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Some Thoughts on Evidence and Procedure in European Community Competition Law

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Abstract

This Article is written in honor of Bo Vesterdorf, President of the Court of First Instance of the European Communities, ("CFI") a court in which we were both sitting as founding judges. Without diminishing the input of Judge Vesterdorf as President of the CFI, I would like to take this opportunity to revisit the first big cartel case that was brought to the CFI. In the so-called Polypropylene case, I was the Judge Rapporteur, and Judge Vesterdorf officiated as the Advocate General. This case raised important issues as to evidence and procedure in European Community competition law. Therefore, the aim of this Article is to highlight the significance of Judge Vesterdorf's Opinion as the Advocate General ("Vesterdorf Opinion") in this case and the further developments of the case law on these issues.

SOME THOUGHTS ON EVIDENCE AND PROCEDURE IN EUROPEAN COMMUNITY COMPETITION LAW

*Koen Lenaerts**

INTRODUCTION

This Article is written in honor of Bo Vesterdorf, President of the Court of First Instance of the European Communities, (“CFI”) a court in which we were both sitting as founding judges. Without diminishing the input of Judge Vesterdorf as President of the CFI, I would like to take this opportunity to revisit the first big cartel case that was brought to the CFI. In the so-called *Polypropylene* case, I was the Judge Rapporteur, and Judge Vesterdorf officiated as the Advocate General. This case raised important issues as to evidence and procedure in European Community competition law. Therefore, the aim of this Article is to highlight the significance of Judge Vesterdorf’s Opinion as the Advocate General (“Vesterdorf Opinion”) in this case¹ and the further developments of the case law on these issues.

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1. Opinion of Judge B. Vesterdorf performing the function of Advocate General, Rhône-Poulenc SA v. Commission, Case T-1/89, [1991] E.C.R. II-867; *see also* Petrofina SA v. Commission, Case T-2/89, [1991] E.C.R. II-1087; Atochem SA v. Commission, Case T-3/89, [1991] E.C.R. II-1177; BASF AG v. Commission, Case T-4/89, [1991] E.C.R. II-1523; Enichem Anic SpA v. Commission, Case T-6/89, [1991] E.C.R. II-1623; SA Hercules Chems. NV v. Commission, Case T-7/89, [1991] E.C.R. II-1711; DSM NV v. Commission, Case T-8/89, [1991] E.C.R. II-1833; Hüls AG v. Commission, Case T-9/89, [1992] E.C.R. II-499; Hoechst AG v. Commission, Case-10/89, [1992] E.C.R. II-629; Shell Int’l Chem. Co. Ltd. v. Commission, Case T-11/89, [1992] E.C.R. II-757; Solvay & Cie SA v. Commission, Case T-12/89, [1992] E.C.R. II-907; Imperial Chem. Indus. plc v. Commission, Case T-13/89 [1992] E.C.R. II-1021; Montedipe SpA v. Commission, Case T-14/89, [1992] E.C.R. II-1155; Chemie Linz AG v. Commission, Case T-15/89, [1992] E.C.R. II-1275. *See also*, on appeal, Commission v. Anic Partecipazioni Spa, Case C-49/92 P, [1999] E.C.R. I-4125; SA Hercules Chems. NV v. Commission, Case C-51/92 P, [1999] E.C.R. I-4235; Hüls AG v. Commission, Case C-199/92 P, [1999] E.C.R. I-4287; Imperial Chem. Indus. plc v. Commission, Case C-200/92 P, [1999] E.C.R. I-4399; Hoechst AG v. Commission, Case C-227/92 P, [1999] E.C.R. I-4443; Shell Int’l Chem. Co. Ltd. v. Commission, Case C-234/92 P, [1999] E.C.R. I-4501; Montecatini SpA v. Commission, Case C-235/92 P, [1999] E.C.R. I-4539; Chemie Linz GmbH v. Commission, Case C-245/92 P, [1992] E.C.R. I-4643; DSM NV v. Commission, Case C-5/93 P, [1999] E.C.R. I-4695.

In this case, heavy fines were imposed by the Commission on fifteen undertakings in the chemical industry for having participated for several years in an agreement and concerted practice, whereby they formed a price cartel and introduced quota arrangements and other measures supporting the price cartel on the polypropylene market.² Fourteen of the fifteen undertakings thereupon brought proceedings before the CFI, claiming that the decision should be annulled or, in the alternative, that the fines should either be cancelled or reduced.³

As for the substance, this case raised several salient questions, the most important being the interpretation of the term, “concerted practice,” in the Treaty establishing the European Community (“EC Treaty” or “Treaty”), the extent to which the much debated “framework agreement” could constitute a single agreement⁴ within the meaning of Article 85 of the Treaty,⁵ and the collective responsibility or collective infringement of the undertakings.⁶ In this respect, the question of each individual applicant’s involvement provoked several evidentiary issues. Moreover, the plaintiffs raised many arguments, qualified by them as procedural objections, which mainly related to the rights of the defense and the duty to state reasons.

