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The Right to be Heard in EEC Competition Procedures

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Julian M. Joshua

Abstract

This Article examines the procedure under the European Community's Regulation No. 17 and compares it with the concept of a fair hearing as it exists in English and U.S. administrative law. Far from supporting the premise that the Commission's proceedings are fundamentally flawed and unfair, a proper comparison shows that they are fully in accordance with the common law desiderata for a fair procedure. In many respects they not only meet, but also exceed, the common law standard. In the process, this Article will correct some of the more egregious misstatements which have been made regarding the alleged "unfairness" of the procedure under Regulation No. 17.

ARTICLES

THE RIGHT TO BE HEARD IN EEC COMPETITION PROCEDURES

Julian M. Joshua *

INTRODUCTION

Conflicts between private and public interests are commonly resolved, at first instance at least, not by ordinary courts but by administrative bodies. For any system of administrative adjudication to be acceptable, it is perhaps more important for it always to be fair than always to be right. Before taking a decision which may be detrimental to the interests of the subject, a public authority exercising an adjudicatory function has, as a general rule, to give that party a fair chance to put its case. *Audi alteram partem* is said to be "certainly the oldest established principle in Anglo-American administrative law."¹ After years of being honoured mostly in the breach, *audi alteram partem* has now been firmly re-established in English common law as a precondition for the validity of the decisions of a public authority.²

In the United States, the opportunity to be heard has always been a fundamental requisite of constitutional due process under the Fifth Amendment.³ The same principle is to be found in most of the Member States of the European Community (the "Community" or the "EEC"). It is also an integral part of the "general principles of law" which the European Court of Justice will enforce.⁴ Like the courts in England and

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1. BERNARD SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 105 (2d ed. 1962).

2. *Ridge v. Baldwin*, 1964 App. Cas. 40 (1963).

3. *Grannis v. Ordean*, 234 U.S. 385 (1914); see *Goldberg v. Kelly*, 397 U.S. 254 (1970).

4. See 51 HALSBURY'S LAWS, EUROPEAN COMMUNITIES, para. 2-293-2-94 (1986). Hitherto European Community ("EEC") anti-dumping procedures have escaped the sort of scrutiny from the Court which competition enforcement has attracted. This may be due to change. See *Al Jubail Fertilizer v. Council*, Case 49/88, [1991] E.C.R. — (LEXIS, Eurcom library, Cases file) (not yet reported) (opinion of Advocate General Darmon, delivered on Feb. 7, 1991).

the United States, the Court of Justice, in an appropriate case, will step in and imply a right to be heard even where the Community legislator was silent.⁵ In EEC antitrust procedures, the rule is given statutory form in Regulation No. 17⁶ and its later procedural "clones."⁷ The Commission's jurisdiction in competition matters is broad and ranges from the mainly "administrative" task of applying competition policy to notified commercial agreements to the more "judicial"⁸ function of sanctioning serious cartel infringements. The same basic principle is, however, common to almost all its regulatory functions. The Commission may not take a decision which will adversely affect an undertaking's interests unless the undertaking has first been given proper notice of the objections against it and a fair chance to be heard. Article 19(1) of Regulation No. 17 sets out the types of decision which require a full hearing procedure for the affected party. The Court has extended the list to include interim measures⁹ and the imposition of conditions on the grant of an exemption.¹⁰ Not surprisingly, the Court has refused to imply any right to be "heard" before an investigation is ordered under Article 14(3).¹¹

The principle enunciated in Article 19 of Regulation No. 17 is implemented in Commission Regulation No. 99/63.¹² This regulation lays down the broad rules for the conduct of

5. *Transocean Marine Paint Ass'n v. Commission*, Case 17/74, [1974] E.C.R. 1063, [1974] 2 C.M.L.R. 459.

6. Council Regulation No. 17, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

7. Council Regulation No. 1017/68, J.O. L 175/1 (1968) (rail, road and inland waterway transport); Council Regulation No. 4056/86, O.J. L 378/4 (1986) (maritime transport); Commission Regulation No. 4261/88, O.J. L 376/10 (1988) (air transport). The new Merger Regulation 4064/89 also makes provision for a hearing. O.J. 395/1 (1989), corrected version in O.J. L 257/13 (1990).

8. *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, 398-99 (C.A.). The term "quasi-judicial" is often used loosely of any power of adjudication entrusted to a body other than a court of law which has to be exercised "judicially," i.e., in accordance with natural justice. More accurately, in English law, a "quasi-judicial" decision is an administrative decision based on policy considerations which at some stage, however, involves a hearing. *Id.* at 398-400.

9. *Camera Care Ltd. v. Commission*, Case 792/79R, [1980] E.C.R. 119, 131, [1980] 1 C.M.L.R. 334, 348.

10. *See Transocean Marine Paint Ass'n v. Commission*, Case 17/74, [1974] E.C.R. 1063, 1080, [1974] 2 C.M.L.R. 459, 477-78.

11. *National Panasonic (UK) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169.

12. Commission Regulation No. 99/63, 127 J.O. 2268 (1963).

the hearing procedure by providing that the parties are to be given proper notice of the objections against them, to reply in writing to the charges and also to be heard orally.

The Commission is not likely, in the normal run of things, to forget to send out objections or to hold a hearing. Nevertheless, no major competition case has come before the Court of Justice on appeal from a Commission decision in which the applicants have not alleged denial of the right to be heard. Such complaints seldom stand any examination. Usually, they consist of a procedural quibble dressed up as a failure to hear. Almost invariably, the Court has found that there was no substantive breach of due process.¹³

Faced with this signal lack of success before the Court, some business and legal pressure groups resorted to extra-judicial tactics. However clearly the Court has expressed itself, these groups insist that a problem still exists, the answer to which lies in "reform" of the Commission's procedures. The critics never cite any concrete examples of injustice on the part of the Commission, but they all start from the premise that the procedure is inherently alien and unfair.

In support of this proposition, some advocates of reform adversely compare the procedure under Regulation No. 17 with the Anglo-Saxon form of criminal trial. The Commission's procedure, it is said, should be made more "judicial," with a strong injection of the incidents of the adversary process.¹⁴

The Court's frequent reminders of the administrative nature of the procedure is taken by the critics as an endorsement by Luxembourg of a lower standard of justice than would apply in "judicial" or "quasi-judicial" proceedings.¹⁵ Of course, the Court has never endorsed anything of the sort. Its statements are a recognition of the fact that the Commission is not a court of law, but an administrative agency and thus its procedures cannot be forced into the mould of the adversary crimi-

13. See *infra* notes 41-52 and accompanying text.

14. Ivo Van Bael, *EEC Antitrust Enforcement and Adjudication as Seen by Defence Counsel*, 7 *REVUE SUISSE DU DROIT INTERNATIONAL DE LA CONCURRENCE* 1 (1979).

15. *Id.*; see Jochim Sedemund, *Due Process in EEC Competition Procedures*, in *REPORT OF ANTITRUST COMMITTEE OF INTERNATIONAL BAR ASSOCIATION* (1979). For a different view, see J.E. Ferry, *Procedure and Powers of the EEC Commission in Anti-Trust Cases*, *EUR. INTELL. PROP. REV.*, May 1979, at 126.

nal trial. This is very far from saying that the Commission may deny the firms a proper hearing just because its procedures are "administrative." The Court has always insisted that the Commission is under a duty to act fairly (or as English courts used, not altogether helpfully, to put it, "judicially").¹⁶

It should be clear enough that the Anglo-American criminal trial, with its manifold exclusionary rules of evidence and safeguards designed to protect persons in police custody, is an inappropriate model for a procedure such as the Commission's. In administrative law cases, English and U.S. courts have themselves frequently had to deal with arguments that fairness and judicialisation were synonymous. They have always warned against trying to fit administrative bodies into the straitjacket of rules of civil or criminal procedure inappropriate to the proceedings in question.¹⁷ The English law "rules of natural justice" and the analogous constitutional requirement of due process known to U.S. lawyers are flexible concepts and provide no support for those who advocate reform of EEC procedures by the introduction of sets of detailed procedural rules.

The purpose of this Article is to examine the procedure under Regulation No. 17 and compare it with the concept of a fair hearing as it exists in English and U.S. administrative law. Far from supporting the premise that the Commission's proceedings are fundamentally flawed and unfair, a proper comparison shows that they are fully in accordance with the common law desiderata for a fair procedure. In many respects they not only meet, but also exceed, the common law standard. In the process, this Article will correct some of the more egregious misstatements which have been made regarding the alleged "unfairness" of the procedure under Regulation No. 17.

16. *See supra* note 8.

17. *See* B. Johnson & Co. (Builders), Ltd. v. Minister of Health, [1947] 2 All E.R. 395, 399-400 (C.A.); *see also* *Re Pergamon Press Ltd.*, [1970] 3 All E.R. 535 (C.A.).

For examples in the United States, *see* Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); *see also* Mathews v. Eldridge, 424 U.S. 319 (1976); Skelly v. State Personnel Bd., 539 P.2d 774 (Cal. 1975).

For further analysis, *see* Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975).

I. *THE RIGHT TO BE HEARD IN REGULATION No. 17*

This Article is not intended as a procedural *vade mecum*, but a brief summary of the regulatory provisions relating to the hearing process may help to set the scene.

Regulation No. 17 is the basic procedural enactment for applying competition rules. The Commission, as the guardian of the Treaty Establishing the European Economic Community (the "Treaty"),¹⁸ was charged with enforcing Articles 85 and 86. It has considerable powers to prohibit, clear or exempt notified agreements and to sanction infringements with heavy fines. In the scheme of the Treaty, the Commission was empowered both to investigate and to decide in competition cases. There can be little controversy about its perceived "duality" of function in the case of notified agreements, where it is mainly concerned with implementing competition policy. In contentious cases involving a fine, the option was no doubt available of having the Commission act as prosecutor before an independent judicial instance, but it was not taken up.

The Commission is an administrative body and its procedures inevitably reflect its institutional structure. The Directorate General for Competition is only one of over twenty departments and all substantive decisions in competition matters have to come up to the full College of Commissioners. In the competition field, the Commission's remit has both administrative and judicial aspects.¹⁹

Given this concentration of functions and the extent of the Commission's powers in the competition field, it was particularly necessary to make full provision for the *audi alteram partem* rule. Article 19 of Regulation No. 17 provides that an undertaking has a right to be heard before any decision is taken against it refusing negative clearance or exemption, requiring termination of an infringement, revoking an exemption, or imposing a fine or periodic penalty payments.

18. Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958) [hereinafter Treaty].

19. See HOUSE OF LORDS, EUROPEAN COMMUNITIES COMMITTEE, EIGHTH REPORT ON COMPETITION PRACTICE, (1981-82, H.L. 91) [hereinafter H.L. EIGHTH REPORT]. Lord Scarman aptly observed: "[The Commission] has to consider questions which are administrative in character—questions of policy—in the way in which it deals with its responsibilities under Articles 85 and 86. It has of course judicial functions in that administrative context." 429 PARL. DEB. H.L. (5th ser.) 741 (1982).

Decisions taken under Article 11 (requests for information) or Article 14 (investigations on the spot) do not require a prior hearing.

Regulation No. 99/63 implements the *audi alteram partem* principle of Article 19 and sets out the basic machinery for hearing affected parties. The right to be heard is primarily exercisable in writing. The Commission must notify firms in writing of the objections taken against them. The firms then have the chance to reply in writing to the charges and to submit documentary evidence in their defense. They can also ask for an opportunity to put forward oral arguments and may propose that "witnesses" be heard on their behalf. If the Commission intends to fine the firm, it must grant an oral hearing.

Express provision is made for legal representation at the oral hearing. The oral stage is chaired by a specially-appointed Hearing Officer. A detailed record is made setting out the essential content of the submissions made by the parties in the oral hearing and has to be read and approved by them. The hearing officer does not, however, adjudicate on substantive issues. If after the written and oral stages the case proceeds to a final decision, the final decision must be made by the full Commission. The decisions must give reasons. The Commission may make findings only on matters which have been put to the firms concerned.

II. *THE RIGHT TO BE HEARD IN ENGLISH AND AMERICAN LAW*

It is probably worthwhile to outline the nature of the "right to be heard" in the administrative law of England and the United States. The *audi alteram partem* principle is the basic instrument by which courts on both sides of the Atlantic control the procedural legality of the decisions of administrative agencies.

In English law, there is no statutory code of administrative procedure. The right to be heard was created and developed by the common law in empirical fashion. Only two "principles of natural justice" were traditionally recognized: the adjudicator must be unbiased (*nemo iudex in causa sua*) and the persons affected must have an opportunity to be heard (*audi alteram partem*). It is implicit that the hearing be fair, so the *audi alteram*

partem rule is broad enough to include the rule against bias. Indeed if *audi alteram partem* is to serve any purpose, it presupposes that the deciding instance has not made up its mind in advance. The two principles can thus be run together into a single general requirement of a fair hearing before an unbiased adjudicator.²⁰ As with every general principle, there are exceptions. In recent years the courts in England have emphasized that "fairness" does not always involve an obligation to hear.²¹

The right to be heard developed as an implied requirement, imposed by the courts as a procedure essential to the validity of decisions of government agencies. The case law from the mid-19th century onwards was mainly concerned with controlling the exercise of adjudicatory functions conferred by statute on local and national government departments in the fields of licensing, health and education. The courts assumed jurisdiction on the same basis as they had previously justified their control over the Justices of the Peace when exercising local government functions. This approach required that administrative acts that affected a person's rights be designated as "judicial."²² Even if the act made no provision for a hearing, common law would fill the gap. From about the turn of the century, with the proliferation of planning and public health legislation conferring powers on Ministers or special Boards, the enabling statutes have increasingly made express provision for some form of inquiry before an administrative decision was taken.²³

20. See D.H. Clark, *Natural Justice: Substance and Shadow*, 1975 PUB. L. 27. Sometimes a third rule of natural justice has been put forward, namely that the decision must be based on some evidence that tends to show the existence of the facts found. See *Mahon v. Air New Zealand Ltd.*, 1984 App. Cas. 808 (P.C.); *Regina v. Deputy Indus. Injuries Ins. Comm'r, ex parte Moore*, [1965] 1 Q.B. 456, 488-90 (C.A.).

21. See, e.g., *Breen v. Amalgamated Eng'g Union*, [1971] 2 Q.B. 175, 190-91 (C.A.).

22. *Cooper v. Board of Works for the Wandsworth District*, [1863] 14 C.B.N.S. 180, 143 Eng. Rep. 414 (C.P. 1863). For a clear explanation of the history of this development, see H.W.R. WADE, *ADMINISTRATIVE LAW* 447-52 (5th ed. 1982).

23. As a result of which, paradoxically, the English courts became more reluctant to read into an Act of Parliament the *audi alteram partem* principle as a common law requirement of the validity of administrative decisions. The courts increasingly took the view that where no statutory provision for a hearing was made, the omission was deliberate; and that where provision was made for some form of a hearing, falling short of the requirements of natural justice, it was intended to be exhaustive. See STANLEY A. DE SMITH, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 166 (4th ed.

The right to a fair hearing is a substantive principle of law and is not intended to prescribe any detailed rules of procedure. In *Ridge v. Baldwin*,²⁴ the House of Lords reinstated the principle as one of very wide general application. Indeed, the circumstances which nowadays give rise to an obligation to hear are so many and varied that it would be counter-productive to attempt to reduce the broad principle to hard-and-fast rules. Judges have, in recent years, tended to speak of “fairness” rather than of “the rules of natural justice” and have continually stressed the real need for flexibility. The rules of natural justice “are not engraved on tablets of stone”: what is required in order for a procedure to be “fair,” and the scope and extent of any duty to hear, depends on the character of the decision-making body, “the kind of decision it has to make, and the statutory or other framework in which it operates.”²⁵ There may be cases where a full hearing is required, and others where fairness may not even require a hearing at all. The right to a hearing will generally be presumed where the decision involves the determination of disputed questions of law or fact. A presumption that the rules apply will also generally arise where the power in question involves imposing a penalty, depriving people of their livelihood, liberty or property rights, or exposing them to some other severe detriment. While the courts are certainly not concerned with ensuring the ritual observance of procedural formalities, the procedure which is adopted in such a case must reflect the high degree of fairness which is required. Within these parameters, the courts consider that the deciding body should be the master of its own procedure. It is not considered necessary or appropriate to try and make the authority concerned act exactly as if it were conducting a judicial inquiry in a court of law.²⁶

The essence of the principle in English law is the dual requirement of proper notice and the opportunity to be heard.

1980). Nowadays, courts are far more ready not only to require the statutory procedure to be followed, but also to imply such additional safeguards as are judged necessary to ensure the attainment of fairness.

24. 1964 App. Cas. 40 (1963).

25. *Lloyd v. McMahon*, 1987 App. Cas. 625, 702 (Lord Bridge).

26. *Norwest Holst Ltd. v. Department of Trade*, [1978] 3 All E.R. 280 (Ch.); *Re Pergamon Press Ltd.*, [1970] 3 All E.R. 535 (C.A.); see *Maxwell v. Department of Trade and Indus.*, [1974] 1 Q.B. 523 (C.A.); see also *Regina v. Army Bd. of Defence Council, ex parte Anderson*, [1991] 3 All E.R. 375 (Q.B. 1990).

Due notice requires that the charge or the proposed adverse action be set out with sufficient particularity to enable the party affected to understand the case against him, to be in a position to answer it, and to make his own case.²⁷ It also implies that the time given to prepare the defence is reasonable.²⁸

Given that the *audi alteram partem* rule now applies across a whole range of statutory powers, there is no absolute rule in English administrative law that the hearing must be oral.²⁹ According to the nature of the power being exercised, it may sometimes be fair to dispose of a case on the basis of written representations only. On the other hand, there may be procedures where a fair chance of exculpation cannot be given without the offer of an oral hearing. Nor is it an inflexible rule that the deciding body disclose the detailed evidence to the affected party. An outline of the charge may in some circumstances be sufficient to do justice without quoting chapter and verse.³⁰ This does not however mean that the authority can decide on the basis of *ex parte* evidence unknown to the affected party, or that the person affected may only be given a diluted version of the real charges made against him.³¹ Surprisingly, in English law it has never been considered a common law requirement to give reasons for any decision,³² although failure to

27. See I(1) HALSBURY'S LAWS OF ENGLAND: ADMINISTRATIVE LAW, para. 95 (4th ed. 1989); DE SMITH, *supra* note 23, at 172.

28. *Lee v. Department of Educ. and Science*, [1968] 66 Local Gov't R. 211, [1967] 111 Sol. J. 756 (Q.B. 1967); see *Regina v. Thames Magistrates' Court, ex parte Polemis*, [1974] 2 All E.R. 1219 (Q.B.).

