

Procedural Rights and Issues in the
Enforcement of Articles 81 and 82 of the EC
Treaty

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Abstract

A discussion of evidentiary and procedural standards regarding Articles 81(1) and 82 of the EC Treaty, which deal with infringements of anti-competitive collusion.

PROCEDURAL RIGHTS AND ISSUES IN THE ENFORCEMENT OF ARTICLES 81 AND 82 OF THE EC TREATY

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INTRODUCTION

Article 81(1) of the EC Treaty¹ prohibits anti-competitive collusion between economic operators regardless of whether such collusion takes the form of an agreement or a concerted practice between undertakings or a decision of an association of undertakings. Article 82 of the EC Treaty prohibits conduct by undertakings having a dominant position within the common market or in a substantial part of it, which constitutes an abuse of that position.²

The national courts of the Member States have jurisdiction

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1. With the entry into force of the Amsterdam Treaty on May 1, 1999, the numbering of most of the Treaty provisions changed. Article 81(1) of the EC Treaty is the ex-Article 85(1) of the EC Treaty. The wording of the provision did not change. Article 81(1) reads as follows:

The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market

See Treaty establishing the European Community, Feb. 7, 1992, O.J. 224/1 (1992), [1992] 1 C.M.L.R. 573, art. 81(1) [hereinafter Consolidated EC Treaty], *incorporating changes made by* Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam] (amending Treaty on European Union ("TEU"), Treaty establishing the European Community ("EC Treaty"), Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), and the Treaty establishing the European Atomic Energy Community ("Euratom Treaty") and renumbering articles of TEU and EC Treaty).

2. Consolidated EC Treaty, *supra* note 1, art. 82. Article 82 (ex-Article 86) of the EC Treaty reads as follows: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States." *Id.*

to enforce the rights conferred by Articles 81(1) and 82 of the EC Treaty on individuals as they are among those Treaty provisions that have direct effect.³ Since those two prohibitions are mandatory rules of law, national courts are even obliged to raise of their own motion issues concerning the violation of Articles 81(1) and 82 of the EC Treaty in cases where they are relevant.⁴

The European Commission is also competent to find infringements of Article 81(1) and/or Article 82 of the EC Treaty.⁵ It also has the power to impose a fine on an undertaking or association that has intentionally or negligently infringed these provisions. Such a fine may be as high as ten percent of the worldwide turnover of the undertaking or association concerned in the preceding business year.⁶

The formal opening of proceedings under Article 81(1) and/or Article 82 of the EC Treaty follows an investigation conducted by the Commission. As will be explained below, the Commission has considerable powers of investigation. In a procedure relating to an infringement of the EC competition rules, the Commission thus performs both investigative and decision-making functions.

In several cases, parties have argued that it is contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 ("ECHR"), which grants to each person the fundamental right to be heard by an independent and impartial tribunal,⁷ for one and the same institution to fulfil both these functions. However, the

3. Council Regulation 13/204, art. 1, 1962 O.J. 17 [hereinafter Regulation No. 17; see also Case 127/73, BRT, [1974] E.C.R. 51; Case C-234/89, Delimitis, [1991] E.C.R. I-935, at 45.

4. Eco Swiss, Case 126/97, [1999] E.C.R. I-3055; see also Van Schijndel, Van Veen, Joined Cases C-430/93 and C-431/93, [1995] E.C.R. I-4705.

5. Regulation No. 17, *supra* note 3, at arts. 3(2), 9.

6. Regulation No. 17, *supra* note 3, at art. 15.

7. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950 [hereinafter ECHR] states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Article 6(2) of the Treaty on European Union ("TEU") states: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 . . . as general principles of Community law." Consolidated version of the Treaty on European Union, O.J. C 340/2 (1997) 37 I.L.M. 67 [hereinafter Consolidated TEU], *incorporating changes made by Treaty of Amsterdam*, *supra* note 1.

Community courts⁸ have consistently held that this provision does not prevent the Commission, which is not a “tribunal,” from carrying out both investigative and decision-making functions.⁹ The Courts’ view is that the right of an undertaking to be heard by an independent and impartial tribunal within the meaning of Article 6 of the ECHR is sufficiently guaranteed by the fact that it may bring an action for annulment under Article 230 of the EC Treaty before the Court of First Instance of the European Communities (“CFI”)¹⁰ against a decision of the Commission finding an infringement of Article 81(1) and/or Article 82 EC. Indeed, within the framework of such an action, the CFI may be called upon to undertake an exhaustive review of the Commission’s findings of fact, its legal appraisal of those facts, and the fine imposed.¹¹ The CFI will thus double-check the factual findings on which the Commission decision is based. It must be emphasized that the CFI cannot start a new investigation.¹² It will merely assess the probative value of the evidence

8. The Community courts are the Court of Justice of the European Communities and the Court of First Instance of the European Communities. The division of jurisdiction between the Court of Justice and the Court of First Instance is *ratione personae*. The Court of First Instance hears all actions for annulment (Article 230 of the EC Treaty), failure to act (Article 232 of the EC Treaty), or damages (Articles 235 and 288, second paragraph, of the EC Treaty) brought by a natural or legal person against an institution of the Communities. If such a case is brought by a Member State or an institution, the Court of Justice will have jurisdiction. Furthermore, only the Court of Justice has jurisdiction to give preliminary rulings under Article 234 of the EC Treaty. So, if a national court makes a request for a preliminary ruling on the interpretation or the validity of a Commission decision concerning the application of Article 81 or Article 82 of the EC Treaty, the case will be heard by the Court of Justice. For a full analysis of these procedures, see K. LENAERTS AND D. ARTS, *PROCEDURAL LAW OF THE EUROPEAN UNION* (R. Bray ed., 1999).

9. More precisely, the Community courts take the view that the general principles of Community law, of which the rights and freedoms enshrined in the ECHR form an integral part, do not prohibit the carrying out of both functions. *Internationale Handelsgesellschaft*, Case 11/70, [1970] E.C.R. 1125, at ¶ 4; *ERT*, Case C-260/89, [1991] E.C.R. I-2925, at ¶ 4; *Bosman & Others*, Case C-415/93, [1995] E.C.R. I-4921, at ¶ 79; *Enso Española v. Comm’n*, Case T-348/94, [1998] E.C.R. II-1875, at ¶ 56; *CBR & Others v. Comm’n*, Joined Cases T-25/95, T-26/95, T-30/95-T-32/95, T-34/95-T-39/95, T-42/95-T-46/95, T-48/95, T-50/95-T-65/95, T-68/95-T-71/95, T-87/95, T-88/95, T-103/95-T-104/95, [2000] 5 C.M.L.R. 204, at ¶ 718 [hereinafter *Cement Judgment*].

10. See *supra* note 8.

11. See *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 719. Concerning the fines, the CFI has unlimited jurisdiction under Article 229 (ex-Article 172) of the EC Treaty and Article 17 of Regulation No. 17.

12. In *SIV v. Comm’n*, Joined Cases T-68/89, T-77/89 and T-78/89, [1992] E.C.R. II-1403, at ¶ 319, the CFI held: “[A]lthough a Community court may, as part of the judicial review of acts of the Community administration, partially annul a Commission

adduced by the Commission in its decision finding an infringement of the EC competition rules. Where, in a particular case, the CFI, on the basis of the evidence relied upon in the decision, is not convinced that the applicant committed an infringement, it will annul the decision.¹³ If there is any doubt, the Community judicature will rule in favour of the applicant.¹⁴ The annulment may be partial where, for example, the CFI considers that the evidence adduced demonstrates the existence of an infringement but not in respect of the total period of time found in the decision.¹⁵

Even though the Commission is not a "tribunal" within the meaning of Article 6 ECHR,¹⁶ Community law confers certain procedural rights upon undertakings in proceedings under Article 81(1) and/or Article 82 of the EC Treaty. It is the purpose of this Essay to provide an overview of these procedural rights as they apply at each stage of the infringement procedure.¹⁷ These

decision in the field of competition, that does not mean that it has jurisdiction to re-make the contested decision. The assumption of such jurisdiction could disturb the inter-institutional balance established by the Treaty and would risk prejudicing the rights of defence".

13. See, e.g., *Enso-Gutzeit v. Comm'n*, Case T-337/94, [1998] E.C.R. II-1571, at ¶¶ 151-54; *Bayer v. Comm'n*, Case T-41/96, Judgment of Oct. 26, 2000, not yet published in E.C.R., at ¶¶ 183-84.

14. See *Ahlström Osakeyhtiö & Others v. Comm'n*, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85-C-129/85, [1993] E.C.R. I-1307 at ¶¶ 126, 127 [hereinafter *Woodpulp Judgment*], where the Court concluded:

[I]n this case, concertation is not the only plausible explanation for the parallel conduct . . . Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation. In the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the Commission. Article 1(1) of the contested decision must therefore be annulled.

Id.

15. The Commission bears the burden of proving not only the existence of a violation of the EC competition rules but also the duration of such infringement. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 4270. In *Cement Judgment*, the CFI "concluded that having regard to all the evidence put forward in the contested decision the Commission was not entitled to take the view that all the addressees whose participation in the . . . agreement had been established were still adhering to that agreement when the contested decision was adopted." *Id.* at ¶ 4279.

16. *Van Landewyck & Others v. Comm'n*, Joined Cases 209-215/78 and 218/78, [1980] E.C.R. 3125, at ¶ 81; *Musique Diffusion Française & Others v. Comm'n*, Joined Cases 100-103/80, [1980] E.C.R. 1825, at ¶ 7; *Shell v. Comm'n*, Case T-11/89, [1992] E.C.R. II-757, at ¶ 39; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 717.

17. See C.S. KERSE, *E.C. ANTITRUST PROCEDURE* (1998); see also L. GOOSSENS, *Concurrence et Droits de la Défense: La Phase Administrative Devant la Commission*, 6 *JOURNAL DES TRIBUNAUX - DROIT EUROPÉEN* 169-75, 200-04 (1998).

rights are set out in the provisions of Council Regulation No. 17¹⁸ and of Commission Regulation No. 2842/98 of December 22, 1998 on the hearing of parties in certain proceedings under Article 81 and/or Article 82 of the EC Treaty.¹⁹ They have been further explained by the case law of the Court of Justice and the CFI.

I. *PROCEDURAL RIGHTS OF PARTIES THAT ARE ALLEGED TO HAVE INFRINGED THE EC COMPETITION RULES*

The Community courts have often stressed that observance of the rights of the defense in all proceedings in which sanctions may be imposed is a fundamental principle of Community law that must be respected in all circumstances.²⁰ Even if it is true that the proceedings under Articles 81(1) and 82 of the EC Treaty are of an administrative nature, the rights of the defense must be observed as from the first acts of investigation undertaken by the Commission and during every subsequent stage of the infringement procedure.

A. *The Initiation of an Investigation: Requests For Information and "On The Spot" Investigations*

When the Commission suspects the existence of anticompetitive practices in a given economic sector, it will initiate an investigation. Such suspicions may arise from the examination of a complaint, a notification under Article 81(3) of the EC Treaty,²¹

18. See Regulation No. 17, *supra* note 3.

19. O.J. L 354/18 (1998). This Regulation repealed Comm'n Regulation 99/63/EEC of July 25, 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No. 17 [O.J. 127/2268 (1963)].