Apart from the substance of the case, these issues provided the Advocate General—designated because of the legal difficulty and the factual complexity of the case—with the opportunity to formulate some general principles, which had seminal importance both for the case law and the legislative developments on evidence and procedure in European Community competition law.

2. See Commission Decision No. 86/398/EEC relating to a proceeding under Article 85 of the Treaty establishing the European Economic Community (“EEC Treaty”) (IV/31.149—Polypropylene), O.J. L 230/1 (1986).

3. See the references to these cases, *supra* note 1.

4. On these issues, see Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-921-50.

5. Consolidated Version of the Treaty Establishing the European Community art. 81, O.J. C 321E/37 (2006) [hereinafter EC Treaty].

6. On this issue, see Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-953-60.

I. *EVIDENCE IN EUROPEAN COMMUNITY
COMPETITION LAW*

Evidence is difficult to deal with on a theoretical basis.⁷ Nevertheless, it is possible to formulate certain leading principles as far as the autonomy and the unfettered evaluation of the evidence, as well as the evidentiary means and the burden of proof, are concerned. It is essential to point out from the outset that, given that the activity of the Court of Justice, and hence that of the CFI, is governed by the principle of the unfettered evaluation of evidence, unconstrained by the various rules laid down in the national legal systems, “it is only the reliability of the evidence before” the Community courts “which is decisive when it comes to its evaluation.”⁸

A. *Autonomy and Unfettered Evaluation of Evidence*

Two principles play a role in this respect. First, there is the principle of autonomy, meaning that only Community law governs the submission of evidence.⁹ Second, there is the principle of the unfettered evaluation of evidence,¹⁰ allowing all evidentiary means to be used, the only exception being “the evidence which cannot be used by the Commission against the undertakings because it was not communicated to them during the administrative procedure.”¹¹

The principles of autonomy and of the unfettered evalua-

7. *Id.* at II-953.

8. *Id.* at II-954.

9. This question may receive a more nuanced answer in the context of the implementation of Community competition rules by competition authorities and courts of the Member States in accordance with Council Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1/1 (2003). In this respect, recital 5 of Regulation No. 1/2003 provides that this regulation affects “neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law.”

10. On the issue of evidence before the Community courts in general, see KOEN LENAERTS, DIRK ARTS & IGNACE MASELIS, *PROCEDURAL LAW OF THE EUROPEAN UNION* §§ 24-072-075, at 556-58 (2d ed. 2006); see also Christian Berger, *Beweisaufnahme vor dem Europäischen Gerichtshof*, in *FESTSCHRIFT FÜR EKKEHARD SCHUMANN ZUM 70. GUBERTSTAG* 27 (2001); Koen Lenaerts, *Rechter en partijen in de rechtspleging voor Hof en Gerecht*, in *SOCIAAL-ECONOMISCHE WETGEVING: TIJDSCHRIFT VOOR EUROPEES EN ECONOMISCH RECHT* 231 (2002).

11. Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-954. On this issue, which relates to the right to a fair process, see *infra* Part II.A.1.

tion of evidence have now been confirmed by the CFI.¹² Since it is only the reliability of the evidence before the Community courts which is decisive when it comes to its evaluation, the CFI has held that there is no principle of Community law which precludes the Commission from relying on a single piece of evidence in order to conclude that Article 81(1) EC has been infringed, provided that its probative value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question.¹³

The Court of Justice has also ruled—in non-competition law matters—that, “given that there is no legislation at Community level governing the concept of proof, any type of evidence admissible under the procedural law of the Member States in similar proceedings is in principle admissible.”¹⁴ Recently, the Court of Justice considered, on appeal in the *Seamless Steel Tubes* case, that the CFI was “correct to hold that the principle that prevails in Community law is that of the unfettered evaluation of evidence and that it is only the reliability of the evidence that is decisive when it comes to its evaluation.”¹⁵ It is worth mentioning that in this case both the challenged CFI decisions¹⁶ and the Opinion of the Advocate General before the Court of Justice¹⁷ relied on and expressly referred to the Vesterdorf Opinion in the *Polypropylene* case.

