Notwithstanding possible appeals (see Module on Court Litigation), the life of the case after the adoption and notification of a decision may include, where appropriate, the recovery of fines or periodic penalty payments and the monitoring of remedies imposed by the decision. These aspects are briefly dealt with below.

1. The recovery of fines/periodic penalty payments and the waiver of such recovery

1.1. List of applicable rules

- (1) The recovery of fines and periodic penalty payments (including the waiver of such recovery) is governed by a number of EU Budget rules, including:
- The **Financial Regulation**¹ (notably Article 73);
 - The **Implementing Rules**² (notably Articles 82-89);

1.2. Recovery

- (2) Any decision imposing fines (for more background information, see Module on Prohibition Decisions) or periodic penalty payment (for more background information, see Module on Periodic Penalty Payment) already provides for the following in its operative part (which has to be submitted to DG Budget before adoption – see the relevant Modules referred above):
- amount of the fine (or periodic penalty payment),
 - indication of the currency in which the fine should be paid (euros),
 - deadline for payment (3 months from the notification),
 - bank account to which it should be paid,
 - interest rate if payment is not made in due time.
- (3) Immediately after the adoption of a decision imposing a fine or a periodic penalty payment, it is necessary to establish a recovery order by the authorizing officer (the Director of the operational Directorate in charge of the underlying case).

1.2.1. Obligation to pay within the time limit set by the decision and exceptions

- (4) At the latest on the date set by the decision for payment, the fine (or periodic penalty payment) must be paid pursuant to Article 299 TFEU (the Commission's decisions are enforceable) and Article 278 TFEU (the appeal does not have suspensory effect).

¹ Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1), as last amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ L 390, 30.12.2006, p. 1).

² Commission Regulation (EC, EURATOM) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ L 357, 31.12.2002, p. 1), as last amended by Regulation (EC, EURATOM) No 478/2007 of 23 April 2007 (OJ L111, 28.4.2007, p. 13).

- (5) There may however be two particular scenarios.

1.2.1.1 Challenge before the EU Courts

- (6) If the addressee of the decision decides to challenge the decision, it has to opt between a provisional payment or a bank guarantee complying with certain minimum requirements, both to be deposited before the due date (see Article 85a of the Implementing Rules). The addressee is informed of that possibility in the cover letter of notification of the decision imposing a fine sent by the Secretariat-General.
- (7) The discussions between the Commission and the addressee of the decision with regard to the provisional payment or bank guarantee are of the competence of DG Budget (as Accounting Officer). If the company opts for a bank guarantee (and which is accepted by DG Budget, as Accounting Officer), the payment of the fine (and default interest as the case may be³) will be deferred until the judgment; depending on the outcome of the Court case, the guarantee will be enforced or released.
- (8) Note however that the addressee of the decision can decide to ask the Court to suspend its payment obligation (interim measures) without even the constitution of a bank guarantee. This is however only exceptionally granted by the Court, often under conditions.⁴

1.2.1.2 The granting of payment facilities and/or fine reductions

- (9) Exceptionally, the addressee of the decision may be granted payment facilities by the Accounting Officer of the Commission (Article 85 of the Implementing Rules). Such facilities will take the form of instalment payments (the undertaking agrees to pay a certain sum at regular points in time). Such facilities will only be granted if the conditions of Article 85 of the Implementing Rules are met (notably the provision of a bank guarantee covering the debt outstanding in both the principal sum and the interest).
- (10) Instead of the above-referenced payment facilities (or in combination therewith), the Commission may also defer payment of a fine without coverage by a bank guarantee or it may fully or partially reduce a fine if the conditions of point 35 of the 2006 Fining Guidelines ("inability to pay") are fulfilled. Such exceptional deferred payment or reduction/cancellation of a fine on inability to pay grounds requires a College decision (for further details see Information Note on inability to pay and payment conditions by Commissioners Almunia and Lewandowski of June 2010, SEC(2010) 737). The rejection of a post-decision request invoking inability to pay is done by administrative letter signed by the Director-General of DG Competition.

1.2.2. Failure to pay within the time-limit

- (11) DG Budget is responsible for the recovery of fines and periodic penalty payments.
- (12) If the fine is not discharged within the deadline set by the decision (and assuming the exceptions above do not apply), the Accounting Officer first proceeds with a letter of formal notice.
- (13) If the fine remains unpaid after the sending of the letter of formal notice, DG Budget will launch the enforcement procedure ("*exécution forcée*"). Article 299 TFEU reads as follows:

³ The default interest in case of a bank guarantee is lower than the default interest applicable to a company that simply does not pay (rate applied by the ECB to its principal refinancing operations in force on the first calendar day of the month in which the decision is adopted plus 1.5 percentage points in case of a bank guarantee, instead of 3.5 percentage points in other cases) (see article 86 of the Implementing Rules).

⁴ See, for recent examples, the orders of the President of the General Court of 7.7.2006 in Case T-11/06 R *Romana Tabacchi SpA v Commission*; of 2.3.2011 in Case T-392/09 R *1. garantovaná a.s. v Commission*; and of 13.4.2011 in Case T-393/10 R *Westfälische Drahtindustrie GmbH v Commission*.

"Acts of (...)the Commission (...) which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority."

1.3. Waiver of the recovery of fines

- (14) Fines are imposed to be enforced. There may however be exceptional situations where fines cannot be recovered and may therefore be waived (for exceptional fine reductions/cancellations on inability to pay grounds see 1.2.1.2. above). The waiver of recovery of fines is governed notably by Article 73 of the Financial Regulation and Articles 87 *et seq* of the Implementing Rules.

1.3.1. Situations where a waiver of fines may be decided

- (15) Article 87(1) of the Implementing Rules provides that:

"the authorising officer responsible may waive recovery of all or part of an established amount receivable only in the following cases:

(a) where the foreseeable cost of recovery would exceed the amount to be recovered and the waiver would not harm the Community's image;

(b) where the amount receivable cannot be recovered in view of its age or the insolvency of the debtor;

(c) where recovery is inconsistent with the principle of proportionality."

- (16) With regard to fines and periodic penalty payments, it is generally in the situation of the liquidation of the debtor that the recovery of a fine could be waived if the necessary conditions are fulfilled and after careful examination and consultation with DG Budget and the Legal Service.
- (17) The waiver may concern all or part of the fine (for instance, the undertaking may have already paid a part of the fine; only the recovery of the remainder – and of the default interests – would then be waived).

1.3.2. Internal responsibility for the adoption of the decision to waive the recovery of fines

- (18) The determination of the competent authority within the Commission to waive the recovery of a fine depends on the amount to be waived (this amount includes the fine and the default interest).
- (19) DG Competition is responsible for the waiving decision (and not DG Budget) since the Director General of DG Competition is by delegation the Authorising Officer ('ordonnateur') of the fine in the Commission's financial procedure.
- (20) However in practice, waivers of the recovery of antitrust fines are most often of the competence of the College, as the waiving of recovery of an established amount receivable may not be delegated where the amount to be waived:

–is EUR 1,000,000 or more; or

–is EUR 100,000 or more, where this represents 25 % or more of the established amount receivable (Article 87(4) of the Implementing Rules).

1.3.3. Preparation of the decision to waive the recovery of fines

- (21) The case-team has to prepare a draft decision waiving recovery of the fine. Such a decision must be substantiated and refer to the diligence exercised to secure recovery and the points of law and fact on which the waiver is based (Article 87(3) of the Implementing Rules). The decision should contain a short review of the case and the decision of the Commission imposing the fines, and make a summary of DG Budget's and the Legal Service's efforts to recover the fine. It should also contain a reasoning why the conclusion is justified that the Commission, in accordance with the principles of proportionality and of sound financial management, decide to waive the recovery of the fine in question (in accordance with Articles 73 of the Financial Regulation and Article 87 1 (b) of the Implementing rules on the recovery of fines).
- (22) The decision has only two Articles in the operative part: Article 1 stating that "the European Commission hereby waives the recovery of the amount of the fine of EUR XXX imposed on that company" and Article 2 stating that "the Director-General of DG Competition, acting as the competent authorising officer by delegation, is hereby authorised to draw up a negative recovery order for the amount mentioned in Article 1 and to record it in the general accounts of the European Commission".
- (23) A waiver decision could refer to the whole or to only one part of the fine imposed which remains unpaid (for instance, the company may have already paid a part of the fine; only the recovery of the remainder – and of the default interests – would then be waived).

1.3.4. Adoption procedure of the decision to waive the recovery of fines

- (24) The draft decision to waive the recovery of a fine has to be approved by the Legal Service and by DG Budget. The adoption of the decision will be with the written procedure.