29. *Local Gov't Bd. v. Arlidge*, [1915] 1 App. Cas. 120; *The King v. Judge Amphlett*, [1915] 2 K.B. 223; see *Regina v. Secretary of State for Trade and Indus., ex parte Lonrho Plc.*, [1989] 1 W.L.R. 525, 531 (H.L.). Whether or not to hold an oral hearing may be a matter for the discretion of the deciding body. In *Anderson*, the Divisional Court disapproved of the "inflexible policy" of the Board at the other extreme not to hold an oral hearing in any case involving a complaint of discrimination. *Anderson*, [1991] 3 All E.R. 375. Where an oral hearing is given, the tribunal must normally (a) consider all relevant evidence which a party wishes to submit, (b) inform every party of the evidence to be taken into account, (c) allow witnesses to be questioned, and (d) allow comment on the evidence and argument on the whole case. *Regina v. Deputy Indus. Injuries Comm'r, ex parte Moore*, [1965] 1 Q.B. 456, 490 (C.A. 1964) (Lord Diplock).

30. *Re Pergamon Press Ltd.*, [1970] 3 All E.R. 535, 539 (C.A.) (Lord Denning).

31. See, e.g., *Mahon v. Air New Zealand Ltd.*, 1984 App. Cas. 808 (P.C.); *Board of Trustees of the Maradana Mosque v. Mahmud*, [1967] 1 App. Cas. 13 (P.C.); *Reynolds v. Llanely Associated Tinplate Co.*, [1948] 1 All E.R. 140 (C.A. 1947).

32. *Regina v. Gaming Bd. for Great Britain, ex parte Benaim and Khaida*, [1970] 2 Q.B. 417, 431 (C.A.).

give reasons may well make it more likely that a decision will be quashed as arbitrary and unreasonable.³³ In some cases, a statute or subordinate legislation makes express provision for reasons to be given.

In the United States, the right to a fair hearing is guaranteed by the Constitution. The Fifth Amendment provides that no person may be deprived of life, liberty, or property without "due process of law."³⁴ The Due Process Clause imposes basic procedural requirements on government agencies and courts alike, whether or not the relevant enabling statute so provides. Indeed because it is entrenched in the Constitution, federal and state legislatures cannot derogate from it.³⁵ In the context of administrative procedure, the core element of due process, like the English law principles of natural justice, is "the opportunity to be heard' . . . at a meaningful time and in a meaningful manner."³⁶

The case law in England on the right to be heard in administrative proceedings has to a large extent been concerned with the need for some form of public inquiry before the adoption of a ministerial policy decision (i.e. "quasi-judicial" proceedings in the strict sense of the term). In such circumstances, the "courtroom model" is clearly inappropriate. Indeed, there are not many direct parallels in English law with a procedure such as the Commission's in antitrust cases. In the U.S. system, there has been far more experience of administrative agencies possessing significant powers of adjudication. This includes the right of an agency to impose financial penalties as well as issue "cease and desist" orders. The Federal Trade Commission and several other regulatory agencies in the United States can make administrative orders very similar to an injunction. In major cases before the FTC and the Interstate Commerce Commission, the procedure followed is formal and has many of the attributes of judicial procedures.³⁷

33. WADE, *supra* note 22, at 486-87.

34. U.S. CONST. amend. V.

35. SCHWARTZ, *supra* note 1, at 103-04.

36. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(citation omitted); *see Barry v. Barchi*, 443 U.S. 55 (1979).

37. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, FINAL REPORT, S. DOC. NO. 8, 77th Cong., 1st Sess. 35 (1941) [hereinafter FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE].

In the United States, the constitutional requirement of due process has been given statutory expression. The Administrative Procedure Act (the "APA" or "Act"),³⁸ passed in 1946, was "the first legislative attempt in the common-law world to state the essential principles of fair administrative procedure."³⁹ Prior to the passing of the Act, each agency had its own practice and rules. The Act applies to all federal adjudicatory tribunals and agencies and sets out in statutory form the basic minimum considered necessary for a fair hearing. The procedures prescribed by the Act were drawn from what were considered the best elements of the pre-existing administrative practice. The courts in the United States have, as a result, been principally concerned in recent years not with an ad hoc determination of what fairness requires in any given case, as English courts have been, but with the application and interpretation of the legislation. The Act generalized the use of an adjudicatory procedure based on an "Examiner" system. The process is thus much closer to the judicial model than the hearing or public inquiry usually envisaged in the English case law. Even so, the Act only sets out a framework of general principles and is not a comprehensive code of procedure.

To a U.S. lawyer, the notion of a "fair hearing" in administrative proceedings is developed in greater detail than the corresponding broad concept in English law, and is usually understood to include specific rights. These include the right to be heard orally, the right to present evidence and argument, the right to contest the evidence brought against the party concerned, the right to have the decision based exclusively on the evidence noticed on the record, the right to be assisted by counsel, and the right to know the reasons for the decision.⁴⁰

The U.S. experience in the agency adjudication process would thus seem to provide in many respects a closer parallel for the administrative procedure envisaged under Regulation No. 99/63 than the English model.

38. Pub. L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-559, 701-706, 3105, 3344, 6362, 7562 (1988)).

39. SCHWARTZ, *supra* note 1, at 129.

40. *Id.* at 120. Professor Schwartz lists only the first five of these rights but the obligation to give a reasoned decision is also fundamental to the notion of a fair hearing in U.S. law. *Id.*

III. THE APPROACH OF THE COURT OF JUSTICE

Despite the fact that Regulation No. 99/63 sets out the basic procedural machinery for a fair hearing, the applicants in appeals to the Court of Justice almost invariably produce a whole catalogue of alleged deficiencies in the hearing process. The Court (and now the Court of First Instance) may annul Commission decisions for breach of an essential procedural requirement or infringement of any rule of law relating to the application of the Treaty. "Due process" arguments may thus be presented either as a procedural irregularity or as a breach of a fundamental rule of law. The grounds for annulment tend to overlap, and it is not always entirely clear from the reported judgments which head the Court was relying on. Where the case involves a fine and the Court has plenary jurisdiction, the distinction between procedural and evidential arguments may be further blurred.

Whichever way the right to be heard is treated, two broad principles emerge from the case law. The first is that in general, even where the regulation does not expressly provide for a hearing, a defendant firm must be given a fair opportunity to comment before an adverse decision is adopted against it. The second is that the Court will not overturn a decision for a technical irregularity if in substance the defendant has had a fair opportunity to be heard.⁴¹

Given the express provision in the regulations for a hearing in most cases, the Court's task has mainly been a matter of interpreting and filling out the regulations. Many of the allegations of a "failure to hear" have in fact amounted to little more than procedural hairsplitting. The Court made it clear from the beginning that it recognized that the Commission had to get on with its work. Thus, it would not impose upon the Commission an unachievable or unreasonable standard of perfection. In particular, the Court set itself against pointless formalism.⁴² For the Court, the rights of defence are respected where those concerned are informed during the pro-

41. Valentine Korah, *The Rights of the Defence in Administrative Proceedings Under Community Law*, 33 CURRENT LEGAL PROB. 73 (1980).

42. See, e.g., VBVB and VBBB v. Commission, Joined Cases 43 & 63/82, [1984] E.C.R. 19, [1985] 1 C.M.L.R. 27; SA Musique Diffusion Française v. Commission, Joined Cases 100-03/80, [1983] E.C.R. 1825, [1983] 3 C.M.L.R. 221 [hereinafter Pioneer].

cedure of the essential elements of fact on which the objections are based, and have the chance to put their side of the case.

The Court seems to have taken the robust view that the invocation by an applicant of procedure mantras may be an attempt to divert attention away from the weakness of its case on the merits. Procedural arguments that have received short shrift in the past include the alleged "incompleteness" of a fifty-page statement of objections,⁴³ the failure to hear by not asking any questions in the oral hearing,⁴⁴ the absence from the oral hearing for a few minutes of subordinate DG IV officials,⁴⁵ the "failure" of the Commission to inform a firm in advance that it intended to carry out a surprise investigation under Article 14(3),⁴⁶ the failure to "consult" an undertaking before issuing objections against it,⁴⁷ and the alleged "nullity" of a statement of objections sent to Switzerland (which the firm promptly sent back on the ground that Swiss law did not recognize foreign process).⁴⁸

In other cases, the Court found there was a technical shortcoming but refused to quash the decision where in substance the firm had every opportunity to state its case. The Court will not invalidate the decision as a whole where some deficiency has occurred in the hearing process which relates only to matters of secondary importance in relation to the infringement found.⁴⁹ Where the decision makes such findings

43. *ACF Chemiefarma NV v. Commission*, Case 41/69, [1970] E.C.R. 661, 707, [1967-1970 Transfer Binder] Common Mkt. Rep (CCH) ¶ 8083, at 8193 [hereinafter *Quinine*].

44. *Europemballage Corp. and Continental Can Co. v. Commission*, Case 6/72, [1973] E.C.R. 215, 239-40, [1973] C.M.L.R. 199, 219-20 [hereinafter *Continental Can*].

45. *Van Landewyck Sàrl (FEDETAB) v. Commission*, Joined Cases 209-15 & 218/78, [1980] E.C.R. 3125, 3300, [1981] 3 C.M.L.R. 134, 174-75 [hereinafter *FEDETAB*].

46. *National Panasonic (UK) Ltd. v. Commission*, Case 136/79, [1980] E.C.R. 2033, 2053, [1980] 3 C.M.L.R. 169, 183.

47. *IBM v. Commission*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635. Coincidentally, a similar attempt by Standard Oil of California to have the issuance of a Federal Trade Commission complaint set aside was rejected by the U.S. Supreme Court in the same year. See *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 244 (1980).

48. *J.R. Geigy AG v. Commission*, Case 52/69, [1972] E.C.R. 787, 823-24, [1972] C.M.L.R. 557, 637-38.

49. *Pioneer*, Joined Cases 100-03/80, [1983] E.C.R. 1825, 1885, [1983] 3 C.M.L.R. 221, 319.

based on documents not put to the defendant, the Court usually disregards the contents of those documents when considering the substantive validity of the decision. Thus in *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission* (“*Telefunken*”),⁵⁰ where the gravity of the infringement lay in its systematic nature, the Court held that the omission of the Commission to put to the firm all the individual examples of misconduct found did not affect the scope of the infringement found in the decision.⁵¹

On the other hand, the Court has not shrunk from implying a “common law” obligation to hear in cases where the Regulation made no provision for a hearing but the firm’s interests might be adversely affected by the proposed decision.⁵²

IV. *THE REQUIREMENT OF PROPER NOTICE*

Persons likely to be adversely affected by a proposed administrative act have to be put in a position to appear at any hearing, to prepare their own case, and to answer the case made against them. A U.S. federal judge has colorfully illustrated the axiom that effective exercise of the right to be heard depends upon proper notice: “It is universally agreed that adequate notice lies at the heart of due process. Unless a person is adequately informed of the reasons for denial of a legal interest, a hearing serves no purpose—and resembles more a scene from Kafka than a constitutional process.”⁵³ Regulation No. 99/63 sets out the notice requirement in EEC competition procedures. Under Article 2, undertakings have to be informed in writing of the objections raised against them. Article 4 reinforces this requirement by providing that the Commission may in any decision deal only with objections in re-

50. Case 107/82, [1983] E.C.R. 3151, [1984] 3 C.M.L.R. 325 [hereinafter *Telefunken*].

51. *Id.* at 3193, [1984] 3 C.M.L.R. at 391. It is submitted that it may not always be appropriate for the Court simply to ignore the contents of a document not put to the defendant. There may be cases where the “undisclosed” document is material to the decision but the omission to put it formally to the firm has caused no substantial prejudice to the defence.

52. *Transocean Marine Paint Ass’n v. Commission*, Case 17/74, [1974] E.C.R. 1063, 1079-80, [1974] 2 C.M.L.R. 459, 477; *see Camera Care Ltd. v. Commission*, Case 792/79R, [1980] E.C.R. 119, 132, [1980] 1 C.M.L.R. 334, 348.

53. *Gray Panthers v. Schweiker*, 652 F.2d 146, 168 (D.C. Cir. 1980).

spect of which the firm concerned has had the opportunity to make known its views.

The problems raised by "notice" may include disputes as to the adequacy of the notice period. Under Article 11 of Regulation No. 99/63 it is for the Commission to set the time limit for reply to objections, and in doing so it has to have regard both to the time required for preparing comments and to the "urgency of the case." Time limits are mandatory but may be extended and no sanction is provided for failure to comply.⁵⁴ Apart from the stipulation that in no case may the time allowed be less than a fortnight, no mechanical rule is laid down under Regulation No. 99/63.

In practice the Commission allows six to eight weeks in a major case and is prepared to extend this period by a few weeks if good reason is shown. Firms sometimes claim that many months more are required to prepare their case but the Commission is seldom convinced. In the absence of fixed rules, the test must surely be one of reasonableness.⁵⁵ The Court has shown that it will not interfere with the Commission's discretion unless the time limit is manifestly unreasonable.⁵⁶ The same "hands off" approach is adopted by the courts in the United States and England: time limits should not be so short as to deprive the subject of the chance to be heard effectively but otherwise are a matter for the discretion of the agency.⁵⁷

Occasionally difficulties with refusal of service are encountered where the headquarters of a group are located outside the Community but the group operates inside the EEC. The Commission may go right to the top and send the objections

54. Commission Regulation No. 99/63, 127 J.O. 2268 (1963). "Undertakings . . . shall, within the appointed time limit, make known in writing concerning the objections raised against them." *Id.* art. 3.

55. See *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission*, Joined Cases 6 & 7/73, [1974] E.C.R. 223, 274, [1974] 1 C.M.L.R. 309, 334-35 (opinion of Advocate General Warner, delivered on January 22, 1974).

56. See, e.g., *Coöperatieve vereniging 'Suiker Unie' UA v. Commission*, Joined Cases 40-48, 50, 54-56, 111 & 113-14/73, [1975] E.C.R. 1663, 1927-28, [1976] 1 C.M.L.R. 295, 413-14 [hereinafter *Suiker Unie*].

57. Cf., e.g., *Goss v. Lopez*, 419 U.S. 565, 584 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972); *In re Gault*, 387 U.S. 1, 33 (1967); *Roller v. Holly*, 176 U.S. 398, 409 (1900); *Priddle v. Fisher & Sons*, [1968] 1 W.L.R. 1478, 1481 (Q.B.); see also *Regina v. Liverpool Corp., ex parte Liverpool Taxi Fleet Operators' Ass'n*, [1972] 2 Q.B. 299, 308, [1972] 2 W.L.R. 1262, 1268 (C.A.).

by post to the group head office in the third country, or "care of" a subsidiary in the Community, or it may *ex abundante cautela* use both methods. It will be remembered that the subjects of EEC competition law are "undertakings," an apt concept to describe the multinational combine which may consist of a network of holdings and cross-holdings and thousands of direct and indirect subsidiaries ultimately linked to a top holding company. Sometimes the head company of the group sends back the objections, claiming that foreign process is invalid, or the EEC subsidiary claims to have no authority to accept service on behalf of the whole group. The Court of Justice has usually been unimpressed by such games of corporate peek-a-boo.⁵⁸ The purpose of serving the objections is to enable the undertaking to exercise its right to be heard, and if it chooses by its own actions to deprive itself of the opportunity it has only itself to blame. Similarly, in England non-service may be excused if the addressee makes service impossible or impractical.⁵⁹ In the United States, due process implies no more than fair notice, and courts recognize that where all normal means of reaching the defendant have been attempted any further insistence upon notice would be unreasonable.⁶⁰

A more serious subject for discussion is the standard of particularity called for in the statement of objections, the document by which the Commission communicates to an undertaking the case against it. Regulation No. 99/63 does not spell out the degree of specificity which is required: it has been left to the Court to lay down the ground rules and apply them on a case-by-case basis.

The statement of objections is of course much more than just an indictment or summons giving formal notice of the charges against the undertaking. As there is no provision during the later stages of the procedure for the Commission to develop the evidence orally or to call witnesses, it has at the outset to state in writing the nature of the case and detail the evidence relied upon. The normal practice of the Commission

58. *Orkem SA v. Commission*, Case 374/87, [1989] E.C.R. 3283, [1991] 4 C.M.L.R. 502.

59. *De Verteuil v. Knaggs*, 1918 App. Cas. 557, 561 (P.C.); see *Glynn v. Keele Univ.*, [1971] 1 W.L.R. 487, 495 (Ch. 1970).

60. See, e.g., *Craddock v. Financial Indem. Co.*, 242 Cal. App. 2d 850, 857 (1966).

is to go into considerable detail in drafting the objections, which are usually divided into an exposé of the factual evidence and a legal assessment showing how the case falls under the relevant Treaty article. In a complex case, the objections may run to a hundred pages or more. Where there are many participants, as in a major cartel case, further particulars may also be served detailing the case against each one individually, describing its role in the alleged infringement and setting out any special considerations relevant to it.⁶¹ In addition the documentary evidence and tables may be annexed, as may be market surveys or other relevant background material, sometimes amounting in all to thousands of pages.

Despite this multiplicity of detail, undertakings frequently allege on appeal to the Court that the Commission somehow failed during the procedure to make clear the "real nature" of the allegations made against them. According to one (perhaps not entirely disinterested) source:

[T]he accused party is often not informed sufficiently early of all the facts on which the Commission bases its charges and subsequently its decision so that in such instances the party in question is unable to correct, qualify or amplify those facts. The result is that in these cases it is only when the Commission's decision is handed down that it becomes evident that the charges and/or decision have been based either on incomplete facts, or on a misunderstanding of the facts, omitting what to the accused party are important considerations.⁶²

It would be a matter for concern if a party were indeed to be precluded from putting forward its defence adequately by being misled as to the basis on which the Commission intended to rest a decision. In individual cases, however, such arguments seldom cut much ice before the Court. The main concern of the Court of Justice is with the actuality of notice and not with the minutiae. In *ACF Chemiefarma N.V. v. Commis-*

61. See Polypropylene, O.J. L 230/1 (1986).

62. International Chamber of Commerce, Commission on Law and Practices Relating to Competition, *The Procedure of the European Commission in Investigations under Articles 85 and 86*, Doc. No. 225/206 (Paris 1975) [hereinafter ICC Recommendations] (said to be "based on the experience of numerous companies which have been involved in proceedings before the Commission").

sion ("Quinine"),⁶³ a fifty page statement of objections had been criticized as "imprecise and incomplete." The Court referred to the requirements of Article 19(1) of Regulation No. 17 and Article 4 of Regulation No. 99/63 and continued:

The (statement of objections) fulfils this requirement since it sets forth clearly, albeit succinctly, the essential facts on which the Commission relies.