Obviously, the unfettered evaluation of evidence makes the task of the Commission easier—it is indeed for the Commission to establish the materiality of an infringement of the competition rules. In this context, especially for cartels, the Commission

12. *See* Gen. Elec. Co. v. Commission, Case T-210/01, [2005] E.C.R. II-5575, ¶ 297.

13. *See* Cimenteries CBR v. Commission, Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, 104/95, [2000] E.C.R. II-491, ¶ 1838; *see also* Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-955-57, ¶ 4.

14. Labis, trading as “Przedsiębiorstwo Transportowo-Handlowe” (Met-Trans) & Sagpol SC Transport Międzynarodowy i Spedycja, Joined Cases C-310 & 406/98, [2000] E.C.R. I-1797, ¶ 29.

15. *Salzgitter Mannesmann GmbH v. Commission*, Case C-411/04 P, ¶ 45 (ECJ Jan. 25, 2007) (not yet reported); *Dalmine SpA v. Commission*, Case C-407/04 P, ¶ 49 (ECJ Jan. 25, 2007) (not yet reported).

16. *See* *Mannesmannröhren-Werke AG v. Commission*, Case T-44/00, [2004] E.C.R. II-2223, ¶ 84; *Dalmine SpA v. Commission*, Case T-50/00, [2004] E.C.R. II-2395, ¶ 72. *See also* the third judgment of the CFI of the same day, *JFE Eng'g Corp. v. Commission*, Joined Cases T-67, 68, 70 & 78/00, [2004] E.C.R. II-2501, ¶ 273.

17. *See* Opinion of Advocate General Geelhoed, *Salzgitter Mannesmann GmbH v. Commission*, Case C-411/04 P, (ECJ Jan. 25, 2007) (not yet reported).

is often faced with secret and complex practices, which by their very nature, are often difficult to detect and to investigate and the evidence of which is therefore not easy to establish.¹⁸ These are some of the reasons which explain the Commission's leniency policy as far as fines for the infringement of Article 81 EC are concerned.¹⁹

B. *Evidentiary Means*

Since the evaluation of evidence should be unfettered in Community competition law, the Commission is entitled, in principle, to establish the existence of an infringement of Articles 81 and 82 EC by all means at its disposal. This can include recourse to economic studies. These studies "often make up an important part of the evidence in competition cases and can be of great value to the Court in understanding the relevant economic context."²⁰ Economic studies may indeed prove to be important for determining "how an oligopolistic market might react in different circumstances."²¹ Their evidentiary value may thus be crucial in a concerted practice case²² or in a concentra-

18. See *Aalborg Portland A/S v. Commission*, Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, [2004] E.C.R. I-123, ¶¶ 55-57, in which the Court of Justice observed that "since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum."

19. See Commission Notice on Immunity from fines and reduction of fines in cartel cases, recital 3, O.J. C 298/17 (2006). On the issue of the withdrawal, before the Community courts, of voluntary admission resulting from the non-objection, during the administrative procedure, to facts which have been established in the statement of objections, see *infra* Part II.B.2.

20. *Vesterdorf Opinion, Rhône-Poulenc SA v. Commission*, Case T-1/89, [1991] E.C.R. II-867, at II-957; see also *European Night Servs. Ltd. v. Commission*, Joined Cases T-374-375, 384 & 388/94, [1998] E.C.R. II-3141, ¶¶ 93-105.

21. *Vesterdorf Opinion, Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-957.

22. Evidence of a concerted practice indeed raises the issue of the possibility that a given conduct may arise without any concertedness; parallel conduct cannot be regarded as furnishing proof of such practice unless concert of action constitutes the only plausible explanation of such conduct. It is therefore necessary to ascertain whether the parallel conduct alleged by the Commission cannot, taking account of the nature of the products, the size and the number of the undertakings and the volume of the market in question, be explained otherwise than by concert of action, in other words whether the evidence of parallel conduct constitutes a firm, precise and consistent body of evidence of prior concertedness. This is why the undertakings involved may be in a position, on the basis of economic studies, to prove that the facts that the Commission considers cannot be explained otherwise than by concerted action, may on the contrary

tion case. In the latter area, economic studies may serve to establish the probable evolution of the market situation and of the conduct of certain undertakings.²³ However, economic studies “cannot take the place of legal assessment and adjudication.”²⁴ And it is precisely with reference to the Vesterdorf Opinion that in a recent concentration case, the CFI ruled that “since in Community law it is an overriding principle that the evaluation of evidence should be unfettered,” the absence of economic studies “establishing the likely development of the market situation and demonstrating that there is an incentive for the merged entity to behave in a particular way” is “not in itself decisive,” in particular where “it is obvious that the commercial interests of an undertaking militate predominantly in favor of a given course of conduct, such as making use of an opportunity to disrupt a competitor’s business.”²⁵