2. Monitoring of remedies

2.1. Monitoring cease and desist orders (Art. 7(1) Reg .1/2003)

- (25) Most prohibition decisions include a so-called "cease and desist order", i.e. an injunction to stop or not to repeat the same or a similar illegal conduct⁵. Unless specified otherwise, this injunction applies immediately. If, for objective reasons, it is not possible to end immediately the infringement, transitory deadlines may be granted to the companies.
- (26) The monitoring of such cease and desist orders may be based on tools provided for in the decision itself, such as a reporting obligation. For example, a dominant company having abused its position through an illegal pricing policy may have to regularly report its prices to the Commission during a number of years.

⁵ It is generally worded as follows: "The undertaking(s) shall immediately bring to an end the infringement [described in Article 1 of the decision] insofar as it (they) have not already done so. It (they) shall refrain from any act or conduct described in Article 1 and from any act or conduct having the same or a similar object or effect."

- (27) The violation of a cease and desist order may lead to the adoption of a periodic penalty payment decision (see Module on periodic penalty payment).
- (28) The follow-up actions (such as a decision on periodic penalty payment) do not require the adoption of a decision to open proceedings neither do they require a decision to close proceedings once monitoring is no longer deemed necessary. The Commissioner for Competition can however issue a public statement to take note that the addressees of the prohibition decision have adjusted their behaviour to the cease and desist orders.
- (29) Instead of pursuing an undertaking for violation of a cease and desist order the Commission may equally decide to open a new investigation (with a decision to open proceedings) in the case of infringements that were continued or repeated despite a prohibition decision including a cease and desist order. The starting date of such a new infringement would be the date of the previous Commission decision or a subsequent date from which the recommencing of the infringement can be proven. In such a case the legal entities within the undertaking that continued or repeated the same infringement may also be liable for the aggravating circumstance of recidivism⁶.

2.2. Monitoring of binding commitments (Article 9 of Regulation 1/2003)

- (30) Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment or in a statement of objections, the Commission may by decision make those commitments binding on those undertakings (Article 9(1) of Regulation No 1/2003).
- (31) The implementation of commitments often requires monitoring by the Commission. For details see the Module on commitment decisions.
- (32) To enforce compliance with the commitments, the Commission can
- impose fines if the undertakings or associations of undertakings fail to comply with a commitment (Article 23(2)(c) of Regulation No 1/2003);
 - impose daily penalty payments to compel the undertaking or the association of undertakings to comply with a commitment (Article 24(1)(c) of Regulation No 1/2003).
- (33) For details on the procedure to follow if fines and/or daily penalty payments need to be imposed, see Module on Periodic Penalty Payment.

⁶ See point 28 of the 2006 - Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5.

26 Court litigation

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1. Overview of the EU Court system

- (1) The present section is intended to give an overview on the EU judicial system that avoids the use of technical jargon. The lack of technical legal language in this section is therefore a deliberate choice, reflecting the limited objective of this section. For further information, please revert to the website of the Court of Justice.

1.1. EU Courts

- (2) The Court of Justice of the European Union is one of the EU institutions. It is based in Luxembourg. It is now composed of three different courts: the Court of Justice of the European Union ("Court of Justice" also known as the "ECJ") (this wording therefore refers to both the European institution as a whole and to one of the Courts of that institution), the General Court of the European Union ("General Court", formerly known as the "Court of First Instance" or "CFI") and the European Union Civil Service Tribunal. In relation to DG Competition's activities, only the first two are relevant.
- (3) To keep it simple, for antitrust activities, the Court of Justice deals only with appeals from the General Court and questions referred to it by a national court. All other antitrust litigation is under the jurisdiction of the General Court. Judgments of the General Court can be appealed to the Court of Justice as of right.
- (4) The General Court and the Court of Justice are composed of 27 judges (i.e. one per Member State). The Court of Justice also includes eight Advocates General who (as, opposed to the judges) do not decide on the case, but who provide the Court with their opinion of the case and the solution in law which should be applied in their view. Opinions of Advocates General are made public. The General Court does not have permanent Advocates General, but may appoint one in a given case of particular complexity, although it has not used that possibility for years.

1.2. Main types of legal actions

- (5) In non-technical terms, the TFEU provides for a number of possible legal actions before the European Courts. The following paragraphs give an idea of the most relevant ones in relation to an antitrust case.

1.2.1. Action for annulment (article 263 TFEU) ("recours en annulation")

- (6) This is by far the most frequent type of proceedings. In such a case, an applicant is asking the General Court to annul an act of the EU institutions (in general either because of a procedural irregularity or because of an incorrect assessment of the substance of the case). For DG Competition's antitrust activities, this can be for instance the addressee of a prohibition decision challenging the validity of that decision; or a complainant asking for the annulment of the Commission's decision by which its complaint has been rejected. On average, in the area of antitrust, there are around 50 new actions for annulment every year.

1.2.2. Request for preliminary ruling (article 267 TFEU) ("question préjudicielle")

- (7) National courts frequently deal with questions involving EU law. They may then face difficult questions of interpretation of the relevant EU law or even have doubts as to the validity of that legislation or a decision adopted under it. In order to have a uniform interpretation of EU law

throughout the EU, the Treaty allows national courts to raise such questions to the Court of Justice. Such requests by a national court to the Court of Justice are the "requests for preliminary ruling". With regard to DG Competition's activities, this may be for instance a question on the interpretation of a Block Exemption Regulation, or the powers of a NCA in applying EU antitrust law. On average, in the antitrust area, there are 5 to 10 preliminary ruling requests every year.

1.2.3. Failure to act (article 265 TFEU) ("recours en carence")

- (8) By such an action, the applicant challenges an EU institution for not having adopted a decision. For DG Competition's activities, this may for instance be the case where a complainant considers that the Commission does not act on its complaint. Such actions are rare in relation to DG Competition's activities.

1.2.4. Damage claims (article 268 TFEU) ("action en dommages et intérêts")

- (9) The applicant requests the Court to find that it has suffered harm as a result of an illegal action of an EU institution and therefore asks the Court to award damages. In relation to DG Competition's activities, such actions have been exceptional.

1.2.5. Appeals (article 256 TFEU) ("pourvoi")

- (10) Judgments of the General Court can in turn be appealed, in whole or in part, to the Court of Justice by the unsuccessful party, before the General Court. The Commission may therefore be the appellant if it has been unsuccessful before the General Court.
- (11) Such appeals are limited to questions of law (the Court of Justice does not review the facts of the case unless it can be shown that the General Court clearly distorted the obvious meaning of the evidence before it). A significant number of General Court judgments in the competition field are appealed before the Court of Justice every year.

1.2.6. Interventions

- (12) This is not a distinct form of action in itself. With such a procedure, a party having an interest in the outcome a pending case can intervene in the case in support of the applicant or the defendant. The intervention must first be authorised by the Court.

1.2.7. Interim measures ("référé")

- (13) This is not an independent form of action. An applicant can only ask for interim measures in parallel to its main action. For instance, with regard to DG Competition's antitrust activities, an applicant can introduce an action for annulment of a prohibition decision imposing a fine on it (main proceedings) and, in parallel, ask the Court to suspend the payment of the fine while the main proceedings are pending. The reason for making such a request for interim measures is that the bringing of the main proceedings does not suspend the obligations under of the Commission's decision (so the company has to pay the fine or give a bank guarantee even if it brings an action for annulment before the Court).

1.3. Basic elements of EU Court procedures

- (14) The Court procedures are managed by the Legal Service, whose agents represent the Commission. Therefore, the following paragraphs only provide very general information that can be of interest for DG Competition case-teams.

1.3.1. Language

- (15) The language of the Court case is the EU official language in which the application before the Court is lodged. The Commission must respond to the application in that language.

1.3.2. Chambers

- (16) Although it is legally possible that a judgment is delivered by the full Court (the 27 judges), this has become exceptional in practice. Both the General Court and the Court of Justice generally decide cases in Chambers, composed of a more limited number of judges (frequently 3 or 5). Before the General Court, antitrust cases are commonly decided by a 3-judge Chamber. One of the judges is appointed "*judge rapporteur*" by the Chamber (she/he will be mainly responsible for the case, notably for the drafting of the Report for the Hearing – see below - or the judgment).
- (17) Interim measures are, in principle, decided by the President of the relevant Court.

1.3.3. Procedure

- (18) The procedure before the General Court and the Court of Justice is written and (possibly) oral.