20. *Cimenteries CBR & Others v. Comm'n*, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, [1992] E.C.R. II-2667, at ¶¶ 38, 39 [hereinafter *CBR & Others*]; *BPB Indus. & British Gypsum v. Comm'n*, Case T-65/89, [1993] E.C.R. II-389, at ¶ 30; *Solvay v. Comm'n*, Case T-30/91, [1995] E.C.R. II-1775, at ¶ 59; *ICI v. Comm'n*, Case T-36/91, [1995] E.C.R. II-1847, at ¶ 69; *ICI v. Comm'n*, Case T-37/91, [1995] E.C.R. II-1901, at ¶ 49; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 142.

21. According to Article 81(3) [ex-Article 85(3)] of the EC Treaty, the provisions of Article 81(1) may be declared inapplicable in the case of any agreement, concerted practice, or decision:

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment

a market study, or simply information gleaned from the economic and financial press.

Whenever the Commission becomes aware that an infringement of Article 81(1) and/or Article 82 of the EC Treaty may have been committed, it may decide to address a request for information to the parties concerned in order to "obtain all necessary information."²² Such a request can be addressed not only to parties to the alleged infringement but also to the governments and the competition authorities of the Member States.²³

Article 11 of Regulation No. 17 makes a distinction between two forms of requests for information: there are "simple" requests for information and binding requests contained in a formal Commission decision.²⁴ The addressees of a simple request are free to decide whether or not they will reply to the questions put to them. A penalty may only be imposed where, having decided to reply, the undertaking or association concerned provides inaccurate information.²⁵ However, if an undertaking or association does not supply the information requested within the time-limit fixed or supplies incomplete information, the Commission may, by binding decision, require the information to be supplied.²⁶ Penalties may be imposed on the addressee of such decision, should it fail to provide the relevant information.²⁷

The Commission's power to request information from undertakings and associations involved in proceedings under Article 81(1) and/or Article 82 of the EC Treaty is strictly circumscribed. Thus, the Commission may not compel an undertaking or an association to provide answers that might involve an admission on its part of the existence of an infringement that it is in-

of these objectives; (b) afford such undertakings the possibility of eliminating competition.

Id.

22. Regulation No. 17, *supra* note 3, art. 11(1). This provision also allows the Commission to require the disclosure of documents. See *Orkem v. Comm'n*, Case 374/87, [1989] E.C.R. 3283 (C.J.), at ¶¶ 13, 14.

23. Regulation No. 17, *supra* note 3, art. 11(1).

24. Regulation No. 17, *supra* note 3, art. 11.

25. Regulation No. 17, *supra* note 3, art. 11(1), 11(3), 15(1)(b).

26. Regulation No. 17, *supra* note 3, art. 11(5). Given its binding nature, the annulment of such an act can be sought before the CFI. See *Scottish Football Ass'n v. Comm'n*, Case T-46/92, [1994] E.C.R. II-1039 (CFI).

27. Regulation No. 17, *supra* note 3, art. 11(5), 15(1)(b), 16(1)(c).

cumbent on the Commission to prove.²⁸

In *PVC*²⁹ and *Cement*,³⁰ a number of applicants contested the fact that the Commission, in its decision finding an infringement of Article 81 of the EC Treaty, had referred to answers obtained to requests for information. They contended that the Commission had thus violated the principle that parties cannot be obliged to give evidence against themselves enshrined in Article 6 of the ECHR.³¹ The CFI, however, dismissed this plea and distinguished three situations. Firstly, where the Commission bases its decision finding an infringement of the EC competition rules partly on answers given to requests for information, only the undertakings and associations of undertakings that have given the relevant answers have grounds for claiming that, during the course of the administrative procedure, the Commission infringed their right not to give evidence against themselves.³² In such circumstances it is not open to the other parties to assert that they were compelled by the Commission to give evidence against themselves. Secondly, the Commission can never infringe the principle that parties cannot be obliged to give evidence against themselves by referring in its final decision to answers given to "simple" requests for information. Indeed, parties are free to decide whether or not to reply to such requests for information and the element of compulsion is therefore absent.³³ Thirdly, insofar as the Commission decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty is based on answers given to decisions requiring information, which are themselves acts subject to judicial review, any applicant to which such a decision has been addressed but which has not sought its annulment, within the two month time-limit imposed by Article 230, fifth paragraph, of the EC Treaty, will be foreclosed from pleading the illegality of the decision requiring

28. *Orkem*, [1989] E.C.R. 3283 (C.J.), at ¶ 35; *Société Générale v. Comm'n*, Case T-34/93, [1995] E.C.R. II-545 (CFI), at 74; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 732.

29. *Limburgse Vinyl Maatschappij & Others v. Comm'n*, Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, [1999] E.C.R. II-931 (CFI), [hereinafter *PVC Judgment*] at ¶¶ 455-459.

30. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 731-36.

31. See *Funke v. France*, App. No. 10828/84, 16 Eur. H.R. Rep. 297 (1993).

32. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 732-33.

33. *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶¶ 456, 457; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 734.

information in any subsequent action for annulment of the Commission decision finding an infringement.³⁴

It must be stressed that Community law, as it stands, allows the Commission to compel parties against which an investigation is directed, to provide any purely factual information. It may thus require such parties to provide information concerning the dates of certain meetings, the persons who attended these meetings, the capacity in which the participants attended, the subjects discussed during the meetings, etceteras. The Commission may not, however, seek clarification with respect to the objectives pursued by the undertakings or associations of undertakings concerned in adopting a particular course of action, since the answer to any such questions might involve an admission that an infringement has been committed.³⁵

When a possible violation of the competition rules is brought to its attention, the Commission will also generally conduct an "on the spot" investigation in the premises of the undertakings or associations allegedly involved in the anticompetitive practices.

Article 14 of Regulation No. 17 makes a distinction between two forms of investigation, namely investigations carried out upon production of an authorization in writing³⁶ (hereinafter "investigations under authorization") and investigations formally ordered by a decision of the Commission.³⁷ The former type of investigation, conducted under Article 14(2) of Regulation No. 17, can be carried out only if the undertakings and associations concerned are prepared to cooperate. No fine can be imposed where an undertaking or association of undertakings refuses to submit to an investigation under authorization. However, if the party concerned decides to cooperate, a penalty may be imposed where it produces the required books or other business records

34. *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶¶ 441, 442.

35. In *Mannesmannröhren-Werke AG v. Comm'n*, Case T-112/98, (judgment of the CFI, Feb. 20, 2001, not yet reported) the applicant argued that Community law, as interpreted in *Orkem v. Comm'n Case*, 374/87, [1989] E.C.R. 3283 (C.J.), and *Société Générale v. Comm'n Case*, T-34/93, [1995] E.C.R. II-545 (CFI), conflicts with the principles developed by the European Court of Human Rights in *Funko*, 16 Eur. H.R. Rep. 297. The CFI merely stated that "the applicant cannot directly invoke the [ECHR] before the Community courts." *Mannesmannröhren-Werke AG*, at ¶ 75.

36. Regulation No. 17, *supra* note 3, art. 14(2).

37. Regulation No. 17, *supra* note 3, art. 14(3).

in incomplete form.³⁸

Where the Commission expects the parties concerned not to adopt a cooperative attitude, it will order an investigation by a formal decision pursuant to Article 14(3) of Regulation No. 17. It should be stressed that the Commission may carry out such an investigation without first attempting an investigation by authorization.³⁹ There is a legal obligation to submit to an investigation ordered by a decision and failure to do so will generally result in financial penalties being imposed.⁴⁰

Given its binding character, a decision ordering an investigation can be the subject of an action for annulment brought under Article 230 of the EC Treaty. However, all persons subject to Community law are under an obligation to acknowledge that measures adopted by the institutions are fully effective as long as they have not been declared invalid by the Court of Justice or the CFI and to recognize their enforceability unless one of those courts has decided to suspend the legal effects of said measures.⁴¹ Practically speaking, this means that an undertaking or association of undertakings will not be in a position to prevent an investigation ordered by a decision of the Commission from taking place. The party concerned will only be able to seek judicial redress before the CFI *ex post facto* by lodging an action for annulment against the decision ordering an investigation.⁴² In the event that the CFI were to find that the investigation had been unlawful, the evidence obtained in the course of such in-

38. Regulation No. 17, *supra* note 3, art. 15(1)(c).

39. *Nat'l Panasonic v. Comm'n*, Case 136/79, [1980] E.C.R. 2033 (C.J.), at ¶¶ 10-12.

40. Regulation No. 17, *supra* note 3, art. 15(1)(c), 16(1)(d).

41. *Hoechst v. Comm'n*, Joined Cases 46/87 and 227/88, [1989] E.C.R. 2859 (C.J.), at ¶ 64.

42. Insofar as the Commission decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty is based on evidence found in the course of investigations ordered by a decision, which is an act subject to judicial review, any applicant to which such a decision has been addressed but which has not sought its annulment, within the two month time-limit imposed by Article 230, fifth paragraph, of the EC Treaty, will be foreclosed from pleading the illegality of the decision ordering the investigation in any subsequent action for annulment of the Commission decision finding an infringement. *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶¶ 408-10. However, where the applicant does not contest the lawfulness of the decision ordering an investigation but only criticizes the way in which such decision was implemented, such arguments will have to be raised in the action for annulment against the final decision of the Commission finding the infringement. *See PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶ 413; *Dow Benelux v. Comm'n*, Case 85/87, [1989] E.C.R. 3137 (C.J.), at ¶ 49.

vestigation would also be unlawful. The Commission could then no longer find an infringement on the basis of such unlawful evidence.⁴³

In order to protect undertakings and associations against so-called "fishing expeditions," both the written authorizations and the decisions must specify the subject matter and purpose of the investigation.⁴⁴ In order to ensure their efficacy, "on the spot" investigations are generally conducted without advance warning⁴⁵ and are therefore often referred to as "dawn raids."

In the course of an "on the spot" investigation, Commission officials are entitled to enter any premises, land, and means of transport of the undertakings and associations concerned.⁴⁶ They may examine business records and other documents and make copies of any document that appears to be related to the subject matter under investigation. However, the written communications between an independent lawyer and the party under investigation remain confidential.⁴⁷ Nevertheless, a party

43. Opinion of AG Warner in *Nat'l Panasonic*, [1980] E.C.R. 2033 (C.J.), at ¶ 2069: [The fact that the remedy can only be invoked] after the investigation has taken place . . . does not make it an ineffective remedy. The Court may . . . if it holds the decision to have been unlawful, order the Commission to return to the undertaking any copies of documents obtained as a result of the investigation and to refrain from using any information so obtained.

See also *Hoechst*, [1987] E.C.R. 1549 (Order C.J.), at ¶ 34; *Dow Chem. Nederland v. Comm'n*, Case 85/87 R, [1987] E.C.R. 4367 (Order C.J.), at ¶ 17.