Evidence can also consist of oral statements. During the administrative procedure, the undertakings involved are entitled to make a request to the Commission in their written submissions for an oral hearing in order to discuss the contents of the statement of objections addressed to them. In such a case, the Commission must grant an oral hearing. For third parties to the procedure, such as those who addressed a complaint to the Commission, the Commission is not bound to grant such a hearing, but

be explained in a satisfactory manner which does not contemplate any concert of action. *See* Imperial Chem. Indus. plc v. Commission, Case T-36/91, [1995] E.C.R. II-1847, ¶ 85; Solvay SA v. Commission, Case T-30/91, [1995] E.C.R. II-1775, ¶ 75; Compagnie Royale Asturienne des Mines SA & Rheinzink GmbH v. Commission, Joined Cases 29 & 30/83, [1984] E.C.R. 1679, ¶¶ 16-20.

23. *See* Council Regulation No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), art. 2, O.J. L 24/1 (2004). For more on this issue, see, e.g., EMMANUEL COMBE, *ÉCONOMIE ET POLITIQUE DE LA CONCURRENCE* 297 (2005).

24. Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-957. In the *Polypropylene* case, the CFI took the view that the various economic studies produced by the plaintiffs were not relevant, since the “concerted” character of the practice was established by documents, whereas the “practice” was supposed to be established because the undertakings involved remained active on the relevant market. No economic study was at play in this regard. The CFI rejected it as irrelevant, since evidence was already produced on the basis of documents which had been seized in the premises of one of the undertakings involved. *See, e.g.,* Imperial Chem. Indus. plc v. Commission, Case T-13/89, [1992] E.C.R. II-1021, 1125-26, ¶¶ 289-93.

25. *Compare* Gen. Elec. Co. v. Commission, Case T-210/01, [2005] E.C.R. II-5575, ¶ 297, *with* Commission v. Tetra Laval BV, Case C-12/03 P, [2005] E.C.R. I-987, ¶¶ 37-51.

may do so if it considers it is necessary.²⁶

In the context of its leniency policy, the Commission may also collect statements from undertakings which denounce a cartel for the purpose of enjoying immunity from fines or a reduction in the amount of such fines.²⁷ The Commission is entitled to rely on these submissions in order to establish the existence of an infringement. Since the principle is that the evaluation of evidence should be unfettered, this type of evidence is admissible under Community competition law. However, in the administrative procedure, the Commission does not have the power “to compel persons to give evidence under oath.”²⁸ The following solution is now expressly provided in Regulation No. 1/2003: “[I]n order to carry out” its duties, “the Commission may interview any natural or legal person *who consents to be interviewed* for the purpose of collecting information relating to the subject-matter of an investigation.”²⁹

Obviously, the fact that, in the administrative procedure, the Commission does not have the power to compel persons to give evidence under oath is one of the reasons why Commission decisions in competition cases “rest to a large extent on documentary evidence.”³⁰ In other words, in Community competition law, evidence is mainly based on documents. In this respect, questions of admissibility and probative value of documents may be awkward when the Commission is relying on anonymous documents or on documents for which it refuses to disclose the identity of the author.³¹

In the *Seamless Steel Tubes* case, the plaintiffs contested the admissibility of anonymous documents which the Commission

26. See Commission Regulation No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, arts. 3, 4, 11-13, O.J. L 123/18, at 20-21 (2004); previously, Commission Regulation No. 2842/98 on the hearing of parties in certain proceedings under Articles 85 and 86 [now Articles 81 and 82] of the EC Treaty, arts. 5-9, O.J. L 354/18, at 20 (1998).

27. See Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. C 298/17 (2006); previously, Commission Notices on Immunity from fines and reduction of fines in cartel cases, O.J. C 45/3 (2002) and O.J. C 207/4 (1996). On leniency, see, e.g., DOMINIQUE VOILLEMOT, *GÉRER LA CLÉMENCE* (2005).

28. Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-954.

29. Regulation No. 1/2003, art. 19(1), O.J. L 1/1, at 14 (2003) (emphasis added).

30. Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-954.