1.3.3.1 Written procedure

- (19) The written procedure is particularly important in fact-intensive cases, as many antitrust cases are.
- (20) In direct legal actions (action for annulment, damage claim, failure to act), the written procedure includes a number of successive written pleadings ("*mémoires*"):
 - Application ("*requête*"): starting point of the procedure, the application is the basis of the legal action;
 - Defence ("*défense*"): Commission's reply to the application (prepared and sent by the LS with the assistance of DG Competition)
 - Reply ("*réplique*"): applicant's reply to the Commission's arguments
 - Rejoinder ("*duplique*"): Commission's final reply to the applicant.
- (21) It is to be noted however that the General Court and the Court of Justice try to limit the number of written pleadings (and therefore the volume and length of the procedure). For instance, in appeal cases before the Court of Justice, there is normally only one round of written pleadings (so no reply and no rejoinder, unless decided otherwise by the Court). Similarly, the General Court has created a "fast track procedure" for cases that justify urgent treatment (for DG Competition activities, this may be the case for mergers)¹; one feature of this expedited procedure is that there will normally be only one round of written pleadings.
- (22) If a party intervenes in the case, it will lodge a statement in intervention ("*mémoire en intervention*"), to which the applicant and the defendant will usually be invited to comment on in writing.
- (23) In references for preliminary rulings, the starting point of the case (and accordingly of the written procedure) is the request of the national Court itself. All parties to the national court case are invited by the Court of Justice to submit written observations on the questions referred. In addition all EU institutions and Member States receive a copy of the request for preliminary ruling

¹ Article 76a of the Rules of Procedure of the General Court.

and have a right to submit written observations to the Court of Justice. The Commission always submits observations in references from national courts.

1.3.3.2 Oral procedure

- (24) The second part of the procedure before the General Court and Court of Justice is the oral hearing. A few weeks before the hearing, the Court provides the parties with a "Report for the Hearing"; this Report, drafted by the *Judge Rapporteur*, is a brief summary of the parties' arguments. Sometimes, the Court may also send a few written questions to the parties, usually to be answered in writing in advance of the hearing or sometimes orally at the hearing. During the hearing, each party presents oral pleadings before the Court - around 30 - 45 minutes is typically allowed in competition cases; parties may then be asked a series of questions by the judges and (in the case of the Court of Justice) the Advocate General (questions are an invariable feature of the hearing before the General Court but not always before the Court of Justice).

1.3.4. Outcome

- (25) The normal outcome of a Court case is the delivery of a judgment after the written and oral procedure.
- (26) In particular situations, the outcome may however take the form of an "order" ("*ordonnance*"), adopted without an oral procedure. There are a variety of possible orders that put an end to a case, such as: orders by which the Court finds that the action is inadmissible; orders by which the Court takes note of the withdrawal of the proceedings; orders by which the Court finds that there is no longer any reason to decide on the substance of the case, etc. Note that the Court may also adopt different sorts of orders during the lifetime of the case by which the Court decides on incidental issues (such orders do not put an end to the case): orders by which the Court accepts the intervention of a third party; orders dealing with confidentiality issues; orders deciding on an interim measure request, etc.

1.3.5. Deadlines

- (27) Deadlines to lodge written pleadings (including, for instance, rules on the starting point of such deadlines), are governed by the TFEU, the Protocol on the Statute of the Court of Justice, annexed to the TFEU, the Rules of Procedure of the Court of Justice and those of the General Court. Such deadlines are mandatory and any late application will be inadmissible. It is not the purpose of this module to describe those rules (whether an application is late or not is a question for the LS to assess), especially since the Commission is usually a defendant.
- (28) The only situation where the Commission may initiate proceedings is an appeal before the Court of Justice against a General Court judgment. Such an appeal must be lodged within two months of the notification of the General Court judgment/order to the Commission (that date should be checked with the LS – it may be a few days after the date of the General Court judgment), plus ten days on account of distance². Special rules apply when the deadline ends on an official public holiday or a week-end (deadline extended to the end of the first following working day). All in all, in practice, this means that an appeal must be lodged before the Court, on average, 2 ½ months after the date of the judgment.
- (29) Deadlines during the Court procedure are governed by the Statute of the Court of Justice, the Rules of Procedure of the Court of Justice and those of the General Court. Most of them are at the discretion of the Courts themselves (for instance: deadline for the Commission to lodge its defence or its rejoinder), which gives the possibility to the Commission (via the LS) to ask for

² Article 81(2) of the Rules of Procedure of the Court of Justice and Article 102(2) of the Rules of procedure of the General Court.

extension. It must be noted however that, in order to speed up the Court process, the General Court has become more reluctant to grant extensions. Typically, the LS will have 2-3 months to draft and submit the Commission's defence and a little less for the rejoinder. DG Competition therefore needs to respond promptly to requests for assistance from the LS in litigation in order to allow time for DG Competition's contribution to be useful to the LS in drafting pleadings. In addition, some deadlines are fixed in the relevant rules and cannot be extended. This is the case before the Court of Justice in preliminary ruling cases (the deadline to lodge observations on the request of the national court is two months, running from the date of notification of the reference to the parties)³ or in appeals against General Court judgments (the deadline to reply to such an appeal is two months and cannot be extended)⁴.

- (30) The overall duration of a Court case varies depending on the nature of the legal action, the volume of the pleadings, the number of parties, etc. On average, one can say that, in relation to antitrust cases, preliminary ruling cases are decided within 18 to 30 months; actions for annulment/failure to act/damages are decided normally within 24 to 36 months and cartel cases generally take even more time (3 to 5 years).

2. Internal procedure within the Commission in case of litigation

2.1. Features common to all types of legal actions

2.1.1. Relations with LS

- (31) For all Court cases, the Legal Service represents the Commission. It is therefore the responsibility of the LS to draft the various written pleadings in a case and to notify them to the Court, to present the oral arguments of the Commission at the hearing or to reply to the questions of the Courts.
- (32) The relevant DG assists the Legal Service in carrying out this responsibility.

2.2. Specific remarks applicable to some types of legal actions

- (33) The two most frequent types of legal actions before the Court that are relevant for DG Competition's antitrust activities (action for annulment and preliminary ruling case) are governed by the common features described above. Two more specific types of actions however deserve some particular attention, since they imply additional internal steps: appeals against General Court judgments and failure to act actions.

2.2.1. Appeals before the Court of Justice against General Court judgments

- (34) If the Commission is unsuccessful before the General Court (for instance, the General Court annuls a decision, or considers that the Commission failed to act in a given case, or finds that the Commission is liable for the harm suffered by an undertaking), the Commission must decide whether to appeal or not that judgment.

³ Article 23 of the Statute of the Court of Justice.

⁴ Article 155 of the Court of Justice Rules of Procedure.

- (35) As explained above [see point (28)], the appeal will normally have to be lodged 2 ½ to 3 months after the date of the judgment (the exact deadline for appeal can be checked with LS). A decision to appeal or not should therefore be taken as quickly as possible, in order to leave sufficient time for the drafting of the appeal itself.
- (36) The decision to appeal is adopted by the College. It should not be confused with the appeal itself. The decision is the necessary preliminary step, by which the Commission accepts the principle of an appeal. The appeal itself is the written application sent by the LS (on behalf of the Commission) to the Court of Justice, which contains a full description of the Commission's arguments and grounds of appeal to the Court.

2.2.2. Failure to act (article 265 TFEU)

- (37) A failure to act action can only be validly brought before the Court if the applicant has first followed a pre-litigation procedure. This pre-litigation procedure is thus the last possibility for the Commission to remedy its failure (if there is indeed one) and to avoid an action before the Court. Therefore, it is important to understand how and when the pre-litigation procedure starts and what the case-team should do from that moment on.

2.2.2.1 Formal request to act

- (38) A party can only bring a failure to act action before the Court if it has first sent a formal request to act to the Commission (Article 265(2) TFEU), which opens a two-months deadline during which the Commission is invited to put an end to the alleged failure.

1. What constitutes a formal request to act?

- (39) A formal request to act within the meaning of Article 265 TFEU must:
- be sufficiently explicit and precise to enable the Commission to know the nature of the act which it is being asked to take, and
 - make understood that the invitation is intended to compel the Commission to take a position⁵.
- (40) We typically receive formal requests to act in the context of complaints. The responsibility for identifying a formal request to act lies on the relevant Unit.
- (41) In many cases it will be clear that a letter does constitute a formal request to act (for example, a letter expressly referring to Article 265 and threatening an action for failure to act if no position is taken within 2 months).

2. What action can put an end to the failure to act?

- (42) Assuming that there is indeed a failure to act⁶, the act ending the failure to act must normally be a formal act defining the Commission's position, although it does not have to be a definitive act.
- (43) With regard to complainants, it results from the case law that an Article 7 letter addressed to the complainant and announcing the Commission's intention to reject the complaint constitutes a definition of the Commission's position on the complaint and therefore puts an end to the alleged

⁵ Case C-249/99 *Pescados Congelados v. Commission* [1999] ECR I-8333.