44. Regulation No. 17, *supra* note 3, at art. 14(2)-(3). The decision must make clear that the investigation to be carried out is justified. Any intervention by the public authorities in the sphere of the private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law. *Hoechst*, [1987] E.C.R. 1549 (Order C.J.), at ¶¶ 17-19, 26-29, 40-41; *Dow Benelux*, [1989] E.C.R. 3137 (C.J.), at ¶¶ 6-9, 28-30.

45. The fact that the Commission carries out "on the spot" investigations without previous notification does not infringe the fundamental rights of undertakings. *Nat'l Panasonic*, [1980] E.C.R. 2033 (C.J.), at ¶ 20.

46. Regulation No. 17, *supra* note 3, at art. 14(1)(a); see *Hoechst*, [1987] E.C.R. 1549 (Order C.J.), at ¶ 26; *Dow Benelux*, [1989] E.C.R. 3137 (C.J.), at ¶ 37. Under the proposed Council Regulation implementing Articles 81 and 82 of the Treaty of 27 September 2000, Commission officials will also have the right "to enter any other premises, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned, in so far as it may be suspected that business records are being kept there." COM(2000) 582 final, [500PC0582] Article 20(2)(b).

47. In *AM & S v. Comm'n*, Case 155/79, [1982] E.C.R. 1575 (C.J.), the Court of Justice ruled that this privilege concerns only the written communications which relate to the subject-matter of the procedure. It could, however, be argued that, where the written communications between a lawyer and his client do not relate to the procedure,

under investigation may waive that privilege and disclose the written communications between itself and a lawyer if that party considers that it is in its interest to do so.⁴⁸

According to Article 14(1)(c) of Regulation No. 17, the Commission officials may also ask for oral explanations on the spot.⁴⁹ The questions asked may, however, only seek explanations relating to the books and records under examination.⁵⁰ In the case of an investigation under authorization, the addressees of such questions are entitled to decline to answer them.⁵¹ Consequently, if a party decides of its own free will to answer the questions put to it in the course of an investigation under authorization, it will not be able to claim, in a subsequent action for annulment brought against the final decision finding an infringement that by using the answers given, the Commission has infringed its right not to give evidence against itself. In case of an investigation ordered by decision, the party under investigation will be obliged to answer any oral question relating to the books and records under examination.⁵² However, here again, the Commission may not compel an undertaking or an association of undertakings to provide answers that might involve an

they fall outside the scope of the investigation, and could not therefore be copied by the Commission's officials in any event. The protection of written communications between a lawyer and his client extends to internal notes which are confined to reporting the text or the content of those communications for the purpose of distributing them within the undertaking and submitting them for consideration by managerial staff. See *Hilti v. Comm'n*, Case T-30/89, [1990] E.C.R. II-163 (CFI), at 18.

48. *AM & S v. Comm'n*, [1982] E.C.R. 1575 (C.J.).

49. See KERSE, *supra* note 17, at 3.34-3.36. If, in the course of an "on the spot" investigation, the Commission discovers documents containing evidence of the existence of an infringement of Article 81(1) and/or Article 82 of the EC Treaty, it may of course also seek further clarification by addressing a written request for information to the parties concerned under Article 11 of Regulation No. 17.

50. *Nat'l Panasonic*, [1980] E.C.R. 2033 (C.J.), at ¶ 15. *But see* Article 20(2)(f), of the proposed Council Regulation implementing Articles 81 and 82 of the Treaty of 27 September 2000, according to which Commission officials will have the right "to ask any representative or member of staff of the undertaking or association of undertakings for information relating to the subject-matter and purpose of the inspection and to record the answers". COM(2000) 582 Final, [500PC0582].

51. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 735.

52. In *Nat'l Panasonic*, [1980] E.C.R. 2033 (C.J.), the Court of Justice rejected the plea that Article 14 could be used by the Commission to circumvent the two-stage procedure prescribed by Article 11 of Regulation No. 17 (& 15). AG Warner stressed in that regard that "the only explanations that can be sought under Article 14(1)(c) are explanations relating to the books and records under examination or their contents . . ." *Id.* at ¶ 2066.

admission on its part of the existence of an infringement that it is incumbent on the Commission to prove.

B. *The Initiation of Infringement Proceedings*

If the Commission considers, on the basis of the information obtained during its investigation, that certain undertakings and/or associations of undertakings have infringed the EC competition rules, it will open, pursuant to Article 3(1) of Regulation No. 17 a formal procedure against the parties concerned. Shortly afterwards, it will send a statement of objections ("SO") to these parties.⁵³

1. The Content of the Statement of Objections

The SO, as its name indicates, identifies the anticompetitive conduct to which the Commission objects.⁵⁴ Like the decision finding an infringement, the SO generally is composed of two distinct sections: one section headed "the facts" containing a factual description of the contested practices and another section headed "legal assessment" containing the Commission's provisional legal qualification of the facts.

In order for the rights of the defense to be observed the Commission must deal, in its decision finding an infringement, exclusively with objections in respect of which the parties have been afforded the opportunity of making their views known, that is, with objections which have been clearly identified in the SO.⁵⁵ This does not mean, however, that the wording of the SO should be virtually identical to the wording of the decision the Commission intends to adopt. The rights of the defense are not violated provided the SO is couched in terms which, though succinct, are sufficiently clear to enable the parties concerned properly to

53. The Commission is not required to give notice of the decision to initiate the procedure to establish an infringement prior to notification of the statement of objections [hereinafter SO]. It is the SO alone and not the decision to commence proceedings which is the measure stating the attitude of the Commission concerning the parties against which proceedings for infringement of the rules on competition have been started. *Azienda Colori Nazionali-ACNA v. Comm'n*, Case 57/69, [1972] E.C.R. 933 (C.J.), ¶¶ 10-11.

54. Regulation No. 2842/98, *supra* note 19, art. 3.

55. Regulation No. 2842/98, *supra* note 19, art. 2(2); *Hofmann-La Roche v. Comm'n*, Case 85/76, [1979] E.C.R. 461 (C.J.), at ¶ 11; *Woodpulp Judgment*, [1993] E.C.R. I-1307 at ¶¶ 40-53; *CB & Europay v. Comm'n*, Joined Cases T-39/92 and T-40/92, [1994] E.C.R. II-49 (CFI), at ¶ 48; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 553.

identify the conduct to which the Commission objects.⁵⁶ Indeed, the function of the SO is to give the parties concerned all the information necessary to enable them to defend themselves, before the Commission adopts a final decision.⁵⁷

In its *Woodpulp* judgment, the Court of Justice annulled certain paragraphs of the operative part of the decision after having found that the infringements found in these paragraphs had not been clearly set out in the SO. The parties concerned had thus not been given an opportunity to defend themselves effectively during the administrative procedure against the objections raised against them.⁵⁸

If the Commission, after having notified the SO, intends to alter the objections raised, it has to address to the parties concerned a new SO or a supplement to the initial SO.⁵⁹ Thus, in *CB & Europay*, the Commission, after having altered the intrinsic nature of the infringement with which the parties concerned were charged in a supplementary SO, had notified this supplement to one of the parties by way of information only, without any period of time being granted to that party in order for it to submit its observations. The final decision finding that the infringement dealt with in the supplementary SO had indeed been committed was therefore annulled vis-à-vis this party. The CFI ruled that one could not exclude the possibility that the administrative procedure might have reached a different result if the Commission had properly notified the supplementary SO to the party concerned and if it had set a time limit for that party to submit its observations.⁶⁰

However, as a matter of principle, the undertakings and associations of undertakings cannot complain that their rights of defense have been infringed because the Commission has withdrawn some of its objections in the course of the administrative

56. *Woodpulp Judgment*, [1993] E.C.R. I-1307 at ¶ 42; *Mo och Domsjö v. Comm'n*, Case T-352/94, [1998] E.C.R. II-1989 (CFI), at ¶ 63; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 476.

57. *Woodpulp Judgment*, [1993] E.C.R. I-1307 at ¶ 42; *Mo och Domsjö*, [1998] E.C.R. II-1989 (CFI), at ¶ 63; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 476.

58. *Woodpulp Judgment*, [1993] E.C.R. I-1307 at ¶¶ 52, 154.

59. *Bayer v. Comm'n*, Case 51/69, [1972] E.C.R. 745, at 11; *CB & Europay*, [1994] E.C.R. II-49 (CFI), at ¶ 48.

60. *CB & Europay*, [1994] E.C.R. II-49 (CFI).

procedure.⁶¹ Indeed, the withdrawal of objections is precisely the objective that their addressee hopes to achieve by replying to them.⁶²

Not only must the SO contain a description of the contested practices, it must also indicate the duration of the infringement that the Commission provisionally intends to find in its decision.⁶³ The Commission is thus obliged to set out in the SO all the relevant information as to the date when the alleged infringement is supposed to have begun. In its *Cement* decision,⁶⁴ the Commission had set this date at January 14, 1983, because on that day a meeting had taken place during the course of which several cement producers and several national cement producers' associations had agreed on a rule of "non-transshipment to home markets," thereby prohibiting any export of cement within Europe which might destabilize neighbouring markets. The same starting date for the infringement had also been adopted in respect of those companies that had not been present at the meeting. The Commission indeed took the view that these companies had been represented at the meeting of January 14, 1983 by their respective national cement producers' associations. In its judgment, the CFI found that the SO had not indicated that the membership of a national association would be considered a relevant factor for determining the starting date of the infringement. The CFI therefore partially quashed the decision and itself determined the starting date in respect of each company concerned on the basis of its own participation in the infringement rather than by applying the criterion of representation at the meeting of January 14, 1983 as it was developed by the Commission.⁶⁵

By contrast, the SO does not necessarily need to set a date when the infringement is supposed to have ceased.⁶⁶ If the Commission takes the view that the infringement is still continuing when the SO is sent and provided it so informs the address-

61. Insofar as the dropping of some objections does not affect the nature of the remaining objections.

62. *Musique Diffusion Française & Others v. Comm'n*, Joined Cases 100-103/80, [1980] E.C.R. 1825, at ¶ 14; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 439.

63. *Musique Diffusion Française & Others v. Comm'n*, [1980] E.C.R. 1825, at ¶ 15; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 553.

64. *Cement*, O.J. L 343/1 (1994) (Commission).

65. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 553-568.