31. It is necessary to stress that the issue of the admissibility and of the probative value of anonymous documents is distinct from the issue of the right of access to documents containing business secrets: On this latter question, see *infra* Part II.A.1.

had used as evidence against them. This objection was rejected by the CFI. On appeal, the Court of Justice observed that respect for the rights of the defense, and more broadly the right to a fair trial, require that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement.³² However, the Court of Justice rejected the plaintiff's claim, since it considered, in light of the principle of the unfettered evaluation of evidence, that the fact that the documents were anonymous did not preclude their admissibility as such.³³

The Court of Justice allows only "an overall assessment of a document's probative value."³⁴ The question of the probative value of certain evidence relied on by the Commission may be a delicate matter in circumstances where the existence of a cartel is supported by a single document.³⁵

C. *Burden of Proof*

Evidence collected by the Commission must be conclusive, and it is for the Commission to show the existence of an infringement of Articles 81 or 82 EC. That being said, the principle of the unfettered evaluation of evidence under Community competition law may not lead to jeopardizing the respect of the rights of the defense: "[C]onclusions drawn from the evidence must never develop into ill-founded speculation", as there "must be a sufficient basis for the decision, and any reasonable doubt must be for the benefit of the applicants according to the principle *in dubio pro reo*."³⁶ This illustrates that there is an important principle attached to the rule on the burden of proof in Com-

32. On the respect of the rights of the defense during the administrative procedure, see *infra* Part II.A.

33. *Salzgitter Mannesmann GmbH v. Commission*, Case C-411/04 P, ¶¶ 46-50 (ECJ Jan. 25, 2007) (not yet reported); *Dalmine SpA v. Commission*, Case C-407/04 P, ¶¶ 44-53 (ECJ Jan. 25, 2007) (not yet reported); see also Opinion of Advocate General Geelhoed, *Salzgitter Mannesmann GmbH v. Commission*, Case C-411/04 P, ¶¶ 62, 65 (ECJ Jan. 25, 2007) (not yet reported).

34. Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-954.

35. See *Cimenteries CBR v. Commission*, Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103-104/95, [2000] E.C.R. II-491, ¶ 1838; *supra* Part I.A.

36. Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-954.

munity competition law and now provided in Regulation No. 1/2003, namely the presumption of innocence.³⁷

The Community courts have recognized that the principle of the presumption of innocence, which is enshrined in Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”), is a fundamental right protected in the Community legal order.³⁸ This principle applies to procedures concerning the infringement of the Community competition rules in view of the nature and the degree of sanctions which can be imposed.³⁹ It is closely linked to the principle under which doubt must be for the benefit of the one who is prosecuted: *in dubio pro reo*.⁴⁰ In essence, this principle reflects the duty of the Commission to act in conformity with the level of proof required by law when showing the reality of circumstances which constitute an infringement.

It is now settled case law that it is for the Commission to show the existence of an infringement by putting forward suffi-

37. According to Article 2 of Regulation No. 1/2003, “the burden of proving an infringement of Article 81(1) EC or of Article 82 EC shall rest on the party or the authority alleging the infringement.” However, according to the very same provision, the “undertaking or association of undertakings claiming the benefit of Article 81(3) EC shall bear the burden of proving that the conditions of that paragraph are fulfilled.” Regulation No. 1/2003, art. 2, O.J. L 1/1, at 8 (2003). On these issues, see *Aalborg Portland A/S v. Commission*, Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, [2004] E.C.R. I-123, ¶¶ 78-79; *see also Publishers Ass’n v. Commission*, Case T-66/89, [1992] E.C.R. II-1995, ¶ 5; *Groupement des Cartes Bancaires “CB” & Europay Int’l SA v. Commission*, Joined Cases T-39 & 40/92, [1994] E.C.R. II-49, ¶ 114; *Matra Hachette SA v. Commission*, Case T-17/93, [1994] E.C.R. II-595, ¶ 104; *John Deere Ltd. v. Commission*, Case T-35/92, [1994] E.C.R. II-957, ¶ 105; *Vereniging van Samenwerkende Prijzeregulende Organisaties in de Bouwnijverheid v. Commission*, Case T-29/92, [1995] E.C.R. II-289, ¶ 262; *Compagnie Générale Maritime v. Commission*, Case T-86/95, [2002] E.C.R. II-1011, ¶ 381.

38. *See Solvay SA v. Commission*, Case T-30/91, [1995] E.C.R. II-1775, ¶ 59; *Montecatini SpA v. Commission*, Case C-235/92 P, [1999] E.C.R. I-4539, ¶ 175; *Hüls AG v. Commission*, Case C-199/92 P, [1999] E.C.R. I-4287, ¶¶ 149-150; *JCB Serv. v. Commission*, Case C-167/04 P, ¶ 90 (ECJ Sept. 21, 2006) (not yet reported).

