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## The Court of First Instance: The First Three Years

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Marc van der Woude

## **Abstract**

This Article examines the way the CFI has exercised its jurisdiction in the category of cases concerning EC competition matters, from the beginning of its activities until June 30, 1992. The first three sections of this Article are of an institutional nature. They deal respectively with the definition of the CFI's competence, its working methods as specified by its new Rules of Procedure, and its productivity in comparison to that of the Court of Justice. The fourth section gives a survey of some selected issues of its jurisprudence.

# THE COURT OF FIRST INSTANCE: THE FIRST THREE YEARS\*

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## INTRODUCTION

On October 24, 1988, the Council of the European Communities (the "Council") decided to establish a Court of First Instance (the "CFI"),<sup>1</sup> as foreseen by Article 168a of the

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1. Council Decision No. 88/591, O.J. L 319/1 (1988), amended by O.J. C 215/1 (1989) [hereinafter CFI Statute]. For further reading on the Court of First Instance ("CFI"), see TIMOTHY MILLET, *THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES* (1990); R. Joliet & W. Vogel, *Le Tribunal de première instance des Communautés européennes*, 329 *REVUE DU MARCHÉ COMMUN* 423 (1989); Ole Due, *The Court of First Instance*, Y.B. EUR. L. 1 (1988); Jacques Biancarelli, *La création du Tribunal de première instance des Communautés européennes: un luxe ou une nécessité?*, 26 *REVUE TRIMESTRIELLE DE DROIT EUROPÉEN* 1 (1990); K. Lenaerts, *Het Gerecht van eerste aanleg van de EG*, 38 *SOCIAAL ECONOMISCHE WETGEVING* 527 (1990); *LE TRIBUNAL DE PREMIÈRE INSTANCE DES COMMUNAUTÉS EUROPÉENNES* (Spyros Pappas ed. 1990).

Treaty Establishing the European Economic Community (the "EEC Treaty").<sup>2</sup> The Council considered that the establishment of this court would not only improve the judicial protection of individual interests with respect to actions requiring close examination of complex facts, but that it would also alleviate the workload of the European Court of Justice (the "Court of Justice").<sup>3</sup> The Council therefore transferred to the CFI the jurisdiction to hear and determine, at first instance, certain classes of actions which frequently require an examination of complex facts including staff cases, certain coal and steel cases, and actions brought by natural and legal persons in EC competition matters.<sup>4</sup>

This Article examines the way the CFI has exercised its jurisdiction in the category of cases concerning EC competition matters, from the beginning of its activities until June 30, 1992. The first three sections of this Article are of an institutional nature. They deal respectively with the definition of the CFI's competence, its working methods as specified by its new Rules of Procedure, and its productivity in comparison to that of the Court of Justice. The fourth section gives a survey of some selected issues of its jurisprudence. The nature of the CFI's judicial control is the theme of the last section. The final remarks concern the question of whether the CFI's activities have lived up to the Council's expectations. These remarks serve as conclusions of this descriptive, rather than analytical, Article.

## I. COMPETENCE OF THE CFI

According to Article 168a of the EEC Treaty, the Council may give the CFI jurisdiction to decide certain classes of actions or proceedings brought by natural or legal persons, subject to the right of appeal to the Court of Justice on questions

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2. Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 3 (1958), amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [treaty as amended referred to hereinafter as EEC Treaty].

3. CFI Statute, *supra* note 1, O.J. L 319/1, at 1 (1988); see *A European Court of First Instance*, SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, 5TH REP., 1987-88 Sess., H.L. (Eng.) (stating facts and figures of workload reduction).

4. CFI Statute, *supra* note 1, art. 3, O.J. L 319/1, at 2 (1988).

of law alone.<sup>5</sup> On October 24, 1988, the Council specified this jurisdiction.<sup>6</sup> Article 3(1)(c) of Council Decision No. 88/591 (the "CFI Statute") provides that the CFI shall be competent to decide actions brought against an institution of the Communities by natural or legal persons pursuant to Articles 173(2) and 175(3) of the EEC Treaty relating to the implementation of the competition rules applicable to undertakings.<sup>7</sup> The CFI also has jurisdiction to determine actions for compensation for damages caused by a Community institution by an act or by a failure to act which is subject to an action under Articles 173 and 175 of the EEC Treaty.<sup>8</sup>

The Council's definition of the CFI's jurisdiction raises several problems. First, what is meant by "competition rules applicable to undertakings?" Does this mean Articles 85 and 86 of the EEC Treaty only or other rules as well? Second, undertakings may be confused because of the vague definition of the CFI's jurisdiction and file their applications with the wrong court. Do such errors have consequences for the admissibility of applications and, in particular, for the calculation of the time limits of Articles 173(2) and 175(3)? Third, Article 168a of the EEC Treaty specifically rules out the CFI's competence to decide actions brought by Member States or Community institutions and questions referred for a preliminary ruling under Article 177.<sup>9</sup> This means that both the CFI and the Court of Justice can be seised of cases in which the same relief is sought, the same issue of interpretation is raised, or the validity of the same act is called into question, at the same time.

These problems were foreseen by the Council. Article 7 of the CFI Statute inserted certain mechanisms in the Protocol on the Statute of the Court of Justice of the European Economic Community (the "ECJ Protocol").<sup>10</sup> Article 47(1) of the ECJ Protocol ensures that applications lodged with the regis-

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5. EEC Treaty, *supra* note 2, art. 168a.

6. CFI Statute, *supra* note 1, O.J. L 319/1 (1988).

7. *Id.* art. 3(1)(c), O.J. L 319/1, at 2 (1988).

8. *Id.* art. 3(2), O.J. L 319/1, at 2 (1988).

9. EEC Treaty, *supra* note 2, art. 168a.

10. CFI Statute, *supra* note 1, art. 7, O.J. L 319/1, at 4-6 (1988) (amending Protocol on the Statute of the Court of Justice of the European Economic Community [hereinafter ECJ Protocol]).

trar of the wrong court do not lead to admissibility problems.<sup>11</sup> It provides that applications lodged by mistake be automatically transferred from one registrar to the other.<sup>12</sup>

Article 47(2) of the ECJ Protocol concerns the division of jurisdiction between the CFI and the Court of Justice.<sup>13</sup> If one court finds that it is not competent, it shall refer the action to the other court.<sup>14</sup> The Court of Justice, however, has the final say. Once a case has been transferred from the Court of Justice to the CFI, the latter may not decline jurisdiction.<sup>15</sup> It should be noted that this system only deals with negative conflicts of jurisdiction. If the CFI determines that it has jurisdiction and that it will decide the case, the only means to contest its competence is an appeal to the Court of Justice. This appeal need not necessarily be brought against the final judgment of the CFI. Article 114 of the CFI's Rules of Procedure allows parties to apply for a separate decision on the CFI's competence.<sup>16</sup> This decision does not go to the substance of the case and it can be challenged in an appeal before the Court of Justice. During the procedure before the Court of Justice, the CFI may stay its proceedings pursuant to Article 77 of its Rules of Procedure.<sup>17</sup>

The third paragraph of Article 47 of the ECJ Protocol deals with the concurrent jurisdiction of both courts.<sup>18</sup> This situation may occur when a Member State challenges the same decision as an undertaking or when an action before the CFI raises the same issue as a request for a preliminary ruling.<sup>19</sup> In such cases the CFI may, after hearing the parties, stay the pro-

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11. *See id.* art. 7, O.J. L 319/1, at 4-5 (1988) (amending ECJ Protocol, *supra* note 10).

12. *Id.* The system has been applied in staff cases. *See, e.g.*, TAO/AFI v. Commission, Case C-322/91 (pending before the Court of Justice).

13. *See* CFI Statute, *supra* note 1, art. 7, O.J. L 319/1, at 5 (1988) (amending ECJ Protocol, *supra* note 10).

14. *Id.*

15. *Id.*

16. Court of First Instance, Rules of Procedure, art. 114, O.J. L 136/1, at 20 (1991) [hereinafter CFI Rules of Procedure].

17. *Id.* art. 77(b), O.J. L 136/1, at 15 (1991).

18. *See* CFI Statute, *supra* note 1, art. 7, O.J. L 319/1, at 5 (1988) (amending ECJ Protocol, *supra* note 10).

19. Member States may have an interest in challenging decisions addressed to undertakings. *See* Italy v. Commission, Case 41/83, [1985] E.C.R. 873, [1985] 2 C.M.L.R. 368.

ceedings until the Court of Justice has delivered its judgment.<sup>20</sup> Where applications are made for the same act to be declared void, the CFI may also decline jurisdiction in favor of the Court of Justice.<sup>21</sup> Conversely, Article 47(3) of the ECJ Protocol enables the Court of Justice to stay its proceedings; in that event the proceedings before the CFI continue.<sup>22</sup>

The system foreseen by Article 47 of the ECJ Protocol has been applied on three occasions. The first case concerned an application before the Court of Justice lodged by Asia Motor France against the Commission.<sup>23</sup> In that case, the Court of Justice held that the Commission had failed to initiate Article 169 proceedings against France for infringing Article 30.<sup>24</sup> The Court of Justice also stated that the Commission had failed to act under Article 85 against a cartel of French importers of Japanese motor vehicles. In its order of May 23, 1990, the Court of Justice ruled that the first plea was manifestly inadmissible and that the second concerned the implementation of competition rules applicable to undertakings.<sup>25</sup> The case was therefore transferred to the CFI, pursuant to Article 47(2) of the ECJ Protocol.<sup>26</sup>

The second case was more complicated. It started with two actions for annulment brought before the Court of Justice, one by the Dutch government<sup>27</sup> and the other by the official Dutch mail company,<sup>28</sup> against a decision adopted by the Commission under Article 90(3) and addressed to the Dutch government.<sup>29</sup> On June 4, 1991, the Court of Justice decided, under Article 47(2) of the ECJ Protocol, to refer *Dutch Mail* to

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20. CFI Statute, *supra* note 1, art. 7, O.J. L 319/1, at 5 (1988) (amending ECJ Protocol, *supra* note 10).

21. *Id.*

22. *See id.* art. 5, O.J. L 319/1, at 3 (1988) (amending ECJ Protocol, *supra* note 10).

23. *See Asia Motor France v. Commission*, Case C-72/90, [1990] E.C.R. 2181.

24. *Id.* at 2185.

25. *Id.* at 2185-86. It is standing case law that, pursuant to Article 175, private individuals cannot compel the Commission to act under Article 169. *See Emrich v. Commission*, Case C-371/89, [1990] E.C.R. 1555.

26. *Asia Motor France*, [1990] E.C.R. at 2186.

27. *Re Courier Services: Netherlands v. Commission*, Case C-48/90 (Eur. Ct. J. Feb. 1992) (not yet reported).

28. *Koninklijke PTT Nederland NV and PTT Post BV v. Commission*, Case C-66/90, [1991] E.C.R. 2723 [hereinafter *Dutch Mail*].

29. *Dutch Express Delivery*, O.J. L 10/47 (1989).

the CFI. The *Dutch Mail* case concerned an action brought against an institution of the Communities by a legal person pursuant to Article 173(2) that related to the implementation of competition rules applicable to undertakings which are foreseen by the first section of Chapter 1, Title I of Part III (Articles 85-90) of the EEC Treaty.<sup>30</sup> In its order, the Court of Justice also applied Article 47(3) of the ECJ Protocol. The Court of Justice decided not to suspend the proceedings in case C-48/90.<sup>31</sup>

The CFI understood that the Court of Justice wanted to clear the issue raised by the Dutch government and, after hearing the parties, declined jurisdiction in order to allow the Court of Justice to rule on both cases that concern the same act. In its order of June 21, 1991 the CFI explained why it declined jurisdiction.<sup>32</sup> It specified that a simple stay of proceedings would affect the right of the parties to make their observations known in due time.<sup>33</sup> This is because Article 37 of the ECJ Protocol does not allow private parties to intervene in cases between Member States and Community institutions.<sup>34</sup>

The last case again concerned the importation of Japanese cars into France. Sofacar, a French parallel importer, lodged two complaints with the Commission's services, one with DG-III based upon Article 30 of the EEC Treaty and the other with DG-IV based upon Article 90 of the EEC Treaty.<sup>35</sup> After the Commission failed to define its position, Sofacar initiated an Article 175 proceeding before the CFI against the Commission's failure to act. The Commission applied by a separate document for a decision on the admissibility of the action and on the competence of the CFI.<sup>36</sup> It argued that Articles 30 and

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30. *Dutch Mail*, [1991] E.C.R. 2723.

31. *See Re Courier Services: Netherlands v. Commission*, [1991] E.C.R. 2723.

32. *Koninklijke PTT Nederland NV and PTT Post BV v. Commission*, Case T-42/91, [1991] E.C.R. II-274 (Ct. First Instance).

33. *Id.*

34. *See id.*

35. *Sofacar sarl v. Commission*, Case T-27/91 (Ct. First Instance Feb. 31, 1992) (not yet reported). The complaint raised an interesting issue: Can the Commission grant interim relief under Article 90(3) of the EEC Treaty?

36. The Commission's application was lodged pursuant to Article 91 of the Rules of Procedure of the Court of Justice that applied *mutatis mutandis* to the procedure before the CFI until the adoption of its own rules of procedures that came into force on July 1, 1991. The application is dated May 30, 1991, five days before the Court of Justice's order in *Dutch Mail*, Case C-66/90, [1991] E.C.R. 2723.



90(1) of the EEC Treaty concern the behavior of Member States. The CFI did not accept these arguments. It observed that Sofacar's action did not relate to Article 30. As regards Article 90, the CFI simply referred to the decision of the Court of Justice of June 4, 1991 in *Dutch Mail*. Sofacar's action, therefore, fell within the jurisdiction of the CFI.

In light of this case law, it can be said that all actions brought by private parties under Articles 173 and 175 and relating to the provisions of Part III, Title I, Chapter I, section 1 of the EEC Treaty (Articles 85-90) belong to the jurisdiction of the CFI. This criterion is simple and formalistic. The fact that Article 90 belongs to the section with the title "Rules applying to undertakings"<sup>37</sup> does not mean that it actually regulates the conduct of undertakings. On the contrary, in *France v. Commission*, the Court of Justice specifically held that this provision only related to the behavior of Member States and that private conduct should be assessed under Articles 85 and 86.<sup>38</sup> Moreover, the rigid application of the Court of Justice's formalistic criterion may lead to the strange result that competition cases which are not based on provisions of section 1 fall outside the scope of the CFI's jurisdiction, even if they directly concern the conduct of undertakings. This situation may occur in actions related to the application of the regulation on merger control.<sup>39</sup> It is highly improbable, however, that the Court of Justice would deny the jurisdiction of the CFI in merger cases.<sup>40</sup> This is because the CFI's competence is in the process of being enlarged.

Article 3(3) of the CFI Statute provides, in this respect, that the Council will, in the light of experience, including the development of jurisprudence, and after two years of operation of the CFI, reexamine the Court of Justice's initial proposal to give the CFI competence to exercise jurisdiction in dumping cases.<sup>41</sup> On October 17, 1991, the Court of Justice submitted a new proposal to the President of the Council

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37. EEC Treaty, *supra* note 2, art. 90.

38. *France v. Commission*, Case C-202/88, [1991] E.C.R. 1223, ¶ 55.

39. Council Regulation No. 4064/89, O.J. L 395/1 (1989), *corrected version in O.J. L 257/13* (1990).

40. In the meantime, the CFI's jurisdiction is confirmed. See *Perrier Employees v. Commission*, Case T-96/92R (Ct. First Instance Dec. 15, 1992) (not yet reported).

41. CFI Statute, *supra* note 1, art. 3(3), O.J. L 319/1, at 2 (1988).

which envisages giving the CFI jurisdiction in all cases brought by private parties against an institution of the Communities pursuant to Articles 173, 175, and 178 of the EEC Treaty. Although the Council has not yet defined its position, the Court of Justice's proposal is likely to be accepted. The Member States have decided, in the context of the Maastricht conference, to revise Article 168a. The new version of this article excludes from the CFI's competence preliminary proceedings under Article 177 only.<sup>42</sup> This means that the Council may give the CFI competence not only in all actions brought by individuals against Community institutions, but also in actions against Member States and institutions.