66. *Id.* at 574-6.

ees of the SO, the parties concerned cannot claim that their rights of defense have been infringed by the fact that the end date fixed for the infringement in the decision is a later date than the date of notification of the SO. In those circumstances, the addressees of the SO are indeed put on notice that the Commission intends to find, in its final decision that the infringement has continued beyond the date of the SO.⁶⁷

If the Commission intends to impose fines in its decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty, it should inform the addressees of the SO of its intention to do so. Indeed, the SO must make it possible for the undertaking or association of undertakings concerned to defend themselves not only against a finding that an infringement exists but also against the imposition of a fine.⁶⁸ The fact that the SO clearly describes the participation of a party to an alleged infringement is not in itself sufficient to put that party on notice that a fine is likely to be imposed upon it in respect of its participation in that infringement.⁶⁹

Finally, it should be stressed that a SO is not an act whose annulment may be sought in an action brought under Article 230 of the EC Treaty. Indeed it is merely a preparatory measure intended to pave the way for the final decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty, which will constitute a reviewable act.⁷⁰ However, unlawful acts committed in the course of the administrative procedure, such as, for instance, irregularities concerning the notification of the SO, may call into question the legality of the final decision taken by the Commission.⁷¹

67. *Id.*

68. *Michelin v. Comm'n*, Case 322/81, [1983] E.C.R. 3461 (C.J.), at ¶ 20; *Compagnie maritime belge transports SA and Dafra-Lines v. Comm'n*, Joined Cases C-395/96 P and C-396/96 P, [2000] E.C.R. I-1365 (C.J.), at ¶ 142-3; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 476-88 (holding in which the CFI annulled the fines imposed on the associations of undertakings after having found that the SO had only informed the undertakings concerned, and not the associations of undertakings, of the Commission's intention to impose fines).

69. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 482-7.

70. *IBM v. Comm'n*, Case 60/81, [1981] E.C.R. 2639 (C.J.), at ¶¶ 20-21.

71. *Id.*; *CBR & Others*, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, [1992] E.C.R. II-2667, at ¶ 47; *see, e.g., CB & Europay v. Comm'n*, Joined Cases T-39/92 and T-40/92, [1994] E.C.R. II-49 (CFI).

2. The Reply to the Statement of Objections

The undertakings and associations of undertakings to which a SO has been addressed can make their views known to the Commission in writing. They have to be granted at least two weeks to prepare their reply to the SO.⁷² In fixing the period in which the reply should be lodged, the Commission is to have regard both to the time required for the preparation of comments and to the urgency of the case.⁷³ The time allowed must be assessed specifically in relation to the difficulty of the particular case.⁷⁴ In complex competition cases, two months are generally considered to be sufficient.⁷⁵

In their reply, the addressees of a SO may set out all matters they consider relevant to their defense. They may annex any documents as proof of the facts set out in the reply and may also propose that the Commission hear witnesses whose testimony may corroborate those facts.⁷⁶

An undertaking or association of undertakings is free to decide whether or not to reply to a SO addressed to it.⁷⁷ It follows that, if the Commission uses the reply to the SO given by a party in the decision finding an infringement as an element establishing the guilt of its author, that party will have no grounds for claiming that the Commission has violated its right not to give evidence against itself.⁷⁸

3. Access to the Commission's File

The Commission has to give access to its file in the course of the administrative procedure.⁷⁹ Access to the file in competition

72. Comm'n Regulation No. 2842/98, O.J. L. 354/18 (1998), art. 14.

73. *Id.*

74. *Suiker Unie & Others v. Comm'n*, Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73, [1975] E.C.R. 1663, (C.J.), at ¶¶ 94 to 99 [hereinafter *Suiker*]; *United Brands v. Comm'n*, Case 27/76, [1978] E.C.R. 207 (C.J.), at 272-3.

75. *Suiker*, [1975] E.C.R. 1663, (C.J.) at ¶¶ 94-9; *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶¶ 344-55.

76. Comm'n Regulation No. 2842/98, O.J. L. 354/18 (1998), art. 4(2).

77. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 735.

78. *Id.*

79. *CBR & Others*, [1992] E.C.R. II-2667, at ¶¶ 38-9; *BPB Indus. & British Gypsum v. Comm'n*, Case T-65/89, [1993] E.C.R. II-389, at ¶ 30; *Solvay v. Comm'n*, Case T-30/91, [1995] E.C.R. II-1775, at ¶ 59; *ICI v. Comm'n*, Case T-36/91, [1995] E.C.R. II-1847, at ¶ 69; *ICI v. Comm'n*, Case T-37/91, [1995] E.C.R. II-1901, at ¶ 49; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 142.

cases is intended to allow the parties under investigation to examine evidence held by the Commission so that they are in a position effectively to express their views on the conclusions, which the Commission reaches in the SO on the basis of that evidence.⁸⁰ Access to the file is thus one of the principal procedural guarantees intended to protect the rights of the defense and to ensure, in particular, that the right to be heard provided for in Article 19(1) and (2) of Regulation No. 17 and Article 3 of Regulation No. 2842/98 can be exercised effectively.⁸¹

In order to assess whether incomplete access to the file violates a party's rights of defense, case law makes a distinction between incriminating or inculpatory documents, on the one hand, and documents which could be exculpatory, on the other hand.

a. Incriminating or Inculpatory Documents

If the Commission intends to use documentary evidence in the decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty, mention should be made of these documents in the SO and they should be made available to the addressees of the SO. In principle, only documents to which the alleged infringer has been given access and which have been cited or mentioned in the SO constitute valid evidence.⁸²

The fact that the decision finding an infringement refers to a certain document does not necessarily mean that it contains incriminating evidence. In order to prove that its rights of defense have been violated in the context of an annulment action brought under Article 230 of the EC Treaty, it is not sufficient for an applicant to show that it was unable to express its views during the administrative procedure on a document to which reference was made anywhere in the contested decision. For such a line of argument to succeed, it is necessary for the applicant to prove that the Commission used, in its decision, a piece of evidence which was not disclosed to it during the administra-

80. *Hercules Chem. v. Comm'n*, Case C-51/92 P, [1999] E.C.R. I-4235 (C.J.), at ¶ 75; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 142.

81. Regulation No. 99/63, *supra* note 19, ex-art. 2.

82. *AKZO v. Comm'n*, Case C-62/86, [1991] E.C.R. I-3359 (C.J.), at ¶ 21; *Shell v. Comm'n*, Case T-11/89, [1992] E.C.R. II-757, at ¶ 55; *ICI v. Comm'n*, Case T-13/89, [1992] E.C.R. II-1021 (CFI), at ¶ 34 [hereinafter *ICI*]; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 323.

tive procedure, specifically in order to prove the existence of an infringement in which the applicant is alleged to have participated.⁸³

Often, the Commission will append the incriminating documents to the SO. If reference is made to these documents in the SO, they will obviously constitute valid evidence. However, it sometimes happens that the SO itself does not expressly refer to a document which is nevertheless appended to it. Such a document will only constitute admissible evidence if the addressee of the decision finding the infringement could have reasonably deduced from the SO what conclusions the Commission intended to draw from the document in question.⁸⁴

If the number of incriminating documents is too large, the Commission will, rather than appending these documents to the SO, make available to the addressees of the SO, a file of incriminating documents. Case law considers that the documents thus made available are to be assimilated to appendices to the SO.⁸⁵

Sometimes, after having notified the SO, the Commission will uncover documents, which further substantiate its allegations. For example, it may happen that one addressee of a SO which wishes to stress the marginal nature of its role in the anticompetitive practices alleged, or which wishes to co-operate with the Commission with a view to reducing the fine to be imposed on it, admits certain facts or hands over to the Commission certain documents which are incriminating for the other parties under investigation. If the Commission wishes to rely on such evidence to prove the existence of an infringement of Article 81(1) and/or Article 82 of the EC Treaty, it must make that evidence available to the parties concerned and invite them to submit their observations.⁸⁶

If a party demonstrates, in the context of an action for annulment, that, in the course of the administrative procedure, it was not in a position to express its views with regard to one or more incriminating documents, the CFI will find that there has

83. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 284.

84. *Shell*, [1992] E.C.R. II-757, at ¶ 56; *ICI*, [1992] E.C.R. II-1021 (CFI), at ¶ 35; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 324.

85. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 324.

86. *AKZO*, [1991] E.C.R. I-3359 (C.J.), at ¶ 21; *ICI*, [1992] E.C.R. II-1021 (CFI), at ¶¶ 34-5; *Shell*, [1992] E.C.R. II-757, at ¶¶ 55-6; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 386.

been a violation of that party's rights of defense. Those incriminating documents will be excluded as evidence. Far from leading inevitably to the annulment of the decision in its entirety, the exclusion of such documents will only lead to the annulment—in whole or in part—of the decision in so far as the corresponding objection raised by the Commission can only be proved by reference to them.⁸⁷ In other words, if the CFI considers that the infringement is sufficiently established on the basis of the other incriminating documents, which have been made available to the applicant in the course of the administrative procedure and in respect of which the applicant has been able to express its views, the violation of the rights of the defense will not affect the legality of the decision.⁸⁸

b. Other Documents in the Commission's File at the Time
When the Statement of Objections is Notified

At the time when the SO is notified to its addressees, the Commission's file already contains a considerable amount of material including the documents obtained during the "on the spot" investigation, copies of the requests for information, the replies to those requests, press cuttings, internal notes, and the text of any complaints lodged. Generally, the incriminating documents only represent a small proportion of the Commission's file. The question therefore arises whether the Commission has to grant access to all the other documents in its file, in addition to those which are incriminating, in the course of a proceeding under Article 81(1) and/or Article 82 of the EC Treaty.

The initial answer to this question was negative. In July 1991, the Court of Justice ruled in its *AKZO* judgment⁸⁹ that the

87. *AEG v. Comm'n*, Case 107/82, [1983] E.C.R. 3151 (C.J.), at ¶¶ 24-30; *Solvay v. Comm'n*, Case T-30/91, [1995] E.C.R. II-1775, at ¶ 58; *ICI*, [1995] E.C.R. II-1901, at ¶ 71; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 364.

88. It is therefore only exceptionally that the non communication of incriminating documents during the administrative procedure will lead to the partial or total annulment of the decision finding the infringement. See, e.g., *Woodpulp Judgment*:

[I]n establishing the infringement relating to transaction prices, the Commission must have relied essentially on documents gathered after the statement of objections was drawn up. Since the members of KEA had no opportunity to make their views known on those documents, Article 1(3) of the contested decision must be annulled for disregard of the rights of the defence in so far as it concerns that infringement.

Woodpulp Judgment, [1993] E.C.R. I-1307 at ¶ 138.

89. *AKZO*, [1991] E.C.R. I-3359 (C.J.), at ¶ 16.

Commission was only required to make available to the addressees of the SO the incriminating documents on which it intended to rely in its decision.

The case law of the CFI has substantially extended the parties' right of access to the Commission's file.⁹⁰ Thus, in December 1991, the CFI held in *Hercules Chemicals*⁹¹ that, since the Commission had established in its Twelfth Report on Competition Policy a procedure for providing access to the file in competition cases, it had to grant access to its file in accordance with these self-imposed rules, which exceeded the requirements laid down in the existing case law of the Court of Justice. According to the CFI, those rules oblige the Commission to make available to the undertakings and associations of undertakings involved in proceedings under Article 81(1) or Article 82 all documents, whether in their favour or otherwise, which it has obtained in the course of the investigation, save where business secrets of other undertakings, internal documents of the Commission or other confidential information are involved.⁹²

Consequently, it is not for the Commission to select for disclosure the documents in its file which it considers useful for the parties' defense.⁹³ On the contrary, the Commission has an obligation to make available its entire file, except for its internal documents and documents containing business secrets or other confidential information.⁹⁴

It is striking that recent case law no longer bases the Commission's obligation to grant access to both the incriminating and potentially exculpatory documents in its file on the rules laid down in the Twelfth Report on Competition Policy, but rather on the general principle of equality of arms.⁹⁵ Indeed, it

90. See, e.g., K. Lenaerts, *Le Tribunal de première instance des Communautés européennes: regard sur une décennie d'activités et sur l'apport du double degré d'instance au droit communautaire*, 76 *CAHIERS DE DROIT EUROPÉEN* 2000.