39. *See Öztürk v. Germany*, 8544/79 [1984] E.C.H.R. 1, 12 (Feb. 21, 1984), *cited in* Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-885; *Lutz v. Germany*, [1987] E.C.H.R. 20 (Aug. 25, 1987).

40. The principle, *in dubio pro reo*, is enshrined in Article 6 of the European Convention on Human Rights (“ECHR”) and in Article 48 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on December 7, 2000, O.J. C 364/1 (2000). It is a fundamental principle of the Community legal order. *See, e.g., Hüls*, [1999] E.C.R. I-4287, ¶ 49; *Nederlandse Federative Vereniging voor de Groothandel op Elektrotechnisch Gebied & Technische Unie BV v. Commission*, Joined Cases T-5 & 6/00, [2003] E.C.R. II-5761, ¶ 210.

ciently precise and consistent evidence.⁴¹ The very creation of the CFI, as a court of both first and last instance regarding the assessment of facts, was an express invitation to cautiously assess evidence reported by the Commission in order to verify that the Commission correctly relied on this evidence when adopting its decision.⁴² Accordingly, the Community courts have annulled decisions of the Commission when the evidence submitted was insufficient or could have been interpreted equivocally.⁴³ Indeed, in many cases, the plaintiffs have contested that the Commission relied on sufficient evidence in order to identify an infringement of the competition rules and have argued that the Commission had, by doing so, violated the principle of the presumption of innocence.⁴⁴

The Commission must always provide sufficient evidence supporting the existence of an infringement of the Community competition rules. This burden may be difficult for the Commission, especially where it has to show that parallel conduct on a given market resulted from an illegal concerted practice. Such conduct may derive from the oligopolistic structure of the market. As a result, an undertaking may be in a position to prove that the evidence relied on by the Commission is insufficient to establish the existence of an illegal concerted practice, as the conduct may in fact be explained in a satisfactory manner that does not presuppose any such concerted practice.⁴⁵

In the *Polypropylene* case, however, the CFI considered that the fact that the plaintiffs took part in meetings—the purpose of which was to fix price and sales volume targets—was sufficient for presuming their participation in the concerted practice and that the plaintiffs could not rely either on the lack of effect of

41. See *Volkswagen AG v. Commission*, Case T-62/98, [2000] E.C.R. II-2707, ¶¶ 43, 72.

42. Bo Vesterdorf, *Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement*, 1 *COMPETITION POL'Y INT'L* 14 (2005).

43. See, e.g., *Coöperatieve Vereniging "Suiker Unie" UA v. Commission*, Joined Cases 40-48, 50, 54-56, 111, 113-114/73, [1975] E.C.R. 1663; *Compagnie Royale Asturienne des Mines SA & Rheinzink GmbH v. Commission*, Joined Cases 29 & 30/83, [1984] E.C.R. 1679; *Società Italiana Vetro SpA v. Commission*, Joined Cases T-68, 77-78/89, [1992] E.C.R. II-1403.

44. See, e.g., *Commission v. Anic Partecipazioni SpA*, Case C-49/92 P, [1999] E.C.R. I-4125, ¶¶ 93-94; *Hüls*, [1999] E.C.R. I-4287, ¶¶ 59-65; and most recently, *Endesa, SA v. Commission*, Case T-417/05, ¶¶ 89-91 (CFI July 14, 2006) (not yet reported).

45. See *supra* note 22.

their individual behavior on the market or on their ignorance. The CFI decided that because of the obvious anti-competitive nature of these meetings, even if an undertaking had not participated in the meetings in an active manner, its participation in them without publicly distancing itself from what was discussed led the other participants to believe that it subscribed to, and would comply with, what had been decided there. Without a formal objection from the undertaking involved, the mere participation in a meeting between competitors might suffice for presuming its participation in the infringement.⁴⁶ Moreover, according to the Court of Justice, subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market. In such circumstances, the Commission does not have to adduce evidence that their concerted practice had manifested itself in conduct on the market or that it had effects restrictive of competition.⁴⁷

Even if it is the Commission that, in principle, carries the burden of the proof, facts that the Commission is relying on may be of a nature to compel the undertaking involved to provide an explanation or a justification, without which it can be decided that the burden has been satisfied.⁴⁸ In assessing the evidentiary value of a document produced by the Commission, “regard should be had first and foremost to the credibility of the account it contains,” in particular “to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed,” and whether, “on its face, the document appears sound and reliable.”⁴⁹ These general terms have been broadly used by the Community courts.⁵⁰

46. See *SA Hercules Chems. NV v. Commission*, Case T-7/89, [1991] E.C.R. II-1711, ¶ 232; *Solvay & Cie SA v. Commission*, Case T-12/89, [1992] E.C.R. II-907, ¶¶ 98-100.