## II. THE FUNCTIONING OF THE CFI<sup>43</sup>

The CFI has a president and eleven other members who sit in chambers of three or five judges.<sup>44</sup> Staff cases are assigned to chambers of three.<sup>45</sup> All other cases are, in principle, assigned to chambers of five, i.e., the first and the second chambers.<sup>46</sup> Article 14 of the Rules of Procedure provides that a case may also be referred to the CFI sitting in plenary session or to a chamber composed of a different number of judges whenever the legal difficulty, the importance of the case, or special circumstances so justify.<sup>47</sup> The CFI has applied Article 14 in *Tetra Pak Rausing SA v. Commission*.<sup>48</sup>

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42. The Registrar of the CFI believes that the CFI's competence should also extend to preliminary rulings. See H. Jung, *Funktion, Arbeitsweise und Zukunft des Gerichts Erster Instanz der Europäischen Gemeinschaften*, ZENTRUM FÜR EUROPÄISCHEN WIRTSCHAFTSRECHT 17-21 (1992). Mr. Jung foresees already that this overall competence of the CFI would increase its workload and that the number of members of the CFI would eventually be increased. All organizations have an inherent tendency to grow, even those that were intended to alleviate the burden of other organizations. For a more moderate assessment of the CFI's future role, see *Reflections on the Future Development of the Community Judicial System* by the CFI itself in 1991 EUR. L. REV. 175.

43. For a detailed description of the CFI's rules of procedure, see Jacques Biancarelli, *Le règlement de procédure du Tribunal de première instance des Communautés européennes: le perfectionnement dans la continuité*, 27 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 543 (1991).

44. CFI Statute, *supra* note 1, art. 2, O.J. L 319/1, at 2 (1988).

45. CFI Rules of Procedure, *supra* note 16, art. 12, § 1, O.J. L 136/1, at 5 (1991).

46. *Id.*

47. *Id.* art. 14, O.J. L 136/1, at 5 (1991).

48. *Tetra Pak Rausing SA v. Commission*, Case T-51/89, [1990] E.C.R. II-309, [1991] 4 C.M.L.R. 334 (Ct. First Instance). Article 14 has also been applied in two recently decided cases: *Asia Motor France SA v. Commission*, Case T-28/90, [1992]

When the CFI sits in plenary session, Article 17 of the Rules of Procedure prescribes that it shall be assisted by an advocate general designated by the President from among the members of the CFI.<sup>49</sup> This rule ensures the uneven amount of judges required by Article 32 of the CFI Rules of Procedure.<sup>50</sup> According to Article 18 of the CFI Rules of Procedure, an advocate general may also be designated to assist a chamber if the legal difficulty or factual complexity of a case so requires.<sup>51</sup> Judges Kirschner, Vesterdorf, and Edward were designated as advocate general in *Tetra Pak*, *Polypropylene*, and *Automec II* respectively.<sup>52</sup>

As soon as a case comes into the registry of the CFI, the President assigns it to a chamber and to one of its judges who will act as rapporteur.<sup>53</sup> At the end of the written procedure the rapporteur must present to all the members of the CFI a preliminary report which contains recommendations as to

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E.C.R. \_\_, [1992] 5 C.M.L.R. 431 (Ct. First Instance); *Automec Srl v. Commission*, Case T-24/90, [1992] E.C.R. \_\_, [1992] 5 C.M.L.R. 431 (Ct. First Instance) [hereinafter *Automec II*].

49. CFI Rules of Procedure, *supra* note 16, art. 17, O.J. L 136/1, at 5 (1991).

50. *Id.* art. 32, O.J. L 136/1, at 7 (1991).

51. *Id.* art. 18, O.J. L 136/1, at 5 (1991).

52. See *Tetra Pak Rausing SA v. Commission*, Case T-51/89, [1990] E.C.R. II-309, [1991] 4 C.M.L.R. 334 (Ct. First Instance). The Polypropylene cartel cases included several actions against various companies: *Re the Polypropylene Cartel: SA Hercules NV v. Commission*, Case T-7/89, [1991] E.C.R. \_\_, [1992] 4 C.M.L.R. 84 (Ct. First Instance) [hereinafter *Hercules*]; *Rhône-Poulenc v. Commission*, Case T-1/89, (Ct. First Instance Oct. 24, 1991) (not yet reported); *Petrofina v. Commission*, Case T-2/89, (Ct. First Instance Oct. 24, 1991) (not yet reported); *Atochem SA v. Commission*, Case T-3/89, (Ct. First Instance Oct. 24, 1991) (not yet reported); *BASF AG v. Commission*, Case T-4/89 (Ct. First Instance Dec. 17, 1991) (not yet reported); *Enichem Anic SpA*, Case T-6/89 (Ct. First Instance Dec. 17, 1991) (not yet reported); *DSM NV v. Commission*, Case T-8/89 (Ct. First Instance Dec. 17, 1991) (not yet reported); *Hüls AG v. Commission*, Case T-9/89 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Hoechst AG v. Commission*, Case T-10/89 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Shell Int'l Chemical Co. v. Commission*, Case T-11/89 (Ct. First Instance Mar. 10, 1992) (not yet reported) [hereinafter *Shell*]; *Solvay et Cie SA v. Commission*, Case T-12/89 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Imperial Chemical Indus. PLC v. Commission*, Case T-13/89 (Ct. First Instance Mar. 10, 1992) (not yet reported) [hereinafter *ICI*]; *Montedipe SpA v. Commission*, Case T-14/89 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Chemie Linz AG v. Commission*, Case T-15/89 (Ct. First Instance Mar. 10, 1992) (not yet reported). *Automec II* and *Asia Motor France* were joined in the March 10, 1992 opinion of Advocate General Edward. See Opinion of Advocate General Edward, *Automec II* and *Asia Motor France*, [1992] E.C.R. at \_\_, [1992] 5 C.M.L.R. at 438.

53. CFI Rules of Procedure, *supra* note 16, art. 13, O.J. L 136/1, at 5 (1991).

whether measures of organization of procedure or measures of inquiry should be undertaken and whether the case should be referred to the CFI in plenary session or to a chamber with a different number of judges.<sup>54</sup> The CFI seems to attach more importance to preliminary reports than the Court of Justice does. At the Court of Justice, the reports are primarily considered as a means to brief the members, whereas the reports of the CFI provide a more detailed description and analysis of the case.

The organization and function of the hearing is also different at the CFI. During the oral procedure in *Polypropylene, Società Italiano Vetro SpA, Fabbrica Pisana SpA, and PPG Vernante Pennitalia SpA v. Commission* ("Flat Glass"), and *Re the PVC Cartel: BASF AG v. Commission* ("PVC"), the CFI pursued an active investigation of the case.<sup>55</sup> This requires a proper organization of the procedure. The CFI Rules of Procedure are, in this respect, much more elaborate and flexible than the rules of the Court of Justice. Article 64 of the CFI Rules of Procedure provides for measures of organization of procedure which may consist, in particular, of putting questions to parties, inviting them to make submissions on certain issues, asking them or third parties for information on particulars, asking for documents or papers to be produced, or summoning parties to meetings.<sup>56</sup> These measures normally require the cooperation of the parties and are decided by the CFI without any formal order. According to the practice in big cartel cases, the CFI (the rapporteur, the advocate general and the registrar) organizes an informal meeting where the hearing is prepared.<sup>57</sup>

In *Flat Glass*, for example, the rapporteur chaired a two-day informal meeting to prepare reports for the hearing, the content of which could be accepted by each of the parties as a complete and detailed summary of its position, and a single

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54. *Id.* art. 52, § 1, O. J. L 136/1, at 11 (1991).

55. *See, e.g., Hercules*, [1991] E.C.R. \_\_, [1992] 4 C.M.L.R. 84; *Società Italiano Vetro SpA, Fabbrica Pisana SpA, and PPG Vernante Pennitalia SpA v. Commission*, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_, [1992] 5 C.M.L.R. 302 (Ct. First Instance) [hereinafter *Flat Glass*]; *Re the PVC Cartel: BASF AG v. Commission*, Joined Cases T-79, 84-86, 89, 91, 92, 94, 96, 98, 102 & 104/89, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 357 (Ct. First Instance) [hereinafter *PVC*].

56. CFI Rules of Procedure, *supra* note 16, art. 64, § 3, O.J. L 136/1, at 12 (1991).

57. *See Jung, supra* note 42, at 6-9.

common file of documents for all the three cases containing all the documents that they considered important, together with agreed transcripts and translations where they were required. The rapporteur also asked the Commission to produce the documentary evidence on which the CFI relied for the adoption of its decision. As regards the assessment of the relevant market, the parties agreed to place in the common file all the statistics needed for an appreciation of the functioning of the flat-glass markets.

Article 64 can also be used in less complicated cases. In *La Cinq SA v. Commission*,<sup>58</sup> for example, an informal meeting was held with the parties during which the essential issues of the case were identified. Following this meeting the applicant waived his right to reply and contributed to speeding up the written proceedings. This example shows that the CFI can actively influence the course of proceedings. It should be noted in this respect that Article 64 of the CFI Rules of Procedure also allows the CFI to facilitate an amicable settlement of proceedings.<sup>59</sup>

Apart from measures of organization of procedure, the CFI Rules of Procedure provide for measures of inquiry which correspond to those foreseen by the Rules of Procedure of the Court of Justice including personal appearance of the parties, requests for information, oral testimony, the commissioning of an expert's report, and inspections of the place or thing in question.<sup>60</sup> The CFI may prescribe, pursuant to Article 49 of its Rules of Procedure, measures of organization and inquiry at any stage of the proceedings.<sup>61</sup> In *La Cinq*, for example, the CFI ordered such measures during the written procedure.<sup>62</sup>

58. Case T-44/90, [1992] E.C.R. \_\_\_, [1992] 4 C.M.L.R. 449 (Ct. First Instance).

59. CFI Rules of Procedure, *supra* note 16, art. 64, § 2, O.J. L 136/1, at 12 (1991).

60. European Court of Justice, Rules of Procedure, art. 45, § 2, O.J. C 39/1, at 13 (1982) [hereinafter ECJ Rules of Procedure]. The CFI seems to prefer measures of organization of procedure to measures of inquiry. Mr. John Temple Lang's prediction that the CFI would probably make more use of measures of inquiry has not yet come true. See John Temple Lang, *The Impact of the New Court of First Instance in EEC Antitrust and Trade Cases*, in 1987 FORDHAM CORP. L. INST. 579, 587-93 (Barry E. Hawk ed., 1988).

61. CFI Rules of Procedure, *supra* note 16, art. 49, O.J. L 136/1, at 11 (1991).

62. *La Cinq*, [1992] E.C.R. at \_\_\_, [1992] 4 C.M.L.R. at 457.

The Court of Justice, however, may only do so at the end of the written procedure.

The way the CFI reaches its decisions differs from the decision-making procedure at the Court of Justice. The competent chamber of the CFI normally meets immediately after the hearing in order to decide upon the outcome and the basic reasoning of the future judgment. In cases where an advocate general has been designated, the CFI follows the same procedure as the Court of Justice: the judges meet only after the advocate general has read his opinion.<sup>63</sup>

The most striking difference between the CFI and the Court of Justice is the length and structure of the judgments. This difference can be explained by the fact that the judgments of the CFI do not refer to the hearing report. Instead, they contain a rather exhaustive summary of the facts, the procedure and the arguments of the parties. As regards these arguments, the CFI uses different techniques to deal with the issues raised by the parties. In most judgments, the CFI identifies the pleas of the applicant and deals with them after having summarized the arguments of the applicant and the Commission. In this way, the pleas and arguments determine the structure of the CFI's reasoning.<sup>64</sup>

This approach is very difficult to follow in big cartel cases where many legal and factual arguments are intertwined.<sup>65</sup> In *Polypropylene*, the CFI completely restructured and reformulated the numerous arguments.<sup>66</sup> It clearly separated the argu-

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63. ECJ Rules of Procedure, *supra* note 60, art. 66(3), O.J. C 39/1, at 17 (1982). Article 5 of the CFI Statute and Article 61 of the CFI Rules of Procedure allow the Advocate General to deliver his opinion in writing. See CFI Statute, *supra* note 1, art. 5, O.J. L 319/1, at 3 (1988) and CFI Rules of Procedure, *supra* note 16, art. 61, O.J. L 136/1, at 12 (1991).

64. See, e.g., *Tetra Pak Rausing SA v. Commission*, Case T-51/89, [1990] E.C.R. II-309, [1991] 4 C.M.L.R. 334 (Ct. First Instance); *Radio Telefis Eireann ("RTE") v. Commission*, Case T-69/89, [1991] E.C.R. \_\_\_, [1991] 4 C.M.L.R. 586 (Ct. First Instance) [hereinafter RTE].

65. Because appeal to the Court of Justice is limited to legal arguments, the distinction between questions of law and questions of fact is important. John Temple Lang considered that this distinction would influence the way lawyers would present their case before the CFI. See Temple Lang, *supra* note 60, at 585. The case law examined for the purposes of this present paper does not seem to confirm Mr. Temple Lang's prediction.

66. See, e.g., *Hercules*, Case T-7/89, [1991] E.C.R. \_\_\_, [1992] 4 C.M.L.R. 84 (Ct. First Instance).

ments of fact from the legal issues. Each section deals with an issue identified by the CFI itself. The section starts with a summary of the contested part of the Commission decision, which is followed by a presentation of the arguments of the parties and the CFI's assessment. In this way the judgment reflects more the structure of the contested decision than that of the application. In *Flat Glass* the CFI followed, in some respects, a similar approach.<sup>67</sup> The bulk of the judgment, however, is not directly concerned with the arguments of the parties. The CFI notes that the applicants contest the findings of facts of the Commission, but it does not specify which parts of the decision are challenged and what the exact arguments are. The CFI subsequently examines whether the evidence submitted to the common file by the Commission proves to the requisite legal standard what the decision states. In this way, the CFI checks whether the Commission correctly fulfilled its duty.

The new technique developed by the CFI in *Polypropylene* should be welcomed. It enables a thorough and logical examination of the facts which are normally decisive in cartel cases. However, the restructuring of arguments together with the CFI's active role in the preparation of the procedure may have some undesirable side effects. It may induce the parties to raise all sorts of arguments at random hoping that the CFI will reformulate and rearrange them.<sup>68</sup>

### III. SOME FIGURES

Courts cannot be compared to factories. Their output cannot be predicted, planned, or measured; each case has its own characteristics. This makes it very difficult and hazardous to give a statistical overview of judicial activities.<sup>69</sup> One should therefore be cautious with the following figures.

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67. *Flat Glass*, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_\_, [1992] 5 C.M.L.R. 302 (Ct. First Instance).

68. The Court of Justice has in the past been relatively tolerant with the Commission as regards the way it presented its cases under Article 169 of the EEC Treaty. In a series of recent judgments, however, the Court of Justice has changed its attitude. See *Commission v. Denmark*, Case C-52/90 (Eur. Ct. J. March 31, 1992) (not yet reported); see also *Commission v. Germany*, Case C-290/90 (Eur. Ct. J. May 20, 1992) (not yet reported).

69. For the statistical difficulties encountered, see Christopher Harding, *Who Goes to Court in Europe? An Analysis of Litigation Against the European Community*, 17 EUR. L. REV. 105 (1992).

When the CFI began functioning in 1989 it received 153 cases from the Court of Justice, seventy-five of which concerned competition problems. The latter figure is somewhat distorted because forty-two applications related to only three Commission decisions. On June 30, 1992, the CFI had settled fifty-three competition cases out of a total of 227 cases. It rendered 133 judgments in general and thirty-two on competition issues. A similar proportion between staff cases and competition cases can be noticed regarding the number of pending cases: 146 in general in comparison to sixty-five competition cases. Finally, an overview of the CFI's productivity could not be complete without mentioning the orders of the President in interim proceedings: twelve orders in competition cases out of a total of twenty-three.

Appeals were brought against thirteen judgments on competition issues. The Court of Justice has not yet had the opportunity to rule on these appeals. This does not mean that the Court of Justice has been inactive in the field of competition. During the period from January 1, 1990 to June 30, 1992, the Court of Justice removed nineteen competition cases from its registrar and rendered fourteen judgments (nine preliminary rulings and five rulings under Article 173 of the EEC Treaty). Dozens of competition cases are still pending.