91. *Hercules Chem. v. Comm'n*, Case T-7/89, [1991] E.C.R. II-1711 (CFI), at ¶¶ 52-54.

92. *Id.*

93. *Solvay*, [1995] E.C.R. II-1775 (CFI), at ¶ 81; *ICI v. Comm'n*, Case T-36/91, [1995] E.C.R. II-1847, at ¶ 91; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 143.

94. *Hercules Chem.*, [1991] E.C.R. II-1711 (CFI), at ¶ 54, *BPB Indus. & British Gypsum v. Comm'n*, Case T-65/89, [1993] E.C.R. II-389, at ¶ 29; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 144; see Opinion of AG Léger in *BPB Indus. & British Gypsum v. Comm'n*, Case C-310/93 P, [1995] E.C.R. I-865 (C.J.), at ¶ 867, pt. 116; *Bausahlgeewebe v. Comm'n*, Case C-185/95 P, [1998] E.C.R. I-8417 (C.J.), at ¶ 8422, pt. 150.

95. *Solvay*, [1995] E.C.R. II-1775, at ¶ 83; *ICI*, [1995] E.C.R. II-1847, at ¶ 93; *PVC*

is not acceptable that the Commission should decide unilaterally whether or not to use documents against parties under investigation, when the latter have no access to them and are therefore unable to decide whether or not to use them in their defense.⁹⁶ As a corollary of the principle of the protection of the rights of the defense,⁹⁷ the right of access to the file has now come to be considered to be a general principle of Community law.⁹⁸

As regards the exceptions to the general rule of access to the entire file, it must be stressed that the Commission is never obliged to grant access to its internal documents during the course of the administrative procedure. That restriction is justified by the need to ensure the proper functioning of the Commission when it deals with infringements of Article 81(1) and/or Article 82 of the EC Treaty.⁹⁹

The exception concerning documents containing business secrets and other confidential information has a more limited scope. If this were not the case, the parties' right of access to the file could easily be undermined. It has thus been held that the right of undertakings to protect their business secrets and other confidential information must be balanced against the need to safeguard the rights of the defense and does not therefore justify a refusal by the Commission to disclose evidence which could be of use for the defense of other undertakings.¹⁰⁰

Judgment, [1999] E.C.R. II-931 (CFI), at ¶ 1012; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 143.

96. *Solvay*, [1995] E.C.R. II-1775, at ¶ 83; *ICI*, [1995] E.C.R. II-1847, at ¶ 93; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 143.

97. Opinion of AG Léger in *BPB Indus. & British Gypsum v. Comm'n*, Case C-310/93 P, [1995] E.C.R. I-865 (C.J.), at ¶ 867, pt. 116.

98. *CBR & Others*, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92, [1992] E.C.R. II-2667, at ¶¶ 38-9; *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶ 1011; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 142; see *Lenaerts & Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process*, 34 COMMON MKT. L. REV. 531-569 (1997).

99. *NMH Stahlwerke & Others v. Comm'n*, Joined Cases T-134/94, T-136/94 to T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94, [1997] E.C.R. II-2293 (Order CFI), at ¶ 36; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 420. The CFI will not require the Commission to communicate internal documents during the judicial proceedings, unless the circumstances of the case are exceptional and the applicants make out a plausible case for the need to do so. See *BAT & Reynolds v. Comm'n*, Joined Cases 142/84 and 156/84, [1986] E.C.R. 1899 (Order C.J.), at ¶ 11; *Deere v. Comm'n*, Case T-35/92, [1994] E.C.R. II-957 (CFI), at ¶ 31; *NMH Stahlwerke & Others*, [1997] E.C.R. II-2293 (Order CFI), at ¶ 35; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 420.

100. *Solvay*, [1995] E.C.R. II-1775, at ¶ 88; *ICI*, [1995] E.C.R. II-1847, at ¶ 98; *PVC*

If there are documents containing confidential information in the file, the Commission has two options. It can prepare a non-confidential version of each of the documents in question or have such versions prepared by the undertakings or associations from which the documents emanate. If this option proves too onerous, for example due to the number of documents involved, the Commission should send to the parties concerned a list which describes the documents contained in its file in sufficient detail to enable them to assess properly whether some documents are likely to be relevant for the preparation of their defence. On the basis of such list, the undertakings and associations of undertakings can request access to specific documents within the file. Pursuant to such a request the Commission can then, if the documents to which access has been asked contain confidential information, prepare, or have prepared, a non-confidential version of the documents in question.¹⁰¹

Thus, whereas the exception concerning the internal documents of the Commission covers a particular category of documents in the Commission's file, the exception concerning documents containing business secrets or other confidential information only relates to the business secrets or other confidential information contained in these documents and not to the documents as such.¹⁰²

It should be added that the Community courts have accepted the non-disclosure of documents in the course of Article 82 proceedings on the ground that the undertaking concerned holding a dominant position on the market might adopt retaliatory measures against competitors, suppliers or customers who have cooperated in the investigation carried out by the Commission.¹⁰³ In reality, however, there is no reason for the Commission to apply a different standard for access to the file in Article

Judgment, [1999] E.C.R. II-931 (CFI), at ¶ 1016; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 147.

101. *Solvay*, [1995] E.C.R. II-1775, at ¶¶ 92-4; *ICI v. Comm'n*, Case T-36/91, [1995] E.C.R. II-1847, at ¶¶ 102-4; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 147.

102. There exists a Commission notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No. 4064/89 [O.J. C 23/3 (1997)].

103. *BPB Indus. & British Gypsum v. Comm'n*, Case T-65/89, [1993] E.C.R. II-389, at ¶ 33; *BPB Indus. & British Gypsum v. Comm'n*, Case C-310/93 P, [1995] E.C.R. I-865 (C.J.), at ¶ 26.

82 proceedings. Indeed, documents supplied by undertakings which may be the object of reprisals on the part of the dominant undertaking fall within the category of documents containing "other confidential information". The Commission, when preparing a non-confidential version of these documents, must ensure that the interests of the parties, which have cooperated with it, are adequately protected. In this regard, it will normally be essential that the identity of such parties is not disclosed to the dominant undertaking.¹⁰⁴

If, in the context of an annulment action brought against a decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty, the CFI considers that the Commission did not make the entire file available to the parties concerned, during the course of the administrative procedure, in accordance with the rules set out above, it will hold that the Commission failed to grant proper access to its file.¹⁰⁵ However, such a ruling will not automatically lead to the annulment of the contested decision.¹⁰⁶ The decision will only be quashed, in whole or in part, if it is found that the lack of proper access to the file during the administrative procedure affected the parties' capacity to defend themselves.¹⁰⁷

Thus, it is not open to a party to claim that its rights of defense have been infringed during the administrative procedure where the Commission has failed to disclose to it a document, which might contain exculpatory evidence, in circumstances where it is clear that it was nevertheless in possession of that document during the administrative procedure.¹⁰⁸ In such circumstances, the fact that access to the file was inadequate could not have adversely affected that party's preparation of its defense. Indeed, a party is not restricted to using only documents in the Commission's file to defend itself. It may refer to any document,

104. See *Adams v. Comm'n*, Case 145/83, [1985] E.C.R. 3539 (C.J.), at ¶¶ 35-44.

105. *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶ 1019; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 152.

106. *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶ 1020; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 240.

107. *Solvay*, [1995] E.C.R. II-1775, at ¶¶ 80, 81, 84, 98, 100; *ICI v. Comm'n*, Case T-36/91, [1995] E.C.R. II-1847, at ¶¶ 90, 91, 94, 108, 110, 115; *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶ 1021; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 240.

108. Cf. *BPB Indus. & British Gypsum v. Comm'n*, Case C-310/93 P, [1995] E.C.R. I-865 (C.J.), at ¶ 25; *ICI* [1995] E.C.R. II-1901, at ¶ 64; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 248.

which it considers appropriate to rebut the Commission's allegations.¹⁰⁹

However, where a document in the Commission's file was not available to a party during the administrative procedure, the CFI will find a violation of that party's rights of defense and will totally or partially quash the contested decision, if the party concerned can show that there is even a small chance that the outcome of the administrative procedure might have been different if it had been able to rely on the document during that procedure.¹¹⁰

Therefore, when in the context of an action seeking annulment of the Commission's final decision, an applicant challenges the Commission's refusal to disclose one or more documents during the administrative procedure, the CFI will require their disclosure in the proceedings before it.¹¹¹ The applicant will then be invited to inspect the documents and to substantiate its plea alleging infringement of its rights of defense.¹¹² If the

109. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 248.

110. *Hercules Chem. v. Comm'n*, Case T-7/89, [1991] E.C.R. II-1711 (CFI) ¶ 56; *Solvay*, [1995] E.C.R. II-1775, at ¶ 68; *ICI*, [1995] E.C.R. II-1901, at ¶ 78; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 241-7; Opinion of AG Léger in *BPB Indus. & British Gypsum v. Comm'n*, Case C-310/93 P, [1995] E.C.R. I-865 (C.J.), point 120. The test applied by the CFI with respect to the non-disclosure of potentially exculpatory documents is completely in line with the case law which the Court of Justice developed in *Distillers v. Comm'n*, Case 30/78, [1980] E.C.R. 2229 (C.J.), at ¶ 26, with respect to procedural defects and according to which an alleged procedural defect cannot be relied upon to annul a decision where that defect could not in any event have affected the content of the decision. The applicant does not have to show that, if it had had access to certain documents in the administrative proceedings, the Commission decision would have been different in content, merely that it would have been able to use those documents in its defense. See *Hercules Chem. v. Comm'n*, Case C-51/92 P, [1999] E.C.R. I-4235 (C.J.), at ¶ 81. The test applied by the CFI with respect to the non-disclosure of potentially exculpatory documents is thus more favorable to the applicant than the test applied with respect to the non-disclosure of inculpatory documents. Indeed, if the CFI were to apply the same test in respect of potentially exculpatory documents as that laid down in its case law in respect of the non-disclosure of inculpatory documents, it would have to assess whether the evidence adduced in the decision read in conjunction with the exculpatory documents, which had not been disclosed in the administrative proceedings, demonstrates the existence of the infringement concerned and the participation of the party concerned in that infringement.

111. By way of a measure of organisation of procedure within the meaning of Article 64 or a measure of inquiry within the meaning of Article 65 of the CFI Rules of Procedure.

112. Opinion of AG Léger in *BPB Indus. & British Gypsum v. Comm'n*, Case C-310/93 P, [1995] E.C.R. I-865 (C.J.), point 121; *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶ 1023; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 158-162, 241.