⁶ Case T-127/98, *UPS Europe / Commission*, ECR [1999] p. II-2633, points 34 to 41.

failure⁷ (on Article 7 letters and rejection of complaints in general, see the Module on Handling of complaints).

- (44) If the intention is to take up the complaint and start proceedings against the subject of the complaint:
- Provided the investigation is completed, a letter informing the complainant of the initiation of proceedings against the subject of the complaint, with a copy of the position taken (i.e. a non-confidential version of the Statement of Objections); or
 - If the complainant is ready to allow some additional delay, or if it can be justified that the investigation is still on-going, a letter explaining the steps taken by the Commission and showing that the Commission has not been inactive might be sufficient to convince the complainant not to go to Court⁸.
- (45) If the complainant continues correspondence with the Commission after the formal request for the Commission to act, then the Commission is entitled to regard the formal request to act as having been withdrawn. The Commission should then write to the complainant informing it of this.

3. Acknowledgement of receipt

- (46) In accordance with the Code of Good Administrative Conduct, the acknowledgement of receipt should identify the Head of Unit and her/his telephone number, and should indicate a date by which the addressee can expect to be sent a reply.

4. Decision taken under empowerment

- (47) If the formal act defining the Commission's position is a formal decision rejecting the complaint, then it is taken by empowerment procedure.

2.2.2.2 Application for failure to act before the Court

- (48) If no act has been adopted within the deadline of two months as provided for by Article 265 (2) TFEU, the applicant can immediately bring a case before the Court. If it does so, the general Court procedure will apply.
- (49) If the Commission acts after the applicant has brought the case before the Court but before the Court decides on substance, the Court will close the case since it will have become devoid of purpose; the Court's practice is however to order that the Commission must pay the applicant's lawyers' fees.

⁷ Case 125/78 *GEMA v Commission* [1979] ECR 3173, paragraph 21; Case T-186/94 *Guérin Automobiles v Commission* [1995] ECR II-1753, paragraphs 30 and 31.

⁸ Legally speaking, such a letter does not put an end to the failure to act (see Case T-95/96, *Gestevisión Telecinco / Commission*, [1998] ECR p. II-3407, point 88: "A letter from an institution called upon to act under Article 175 of the Treaty stating that the questions raised are being examined does not in fact amount to the defining of a position such as to release it from its duty to act"). But such a letter can be enough to convince the complainant that the Commission has (and is still) actively dealing with the case, so that he does not need to go to Court. (Judgments in *Snupat v High Authority*, cited above, and Case 13/83 *Parliament v Council* [1985] ECR 1513, paragraph 25).

27 Use of languages in antitrust proceedings

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1. General Rules

- (1) It is essential to understand a key distinction between official languages, internal procedural languages (generally known as "working languages") and authentic languages. In relation to the latter, it is also important to understand the role of so-called "language waivers".

1.1. Official languages

- (2) Official languages of the European Union include virtually all the official languages of the various EU Member States. Council Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community, as amended on a number of occasions (as a result of the various EU enlargements),¹ lists the following 23 official languages (in alphabetical order): Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.
- (3) As a result, the Official Journal of the European Union exists in all these languages. EU regulations and other documents of general application (directives, for instance) are published in the official languages. There is however an exception for Irish (until 1 January 2012): before that date, only regulations adopted jointly by the European Parliament and Council (not relevant for DG Competition's activities) had to be published in Irish. For other types of acts, such as all acts prepared by DG Competition the institutions of the European Union were not bound to publish in Irish².
- (4) A Member State or a European citizen can write to an EU institution in any of the official languages listed above. The reply should be drafted in the same language³ (so for example, a Bulgarian citizen can write to the Commission in Spanish and will receive a reply in that language).

1.2. Internal procedural languages ("Working languages")

- (5) In practice, it is impractical to work internally in all the official languages. Therefore, internally, the Commission works in only three procedural languages, English, French and German (so-called "working languages"), and material generated inside the Commission for internal use only is drafted in one or more of these and, if necessary, is translated only between those three. This limited working language regime is dictated by the imperatives of speed and efficiency; it is nevertheless without prejudice to practising full multilingualism in the Commission's external communications.
- (6) Incoming documents in a non-procedural language are only translated into one of the procedural languages if this is necessary to process them.
- (7) Pursuant to the Guide to inter-service consultation, the consultation of the LS and other concerned DGs should however be only in English or French.

¹ OJ L 7, 6.10.1958, p. 385–386, as amended by Regulation No 1791/2006.

² Article 2 of Council Regulation (EC) No 920/2005 of 13 June 2005, OJ L 156, 18.06.2005, p. 3.

³ See, with regard to Member States, Article 2 of Regulation No 1 and, with regard to European citizens, Article 24 of the Treaty on the Functioning of the European Union and Article 2 of Regulation No 1.

1.3. Authentic languages

- (8) The authentic version(s) of a text is (are) the only legally binding versions. The consequence is that an act can only be validly adopted if it exists in the authentic language(s) of the case and its interpretation will be determined by reference only to those language versions. The availability of the text in the authentic language(s) at the stage of the adoption of the decision is indeed not just an administrative burden. It is a key condition of the validity of the act.⁴
- (9) The authentic language is determined according to the following basic principle enshrined in Regulation No 1:
- Pursuant to Article 3(1) of Regulation 1, documents which the Commission sends to an undertaking based in the European Union will be drafted in the language of the Member State in which the undertaking is seated.
 - Pursuant to Article 2 of that same Regulation, documents which an undertaking sends to the Commission may be drafted in any one of the official languages of the European Union selected by the sender. The reply and subsequent correspondence will be drafted in the same language.
- (10) If a Member State has more than one official language (such as Belgium, Finland and Luxemburg, for instance), the language to be used should be governed by the general rules of that Member State (Article 8 of Regulation 1/58). In bilingual countries or regions a decision is notified in the most appropriate language according to the national rules or determined in prior correspondence with the concerned addressee. Correspondence with the Belgian public authorities is however always sent in both French and Dutch.
- (11) Undertakings located in Norway, Iceland and Liechtenstein should be addressed in English, except for undertakings located in Liechtenstein which may also be addressed in German.
- (12) Undertakings located outside the EEA should preferably be addressed in an EU language that they may understand, eg. Spanish in South America, except Portuguese in Brazil. Particular care should be taken when notifying decisions to Swiss undertakings, as one of three languages may be used, depending on the Canton in which the undertaking is established. A different language regime might however be agreed to with the Commission in correspondence before the notification of a decision (see below section 1.4).

1.4. Language waivers

- (13) In a given case, there may be a number of authentic languages. For instance, in a cartel case that includes undertakings from 8 Member States, there may be 8 authentic languages. This will lead to a heavy work for translation in all these languages (and will generate delay).
- (14) Even in cases involving fewer (or even one) authentic language, this may generate delay (due to translation from the working language into which the text has been drafted to the authentic language).
- (15) It might also be that for the parties another language than the authentic language is more convenient (e.g. the common language used in the communication between the mother and the daughter companies, or the mandated law-firm, in agreement with the company, prefers another language than the authentic language).

⁴ see Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555.

- (16) In order to avoid or limit these constraints, it is possible to ask the parties, if they do not ask for it themselves, to waive their right to receive the text in the relevant language of their home Member State and to opt for another language among the official language of the EU. In order to avoid any risk as to the validity of the decision, the so-called language waiver must be crystal clear.
- (17) To ensure that the Secretariat General recognizes easily the validity of the language waiver, it is recommended to propose to the parties a standard text:

"We, company [NAME OF FUTURE ADDRESSEE OF THE DECISION] legally represented by [NAME OF THE EMPLOYEE OF THE COMPANY SIGNING THE LANGUAGE WAIVER], hereby declare that in the context of Case [XXXXXX] – [CASE NAME] the European Commission may address any documents, [e.g. Statement of Objections/Preliminary Assessment/Letter rejecting a complaint ...]] or any Decisions it may take and notify to us pursuant to Article 297 of the Treaty on the Functioning of the European Union in [e.g. English], and we waive all rights to receive such documents in our own language."

- (18) This "language waiver" should be signed by a representative, authorised to make such declarations, of every legal entity to which the SO or decision is addressed (regardless of the fact that two or more companies/legal entities belong to the same group) and should be drafted on the letter-head of the undertaking/addressee.
- (19) The lawyer acting for the undertaking/addressee may sign the language waiver only if he is properly authorised to receive all communication on behalf of the addressee (so-called "power of attorney"). As regards undertakings based outside the EEA, a formal language waiver is not required, but the language regime to be used should be clarified with the undertaking as early as possible.

2. Specific Rules

- (20) Considering the principles and general background above, the specific language requirements are as follows.