Unfortunately, it is not yet possible to make a reliable comparison between the average duration of proceedings in competition cases before the CFI and the corresponding duration before the Court of Justice. It took the latter 15.7 months to settle a competition case in 1990, 20.6 months in 1991 and 18.3 months for the first two quarters of 1992.<sup>70</sup> As regards the length of proceedings before the CFI, cases transferred from the Court of Justice should be discarded, because the written procedure in most of these cases was already finished before their transfer. This leaves only four judgments as the basis for the calculation of an average length of fourteen months. However, it is somewhat discouraging to note that some of the transferred cases have not yet been decided.

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70. The disappointing 1991 figures can be explained by the proceedings in *AKZO Chemie v. Commission*, Case C-62/86 (Eur. Ct. J. July 3, 1991) (not yet reported).



## IV. THE CASE LAW OF THE CFI

## A. Cartels

Under EC law, a horizontal agreement, which has as its object or effect to fix prices and quotas, necessarily restricts competition within the meaning of Article 85(1) of the EEC Treaty.<sup>71</sup> The CFI confirmed this per se approach in *Polypropylene*.<sup>72</sup> An anti-competitive object suffices to trigger the prohibition of Article 85(1), even if the activities of one of the parties to the agreement were unable to have any effect on the market. The relevant question in this respect is not whether the individual participation of one of the parties was capable of having such an effect but whether the infringement in which the party participated could affect the market.

This per se approach does not mean that an analysis of the relevant market is superfluous. In *Flat Glass*, the CFI held that "the appropriate definition of the market in question is a necessary precondition of any judgment concerning allegedly anti-competitive behavior."<sup>73</sup> This general statement implies that both the object and the effect of a potentially restrictive agreement should be assessed in the light of the relevant market.<sup>74</sup> Such a market analysis is indeed necessary to assess whether the restriction is appreciable.<sup>75</sup> It might also be required in cases like *Flat Glass* where the qualification of certain evidence as incriminating depends to a large extent on the characteristics of the relevant market. One may wonder, however, what the interest of a market analysis is in straightforward cartel cases in which many transnational companies are involved.<sup>76</sup>

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71. EEC Treaty, *supra* note 2, art. 85.

72. *See, e.g.*, *Hercules*, Case T-7/89, [1991] E.C.R. \_\_, \_\_ [1992] 4 C.M.L.R. 84, 314, ¶¶ 270-72; *ICI*, Case T-13/89, slip op. ¶¶ 290-94 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Shell*, Case T-11/89, slip op. ¶¶ 301-05 (Ct. First Instance Mar. 10, 1992) (not yet reported).

73. *Flat Glass*, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_, \_\_, [1992] 5 C.M.L.R. 302, \_\_, ¶ 159 (Ct. First Instance Mar. 10, 1992).

74. *See Société Technique Minière v. Maschinenbau Ulm GmbH*, Case 56/65, [1966] E.C.R. 235, [1966] C.M.L.R. 357.

75. *See Völk v. Établissements J. Vervaecke*, Case 5/69, [1969] E.C.R. 295, [1969] C.M.L.R. 273.

76. Advocate General Vesterdorf produced an opinion, dated July 10, 1991, in the *Polypropylene* cases, listed *supra* note 52. It has been reproduced with the *Hercules* judgment at [1991] E.C.R. \_\_, [1992] 4 C.M.L.R. at 89 (Ct. First Instance). *See* Opinion of Advocate General Vesterdorf, *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 164-67, § I.D.5.

The restrictive nature is, in any case, not the most difficult aspect of cartels. The biggest problem is finding them. The Commission must prove that companies colluded to fix prices and/or quotas. This is a heavy burden because the Commission will rarely find a document entitled "cartel" and which contains all the relevant evidence. Proof of cartels is normally of a circumstantial nature; several documents have to be combined and interpreted in the context of a given market. This kind of evidence was at the core of *Polypropylene* and *Flat Glass*.<sup>77</sup> In both cases, the CFI examined whether the Commission had proved to the requisite legal standard the existence of a cartel. It is unclear what this standard exactly implies, especially since the scope of the CFI's control in the two cases seems to differ.

In *Polypropylene*, the CFI's factual analysis is limited to the allegations of the applicants. Within these limits, the control of the facts is characterized by the presentation of these allegations. The CFI did not follow the order in which the parties presented their arguments, rather it reordered them in a logical and chronological way:

- did the company concerned have contacts with its competitors?
- did it attend the meetings?
- to what extent did it participate in the decisions taken at these meetings?<sup>78</sup>

This approach makes sense from a judicial policy point of view. If the answer to the first question is negative, the court does not have to reply to the following question. Moreover, the facts which are held to be conclusive under one question can be used as the basis for assessing the allegations under the following question. For example, if it is established that manager *X* of company *A* was present at all meetings, his presence

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77. See, e.g., *Hercules*, Case T-7/89, [1991] E.C.R. \_\_, \_\_, [1992] 4 C.M.L.R. 84, 267-306, ¶¶ 58-232 (reporting findings of fact); *ICI*, Case T-13/89, slip op. ¶¶ 48-225 (Ct. First Instance Mar. 10, 1992) (not yet reported) (same); *Shell*, Case T-11/89, slip op. ¶¶ 71-290 (Ct. First Instance Mar. 10, 1992) (not yet reported) (same); *Flat Glass*, [1992] E.C.R. at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶¶ 172-313 (same).

78. See, e.g., *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 267-306, ¶¶ 58-232 (reporting findings of fact); *ICI*, slip op. ¶¶ 48-225 (same); *Shell*, slip op. ¶¶ 71-290 (same).

may be considered as a serious indication that company *A* actually participated in the decisions taken at those meetings.

The *Polypropylene* judgments do not clearly reveal upon whom, the applicant or the Commission, the burden of proof rests. It seems that this burden shifts according to the different stages of the CFI's analysis.<sup>79</sup> The Commission's findings should, in the first place, rely on sufficient evidence. If this is established, the applicant should prove that this evidence is not correct. The difficulty in putting forward this proof depends upon the issue involved and the stage of the Court of Justice's analysis at which this issue arises. This is because the evidence produced for a certain finding may often be considered as a presumption for the subsequent issue.

Following this way of reasoning, the CFI found that the Commission had, in the majority of cases, established to the requisite legal standard that the applicants had been a party to a whole complex of schemes, arrangements, and measures decided in the framework of a system of regular meetings and continuous contact during the years 1977 to 1983. The participation of some companies during certain times within the reference period was, however, not sufficiently proven.

In *Flat Glass*, the CFI proceeded in a different way.<sup>80</sup> During preparatory meetings the parties agreed on a common file of documents in light of which the CFI examined the evidence put forward by the Commission.<sup>81</sup> In doing so, the CFI followed the order of the contested decision without referring formally to the allegations of the applicants. The CFI did not hesitate to put the evidence in a different context<sup>82</sup> and to give a new interpretation of the facts in light of the relevant market.<sup>83</sup> On several issues, the CFI concluded that the evidence of the Commission was simply lacking,<sup>84</sup> that it only gave a partial or inaccurate account of the facts,<sup>85</sup> or that it was not cor-

79. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 287, ¶ 145.

80. *See Flat Glass*, [1992] E.C.R. \_\_, [1992] 5 C.M.L.R. 302.

81. *Id.* During its inquiry, the CFI noticed that when the Commission prepared the documentary evidence with a view to communication to the undertakings, certain relevant passages were deliberately deleted or omitted, even though they did not relate to business secrets. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 91.

82. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶¶ 219, 224-25.

83. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶¶ 200-01, 222.

84. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 271.

85. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 193.

rectly interpreted.<sup>86</sup> In paragraph 205, the CFI explicitly criticized the Commission for applying the technique of “cutting and pasting” evidence collected from unclear sources.<sup>87</sup>

In *Flat Glass*, the burden of proof seemed to rest entirely upon the Commission. During its reinvestigation of the case, the CFI required the Commission to present convincing evidence for the factual allegations in its decision. The Commission failed in this respect. The CFI concluded that one of the companies had not participated at all in the cartel scheme and that the participation of the other two companies was limited both in time and in substance.

The next step to make in cartel cases is the legal qualification of the evidence. In *Flat Glass*, the Commission based its decision on the hypothesis that there was a close cartel among the three members of a national oligopoly.<sup>88</sup> As seen above, the CFI found that this hypothesis was not correct. The question therefore arose whether the CFI should carry out a new legal assessment. It held in this respect that

although a Community court may, as part of the judicial review of the acts of the Community administration, partially annul a Commission decision, . . . that does not mean that it has jurisdiction to remake the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the [EEC] Treaty and would risk prejudicing the rights of defence [of the undertakings involved].<sup>89</sup>

In light of these considerations, the CFI examined whether after the partial annulment of the contested decision the scope of the operative part of the decision could be limited *ratione materiae*, *ratione personae* or *ratione temporis*.<sup>90</sup> This new qualification was subject to the condition that the remaining parts of the decision contained an adequate assessment of the market and that the companies concerned had had the opportunity to effectively reply to the newly defined objections.<sup>91</sup>

In *Polypropylene* the qualification issue was of a different na-

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86. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 222.

87. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 205.

88. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 314.

89. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 319.

90. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 320.

91. *Id.*

ture. It concerned the question whether the collusion between the manufacturers should be qualified as an agreement or as a concerted practice. The Commission had qualified the whole complex of schemes and arrangements decided on in the context of regular and institutionalized meetings as a single continuing agreement. More detailed sub-agreements, which were sometimes of an implied nature, implemented this scheme. The Commission decided in this respect that it did not matter whether the concrete implementation by certain producers displayed more of the characteristics of a concerted practice than those of an agreement. The importance of the concept of concerted practice did not result so much from the distinction between the different forms of collusion falling under Article 85(1) of the EEC Treaty as from the distinction between collusion in general and mere parallel behavior with no element of concertation.

Most applicants argued that they had not participated in any agreement because they had not expressed their consent to be bound. They also argued that in order for companies to participate in a concerted practice, they should have mutual expectations as regards their behavior. Moreover, a practice could only exist if these concerted expectations effectively led to the envisaged conduct in the market. *Rhône Poulenc v. Commission* specified, in this respect, that the concept of concerted practice had two constituent elements, conspiracy and conduct.<sup>92</sup> Mere conspiracy with the object to restrict competition could therefore not be caught under Article 85(1) of the EEC Treaty.

The CFI's answer to these arguments was primarily of a factual nature. It held in the first place that the Commission had proved to the requisite legal standard that the companies concerned had expressed their joint intention to conduct themselves in the market in a specific way.<sup>93</sup> The existence of an agreement was therefore properly established.

The CFI also ruled that the measures for the concrete implementation of the scheme could be qualified as a concerted

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92. *Rhône Poulenc v. Commission*, Case T-1/89 (Ct. First Instance Oct. 24, 1991) (not yet reported).

93. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 311, ¶ 256; *ICI*, slip op. ¶ 253; *Shell*, slip op. ¶ 299.

practice in light of the conditions defined by the Court of Justice in *Coöperatieve vereniging 'Suiker Unie' UA v. Commission*.<sup>94</sup> The CFI rejected the argument that this concept required actual conduct on the market.<sup>95</sup> Through their participation in meetings, the companies concerned took part in concerted action, the purpose of which was to influence their conduct in the market and to disclose to each other the course of conduct which each of the producers itself contemplated adopting on the market.<sup>96</sup>

However, the CFI specified that, by eliminating in advance the uncertainty about their future conduct and the determination of their policies on the market, the companies could not fail to take account, directly or indirectly, of the information obtained during the course of those meetings.<sup>97</sup> This could mean that every concertation produces its effects on market conduct, albeit not necessarily those effects which were envisaged at the moment of concertation.

Finally, the CFI examined whether the Commission was entitled to qualify one infringement as both an agreement and a concerted practice.<sup>98</sup> In this respect, it repeated that, in view of their identical purposes, the various concerted practices followed and agreements concluded formed part of systems of regular meetings, target-price fixing, and quota-fixing.<sup>99</sup> Those systems were part of a series of efforts made by the undertakings in question in pursuit of a single aim, namely to distort the normal development of prices on the polypropylene market.<sup>100</sup> The CFI held that it would be artificial under these

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94. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 311-12, ¶ 258 (citing *Coöperatieve vereniging 'Suiker Unie' UA v. Commission*, Joined Cases 40-48, 50, 54-56, 111 & 114/73, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295 (Ct. First Instance); *ICI*, slip op. ¶ 300 (same); *Shell*, slip op. ¶ 255 (same).

95. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 311-12, ¶¶ 258-60; *ICI*, slip op. ¶¶ 255-58; *Shell*, slip op. ¶¶ 300-05.

96. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 311-12, ¶¶ 258-60; *ICI*, slip op. ¶¶ 255-58; *Shell*, slip op. ¶¶ 300-05.

97. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 311-12, ¶¶ 258-60; *ICI*, slip op. ¶¶ 255-58; *Shell*, slip op. ¶¶ 300-05.

98. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 312-13, ¶¶ 262-64; *ICI*, slip op. ¶¶ 259-61; *Shell*, slip op. ¶¶ 304-05.

99. *Hercules*, [1991] E.C.R. \_\_, [1992] 4 C.M.L.R. at 312-13, ¶¶ 262-64; *ICI*, slip op. ¶¶ 259-61; *Shell*, slip op. ¶¶ 304-05.

100. *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 312-13, ¶¶ 262-64; *ICI*, slip op. ¶¶ 259-61; *Shell*, slip op. ¶¶ 304-05.

circumstances to split up such continuous conduct by treating it as consisting of a number of separate infringements.<sup>101</sup> Some factual elements could, therefore, be characterized as agreements and others as concerted practices for the purposes of Article 85(1), which does not foresee a specific category of collusion for a complex infringement of this type.

*Dansk Pelsdyravlereforening v. Commission* ("Danish Furs")<sup>102</sup> did not raise the same problems as those analyzed above in the context of *Polypropylene* and *Flat Glass*. It concerned the statutory obligations of the individual members of a Danish breeder's association. First, the members were not allowed to contribute to the organization of fur sales which competed with the sales of the association. Second, the members could benefit from certain advantages, like advance payments and risk insurance, if they supplied their production exclusively to the association. The Commission held that the combined effect of these clauses was the foreclosure of the Danish fur market and fined the association ECU500,000.

The applicant argued that these obligations were inherent in the structure of a farmer's association, which allows small family undertakings to survive. Article 85 should therefore not apply to these obligations. After having observed that furs were not agricultural products falling within the scope of Regulation 26/62,<sup>103</sup> the CFI ruled that the creation of an association did not in itself restrict competition. However, its functioning and, in particular, its fidelity obligations could, in certain markets, have such an effect on both the relations between members and the relations between members and third parties. The particular obligations of an association did not, therefore, preclude the application of Article 85(1) of the EEC Treaty. The CFI specified, however, that their characteristics could be assessed under Article 85(3). This specification was intended to comfort the Danish and Belgian governments who

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101. *Hercules*, [1991] E.C.R. \_\_\_, [1992] 4 C.M.L.R. at 312-13, ¶¶ 263; *ICI*, slip op. ¶ 260; *Shell*, slip op. ¶ 305.

102. Case T-61/89 (Ct. First Instance July 3, 1992) (not yet reported) [hereinafter *Danish Furs*].

103. Council Regulation No. 26/62, 30 J.O. 993 (1962), O.J. Eng. Spec. Ed. 1959-62, at 129 (applying certain rules of competition to production of and trade in agricultural products).

considered that the legal form of an association should remain available as a means to run a company.

As regards the non-competition clause imposed on the Danish fur breeders, the CFI held that such clauses do not necessarily restrict competition. In the present case, however, the clause did have a restrictive effect because it was disproportionate in light of the objectives pursued by the association and because it effectively shielded off the Danish market. The CFI also held that the Commission was entitled to decide that the exclusive supply obligations were contrary to Article 85(1), because they were not necessary for the operation of the advance payment and insurance schemes. However, the CFI partially annulled the decision. It considered that some aspects were not proved and that others were not properly motivated. The CFI therefore reduced the fine to ECU300,000.

### B. *Distribution*

In *Peugeot v. Commission*,<sup>104</sup> the CFI had to interpret Regulation 123/85 on selective distribution for motor vehicles, and, in particular, Article 3(11) which exempts the following obligation: the dealer may only sell vehicles to final consumers using the services of an intermediary if that intermediary fulfills two conditions. The intermediary must have prior written authority to purchase a specified model and, as the case may be, to accept delivery thereof on the final consumer's behalf.<sup>105</sup> The explanatory notice concerning this regulation specifies that the intermediary must prove that, in buying a vehicle, he is acting on behalf of and for the account of the customer and that dealers can be obliged not to supply vehicles to or through a third party who represents himself as an authorized dealer.<sup>106</sup> These two aspects can be contradictory as some resellers may act on behalf of customers and represent themselves as official dealers.