CFI did not order such disclosure, it would be impossible for an applicant that alleges that its rights of defense have been infringed during the administrative procedure because of the failure to disclose certain documents to it, to demonstrate that the outcome of the administrative procedure might have been different had such access been granted.¹¹³

When assessing whether inadequate access to the file has violated an applicant's rights of defence, the CFI will first examine whether there is any objective link between the documents which were not disclosed during the administrative procedure and a specific objection adopted against the applicant concerned in the contested decision. If there is no such link, the CFI will hold that the documents in question would not have assisted the applicant's preparation of its defence.¹¹⁴ If, however, it reaches the opposite conclusion, the CFI will examine the evidence adduced by the Commission in support of that objection and will assess whether the documents withheld during the administrative procedure might—in the light of the evidence adduced by the Commission—have had a significance which ought not to be disregarded.¹¹⁵ As already indicated, there will be an infringement of the rights of defense justifying the annulment of the Commission's decision, if there was even a small chance that the outcome of the administrative procedure might have been different if the applicant had been able to rely on the documents in question during that procedure.¹¹⁶

In the "*Soda Ash*" cases,¹¹⁷ the CFI applied these principles and, for the first time, annulled a Commission decision concerning the application of the competition rules of the EC Treaty on the ground that the applicants had not had access to documents,

113. See *Cement Judgment*, noting that in this respect:

Applicants who have raised a plea alleging infringement of their rights of defence cannot be required to set out in their application detailed arguments or a consistent body of evidence to show that the outcome of the administrative procedure might have been different if they had had access to certain documents which were in fact never disclosed to them. Such an approach would in effect amount to requiring a *probatio diabolica* . . .

Cement Judgment, [2000] 5 C.M.L.R. at ¶ 161.

114. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 241-7.

115. *Solvay*, [1995] E.C.R. II-1775, at ¶¶ 61-5, 68; *ICI v. Comm'n*, Case T-36/91, [1995] E.C.R. II-1847, at ¶¶ 71-5, 78; *ICI*, [1995] E.C.R. II-1901, at ¶¶ 51-6; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 241.

116. See *supra* note 110 and accompanying text.

117. *Solvay*, [1995] E.C.R. II-1775; *ICI*, [1995] E.C.R. II-1847.

which could have been useful to rebut the Commission's allegations. According to the decision which was annulled, there had been, from January 1, 1973 until the beginning of 1989, a concerted practice between Solvay and ICI, contrary to Article 81 of the EC Treaty, involving the sharing of the Western European soda ash market.¹¹⁸ According to the Commission, both parties had also abused their dominant position on the same product market. In two other decisions, the Commission therefore found that Solvay and ICI had infringed Article 82 of the EC Treaty, on the continental European market and on the United Kingdom market, respectively.¹¹⁹ During the administrative procedure concerning the Article 81 infringement, Solvay did not have access to the Commission's file relating to ICI's alleged abusive practices and ICI did not have access to the file relating to Solvay's alleged abusive practices on the relevant product market.

In the context of their actions seeking the annulment of the Commission's decision finding an infringement of Article 81 of the EC Treaty,¹²⁰ the applicants alleged that the Commission had infringed their rights of defence by failing to disclose to them the file concerning the alleged abuse of a dominant position by the other applicant. In dealing with that line of argument, the CFI first of all examined the evidence on which the Commission had based its decision. It found that the market-sharing agreement concluded by ICI and Solvay in 1949 was the only documentary evidence of the infringement uncovered in respect of the period between 1973 and 1982.¹²¹ However, this agreement had been formally terminated in 1972. According to the CFI, it could not be ruled out that, by terminating the agreement, the two undertakings intended to comply with the EC Treaty. In the CFI's view, the 1949 agreement was therefore weak evidence on which to base a finding that the infringement in question had been committed by ICI and Solvay as from January 1, 1973. The only other evidence of the existence of a concerted practice adduced by the Commission was derived from the conduct of the undertakings concerned on the market, that

118. Soda-ash-Solvay, ICI, O.J. L 152/1 (1991) (Commission).

119. These decisions gave rise to the judgments of the CFI in *Solvay v. Comm'n*, Case T-32/91, [1995] E.C.R. II-1825 (CFI) and in *ICI*, [1995] E.C.R. II-1901.

120. *Solvay*, [1995] E.C.R. II-1775; *ICI*, [1995] E.C.R. II-1847.

121. *Solvay*, [1995] E.C.R. II-1775, at ¶ 74; *ICI*, [1995] E.C.R. II-1847, at ¶ 84.

is to say, the absence of cross-Channel trade in soda ash on the part of either ICI or Solvay.¹²² The CFI then ruled that the documents concerning the infringement of Article 82 of the EC Treaty supposedly committed by ICI could have helped Solvay to rebut the allegation that a concerted practice existed between Solvay and ICI. Indeed, those documents might have shown that allegedly illegal passive conduct on the part of Solvay was the result of its own independent decisions, motivated by the difficulty of penetrating a market, to which access was blocked by an undertaking in a dominant position.¹²³ On the same grounds, the documents concerning the infringement of Article 82 of the EC Treaty allegedly committed by Solvay could have helped ICI in its defence.¹²⁴ As there was a chance that, if ICI and Solvay had had access to the documents in question during the administrative procedure, they might have been able to influence the Commission's assessment, at least as regards the interpretation of their alleged passive and parallel conduct, the CFI found that the rights of defence had been infringed and annulled the decision in question.¹²⁵

In order to assess whether documents which were not disclosed during the administrative procedure could have changed the outcome of that procedure if they had been made available to an applicant who is alleging a violation of its rights of defence, it is thus essential to examine the evidence on which the Commission relies in support of its finding of an infringement in the contested decision.

It follows that, where the Commission relies solely on documentary evidence, rather than on the parallel conduct of the parties concerned, in order to prove an infringement of the EC competition rules, the applicants alleging a violation of their rights of defence on the grounds that certain documents in the Commission's file were not disclosed to them must show that these documents are at variance with the evidence on which the Commission relies or, at least, that they shed a different light on that evidence. Indeed, it is only in those circumstances that documents, which were not made available during the administra-

122. *Solvay*, [1995] E.C.R. II-1775, at ¶ 73; *ICI*, [1995] E.C.R. II-1847, at ¶ 83.

123. *Solvay*, [1995] E.C.R. II-1775, at ¶ 77.

124. *ICI*, [1995] E.C.R. II-1847, at ¶ 87.

125. *Solvay*, [1995] E.C.R. II-1775, at ¶¶ 98-9; *ICI*, [1995] E.C.R. II-1847, at ¶¶ 108-09.

tive procedure, could have influenced the Commission's assessment of the documentary evidence relied on in the contested decision.¹²⁶

In the *Cement* cases,¹²⁷ several applicants alleged that during the administrative procedure they could have presented an alternative economic explanation of their conduct on the market, had they been granted access to certain documents that had been withheld. Having found that the Commission had relied solely on specific documentary evidence in order to prove the various infringements¹²⁸ in its decision,¹²⁹ the CFI dismissed this argument. In the light of the mode of proof used in the decision, that argument could not possibly have altered the outcome of the administrative procedure.¹³⁰ However, in those same cases, certain applicants did succeed in demonstrating that documents which had not been disclosed to them shed a different light on the documentary evidence which had been used by the Commission in its decision in order to prove their participation to the "Cement cartel". In the cases of those applicants, there was a chance that the outcome of the administrative procedure could have been different if they had had access to these documents, and the CFI therefore annulled the decision as regards those particular applicants.¹³¹

126. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 263.

127. *Id.*

128. Similarly, in *ICI v. Comm'n*, [1995] E.C.R. II-1901, relating to a decision in which the Commission found that ICI had infringed Article 82 of the EC Treaty, the CFI dismissed the plea concerning an alleged insufficient access to the file in the administrative procedure. The CFI pointed out that in the contested decision the finding of a dominant position was based on ICI's market share and the finding of the abuse of that position was based on specific documentary evidence such as the rebate system applied by ICI and the exclusive contracts ICI had entered into with its customers. *ICI*, [1995] E.C.R. II-1901, at ¶ 61. After having assessed the evidence adduced by the Commission, the CFI ruled that ICI's defense had not been hindered by the fact that it did not have access during the administrative procedure to the documents of the file relating to the procedure under Article 82 of the EC Treaty against Solvay. *ICI v. Comm'n*, [1995] E.C.R. II-1901, at ¶ 63. There was indeed nothing to suggest that these documents could have altered the Commission's findings concerning ICI's abuse of its dominant position.

129. *See* [2000] 5 C.M.L.R. 204.

130. *Id.* at 264.

131. *Id.* at ¶¶ 2205-12, 2224, 2225, 2284-90, 2384, 2385, 2469, 3406-35, 3996-4005.

c. Access to Documents Which Were Not in the Commission's File at the Time When the Statement of Objections Was Notified

In the context of an action for annulment of the Commission's decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty, applicants sometimes complain that during the administrative procedure certain documents which were not included in the Commission's file when the SO was notified but which were later added to it, such as the replies of other parties to the SO¹³² and the transcripts of the hearing,¹³³ were not disclosed to them.

However, in proceedings under Article 81(1) and/or Article 82 of the EC Treaty, the Commission is not required to make available, of its own motion, documents which were not in its file at the time when the SO was notified and on which it does not intend to rely, against the party concerned, in its final decision. Therefore, a party who discovers, in the course of the administrative procedure, that the Commission has added new documents to its file, which might be of use for the preparation of its defence, must make an express request to the Commission for access to those documents. A party who fails to do so during the administrative procedure will be barred, in a subsequent action for annulment brought against the final decision, from raising a plea concerning a violation of its rights of defense on the ground that these "new" documents were not disclosed to it. However, if the Commission has rejected a request for access to documents added to the file after the notification of the SO, an infringement of the rights of defense may be found provided it is shown that the outcome of the administrative procedure might have been different if the applicant had had access to the documents in question during the administrative procedure.¹³⁴

C. *The Hearing*

The administrative procedure normally also includes an oral phase. Indeed, if the parties so request in their reply to the SO, the Commission is obliged to afford them the opportunity to

132. See, e.g., Case C-51/92 P, [1999] E.C.R. I-4235 (C.J.), at ¶¶ 75-83; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 384-407.

133. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 408-09.

134. *Id.* at ¶ 383.

present their arguments orally.¹³⁵

The hearing is conducted by a hearing officer.¹³⁶ In organizing the hearing this official acts in complete independence from the parties as well as from the Commission's own hierarchy.¹³⁷ It is relevant to note that the function of hearing officer was created in 1982 as a response to criticism that the Commission officials organizing competition hearings were not sufficiently independent.¹³⁸

The hearing officer fixes the date for the oral hearing and invites the parties who requested it to attend. Officials from the competition authorities of the Member States may also attend the oral hearing.¹³⁹ Parties invited to attend may be assisted by their legal advisers or other qualified persons admitted by the hearing officer.¹⁴⁰

The fact that the hearing officer imposes a programme for the hearing does not constitute an infringement of the rights of defence of the parties concerned.¹⁴¹ There would only be such an infringement where the parties concerned could prove that the manner in which the hearing was organized either made it impossible for them to attend or prevented them from putting forward orally their arguments.¹⁴²

Each person may be heard either separately or in the presence of other persons invited to attend.¹⁴³ The statements made by each person who appears are recorded on tape. A copy of the recorded statements is made available to all those who appear, should they request it.¹⁴⁴ Whilst the addressees of a SO may be invited to attend the hearings involving the other undertakings under investigation, they do not have a formal right to do so. Indeed, the oral hearing is not held in public.¹⁴⁵ The right to be

135. Comm'n Regulation No. 2842/98, *supra* note 19, art. 5.

136. *Id.* art. 10.