The requirement imposed on the Commission by Article 19 is met when in the course of the administrative procedure it supplies the details necessary to the defence.

In the present case the Commission has clearly set out the essential factors on which it based the complaints listed, referring expressly to statements contained in the minutes of certain meetings of the undertakings concerned and to correspondence relating to the protection of domestic markets which was exchanged between those undertakings in October and November 1963.⁶⁴

Complaints about the standard of notice were rejected in similar terms by the Court in *Imperial Chemical Industries Ltd. v. Commission* ("Dyestuffs"),⁶⁵ *United Brands Co. and United Brands Continental B.V. v. Commission* ("United Brands"),⁶⁶ *Europemballage Corp. & Continental Can Co. v. Commission* ("Continental Can"),⁶⁷ *Coöperatieve vereniging "Suiker Unie" UA v. Commission* ("Suiker Unie"),⁶⁸ *SA Musique Diffusion Française v. Commission* ("Pionier"),⁶⁹ and a number of other cases.

The notice requirement extends to matters of law as well as of fact. Thus if it is minded to refuse an exemption under Article 85(3), the Commission has to explain how Article 85(1) applies and why it considers an exemption not justified.⁷⁰

63. Case 41/69, [1970] E.C.R. 661, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8083.

64. *Id.* at 684, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) at 8193.

65. Joined Cases 48-49 & 51-57/69, [1972] E.C.R. 619, 649-50, [1972] 1 C.M.L.R. 557, 620-21 [hereinafter Dyestuffs].

66. Case 27/76, [1978] E.C.R. 207, 304-05, [1978] 1 C.M.L.R. 429, 504-05 [hereinafter United Brands].

67. Case 6/72, [1973] E.C.R. 215, 239-41, [1973] C.M.L.R. 199, 219-21.

68. Joined Cases 40-48, 50, 54-56, 111 & 113-14/73, [1975] E.C.R. 1663, 1927-28, [1976] 1 C.M.L.R. 295, 413-14.

69. Joined Cases 100-03/80, [1983] E.C.R. 1825, 1881-82, [1983] 3 C.M.L.R. 221, 316-17.

70. A. PLIAKOS, *LES DROITS DE LA DÉFENSE ET LE DROIT COMMUNAUTAIRE DE LA CONCURRENCE* 303 (1987).

If a fine is envisaged, the Commission has to give notice of its intention. The statement of objections must set out the factual elements considered relevant to the Commission's assessment of the gravity and duration of the infringement. The Court considers however that it would be inappropriate to anticipate the decision and to indicate the level or amount of the fines envisaged.⁷¹ The reason that the Court gives has been criticised⁷² because the whole point of issuing objections is to allow the affected firm to comment on the proposed course of action. The Court may well have had in mind the need to avoid the proceedings degenerating into an unseemly haggling about money. It would however seem in the interests of fairness for the Commission at least to give a "ball-park" indication so that the firm and its legal advisers would know whether the fine which is contemplated will be in the thousands or the millions and would be able to address argument on this point. In recent cases this practice has been adopted by the Commission.

The President of the Court of Justice has succinctly stated the nature and extent of the "notice" requirement in EEC competition procedures as follows:

The basic principle is that the Commission may not in its final decision

—find the existence of an infringement which was not the subject of the statement of objections;

—find that the infringement is more serious or of a longer duration in comparison with the indications given to that effect in the objections;

—impose a fine if it has not indicated its intention to do so in a statement of objections;

—find the existence of an infringement on a factual basis significantly different from that set out in the objections.⁷³

The Court's unwillingness to impose an excessive formalism on the Commission is reflected in its frequent reminders that the final decision does not have to be a replica of the state-

71. *NV Nederlandsche Banden-Industrie Michelin v. Commission*, Case 322/81, [1983] E.C.R. 3461, 3500-01, [1985] 1 C.M.L.R. 282, 319-20.

72. *PLIAKOS*, *supra* note 70, at 307.

73. *Ole Due, Le Respect des Droits de la Défense dans le Droit Administratif Communautaire*, 1989 C. DE D. EUR. 383 (translated by the author).

ment of objections.⁷⁴ Indeed there would seem little point in the hearing at all if the Commission were not prepared to modify its views. Due account has to be taken of defence arguments raised during the administrative procedure, not only to drop objections if these prove unsustainable, but also to amend and supplement the factual and legal assessment of the objections which are maintained. In recognizing the realities of unfolding proceedings the Court has emphasized the core requirement of notice: flexibility is subject to the dual provisos that the Commission may still rely only on facts on which the parties have had the chance to make observations, and has to make the relevant documentary material available to them.

As the procedure develops, the Commission may consider it opportune to conduct fresh inquiries and, if necessary, introduce new objections.⁷⁵ Usually this will be done by letter, but the precise form in which it is done is irrelevant: all that is necessary is that the defendant should have an adequate opportunity to make observations on the charges against them. Normally if substantial new objections are introduced by the Commission at the hearing, oral argument will be heard and further time will also be allowed to submit written comments. Technical arguments to the effect that notice has to be given in a formal document labelled "supplementary statement of objections" are unlikely to find much favour with the Court.

The Court's judgment in *Van Landewyck Sàrl (FEDETAB) v. Commission*⁷⁶ makes it clear that what matters in administrative proceedings is the actuality of notice and hearing and not the technicalities of pleading. After the Commission had instituted proceedings against FEDETAB, on the basis of a complaint from a major retail chain, two fresh complaints to the same effect were lodged by other parties: copies were sent to FEDETAB, which submitted its written observations. The Court held that it was sufficient for the Commission to inform FEDETAB of the new complaints and receive its observations

74. See, e.g., *Pioneer*, Joined Cases 100-03/80, [1983] E.C.R. 1825, 1881-82, [1983] 3 C.M.L.R. 221, 316.

75. See C.S. KERSE, *EEC ANTITRUST PROCEDURE* 87 (2d ed. 1981).

76. Joined Cases 209-15 & 218/78, [1980] E.C.R. 3125, 3232-48, [1981] 3 C.M.L.R. 134, 212-24; see *Pioneer*, [1983] E.C.R. at 1880-87, [1983] 3 C.M.L.R. at 314-20.

without any need to open new proceedings or send a further formal statement of objections.

The Court's flexibility on the question of notice has not found favour in all quarters. According to one commentator:

In view of the fact that under the Court's case law the Commission in its Statement of Objections is only required to inform the defendant of the "essential" facts on which the objections are based and similarly in its decision need only mention the "principal" issues, it is not uncommon for a defendant to only grasp the intricacies of the case brought against him after the exchange of briefs before the Court. This would seem to underline the need for a more truly adversary type of procedure before the Commission.⁷⁷

Whether transferring the ethos of the adversary trial to EEC competition procedures in fact fosters clarity is a matter of opinion. Where all else fails, obfuscation of the issues may be considered a legitimate adversary tactic. It is not uncommon for the defence to claim that the objections are vague or unclear on some point or other and then, when the Commission explains the position or gives further particulars, to allege that the "whole direction" of the case has now been altered so that a new statement of objections and/or a fresh oral hearing are required.

Specification of the issues is clearly a fundamental requirement for proper notice, but the common law courts emphasize that in the context of administrative proceedings notice does not serve the same purpose as pleadings in civil litigation. The arcane complexities of the common law rules of written pleading have no role to play in administrative procedures: "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'"⁷⁸ The test is one of fundamental fairness in the circumstances of the individual case and it is the reality, not the formality, which is decisive.⁷⁹

77. Van Bael, *supra* note 14, at 17.

78. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978) (citations omitted).

79. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981); see SCHWARTZ, *supra* note 1, at 450. It should be recalled that in the English legal system the formal "pleading" serves to identify and limit before trial of the action the issues of fact and law between the parties and does not include argument.

In *Kuhn v. Civil Aeronautics Board*⁸⁰ the petitioner had argued that the decision of the U.S. Civil Aeronautics Board had been based in large part on a finding outside the scope of the original complaint. The judgment of Judge Bazelon stressed that the test for agency notice is whether it reasonably informs the defendant of the allegations against him:

The whole thrust of modern pleading [in administrative procedures] is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law. It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern.⁸¹

Even if there has been some deficiency in the original notice or complaint, the defect may be cured in the course of the proceedings. In such a case the real question is whether there was a fair opportunity to rebut the charges or to bring counter evidence once notice was brought home; to constitute grounds for reversal "there must be a showing that petitioner was prejudiced by whatever delay or informality there may have been in the notice received by him."⁸²

If the parties have in fact addressed the new issues and the matter has been explored they can hardly be heard to complain later that the notice was technically deficient. Unlike a pleading in a civil action, the notice of complaint does not necessarily have to make out a "cause of action," particularly if the parties were already aware of what the proceedings would entail.⁸³

80. 183 F.2d 839 (D.C. Cir. 1950).

81. *Id.* at 841-42 (footnotes omitted).

82. *Id.* at 842.

83. *North State Tel. Co. v. Alaska Pub. Util. Comm'n*, 522 P.2d 711, 714 (Alaska 1974); see *ITT Continental Baking Co. v. Federal Trade Comm'n*, 532 F.2d 207, 215-16 (2d Cir. 1976). For an English case on "notice," see *Lloyd v. McMahon*, 1987 App. Cas. 625.

V. *DISCLOSURE OF DOCUMENTARY EVIDENCE*

In major cartel cases the Commission's case will be based almost invariably on documents obtained from the firms themselves by surprise investigations under Article 14(3). In some cases—particularly under Article 86—the evidence may consist exclusively of documents which originate from the defendant itself, but in “conspiracy” cases evidence may be found only at one or two of the suspected participants, although it will incriminate all of them. In both cases, and irrespective of whether or not the documents are already known to the company, the usual practice now is to annex them to the objections. Clearly in any case where the facts are likely to be contested, the undertakings must be made aware of the Commission's assessment of the evidence and should be able to comment on the probative value of the various documents on which the Commission relied.

Curiously, Regulation No. 99/63 imposes no express requirement at all for disclosure of documentary evidence. The right to see the documentary evidence is however implicit in the party's entitlement to be apprised of the material factual elements on which the Commission relies.

In *Quinine*, the first fining case, the Court referred in rather general terms to the need for the Commission to supply the details necessary to the defence,⁸⁴ but in later cases it is made clear that the Court meant that the defendant must be informed of the evidence for the factual allegations. Thus in *Hoffmann-La Roche & Co. AG v. Commission*⁸⁵ the Court observed that

in order to respect the principle of the right to be heard the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of Article 86 of the Treaty.⁸⁶

There has been some debate as to whether under the

84. *Quinine*, Case 41/69, [1970] E.C.R. 661, 669-70, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8083, at 8195.

85. Case 85/76, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

86. *Id.* at 512, [1979] 3 C.M.L.R. at 268.

above principle the Commission must disclose all the evidence relied on or only the "essential" documents. Advocate General Reischl in *FEDETAB* thought that the Court had said nothing new in *Hoffmann-La Roche*. In his view, inspection of documents was to be afforded only insofar as it was indispensable for reasonable comment on the facts contained therein, as for instance where the evidential value was challenged.⁸⁷ This approach has been criticised by some commentators who see in the later *Pioneer* and *Telefunken* judgments a requirement to disclose *all* documents relied upon to prepare the objections.⁸⁸

It would seem good practice for the Commission to put forward the documentary support for all material statements or assertions of fact in the objections, not just the "smoking gun" documents. It is equally clear that the Court will not overturn a decision for non-disclosure of documents relating to uncontested or unimportant matters. A headnote in *Telefunken* reads:

An infringement of the rights of the defence affecting only certain special aspects of a proceeding for establishing whether there has been an infringement of Community competition rules cannot imply that the procedure as a whole is irregular. The exclusion of certain documents used by the Commission in infringement of the rights of the defence is of no significance except to the extent to which the Commission's objections can be proved only by reference to those documents.⁸⁹

The discussion about "non-essential" documents is interesting but somewhat academic: either there has been no breach of rights of defence (because the alleged defect has to be substantive, not just technical) or if there were, it would be only a "technical" breach (and as such does not affect the validity of the decision). In either case, the crucial point is not whether mechanical rules of "discovery" have been observed

87. *FEDETAB*, Joined Cases 209-15 & 218/78, [1980] E.C.R. 3125, 3291, [1981] 3 C.M.L.R. 134, 165 (opinion of Advocate General Reischl, delivered on July 3, 1980). The Court held that even if *FEDETAB* had produced a list of documents allegedly not disclosed, it had not shown that the Commission had refused to produce documents relating to essential facts as depriving the applicants of items necessary for its defence. *Id.* at 3237, [1981] 3 C.M.L.R. at 215.

88. See *PLIAKOS*, *supra* note 70, at 314.

89. *Telefunken*, Case 107/82, [1983] E.C.R. 3151, 3153, [1984] 3 C.M.L.R. 325, 325.

but whether in the particular case the undertaking has or has not been given a fair opportunity to be heard. English courts, which view the right to be heard as a substantive rule of law, consider that there can be no such thing as a "technical" breach of natural justice: i.e. if in substance the affected parties have had a fair opportunity to put their side of the case, no denial of natural justice will occur because of some minor irregularity.⁹⁰ Similarly, in the United States, administrative decisions will not be reversed for "harmless error": it has to be shown that the omission to disclose caused "substantial prejudice" to the defendant.⁹¹

While fairness would normally seem to require the disclosure by the deciding body of reports and evidence before it, there is no universal rule to this effect in English administrative law. The extent of any obligation to hear would depend on the character of the proceedings and the type of decision. Substantial fairness may in certain circumstances be achieved by informing the person of the gist of the case he has to meet without necessarily disclosing the precise evidence or its source. The obvious interest in disclosure may well have to be balanced against possible prejudice to the public interest. There may be a need to encourage witnesses to come forward and provide information in confidence without putting themselves at risk. What is essential is that the affected party be given a fair chance to rebut the substance of the allegations, which may be done by informing him of their "sting."⁹²

In some cases non-disclosure of even the substance of the adverse evidence may not be fatal provided that during the procedure the party affected has had the opportunity to address the deciding body on the relevant issue. It is interesting

90. *See, e.g.*, *Lake District Special Planning Bd. v. Secretary of State for the Env't*, [1975] 119 Sol. J. 187 (Q.B.); *Maxwell v. Department of Trade*, [1974] 2 All E.R. 122, 129 (C.A.) (Lord Denning). Violation of the principles of natural justice will normally render the decision void and it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. *See General Medical Council v. Spackman*, 1943 App. Cas. 627, 641 (Lord Wright).

91. *See, e.g.*, *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, 529-30 (1946); *NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962).

92. *See Re Pergamon Press Ltd.*, [1970] 3 All E.R. 535 (C.A.) (Lord Denning); *Regina v. Gaming Bd. for Great Britain, ex parte Benaim and Khaida*, [1970] 2 Q.B. 417.

to note that in relation to proposed mergers, where the Monopolies and Mergers Commission (the "MMC") has a discretion within the terms of the enabling act to establish its own procedure, the High Court will not read into the act a requirement on the MMC to disclose to all parties every piece of evidence which might influence its report either way.⁹³

The United States has a far greater experience of administrative adjudication proceedings than do the English courts. Based largely on the courtroom model, U.S. proceedings under the Administrative Procedure Act place considerable emphasis on the formal leading of evidence and its inclusion on the record.⁹⁴ The Federal Trade Commission, for example, can compel the attendance and testimony of witnesses and require the production of documentary evidence. Subpoenas may be signed by any member of the Commission and compliance can be secured through the courts.⁹⁵ The common law exclusionary rules of evidence—such as the "hearsay" rule—are not however binding on administrative agencies, which may act on any reliable oral or documentary evidence.⁹⁶ The agency may also sometimes take "official notice" of facts not introduced on the record itself, although this possibility is limited in order to ensure that parties are not deprived of a fair hearing.⁹⁷

VI. GENERAL DISCLOSURE OF FILES

During its investigations under Article 14(3), in a complex case the Commission may obtain thousands of internal commercial and management documents from the undertakings. Where the suspected infringement involves Article 85, it may carry out simultaneous visits at up to a dozen or more producers. The Commission investigators do not carry away docu-

93. *Regina v. Monopolies & Mergers Comm'n, ex parte Elders IXL Ltd.*, [1987] 1 W.L.R. 1221 (Q.B.); *Regina v. Monopolies & Mergers Comm'n, ex parte Matthew Brown PLC*, [1987] 1 W.L.R. 1235 (Q.B.).

94. See generally FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE, *supra* note 37.

95. Federal Trade Commission Act, 15 U.S.C. § 49 (1988).

96. 5 U.S.C. § 556(d) (1988). However, under the "legal residuum" rule, an agency may admit hearsay but cannot rely solely on such evidence as the basis for its finding. *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 440 (1916).

97. See, e.g., 5 U.S.C. § 556(e) (1988); *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937).

ments by the truckload and will make their best efforts on the spot to sort out the possibly relevant from the clearly irrelevant. Inevitably, however, far more documents are copied on the spot than are eventually used as evidence. Good administrative practice demands that all documents obtained under compulsory powers be officially filed, irrespective of their ultimate evidential value. The rapporteur of the case will then have the tasks of examining the documents in order to sort out the wheat from the chaff and determining what objections should be brought, if any, and against which undertakings. The evidence relied on should normally be annexed to the statement of objections.

In the case of a multi-handed Article 85 cartel case, documents found at firm A may well constitute evidence against firms B, C, D, and E. The "co-conspirator hearsay rule"⁹⁸ is a well-known exception to the normal common law evidential principle that an out-of-court statement is admissible only against its maker and has its counterpart in EEC case law.⁹⁹ If the Commission relies on the document as evidence it will have to disclose it to all those incriminated. Insofar as such documents may contain sensitive business information not connected with the suspected infringement, the Commission may have to excise passages or details, disclosure of which might be damaging to the firm's legitimate interests or to competition. The procedure is a perfectly normal one and is usually accepted by all concerned. What the Commission may not do is refuse disclosure of a passage or a document on the ground of confidentiality or business secrecy and then rely on the non-disclosed information in its decision to prove the infringement.¹⁰⁰ This is no more than an incident of the general *audi alteram partem* principle.