2.1. Inspections

- (21) Inspections occur in the official language of the Member State where the undertaking is located. When the company is situated in a bilingual territory (eg. Finland or the Brussels bilingual region in Belgium), the rules set out above apply.

2.2. Article 18 letters

- (22) As regards Art. 18 (2) letters, simple requests for information letters, it is standard practice, to send the cover letter in the language of the addressee's location or in English (including a reference to Art. 3 Regulation 1) and to attach the questionnaire in English. The addressee is also clearly informed – in the language of the addressee's location - of its right to obtain a translation of the cover letter and/or questionnaire into the language of the addressee's location.

This practice allows for more expeditious treatment of information requests, while preserving the rights of addressees.

- (23) The standard paragraph, available in all official languages, reads:

"According to Article 3 of Regulation No 1 determining the languages to be used by the European Economic Community, documents which an institution of the European Union sends to a person subject to the jurisdiction of a

Member State should be drafted in the language of such State. This request is made in the working language of the proceedings. Upon your request, you may obtain an [language of the addressee's location] version. Your reply can be drafted, at your choice, in any one of the official languages of the European Union.”

2.3. Correspondence with the complainants and leniency applicants

- (24) Pursuant to Art. 2 of Regulation 1/58, the reply and the subsequent correspondence addressed to the complainant will be in the language of their complaint, even if this is not the language of the Member State where they are located. This applies as far as the complaint is in one of the EU official languages and the complainant has not agreed to another EU language by way of a language waiver.
- (25) The language used for filing the leniency application should be the authentic language of the proceedings (subject to any language waiver that has been granted). As a matter of courtesy, some immunity/leniency applicants accept receiving questions in English even if they reply in another language.

2.4. The Oral Hearing

- (26) The Hearing Officer may hear parties in person and witnesses in an EU official language other than the authentic language of the proceedings. In that case, interpretation into the language of the proceedings from another official EU language should be provided during the Oral Hearing. Interventions, questions and debate are simultaneously translated into EN, FR, DE as well any other languages of the EU chosen by the parties during the administrative procedure.
- (27) The Hearing Officer's final report is drafted in the three working languages of the Commission (EN, FR, DE) and (if different) in the authentic languages of the case.

2.5. Language requirements for Interservice consultation

- (28) Pursuant to the Guide to Inter-service consultation, the consultation of the LS and other concerned DGs must be in English or French.

2.6. Language requirements for the Advisory Committee (AC)

- (29) A summary of the case, the preliminary draft decision and the draft final report of the HO should be sent to the representatives of Member States in the three working languages of the Commission in addition with a the list of the most important documents.

2.7. Language requirements for the adoption of the Commission's Decision

- (30) The draft decision has to be adopted by the Commission in all the relevant authentic languages of the case and, unless the President of the Commission⁵ has granted a language derogation, the draft decision must be available to the Commission in the 3 working languages of the Commission (EN, FR, DE).
- (31) The translation service should be asked to translate the draft decision in all these languages. It should be kept in mind that, considering the length of DG Competition draft decisions, translation is a lengthy exercise. This would militate in favour of an early transmission to the translation service; on the other hand, the transmission of the text at too early a stage will generate additional work for the case team later on if changes are made to the text (and will therefore increase the risk of errors and discrepancies between linguistic versions). See further hereunder Section Planning of translation requests.

2.8. Translating documents from the file

- (32) As a general rule, an undertaking is not entitled to a translation of documents not emanating from the Commission (e.g. corporate statements, documents found during an inspection at the headquarters of an undertaking located in a different Member State, etc). Access is granted to evidence as contained in the Commission file, in its original form: the Commission is under no obligation to provide a translation of documents in the file⁶.
- (33) It is good drafting practice, when an extract of the document is quoted in the SO (or later in the decision) to translate that extract into the authentic language(s) in the text of the Statement of Objections (or later in the decision) and to quote in a footnote the corresponding text in its original version (see also General rules and citation of evidence in the Module Statement of Objections).
- (34) Concerning different language version of SO/decisions, DG Competition follows a strict policy of not supplying courtesy copies of SO/decisions in another authentic language version to the addressees.

2.9. Official journal and publication

- (35) It follows from Article 297 TFEU and Regulation 1/2003 that "publication" implies publication in the Official Journal (in the "L" series for publication of the decision in full, in "C" series for all other texts and information, such as summaries of decisions).
- (36) All publications in the Official Journal are in all EU languages. The publication on the DG COMP website (e.g. of the full non-confidential version of a final decision or decision or of texts not published in the Official Journal) is done in the authentic language(s) and generally also in the drafting language (if different from the authentic language). See more in the Module Publication.

⁵ The case-team can submit a request to the responsible Cabinet member, who can ask the responsible Cabinet member of the President's Cabinet for a language derogation, in order to keep only one working language, instead of three, generally for the reason of a necessary expedited adoption procedure.

⁶ Cf. Case T-25/95 et al. Cimenteries, para. 635. and Commission Notice on the rules for access to the Commission file in cases pursuant to Art. 81 and 82 of the EC Treaty (OJEU, C 325/7 of 22.12.2005), pt. 46

3. Planning of translation requests

- (37) It is of the utmost importance that case-teams take sufficient time into account in their planning of the adoption of a decision for translation issues. For best planning contact the Administrative Assistant to the Director-General.
- (38) In order to avoid timing problems, ask for translation of the draft decision in the, if applicable, 2 other working languages and other authentic language(s) of the case:
- in parallel to the consultation to the Legal Service by sending the translation to DGT and indicating clearly the factual part of the text, as DG Translation will first only translate this part first.
 - After reply of the Legal Service, send the updated text to DG Translation, who will then translate the legal part.
- (39) The deadline depends on the length of the document and the current workload of DGT.
- (40) **Legal Revisers:** The Legal Revisers review only the authentic language versions of final decision adopted by the College (so not at the stage of SO). **Language improvement:** In case the English or French original text needs linguistic improvement, the DG for Translation has an Editing Unit which will produce a version in Track Changes suggesting corrections. Priority is given to documents for interservice consultation, especially if they are to be translated into other languages, which affect the Commission's core business or are intended for publication in English or French.

28 Publication of Decisions

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1. Publication in the Official Journal

1.1. Scope of publication

- (1) Article 30(1) of Regulation No 1/2003¹ requires the Commission to publish the main content of the following decisions in the OJ:
 - Article 7, Finding and termination of an **infringement**,
 - Article 8, **interim measures**,
 - Article 9, **commitments**,
 - Article 10, Finding of **inapplicability**,
 - Article 23, **fin**es,
 - Article 24, **periodic penalty payments**.
- (2) The obligation to publish in the OJ extends to the final report of the Hearing Officer,² as well as to the opinion of the Advisory Committee, if the Advisory Committee so recommends.³
- (3) According to Article 27(4) Reg.1/2003, when the Commission intends to adopt a decision pursuant to Article 9 or 10 Reg. 1/2003, it has to publish a summary of the case and the main content of the commitment or of the proposed course of action (so-called Art. 27(4) Market test notice).
- (4) Publications going beyond the legal requirements are published on the DG Competition website (see further section 3).

Addressees of decisions adopted under the above mentioned articles have no specific right to prevent the publication by the Commission in the Official Journal and, where relevant, on DG Competition's website, of information which, even though not confidential, includes more than the 'main content' essential for understanding the operative part of those decisions.

- (5) As the Court has established: "(...) the interest of an undertaking which the Commission has fined for breach of competition law in the details of the offending conduct of which it is accused not being disclosed to the public does not warrant any particular protection, given the public interest in knowing as fully as possible the reasons behind any Commission action, the interest of the economic operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and in view of the fined undertaking's ability to seek judicial review of such a decision"⁴.

1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25.

2 Art. 17(3) of the Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Hearing Officer Terms of Reference").

3 Art. 14(6) Regulation No. 1/2003. Nota: For decisions imposing fines, the opinion of the Advisory Committee consists of two parts (one on the substance and one on the fines). In line with Art. 14 Regulation No. 1/2003 this section refers to both parts as the "opinion of the Advisory Committee".

4 See Case T-198/03 *Bank Austria Creditanstalt / Commission* [2006] ECR II-1429, paragraph 77.

1.2. Content of the publication in the OJ

1.2.1. Summary of the decision

- (6) Pursuant to Article 30(2) Reg. 1/2003, the publication in the OJ shall state the
- names of the parties,
 - main content of the decision,
 - including any penalties imposed.
- (7) These elements therefore have to be contained in the published summary of the decision.
- (8) The summary is often based on the Communication to the College or the summary prepared for the Advisory Committee.
- (9) In order to make clear that the summary of the decision is not a decision itself, the heading should read “Summary of the Commission’s decision”.