In *Peugeot*, the CFI determined that the commercial freedom of an intermediary prevailed. An intermediary should be

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104. *Peugeot v. Commission*, Case T-23/89 (Ct. First Instance July 12, 1991) (not yet reported).

105. *Id.*; Council Regulation No. 123/85, O.J. L 15/16 (1985).

106. Commission Notice Concerning Council Regulation No. 123/85, O.J. C 17/3, at 5 (1985).



free to buy vehicles from authorized dealers established in one Member State on behalf of customers in another Member State, provided that it acts upon their prior written notice. In this respect, it should be noted that the intermediary involved, Ecosystem, exercised its activities on a commercial basis and imported into France 150 vehicles a month. This means that selective distribution networks for motor vehicles can effectively be undermined through formalistic devices such as an authorization to act signed by the customer.

The CFI's assessment of the selective distribution network for parapharmaceutical products in *Vichy v. Commission* is equally formalistic.<sup>107</sup> The CFI upheld a decision adopted pursuant to Article 15(6) of Regulation 17 in which the Commission considered that access to this network was based upon quantitative criteria; only official pharmacies could become resellers of Vichy products and the number of pharmacies was limited by law in six Member States. According to the CFI, it was irrelevant whether this restricted access resulted from the will of Vichy itself or from pre-existing public regulations. Vichy could not ignore these regulations. The CFI added that a proper distribution of the products in question did not necessarily require sales in official pharmacies. Such a requirement is disproportionate because the goods can be sold adequately by pharmacists employed by other resellers.<sup>108</sup>

Quite surprisingly, the CFI considered that the quantitative and disproportionate nature of the selection criteria did not suffice to trigger the application of Article 85(1), whereas the Court of Justice has ruled on several occasions that such criteria lead to the exclusion of potential resellers and, therefore, restrict competition.<sup>109</sup> Does this attitude of the CFI mean that the restriction of intra-brand competition resulting from the criteria may be offset by an increase in inter-brand competition?

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107. Case T-19/91 (Ct. First Instance Feb. 27, 1992) (not yet reported) [hereinafter *Vichy*].

108. Proportionality as a means to assess the admissibility of selective distribution under Article 85(1) is new; does it mean that proportionate quantitative criteria are allowed and that disproportionate qualitative criteria are not?

109. See *Metro SB-Grossmarkte GmbH & Co. KG v. Commission*, Case 26/76, [1977] E.C.R. 1875, [1978] 2 C.M.L.R. 1; *SA Binon and Cie v. SA Agence et messageries de la presse (AMP)*, Case 298/83, [1985] E.C.R. 2015, [1985] 3 C.M.L.R. 800.

The answer to this question could be affirmative, if one notes that the CFI carried out a separate examination of the restrictive effects of the network in its economic and legal context. However, in assessing these elements the CFI seems not to be concerned with inter-brand competition, but with the question of whether the restriction of intra-brand competition was appreciable.<sup>110</sup> It held, in this respect, that the deontology rules weakened competition between official pharmacies and that promoting competition between these resellers and others would increase intra-brand competition and erode the price differences throughout the Community. As regards the reference to the context of the Vichy network, the CFI ruled that the existence of parallel networks cumulatively restricted competition and that, in light of Vichy's position in the market, this restriction was appreciable. The CFI did not examine whether the existence of these networks effectively led to the foreclosure of the market. Such a test was prescribed by the Court of Justice in *Delimitis v. Henninger Bräu AG*.<sup>111</sup> In that judgment the Court of Justice made it clear that exclusive purchasing agreements for beer are only caught by Article 85(1) insofar as they significantly contribute to the foreclosure of the relevant market and the existence of parallel networks is only one of the elements which can contribute to this restrictive effect. In light of these considerations, one may wonder whether the CFI's *Vichy* judgment complies with the case law of the Court of Justice.<sup>112</sup>

Finally, the CFI held that the Vichy network did not merit an exemption, because the improvements of the distribution of the products in question did not require sales in an official pharmacy. The same results could be achieved by sales in other stores employing a pharmacist.

### C. Article 86

In *Tetra Pak*, the CFI had to decide whether a block ex-

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110. *Vichy*, slip op. ¶ 78. In paragraph 78, the CFI even states that the quantitative selection criterion is in itself a restriction of competition. *Id.*

111. *Delimitis v. Henninger Bräu AG*, Case C-234/89, [1991] E.C.R. 935, \_\_, [1992] 5 C.M.L.R. 210, 246-47.

112. In this respect, it should also be noted that selective distribution agreements are, in principle, less harmful for competition than beer supply agreements because the former agreements do not tie a single reseller to a specific brand.

emption could prevent the application of Article 86.<sup>113</sup> The Commission had found that Tetra Pak had abused its dominant position in the market for certain packaging materials by acquiring a competitor that held an exclusive patent license for a new packaging technology. The license fulfilled the requirements of block exemption Commission Regulation No. 2349/84.<sup>114</sup> Tetra Pak argued that this exemption prevented the Commission from applying Article 86 of the EEC Treaty.

The CFI held in this respect that Articles 85 and 86 are complementary inasmuch as they pursue a common objective, set out in Article 3(f).<sup>115</sup> However, they provide for two independent legal instruments addressing different situations. As regards the situation in *Tetra Pak*, the CFI held that one should distinguish the mere acquisition of an exclusive license from the situation which the Commission condemned under Article 86.<sup>116</sup> The Commission examined the license in question in the context of Tetra Pak's very dominant position, which was reinforced by their acquisition of the only freely available technology that allowed third parties to compete effectively with Tetra Pak. These circumstances constituted additional qualifications of the acquisition of the exclusive license and justified the application of Article 86.

In more general terms, the CFI held that the grant of an exemption, whether individual or block exemption, cannot render Article 86 inapplicable.<sup>117</sup> It followed that the benefit of a block exemption does not have to be withdrawn before this Article can be applied.

The application of Article 86 requires in the first place that the undertaking in question have a dominant position in a sub-

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113. *Tetra Pak Rausing SA v. Commission*, Case T-51/89, [1990] E.C.R. II-309, 316, [1991] 4 C.M.L.R. 334, 342. The Court of Justice had already decided in *Hoffman-La Roche v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, Case 107/76, [1977] E.C.R. 957, [1977] 2 C.M.L.R. 334 and *Ahmed Saeed Flugreisen and Silver Line Reiseburo GmbH v. Zentrale Zur Bekämpfung Unlauteren Wettbewerbs Ev*, Case 66/86, [1989] E.C.R. 803, [1990] 4 C.M.L.R. 102, that Articles 85 and 86 could be applied simultaneously.

114. *Tetra Pak*, [1990] E.C.R. at 338, [1991] 4 C.M.L.R. at 368; Commission Regulation No. 2349/84, O.J. L 219/15 (1984), corrected by O.J. L 113/34 (1985).

115. *Tetra Pak*, [1990] E.C.R. at 340, [1991] 4 C.M.L.R. at 370.

116. *Id.* at 342, [1991] 4 C.M.L.R. at 371-72.

117. *Id.* at 342-43, [1991] 4 C.M.L.R. at 372-73.

stantial part of the common market.<sup>118</sup> This condition normally means that the Commission should define the relevant market and the position of the undertaking on this market vis-à-vis its competitors. Both definitions are interrelated; it is easier to establish a dominant position on a narrowly defined market than on a large one. This logic has often been the basis of the Article 86 case law of the Community institutions.<sup>119</sup> The "Irish Television" cases, in which the CFI backed the Commission's definition of the relevant market, offers an example of this approach.<sup>120</sup>

In these cases, the Commission decided that the main broadcasting organizations in Ireland had abused their dominant positions in the markets for the weekly listings of their television programs and the guides in which they were published. The applicants argued before the CFI that the Commission's definition of the relevant product market was too narrow. In their view this market should not only relate to weekly program listings and television magazines based on these listings, but to all advance program information supplied to the public on a weekly or daily basis (i.e., newspapers). The CFI ruled, however, that the market for listings constituted a submarket within the market for television program information in general because the listings met a specific demand from viewers and from third parties wishing to publish comprehensive television guides. Moreover, weekly listings are substitutable only to a limited extent with program publications in newspapers, which cover a twenty-four-hour period.

In other words, the relevant market was of a derived nature: the listings of programs of each television organization. In this market, dominance was quickly established with refer-

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118. EEC Treaty, *supra* note 2, art. 86.

119. See *Centre Belge D'Etudes de Marche-Telemarketing SA v. Compagnie Luxembourgeoise de Telediffusion SA*, Case 311/84, [1985] E.C.R. 3261, [1986] 2 C.M.L.R. 558; *Hugin Kassaregister v. Commission*, Case 22/78, [1979] E.C.R. 1869, [1979] 3 C.M.L.R. 345; *General Motors Continental NV v. Commission*, Case 26/75, [1975] E.C.R. 1367, [1976] 1 C.M.L.R. 95; *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. Commission*, Joined Cases 6 & 7/73, [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309.

120. *RTE*, Case T-69/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 586 (Ct. First Instance July 10, 1991); *British Broadcasting Corp. v. Commission*, Case T-70/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 669 (Ct. First Instance); *Independent Television Publications Ltd. v. Commission*, Case T-79/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 745 (Ct. First Instance July 10, 1991).

ence to the copyright of the organizations on their individual listings.

In *Hilti AG v. Commission*, the CFI followed a similar approach.<sup>121</sup> The CFI agreed with the Commission that the relevant market was the market for nails designed for use in Hilti nail guns.<sup>122</sup> It emphasized in this context that independent producers made nails intended for use in nail guns and that some of them specialized in Hilti-compatible nails. In this derived market for Hilti-compatible nails, Hilti held a market share oscillating between seventy percent and eighty percent.<sup>123</sup> Such a share was, in itself, a clear indication of a dominant position.<sup>124</sup>

The CFI was less complacent with the Commission's definition of dominance in *Flat Glass*.<sup>125</sup> In that case, the Commission decided that the three Italian producers held a collective dominant position because of the oligopolistic nature of the market and their close cooperation.<sup>126</sup> The CFI did not exclude the possibility that, in some situations, undertakings may hold a collective dominant position, for example, where they "jointly have, through agreements or licences, a technological lead affording them the power to behave independently" of other market participants.<sup>127</sup> It found support for this interpretation in Article 8(2) of Commission Regulation No. 4056/86; liner conferences which benefit from an exemption may nevertheless have effects which are incompatible with Article 86.<sup>128</sup>

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121. *Hilti AG v. Commission*, Case T-30/89 (Ct. First Instance Dec. 12, 1991) (not yet reported) [hereinafter *Hilti*].

122. *Id.* slip op. ¶ 77.

123. *Id.* ¶ 89.

124. *Id.* ¶ 92.

125. *Flat Glass*, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_, \_\_ [1992] 5 C.M.L.R. 302, \_\_, ¶¶ 340-69 (Ct. First Instance) (discussing application of Article 86 of EEC Treaty).

126. *E.g.*, *id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶¶ 350-56. The text of Article 86 of the EEC Treaty mentions an "abuse by one or more undertakings." EEC Treaty, *supra* note 2, art. 86. This is a matter of joint abuse and not a problem of joint dominance.

127. *Flat Glass*, [1992] E.C.R. at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 358; see *Hoffman La Roche v. Commission*, Case 85/76, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

128. Commission Regulation No. 4056/86, O.J. L 378/4 (1986). The Commission recently applied this regulation in a case which related, *inter alia*, to a problem of joint dominance. See *French-African Shipping Cartel*, O.J. L 134/1 (1992).

The CFI pointed out, however, that “for the purposes of establishing an infringement of Article 86 of the [EEC] Treaty, it is not sufficient . . . to ‘recycle’ the facts constituting an infringement of Article 85.”<sup>129</sup> Moreover, the Commission failed to give a proper definition of the relevant market and also failed to substantiate its statement that the three producers presented themselves as a single entity on the market. The CFI therefore annulled the Commission’s decision as regards its assessment under Article 86.<sup>130</sup>

After having established the existence of a dominant position, the application of Article 86 requires that the undertakings abuse this position.<sup>131</sup> In the “Irish television” cases, the abuse consisted of the television companies’ refusal to grant an independent publisher licenses for its weekly listings.<sup>132</sup> This refusal prevented the publisher from marketing a new product, a comprehensive weekly guide. The applicants did not accept this analysis. They claimed that their policies on the distribution of information concerning the weekly programs did not constitute an abuse because it was based upon their copyright.

The CFI ruled that the copyright policies were not necessary to protect the actual substance of the copyright because they were not justified by the specific need to protect the intellectual efforts of the television companies in the broadcasting sector. The television companies’ conduct was characterized by the prevention of the emergence of a new product likely to compete with their own individual magazines, thereby using copyright in the program listings to protect their monopolies in the derivative market of weekly television guides. The anti-competitive nature of this conduct is emphasized by the fact that the companies authorized, free of charge, the publication of their listings in the press on a daily basis.

This analysis was based upon *Volvo AB v. Erik Veng* and *Consorzio Italiano della Componentistica de ricambio per autoveicoli v.*

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129. *Flat Glass*, [1992] E.C.R. at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 360.

130. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶¶ 361-68.

131. EEC Treaty, *supra* note 2, art. 86.

132. RTE, Case T-69/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 586 (Ct. First Instance July 10, 1991); *British Broadcasting Corp. v. Commission*, Case T-70/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 669 (Ct. First Instance); *Independent Television Publications Ltd. v. Commission*, Case T-79/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 745 (Ct. First Instance July 10, 1991).

*Régie nationale des usines Renault* ("Maxicar"), in which the Court of Justice ruled that the possibility for the owner of an exclusive design right to stop the production, sales and imports of the protected model constituted the very substance of exclusivity and that the mere use of this possibility did not give rise to an abuse.<sup>133</sup> The Court of Justice, however, defined three situations in which an abuse could occur: (1) the arbitrary refusal to sell spare parts to independent repair shops; (2) unfair prices; (3) the termination of the production of spare parts of a model of which many cars still circulate.<sup>134</sup>

These three situations do not concern a refusal to license as such but illustrate the fact that the owner of an exclusive right is unable or unwilling to supply the market on proper terms. It is doubtful whether similar situations occurred in the present case. RTE, ITV, and BBC did supply the market, albeit with magazines that only contained their individual programs. The logical consequence of the CFI's reasoning is that the television companies must license a competitor in the market in which they operate themselves. This reasoning could be interpreted as the negation of the exclusive nature of the copyrights involved.

One of the many abuses in *Hilti* also concerned a refusal to license.<sup>135</sup> The situation in this case was, however, fundamentally different from those in the "Irish television" cases. Hilti's patents were granted with the mention "licence of right," which meant that third parties were, in principle, entitled to obtain licenses.<sup>136</sup> The CFI backed the Commission's findings that Hilti frustrated or delayed legitimately available licenses of right under its patents and that it operated discriminatory policies against the businesses of competitors.<sup>137</sup>

The last analytical step necessary under Article 86 con-

133. *Volvo AB v. Erik Veng (UK) Ltd.*, Case 238/87, [1988] E.C.R. 6211, [1989] 4 C.M.L.R. 122; *Conorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale des usines Renault*, Case 53/87, [1988] E.C.R. 6039, [1990] 4 C.M.L.R. 265 [hereinafter *Maxicar*].

134. *Maxicar*, [1988] E.C.R. at 6073, [1990] 4 C.M.L.R. at 283-84.

135. *Hilti*, Case T-30/89 (Ct. First Instance Dec. 12, 1991) (not yet reported).

136. *Id.* slip op. ¶ 15. For a description of this kind of license, see *Allen & Hanbury's Ltd. v. Generics (U.K.) Ltd.*, Case 434/85, [1988] E.C.R. 1245, 1273 [1988] 1 C.M.L.R. 701, 714, ¶¶ 12-14.