47. See *Hüls*, [1999] E.C.R. I-4287, ¶¶ 162, 167.

48. See *Aalborg Portland A/S v. Commission*, Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, [2004] E.C.R. I-123, ¶ 79.

49. *Vesterdorf Opinion*, *Rhône-Poulenc SA v. Commission*, Case T-1/89, [1991] E.C.R. II-867, at II-956.

50. See *Cimenteries CBR v. Commission*, Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, 104/95, [2000] E.C.R. II-491, ¶ 1838; *Groupe Danone v.*

II. PROCEDURE IN EUROPEAN COMMUNITY COMPETITION LAW

The procedural framework of Community competition cases consists "of an administrative procedure followed by judicial review of legality," but, as to the substance, these cases "broadly exhibit the characteristics of a criminal law case."⁵¹ This two-sided nature is now reflected in most cases brought before the Community courts in competition matters. Under Community competition law, the procedure is mainly an administrative one under the review of the Community courts. Yet, this procedure is increasingly colored by criminal concerns, which have served to shape the right to a fair trial under Community competition law.

A. Fundamental Aspects of the Administrative Procedure

In the *Polypropylene* case, the plaintiffs relied on several arguments relating to the right of access to the file and the obligation to state reasons. This provided the Court with the opportunity to formulate, in very general terms, the content of the rules governing the administrative procedure. Fundamentally, these rules provide the contours for the principle of a fair legal process as soon as the administrative procedure is engaged in Community competition law. They imply the respect of the rights of the defense, which includes the principle of *audi alteram partem* and the right of access to the file as well as, indirectly, the duty to state reasons in decisions finding and sanctioning an infringement of Articles 81 or 82 EC. These rules also require respect for the principle that decisions must be given within a reasonable time, i.e., the principle of the speed of the proceedings.

1. Access to the File

The principle, *audi alteram partem*, is an "absolutely fundamental principle in the administrative law of the Community, including its competition law."⁵² This principle, which results, as

Commission, Case T-38/02, [2005] E.C.R. II-4407, ¶ 286 (on appeal in this latter case, the Court of Justice did not deal with this issue: *See* Groupe Danone v. Commission, Case C-3/06 P (ECJ Feb. 8, 2007) (not yet reported)); *see also* Opinion of Advocate General Léger, *Compañía española para la fabricación de aceros inoxidables SA (Acerinox) v. Commission*, C-57/02 P, [2005] E.C.R. I-6689, ¶ 202.

51. Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-884-85.

52. *Id.* at II-883.

mentioned above, from the right to a fair legal process and the respect of the rights of the defense, implies that the undertakings concerned must be allowed access to the file and must be given an opportunity to comment on both the facts and the legal arguments on which the Commission's decision will be founded.⁵³ The concern for "sound administration and sound administration of justice require persons and undertakings liable to fines to be given full opportunity to defend themselves," which means that "those concerned should be apprised of all of the relevant material."⁵⁴

Indeed, it is settled case law that observance of the rights of the defense in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings. Due observance of this principle requires that the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged by the Commission.⁵⁵ Thus, the purpose of providing access to the file in competition cases is to enable the addressees of a statement of objections to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence. Access to the file is one of the procedural safeguards intended to protect the rights of the defense.⁵⁶

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

53. *See id.* at II-892-905.

54. *Id.* at II-892-93.

55. *See Hoffmann-La Roche & Co. AG v. Commission*, Case 85/76, [1979] E.C.R. 461, ¶¶ 9, 11; *Cimenteries CBR v. Commission*, Joined Cases T-10, 11, 12, 15/92, [1992] E.C.R. II-2667, ¶¶ 38-39; *Imperial Chem. Indus. plc v. Commission*, Case T-37/91, [1995] E.C.R. II-1901, ¶ 49; *Limburgse Vinyl Maatschappij NV v. Commission*, Joined Cases T-305, 306, 307, 313-316, 318, 325, 328, 329, 335/94, [1999] E.C.R. II-931, ¶ 1011; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 142.