Defendants in contested EEC competition cases sometimes demand the right to go through the documents in the

98. *E.g.*, *Regina v. Blake & Tye*, [1844] 6 Q.B. 126; *see* *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917). Under U.S. Federal Rule of Evidence 801(d)(2)(E), a "co-conspirator" statement is not regarded as hearsay at all but as original evidence.

99. *See* *Suiker Unie*, Joined Cases 40-48, 50, 54-56, 111 & 113-14/73, [1975] E.C.R. 1663, 1940, [1976] 1 C.M.L.R. 295, 423; *see also* *Pioneer*, Joined Cases 100-03/80, [1983] E.C.R. 1825, [1983] 3 C.M.L.R. 221.

100. *See* *Telefunken*, Case 107/82, [1983] E.C.R. 3151, [1984] 3 C.M.L.R. 225.

Commission's possession which have not been used as evidence. There is however no rule of law that the Commission must open the whole of its investigation files to the undertakings. No such requirement is imposed by the regulations, and the Court has on many occasions refused to import any unwritten obligation to this effect.¹⁰¹ It is fairly trite law that the right to be heard implies that a firm has to be informed of the allegations relied on and not of matters which are not relied on.

In *VBVB and VBBB v. Commission*,¹⁰² the Court reiterated the statement of law made in earlier cases beginning with *Établissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission*.¹⁰³ One of the applicants had complained that the Commission had not given it access to the full administrative file, and as a result the applicant was unable to take cognizance of documents allegedly used by the Commission for the purposes of the decision. The Court noted however that it had not identified any document which might have been used by the Commission as a basis for its decision but which had not been accessible to the applicant:

Its complaint therefore seems rather to relate to the fact that it has not had the opportunity to inspect the Commission's file with a view to determining whether it might possibly contain documents in which it might be interested.

In that connection it must be observed that although regard for the rights of the defence requires that the undertaking concerned shall have been enabled to make known effectively its point of view on the documents relied upon by the Commission in making the findings on which its decision is based, there are no provisions which require the Commission to divulge the contents of its files to the parties concerned. It does not appear in fact that the Commission has made use of any document which was not available to the parties and on which they have not had the opportunity to make their views known. This submission also must therefore be dismissed.¹⁰⁴

101. See, e.g., *Établissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission*, Joined Cases 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418 [hereinafter *Consten*].

102. Joined Cases 43 & 63/82, [1984] E.C.R. 19, [1985] 1 C.M.L.R. 27.

103. *Consten*, [1966] E.C.R. 299, [1966] C.M.L.R. 418.

104. *VBVB and VBBB*, [1984] E.C.R. at 59, [1985] 1 C.M.L.R. at 88. The Court of Justice expressly confirmed the position it had taken in *VBVB and VBBB* in the

The Court's position would seem unexceptionable in terms of the right to be heard in English and U.S. administrative law. In principle the affected party's right is to know the case which is being made against him. No rule of fairness or justice requires that he be allowed to comb through the confidential files of the agency in the hope of turning up something useful to his own case or embarrassing to the agency. As is shown above, English administrative law does not even impose a universal requirement to disclose the detailed evidence on which the decision itself may be based. There is certainly no general rule that one party to an investigation should be given all the material submitted by another. The U.S. adjudicatory model provides a closer parallel with the Commission's procedure, but gives no support to the notion of general access. Most agency proceedings make no provision at all for discovery procedures. The Federal Trade Commission does permit parties to obtain discovery under the control of the presiding administrative law judge, but its Rules of Practice are considerably narrower in scope than the discovery provided for in the Federal Rules of Civil Procedure. A few headnote citations from FTC dockets will convey the general flavour:

General access to FTC records. Good cause, that is, real or actual need was not shown for the production of confidential information in the Commission's files, since the respondent, in effect, was asking for general access to confidential investigational files merely to see whether something useful to its defense may turn up. The respondent did not show in any specific way that the material was necessary to its defense, and it did not seek any specific material relating to any specific defense.¹⁰⁵

Relying on the traditional confidentiality of the FTC's investigational files, the informer's privilege and the attorney's work product rule, an FTC hearing examiner denied production of documents contained in FTC files. Even assuming relevance of the documents sought, the examiner said, the fact that material sought by the company is not being offered in evidence by the government, doubt as to its

recent *AKZO Chemie BV v. Commission*, Case 62/86, [1991] E.C.R. — (July 3, 1991) (not yet reported).

105. *Sperry Hutchinson Co.*, Federal Trade Commission Docket No. 8671 (1966-1973).

necessity in establishing a defense was shown. The motions could therefore be denied as premature.¹⁰⁶

Whatever the clarity of the position both in law and in principle, legal and business groups continued to maintain that disclosure in EEC competition cases was inadequate. The Joint Working Party of the Bar and Law Society was "of the opinion that at present companies alleged to be in breach of the competition rules are not provided with all the evidence against them in the hands of the Commission."¹⁰⁷

Another business group complained of "inadequate fact-finding and analysis" and attributed it in part to "the inability of the defendants to see all the documents on which the Commission relies, so that they can base their replies on the same facts as are available to the Commission."¹⁰⁸

Both these complaints related to the alleged non-disclosure of the evidence relied upon by the Commission to prove the infringement. Insofar as in the past there may have been deficiencies in this respect they have been cured by the current practice of annexing all the documentary evidence to the objections.

The Association of British Chambers of Commerce in its written submissions to the House of Lords Select Committee however took the argument further and into the realms of speculation:

It is most important to any firm against which a statement of objections is issued that it should know the evidence upon which the Commission relies. It should also know of any evidence which, although not directly relied upon by the Commission is to be found on the Commission files and which may be generally prejudicial to the firm concerned. The firm ought also to know of any evidence which is on the Commission's files but which is in fact helpful rather than prejudicial to the case of the company under investigation.¹⁰⁹

106. Columbia Broadcast Sys. Inc., Federal Trade Commission Docket No. 8512 (1967-1971).

107. H.L. EIGHTH REPORT, *supra* note 19, Minutes of Evidence, at 25.

108. Written Submission from UNICE (Union des Industries de la Communauté Européenne), in H.L. EIGHTH REPORT, *supra* note 19, Minutes of Evidence, at 67 [hereinafter UNICE Memorandum].

109. H.L. EIGHTH REPORT, *supra* note 19, Minutes of Evidence, at 50. The UNICE Memorandum, *supra* note 108, also asserted (without citing any evidence or

One commentator criticises the Court's statements that it is sufficient if the undertaking is shown the documents of importance in the Commission's appraisal: "This seems to be incomplete protection against misapprehension. The appellants might feel that the Commission should also have taken other facts into account, but not know of them."¹¹⁰

This statement prompts the observation that if there are further relevant facts to be taken into account, they are likely to be within the knowledge of the parties themselves. In order to understand the case which is being made against one, it hardly seems necessary to have general access to other documents not given in evidence. Nor, in order to know whether or not one is innocent, does one need to peruse the documents of one's competitors.

No evidence, even anecdotal, was cited in support of these suggestions of impropriety on the part of the Commission. Nevertheless, the House of Lords Select Committee was impressed by the assertions made before them and surmised that "[t]here may be relevant documents upon which the Commission does not rely—because they assist the undertaking's case. There may be others on which the Commission does not rely but which throw light on the reasoning by which the Commission reaches its opinion that an infringement exists."¹¹¹ The Committee therefore recommended that "the Commission could effect a great improvement in its present system by allowing undertakings to have access, subject to necessary safeguards, to the whole of the Commission's file. No single reform would do more to dispel distrust and dissatisfaction in the business Community"¹¹²

It is perhaps strange that the House of Lords Select Committee should recommend for the Commission a procedure going far beyond any obligation of disclosure imposed on bodies like the Monopolies and Mergers Commission in the United Kingdom.¹¹³ The Committee report also seems to have over-

examples) that "since DG IV is investigator, prosecutor and judge, there is a natural tendency for them, especially once they have made up their minds, to disregard or not to disclose certain evidence which may weaken their case." *Id.*

110. Korah, *supra* note 41, at 85.

111. H.L. EIGHTH REPORT, *supra* note 19, at viii.

112. *Id.*

113. See *supra* note 93 and accompanying text.

looked the normal principle that an administrative agency is presumed—subject to proof of the contrary—to be in good faith.¹¹⁴

In its Twelfth Report on Competition Policy the Commission announced a new procedure for giving “access to file.” This meant that after the objections were issued the defendants could come to Brussels to examine and take copies of the file on their case, apart from those documents which were considered confidential. “Confidential” was construed by the Commission to cover: (1) documents containing other undertakings’ business secrets; (2) internal Commission documents; and (3) “any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality.”¹¹⁵

The statement has no statutory or regulatory force, and the Commission expressly reserved the possibility of adjusting its practice in this area in the light of experience. The statement was a bona fide attempt to ensure greater “transparency,” but it is doubtful whether it can give rise to any new legal right on the part of defendants to rove through the internal documents of their competitors, customers or suppliers which may have been obtained by the Commission during its enquiries. It is also clear that such a statement cannot derogate from the provisions of the Treaty or the regulations made thereunder. Under Article 20(2) of Regulation No. 17, *all* information obtained from undertakings under Articles 11 and 14 is “confidential” even without a specific request. Article 20(2) provides: “Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the

114. *See, e.g.,* Regina v. Secretary of State for the Home Dep’t, *ex parte* Santillo, [1981] 1 Q.B. 778 (C.A.); Maxwell v. Department of Trade and Indus., [1974] 2 All E.R. 122 (C.A.). The principle was spelled out by the U.S. Supreme Court in *Withrow v. Larkin*, 421 U.S. 35 (1975). Curiously, none of the bodies which complained about “access to the file” to the House of Lords Committee raised what could be a far greater risk to the integrity of the decision making process, namely attempts by industry to influence the outcome of Commission proceedings by *ex parte* “political” contacts.

115. COMMISSION TWELFTH REPORT ON COMPETITION POLICY, paras. 34-35, 40 (1982).

application of this Regulation and of the kind covered by professional secrecy."¹¹⁶

Article 20(2) refers to the "professional secrecy" of the Commission, not the "business secrets" of the firms. It relates to a general obligation imposed upon the Commission and its officials not to disclose information officially obtained from undertakings under the Regulation. It covers all commercial information obtained, not just that falling in the extremely narrow category of "business secret" for which in *AKZO Chemie BV and AKZO Chemie U.K., Ltd. v. Commission*¹¹⁷ the Court conferred a particularly high degree of protection from disclosure. The Court recognized very clearly in *Hoffmann-La Roche* that the quid pro quo for the Commission's wide powers of investigation is the certainty for firms that commercial information will not be disclosed except insofar as it is necessary:

The said Article 20 by providing undertakings from whom information has been obtained with a guarantee that their interests which are closely connected with observance of professional secrecy, are not jeopardized, enables the Commission to collect on the widest possible scale the requisite data for the fulfilment of the task conferred upon it by Articles 85 and 86 of the Treaty without the undertakings being able to prevent it from doing so¹¹⁸

As the Court pointed out, the Commission's duty of professional secrecy has to be reconciled with the right to be heard: the obligation of confidentiality is expressly subject to Article 19. For present purposes, this provision is the only legal "gateway" out of Article 20.¹¹⁹ Article 19 as interpreted by the Court requires that in any proceeding the Commission must disclose the information and documentation necessary to enable the undertaking to be heard.

The new practice of "access to file" announced in the Twelfth Report did not expressly address the problems which might be posed by a multi-defendant case. In such cases the Commission may have carried out simultaneous inspections at

116. Council Regulation No. 17, 13 J.O. 204 (1962), O.J. Eng. Spec. Ed. 1959-62, at 87.

117. Case 53/85, [1986] E.C.R. 1965, [1987] 1 C.M.L.R. 231.

118. *Hoffmann-La Roche & Co. AG v. Commission*, Case 85/76, [1979] E.C.R. 461, 512, [1979] 3 C.M.L.R. 211, 269.

119. Article 21 concerns the publication of decisions.

a dozen or more undertakings in an industry, and relatively few of the documents copied will finally be relevant to prove the suspected infringement. Relying on the Twelfth Report, some defence lawyers have demanded the right to peruse the unused documents obtained from all the other undertakings in the case. It is however clearly undesirable for the Commission itself to act as the clearing house for the exchange of sensitive information between competitors. This consideration applies not only to business secrets in the narrow sense but to all internal or commercial information: remove uncertainty as to a competitor's intentions and you remove competition. Thus in a number of recent cases the Commission has annexed to the objections all the documentary evidence relied upon and provided any other documents that might be relevant to the issues but has refused the undertakings open access to the internal documents of their competitors, which had been obtained under Articles 11 and 14 of Regulation No. 17 but were not considered relevant to the suspected infringement.¹²⁰

Much of the problem stems from uncertainty as to what is meant by "the file." When the proposals were made, the Competition Directorate-General had a separate "Inspection" Directorate (then called "Directorate A"), which carried out the investigations and then sent to the Examining Directorate ("Directorate B") only the evidence relating to the suspected infringement. All other documents obtained during the investigations remained in Directorate A's archives and were never transmitted. Directorate B drafted the objections, relying only on the material it had received. At that time it was not the usual practice for Directorate B to annex all the documentary evidence to the objections, although the most important documents would at some stage have to be provided if they were not already known to the undertaking in question. (The Court of Justice, for the validity of the decision, only required disclosure to defendants of the "essential" documents.) To the extent that not annexing all the evidence might have given rise to uncertainty there may have been some cause for complaint. The main purpose behind the "access to file" procedure as conceived at the time was thus to ensure that the defendants

120. See COMMISSION EIGHTEENTH REPORT ON COMPETITION POLICY, para. 43 (1989).

had available to them the same documentary evidence as those on which the Commission decided the case. This certainly was the perception of one English practitioner:

In the past the Commission was prepared to give only very limited disclosure of the documents that it . . . was relying on in the Statement of Objections. This has, however, changed dramatically in recent years, and the Commission is now prepared to give what it calls access to the file, which will enable the defendant to inspect the dossier *upon which the case is based*.¹²¹

The principle is essentially what is known in the United States as "exclusivity of the record."¹²² Decisions must not be based on facts not made available to the parties and "spread upon the record": "Whatever actually plays a part in the decision should be known to the parties, and subject to being controverted."¹²³

The notion of the "file" or "dossier" is one familiar to Continental lawyers used to judicial proceedings which rely more on written proofs than oral testimony. The principle however is exactly the same as that of the "record": the court may decide the case only on the basis of the material which is in the "dossier" and has been made available to the parties.¹²⁴

In EEC competition proceedings the concept of "exclusivity of the record" is already embodied in Article 4 of Regulation No. 99/63: the Commission may deal in a decision only with those objections in respect of which the firms have been afforded the opportunity of making known their views. The access to file procedure was intended to go somewhat further and to ensure that the parties affected were apprised not only of all the relevant facts but also of the documentary evidence to prove those allegations. There is no magic in the procedure, and exactly the same result can be achieved by ap-

121. Panel Discussion, *EEC Enforcement Policy and Practice*, 54 *ANTITRUST L.J.* 611, 616 (1985) (remarks of Christopher Bellamy) (emphasis added) [hereinafter Panel Discussion].

122. See *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913); *Mazza v. Cavicchia*, 105 A.2d 545 (N.J. 1954); see also *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937).

123. I I. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN NEW YORK* 208 (1942).

124. See, e.g., V. DALLOZ, *NOUVEAU RÉPERTOIRE DE DROIT, TOME III* 117; *CODE DE PROCÉDURE CIVILE* [C. PR. CIV.] art. 79 (Fr.).

pending all the evidence to the statement of objections.¹²⁵

Obviously the general obligation of fairness requires the Commission not to conceal evidence which might exonerate the defendant.¹²⁶ On the hypothesis that exculpatory evidence does exist in a particular case, it is far more likely to be in the possession of (and so known to) the firm itself rather than found at other undertakings. In recent multi-defendant cases the Commission has nevertheless disclosed to defendant undertakings on a voluntary basis any documents found at other producers which were not used as evidence but in which reference was made to their individual commercial conduct on the market. Such material may well be of assistance to some line of defence (for example, as showing independence of conduct or outbreaks of competition) even if it is not obviously exculpatory. The Commission is also open in a particular case to a request by a defendant for the disclosure to it of any category of documents or documents relating to a particular issue on showing cause. The right to be heard, however, does not entitle the defence to conduct a random fishing expedition in the documents of other undertakings in the hope of turning up some minor inconsistency or contradiction that might help its case or vex the Commission. To the extent that the Commission may base a decision on crucial documents not disclosed to the defendant, it risks the consequence of annulment. It is however difficult to see how the decision could be reversed simply on the basis of an unsupported claim that somewhere in the Commission's filing cabinets there may be some unspecified piece of exculpatory evidence.

In criminal cases, the U.S. courts have dealt with the problem of suppression of exculpatory evidence by the prosecution in the context of the Due Process Clause. It should be emphasized that the U.S. cases all concern instances where after a guilty verdict it emerged that the government had in fact withheld evidence which the defence claimed could have been material.

In *Brady v. Maryland*¹²⁷ the Supreme Court held that "the

125. COMMISSION EIGHTEENTH REPORT ON COMPETITION POLICY, para. 43 (1989).

126. See *Due*, *supra* note 73, at 392.

127. 373 U.S. 83 (1963). The *Brady* principle applies equally to the suppression by the state of material which impeaches a prosecution witness.

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."¹²⁸ In *Brady* there was a specific request from the defence but the principle applies to prosecutorial failure to disclose obviously exculpatory evidence irrespective of whether or not the material has been expressly requested.¹²⁹

Disclosure is required however only if the evidence is both favourable to the accused and material to guilt or punishment. The Supreme Court explained in *United States v. Agurs*¹³⁰ that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."¹³¹ The Supreme Court has also made it clear on several occasions that "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."¹³²

The Court has also rejected as imposing an impossible burden on the prosecutor any rule that the prosecution commits error by any failure to disclose evidence favourable to the accused no matter how insignificant.¹³³ Even if it transpires that relevant material has not been disclosed by the prosecution, such failure does not call for automatic reversal. The Supreme Court has emphasized that the *Brady* requirement is aimed at ensuring that a miscarriage of justice does not occur: "[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."¹³⁴ Evidence is not considered "material" unless there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been

128. *Id.* at 87.