137. *Hilti*, slip op. ¶¶ 99-101

cerns the objective justification of the abusive conduct.<sup>138</sup> The dominant undertaking has the possibility to prove that special circumstances explained and justified its conduct.<sup>139</sup> In *Hilti*, the undertaking argued that its conduct was objectively justified by the necessity to protect the proper functioning of its nail guns because the use of other nails would lead to fastening problems.<sup>140</sup> Hilti explained that it was its duty under product liability law to ensure that such problems did not occur. The CFI did not accept this argument. It considered that at no time had Hilti contacted the competent U.K. authorities for a ruling that the use of other than Hilti nails was dangerous and therefore banned.<sup>141</sup> Hilti should have used the proper legislative channels and was not entitled to take steps on its own initiative to eliminate products which it considered to be dangerous.

#### D. Procedural Issues

During its first three years, the CFI had to deal with a considerable amount of procedural issues. The order in which these issues will be discussed tries to follow the structure of Council Regulation No. 17/62 ("Regulation 17").<sup>142</sup>

A case is registered at DG-IV when it receives a notification, an official complaint or when its officials decide to open a file *ex officio*. Article 10(1) of Regulation 17 obliges the Commission to transmit to the competent authorities of the Member States copies of the notification together with copies of the most important documents lodged with the Commission for the purposes of its investigation.<sup>143</sup>

The investigation of the case is usually based upon information obtained by the Commission, pursuant to Article 11(1) of Regulation 17.<sup>144</sup> This provision allows the Commission to request the necessary information from undertakings by let-

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138. EEC Treaty, *supra* note 2, art. 86.

139. See Luc Gyselen, *Abuse of Monopoly Power within the Meaning of Article 86 of the EEC Treaty: Recent Developments*, in 1989 FORDHAM CORP. L. INST. 597 (Barry E. Hawk ed., 1990).

140. *Hilti*, slip. op. ¶¶ 102-07.

141. *Id.* ¶ 117.

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

143. *Id.* art. 10(1), O.J. Eng. Spec. Ed. 1959-62, at 89.

144. *Id.* art. 11(1), O.J. Eng. Spec. Ed. 1959-62, at 90.



ter.<sup>145</sup> In *Samenwerkende Elektriciteits-Productiebedrijven NV (SEP) v. Commission* ("SEP"), the Dutch association of electricity producers had refused to send, upon the Commission's request, a copy of a gas supply contract concluded with Statoil.<sup>146</sup> The association argued that this contract was not relevant for the examination of its relation with its major gas supplier, Gasunie. It also feared that the Commission would transmit, pursuant to Article 10(1), a copy of the contract to the Dutch government, the majority shareholder of Gasunie. Disclosure of the contract to Gasunie would undermine SEP's negotiating position. In light of this refusal, the Commission adopted an official decision under Article 11(5) ordering SEP to submit the contract. This decision was attacked by SEP before the CFI.

The CFI had to decide first whether the information was necessary within the meaning of Article 11 of Regulation 17. It ruled that the Commission could legitimately consider that the contract had a link with the suspected infringement of Article 85 or 86, because the Statoil contract had, as an element of the context of the infringement, influenced the relationship between SEP and Gasunie.<sup>147</sup> The CFI subsequently dealt with the confidentiality issue. It held that even if the contract was transmitted to the Dutch authorities they would be bound by Article 20 of Regulation 17. This provision protects business secrets and limits the use of the information obtained under Article 11 to the purposes of the investigation.<sup>148</sup> This means that the Dutch authorities in charge of competition are not allowed to transmit the information to their colleagues dealing with Gasunie.<sup>149</sup>

Article 11 letters are not the only correspondence between undertakings and the Commission's officials. In the

145. *Id.*

146. Case T-39/90 (Ct. First Instance Dec. 12, 1991) (not yet reported) [hereinafter SEP].

147. *Id.* The CFI referred in this respect to *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, [1991] 4 C.M.L.R. 502 and *Solvay et CIE v. Commission*, Case 27/88, [1989] E.C.R. 3355, [1991] 4 C.M.L.R. 502.

148. See Council Regulation No. 17/62, *supra* note 142, art. 20, O.J. Eng. Spec. Ed. 1959-62, at 93.

149. However, the national authorities in charge of competition may use the information they receive from the Commission as a starting point for their own investigations under national competition law. See *Dirección General de Defensa de la Competencia v. Asociación Española de Banca Privada*, Case C-67/91 (Eur. Ct. J. July 16, 1992) (not yet reported).

“Dutch pharmaceutical” cases, the undertakings involved challenged a letter sent by the Commissioner in charge of competition policy to the Dutch government.<sup>150</sup> The letter concerned an agreement concluded by drug companies, wholesalers, insurers, pharmacists, and doctors aimed at saving costs by price reductions. The parties would implement the scheme if the Dutch government changed certain provisions of drug reimbursement regulations. The government was not prepared to accept the agreement before it was established that its approval would not infringe the EEC Treaty. Following a meeting with two members of the Dutch government, the Commissioner informed them that, in his view, the Commission could only envisage the adoption of a positive decision if two conditions were fulfilled: the parties should modify their agreement and its effects should be reassessed after a one year monitoring period. He specified that his personal view on the agreement would not affect the procedural rights of the parties concerned.

The Commissioner’s letter produced a kind of stalemate which satisfied neither the parties to the agreement nor the association of parallel importers and generic drug suppliers, Prodifarma, which had lodged a complaint with DG-IV against the scheme. When some of the parties and Prodifarma challenged the letter before the CFI, the Commission raised an exception of inadmissibility, pursuant to Article 92 of the Court of Justice’s Rules of Procedure applicable *mutatis mutandis* to the CFI until July 1, 1991.<sup>151</sup> It argued that the letter did not constitute a challengeable act under Article 173 of the EEC Treaty.<sup>152</sup> The CFI accepted this argument, and held that the letter did not produce any legally binding effect.<sup>153</sup> The Dutch government could not be bound by the personal views of one

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150. Nefarma, Case T-113/89, [1990] E.C.R. II-797 (Ct. First Instance); VNZ, Case T-114/89, [1990] E.C.R. II-827 (Ct. First Instance); Prodifarma I, Case T-116/89, [1990] E.C.R. II-843 (Ct. First Instance); Prodifarma II, Case T-3/90, [1991] E.C.R. II-1 (Ct. First Instance). For a more detailed comment of these cases, see H. Kirschner, *Die Abgrenzung des Verwaltungsaktes von anderen behördlichen Handlungen, vor allem zur Beeinflussung wirtschaftlicher Abläufe*, in *DER RECHTSPRECHUNG DES GERICHTS ERSTER INSTANZ DER EG* (1991).

151. ECJ Rules of Procedure, *supra* note 60, art. 92(1), O.J. C 39/1, at 22 (1982).

152. EEC Treaty, *supra* note 2, art. 173.

153. Nefarma, [1990] E.C.R. II-797; VNZ, [1990] E.C.R. II-827; Prodifarma I, [1990] E.C.R. II-843; Prodifarma II, [1991] E.C.R. II-1.

Commissioner on Articles 85 and 86, which are applicable to undertakings and not to public authorities. Nor could the letter be seen as a final decision vis-à-vis the companies involved. The wording of the letter and the proviso concerning the procedural rights implied that the letter constituted the beginning of the investigation of the case.

After the investigation of a case, pursuant to the provisions of Regulation 17, the Commission must decide whether the final result will be negative or positive for the companies involved.<sup>154</sup> If it decides to adopt a negative clearance or an exemption, the Commission can usually count on the cooperation of the notifying parties.<sup>155</sup> The situation may be different if a third party has lodged a complaint. A positive stand on the agreement or practice, whether or not it is notified, necessarily implies that the Commission does not intend to act upon its complaint. Regulation 17 does not determine how the Commission should act in these circumstances. The only provision which directly concerns the rejection of complaints is Article 6 of Regulation 99; if the Commission considers that there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time limit for them to submit any further comments in writing.<sup>156</sup>

In *Automec Srl v. Commission*, the CFI clarified the functioning of this obscure provision.<sup>157</sup> It specified that the procedure foreseen by Article 6 has three distinct phases.<sup>158</sup> In the first phase the Commission's services investigate the case which is opened upon a complaint.<sup>159</sup> During this phase the officials in charge and the applicant may exchange views and information on an informal basis. The preliminary opinions expressed by these services on these occasions cannot be qualified as chal-

154. Council Regulation No. 17/62, *supra* note 142, arts. 2, 3(1), O.J. Eng. Spec. Ed. 1959-62, at 88.

155. *But see* Sadolin & Holmblad A/S, Members of the Transocean Marine Paint Ass'n v. Commission, Case 17/74, [1974] E.C.R. 1063, [1974] 2 C.M.L.R. 459; Nederlandse Bankiersvereniging v. Commission, Case T-138/89 (Ct. First Instance Sept. 17, 1992) (not yet reported).

156. Regulation No. 99/63, art. 6, 127 J.O. 2268 (1963), O.J. Eng. Spec. Ed. 1963-64, at 48.

157. *Automec Srl v. Commission*, Case T-64/89, [1990] E.C.R. II-367, [1991] 4 C.M.L.R. 177 (Ct. First Instance). For a more detailed description of this case, see Kirschner, *supra* note 150.

158. *Automec*, [1990] E.C.R. at II-382, [1991] 4 C.M.L.R. at 189-90.

159. *Id.*

challengeable acts within the meaning of Article 173.<sup>160</sup>

The second phase starts with a notice sent to the applicant informing him that the Commission considers that there are insufficient grounds for granting the application.<sup>161</sup> This notice may be seen, in the relation between the Commission and the complainant, as the equivalent of a statement of objections in the relation between the Commission and the accused undertaking. Since the Court of Justice ruled in *IBM v. Commission* that such a statement is not a challengeable act, an appeal against an Article 6 notice is inadmissible as well.<sup>162</sup>

In the third phase the Commission definitively rejects the complaint.<sup>163</sup> The Commission's competence to reject the complaint is not explicitly foreseen by Article 6, but was recognized by the Court of Justice in several cases. The final rejection of the complaint is an official act and can be challenged under Article 173.<sup>164</sup>

If the Commission considers that there are sufficient grounds for action under Articles 85 and 86, it must inform the undertakings, pursuant to Article 2 of Regulation 99, of the objections raised against them.<sup>165</sup> Article 3 of the same regulation provides that the undertakings shall make known in writing their views concerning these objections.<sup>166</sup> Despite this mandatory wording, the CFI decided in *Hilti* that undertakings do not have the obligation to reply to the statement of objections and that the absence of any reply does not affect their *locus standi* before the CFI if they raise arguments against the

160. *Id.*

161. *Id.*

162. *International Business Machines Corp. v. Commission*, Case 60/81, [1981] E.C.R. 2639, [1981] 3 C.M.L.R. 635. The CFI's assessment of an Article 6 notice gives an answer to the question left open in *GEMA Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte v. Commission*, Case 125/78, [1979] E.C.R. 3173, [1980] 2 C.M.L.R. 177.

163. *Automec*, [1990] E.C.R. at II-383, [1991] 4 C.M.L.R. at 191.

164. *Demo-Studio Schmidt v. Commission*, Case 210/81, [1983] E.C.R. 3045, [1984] 1 C.M.L.R. 63; *Comité des industries cinématographiques des Communautés européennes (CICCE) v. Commission*, Case 298/83, [1985] E.C.R. 1105, [1986] 1 C.M.L.R. 486 [hereinafter *CICCE*]; *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 & 156/84, [1987] E.C.R. 4487, [1988] C.M.L.R. 24; see *Automec II*, Case T-24/90, [1992] E.C.R. \_\_\_, [1992] 5 C.M.L.R. 431 (Ct. First Instance).

165. Commission Regulation No. 99/63, *supra* note 156, art. 2, O.J. Eng. Spec. Ed. 1963-64, at 47-48.

166. *Id.* art. 3, O.J. Eng. Spec. Ed. 1963-64, at 48.

Commission's final decision.<sup>167</sup>

In most cases, however, the accused undertakings want to defend themselves against the Commission's objections. In *Polypropylene*, two undertakings argued that the possibility for an effective defense did not exist, because the Commission's officials in charge of the case combined both the inspection and reporting function.<sup>168</sup> This dual role would necessarily affect their impartiality and, hence, the legality of the preparation of the decision. The CFI rejected these arguments. It ruled that the Commission is not a "jurisdiction" within the meaning of Article 6 of the European Convention on Human Rights, but that Regulations 17 and 99 nevertheless provide for a contradictory procedure. These regulations elaborate a fundamental principle of Community law which requires that the rights of the defense should be respected in any procedure and which implies, in particular, that the undertaking concerned should be in a position to make its views known on any facts raised against it.<sup>169</sup>

Some undertakings in *Polypropylene* considered that an effective defense required full access to the Commission's file, and, in particular, to those parts of the file which could contain evidence favorable to them. In its reply to these arguments the Commission relied upon the case law of the Court of Justice, according to which regard for the rights of the defense does not require that an undertaking be able to comment on all of the documents forming part of the Commission's file because there are no provisions requiring the Commission to divulge the contents of its files to the parties concerned.<sup>170</sup> The CFI accepted the Commission's reasoning, but considered it incomplete. It observed that in establishing a procedure for pro-

167. Hilti, Case T-30/89, slip op. ¶¶ 37-38 (Ct. First Instance Dec. 12, 1991) (not yet reported). The same holds true for the *locus standi* of a complainant. See *CICCE*, [1985] E.C.R. 1105, [1986] 1 C.M.L.R. 486.

168. See *supra* note 52 (listing *Polypropylene* cartel cases); Shell, Case T-11/89, slip op. ¶ 39 (Ct. First Instance Mar. 10, 1992) (not yet reported); Montedipe v. Commission, Case T-14/89, slip op. ¶ 319 (Ct. First Instance Mar. 10, 1992) (not yet reported).

169. See *SA Musique Diffusion Française v. Commission*, Joined Cases 100-103/80, [1983] E.C.R. 1825, [1983] 3 C.M.L.R. 221 [hereinafter *Pioneer*].

170. *Hercules*, Case T-7/89, [1991] E.C.R. \_\_, \_\_ [1992] 4 C.M.L.R. 84, 265, ¶ 52 (citing *Re Dutch Books: VBVB & VBBB v. Commission*, Joined Cases 43 & 63/82, [1984] E.C.R. 19, 59, [1985] 1 C.M.L.R. 27).

viding access to files in its *Twelfth Competition Report*, the Commission imposed on itself rules exceeding the requirements laid down by the Court of Justice and that the Commission may not depart from rules which it has imposed on itself.<sup>171</sup> It follows that the Commission has the obligation to disclose all documents, whether favorable or otherwise, which it has obtained during the course of its investigation, save where business secrets, internal administrative documents, or other confidential information are involved.<sup>172</sup>

However, the Commission's refusal to grant access to its files did not lead to a breach of the rights of the defense, because it could not be established that the Commission had withheld exonerating evidence.<sup>173</sup> It would have been necessary only to examine whether these rights were infringed, if in the absence of that refusal the administrative proceedings could have led to a different result than the one reached in the contested decision.

During the administrative proceedings in *SA Cimenteries CBR v. Commission*, the Commission again refused to grant full access to its files, this time for confidentiality reasons.<sup>174</sup> The companies involved requested the President of the CFI to order the Commission to grant them access, pursuant to Article 186 of the EEC Treaty. The President rejected their application because the parties did not suffer any serious and irreparable harm. If the CFI were to rule in the main proceedings that the Commission's refusal was illegal, the Commission would have to re-open its own proceedings and grant access to its files. The outcome of *Cimenteries* depends upon the discretion which the Commission has for refusing access for reasons of confidentiality.

As regards confidentiality issues, the CFI adopted an interesting order in *Hilti*.<sup>175</sup> It concerned a request by two of Hilti's competitors to intervene in the procedure before the

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171. *Id.* at \_\_, [1992] 4 C.M.L.R. at 265-66, ¶ 53.

172. *Id.* at \_\_, [1992] 4 C.M.L.R. at 266, ¶ 54.

173. *Id.* at \_\_, [1992] 4 C.M.L.R. at 266-67, ¶¶ 55-56.

174. Joined Cases T-10-12, 14 & 15/92, slip op. ¶ 50 (Ct. First Instance Mar. 23, 1992) (not yet reported). The CFI confirmed the Order of the President on December 18, 1992 (not yet reported).

175. *Hilti Aktiengesellschaft v. Commission*, Case T-30/89, [1990] E.C.R. II-163, [1990] 4 C.M.L.R. 602 (Ct. First Instance).