137. Comm'n Decision No. 94/810/ECSC, O.J. L 330/67 (1994).

138. See L. Goossens, *supra* note 17, at 65; WAELBROECK & FRIGNANI, COMMENTAIRE J. MÉGRET. LE DROIT DE LA CE 466 (1997).

139. Comm'n Regulation No. 2842/98, *supra* note 19, art. 11.

140. *Id.* at arts. 12(1)-(2).

141. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 663.

142. *Id.*

143. Comm'n Regulation No. 2842/98, *supra* note 19, art. 12(3).

144. *Id.* art. 12(4).

145. *Id.* art. 12(3).

heard does not imply a right to hear the case against others.¹⁴⁶

Once the hearing is closed the hearing officer will address a report to the Director-General for Competition in which he will draw his conclusions on the hearing. In this report he will also make observations on the further handling of the proceedings, which may relate, amongst other matters, to the need to obtain additional information, the withdrawal of certain objections, or the addition of new objections to supplement those already raised.¹⁴⁷ This report is a purely internal Commission document. The rights of defense do not require that parties involved in a proceeding under Article 81(1) and/or Article 82 of the EC Treaty be able to comment on the report of the hearing officer.¹⁴⁸

D. *Consultation of the Advisory Committee on Restrictive Practices and Dominant Positions*

Prior to adopting a decision finding an infringement of the EC competition rules, the Commission must, in accordance with Article 10 of Regulation No. 17, consult the advisory committee on restrictive practices and dominant positions ("advisory committee"). The advisory committee is composed of officials from the Member States who are competent in the matter of restrictive practices and monopolies. Each Member State appoints one official.¹⁴⁹

The function of the advisory committee is to deliver an opinion to the Commission concerning the decision to be adopted which is not binding on the Commission, and is not disclosed to the parties to the proceeding.¹⁵⁰ In the *Musique Diffusion Française* case, the Court of Justice ruled that the fact that the opinion is not disclosed to the parties is not contrary to the principle of the right to a fair hearing.¹⁵¹ This case law has been

146. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 682. However, the Commission may not rely in support of its finding that a party has infringed Article 81(1) and/or Article 82 of the EC Treaty on information which it obtained in the course of hearings in which this party was not able to participate.

147. Comm'n Decision 94/810, *supra* note 137, art. 8.

148. *Petrofina v. Comm'n*, Case T-2/89, [1991] E.C.R. II-1087 (CFI), at ¶¶ 54-55; *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶¶ 375-378.

149. Regulation No. 17, *supra* note 3, at art. 10(4).

150. *Id.* art. 10(6).

151. *Musique Diffusion Française v. Comm'n*, Joined Cases 100-103/80, [1980] E.C.R. 1825, at ¶ 36.

heavily criticized by academics and other commentators.¹⁵²

The consultation of the advisory committee is an essential procedural requirement.¹⁵³ The Commission is obliged to provide all necessary information to the members of the committee. Therefore, the notice convening the meeting of the advisory committee has to be accompanied by a summary of the case together with an indication of the most important documents, and a first draft of the decision.¹⁵⁴

Where not all the available information is disclosed to the members of the advisory committee, the legality of the Commission's decision will only be affected if it is shown that failure to forward that information to the committee did not allow the advisory committee to deliver its opinion in full knowledge of the facts, that is to say without being misled in a material respect by inaccuracies or omissions.¹⁵⁵

Finally, it has been held that the Commission does not have to inform the members of the advisory committee of the precise amount of the fines it intends to impose. Provided the Commission gives the members of the advisory committee an approximate overall figure representing the total fines to be imposed and further informs them of the percentage of turnover the fines represent for the parties concerned, the advisory committee will be deemed to have received all the material information necessary to enable it to deal with the issue of fines in its opinion.¹⁵⁶

E. *The Adoption of the Decision and Its Authentication*

A decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty is adopted by the Commission as a college and not by the member of the Commission responsible

152. See WAELBROECK & FRIGNANI, *supra* note 138, at 471.

153. RTE v. Comm'n, Case T-69/89, [1991] E.C.R. II-485 (CFI), at ¶ 23; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 742.

154. Regulation No. 17, *supra* note 3, at art. 10(5). The Commission is not required to disclose the report of the hearing officer to the members of the advisory committee. See *Montedipe v. Comm'n*, Case T-14/89, [1992] E.C.R. II-1155 (CFI), at ¶ 40; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 749.

155. RTE, [1991] E.C.R. II-485 (CFI), at ¶ 23; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 742.

156. *Boehringer Mannheim v. Comm'n*, Case 45/69, [1970] E.C.R. 769, at ¶¶ 19-21; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 744-748.

for competition policy individually.¹⁵⁷ Indeed, the Commission is governed by the principle of collegiate responsibility, which implies, on the one hand, that the decisions taken are the result of collective deliberation¹⁵⁸ and, on the other hand, that all the members of the college of commissioners bear collective political responsibility for all decisions adopted.¹⁵⁹

A change in the composition of the Commission during the administrative procedure does not affect the legality of the decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty. Indeed, there is no general principle of Community law requiring continuity in the composition of an administrative body handling a procedure, which may lead to the imposition of a fine.¹⁶⁰

The decisions of the Commission finding an infringement of the EC competition rules have to be authenticated. By authenticating its acts the Commission makes it possible to identify with certainty the precise text adopted by the college of commissioners in each of the language versions which are binding in the particular case. The authentication of acts is thus intended to guarantee legal certainty by ensuring that it is impossible to tamper with the text adopted by the college of commissioners. In the event of any subsequent dispute, it can then be verified that the texts notified or published correspond precisely to the text adopted by the college and that they thus conform to its intention.¹⁶¹ Logically, authentication must precede notification and publication of the act.¹⁶² Authentication is an essential procedural requirement within the meaning of Article 230 of the EC Treaty, breach of which leads to the annulment of the decision in question.¹⁶³

157. *Comm'n v. BASF & Others*, Case C-137/92 P, [1994] E.C.R. I-2555 (C.J.), at ¶ 71.

158. The quorum of attendance which should be reached for such deliberation is the majority of its members. *Preussag Stahl v. Comm'n*, Case T-148/94, [1999] E.C.R. II-613 (CFI), at ¶¶ 111-126.

159. *Comm'n v. Germany*, Case C-191/95, [1998] E.C.R. I-5449 (C.J.), at ¶ 33; *AKZO v. Comm'n*, Case C-62/86, [1991] E.C.R. I-3359 (C.J.), at ¶ 30; *BASF & Others*, [1994] E.C.R. I-2555 (C.J.), at ¶ 63; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 759.

160. *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶¶ 322-323.

161. *BASF & Others*, [1994] E.C.R. I-2555 (C.J.), at ¶ 73, 75; *ICI*, [1995] E.C.R. II-1901, at ¶ 89.

162. *ICI*, [1995] E.C.R. II-1901, at ¶ 90, confirmed on appeal in *Comm'n v. ICI*, Case C-286/95 P, [2000] E.C.R. I-2341 (C.J.), at 62.

163. *BASF & Others*, [1994] E.C.R. I-2555 (C.J.), at ¶¶ 76-78; *ICI*, [1995] E.C.R. II-

F. Notification and Publication of the Decision

A decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty is notified to its addressee(s). The date of notification constitutes the starting point from which the two-month period laid down in Article 230, fifth paragraph, of the EC Treaty, for the initiation of annulment proceedings, begins to run. A decision is duly notified once it has been communicated to the person to whom it is addressed and that person is in a position to take cognizance of it.¹⁶⁴ Notification is generally effected by way of registered letter with acknowledgment of receipt. An irregularity in the notification of a decision does not affect that measure's legality. It may, however, in certain circumstances, prevent the period within which an application must be lodged from starting to run. Such is however not the case when the addressee of the decision has had full knowledge of the text of that measure.¹⁶⁵

Decisions finding an infringement of the EC competition rules are published in the Official Journal of the European Communities.¹⁶⁶ The text used for publication takes into account the legitimate interest of undertakings in the protection of their business secrets.

III. RIGHTS OF COMPLAINANTS IN INFRINGEMENT PROCEEDINGS

The Commission may open an infringement procedure either upon its own initiative or following a complaint.¹⁶⁷ In either case, the Commission acts in accordance with its duty to ensure that the rules on competition are observed.¹⁶⁸ Since the

1901, at ¶ 89; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶¶ 89-93. If in the context of an action for annulment the applicant puts forward sufficiently serious and convincing evidence of infringement of the inalterability of the contested decision, the CFI will by way of a measure of organisation of procedure or a measure of inquiry request the Commission to communicate the authenticated version of the contested decision. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 767.

164. *Cockerill-Sambre v. Comm'n*, Case 42/85, [1985] E.C.R. 3749 (C.J.); *Bayer v. Comm'n*, Case T-12/90, [1991] E.C.R. II-219 (CFI), at ¶ 18.

165. *Sandoz v. Comm'n*, Case 53/69, [1972] E.C.R. 845 (C.J.).

166. Regulation No. 17, *supra* 3, at art. 21.

167. *Id.* art. 3(1).

168. *BAT & Reynolds v. Comm'n*, Joined Cases 142/84 and 156/84, [1987] E.C.R. 4487 (C.J.), at ¶ 19; *Kish Glass & Co. v. Comm'n*, Case T-65/96, [2000] 5 C.M.L.R. 229, at ¶ 33.

procedure opened following a complaint is not an adversarial procedure conducted between the complainant and the parties that have allegedly taken part in the anti-competitive practice investigated by the Commission, the rights of the former in this procedure are more limited than those of the latter.¹⁶⁹

Indeed, only parties that are the object of the Commission's investigation have a formal right to be heard. The rights of complainants are limited to the right to "participate" in the administrative procedure.¹⁷⁰

Regarding the substance of the complainant's right to participate, Regulation No. 2842/98¹⁷¹ provides that if the Commission, after having initiated an infringement procedure, adopts a SO relating to issues which had been raised in a complaint, the complainant is to receive a non confidential version of the SO and must be invited to submit its observations.¹⁷² Regulation No. 2842/98 confers no other procedural rights upon complainants in the course of an infringement procedure. It simply mentions the possibility that the Commission may invite the complainants to present oral argument "where appropriate."¹⁷³

Concerning access to the file, the principle that there must be full disclosure applies only to undertakings on which a penalty may be imposed by a Commission decision finding an infringement of Article 81(1) or Article 82 of the EC Treaty.¹⁷⁴ Indeed, the right of access to the file is one of the procedural guarantees intended to ensure that the right to be heard is a real safeguard. Thus, complainants cannot claim to have a right of access to the file on the same basis as the parties under investigation.¹⁷⁵ At the time of writing, the case law has not yet given any indication as to which documents, if any, in the Commission's file, must be disclosed to a complainant.¹⁷⁶

169. *Id.*; see Maselis & Gilliams, *Rights of Complainants in Community Law*, 22 *EURO. L. REV.* 103 (1997) (concerning the rights of complainants in general).