129. *See* *United States v. Agurs*, 427 U.S. 97 (1976); *see also* *United States v. Bagley*, 473 U.S. 667 (1985).

130. 427 U.S. 97 (1976).

131. *Id.* at 104.

132. *Bagley*, 473 U.S. at 675; *see Agurs*, 427 U.S. at 108; *Moore v. Illinois*, 408 U.S. 786 (1972).

133. *Bagley*, 473 U.S. at 675 n.7.

134. *Id.* at 678.

different.¹³⁵

The test laid down by the Supreme Court for “*Brady* material” is thus very similar to the approach of the European Court of Justice in cases like *Pioneer* and *Telefunken* to non-disclosure by the Commission of documents relied upon in the decision. A decision will not be annulled for non-disclosure of documents “of secondary importance to the infringement found.” So far there have been no cases before the Court of Justice where non-disclosure concerned “exculpatory” material rather than incriminatory evidence on which the Court later relied. It is of course highly improbable that the Commission would be able, even if it were so inclined, to conceal exonerating evidence in a cartel case: in all likelihood any such evidence will have originated from and be known to one or other of the defendants. Were such a case to arise, however, there is no reason to believe that the test applied by the Court would be any different.

As the Court of Justice has adverted, reconciling professional secrecy and the right to be heard involves a balancing of two competing interests.¹³⁶ The Commission is a public authority charged with certain obligations and duties. It has no interest in “securing a conviction” at all costs by suppressing the truth. Its function transcends that of a party in adversary proceedings and its officials are quite capable of the objectivity necessary for a proper assessment of all material on the file. If fairness requires disclosure of exculpatory material, it does not call for a sweeping access to the whole of the files. Even if opening the files does not disclose any exculpatory material, it will give the defence a very good insight into how the investigatory authority has conducted its enquiries. The dangers of such a procedure should not be overlooked. As the U.S. Supreme Court pointed out in *Moore v. Illinois*,¹³⁷ “[w]e know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.”¹³⁸

In an EEC cartel case, once all the documents in the pos-

135. *Id.* at 682.

136. *Hoffmann-La Roche & Co. AG v. Commission*, Case 85/76, [1979] E.C.R. 461, 512, [1979] 3 C.M.L.R. 211, 269.

137. 408 U.S. 786 (1972).

138. *Id.* at 795.

session of the Commission are known, it becomes much easier to “slalom” through the evidence or manufacture a defence without the risk of contradiction. Further, there may be material on the files which is not relevant to the case in issue but could serve as the basis for future investigations; premature disclosure of this material could ensure the disappearance of any further evidence. The delicate task of deciding what material should be disclosed to the defence is one that is normally entrusted to the good faith judgment of the investigating authority. Of course the test of any reviewing court is of necessity an “ex post” operation, and with the benefit of hindsight it can ask the question whether or not the evidence would have made any difference. On the hypothesis that there is a duty to disclose, the standard of “materiality” for the Commission at the stage of the administrative proceedings is a different one and could be formulated along the following lines: disclosure should be made of all evidence in the files (1) which might reasonably be considered material to the proper determination of the issues, (2) which is not readily available to the defendant by other means, and (3) non-disclosure of which could seriously prejudice the defendant’s case.

The Court of Justice has recognized in several cases that allegations of dark dealings by the Commission have to overcome a strong presumption of integrity on the part of a body exercising a public function. No agency could function effectively were it constantly required to prove to those under investigation that it is itself not acting in bad faith.

In *British American Tobacco Co. and R.J. Reynolds Indus. Inc. v. Commission*¹³⁹ it was alleged that the Commission had been pressured by lobbying from one of its former vice-presidents into changing its original—and unfavourable—assessment of certain agreements. The President of the Court rejected the application for sight of the Commission’s internal files, pointing out that any exceptional measures of enquiry such as the applicants requested would presuppose that substantial doubts existed as to the real reasons for the Commission’s decision, and in particular that such reasons were extraneous to the objectives of Community law and hence amounted to an abuse of power. In the case in question there was nothing untoward

139. Joined Cases 142 & 156/84, [1987] E.C.R. 4487, [1987] 2 C.M.L.R. 551.

in the Commission's changing its preliminary assessment, particularly because the agreement had been substantially amended.

Similarly in *Imperial Chemical Industries PLC v. Commission*,¹⁴⁰ the Court rejected a preliminary application for sight of internal Commission working documents relating to a decision in which ICI had been fined 10 million ECU for participating in a cartel. The main grounds for the application consisted of general allegations of "bias" on the part of the Commission. Citing *British American Tobacco v. Commission*, the Court dismissed the application, observing that no solid argument had been advanced to give rise to any serious doubts as to the real reasons behind the taking of the decision.¹⁴¹

Clearly the Court has set itself against undertaking an in camera examination—let alone ordering disclosure to the firms—of internal Commission documents except in the most exceptional circumstances. Unsupported and generalised allegations of bias or wrongdoing will not impress the Court. The applicant would need to satisfy the Court that compelling grounds existed aliunde for suspecting grave misconduct. A fishing expedition on purely speculative grounds will not be permitted.

VII. ADMINISTRATIVE OR JUDICIAL? THE GREAT DEBATE

The Court's frequent reminders¹⁴² that the Commission's adjudicatory procedure is "administrative" have attracted much criticism from commentators. They see it as a licence from the Court for the Commission to be unfair or even arbitrary. Thus one reads that in those cases where the Court has rejected a "due process" argument, "the Court invariably let the Commission's decision stand, usually on the ground . . . that the administrative nature of the proceedings before the Commission implies that lesser standards of care and fairness apply than in judicial proceedings."¹⁴³ Another critic has com-

140. Case 212/86, — E.C.R. —, [1987] 2 C.M.L.R. 500.

141. *Id.* at —, [1987] 2 C.M.L.R. at 502-03.

142. These reminders began with the competition case *Consten*, Joined Cases 56 & 58/64, [1966] E.C.R. 299, [1966] C.M.L.R. 418.

143. Van Bael, *supra* note 14, at 23.

plained that "[t]he absence of full legal protection in EEC competition cases has repeatedly been justified by the Court of Justice on the ground that such procedures as instituted by Reg. No. 17/62 were not of a 'judicial' or 'quasi judicial' but of an administrative nature."¹⁴⁴

Such assertions beg the question: if the Court rejects a procedural argument it does not necessarily imply denial of full legal protection; it could just be because the point is a bad one. Nor has the Court given its stamp of approval to an economy class standard of justice. Whatever the possible ambiguity of its earliest pronouncements on the matter, the Court of Justice has gone out of its way in recent years to emphasize that the duty to give a fair hearing is a fundamental rule of law irrespective of the analytical nature of the proceedings: "Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings are administrative proceedings."¹⁴⁵

It is thus quite clear that the Court is not absolving the Commission of the fundamental obligation to act fairly. The significance of the "administrative" label attached by the Court to EEC enforcement procedure lies in its recognition of the institutional nature of the Commission and its decision-making processes. It would be wholly inappropriate to graft unmodified onto the Commission's proceedings rules of criminal evidence and procedure. Nor—given its hierarchic and institutional structure—can the Commission be assimilated to a judge as regards the procedure by which it reaches a decision. The standard of substantive fairness which the Court requires of the Commission is, however, no different from that expected of a judicial tribunal.

Indeed an experienced administrative lawyer from one of the common law jurisdictions might well be puzzled by the insistent claims that the procedure under Regulation No. 99/63 is inherently deficient in terms of fairness, containing as it does the hallmarks of an all but fully judicialised procedure.

144. Sedemund, *supra* note 15, at 4.

145. Hoffmann-La Roche & Co. AG v. Commission, Case 85/76, [1979] E.C.R. 461, 511, [1979] 3 C.M.L.R. 211, 268.

In the United States these have been summarized as including the rights to: (1) receive timely notice and an adequate formulation of the legal and factual issues involved in the case; (2) present oral testimony (usually on oath), documentary evidence and argument; (3) rebut adverse evidence via cross-examination or other appropriate means; (4) appear with counsel; (5) have the decision based exclusively on matters introduced into the record; and (6) have a complete record consisting of the transcript of the oral stage as well as the documentary evidence and other papers filed in the proceeding.¹⁴⁶

With a few minor omissions, this catalogue could be a summary of the safeguards built into Regulation No. 99/63. There is no oath, and cross-examination of Commission officials would be pointless since the "prosecution" evidence consists not of oral testimony but almost entirely of the undertakings' own internal documents. However, all the other essential elements of the courtroom trial are there: proper notice (Article 2); the right to reply by means of argument, documentary evidence and calling oral witnesses (Articles 3 & 7); legal representation (Article 9); exclusivity of the record (Article 4); and a formal record of the hearing (Article 9). The procedure thus comes very close to the full evidentiary hearing of the type required by the U.S. Supreme Court in the leading case of *Goldberg v. Kelly*.¹⁴⁷

Defence lawyers may perhaps be forgiven for seeing—however mistakenly—a sinister significance in the Court's use of the "administrative" label. During the forties and fifties, English judges justified their denial of the right to be heard in many cases by drawing a rigid distinction between "administrative" and "judicial" proceedings.¹⁴⁸ Their basic fallacy lay in

146. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 412-13 (2d ed. 1982); see *Goldberg v. Kelly*, 397 U.S. 254 (1970).

147. 397 U.S. 254 (1970).

148. See, e.g., *Nakkuda Ali v. Jayaratne*, 1951 App. Cas. 66 (P.C. 1950); *Regina v. Metropolitan Police Comm'r, ex parte Parker*, [1953] 2 All E.R. 717 (Q.B.). The same distinction was made to justify the refusal of certiorari and mandamus. Some authors show how this "mystifying lapse" in the law came about. See DE SMITH, *supra* note 23, at 162-64; WADE, *supra* note 22, at 458; see also LORD DENNING, *THE DISCIPLINE OF LAW* 88-96 (1979). The Donoughmore Committee on Ministers Powers used the term "administrative" to mean a ministerial decision involving the exercise of an unfettered discretion. DONOUGHMORE COMMITTEE ON MINISTERS POWERS, 1932, CMND 4060.

the belief that the two categories were mutually exclusive: if a function was "administrative" or "purely administrative," it was thought that it could not be "judicial," and thus was not subject to the rules of natural justice. Accordingly, the courts held there was no duty to grant any type of a hearing at all. The courts seemed to have forgotten that in the classic 19th century cases it was precisely administrative acts which the courts had felt obliged to class as "judicial" or "quasi judicial" in order to impose a duty to hear.¹⁴⁹ Only in 1963 was the law put back to where it had been before. The House of Lords held in *Ridge v. Baldwin*¹⁵⁰ that if a power adversely affects a person's rights, it does not matter whether it is "administrative" or "judicial"; it still has to be exercised "judicially," i.e. the rules of natural justice must be respected.¹⁵¹

The courts in England finally came round full circle and again recognized that "judicial" and "administrative" are not mutually exclusive concepts. There have been some hiccups since: the discredited distinction re-emerged briefly in the form of the ingenious proposition that if a power were "administrative" it only had to be "exercised fairly," while if it were "judicial" or "quasi judicial" then "natural justice" applied.¹⁵² More recently, judges have adopted a "modern approach"¹⁵³ and now prefer to talk of a duty to act fairly rather than of the rules of natural justice. They prudently avoid the administrative/judicial pitfall altogether by taking the line that "observing natural justice" and "acting fairly" are the same basic concept, but that no hard and fast rules can be laid down as to exactly what the exercise of fairness requires.¹⁵⁴

The beauty of the concept of "fairness" is that it neatly avoids the circular reasoning inherent in the "administrative-

149. WADE, *supra* note 22, at 458.

150. 1964 App. Cas. 40.

151. This repudiation by the House of Lords of the administrative-judicial fallacy came exactly one hundred years after the classic statement of the law in *Cooper v. Board of Works for the Wandsworth District*, [1863] 14 C.B.N.S. 180, 143 Eng. Rep. 414 (C.P.). The leading speech of Lord Reid reviews the authorities and exposes the fallacies of the 1950s.

152. *Pearlberg v. Varty*, [1972] 1 W.L.R. 534, 547 (H.L.).

153. *Regina v. Liverpool Corp., ex parte Liverpool Taxi Fleet Operators' Ass'n*, [1972] 2 Q.B. 299, [1972] 2 W.L.R. 1262 (C.A.) (Lord Denning).

154. *Re Pergamon Press Ltd.*, [1970] 3 All E.R. 535 (C.A.); *Regina v. Gaming Bd. for Great Britain, ex parte Benaim and Khaida*, [1970] 2 Q.B. 417 (C.A.).

judicial" distinction. It provides the answer to both questions: (1) whether the principles of fairness apply, and (2) the substance of those principles.¹⁵⁵ The duty to act fairly is imposed on all bodies whose decision may adversely affect the interests of the individual: exactly what "fairness" requires can then be determined according to the particular circumstances.¹⁵⁶

The Court of Justice, in drawing attention to the "administrative" nature of the Commission's powers in competition matters, is not in any way seeking to exclude or even diminish its obligation to act fairly (or "judicially").¹⁵⁷ But—as the courts in England and the United States have repeatedly stressed—fairness is a flexible concept and its observance does not necessarily lie in adherence to a set of mechanical rules.

VIII. DUE PROCESS AND FLEXIBILITY

Regulation No. 99/63—rather like the U.S. Administrative Procedure Act—does not purport to set out detailed procedural rules. While laying down the general framework of a fair procedure, it allows the maximum freedom to deal with the different types of cases which may arise and the variety of situations that may confront the Commission at any stage of a case. In the name of "due process" some lawyers and industry groups have advocated however that "more comprehensive" rules than those currently contained in Regulation No. 99/63 be drawn up:

This would enable parties involved or likely to be involved in Commission proceedings better to understand their rights and obligations and would ensure a more uniform safeguarding of their rights of defence. To save time, such rules could initially be drawn up by informal agreement between the Commission and a body representing legal practitioners within the Community . . . and could subsequently be embodied in a Regulation.¹⁵⁸

155. See Nigel P. Gravells, Note, *Fairness as the Basis of Procedure for Decision-Making Bodies*, 39 MOD. L. REV. 342, 344 (1976).

156. *Pergamon Press*, [1970] 3 All E.R. at 542 (Lord Justice Sachs); *Furnell v. Whangarei High Sch. Bd.*, 1973 App. Cas. 660 (P.C. 1972); see *Maxwell v. Department of Trade and Indus.*, [1974] 2 All E.R. 122 (C.A.).

157. Nevertheless some critics still find difficulty in accepting that if a proceeding is classed as "administrative" it is therefore not "quasi-judicial." See, e.g., UNICE Memorandum, *supra* note 108; see also ICC Recommendations, *supra* note 62.

158. UNICE Memorandum, *supra* note 108.

The judgment of Lord Justice Sachs in the leading English case *Re Pergamon Press Ltd.*¹⁵⁹ is particularly apt in this connection and provides a salutary warning. After pointing out that in order to determine the appropriate measure of natural justice or "fair play" required in a given case, it was unnecessary to label the proceedings "judicial," "quasi judicial," "administrative," or "investigatory," he went on:

In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand. . . . It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate (see per Lord Reid in *Wiseman v Borneman*) the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.¹⁶⁰

Lord Denning put it rather more pithily in another case but the message is the same: "[T]he rules of natural justice—or of fairness—are not cut and dried. They vary infinitely."¹⁶¹

Courts in the United States have been equally insistent that due process does not require courts or administrative agencies to adhere woodenly to a set of procedural rules:

"Once it is determined that due process applies, the question remains what process is due." We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."¹⁶²

"Bright line" tests are therefore to be avoided. The re-

159. [1970] 3 All E.R. 535 (C.A.).

160. *Id.* at 542 (citing *Wiseman v. Borneman*, [1969] 3 W.L.R. 706, 710 (H.L.)).

161. *Regina v. Secretary of State for the Home Dep't, ex parte Santillo*, [1981] 1 Q.B. 778, 795 (C.A.) (Lord Denning).

162. *Goss v. Lopez*, 419 U.S. 565, 577-78 (1975) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

quirements of due process vary with the type of proceeding concerned. In the administrative context, procedural due process does not necessarily involve the application of the un-reconstructed judicial model:

The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts." The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision making in all circumstances.¹⁶³

The U.S. Supreme Court has identified three distinct factors which have to be considered in determining the procedural incidents required by due process in any given case. The test is particularly useful in cases where the argument is raised that the constitutional due process clause requires some additional procedural safeguards over and above those provided for in the legislation. The Court will consider and weigh: (1) the private interest that will be affected by the official action; (2) the fairness and reliability of the existing procedures and the probable value, if any, of additional or substitute procedural safeguards; and (3) the public interests including the function involved and the fiscal or administrative burdens that the additional or substitute procedural requirements would entail.¹⁶⁴ The determination of the appropriate measure of due process in a particular case is thus to be seen as a complex balancing operation. The benefit of the incremental procedural safeguard proposed has to be compared with the additional cost it will entail, not only in financial, but also in practical terms.¹⁶⁵

The type of hearing required by due process will vary with the gravity of the case. While as a general rule the more signif-

163. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976)(citing *Federal Communication Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)).

164. *Id.* at 335.

165. *See, e.g.*, *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980); *Friendly*, *supra* note 17, at 1303-04.

icant the deprivation, the closer the procedure should be to a formal judicial type hearing, this principle is not to be seen as involving an inflexible mechanical progression: the timing and content of the notice and the nature of the hearing required will depend upon an appropriate accommodation of the competing interests involved.¹⁶⁶

IX. *THE ADVERSARY TRIAL MODEL*

Many of the proposals made by interest groups for reforming the Commission's procedure seem aimed at making it more of a sporting contest than a search for the truth. They take as their paradigm not the administrative or public law process but the adversary trial system of the common law countries.¹⁶⁷ Some of the proposals made under the banner of "adversarialism," however, are not always consistent, such as the demands for the Commission to make blanket disclosure of its files to the undertakings concerned:¹⁶⁸ in its full-blooded form the adversary mode of trial leaves it entirely up to the opposing parties to collect their own evidence without any help from the other side.¹⁶⁹ One is left with the distinct impression that the proposals for the adversarialisation of the EEC procedure are somewhat one way: rarely are any suggestions made to strengthen the Commission's powers. Cynics might even observe that some of the suggestions for reform would ensure that the proceedings are made more cumbersome and dilatory with no corresponding increase in fairness. The proponents of reform clearly see the Anglo-Saxon adversary system of trial as superior to the continental inquisitorial system:

Although it might well be true that the Anglo-Saxon political and legal systems provide for greater checks and balances than have traditionally been the case on the continent, it does not follow that the E.E.C. should not benefit

166. *Arnett v. Kennedy*, 416 U.S. 134, 167-68 (1974) (Powell, J., concurring in part); see *Fusari v. Steinberg*, 419 U.S. 379 (1975); *McElroy*, 367 U.S. 886.