CFI.<sup>176</sup> The rules of procedure then in effect prescribed that interveners are to receive a copy of every document served on the parties, except when it is subject to confidential treatment.<sup>177</sup> It follows from *AM & S Europe Ltd. v. Commission* that written communication between an independent lawyer and its client is confidential because it is covered by legal professional privilege.<sup>178</sup> The CFI extended the scope of this principle to internal notes of the undertaking reporting on external legal advice. Even if this order of the CFI only concerns its own procedure, it reflects the CFI's general attitude towards legal professional privilege and it is therefore relevant for the assessment of the scope of the Commission's powers under Article 14 of Regulation 17.<sup>179</sup>

The right of undertakings to be heard means that they can make their views known not only in writing, but orally as well. Article 9(4) of Regulation 99 provides that the parties have the right to approve the minutes of the hearing.<sup>180</sup> In *Polypropylene*, the CFI ruled that the violation of this right could affect the legality of this decision only if the Advisory Committee and the Commission itself would have expressed different views if they had known the contents of the approved minutes.<sup>181</sup> With reference to *Re Dutch Books: Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB) & Anor v. Commission*, the CFI specified that the parties do not have a right to comment on the report of the hearing officer.<sup>182</sup>

After the hearing of the parties, the contradictory phase of the administrative proceedings is closed. If the Commission

176. *Id.* at II-166, [1990] 4 C.M.L.R. at 604.

177. *Id.* at II-168, [1990] 4 C.M.L.R. at 605 (citing ECJ Rules of Procedure, *supra* note 60, art. 93(4), O.J. C 39/1 (1982).

178. *AM & S Europe Ltd. v. Commission*, Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264.

179. Council Regulation No. 17/62, *supra* note 142, art. 14, O.J. Eng. Spec. Ed. 1959-62, at 91. This view is confirmed by M. A. Fierstra, *Het legal privilege opnieuw beschouwd*, 39 SOCIAAL ECONOMISCHE WETGEVING 699 (1991).

180. Commission Regulation No. 99/63, *supra* note 156, art. 9(4), O.J. Eng. Spec. Ed. 1963-64, at 48.

181. *See Hercules*, Case T-7/89, [1991] E.C.R. \_\_, \_\_, [1992] 4 C.M.L.R. 84, 265, ¶ 51 (Ct. First Instance).

182. *See id.* at \_\_, [1992] 4 C.M.L.R. at 265, ¶ 52 (discussing *Vereniging ter Bevordering van het Vlaamse Boekwezen (VBVB) & Anor v. Commission*, Joined Cases 43 & 63/82, [1984] E.C.R. 19, [1985] 1 C.M.L.R. 27)); *ICI*, Case T-13/89, slip op. ¶¶ 40-41 (Ct. First Instance Mar. 10, 1992) (not yet reported).

wants to continue these proceedings in view of a final decision, it has to consult the Advisory Committee on Restrictive Practices and Monopolies, pursuant to Article 10(3) of Regulation 17.<sup>183</sup> The CFI decided in *Vichy* that the text of Articles 10 and 15 of that regulation did not require such a consultation in proceedings initiated under Article 15(6).<sup>184</sup> This provision enables the Commission to withdraw the immunity from fines in cases where the notified agreement infringes Article 85(1) and clearly does not merit an exemption under Article 85(3). This procedure is a useful weapon against delaying tactics of notifying parties which count on the Commission's inertia for the pursuit of their restrictive objectives while benefitting from an immunity against fines.

An Article 15(6) decision corresponds in some respects to interim measures.<sup>185</sup> Both are provisional steps pending the final decision in the case. There are some differences. Interim measures enable the Commission to impose a certain conduct on undertakings, even if they did not notify their agreement.<sup>186</sup> Article 15(6) decisions have a more limited scope; they merely withdraw a benefit and do not require the notifying parties to change their behavior.<sup>187</sup> However, the practical effect of such decisions will normally be the termination of the notified agreements because the risk of being fined is considerably increased. This means that the Commission can obtain under Article 15(6) the same results as it would with interim measures without having to consult the Advisory Committee.<sup>188</sup> It is possible to infer from the CFI's case law on interim meas-

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183. Council Regulation No. 17/62, *supra* note 142, art. 10(3); O.J. Eng. Spec. Ed. 1959-62, at 92.

184. *Vichy*, Case T-19/91 (Ct. First Instance Feb. 27, 1992) (not yet reported).

185. Council Regulation No. 17/62, *supra* note 142, art. 15(6), O.J. Eng. Spec. Ed. 1959-62, at 90.

186. *See Peugeot v. Commission*, Case T-23/90R, [1990] E.C.R. II-195 (Ct. First Instance).

187. It should be noted that an Article 15(6) decision also gives a clear indication to national jurisdictions. It follows from *Portelange v. Smith Corona*, Case 43/69, [1969] E.C.R. 309, [1974] 1 C.M.L.R. 426, that such a decision makes an end to the provisional validity of old agreements.

188. It is the Commission's practice to consult the Advisory Committee for interim measures. However, it is unclear whether it has an obligation to do so. *See Opinion of Advocate General Slynn, Ford-Werke AG v. Commission*, Joined Cases 25 & 26/84, [1985] E.C.R. 2725, [1985] 3 C.M.L.R. 528 (considering whether this obligation exists).



ures and Article 15(6) that the latter procedure has another advantage for the Commission. In *Prodifarma* the CFI ruled that a complainant cannot compel the Commission to adopt an Article 15(6) decision under Article 175, whereas in *La Cinq* it annulled, upon request of a complainant, the Commission's refusal to adopt interim measures.<sup>189</sup>

In *Vichy*, the CFI specified the conditions which allow the Commission to act under Article 15(6).<sup>190</sup> With reference to the Court of Justice's 1967 judgment in *Cimenteries* it considered that this procedure may be followed if the infringement of Article 85(1) is so manifest and serious that an exemption seems excluded.<sup>191</sup> The CFI held that the three circumstances put forward by the Commission met this requirement: a complaint lodged by Cosimex illustrating the concrete restrictive effects of Vichy's network, its own *APB* decision as a precedent and the decisions adopted by the French competition authorities.<sup>192</sup> It should be noted that the complaint was rejected. This seems to imply that the existence of precedents, including national ones, is sufficient for recourse to Article 15(6). The CFI did not examine whether or not urgency was required.

After consultation with the Advisory Committee or after the contradictory phase in Article 15(6) proceedings, DG-IV sends the case to the Commission. From that moment onwards, the President, with the assistance of the Executive Secretary, must ensure that the Commission takes its collegiate decision according to its Rules of Procedure.<sup>193</sup> Article 10 of these rules states that minutes of all meetings shall be taken and that the draft minutes shall be authenticated by the President and the Executive Secretary.<sup>194</sup> Article 12 of the rules reads as follows:

Acts adopted by the Commission, at a meeting or by written

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189. *Prodifarma I*, Case T-116/89, [1990] E.C.R. II-843; *Prodifarma II*, Case T-3/90, [1991] E.C.R. II-1; *La Cinq SA v. Commission*, Case T-44/90, [1992] E.C.R. —, [1992] 4 C.M.L.R. 449 (Ct. First Instance).

190. *Vichy*, Case T-19/91 (Ct. First Instance Feb. 27, 1992) (not yet reported).

191. *Id.* (citing *Re Noordwijks Cement Accord: Cimenteries CBR Cementbedrijven NV v. Commission*, Joined Cases 8-11/66, [1967] E.C.R. 75, [1967] C.M.L.R. 77).

192. *APB*, O.J. L 18/35 (1990).

193. Rules of Procedure of the Commission, 17 J.O. 181 (1963), O.J. Eng. Spec. Ed. 2d 1974, at 11.

194. *Id.* art. 10, O.J. Eng. Spec. Ed. 2d 1974, at 11.

procedure, shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary.

The texts of such acts shall be annexed to the minutes in which their adoption is recorded.

The President shall, as may be required, notify acts adopted by the Commission to those to whom they are addressed.<sup>195</sup>

Article 16 of the Rules of Procedure states that the Executive Secretary "shall take the necessary steps to ensure official notification of acts of the Commission and their publication in the *Official Journal of the European Communities*."<sup>196</sup>

In *Re the PVC Cartel: BASF AG v Commission*, the CFI considered that something went fundamentally wrong with the application of these rules.<sup>197</sup> The CFI found, in the first place, that the draft decisions submitted in English, French and German to the Commission on December 14, 1988 differed from the decisions ultimately served upon the companies.<sup>198</sup> These differences were more important than mere linguistic corrections and affected both the reasoning and the operative part of the decisions. The CFI, therefore, held that these modifications were contrary to the principle of the unalterability of the adopted measure and, hence, to Article 190 of the EEC Treaty.<sup>199</sup> The CFI also established that the Commissioner in charge was not competent to issue the contested decisions.<sup>200</sup> In analyzing the minutes of the Commission's meeting, the CFI determined that the decisions were not adopted in Dutch and Italian, which were authentic texts within the meaning of Article 12 of the Rules of Procedure.<sup>201</sup> The CFI held that Article 27 of these rules does not allow the Commission to delegate the preparation of such texts.<sup>202</sup> Therefore, the Commissioner was not competent to sign the decisions in these languages.<sup>203</sup>

195. *Id.* art. 12, O.J. Eng. Spec. Ed: 2d 1974, at 12.

196. *Id.* art. 16(3), O.J. Eng. Spec. Ed. 2d 1974, at 12.

197. PVC, Joined Cases T-79, 84-86, 89, 91-92, 94, 96, 98, 102 & 104/89, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 357 (Ct. First Instance).

198. *Id.* at \_\_, [1992] 4 C.M.L.R. at 367-68, ¶¶ 16-19.

199. *Id.* at \_\_, [1992] 4 C.M.L.R. at 373, ¶ 35 (citing *Re the Protection of Battery Hens: United Kingdom v. Council*, Case 131/86, [1988] E.C.R. II-905, [1988] 2 C.M.L.R. 364 (Ct. First Instance)).

200. *Id.* at \_\_, [1992] 4 C.M.L.R. at 381-82, ¶¶ 61-63.

201. *Id.* at \_\_, [1992] 4 C.M.L.R. at 380, ¶ 55.

202. *Id.* at \_\_, [1992] 4 C.M.L.R. at 380-81, ¶¶ 56-57.

203. *Id.* at \_\_, [1992] 4 C.M.L.R. at 381, ¶ 60.

Moreover, the Commissioner was not competent to sign *ratione temporis*.<sup>204</sup> When, on the last day of his term as Commissioner, Peter Sutherland signed the letters notifying the contested measures, the various language versions of these measures were not yet finalized and could therefore not be notified.<sup>205</sup> The CFI specified that this defect could have been remedied if the Commission had proved that his signatures only concerned the copies of the decisions notified to the undertakings and that the originals were signed by a properly authorized person.<sup>206</sup> However, the Commission was unable to produce the original of these decisions.<sup>207</sup>

The alterations in the texts and the lack of competence of the authority issuing the measures could have been considered as grounds for the annulment of the decisions. However, the CFI examined instead the arguments of the applicants relating to the non-existence of the measures. It held in this respect that the Community judges declare non-existent a measure which is vitiated by particularly serious and manifest defects and that the plea of non-existence concerns a matter of public interest which may be relied upon at any time during the proceedings and which the judge must raise *ex officio*.<sup>208</sup> In light of the serious defects already found, the CFI ordered the Commission to produce the decision of the Commission in its original and authenticated form.<sup>209</sup> The only documents submitted by the Commission were the draft decisions in three languages, two extracts from minutes and the letter of January 5, 1989 signed by Commissioner Sutherland.<sup>210</sup>

It could not be established, therefore, that Article 12 had been respected. This provision is of fundamental importance for the legal certainty of those subject to measures adopted by the Community institutions. Only when a measure is adopted by the full Commission, duly authenticated by the signatures of the President and the Executive Secretary and combined with the minutes of the meeting, is it possible to be certain of the

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204. *Id.*

205. *Id.* at \_\_, [1992] 4 C.M.L.R. at 382, ¶ 63.

206. *Id.* at \_\_, [1992] 4 C.M.L.R. at 382-83, ¶ 64.

207. *Id.*

208. *Id.* at \_\_, [1992] 4 C.M.L.R. at 384-85, ¶ 68.

209. *Id.* at \_\_, [1992] 4 C.M.L.R. at 385, ¶ 69.

210. *Id.* at \_\_, [1992] 4 C.M.L.R. at 385, ¶ 70.

existence of that measure, its content and to be sure that it corresponds exactly to the intention of the Commission.<sup>211</sup> The importance of authentication is confirmed by the fact that natural and legal persons may rely upon the institution's Rules of Procedure, in so far as the provisions create rights and contribute to legal certainty for such persons.<sup>212</sup> The CFI referred to Article 192 of the EEC Treaty in this respect, which allows national jurisdictions to verify the authenticity of Community measures.<sup>213</sup>

The lack of authentication in the confusing context of the case implied that the CFI could not exactly determine the date, the content and the issuing authority of the measures. The CFI concluded that these measures could not be regarded as decisions within the meaning of Article 189 of the EEC Treaty.<sup>214</sup> Hence, the applications were addressed against non-existent decisions and were rejected as inadmissible.<sup>215</sup>

The judgment in *PVC* has created much confusion. If the way the Commission operated in *PVC* reflects its normal decisional practice, many of its acts could be threatened by "non-existence" and the fines eventually imposed should be reimbursed. This idea has inspired many lawyers. In the *LdPE* case, which is still pending before the CFI and which was "decided" by the Commission on the same date as *PVC*, the parties have raised the issue and a special hearing has been held for this matter.<sup>216</sup> In *Polypropylene*, several companies asked for a re-opening of the procedure before the CFI, relying upon the non-existence of the decision. The CFI rejected their request. It considered that a regularly notified and published decision is presumed to exist and to be valid. The applicants should put forward sufficient arguments to rebut this presumption. The CFI concluded that the applicants had failed in this respect. The companies concerned have appealed this ruling before the Court of Justice. The final say belongs to the Court of Justice

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211. *Id.* at \_\_, [1992] 4 C.M.L.R. at 386, ¶ 74.

212. *Id.* at \_\_, [1992] 4 C.M.L.R. at 385-86, ¶ 72.

213. EEC Treaty, *supra* note 2, art. 192.

214. *PVC*, [1992] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 391-92, ¶ 96.

215. *Id.* at \_\_, [1992] 4 C.M.L.R. at 393-94, ¶¶ 101-02.

216. *LdPE*, Joined Cases T-80, 81, 83, 87, 88, 90, 93, 95, 97, 99, 100, 101, 103, 105, 107 & 112/89 (Ct. First Instance not yet decided); Commission Decision No. 89/191, O.J. L 74, at 21 (1989).

which has to pronounce itself on these appeals and on the appeal lodged by the Commission in *PVC*. It is hoped that the Court of Justice will be able to clarify the Commission's existential problem rapidly. Otherwise, the amount of new cases on this issue will continue to increase. Many companies have already contacted the Commission claiming a refund of their fines.

Whatever the final outcome of this issue may be, it should be noted that the CFI's approach in *PVC* is very formalistic and that it contrasts with the more flexible approach followed on procedural issues in other cases. The refusal to grant access to files and the violation of Article 9(4) of Regulation 99 in *Polypropylene* did not have any consequences for the legality of the Commission's decision, because these defects did not affect the rights of the parties in substance. The fact that the period of notification foreseen by Article 10 of Regulation 17 for meetings of the Advisory Committee was not respected did not have any consequences in *RTE* also, because violation of this purely internal rule only affects the legality of the procedure if the Committee was not able to deliver its opinion in full knowledge of the facts. These cases illustrate that the CFI is prepared to go beyond formalities in order to examine whether the parties's individual rights were really affected. A substantive analysis from this angle in *PVC* would perhaps have led to a different result. Finally, the judgment in *PVC* is surprising, even from a purely formal point of view: does it require 103 grounds and sixty pages to rule that something is non-existent?

#### E. *Interim Measures*<sup>217</sup>

The Court of Justice decided in *Camera Care Ltd. v. Commission* that the Commission had the power under Article 3 of Regulation 17 to adopt interim measures in cases proved to be urgent, in order to avoid a situation likely to cause serious and irreparable damage to the party seeking their adoption, or which is intolerable for the public interest.<sup>218</sup> In *La Cinq*, the

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217. In 1987, Mr. Temple Lang made an interesting inventory of procedural issues with which the CFI could be confronted. See Temple Lang, *supra* note 60.