170. *Kish Glass & Co.*, [2000] 5 C.M.L.R. at ¶ 34. The difference of legal position between the subjects of an investigation and the complainant is clearly set out in Regulation No. 2842/98. See *supra* note 19.

171. See *supra* note 19.

172. Comm'n Regulation No. 2842/98, *supra* note 19, at art. 7.

173. *Id.* art. 8.

174. *Kish Glass & Co.*, [2000] 5 C.M.L.R. at ¶ 34.

175. *Id.*; see also *Matra Hachette v. Comm'n*, Case T-17/93, [1994] E.C.R. II-595 (CFI), at ¶ 34.

176. It must, however, be noted that the Court of Justice held (not suprisingly)

IV. RESPECT OF THE OBLIGATION TO ACT WITHIN A REASONABLE TIME

It is a general principle of Community law that the Commission must act within a reasonable time to adopt a decision once it has opened an administrative procedure in the field of competition policy.¹⁷⁷ The question whether the duration of an administrative procedure is reasonable is not assessed in the abstract but by reference to the facts of the particular case. It is necessary to assess whether the time taken to complete each stage of the procedure was reasonable. If this is the case, the total duration of the procedure will be deemed to be reasonable, even if the total time taken appears long.

In assessing the reasonableness of the time taken for each procedural step as well as for the administrative procedure as a whole, regard must be had to the conduct of the parties in the course of the procedure, the complexity of the case and its importance for the various parties concerned.¹⁷⁸

Thus, in the *Cement* cases, the CFI ruled, after having examined the time taken for each procedural step in the administrative procedure, that the Commission had acted within a reasonable time even though the administrative procedure had lasted five years and eight months, from the opening of the initial investigations in April 1989 to the adoption of the contested decision on 30 November 1994.¹⁷⁹ In its judgment,¹⁸⁰ the CFI noted the complexity of the case—an investigation concerning almost the whole of the European cement industry leading to a decision addressed to forty-two undertakings and associations—as well as the fact that, during the administrative procedure, several undertakings and associations of undertakings had brought an action for annulment against the Commission's refusal to send them the full text of the SO and to make its file available to

that a party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets. *AKZO Chemie v. Comm'n*, Case 53/85, [1986] E.C.R. 1965 (C.J.), at ¶ 28.

177. *SCK and FNK v. Comm'n*, Joined Cases T-213/95 and T-18/96, [1997] E.C.R. II-1739 (CFI), at ¶ 56; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 707.

178. *SCK & FNK*, [1997] E.C.R. II-1739 (CFI), at ¶ 56; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 707.

179. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 707.

180. *Id.* at ¶ 709.

them. Similarly, in cases *SCK & FNK*,¹⁸¹ a total time period of 46 months was deemed to be reasonable.

So far the Community courts have not yet found that the Commission had failed to respect its obligation to act within a reasonable time in a proceeding under Article 81(1) and/or Article 82 of the EC Treaty. If it were established in a particular case that the Commission had not acted within a reasonable time, such a finding would lead to the annulment of the decision only if the undue delay had adversely affected the ability of the undertakings and associations concerned to defend themselves effectively. In the absence of a finding of an infringement of the rights of defence of the parties concerned, failure to comply with the general principle of Community law that the Commission must act within a reasonable time can be regarded only as a cause of damage capable of being relied on before the Community courts in the context of an action for damages based on Articles 235 and 288, second paragraph, of the EC Treaty (ex-Articles 178 and 215, second paragraph, of the EC Treaty).¹⁸²

V. THE LANGUAGE RULES

All correspondence sent by the Commission to an undertaking or association during the administrative procedure must be conducted in the language of the Member State where the party concerned is established. Article 3 of Council Regulation No. 1 of April 15, 1958 determining the languages to be used by the European Economic Community¹⁸³ ("Regulation No. 1") indeed provides: "Documents which an institution of the Community sends to . . . a person subject to the jurisdiction of a Member State shall be drafted in the language of such State."¹⁸⁴ If it concerns a Member State with several official languages, it is reasonable to assume that the Commission should normally use the

181. *SCK & FNK*, [1997] E.C.R. II-1739 (CFI), at ¶¶ 53-70.

182. *PVC Judgment*, [1999] E.C.R. II-931 (CFI), at ¶ 122. In its Decision C(1999) 3439 of Oct. 26, 1999 concerning a proceeding pursuant to Article 81 of the EC Treaty Case IV/33.884 - Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied en Technische Unie (FEG and TU), the Commission granted, of its own initiative, to the parties concerned a reduction of 100,000 Euros of the fine after having found that during the administrative procedure it had failed to respect its obligation to act within a reasonable time. Compare *Baustahlgewebe v. Comm'n*, Case C-185/95 P, [1998] E.C.R. I-8417 (C.J.), at ¶¶ 26-49, 141, 142.

183. O.J. 17/385 (1958).

184. *Id.* art. 3.

language of the region where the addressee of the document is established.

The language rules laid down in Article 3 of Regulation No. 1 apply only to documents sent by the institutions to specific addressees.¹⁸⁵ The SO is clearly a document that has to be drafted in the language of its addressee where the latter is established within the Union.¹⁸⁶ However, the Commission is not required to provide a translation into that language of the appendices to the SO.¹⁸⁷ The appendices are not “documents” within the meaning of Article 3 of Regulation No. 1. Indeed, the appendices to the SO do not emanate from the Commission, but are rather the evidence on which the Commission relies.

Often, the Commission quotes verbatim certain passages of incriminating documents in the SO. The fact that such quotations are not translated cannot be seen as an infringement of Article 3 of Regulation No. 1. Indeed, the incriminating documents do not emanate from the Commission. The quotations in the SO may thus be included in the original language of the documents in question. Moreover, any translation which the Commission might possibly make of a document emanating from an undertaking or association of undertakings could never be regarded in itself as an authentic version of the document constituting valid evidence.¹⁸⁸

The subsequent stages of the administrative procedure will be conducted in the “language of the case.” Thus, at the hearing, each party will be authorised to make its submissions in its

185. *Tréfilunion v. Comm'n*, Case T-148/89, [1995] E.C.R. II-1063 (CFI), at ¶ 21; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 630.

186. *Tréfilunion*, [1995] E.C.R. II-1063 (CFI), at ¶ 21. Thus in the *Cement* cases, [2000] 5 C.M.L.R. 204, the SO addressed to Aker, a Norwegian company, had been drafted in English.

187. *Tréfilunion*, [1995] E.C.R. II-1063 (CFI), at ¶ 21; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 631.

188. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 633. In its judgment, the CFI further added that in order to assess the value of the evidence relied upon by the Commission in support of its SO and, therefore, in order to prepare a defense against a SO, access must be given to the evidence itself rather than to a non-official translation of it. The observance of the rights of the defense therefore requires that addressees of the SO should have access during the administrative procedure to all the incriminating documents in their original versions. That principle does not however require the Commission to translate documents cited in the SO or used in support of it into the language of the Member State where the addressees of the SO are established.

own language.¹⁸⁹ When there are several “languages of the case” in respect of the same investigation, which will often happen, the parties are able to hear a simultaneous interpretation of the various statements made at the hearings.¹⁹⁰ However, the Commission does not need to translate the minutes of the hearing in all “languages of the case.” These minutes produce only a written record of the oral submissions made by the various parties in the language used by them and can therefore not be considered as documents emanating from the Commission within the meaning of Article 3 of Regulation No. 1.¹⁹¹

When in the course of the administrative procedure, the Commission sends to a party within the jurisdiction of a Member State a document within the meaning of Article 3 of Regulation No. 1 which is not drafted in the language of that state, that irregularity will vitiate the procedure only if it has given rise to harmful consequences for that party.¹⁹² Thus, in its *Cement* judgment, the CFI held that the Commission had infringed Article 3 of Regulation No. 1 inter alia by sending to a Portuguese company an invitation to the hearing drafted in French. However, the CFI noted that that company had attended the hearing on the date fixed in that invitation. In the absence of any harmful consequences for that party, the infringement of Article 3 of Regulation No. 1 did not therefore affect the legality of the decision.¹⁹³

CONCLUDING REMARKS

The administrative procedure preceding the adoption of a decision finding an infringement of Article 81(1) and/or Article 82 of the EC Treaty is an inter partes procedure as between the Commission and the parties under investigation. In the course

189. The invitation to the hearing emanates from the Commission and must therefore be drafted in the language of the Member State in which the addressee of the SO is established. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 642.

190. This supposes that a collective hearing is organized: “Oral hearings shall not be public. Each person shall be heard separately or in the presence of other persons invited to attend . . .” Comm’n Regulation No. 2842/98, *supra* note 19, at art. 12(3).

191. *ICI v. Comm’n*, Case 48/69, [1972] E.C.R. 619 (C.J.), at ¶ 29; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 636.

192. *ACF Chemiefarma v. Comm’n*, Case 41/69, [1970] E.C.R. 661 (C.J.), at ¶ 52; *Parker Pen v. Comm’n*, Case T-77/92, [1994] E.C.R. II-549 (CFI), at ¶ 74; *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 643.

193. *Cement Judgment*, [2000] 5 C.M.L.R. at ¶ 644.

of that procedure, those parties must therefore be offered the opportunity to defend themselves, not only in writing but also orally, against the objections raised by the Commission. Those objections must be drafted in clear and precise terms in the language of the Member State of the undertakings or associations concerned. In order to prepare their defense, the parties concerned must have access to the Commission file in its entirety, except for the institution's internal notes and those elements of the file which are confidential to third parties.

The Commission's obligations to observe the rights of defense would be devoid of any real meaning if that institution did not have to take account in its decision of the observations made by the parties concerned during the administrative procedure. Even if the Commission is not required to discuss all the issues of fact and of law which have been touched upon by the addressees of the SO,¹⁹⁴ it must nevertheless, pursuant to its obligation to state reasons laid down in Article 253 of the EC Treaty,¹⁹⁵ provide them with an adequate explanation of the reasons why their arguments have failed to rebut its allegations.¹⁹⁶

194. *ACF Chemiefarma*, [1970] E.C.R. 661 (C.J.), at ¶ 77.

195. Article 253 (ex-Article 190) of the EC Treaty provides:

Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

Consolidated EC Treaty, *supra* note 1, art. 253 (ex-Article 190).

196. *See Publishers Association v. Comm'n*, Case C-360/92 P, [1995] E.C.R. I-23 (C.J.), at ¶¶ 34-49; *see also*, by analogy, *Comm'n v. Sytraval and Brink's France*, Case C-367/95 P, [1998] E.C.R. I-1719 (C.J.), at ¶¶ 63-65.