1.2.2. Final Report of the Hearing Officer

- (10) The final report is published in the form the Hearing Officer has established it.

1.2.3. Opinion of the Advisory Committee

- (11) The opinion of the Advisory Committee is published in the form it has been established, but without the signatures.

2. What may not be published

- (12) The information that may not be published can be summarized as follows:
- Confidential information, in particular business secrets,⁵
 - Personal data,⁶
 - Information the publication of which may jeopardize Commission investigations.
- (13) Details can be found in Section 6.
- (14) The summary, the final report of the Hearing Officer and the opinion of the Advisory Committee should already be drafted in such a way that no information is contained therein that may not be published. In principle, disputes on the contents of the summary, the final report of the Hearing Officer and the opinion of the Advisory Committee should not arise. Should - exceptionally - a dispute arise, the Sections 4.1.4 et seq. apply accordingly.

⁵ Pursuant to Art. 30(2) Reg. 1/2003, the publication of the decision shall have regard to the legitimate interest of undertakings in the protection of their business secrets. The same applies for the final report of the Hearing Officer (Art. 17(3) Hearing Officer Terms of Reference) and the opinion of the Advisory Committee (Art. 14(6) Reg. 1/2003).

⁶ Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1–22 .

2.1. Timing of the publication in the Official Journal

- (15) There are no explicit legal requirements regarding the timing of the publication in the OJ.
- (16) The publication of the summary of the decision in the OJ may under certain circumstances be relevant to triggering the deadline for an appeal before the European Courts.
- (17) There is no uniform practice of making the non-confidential text of the full decision accessible on the website at the same time as the publication in the OJ. DG Competition strives to publish both the OJ publications and the full non-confidential version on the website at the same time. However, publication on the website may be delayed due to possible disputes with the parties regarding the contents of the web-publication and this should not prevent the timely publication in the OJ.
- (18) The final report of the Hearing Officer must be published together with the summary of the decision in the OJ.⁷
- (19) The opinion of the Advisory Committee may be published separately from the summary of the decision in the OJ. It is however common practice to publish all three documents at the same time.

2.2. Place of publication in the Official Journal

- (20) The summary, the final report of the Hearing Officer and the opinion of the Advisory Committee are published in the OJ in series C under the heading IV – Notices – Notices from European Union institutions, bodies and agencies.

2.3. Corrigenda

- (21) In case an adopted decision contains mistakes, corrections will be implemented following the relevant procedure. If the OJ publication is not yet undertaken, the summary will be corrected and reference is made to the corrigendum decision. In case the summary of the decision has already been published in the OJ, a summary of the corrigendum decision should be published.

3. Publication on the website

3.1. Scope of the publication

- (22) The Commission has a long established practice to publish its final antitrust decisions on DG Competition's website in order to ensure transparency, predictability and legal certainty, even though the Commission is under no legal obligation to do so.⁸
- (23) In addition, all documents published in the OJ are also available on the DG Competition website via a direct link.⁹

3.2. Content of the publication

- (24) Publication on the website is of the full text of the decision, as it was notified to the parties, but cleared of information that may not be published. See further below on how to prepare such a non-confidential version (see section 5).

3.3. What may not be published?

- (25) The same rules apply as for the publication in the OJ. To recall, the information that may not be published can be summarized as follows:
- confidential information, in particular business secrets,
 - personal data,
 - information the publication of which may jeopardize Commission investigations.
- (26) Details can be found in section 6 below.

3.4. Timing of the publication on the website

- (27) There are no legal requirements regarding the timing of the publication on the website. The publication should be done as soon as possible.¹⁰
- (28) As indicated, the case team strives to make the full non-confidential text of the decision accessible on the website at the same time as the publication in the OJ.

3.5. Place of publication on the website

⁸ See Case T-198/03 *Bank Austria Creditanstalt / Commission* [2006] ECR II-1429, paragraph 76: "(...) that provision [Art. 21(2) of Regulation 17] does not limit the Commission's power to publish the full text of its decisions, if, resources permitting, it considers it appropriate to do so" and para. 79: "the aim of Article 21(2) of Regulation No 17 is not to limit the Commission's freedom to publish, of its own volition, a version of its decision that is fuller than the minimum necessary and also to include information whose publication is not required, in so far as the disclosure of that information is not inconsistent with the protection of professional secrecy".

⁹ The bibliographic link allows that viewers can choose the format and the language desired.

¹⁰ See Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C 308, 20.10.2011, p. 6) ("Notice on Antitrust Best Practices"), paragraph 135

- (29) Once ready for publication, the relevant documents are published on the antitrust pages (link: <http://ec.europa.eu/competition/antitrust/cases/index.html>), and, if applicable, on the cartels cases webpage (link: <http://ec.europa.eu/competition/cartels/cases/cases.html>).

3.6. Corrigenda

- (30) In case an adopted decision contains mistakes, corrections will be implemented following the relevant procedure.
- (31) The non-confidential version of the formal corrigendum decision should be published in its entirety on the webpage at the same place where the Commission decision is published.
- (32) In case of clerical mistakes, discovered before the publication of the non-confidential version and for which a formal correction via adoption of a corrigendum decision is not necessary, the correction is indicated in the non-confidential public version (via footnote: “* Clerical mistake: should read as ...”).

4. How to prepare documents for publication

- (33) This section deals with (i) the steps in the identification of information that may not be published, and (ii) the practical aspects of publication.
- (34) As noted above, published texts may not contain:
- confidential information, in particular business secrets,
 - personal data,
 - information the publication of which may jeopardize Commission investigations.
- (35) Before publication, the case team consolidates (i) the accepted confidentiality requests of all parties, (ii) deletions of personal data and (iii) deletions of information the publication of which may jeopardize Commission investigations, and requests confirmation of all parties for this text.

4.1. Identifying information that may not be published

- (36) In order to identify confidential information, correspondence and contacts with the addressees of decisions are necessary.
- (37) Under Article 16(3) of Regulation No 773/2004, the addressees may be required, within a deadline set by the Commission:
- to identify any part of that decision which in their view contains business secrets and other confidential information;
 - to substantiate each claim for confidentiality;
 - to provide the Commission with a non-confidential version of the decision in which the confidential passages are deleted;
 - to provide a concise description of each piece of deleted information.

- If the parties fail to comply with these requirements, the Commission may assume that the decision does not contain confidential information (Article 16(4) of the Reg.773/2004).
- (38) The case team should take a position as to whether the confidentiality claims of the parties are justified and follow up with the parties accordingly (see further section 4.1.4).

4.1.1. First letter to the addressees

- (39) Without undue delay after the adoption of the decision by the Commission, all parties receive a letter signed by the case manager or Head of Unit.
- (40) In this letter, the addressees are requested to confirm that
- the summary of the decision,
 - the final report of the Hearing Officer, and
 - the opinion of the Advisory Committee
- do not contain any confidential information, and, in particular, no business secrets.
- (41) They are furthermore requested to
- provide a complete non-confidential version of the decision that has been addressed to them. This means that they will have to identify any confidential information in the decision that has been addressed to them (by highlighting – and not blanking out – the relevant parts in the entire decision),
 - to substantiate their confidentiality claims for each piece of information claimed to be confidential, and
 - to provide a concise summary of each piece of deleted information.

In this letter, the addressees will be reminded that confidential information refers, in particular, to

- business secrets (see section 6.1), and
 - information that the addressee submitted under the Leniency Notice (see section 6.3).
- (42) The summary of the decision should be attached to the letter in paper or ".pdf" format.
- (43) The deadline for the reply is usually two weeks starting from the day the first Commission letter was received.
- (44) This letter indicates that in accordance with Article 16(4) of Regulation 773/2004 in absence of a reply the Commission will consider that none of the documents in question contain confidential information. Note: Whereas the summary, the final report of the Hearing Officer and the opinion of the Advisory Committee are unlikely to contain confidential information, the decision notified to the addressees ('confidential version') will contain such information.

4.1.2. Request for extension

- (45) In case of a request for an extension of the deadline:
- Such a request must be in writing (e-mail is sufficient).

- The request must be reasoned to allow for its appropriate assessment by the case team.
- In general, the need to prepare, at the same time, for a procedure before the Court (appeal, preparation for a hearing) is not an acceptable reason for an extension, since this applies to all parties.
- In general, a justified extension should not exceed one week, however, account should be taken of the length of the decision, which in certain circumstances may justify a longer extension.
- The reply to the extension request should be in writing (e-mail by the case team is sufficient).