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

CFI specified this case law.<sup>219</sup> La Cinq, a French television company, had lodged a complaint with the Commission relating to the conduct of the European Broadcasting Union ("EBU") which is in charge of exchanges of programs throughout Europe, like Eurovision.<sup>220</sup> Its complaint concerned, in particular, EBU's refusal to accept La Cinq as a member and to give it access to the programs.<sup>221</sup> In its complaint, La Cinq requested interim measures.<sup>222</sup> The Commission considered that it was not in a position to adopt such measures because neither the a priori existence of a clear and flagrant infringement of Articles 85 and 86 nor serious and irreparable damage could be established.<sup>223</sup>

The CFI held that this refusal was sufficiently motivated within the meaning of Article 190 of the EEC Treaty.<sup>224</sup> However, the reasons upon which this motivation relied were not valid. As regards the first reason, the CFI considered that the Commission had confused the condition of a prima facie infringement with the certainty of an infringement required for a final decision. In other words, the grant of interim measures does not require that a clear and flagrant infringement be established.<sup>225</sup> With respect to the second reason, the CFI found that the Commission had also given a wrong interpretation to the concept of serious and irreparable damage.<sup>226</sup> This condition does not mean that the damage cannot be repaired by any later decision of the Commission, but that the damage cannot be repaired by the final decision in the main proceedings. Moreover, the CFI found that the Commission had not properly assessed the facts of the case.<sup>227</sup> In light of these findings, the CFI annulled the Commission's refusal to grant interim measures.<sup>228</sup>

The judgment in *La Cinq* raises the question whether the

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219. *La Cinq SA v. Commission*, Case T-44/90, [1992] E.C.R. \_\_, \_\_, [1992] 4 C.M.L.R. 449, 457-58 (Ct. First Instance).

220. *Id.* at \_\_, [1992] 4 C.M.L.R. at 452-54.

221. *Id.* at \_\_, [1992] 4 C.M.L.R. at 455.

222. *Id.*

223. *Id.* at \_\_, [1992] 4 C.M.L.R. at 456.

224. *Id.* at \_\_, [1992] 4 C.M.L.R. at 460-61.

225. *Id.* at \_\_, [1992] 4 C.M.L.R. at 464-65.

226. *Id.* at \_\_, [1992] 4 C.M.L.R. at 465.

227. *Id.*

228. *Id.* at \_\_, [1992] 4 C.M.L.R. at 470.

Commission has the obligation to adopt interim measures when the newly defined conditions of *Camera Care* are met. In light of the CFI's recent ruling in *Automec II*, it would not be consistent to impose such an obligation on the Commission.<sup>229</sup> Indeed, the CFI decided in that case that the Commission may reject a complaint for the sake of expediency if certain conditions are fulfilled. In any event, the President of the CFI will not order the Commission to adopt interim measures on behalf of a complainant, pursuant to Article 186 of the EEC Treaty.<sup>230</sup> In *Cosimex GmbH v. Commission*, the President of the CFI ruled that such an order would be contrary to the principle governing the distribution of powers between the different Community institutions.<sup>231</sup> He also pointed out that the CFI cannot oblige the Commission to reconsider a request for interim measures without having declared void the act embodying the refusal to adopt the relevant interim measures.<sup>232</sup>

However, the President of the CFI may grant interim relief against a Commission decision on interim measures. In *Peugeot*, the President held that it is sufficient, for the purposes of Article 186 of the EEC Treaty, to consider whether the submissions relied on *prima facie* justify a suspension of the operation of the Commission's decision and whether the maintenance of this decision until the CFI has given its judgment in the main proceedings is likely to cause serious and irreparable damage to the applicants.<sup>233</sup> When applying this rule to the facts of the case, he found that Peugeot had a *prima facie* case as regards its legal arguments.<sup>234</sup> This was not enough to suspend the Commission's interim measures. Since the Commission's decision itself was of a temporary nature, the President also found it necessary to consider whether there was a serious risk that the detrimental effects of that decision would exceed those of a conservatory measure and in the meantime cause

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229. *Automec II*, Case T-24/90, [1992] E.C.R. \_\_, [1992] 5 C.M.L.R. 431 (Ct. First Instance). This problem was already foreseen by John Temple Lang, *supra* note 60, at 600.

230. EEC Treaty, *supra* note 2, art. 186.

231. *Cosimex GmbH v. Commission*, Case T-131/89R, [1990] E.C.R. II-1, \_\_, [1992] 4 C.M.L.R. 395, 397 (Ct. First Instance).

232. *Id.*

233. *Peugeot v. Commission*, Case T-31/89R, [1990] E.C.R. II-309 (Ct. First Instance July 12, 1991) (not yet reported).

234. *Id.*

damage considerably in excess of the inevitable but short-lived disadvantages arising from such a measure.<sup>235</sup> This test implied that a balance should be struck between the interests of Peugeot and those of the company which the Commission sought to protect. The President decided on this basis that Peugeot's request for interim relief against the Commission's interim measures should be dismissed.<sup>236</sup>

*Langnese and Schöller v. Commission* also concerned an application pursuant to Articles 185 and 186 against the Commission's interim measures.<sup>237</sup> In this case, the President actively intervened in order to find a compromise solution. The case concerned the exclusive purchasing contracts concluded by Langnese and Schöller with a considerable number of German retailers for the distribution of ice cream. The Commission had ordered these companies to waive the exclusivity of the purchasing contracts in order to give Mars access to the ice cream market. Both companies requested the suspension of this decision during the proceedings before the CFI.

The President noted that the final judgment could not repair the effects of the Commission decision which concerned the summer season of 1992 and that the arguments of the applicants were not unfounded. In such circumstances a balance should be struck between the interests of a good administration of justice and the interests of all the parties involved. A refusal to suspend the contested decision would cause irreparable damage to the distribution networks of the applicants, whereas a suspension would exclude Mars from the German market for the summer of 1992. The compromise solution consisted of limited access for Mars to certain identifiable outlets, such as ice cream sold at petrol stations.

The President was requested to rule under Articles 185 and 186 of the EEC Treaty on three other occasions.<sup>238</sup> In *SEP*, he dismissed the application because the Commission's

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235. *Id.* (referring to *Ford of Europe Inc. and Ford-Werke Aktiengesellschaft v. Commission*, Joined Cases 228 & 229/82, [1984] E.C.R. 1129, [1984] 1 C.M.L.R. 649).

236. *Id.* at II-204, [1990] 4 C.M.L.R. at \_\_.

237. Joined Cases T-24 & 28/92, (Ct. First Instance June 16, 1992) (not yet reported).

238. *SEP*, Case T-39/90R, [1990] E.C.R. II-649, [1992] 5 C.M.L.R. 27 (Ct. First Instance), *appeal dismissed*, [1992] E.C.R. \_\_, [1992] 5 C.M.L.R. 33; *Vichy*, Case T-19/91 (Ct. First Instance Feb. 27, 1992) (not yet reported); *SA Cimenteries CBR v. Com-*



decision adopted pursuant to Article 11(5) of Regulation 17 did not cause any serious and irreparable harm;<sup>239</sup> the protection of the interest of this company was sufficiently protected by Articles 10 and 20 of Regulation 17 which prevent national competition authorities from using the information they receive from the Commission for purposes other than those of the Commission's investigation.<sup>240</sup> The application in *Vichy* was also unsuccessful.<sup>241</sup> The President considered that an Article 15(6) decision only reflects the Commission's preliminary views and does not contain any injunction vis-à-vis the undertaking concerned. Such a decision cannot cause any irreparable and serious damage. The same holds true for the Commission's refusal to grant access to its files

#### F. Fines

After the partial annulment of a decision, the CFI must reassess the level of fines imposed by the Commission. The *Polypropylene* and *Flat Glass* judgments give a clear indication of the method of reassessment; the participation of the companies concerned to the restrictive agreement *ratione temporis* and *ratione materiae* is established and determines the new level of fines.

The *Polypropylene* judgments contain some other interesting observations on the criteria upon which the Commission may rely under Article 15 of Regulation 17. The fact that in previous cases the Commission had considered that the crisis affecting the economic sector had to be taken into account did not oblige the Commission to take similar account of such a situation in *Polypropylene* since it had been proved that the undertakings involved had deliberately committed a particularly serious infringement of Article 85(1). Nor was the introduction of compliance programs considered as a mitigating factor by the CFI, even if the Commission had done otherwise in another case.<sup>242</sup> This seems to imply that the criteria applied in

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mission, Joined Cases T-10-12/92 & 15/92 (Ct. First Instance Dec. 18, 1992) (not yet reported).

239. *SEP*, [1990] E.C.R. at II-657, [1992] 5 C.M.L.R. at \_\_.

240. *Id.* at 656-57, [1992] 5 C.M.L.R. at \_\_.

241. *Vichy*, slip op.

242. Napier Brown—British Sugar, O.J. L 284/41 (1988).

one case does not have a precedential value for other cases.<sup>243</sup>

The CFI also held that the Commission may consider repeated infringements (recidivation) by an undertaking as an aggravating factor.<sup>244</sup> It specified, however, that the absence of any previous infringement is a normal circumstance which the Commission does not have to take into account as a mitigating factor.

Finally, one factor deserves particular attention. In the practice of the Commission and the Court of Justice, the cooperative attitude of the companies concerned has normally been considered as a mitigating factor.<sup>245</sup> In *Polypropylene*, ICI had been particularly helpful. This was the reason why the Commission reduced ICI's fines by ten percent. This was not enough according to the CFI. It considered that ICI had given, upon the Commission's request, very detailed answers which not only dealt with ICI's individual involvement but also with the position of other undertakings.<sup>246</sup> Without this information the Commission's work would have been much more difficult. ICI therefore contributed to making an end to the infringements. Because of this contribution ICI's fines were reduced from ECU10,000,000 to ECU9,000,000.<sup>247</sup>

## V. JUDICIAL REVIEW

The CFI is, in principle, not bound by judgments of the Court of Justice. It may develop its own jurisprudence. However, the possibility to appeal its decisions before the Court of Justice implies that the CFI has to respect the Court of Justice's case law in practice.<sup>248</sup> Moreover, the CFI frequently refers to the judgments of the Court of Justice as a basis for its reasoning. This may be seen as a confirmation of the fact that it considers itself bound by these judgments. This means that the

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243. ICI, Case T-13/89, slip op. ¶¶ 389-98 (Ct. First Instance Mar. 10, 1992) (not yet reported) (discussing ICI's cooperation with Commission).

244. *Id.* ¶ 395.

245. See *Sandoz Prodotti Farmaceutici SpA v. Commission*, Case C-277/87, [1990] E.C.R. 45.

246. *ICI*, slip op. ¶ 393.

247. *Id.* ¶¶ 393-94.

248. See MILLET, *supra* note 1, at 74; but see A. Arnulf, *Owning up to Fallibility: Precedent and the Court of Justice* COMMON MKT. L. REV. (forthcoming).

scope of the CFI's review of Commission decisions is determined by the Court of Justice.

It should be noted that the decisions adopted by the Commission in the field of competition cases often contain an appraisal of complex economic matters. In such cases judicial review is limited to verifying whether the facts are correct, whether the relevant procedural rules have been complied with, and whether there has been any manifest error of appraisal or a misuse of powers.<sup>249</sup> This section examines how the CFI deals with these three interrelated questions.<sup>250</sup>

#### A. Facts

Judge Vesterdorf acting as Advocate General in *Polypropylene* held that

it is clear from the preamble to the Council's decision of 24 October 1988 that the very creation of the Court of First Instance as a court of both first and last instance for the examination of facts in the cases brought before it is an invitation to undertake an intensive review in order to ascertain whether the evidence on which the Commission relies in adopting a contested decision is sound.<sup>251</sup>

The case law of the CFI shows that it has taken this invitation seriously. Its control of facts is very thorough and detailed, even in cases concerning time limits.<sup>252</sup> However, this control

249. See *Remia BV v. Commission*, Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1; *British American Tobacco Co. and R.J. Reynolds Indus. v. Commission*, Joined Cases 142 & 156/84, [1987] E.C.R. 4487, [1988] 4 C.M.L.R. 24; *La Cinq SA v. Commission*, Case T-44/90, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 449 (Ct. First Instance).

250. Factual and procedural issues and procedural questions are often difficult to distinguish. See Temple Lang, *supra* note 60, at 585; Francis G. Jacobs, *Court of Justice Review of Competition Cases*, in 1987 *FORDHAM CORP. L. INST.* 543-44 (Barry E. Hawk ed., 1988).

251. Opinion of Advocate General Vesterdorf, *Hercules*, Case T-7/89, [1991] E.C.R. \_\_, \_\_ [1992] 4 C.M.L.R. 84, 125, § I.B.1. The factual control exercised by the Court of Justice has not always been satisfactory, as some Members of the Court have admitted. See U. Everling, "Zur richterlichen Kontrolle der Tatsachenfeststellungen durch die Kommission in Wettbewerbssachen," *Wirtschaft und Wettbewerb*, 884, 887, 890 (1989); Ole Due, *The Court of First Instance*, 1988 *Y.B. EUR. L.* 1, 6 (1989); Sir Gordon Slynn, *EEC Competition Law from the Perspective of the Court of Justice*, in 1987 *FORDHAM CORP. L. INST.* 392 (Barry E. Hawk ed., 1988).

252. See *Filtrona Espanola SA v. Commission*, Case T-125/89, [1990] E.C.R. 393, [1990] 4 C.M.L.R. 832 (Ct. First Instance); *Bayer*, Case T-12/90, [1991] E.C.R. 219.

may only be exercised when the facts are disputed.<sup>253</sup> The CFI is a jurisdiction deciding in contradictory proceedings and may not carry out an active investigation on its own initiative. One may wonder whether this principle of judicial restraint has been completely respected in *PVC* and *Flat Glass*.

In the first case, the problem relating to the existence of the contested decision had not been put forward as a distinct plea in the applications.<sup>254</sup> The problem only arose to its full extent after the CFI had actively intervened in the proceedings, particularly at the hearing during which it had ordered the Commission to produce the original of the decision.<sup>255</sup> The CFI justified its active role by stating that the plea of non-existence concerns a matter of public interest which may be relied upon by the parties at any time during the proceedings and must be raised by the Court of Justice on its own motion.<sup>256</sup> It therefore held it necessary to consider whether the contested measure exhibited particularly serious and manifest defects such as to lead the CFI to declare it non-existent.<sup>257</sup> In other words, the CFI pursued an active search as regards the existence of the decision. This action raises some doubts; is it necessary to search for defects which are so serious and manifest that they lead to non-existence?<sup>258</sup>

In *Flat Glass* the CFI did not actively carry out a fact-finding investigation.<sup>259</sup> It merely organized, with the parties' consent, a common file in light of which it would examine the facts. However, the judgment does not indicate which facts were disputed and which needed to be verified. The text of the judgment gives the impression that the CFI examined on its own motion all the facts upon which the Commission relied

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253. See J. Mertens de Wilmars, *Statement of Reasons and Methods of Interpretation in the Case Law of the EC Court of Justice Relating to Articles 85 and 86*, in 1987 *FORDHAM CORP. L. INST.* 607 (Barry E. Hawk ed., 1988) [hereinafter Wilmars].

254. *PVC*, Joined Cases T-79, 84-86, 89, 91-92, 94, 96, 98, 102 & 104/89, [1992] *E.C.R.* \_\_, \_\_, [1992] 4 *C.M.L.R.* 357, 383-85, ¶¶ 66-70 (Ct. First Instance).

255. *Id.* at \_\_, [1992] 4 *C.M.L.R.* at 364-65, ¶ 7.

256. *Id.* at \_\_, [1992] 4 *C.M.L.R.* at 384-85, ¶ 68.

257. *Id.*

258. One may of course consider that the CFI itself was surprised by the result of its investigation which it carried out to appease the applicants. However, even in this hypothesis the non-existence of the decision was not manifest but had to be established.