167. See, e.g., UNICE Memorandum, *supra* note 108; Van Bael, *supra* note 14; see also Written Submissions of IBM to House of Lords Select Committee, in H.L. EIGHTH REPORT, *supra* note 19, Annex [hereinafter IBM Submissions].

168. See, e.g., IBM Submissions, *supra* note 167; Sedemund, *supra* note 15. See generally BRAUN, *LES DROITS DE LA DÉFENSE DEVANT LA COMMISSION ET LA COUR DE JUSTICE DES COMMUNAUTÉS EUROPÉENNES* (1985).

169. See, e.g., *U.S. v. Bagley*, 473 U.S. 667 (1985); *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).

from the higher standards of fairness applicable in the Anglo-Saxon adversary procedure. Due process of law is a matter which, unlike, for instance, the quality standards applicable to certain varieties of apples and pears, does not lend itself to any compromise whereby the higher standards applicable in one member state are lowered to reach an average Community standard. When fundamental rights are at issue, "nothing but the best" should be the rule.¹⁷⁰

Possibly much of the opposition is generated by terminology: if the Commission's procedure were labelled "adjudicative" rather than "inquisitorial" the critics might well be disarmed. Those who consider the full adversary system as a panacea for the ills they see in the Commission's procedure might however do well to reflect upon the growing unease in the common law jurisdictions as to the adequacy of this form of trial as a means of doing justice in criminal cases.

The common law countries have in fact long recognized that the full adversary felony trial is by no means the most appropriate model for administrative justice. Trial-type procedures may well be counterproductive, and the truth may be the first casualty. As one distinguished commentator and judge (who no doubt spoke from personal experience) has pointed out: "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty."¹⁷¹

Due process does not prefer one form of procedure over another. The Fifth Amendment is concerned with protecting substantive rights and guarantees no particular form of procedure: due process does not in every conceivable case require judicial process. Even where due process imposes a right to be heard, it certainly does not call for the fully evidentiary trial type of hearing. As Judge Friendly put it: "There is no constitutional mandate requiring use of the adversary process in administrative hearings unless the Court chooses to construct one out of the vague contours of the due process clause."¹⁷²

170. Van Bael, *supra* note 14, at 26-27 (citations omitted).

171. Friendly, *supra* note 17, at 1288.

172. *Id.* at 1290-91.

There are many circumstances where the disadvantages of a full dress adversary procedure outweigh any advantages it may bring. In the "mass justice" area—welfare and social security claims and the like—considerable modifications have therefore been made in the United States to the traditional adversary model. Even if the procedure is adjudicatory, for reasons of cost saving, simplicity and expedition the proceedings are kept relatively informal. The development of the case is largely in the hands of the presiding administrative law judge rather than those of opposing counsel: the judge elicits the claimant's case by questioning, "represents" the administration, and finally comes to his decision.

In contrast with the "claims" agencies, the regulatory bodies in the United States (such as the Federal Trade Commission) have a far more formal procedure closely patterned on the judicial process. The differences between the methods of the regulatory agencies and those of the ordinary courts largely reflect the agencies' function as instruments for the enforcement of broad policy via specific cases. The procedures of the FTC, an independent agency, rather than those of the courts, were considered the most appropriate way of carrying into effect the legislative policy in favour of free competition.¹⁷³

Given that the EEC Commission is in an analogous position it is not easy to see how its procedures could be made more "judicial" without diminishing its important supervisory and policy-making function.

Nor should the calls for a "more adversarial" form of procedure in EEC competition cases be allowed to obscure the fact that Regulation No. 99/63 itself already provides for many "adversarial" ingredients. The Commission is ultimately the master of its own procedure but as the procedure moves from the purely "investigative" stage under Articles 11 and 14 of Regulation No. 17 to the "hearing" stage under Regulation No. 99/63 its role becomes much less inquisitorial. During the hearing the Commission does not develop the facts, call its own experts, or interrogate witnesses: the undertakings are free to conduct their cases as they see fit, with representation by counsel, the opportunity to file written observations, rebut

173. SCHWARTZ, *supra* note 1, at 88-92.

adverse evidence, develop their own arguments and call oral evidence. The only "adversarial" element missing at the oral hearing is the leading of "prosecution" testimony: the reliance on documentary evidence, the essentially written nature of the proceedings, and the prior service of detailed objections renders such a step otiose. Defence lawyers may also regret the lack of opportunity to "cross-examine" Commission officials, but because the latter are not witnesses to the facts it is not apparent what useful purpose the exercise would serve.

X. *DUALITY OF FUNCTION: PROSECUTOR AND JUDGE*

Under the scheme set up in Regulation No. 17, the Commission is both the investigating and the deciding body. In this respect it is clearly distinguishable from a court of law which is, at least to common lawyers, in the position of a neutral umpire deciding between two opposing parties. A court has no interest in the outcome of the case. The Commission could however be said to be deciding cases in which it is itself, in a sense, a party.

The popular polemic has it that this combination of functions is a virtually insuperable obstacle to fair adjudication. Referring to the "difficulty inherent in combining the policy-making, prosecuting and adjudicating functions all in one and the same entity where a defendant is supposed to be guaranteed a dispassionate analysis of the facts," one commentator goes on to observe, somewhat rhetorically: "Since the Commissioner and his staff are only human and can be expected to react as such, one rightly wonders how they would be able to impartially adjudicate cases which they themselves have started and defended in the first place."¹⁷⁴

An industry group made the same arguments in its submissions to the House of Lords Select Committee in 1981: "Many of the critics of the Commission's procedures believe that there would be less grounds for complaint were DG IV not combining the functions of investigator, prosecutor and judge, without any control over what evidence it uses or does not use in reaching its decisions"¹⁷⁵

A major multinational corporation which was at the same

174. Van Bael, *supra* note 14, at 19.

175. UNICE Memorandum, *supra* note 108, at 69.

time embroiled in litigation with the Commission before the Court of Justice (which it subsequently lost) was scathing in its criticism to the House of Lords:

A defendant's right to defend himself properly, to know the charges against him in reasonable time and with reasonable specificity and clarity, to avoid trial by the press and to protect his reputation, are all severely compromised, in our opinion, by the one-sidedness of the procedures, the great powers of DG IV, and the discretion afforded to the Commission.¹⁷⁶

IBM went on to assert that "political considerations" played a "key part" in individual cases, and urged the Committee to consider changes which included a "complete separation between the parts of the Commission (a) which investigate and prosecute and (b) which adjudicate."¹⁷⁷

One might be prompted to observe that if indeed the Commission were open to such sinister political pressures, internal separation of powers would make no difference whatever.

The Commission's combined role is almost invariably presented by common lawyers as something foreign to their sense of justice. According to one British practitioner: "[T]hese functions of judge, jury, prosecutor, and policeman, are performed by the same body. This is often a rude shock to those accustomed to a more Anglo-Saxon way of doing things"¹⁷⁸

Curiously enough, however, the combination of functions of party and judge is well established in both the U.S. and the U.K. administrative law processes. In the U.S. system the regulatory authority charged with the supervision of economic activities is perhaps better known than in Britain.

Effective administration of schemes of regulation . . . presupposes a concentration of functions wholly foreign to the judicial process. The administrator, it has been felt, must not only have the authority to administer, in the more traditional sense, but also to decide disputes arising out of his administration. If the legislative scheme is effectively to be

176. IBM Submissions, *supra* note 167, at 65.

177. *Id.*

178. Panel Discussion, *supra* note 121, at 614.

executed, the decisions in such cases must be made, not by wholly detached judges, but those who are part and parcel of the administration. And their role is not an arbitral one; it is their responsibility constantly to supervise the field administered by their particular agency. It is their job to ferret out violators of the agency's decrees; they have the affirmative duty of ensuring compliance with the scheme set up by the legislator. Since that is the case, it is not unnatural for the administrative agency concerned to be placed in the position of contesting party in cases arising before it. If regulation is involved, it is the agency which supervises, polices and prosecutes And, in all of these cases, it is the administrative agency, which is thus made a party to the case, that is invested with the power of deciding that case.¹⁷⁹

But even in English administrative law concentration of functions is in no way remarkable. Under many statutes it is the Minister (or a subordinate official) who decides in his own case. Indeed as the late Professor Hamson observed in 1954: "What is calculated most to shock the French administrative lawyer is the extent to which the Minister or Department in England still remains judge in his own cause."¹⁸⁰

The maxim *nemo iudex in causa sua* encapsulates the second principle of natural justice: not only should the affected party be given notice and an opportunity to be heard, but the tribunal should also be disinterested and impartial. As it applies to courts of law the principle of public policy is that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹⁸¹ If confidence is to be maintained in the administration of justice it is clear enough that a judge should not be a party or have any pecuniary interest in the outcome of the case. In the context of administrative law and enforcement, however, the "rule against bias" cannot be applied in its purest and undiluted form. Obviously in a judicial-type determination the adjudicator should neither have a direct personal or pecuniary interest nor be overtly partisan from the start. But where—perfectly properly—a regulatory authority is

179. SCHWARTZ, *supra* note 1, at 80.

180. C.J. HAMSON, EXECUTIVE DISCRETION AND THE RULE OF LAW 210 (1954).

181. *The King v. Sussex Justices, ex parte McCarthy*, [1924] 1 K.B. 256, 259 (Hewart, C.J.).

empowered by statute to take an administrative decision, and before doing so must hear representations from affected parties, it can hardly be expected to have the total detachment of a neutral judge. Similarly the judgment of a minister considering objections in a planning case will naturally be disposed in favour of the overall policy objectives which he is charged with implementing. Contrary to the received wisdom, there is thus nothing intrinsically repugnant to English law in the notion that one and the same body should propose and dispose. Attempts to represent departmental policy decisions as objectionable on grounds of natural justice have invariably failed before the courts. Generally, however, unless the statute expressly so provides, English law looks with disfavour on the same *person*—as opposed to the same body—acting as prosecutor and adjudicator even if he has no direct financial interest. There are many situations, however, in which the problem could arise and perhaps the fundamental principle is that there must not be a “real likelihood” of bias on the part of the adjudicator.¹⁸²

To return to the U.S. model, the Federal Trade Commission is the classic example of a regulatory agency exercising a dual supervisory and adjudicatory function in the economic sphere. The FTC Act directs the FTC in general terms to enforce a policy aimed at preventing unfair methods of competition, but it is for the Commission to develop that policy in individual cases and determine whether particular conduct fails under the prohibition.¹⁸³ The agency itself has the power to initiate proceedings which may lead to an adjudication. It then affords the defendant a hearing and decides whether a violation has been made out.¹⁸⁴

Before unfavourable comparisons are made with the pure judicial process, it is essential to remember that a regulatory agency in the United States is not expected to be in the position of a neutral judge. Any decision it may take in an individual case will be influenced by the need to ensure the application of the broad policy for which it stands. The adjudication

182. See generally DE SMITH, *supra* note 23, at 215-45; WADE, *supra* note 22, at 483.

183. 15 U.S.C. § 45 (1988); see SCHWARTZ, *supra* note 1, at 88.

184. See ROBERT EUGENE CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 700 (1941).

may well involve the determination of disputed questions of fact and law, but the deciding body is expected, and indeed required, to enforce its overall policy objectives through individual cases. In the context of administrative enforcement there can be little objection to what has been called "departmental" or "proper" bias. The combination of roles of "judge" and "prosecutor" is thus "a significant feature of American administrative justice, and one which sharply differentiates it from judicial justice."¹⁸⁵

In the United States "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process."¹⁸⁶ It is common practice for modern administrative agencies to exercise a combined function. Those agency employees who are engaged in adjudication are presumed to be impartial. The law has, however, identified various situations in which the probability of actual bias on the part of the adjudicator is too high to be constitutionally acceptable.¹⁸⁷ These would include cases where the adjudicator has a pecuniary interest in the outcome, where there is a history of personal animosity between adjudicator and party, or where an adjudicator has previously acted as counsel in the same case. But as the Supreme Court observed in the leading case of *Withrow v. Larkin*:

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guaran-

185. See SCHWARTZ, *supra* note 1, at 93. The combination of functions in one agency attracted much the same sort of "broadside condemnations" in the United States in the 1930s as the EEC Commission's does today. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 185 (2d ed. 1975) (dismissing critics as representing "the most naive view").

186. *Withrow v. Larkin*, 421 U.S. 35, 52 (1975) (quoting 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 13.02, at 175 (1958)).

187. *Withrow*, 421 U.S. at 47.

tee of due process is to be adequately implemented.¹⁸⁸

Nor is it a due process violation for the same agency both to make the initial finding of "probable cause" in order to bring proceedings and later to adjudicate upon the final decision.¹⁸⁹ The U.S. case law therefore would seem to provide no support for those who argue that once the EEC Commission has decided to open an investigation, the Commission and its staff are almost by definition disqualified from exercising their functions objectively.

The Supreme Court in *Withrow* was concerned with the combination of functions in the same agency, and did not need to decide whether inside the agency the same *official* may exercise both prosecutorial and judicial functions. The issue is one which has long bothered U.S. administrative lawyers. There was a feeling among some jurists and experts that to ensure a critical detachment in the adjudicator he should be separated from the hurly-burly of the investigative and prosecuting process.¹⁹⁰ The combination in one person of these functions, however, does not by itself involve a denial of constitutional due process. In *Marcello v. Bonds*,¹⁹¹ the Supreme Court rejected the contention that a deportation order was invalid because the immigration officer who decided was the subordinate of the officials charged with investigation and prosecution.¹⁹² In the Supreme Court's view, it was for Congress to decide whether concentration of functions was undesirable; the courts

188. *Id.*; see *Federal Trade Comm'n v. AMREP Corp.*, 705 F. Supp. 119 (S.D.N.Y. 1988).

189. *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 700-03 (1948).

190. *E.g.*, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT TO THE CONGRESS ON LEGAL SERVICES AND PROCEDURE (1955); FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE, *supra* note 37, at 55-60; GOVERNMENT OF THE UNITED STATES, REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 36-37 (1937); see *In re Larsen*, 86 A.2d 430 (N.J. Super. Ct. App. Div. 1952).

191. 349 U.S. 302 (1955).

192. *Id.* at 314; see *Levers v. Berkshire*, 159 F.2d 689 (10th Cir. 1947); see also *Wong Yang Song v. McGrath*, 339 U.S. 33 (1950) (holding that Administrative Procedure Act applies to deportation proceedings). These proceedings were subsequently exempted by act of Congress from the APA separation of function requirements. See Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 1952 (codified at scattered sections of 8 U.S.C. (1988)). In *Marcello*, the Supreme Court ruled that the 1952 Immigration Act had superseded the APA. *Marcello*, 349 U.S. 302.

themselves could not strike down the procedure as unconstitutional.

Examples can be found in the U.S. system of both full combination and almost complete separation of functions.¹⁹³ Clearly a "fair trial in a fair tribunal is a basic requirement of due process,"¹⁹⁴ and this principle applies to administrative agencies as well as to courts.¹⁹⁵ The legislature has however found no single answer to the problem of the extent to which different administrative functions should be performed by the same persons.

The federal Administrative Procedure Act is perhaps the best-known legislative attempt to insulate the adjudicatory function from functions considered to be incompatible with it, such as investigation and prosecution. The Attorney General's Committee on Administrative Procedure in 1941 had recommended against a complete separation of functions, the proposal originally made by the President's Committee on Administrative Management in 1937. It suggested instead a solution that would leave the prosecution and adjudication functions inside the same agency, while at the same time ensuring that they were carried out by different persons. The principal reform of the APA was the extension of the "Examiner" system to all agency adjudication. The function of the Examiner was two-fold: to conduct hearings and to make "initial" or "recommended" decisions. The Examiner, now called the Administrative Law Judge,¹⁹⁶ was to be insulated as far as possible from the agency's investigation and prosecuting functions. Officials who conducted investigations and prosecutions were also to be separated from the decision making process.¹⁹⁷ But the Examiner, though playing a crucial role, is still in a subordinate position: unlike a trial judge, he does not have the power of final

193. *Withrow v. Larkin*, 421 U.S. 35, 51-52 (1974). The APA provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function except as witness or counsel in public proceedings, but this prohibition expressly does not apply to the agency or a member of the body comprising the agency. 5 U.S.C. § 554(d) (1988). Agency heads may thus initiate and supervise the investigations and take the final decision.

194. *In re Murchison*, 349 U.S. 133, 136 (1955).

195. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

196. 37 Fed. Reg. 16,787 (1972). The change in title was confirmed by an act of Congress in 1978.

197. 5 U.S.C. § 554(d) (1988).

decision. His function is to make provisional decisions or recommendations, but the agency if it wishes has the final say on the facts and the law.¹⁹⁸

The EEC Commission is in a position comparable with the typical U.S. regulatory agency. As the body charged by the Treaty to be the watchdog of competition, the Commission has the combined function of instigating proceedings, investigating, prosecuting, hearing and deciding. The Commission's judgment in a particular case will no doubt be affected by its overall policy objectives in competition matters. As an institutional body, however, the Commission's structure is such that many "checks and balances" are built in. While the day-to-day conduct from the investigation to the drafting of a final decision will normally be in the hands of the same official (the "Rapporteur"), as the procedure unfolds the Rapporteur is subject to hierarchic control. At each major stage, the Commission's legal service has to be consulted. The involvement of the Member States in the Advisory Committee and at other stages provides another check on the untrammelled exercise of individual judgment. Finally, the ultimate decision in each case is one for the full Commission, not just the Commissioner responsible for Competition Policy.