4.1.3. Follow-up in case of non-reply

(46) In case the parties do not reply within the deadline (taking account of possible extensions):

- The case manager may follow this up with the parties informally.
- Otherwise or if the informal follow-up is unsuccessful, the parties will receive a reminder letter.
 - For the details of the request, the reminder letter refers back to the first letter.
 - It indicates that the original (or extended) deadline has not been met.
 - It sets a new deadline of 48 hours for reply.
 - It indicates that should the addressee fail to reply within the new deadline, the Commission will publish the decision, assuming that it does not contain confidential information in accordance with Article 16(4) of the Reg.773/2004.
 - In case the decision contains information that is, in the view of the case team, obviously confidential with respect to that addressee, the reminder letter also (i) indicates this information, and (ii) invites the addressee to specifically consider its position with respect to this information.
 - This letter is signed by the Head of Unit or the case manager.

(47) The next step to be taken depends on the reaction of the parties:

- Should there be no reaction by the parties within the new deadline, the documents can be published in line with Article 16(4) of Regulation 773/2004. However, the case team should delete information that is, in the view of the case team, obviously confidential.¹¹
- Should the parties reply with confidentiality claims within the new deadline, the following steps apply.

¹¹ Article 16(4) of the Reg.773/2004 does not oblige the Commission to leave obviously confidential information in the public version: '*If undertakings [...] fail to comply [...], the Commission **may** assume that the documents or statements concerned do not contain confidential information.*' (Emphasis added).

4.1.4. Dealing with confidentiality claims

4.1.4.1 Confidentiality claims acceptable

- (48) Where the addressees make confidentiality claims (either in response to the first or to the reminder letter), the case team will have to assess these and decide whether to accept them or not.
- (49) If the case team accepts all confidentiality claims, it prepares a consolidated version of the decision and takes all the necessary steps for the publication on the website (see 5).

4.1.4.2 Confidentiality claims not acceptable

- (50) It is for the case team to determine whether any of the confidentiality claims are justified on the basis of substantiated reasons provided by the parties, in line with the substantive requirements detailed in section 6 below.
- (51) Disagreements on confidentiality claims with the parties should usually not arise for the documents to be published in the OJ (summary of the decision, final report of the Hearing Officer and opinion of the Advisory Committee), which generally do not contain confidential information. Such disagreements, however, may occur when establishing the non-confidential version of the decision for publication on the website.
- (52) In case of a disagreement with any party on confidentiality issues, the case team informs the party of its disagreement with a view to obtaining the agreement of all parties on a version that is acceptable to the Commission.
- (53) Initially this can be done informally, though it should be done in writing and reasoned. A deadline should be set for the party to submit any written comments. An e-mail by the case handler suffices.

4.1.4.3 Disputes over confidentiality claims not settled – involvement of the Hearing Officer

- (54) Where a disagreement over confidentiality claims cannot be resolved:
- The relevant addressee(s) are informed by a letter signed by a Head of Unit or case manager of those confidentiality claims that are not considered to be justified, the reasons thereof¹² and of the fact that:
 - they may address themselves, within a reasonable deadline to be set in view of the circumstances of the case (in some cases one week may be appropriate), to the Hearing Officer, who can decide on the disputed confidentiality claims¹³, and,
 - if they fail to address the Hearing Officer within the given deadline, the relevant confidentiality claims are considered to be withdrawn and the relevant information covered by those claims will be published.
- (55) If the Hearing Officer is addressed within the given deadline:
- The relevant procedure regarding the involvement of the Hearing Officer – pursuant to Article 8 of the Terms of Reference applies

¹² See Article 8(1) of the Hearing Officer Terms of Reference.

¹³ See Article 8 of the Hearing Officer Terms of Reference.

- In case the Hearing Officer is involved, a provisional version of the decision without the disputed parts will be published on the website.
- The final non-confidential version will be disclosed on the date specified in the reasoned decision of the Hearing Officer notified to the provider of information, unless the addressee(s) brings an action against the Hearing Officer's decision before the General Court and makes a request for interim relief to the Court to suspend the effect of that decision.

4.2. Personal data – Commission's own initiative

- (56) While it is often the case that in the process of identifying confidential information with the addressees, their confidentiality claims also cover the personal data of their former and current employees, it is necessary that the case team, on its own initiative, identifies and removes any personal data from documents prior to their publication (in particular from the decision).
- (57) For more information and guidance on the substantive identification of personal data see section 6.2.
- (58) The case team should identify and remove any personal data on of its own initiative although it may be time efficient to do so after the parties' confidentiality claims have been accepted since they generally cover significant amount of personal data, i.e. with respect to the employees of the relevant addressees.

4.3. Information whose publication may jeopardize Commission investigations – Commission's own initiative

- (59) For more information and guidance on the substantive identification of this type of information see section 6.3 below.
- (60) The case team should start identifying this type of information as soon as possible.

5. Practical aspects

- (61) This section deals with the practicalities involved in preparing a text for publication and publishing it.

5.1. How should confidential information be identified?

- (62) In the first letter to the addressees, they are asked to submit a draft in which they identify the confidentiality claims by highlighting them.
- (63) Only once the issue of confidentiality claims is settled, all parties are asked to confirm their agreement with the final consolidated version of the decision in which the case team has blanked out any confidential information.

5.2. How to establish a consolidated version from which all information that may not be published has been removed

- (64) The case team will prepare a consolidated version for publication by introducing the following into the relevant document (decision, summary of the decision etc):
- deletions of confidential information (information with respect to which confidentiality claims have been accepted) of all addressees;
 - deletions of personal data; and
 - deletions of information where disclosure may undermine the protection of the purpose of Commission investigations.
- (65) Deleted text are replaced by a non-confidential summary in square brackets or are shown as [...].
- (66) As regards summaries of confidential information, should various parties provide different summaries of the same confidential information, it is for the case team to decide whether to put in a summary at all, whether to choose one supplied by the parties or to establish one on the basis of those suggested by the parties.
- (67) The following text should appear as an asterisked note on the first page of the non-confidential version of the decision:
- "Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...]."***
- (68) Under specific circumstances, an indication of appropriate ranges may be used to replace detailed information on the companies' turnover or market share (e.g. a market share of 12.5% can be replaced by a market share range of 10-20%).
- (69) The case team will send this single consolidated version to all parties, informing them that this version will be published by the Commission, should they not raise any objections within the deadline given.
- (70) A short but reasonable deadline is set in the accompanying letter signed by the case manager.
- (71) The preparation of the consolidated version has to be carried out with particular caution to avoid any possibility of accidentally disclosing confidential information of one party to another. Before the final consolidated "blacked out" version is sent to the parties, at least two persons will have to have verified the text. In this context, a similarly high degree of care and attention has to be applied as in access to file.
- (72) Once the deadline has expired and no party has objected to the final consolidated "blacked out" version of the non-confidential version, the process of actual publication can be started.

5.3. Translations

- (73) For the language requirements for publication per decision type, see the Module on Use of languages.

5.3.1. Publication in the Official Journal

5.3.1.1 Languages required

- (74) Everything that is published in the OJ is published in all official languages of the European Union.
- (75) The summary of the decision, the final report of the Hearing Officer and the opinion of the Advisory Committee therefore have to be translated into all EU languages.

5.3.1.2 Timing

- (76) In order to allow for a speedy publication in the OJ, the translation requests should be made as soon as the decision is adopted.
- (77) Any possible confidentiality claims will have to be taken into account, but – as indicated above (see (14)) – should not normally occur.
- (78) As orientation, the publication in the OJ could in principle be possible within three months.

5.3.2. Publication on the DG Competition website

5.3.2.1 Languages required

- (79) The non-confidential version of the decision is published on the DG Competition website in the authentic language(s) of the case.
- (80) In addition, the decision adopted by the College should be published on the DG Competition website in a drafting language, if the drafting language is not an authentic language.

5.3.2.2 Who and how?

- (81) Once the case team is in possession of the consolidated non-confidential version of the decision, it will produce a non-confidential version of the language versions to be published on the basis of that text. All deletions in the "master copy" have to be introduced in the other language version(s), if there is (are) such.

5.4. Practicalities of the actual publication

- (82) This section deals with the technicalities of publishing the relevant text in the Official Journal and on the website.

5.4.1. Publication in the Official Journal

- (83) Once all official language versions have been received the case team sends the texts that need to be published (summary, final report of the Hearing Officer, opinion of the Advisory Committee) to the relevant functional mailbox indicating the name and number of the case as well as the date of adoption of the decision.
- (84) The SG transmits the documents to be published to the Publications Office in Luxemburg, which fixes the date of publication and communicates it to the SG.
- (85) In order to publish the announcement regarding the publication in the OJ, the case team should contact the SG in order to know the planned date of publication in the OJ.

5.4.2. Publication on the DG Competition website

5.4.2.1 Publishing the decision on the website

- (86) On the date of the adoption of the decision, a document called "no public version available" is published on the web. This document is later replaced by the summary of the decision / non-confidential version of the decision.