259. See *Flat Glass*, Joined Cases T-68, 77 & 78/89, [1992] *E.C.R.* \_\_, [1992] 5 *C.M.L.R.* 302 (Ct. First Instance).

and that the administration should prove before the judges that it has a case.<sup>260</sup> Does the CFI see the Commission as the European equivalent of the Federal Trade Commission?<sup>261</sup>

*Flat Glass* raises another question as regards the assessment of facts. The CFI held that the definition of the relevant market is a necessary precondition of any judgment concerning allegedly anti-competitive behavior.<sup>262</sup> Is such a definition a mere matter of fact? In light of the recent *Delimitis* and *Merci* judgments of the Court of Justice, the answer to this question should be negative.<sup>263</sup> These cases were referred to the Court of Justice by national judges pursuant to Article 177.<sup>264</sup> Although the Court of Justice is not allowed to rule on the facts in such proceedings, it did give a definition of the relevant market in both cases. The Court of Justice presumably held that the uniform application of the EC competition rules depends upon a uniform definition of the relevant market and that, seen in this way, this definition is indeed a necessary precondition for any judgment on anti-competitive behavior. One may state that a proper definition of the relevant market constitutes the link between mere facts and pure law and that it should therefore be given by the Court of Justice or the CFI. However, in *Flat Glass* the CFI held that it was not its task to carry out its own analysis of the market<sup>265</sup> and in *Vichy* it accepted the market as defined by common consent of the parties.<sup>266</sup> This judicial self restraint contrasts with its active role on other issues and with the attitude of the Court of Justice in *Delimitis* and *Merci*.

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260. *Id.* at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 160.

261. A more "activist, and so more inquisitorial" approach of the CFI has been predicted by Temple Lang, *supra* note 60, at 590. The active attitude of the CFI may also be compared to the role of the Kammergericht in competition cases under German law; see U. Everling, "Zur richterlichen Kontrolle der Tatsachenfeststellungen und der Beweiswürdigung durch die Kommission in Wettbewerbssachen," *supra* note 251, at 887.

262. *Flat Glass*, [1992] E.C.R. at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 159.

263. *Delimitis v. Henninger Bräu AG*, Case C-234/89, [1991] E.C.R. 935, [1992] 5 C.M.L.R. 210; *Merci v. Bort di Genova*, Case C-179/90, (Eur. Ct. J. Dec. 10, 1991) (not yet reported). J. Mertens de Wilmars notes that the Court of Justice does not hesitate to complete the facts presented by the national judge in order to render its interpretation sufficiently concrete. Wilmars, *supra* note 253, at 611.

264. EEC Treaty, *supra* note 2, art. 177.

265. *Flat Glass*, [1992] E.C.R. at \_\_, [1992] 5 C.M.L.R. at \_\_, ¶ 160.

266. *Vichy*, Case T-19/91, slip op. ¶ 68 (Ct. First Instance Feb. 27, 1992) (not yet reported).

### B. Procedure

In its case law, the CFI examined the Commission's decisions in the light of several procedural rules and principles. One of these rules can be found in the Treaty itself—Article 190 concerns the obligation to motivate decisions.<sup>267</sup> This obligation implies that the Commission should state the reasons upon which its decision is based in order to enable the interested parties to defend their rights and the Courts to exercise their control.<sup>268</sup> This purely procedural requirement is easily confounded with issues of substantive law. Advocate General Vesterdorf expressed this relation as follows: "if a statement of reasons is based on an incorrect legal view or a wrong assessment of the evidence, this is not therefore a defect in the statement of reasons but, on the contrary, a defect in the legal and factual assessment on which the decision in the case is based."<sup>269</sup> In *Polypropylene* some applicants had confused form and substance. They argued that the contested decision was inadequately supported owing to the Commission's failure to pursue its investigations fully and because it had based its conclusions on insufficient evidence. The CFI rejected this argument by referring to its findings of fact which established that the Commission had proved its allegations to the requisite legal standard.

The case law of both the CFI and the Court of Justice demonstrates that the obligation to state reasons does not mean that the Commission must deal with all the arguments raised by the undertakings concerned.<sup>270</sup> However, in *Flat Glass*, the CFI held that there is a limit to this rule. It considered that, having regard to the arguments of the parties relating to the analysis of the relevant market, the Commission ought to have examined more fully the structures and the functioning of the market in order to show why the conclusions drawn by the applicants were groundless. This means that the statement of reasons must pay attention to the fundamental ar-

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267. EEC Treaty, *supra* note 2, art. 190.

268. *Compagnia Italiana Alcool S.A.S. v. Commission*, Case C-358/90, [1992] E.C.R. \_\_, \_\_ [1992] 2 C.M.L.R. 876, 911 (Ct. First Instance).

269. Opinion of Advocate General Vesterdorf, *Hercules*, Case T-7/89, [1991] E.C.R. \_\_, \_\_, [1992] 4 C.M.L.R. 84, 125, § I.B.1.

270. See *La Cinq SA v. Commission*, Case T-44/90, [1992] E.C.R. \_\_, \_\_, [1992] 4 C.M.L.R. 449, 459, ¶ 41 (Ct. First Instance).

guments of the undertakings concerned. This raises the question of what should be considered as fundamental. Here again one gets the impression that the CFI sees itself as the institution which has, under the supervision of the Court of Justice, the final say in competition matters in which the Commission acts as an "indirect" prosecutor.

The second source of procedural rules are the regulations which determine the administrative proceedings before and within the Commission. As seen above in section IV, the CFI is not very eager to annul a Commission decision for violation of the procedural requirements laid down in Regulation 17.<sup>271</sup> It prefers to examine whether the breach of procedural requirements affected the substance of the case; in that sense it will annul only if, without this breach, the final outcome of the decision would have been different. *PVC* is an exception to this substantive approach.<sup>272</sup>

Both sets of procedural rules have been specified and completed in *Hauptzollamt München-Mitte v. Technische Universität München* in which the Court of Justice held that, in cases where the Community has a discretionary competence, observance of procedural guarantees assumes an even more fundamental importance.<sup>273</sup> These guarantees relate, in particular, to the obligation of the competent institution to examine, with diligence and impartiality, all relevant elements of the case, the right of the interested person to express his point of view and the obligation to state adequate reasons for the decision. The CFI has referred to this judgment in *PVC*, *La Cinq*, and *Danish Furs*.<sup>274</sup>

In *Danish Furs*, the CFI held that the statement of reasons should be contained in the decision itself and that it cannot be supplemented during the proceedings before the court. *PVC* concerned a similar specification of Article 190.<sup>275</sup> The CFI held that any administrative procedure for drawing up and

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271. See RTE, Case T-69/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 586 (Ct. First Instance); Hercules, Case T-7/89, [1991] E.C.R. \_\_, [1992] 4 C.M.L.R. 84 (Ct. First Instance).

272. *PVC*, Joined Cases T-79, 84-86, 89, 91-92, 94, 96, 98, 102 & 104/89, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 357 (Ct. First Instance).

273. Case C-269/90 (Eur. Ct. J. Nov. 21, 1991) (not yet reported).

274. See *PVC*, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 357; *La Cinq SA v. Commission*, Case T-44/90, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 449 (Ct. First Instance); *Danish Furs*, Case T-61/89, (Ct. First Instance July 3, 1992) (not yet reported).

275. *PVC*, [1992] E.C.R. \_\_, [1992] 4 C.M.L.R. 357.

adopting measures which allows subsequent amendments to be made to the statement of reasons is directly contrary to the fundamental procedural guarantees mentioned in *Technische Universität München*.<sup>276</sup> It subsequently considered that this principle underlined the importance of Article 12 of the Commission's Rules of Procedure.<sup>277</sup> Does this mean that the CFI sees Article 12 as a further implementation of Article 190? If this is correct, the violation of Article 12 constitutes a breach of an essential procedural requirement and not a factor which leads to non-existence of the measure concerned.

In *La Cinq*, the CFI referred to *Technische Universität München* as regards the principle of administrative diligence and impartiality.<sup>278</sup> The Commission had not respected this principle, because it had failed to take due account of all relevant facts and circumstances. If one compares this outcome with *Flat Glass*, the principle of administrative diligence may overlap the obligation to state reasons; fundamental arguments and elements must be discussed in the statement of reasons. However, the principle has wider implications. It not only implies that the administration should examine all the relevant facts, but also that this examination is carried out in a proper way and takes account of the observations put forward by the interested parties.<sup>279</sup>

### C. Legal Appraisal

According to the standard formula of the Court of Justice in *Remia*, judicial review of the Commission's legal assessment is limited to examining whether the conditions for the application of Articles 85 and 86 are fulfilled and whether the Commission has made a manifest error of judgment or has misused its powers.<sup>280</sup> As regards the conditions for the application of both Articles, the administration does not have any discretionary power; the law should be correctly applied. However, the

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276. *Id.* at \_\_, [1992] 4 C.M.L.R. at 386.

277. CFI Rules of Procedure, *supra* note 16, art. 12, O.J. L 136/1, at 5 (1991).

278. *La Cinq*, [1992] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 468.

279. See Detlef Nölle, Case C-16/90, (Eur. Ct. J. Oct. 22, 1991) (not yet reported), in which the Court of Justice declared an antidumping regulation invalid because the Commission had not respected the principle of administrative diligence.

280. *Remia BV v. Commission*, Case 42/84, [1985] E.C.R. 2545, [1987] 1 C.M.L.R. 1.



main legal issue in competition cases does not, in most cases, relate to the interpretation of legal concepts, but to the qualification of facts in light of these concepts. The case law of the CFI illustrates that it is more tolerant with the Commission as regards this qualification issue.<sup>281</sup> In *Polypropylene*, the CFI even allowed the Commission to qualify the facts as both an agreement and a concerted practice, because they constituted a complex whole for which Article 85(1) does not lay down specific categories.<sup>282</sup>

Qualification problems do not only relate to issues of substantive law, but also to the choice of procedures; was the Commission entitled to use a particular procedure or to exercise a particular type of competence in the specific circumstances of the case? Two cases, *Vichy* and *La Cinq*, seem to reflect the CFI's attitude towards this question. In *Vichy*, the CFI approved the Commission's choice to act under Article 15(6) even if *Vichy*'s notifications could not exactly be qualified as delaying tactics in a field where the law as regards selective distribution in pharmacies was clearly established.<sup>283</sup> This rather generous attitude is confirmed by *La Cinq*, in which the CFI considered that the Commission's interpretation of its powers to grant interim relief was too narrow.<sup>284</sup> However, the ruling in *La Cinq* could also be seen as an obligation for the Commission to grant such relief when it receives a serious complaint.

Within the limits of its substantive and procedural powers the Commission enjoys a considerable discretion.<sup>285</sup> In *Polypropylene*, the CFI introduced a new criterion to control the way in which this discretionary power is exercised in the field of competition. Official publications and declarations bind the

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281. See in particular *Peugeot* with respect to Ecosystem's position as intermediary and RTE as regards the qualifications of the refusal to license as an abuse. *Peugeot*, Case T-23/90R, [1990] E.C.R. II-195, [1990] 4 C.M.L.R. 674 (Ct. First Instance); RTE, Case T-69/89, [1991] E.C.R. \_\_, [1991] 4 C.M.L.R. 586 (Ct. First Instance).

282. *Hercules*, Case T-7/89, [1991] E.C.R. \_\_, \_\_ [1992] 4 C.M.L.R. 84, 312-13, ¶¶ 262-63 (Ct. First Instance); *ICI*, Case T-13/89, slip op. ¶¶ 259-60 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Shell*, Case T-11/89, slip op. ¶ 305 (Ct. First Instance Mar. 10, 1992) (not yet reported).

283. *Vichy*, Case T-19/91 (Ct. First Instance Feb. 27, 1992) (not yet reported).

284. *La Cinq SA v. Commission*, Case T-44/90, [1992] E.C.R. \_\_, \_\_ [1992] 4 C.M.L.R. 449, 467-68 (Ct. First Instance).

285. The Court of Justice applies more principles than the ones mentioned here. See Everling, *supra* note 251, at 882-83.

Commission in as much as it cannot depart from rules which it has imposed on itself. This version of the estoppel principle enhances the importance of the Commission's policy statements. It remains unclear which formal requirements have to be met in this respect; e.g., where should these statements be published? *Polypropylene* concerned a publication in an annual *Competition Report*.<sup>286</sup> It should therefore be supposed that notices published in the *Official Journal* have an even more important binding effect. However, this effect seems to be limited to policy statements of a general nature. The CFI does not attach a binding force to the application of competition rules in individual cases. In *Polypropylene*, the CFI considered that the criteria upon which the Commission relied for the imposition of fines in one case was not binding as regards the assessment of the level of fines in another case.<sup>287</sup>

Finally, mention should be made of the unlimited jurisdiction which the CFI exercises, pursuant to Article 172 of the EEC Treaty, in regard to fines imposed by the Commission.<sup>288</sup> This jurisdiction does not allow the CFI to pursue its own fining policy, but gives it the possibility to substitute its own assessment for that of the Commission in individual cases.<sup>289</sup> As seen in *Polypropylene* and *Flat Glass*, the need for this kind of jurisdiction arises in particular when a Commission decision is partially annulled. Without unlimited jurisdiction, the consequence of such annulment would be that all the fines would be illegally imposed because the Commission calculated them on the basis of the infringement in its entirety. In *Flat Glass* and *Polypropylene* the CFI exercised its unlimited jurisdiction to reassess the level of fines to what was considered to be adequate in light of those parts of the infringement which passed the test of the CFI's control.<sup>290</sup>

However, unlimited jurisdiction can also go further, when

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286. See, e.g., *Hercules*, [1991] E.C.R. at \_\_, [1992] 4 C.M.L.R. at 265-66, ¶ 53.

287. ICI, Case T-13/89, slip op. ¶¶ 322-95 (discussing the fine) (Ct. First Instance Mar. 10, 1992) (not yet reported).

288. EEC Treaty, *supra* note 2, art. 172.

289. See Opinion of Advocate General Vesterdorf, *Hercules*, [1992] E.C.R. at \_\_, [1992] 4 C.M.L.R. at \_\_, § III.A. Sir Gordon Slynn considers that Article 172 allows the Court of Justice to increase the amount of fines. Slynn, *supra* note 251.

290. See *ICI*, slip op. ¶¶ 394; *Shell*, Case T-11/89, slip op. ¶¶ 371 (Ct. First Instance Mar. 10, 1992) (not yet reported); *Flat Glass*, Joined Cases T-68, 77 & 78/89, [1992] E.C.R. \_\_, \_\_ [1992] 5 C.M.L.R. 302, \_\_, ¶ 374 (Ct. First Instance).

an applicant specifically challenges an element of the Commission's calculation of fines. In light of such an application, the CFI must examine whether the Commission made a manifest error on that point. In *Polypropylene* the CFI held that such an error was made as regards the cooperative attitude of ICI during the administrative proceedings before the Commission.<sup>291</sup>

#### *FINAL REMARKS*

During its first three years (cut-off date June 30, 1992) the CFI has rendered thirty-two judgments in competition cases. This is a considerable amount for a newly created jurisdiction that had to set up its registry, determine its working methods and adopt its Rules of Procedure. It should also be noted that its judgments in *Polypropylene*, *Flat Glass* and *PVC* concerned complicated and voluminous cases. These efforts should be applauded as they certainly contributed in alleviating the workload of the Court of Justice. Without a transfer of competence in competition cases, the back-log at the Court of Justice would have been even more disquieting and *Polypropylene*, *Flat Glass*, and *PVC* might still be undecided.

However, some criticism cannot be excluded. First, many of the cases transferred by the Court of Justice to the CFI are still waiting for a judgment. Second, the CFI is supposed to be a specialized jurisdiction. Seen from this angle, its production of thirty-two judgments is relatively disappointing if one makes a comparison with the fourteen judgments rendered by the Court of Justice during the same period, especially since the Court of Justice had to deal with many other cases as well. Third, the Court of Justice has not yet ruled in appeal cases. It might well be that the number of appeals will increase its workload.

As regards the qualitative objective pursued by the Council in its decision of October 24, 1988, the establishment of the CFI has undoubtedly been a success. Its review of complex factual matters is exhaustive and one may even wonder whether the CFI is not too zealous in this respect. If its active inquisitorial attitude in some cases becomes the future norm for its judicial control, the nature of competition proceedings

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291. *ICI*, slip op. ¶ 394.

will change. The center of gravity will shift from the procedure before the Commission to the procedure before the CFI. However, a new transfer of competence to the CFI may be expected in the near future and will probably increase the pressure upon the CFI's resources. Then, there will be no time for new adventures on the path of judicial control.