XI. *THE INSTITUTIONAL DECISION*

It would be wishful thinking to believe that in an EEC competition case all seventeen Commissioners could immerse themselves in the detailed arguments. They are not judges in a court of law. Administrative agencies exercising any adjudicative function always have to delegate the major part of the fact-finding and decision-making process to their officials. The particular problem posed by delegation in the context of the Commission's antitrust enforcement jurisdiction concerns the meaningful exercise of the right to be heard. The Commissioners who adopt the final decision do not personally hear the evidence, read the submissions or address themselves to all the issues of fact or law. Nor of course do they write their own opinions.

In the *Quinine*¹⁹⁹ case it was argued by one applicant that

198. *Id.* § 557(b); DAVIS, *supra* note 185, at 209-10.

199. *Quinine*, Case 41/69, [1970] E.C.R. 661, 671-72, 689, [1967-1970 Trans-

the absence from the hearing of the Members of the Commission who decided on the fine vitiated the decision. Recalling that the procedure is administrative in nature, the Court held that there was no legal requirement for the Commissioners to hear the applicants personally. It was sufficient if each Member of the Commission was completely informed as to the essential points of the case.

In a judicial dispute, the losing side has at least the consolation of knowing that it has had its day in court. In the common law countries, where the oral tradition is strongly developed, evidence is heard in open court and at first instance the case is invariably decided by a single judge. The personal element in the decision making-process is prominent. Institutional decisions are more anonymous. The individual affected may be granted a hearing, but seldom does this take place before the agency head in whose name the final decision is adopted. Once the hearing has been held, the later stages in the decision-making process are all a matter of internal administration. Those adversely affected may be forgiven for sometimes having the feeling that whatever opportunity they may have to put up their arguments before a subordinate official, the real decision has been taken somewhere else. The problem is inescapable given the complex nature of the "institutional" decision. It may be very difficult to pin down the specific individual on whom the whole decision turns. Indeed there may well be no such single person. In the case of the Commission, the decision emerges only after a complicated internal process. The work is very much a team effort. Even if the firms affected did have the opportunity to address the full Commission, it would serve little purpose because the Commissioners themselves will have no knowledge of the details.

Of course in the case of the Commission's antitrust procedure, the "institutional" process is not totally anonymous. The identity of the Rapporteur handling each case is known. The Commission is concerned, however, not to over-personal-

fer Binder] Common Mkt. Rep. (CCH) ¶ 8083, at 8183-84; see *Boehringer Mannheim, GmbH v. Commission*, Case 45/69, [1970] E.C.R. 769, 777-78, 798-99, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8085, at 8244, 8247-48; SCHWARTZ, *supra* note 1, at 137-41 (discussing problem of "institutional decision"); see also BENJAMIN, *supra* note 123; 2 DAVIS, *ADMINISTRATIVE LAW*, *supra* note 186, at 230.

ize the debate, and it is always made clear to firms and their lawyers that the Rapporteur is only one of many officials through whose hands the case will pass before a final decision emerges.

How does the Commission's procedure deal with the "hearing" problem? Until 1982, the oral hearing was almost invariably chaired by the Director responsible. This procedure had a distinct advantage for defense lawyers: if responsibility for the overall conduct of an individual case could be pinned on any single person, it was on the Director. There were however many calls—particularly from common lawyers and industry groups—for the oral hearings to be conducted by an "independent person": the rhetoric had it that the Commission was policeman, prosecutor, judge, jury and executioner rolled into one.²⁰⁰

Largely as a result of these criticisms, the post of Hearing Officer was created in 1982.²⁰¹ Those who believed that he would act as a judge, however, were disappointed. The principal function of the Hearing Officer is to conduct the oral hearing and to ensure that the rights of defense are respected, but he does not decide on factual or legal issues and—unlike the U.S. administrative law judge—cannot give even a preliminary opinion or recommendation on the merits.

It would have been churlish for the advocates of reform not to have welcomed the new institution of the Hearing Officer. But some doubting voices have been raised. Thus one British practitioner, having first drawn attention to the possible delays in the procedure caused by the introduction of this new "tier" of administration, warned:

Perhaps as an advocate one takes an old-fashioned view, but it is often an advantage to be talking to the man who is actually going to decide the case. In the days before the hearing officer was introduced, the man who ran the hearing was the Director of the relevant Directorate, who had an important, although not a decisive, role in the Commission decision making procedure—ultimately the decision is that of the Commission itself, who [sic] one never addresses—but the Director of the relevant Directorate was the nearest one got

200. *See supra* note 109.

201. O.J. C 251/2 (1982). The "terms of reference" of the Hearing Officer are set out in COMMISSION THIRTEENTH REPORT ON COMPETITION POLICY 273 (1983).

to the decision maker. It may not be so satisfactory to be addressing the hearing officer, someone who is no longer directly charged with taking the decision in the case.²⁰²

This statement echoes the view of a U.S. commentator expressed in 1939: "You must satisfy that requirement of the individual who comes before an administrative tribunal, that feeling that he wants to talk to the man who is going to decide that case."²⁰³

Attempts to ensure greater "transparency" in the institutional decision-making process face a dilemma. On the one hand, the individual wants the assurance that the decision will be taken not via some arcane and anonymous process but by a known and identified individual; on the other, it is clearly impractical to expect the head of the agency to which the legislation has given the power of decision to deal with the case himself. The root of the problem is the splitting inside the agency structure of the hearing and the deciding function.

English courts have never had any difficulty with the hearing-deciding dichotomy in government departments. In *Local Government Board v. Arlidge*,²⁰⁴ the House of Lords held that there was no entitlement to a personal decision by the agency head or to an appearance before the officer who made the decision. With few exceptions, where a statute calls for "the Minister" to decide, the decision may be taken by a subordinate official in his name.²⁰⁵ This deciding officer has to address his mind to the evidence and to consider the issues, but he does not personally have to hear any oral evidence or submissions.²⁰⁶ It is thus quite normal for one person to hear and another to decide.

The U.S. courts, however, have viewed the institutional decision process with some unease. In *Morgan v. United States ("Morgan I")*,²⁰⁷ the Supreme Court was concerned with the

202. Panel Discussion, *supra* note 121, at 615.

203. Symposium, *Administrative Law*, 9 AM. L. SCH. REV. 139, 182 (1939) (remarks of Professor Landis).

204. 1915 App. Cas. 120.

205. *Carltona, Ltd. v. Commissioners of Works*, [1943] 2 All E.R. 560, 563 (C.A.).

206. *Arlidge*, 1915 App. Cas. 120; *see* *Jeffs v. New Zealand Dairy Prod. & Marketing Bd.*, [1967] 1 App. Cas. 551 (P.C.).

207. 298 U.S. 468 (1936).

power of the Secretary of Agriculture to fix maximum rates for buying and selling livestock at the Kansas City stockyards. The enabling statute required this power to be exercised after a "full hearing." Not unnaturally, the Secretary who took responsibility for the decision did not conduct the hearing or hear oral argument from the parties. It was alleged by the plaintiff that his sole information had come from consultation with department officials out of the presence of themselves or their representatives. It was claimed that he had effectively rubber-stamped a decision really taken by subordinate officials.

The Supreme Court held that such a procedure would not constitute a "full hearing" as required by the statute:

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. . . . The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts. . . . If the one who determines the facts which underly the order has not considered evidence or argument, it is manifest that the hearing has not been given.²⁰⁸

Chief Justice Hughes rejected the view that the authority was given to the Department as a whole so that one official might examine the evidence while another who had not done so might make the order. The duty of decision was imposed on the Secretary alone and had to be exercised personally: "That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear."²⁰⁹

Taken literally as a statement of the rule this maxim would paralyse the administrative decision-making process.²¹⁰ The Supreme Court itself in *Morgan I* went on to make the very important qualification that while the Secretary had to take the decision personally, evidence may be taken by an examiner and "sifted and analyzed by competent subordinates."²¹¹ There

208. *Id.* at 480-81.

209. *Id.* at 481.

210. See SCHWARTZ, *supra* note 1, at 143-44.

211. *Morgan I*, 298 U.S. at 481.

had to be, however, a "hearing" in the sense that the Secretary who makes the decision has himself to consider and appraise the evidence which justifies his determination.

In later cases, the courts were obliged to reiterate that while the agency head had to take the decision personally, he did not have to hear the evidence himself or see the witnesses.²¹² At some stage, however, he did have to address his own mind to the evidence and argument, and make the decision himself. The responsibility for making the ultimate decision cannot be delegated. As Professor Schwartz observed: "The rule of the *Morgan* case is thus in reality (less elegant although it may sound than the actual statement by Chief Justice Hughes): *The one who decides must decide.*"²¹³

The Supreme Court's decision in *Morgan I* "may well have been tilting a quixotic lance against the institutional administrative decision."²¹⁴ The only way for an aggrieved individual to find out whether or not the agency head in reality gave the case his personal attention is to have him cross-examined in court. In a later *Morgan* case, this procedure had been followed but the Supreme Court held that it had been improper for the Secretary to be interrogated in this manner: "Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected."²¹⁵

The long-running *Morgan* saga was not however without actual effects. In its aftermath Congress dealt with the hearing-deciding dichotomy by enhancing the role of the examiner. Taking literally—but turning around—the maxim of Chief Justice Hughes, the legislature provided that the one who hears should also decide, or at least make a preliminary recommendation. Under the Administrative Procedure Act a corps of Hearing Examiners was set up within each agency but outside its direct control as to remuneration, promotion and tenure. This control was vested in the Civil Service Commission. The

212. *Morgan v. United States*, 304 U.S. 1 (1938); see *Southern Garment Mfrs. Ass'n v. Fleming*, 122 F.2d 622, 626 (D.C. Cir. 1941) (explaining that in *Morgan*, "hear" had been used "in the artistic sense of requiring certain procedural minima to ensure an informed judgment by the one who has the responsibility of making the final decision and order. That did not necessitate the Secretary becoming a presiding officer at the hearing in the *Morgan* litigation . . .").

213. SCHWARTZ, *supra* note 1, at 143.

214. *Id.* at 145.

215. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (citations omitted).

Hearing Examiners thus occupied a sort of semi-detached position in the agency.²¹⁶

The Hearing Examiners were not only empowered to conduct the hearing, but were also given certain decision-making powers, although they were always subject to review or appeal by the agency. In most cases the presiding administrative law judge takes an initial decision which, unless it is reviewed, becomes the decision of the agency without further proceedings. In specific cases, the agency may, however, reserve the initial decision to itself. In such cases the administrative law judge has to make a recommendation.²¹⁷

XII. HEARING OFFICER'S REPORTS

Under the U.S. Administrative Procedure Act, all decisions, including initial, recommended, and tentative decisions of the hearing examiner, are made a part of the record and are served on the parties so that they may take exceptions or submit their observations.²¹⁸ But even earlier, when there was no general statutory provision for disclosure, the common practice was for Examiners' reports to be submitted to the parties.²¹⁹ U.S. administrative lawyers find fundamentally repugnant the idea of a final decision based upon a secret report. Due process requires that the decision be based only on evidence given in evidence and noticed on the record; whatever plays a part in the final decision should thus be made known to the parties. The opinion of Chief Justice Vanderbilt in the state administrative law case of *Mazza v. Cavicchia*²²⁰ is the *locus classicus*:

Where, as here, the final decision is rendered by one who did not hear the evidence but relies, in part at least, upon the findings and report of the hearing officer, there is an obvious danger that the decision may be based on findings set forth in the hearer's report that are not supported by the evidence. To guard against this danger and to accord the appellants the fair play to which he is entitled it is essential

216. *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 132 (1953).

217. 5 U.S.C. § 557(b) (1988).

218. *Id.* § 557(c).

219. SCHWARTZ, *supra* note 1, at 155-56.

220. 105 A.2d 545 (N.J. 1954).

that prior to its submission to the deciding officer the hearer's report be made available to the parties and that they then be given an opportunity to correct any mistakes that may appear in the report. This simple requirement, while imposing no hardship on the agency, does protect the individual against the strong possibility of a miscarriage of justice or the suspicion thereof.²²¹

English law also leans against the deciding body acting blatantly upon *ex parte* evidence,²²² but the principle of "exclusiveness of the record" is not so firmly established in England as it is in the United States. In limited circumstances, it may be legitimate on grounds of public policy for a deciding body to withhold detailed evidence provided that the party affected is not thereby denied a fair hearing.²²³ The case law specifically on disclosure of inspectors' reports arises mainly from Ministerial decisions in planning cases after a public local enquiry rather than from more "judicial" type proceedings.²²⁴ In *Arlidge*,²²⁵ the House of Lords held that a house owner affected by the Local Government Board's confirmation of a closure order had no common law right to disclosure of the report of their inspector. The House of Lords seems to have equated the Inspectors' Report with internal departmental communications. The English courts were perhaps more ready then than they are today to accede to the argument that

221. *Id.* at 559.

222. See, e.g., *Rex v. Justices of Bodmin, ex parte McEwen*, 1947 K.B. 321 (1946); *The King v. Westminster Assessment Comm., ex parte Grosvenor House (Park Lane), Ltd.*, [1941] 1 K.B. 53; *Errington v. Minister of Health*, [1935] 1 K.B. 249 (1934); *Board of Educ. v. Rice*, 1911 App. Cas. 179.

223. See *Regina v. Gaming Bd. for Great Britain, ex parte Benaim and Khaida*, [1970] 2 Q.B. 417, 431; *Collymore v. Attorney-General*, 1970 App. Cas. 538, 549 (P.C. 1969) (appeal taken from Trin. & Tobago).

224. In such cases the courts considered that both the inspector at the enquiry and the Minister deciding whether to confirm the order were performing a "quasi judicial" function and were thus subject to the rules of natural justice. This "quasi judicial" duty only arose, however, once issue was joined (the concept of the *lis*). The Minister was treated in this case as the arbiter between two opposing parties. Where however the Minister originated the plan himself there was no *lis* and it was held that he had no common law duty to hear at all but only a duty to follow the statutory procedure. *Franklin v. Minister of Town & Country Planning*, 1948 App. Cas. 87, 102 (P.C. 1947). Later the courts went even further and held that as the Minister was acting in an "administrative" capacity he had no duty to hear even if no statutory procedure were laid down. *Id.*

225. 1915 App. Cas. 120, 151 (P.C. 1914).

disclosure of material prepared or obtained by government departments would discourage "frankness" in the drawing up of official reports, and thus hinder the administrative process.²²⁶ The position on disclosure of reports in such cases has to some extent been alleviated by statutory rules, but even now the inspectors' report does not need to be disclosed until after the announcement of the Minister's decision. The Minister is not bound by the inspector's recommendations but if he is minded to disagree with them on a finding of fact, then normally he must notify the main parties and give them an opportunity to make further representations in writing.²²⁷

In the European Commission's procedures, the Hearing Officer is required to submit a report after the oral hearing to the Director General or to the Commissioner for competition.²²⁸ The Commission considers this report to be a confidential internal document. Regulation No. 96/63 is entirely silent on the matter. Ought it nevertheless be disclosed to the parties? The Court of Justice has said no. In *Polypropylene*,²²⁹ one of the firms requested in a special application that the Court order the production of the Hearing Officer's Report. The basis for the request was an assertion that evidence which had "impressed" the Hearing Officer had been treated "in a derisory way" in the published decision. General allegations of bias were also made. The Court summarily rejected the application, remarking simply that as the Commission was in no way bound to follow the Hearing Officer's report it did not constitute a "decisive factor" for the purposes of judicial review.²³⁰

At first blush it might seem that European and U.S. views on this matter are diametrically opposed but the conflict is more apparent than real. The crucial point is the different role and function of the Hearing Officer. Administrative law judges in the United States play a key—if subordinate—role in the de-

226. See DE SMITH, *supra* note 23, at 166.

227. *E.g.*, Town and Country Planning (Inquiries Procedure) Rules, S.E. 1988, No. 944.

228. Notice on procedures for applying the competition rules of the EEC and the ECSC Treaties, O.J. C 251/2 (1982).

229. O.J. L 230/1 (1986).

230. *Imperial Chem. Indus. PLC v. Commission*, Case 212/86, — E.C.R. —, [1987] 2 C.M.L.R. 500, 502.

cision-making process, and unless reviewed by the agency their initial decisions stand. The reasoning in *Mazza* was based primarily on the rule against ex parte evidence:

“[W]hatever actually plays a part in the decision should be known to the parties, and subject to being controverted.” The hearer’s report obviously played a part in the decision in this case. For it to have played such a part without having been shown to the appellant clearly violates his right to have the decision based exclusively upon matters in the record, which are known to him and can consequently be controverted by him.²³¹

The Examiner’s report in *Mazza* contained a digest of the evidence with his findings of fact and law and his recommendations on the merits of the case. Chief Justice Vanderbilt went so far as to liken him to “a ‘witness’ giving his evidence to the judge behind the back of the appellant, who has no way of knowing what has been reported to the judge.”²³²

On the other hand, given the very different role of the Hearing Officer in the Commission’s procedure, his report is in the same category as internal staff consultations and preliminary drafts which nobody would expect to be produced except in the most exceptional circumstances. Such advice is not to be equated with evidence or opinion received from outside sources.²³³ As far as the Court of Justice is concerned, the need for the responsible decision makers to rely on staff assistance in order to apprise them of the relevant issues and evidence puts their “work product” beyond the purview of judicial scrutiny.

XIII. LIMITS TO THE RIGHT TO A HEARING

Although *audi alteram partem* is deeply entrenched in the Community law concept of fair procedure, not every administrative decision has to be preceded by a hearing.

231. *Mazza v. Cavicchia*, 105 A.2d 545, 555 (N.J. 1954) (citations omitted).

232. *Id.*

233. *Id.* at 560; *cf.* *Bushell v. Secretary of State for the Env’t*, 1981 App. Cas. 75, 95-96 (1979) (Lord Diplock) (pointing out that internal consultations by Minister are “integral part” of decision-making process and are not to be “equiparated” with Minister receiving advice or evidence from outside source once local inquiry has been closed).

In *National Panasonic (UK) Ltd. v. Commission*²³⁴ the Commission had carried out an on-the-spot investigation under Article 14(3) of Regulation No. 17. In line with normal practice the undertaking was not forewarned of the investigation and the decision was handed over by the inspectors immediately before the investigation commenced. National Panasonic appealed the decision. One of the main planks of its submissions was the alleged breach of fundamental rights. Panasonic argued that the decision imposed "considerable obligations having far-reaching effects": it gave officials wide powers of investigation and exposed the undertaking to financial penalties if it did not comply. According to Panasonic the undertaking was entitled, pursuant to the *audi alteram partem* principle, to prior notice both of the Commission's intention to adopt the decision and of the date it proposed to carry out the investigation.