5.4.2.2 Removal of documents from the website

- (87) Although the addition of documents to the website is automated through case management applications, once documents have been published on the website, case management applications cannot be used to remove them.
- (88) If you need to remove document(s) from the website, it is necessary to specifically request to update the document management system.

5.4.2.3 Checking of document to be published

- (89) A check on correctness of published documents should be made in order to assure that the right documents and texts are published.
- (90) Please note that once documents have been published, they can be copied or cached by third parties, such as search engine or database providers. Therefore, if an error is identified after publication, a correction of that error in the version published on DG Competition's website may not guarantee that the previous, erroneous version will disappear from the public space. Although the Commission may request to delete copies once it becomes aware of such re-publication, there is no guarantee that the Commission will in fact become aware of a re-publication and if so, whether any requests to take such publications of the internet will be respected.

5.4.2.4 Web search

- (91) A search on the DG Competition internet site (antitrust web-pages) is possible via the recently installed search tool http://ec.europa.eu/geninfo/query/advSearch_en.jsp. A search can also be made through the following link: <http://ec.europa.eu/competition/antitrust/cases/index.html>.

6. The contents of the non-confidential version of the decision

- (92) In preparing non-confidential version of the decision for publication the Commission must balance its obligation of professional secrecy and interest in protecting its investigations on the one side with the aim of providing maximum transparency on the other side.
- (93) In making its decisions and their contents public, the Commission has to consider (i) a number of legal requirements for deletion of information, such as the protection of confidential information, in particular business secrets, the protection of personal data, the principle of presumption of innocence and (ii) the effect that the publication of certain information may have on its ability to conduct investigations both in specific cases and generally. Such information is deleted from the non-confidential version of the decision for the purpose of publication.
- (94) On the other hand, requirements of transparency, in particular those contained in the Transparency Regulation (Regulation No 1049/2001)¹⁴, and the interest of the economic

¹⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.5.2001, p. 43.

operators in knowing the sort of behaviour for which they are liable to be penalised and the interest of persons harmed by the infringement in being informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished¹⁵ should be taken into consideration when establishing the non-confidential version for publication.

6.1. Confidential information

- (95) Under Article 339 TFEU, the Commission and its staff are bound by the obligation of professional secrecy.¹⁶ This obligation covers business secrets¹⁷ and other confidential information provided it meets the criteria set out by case law.
- (96) According to the Court¹⁸, in order to fall under the obligation of professional secrecy the information must:
- be known only to a limited number of persons,
 - if disclosed, be liable to cause serious harm to the person who provided it or to third parties, and
 - if disclosed, the interests liable to be harmed by disclosure must, objectively, be worthy of protection.
- (97) The parties have therefore the right to claim that their business secrets and other confidential information are redacted in a non-confidential version.
- (98) The concept of business secrets or other confidential information concerns information of which not only disclosure to the public but also mere transmission to a person other than the one who provided the information may seriously harm the latter's interests.¹⁹
- (99) Therefore, the content of the published decisions is limited by the Commission's obligation to protect business secrets of undertakings or other confidential information that may be part of the reasoning in the decision. Typical examples for information that would be deleted from a non-confidential version concern precise and sufficiently contemporaneous turnover figures, customer information (e.g. their names, quantities purchased or prices paid) and market shares²⁰. Instead, the non-confidential version could contain ranges of figures, data and shares, or a neutral description for a name.
- (100) Whether confidentiality claims are acceptable is to be decided on the basis of the applicable legal rules and the relevant case law.²¹

¹⁵ See Case T-198/03 *Bank Austria Creditanstalt / Commission* [2006] ECR II-1429, paragraph 78.

¹⁶ Art. 339 TFEU provides: "The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components".

¹⁷ Which are expressly mentioned in Article 30(2) of Regulation 1/2003.

¹⁸ Case T-198/03 *Bank Austria Creditanstalt / Commission* [2006] ECR II-1429, para. 71; and also Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse / Commission* [2007] ECR II-4225, paras. 65 et seq.

¹⁹ See Case T-353/94 *Postbank v Commission* [1996] ECR II-921, para. 87.

²⁰ See Case T-383/03 *Hynix Semiconductor v Council* [2005] ECR II-627 and Case T-271/03 *Deutsche Telekom v Commission* [2006] ECR II-1749.

²¹ See Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse / Commission* [2007] ECR II-4225, para. 65, where the Court sets out: "it is necessary, first of all, that such business secrets or confidential information be known only to a limited number of persons. Next, it must be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties (...). Finally, the interests liable to be harmed by disclosure must be worthy of protection."

- (101) The Commission has delegated the power to refuse claims for business secrets for the purposes of publications to the Hearing Officers, who therefore can take this decision for the Commission with the approval of the Legal Service (see for more details on the process section 4.1.4. above)²².

6.2. Personal data

- (102) The Commission must consider the requirements of Regulation EC No 45/2001.²³ Personal data must, in principle, be removed from documents before their publication.
- (103) In Regulation EC No 45/2001, personal data is defined as: "any information relating to an identified or identifiable natural person". Data relating to individuals have to be treated with particular care in any administrative procedure, including any cartel investigation. This duty of care is of particular concern when a decision that includes such data is made available to the public. As a general rule, such information should therefore not be included in a non-confidential version of a decision. Information that could identify a person may therefore be replaced by a more general description (e.g. "Ms. Y" or "X's marketing director between 1998-2000" could be replaced by "one of X's representatives"). Particular reasons may, however, be present that would make the inclusion of such data in a non-confidential version proportional. This may be the case if the indication of a person's function is necessary for the understanding of the decision²⁴ or if the undertaking to which a decision is addressed is an individual.
- (104) The individuals concerned have certain access rights regarding their personal data. DG Competition's data protection co-ordinator would be involved in such issues.

6.3. Information whose publication may jeopardize Commission investigations

- (105) The publication of certain types of information may jeopardize the Commission's ability to conduct its investigations both in specific cases and in general. This can in particular be the case of admissions provided by the parties under the Leniency Notice and voluntary admissions of the participation in an infringement made by parties during inspections, in replies to requests for information and during the oral hearing. Therefore, the Commission may redact certain information falling within this category in the public version of the decision.
- (106) The Commission's leniency policy as expressed in the Leniency Notice is its crucial investigative tool in cartel investigations and its optimal functioning is of vital importance to the Commission's ability to successfully detect, investigate and punish hard-core cartels. A properly functioning leniency policy enhances deterrence of cartel behaviour.
- (107) Protecting the confidentiality of leniency submissions is very important for maintaining the attractiveness of the Commission's leniency policy and its optimal functioning. On the other hand, the public (especially future leniency applicants, victims of competition law infringements and the legal community) have an interest in knowing about the leniency procedure and the treatment of leniency applicants.

²² Delegation of powers C(2011)7442 to the hearing officer relating to the adoption of certain measures in competition proceedings under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

²³ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1–22.

²⁴ See Case T-474/04 *Pergan*, paragraph 72.

- (108) It is up to the parties themselves to mark proposals for redaction of information such as quotes stemming from their own corporate statements or other information stemming from their corporate statements to the extent that they are traceable to them. The Commission, however, ultimately decides whether the publication of certain information would jeopardize the Commission's investigation and whether other information than that marked by the parties should be redacted to avoid such adverse effects on the functioning of the Commission.

6.4. Principle of presumption of innocence

- (109) As established by the General Court in case T-474/04 Pergan, findings relating to an infringement by any third parties who may have participated in the infringement but who are not mentioned in the operative part of the decision must be removed from the published version of the decision.
- (110) In general, the adopted version of the decision should avoid references to any such undertakings, in particular in the Commission's narratives. It is however possible that, e.g. quoted documents, such as price tables found during inspections, contain names of undertakings that may have participated in the infringement but which is not mentioned in the operative part.

6.5. Transparency Regulation

- (111) It is desirable that the non-confidential version of a decision can be used to reply to a request for access to documents under Regulation 1049/2001.
- (112) This Regulation allows any person access to all Commission documents without having to state specific reasons. Such access may only be refused under the specific exceptions provided by the Regulation. These include inter alia the protection of commercial interests and the protection of the purpose of inspections and investigations. While there is a certain overlap with the above-mentioned reasons for redaction of information from a non-confidential version, case teams should be mindful that there are certain differences between the exceptions under Article 4 of Regulation 1049/2001 and the ones listed above.
- (113) For reasons of administrative efficiency, the non-confidential versions of Commission decisions should therefore be prepared with possible access requests in mind. Should a request under Regulation 1049/2001 exceptionally lead to the release of information that was not in the public version of the decision, an adapted public version should be published on the internet.

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