The Court of Justice looked to the scheme and the purpose of the Regulation and rejected the argument:

[T]he aim of the powers given to the Commission by Article 14 of [Regulation No. 17] is to enable it to carry out its duty under the EEC Treaty of ensuring that the rules on competition are applied in the common market. The function of these rules is . . . to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. . . . [I]t does not therefore appear that Regulation No 17, by giving the Commission the powers to carry out investigations without previous notification, infringes the right invoked by the applicant.²³⁵

In such circumstances the grant of a prior hearing would entirely frustrate the effective exercise of powers given to the Commission by the Regulation. More particularly, the Court held that the right of an undertaking to be heard before a decision was adopted regarding it under EEC competition law "is chiefly incorporated in legal or administrative procedures for the termination of an infringement or for a declaration that an agreement, decision or concerted practice is incompatible with Article 85, such as the procedures referred to by Regulation No. 99/63/EEC."²³⁶ A decision ordering an investigation

234. Case 136/79, [1980] E.C.R. 2033, [1980] 3 C.M.L.R. 169.

235. *Id.* at 2057, [1980] 3 C.M.L.R. at 187.

236. *Id.* at 2058, [1980] 3 C.M.L.R. at 187.

under Article 14(3) was not aimed, however, at terminating an infringement or declaring an agreement incompatible with Article 85; its sole objective was to enable the Commission to “gather the necessary information to check the actual existence and scope of a given factual and legal situation.”²³⁷ It was precisely this substantive difference between the decisions taken at the end of a procedure and decisions ordering an investigation which explained the exclusion from the list in Article 19(1) of Regulation No. 17 of decisions which required a prior hearing.

The Court’s rejection of a “right to be heard” at the investigative stage does not of course mean that the Commission is exempt from judicial control; indeed by Article 14(3) the decision has to draw attention to the right to review by the Court. The *Panasonic* decision—based on an examination of the scheme of the Regulation and a strong dose of common sense—has been criticised for implying that on an inspection “defence rights” do not have to be observed.²³⁸ With respect, such criticism misinterprets the Court’s ruling. The judgment was referring only to the alleged right to be heard, not to defence rights in general. Quite clearly the investigation procedure is subject to numerous safeguards. English courts have adopted the same flexible approach in holding that exactly what safeguards are required in a given case depends on the scheme and purpose of the act and the nature of the procedure under review.

The rigid conceptual distinction between administrative and judicial acts has now been abandoned. Procedural rights are now determined on a sort of sliding scale: where a decision only relates to a preliminary matter and is not a final adjudication, it is unlikely that a full duty to hear will be implied at that stage.

In *Norwest Holst Ltd. v. Department of Trade*²³⁹ the subject of a Companies Act investigation claimed that natural justice required that it should have been heard by the Secretary of State before he appointed inspectors to investigate its affairs. The case is on all fours with *National Panasonic*. Both Lord Justice

237. *Id.*

238. Valentine Korah, *ECJ Judgments: National Panasonic v. Commission*, 1980 EUR. COMPETITION L. REV. 234, 237.

239. [1978] 3 All E.R. 280 (C.A.)

Geoffrey Lane and Lord Justice Ormrod pointed out that natural justice and the principle *audi alteram partem* were not synonymous because there are many occasions when fairness does not demand that the other side be heard.²⁴⁰ As Lord Reid had observed in *Wiseman v. Borneman*:

Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.²⁴¹

Norwest Holst and its officers would have the opportunity to answer any allegations and make submissions during the course of the Companies Act enquiry itself. At the preliminary stage of deciding to appoint inspectors, the ordinary principles of justice imposed no duty on the Secretary of State to hear the company: "It seems to me quite plain that the first moment at which it can be said natural justice demands that the suspect be given an opportunity to state his case is at the beginning or during the inquiry by the two inspectors appointed under s 165(b)."²⁴²

This does not however mean that the Secretary of State can exercise his power to order an inspection arbitrarily; it is plain that any discretion has to be exercised *bona fide*. If the Secretary of State were shown to have acted in bad faith or other than honestly his actions could be declared unlawful by the Court.²⁴³

The shift in emphasis in modern English administrative law from the concept of "natural justice"—ineluctably linked with the *audi alteram partem* rule—to the more flexible notion of "acting fairly" no doubt makes it easier to depart from any fixed idea that a hearing is always required. The value of the

240. *Id.* at 294-97.

241. *Wiseman v. Borneman*, 1971 App. Cas. 297, 308 (1969); see *Regina v. Leicester Crown Court, ex parte Director of Pub. Prosecutions*, [1987] 1 W.L.R. 1371, 1374 (Q.B.).

242. *Norwest Holst Ltd. v. Dep't of Trade*, [1978] 3 All E.R. 280, 296 (C.A.) (Lord Justice Lane).

243. *Regina v. Secretary of State for Trade, ex parte Perestrello*, [1980] 3 All E.R. 28, 38 (Q.B. 1979).

more pragmatic "fairness" test lies in underlining that justice does not mean forcing the deciding body into a procedural straitjacket.

Generally speaking, where an act is only the first step in a procedure which may ultimately result in an adverse decision, the English courts will not imply any right to be heard at this first stage, if there is provision for a hearing before the final decision.²⁴⁴ Similarly, in the United States, due process is afforded if the parties have an opportunity to be heard at some stage before the final judgment or adjudication; the exact time is not material so far as due process is concerned.²⁴⁵ The judgment in *Panasonic* is wholly in line with this principle.

The same principle was applied by the Court of Justice more recently in relation to the imposition of periodic penalty payments under Article 16 of Regulation No. 17. The Regulation might seem on a literal reading to require a defaulting undertaking to be "heard" at least twice: once before the first decision which starts the daily penalties running, and then again before the final decision is adopted crystallising the total amount. In *Hoechst AG v. Commission*²⁴⁶ the Court held that a hearing was only required before the second decision: to impose a hearing (and also a consultation of the Advisory Committee) before the first decision would unduly delay the adoption of the decision, and thus have the opposite effect of what was intended by the Regulation.

XIV. REASONS FOR DECISIONS

Although by definition the decision is only adopted at the conclusion of the hearing process, the right to know the reasons for an adverse decision seems a fairly obvious corollary of the right to be heard. Not only does it enable the affected party to know whether or not to challenge the decision; it also

244. See, e.g., *Norwest Holst*, [1978] 3 All E.R. at 296; *Howard v. Borneman*, 1975 Ch. 201, 1974 All E.R. 862 (C.A.). See generally (I)1 HALSBURY'S LAWS OF ENGLAND: ADMINISTRATIVE LAW, para. 94 (4th ed. 1989).

245. See *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-600 (1950); *Consolidated Rendering Co. v. Vermont*, 207 U.S. 541, 551 (1908); *In re Mayberry*, 3 N.E.2d 248 (Mass. 1936); *Industrial Comm'n of Ohio v. Hilshorst*, 158 N.E. 748, 751 (Ohio 1927).

246. *Joined Cases 46/87 & 227/88*, [1989] E.C.R. 2859, [1991] 4 C.M.L.R. 410.

ensures that the deciding authority properly directs its attention to the pertinent issues.

The requirement to give a reasoned decision is enshrined in Article 190 of the Treaty and applies to all Commission decisions, not just to those in competition cases. The Commission must set out in its decision "in a concise but clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its Decision may be understood."²⁴⁷

In the very first EEC cartel case, *Quinine*, the Court held that Article 190 was met by the Commission enumerating the facts forming the legal basis of the measure and the considerations which led it to adopt the decision:

With regard more particularly to decisions imposing a fine, the statement of reasons is to be considered sufficient if it indicates clearly and coherently the considerations of fact and of law on the basis of which the fine has been imposed on the parties concerned, in such a way as to acquaint both the latter and the Court with the essential factors of the Commission's reasoning.²⁴⁸

Nor does the Commission have to deal in the decision with every point raised in the administrative procedure provided the reasoning as set out in the decision justifies the conclusion.²⁴⁹

In his opinion in *Hasselblad (GB) Ltd. v. Commission*²⁵⁰ Advocate General Sir Gordon Slynn suggested nevertheless that fairness might require at least the main contentions of the parties to be analysed, and if the Commission rejected them, that it should give brief reasons why.²⁵¹ This approach seems in keeping with the spirit of the hearing process, and the Commission now often does set out the main defence arguments

247. *Germany v. Commission*, Case 24/62, [1963] E.C.R. 63, 69, [1963] C.M.L.R. 347, 367.

248. *Quinine*, Case 41/69, [1970] E.C.R. 661, 690, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8083, at 8195.

249. *VBVB and VBBB v. Commission*, Joined Cases 43 & 63/82, [1984] E.C.R. 19, 58-59, [1985] 1 C.M.L.R. 27, 81; *NV Nederlandsche Banden-Industrie Michelin v. Commission*, Case 322/81, [1983] E.C.R. 3461, 3500, [1985] 1 C.M.L.R. 282, 319.

250. Case 86/82, [1984] E.C.R. 883, [1984] 1 C.M.L.R. 559 (opinion of Advocate General Sir Gordon Slynn, delivered on July 13, 1983).

251. *Id.* at 915, [1984] 1 C.M.L.R. at 568.

and deals with them in its decision.²⁵²

Article 4 of Regulation No. 99/63 relates the decision specifically to the right to be heard: the Commission may in its decision only deal with objections in respect of which the undertakings have had the opportunity of making their observations. "Objections" here seems to mean not only the bare "charge" itself but also the essential elements of fact and law relied upon: in *Quinine* the Court held that Article 4 was met if the decision does not find infringements other than those referred to in the objections and "only takes into consideration facts on which the persons concerned have had the opportunity of making known their views."²⁵³

The Commission is in something of a dilemma. Too laconic a decision will attract defence protests to the effect that the Commission was biased or failed to understand or deal with the "real" issues. The more detail it goes into, however, the more opportunity there will be for its decision to be put under the microscope and subjected to a destructive textual analysis by the defendants. The need for translation into all the Community languages might be thought an incentive to keep decisions succinct. In recent years the Commission's decisions, particularly in complicated cases turning on contested evidence, have tended however to deal with the evidence in considerable detail. With the advent of the new First Instance Court, the Commission probably can afford even less to be economical with its reasons.

It may come as a surprise to those who invoke English legal concepts as a model for the Commission to follow that in England there is no general common law rule requiring reasons to be given for decisions.²⁵⁴ Since even the judges themselves are not obliged to give reasons for their findings (although "in any matter of importance" this practice should be followed)²⁵⁵ still less has this duty been imposed on admin-

252. See *Michelin*, [1983] E.C.R. at 3500, [1985] 1 C.M.L.R. at 319; see also *Polypropylene*, O.J. L. 230/1, at 21-36 (1986).

253. *Quinine*, Case 41/69, [1970] E.C.R. 661, 691, [1967-1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8083, at 8196.

254. See, e.g., *Regina v. Gaming Bd. for Great Britain, ex parte Benaim and Khaida*, [1970] 2 Q.B. 417, 431; *McInnes v. Onslow-Fane*, [1978] 3 All E.R. 211, 219-23 (Ch.).

255. *Capital & Suburban Properties Ltd. v. Swycher*, [1976] Ch. 319, 325-26 (C.A.); *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45, 49 (N.I.R.C.).

istrative bodies. It has however long been recognized that the giving of reasons is an essential aspect of justice being manifestly seen to be done. As regards a large number of statutory tribunals and ministerial decisions, the gap has now been filled by the Tribunals and Inquiries Act and rules made thereunder.

Where there is a duty to give reasons, they have to be intelligible and adequate and deal with the substantial points at issue,²⁵⁶ but they neither have to set out the full reasoning process of the decision maker²⁵⁷ nor record all the evidence given or submissions made.²⁵⁸ The reasons given should enable a potential appellant to make a proper assessment as to whether a decision was one which could be challenged. On the other hand the standard should not be one which is so high as to frustrate or inhibit the decision-making process, and it will differ according to the nature of the decision and the terms of the legislation. The reasoning should enable the parties to know what material issues had influenced the decision and what views had been reached on issues of fact and law.²⁵⁹ Generally a reviewing court in England will not interfere with a decision unless there is something "substantially wrong or inadequate" in the reasons given.²⁶⁰

In the United States on the other hand the requirement for administrative agencies to give a statement of reasons is considered a fundamental principle of administrative law. The

256. *See, e.g.*, *Norwest Holst Ltd. v. Dep't of Trade*, [1978] 3 All E.R. 280, 296; *Howard v. Borneman*, 1975 Ch. 201, 1974 All E.R. 862 (C.A.). *See generally* (I)1 HALSBURY'S LAWS OF ENGLAND: ADMINISTRATIVE LAW, para. 94 (4th ed. 1989).

257. *Regina v. Secretary of State for the Home Dep't, ex parte Swati*, [1986] 1 All E.R. 717 (C.A.); *Greater London Council v. Secretary of State for the Env't*, [1985] 52 P. & C.R. 158 (C.A.); *Metropolitan Property Holdings Ltd. v. Laufer*, [1975] 29 P. & C.R. 172 (Q.B.).

258. *Elliott v. Southwark London Borough Council*, [1976] 1 W.L.R. 499, 508 (C.A.). However, where the reason given will not be intelligible without a statement of facts this should be given. *Hope v. Secretary of State for the Env't*, [1975] 31 P. & C.R. 120 (Q.B.).

259. *Save Britain's Heritage v. Secretary of State for the Env't*, [1990] 60 P. & C.R. 539 (C.A.).

260. *Westminster City Council v. Great Portland Estates, Plc.*, [1985] 1 App. Cas. 661 (1984) (Lord Scarman). It has to be remembered that in fining cases the European Court (now the Court of First Instance) is not limited to a review of the legality of the Commission's decision: it also can re-examine the merits. In the Court's treatment of cases the scope of review and appeal may overlap. Even if a decision passes the formal "adequacy of reasoning" test of legality it may still be subject to a factual reassessment by the Court.

obligation to give reasons is seen as a substantial check on the abuse of power.²⁶¹ The APA requires all decisions to include a statement of findings, with the "reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."²⁶²

The legislative policy behind the requirements of the APA has been identified as involving at least four intertwining strands: (1) to prevent arbitrary and capricious decisions; (2) as an explanation to the parties involved of the basis of the decision; (3) to give guidance to similarly situated parties; and (4) to provide the basis for judicial review by the courts.²⁶³

In complex administrative cases, elaborate opinions may be written, very similar in nature to the judgments of the higher courts of law in the common law countries. Dissenting opinions are also permitted where the decision is referred by the members of the agency.

One state court has set out, in relation to a state law requirement similar to the APA, the characteristics of an "ideal" order in cases involving complex issues of fact and legal policy. These characteristics include:

- (1) the agency's basic value judgments [as] dictated by its . . . statutory purposes;
- (2) the random facts which have been presented to the agency . . . [which it considers] relevant to the decision;
- (3) the methodology by which those facts have been evaluated . . . credibility of witnesses, the validity of . . . statistical data, [and] the accuracy of expert predictions . . .
- (4) an integrating theory which organises the random evidentiary facts in an intelligent and comprehensible way; and,
- (5) a conclusion based upon the theory developed, supported by the facts, concerning whether a proposed action is in furtherance of the purposes set forth in the statute, along with an explanation of any change in agency policy from former practice.²⁶⁴

261. SCHWARTZ, *supra* note 1, at 157; *see, e.g.*, *Brooks v. Atomic Energy Comm'n*, 476 F.2d 924, 926-29 (D.C. Cir. 1973).

262. 5 U.S.C. § 557(c)(3)(A) (1988).

263. *Illinois v. United States*, 371 F. Supp. 1136, 1138 (N.D. Ill. 1973). The fourth reason (judicial review) is the one usually emphasized by the courts. *See, e.g.*, *United States v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 294 U.S. 499, 504-05 (1935).

264. *Citizens Bank of Weirton v. West Virginia Bd. of Banking & Fin. Inst.*, 233 S.E.2d 719, 730 (W. Va. 1977).

This list of desiderata provides a useful checklist for any decision by the Commission in contested cases involving complex issues of fact and economic assessment. Any reasoned or articulate decision has not only to recite in the statutory language the bare findings on which the decision is based but has to determine the underlying factual basis from which the ultimate findings can be inferred. In recent cartel cases the Commission has set out at some length the factual evidence and has explained the methodology behind its conclusions on the factual and economic issues.²⁶⁵

CONCLUSION

The claims that the system is inherently unfair need to be treated with a certain healthy scepticism. The author does not intend in any way to play down the vital importance in a procedure such as the Commission's of the principle of a fair hearing. It is contended that the *audi alteram partem* rule is at least as firmly embedded in EEC competition procedures as it is in the administrative law of the main common law jurisdictions. Regulation No. 17 makes express provision for a hearing before the Commission may adopt any one of a whole catalogue of decisions which may affect the interests of an undertaking. When the Regulation is silent the Court of Justice has not been backward in "supplying the omission of the legislature" where injustice might otherwise be caused.

As any practitioner with experience in the field can confirm, the Commission's hearing procedure is anything but summary. Objections are drafted in considerable detail and the Commission is careful to give the fullest notice of its allegations to the affected parties. The undertakings and their legal advisers are given a good deal of latitude as to how they conduct their defence. A judge would probably be far more strict.

At the heart of the criticism of the Commission's procedures are two entrenched fallacies. The first is to regard the Commission as if it were a judicial body and to demand of it the detachment of a neutral judge. This approach misses the point. Administrative justice is a different animal from judicial justice. The essence of a fair administrative procedure lies in

265. See, e.g., Polypropylene, O.J. L 230/1 (1986).

the respect by the deciding body of the *audi alteram partem* rule. Once it is grasped that the Commission is not a court and does not purport to act like one, the mistaken nature of the criticism becomes clearer.

The other misplaced standpoint involves treating the “rights of defence” not so much as a guarantee of fairness for the undertakings but as an obstacle course or trial by ordeal for the Commission. Perhaps—like the pleader in *Norwest Holst*—some critics have allowed themselves to lose sight of the rationale behind *audi alteram partem*. While respect for the basic requirements as laid down in the Regulation is essential, this should not mean that procedural ritual be accorded talismanic status. Ultimately the tendency to dress up procedural quibbles as due process arguments risks bringing the whole concept of a fair hearing into disrepute: in the opinion of the author, the *audi alteram partem* principle is too valuable a safeguard to be trivialised by equating it with the inflexible observance of a formal checklist as an end in itself.