56. *See Cimenteries CBR*, [1992] E.C.R. II-2667, ¶ 38; *BPB Indus. plc & British Gypsum Ltd. v. Commission*, Case T-65/89, [1993] E.C.R. II-389, ¶ 30; *Imperial Chem. Indus.*, [1995] E.C.R. II-1901, ¶ 49.

other.⁵⁷ In this respect, it is necessary to stress that a document is considered incriminating towards an undertaking only if it is used by the Commission to support its statement as to the existence of an infringement by the undertaking involved.⁵⁸ The fact that the Commission refers to a certain document in the decision finding an infringement of the Community competition rules does not necessarily mean that it contains incriminating evidence and that the Commission intends to use it in this way.

Nonetheless, if the Commission intends to use documentary evidence in the decision finding an infringement of Articles 81 or 82 EC, mention should be made of that evidence in the statement of objections, and it should be made available to the addressee of the statement of objections. In principle, only documents cited or mentioned in the statement of objections constitute valid evidence.⁵⁹ However, documents appended to the statement of objections, but not mentioned therein, can be reported in the decision against the undertaking involved, if this undertaking could have reasonably deduced from the statement of objections what conclusions the Commission intended to draw from the documents in question.⁶⁰ If the Commission intends to rely on new evidence after the statement of objections has been notified, it has to put this evidence at the disposal of the parties so that they can submit their observations on such evidence. If the Commission relies on a reply to the statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81 EC, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence.⁶¹

57. On this point, for more details, see Koen Lenaerts & Ignace Maselis, *European Community Competition Law: Procedural Rights and Issues in the Enforcement of Articles 81 and 82 of the EC Treaty*, 24 *FORDHAM INT'L L.J.* 1615, 1631 (2001); see also LENAERTS, ARTS & MASELIS, *supra* note 10, §§ 7-023-035, at 216-29.

58. See *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 284.

59. See *AKZO Chemie BV v. Commission*, Case C-62/86, [1991] E.C.R. I-3359, ¶ 21; *Shell Int'l Chem. Co. Ltd. v. Commission*, Case T-11/89, [1992] E.C.R. II-757, ¶ 55; *Imperial Chem. Indus. plc v. Commission*, Case T-13/89, [1992] E.C.R. II-1021, ¶ 34; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 323.

60. *Shell Int'l Chem. Co.*, [1992] E.C.R. II-757, ¶ 56; *Imperial Chem. Indus.*, [1992] E.C.R. II-1021, ¶ 35; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶¶ 323-324.

61. *AKZO Chemie*, Case C-62/86, [1991] E.C.R. I-3359, ¶ 21; *Shell Int'l Chem. Co.*,

As far as documents which could be exculpatory are concerned, it has not always been obvious to assess the circumstances in which these documents may or must be disclosed to the parties. In his Opinion, Judge Vesterdorf nevertheless considered that “all the undertakings concerned should in principle have access to all the documentary evidence in a complex of cases . . . where it is particularly necessary to be able to arrive at a finding on the basis of an overall assessment of all the facts and circumstances of the case.”⁶² In the same Opinion, he also expressed the view that “it is not the Commission’s task to assess what the undertaking can use for its defense.”⁶³ In this way, the Opinion heralded new jurisprudential developments in the case law on this matter.

Since the *Hercules Chemicals* judgment in the *Polypropylene* case,⁶⁴ it is settled case law that documents containing exculpatory evidence must be made accessible to the parties upon their request.⁶⁵ It is worth observing here that such an obligation no longer stems from the rules that the Commission imposes on itself,⁶⁶ but, more broadly, from the general principle of equality of arms.⁶⁷ Complainants and interested third parties do not enjoy the same rights as the parties. They might be “associated closely” with the proceedings under certain circumstances,⁶⁸ but they are not entitled to have full access to the Commission’s file. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it

[1992] E.C.R. II-757, ¶¶ 55-56; *Imperial Chem. Indus.*, [1992] E.C.R. II-1021, ¶¶ 34-35; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 386.

62. Vesterdorf Opinion, *Rhône-Poulenc SA v. Commission*, Case T-1/89, [1991] E.C.R. II-867, at II-899.

63. *Id.*

64. *SA Hercules Chems. NV v. Commission*, Case T-7/89, [1991] E.C.R. II-1711, ¶ 54.

65. Case law requires though that such a request should be specific and refer precisely to documents to which access is requested. *See Groupe Danone v. Commission*, Case T-38/02, [2005] E.C.R. II-4407, ¶¶ 42-43 (on appeal brought against this judgment, the Court of Justice did not deal with this issue: *See Groupe Danone v. Commission*, Case C-3/06 P (ECJ Feb. 8, 2007) (not yet reported)).

66. *See Hercules Chems.*, [1991] E.C.R. II-1711, ¶ 53.

67. *See Solvay SA v. Commission*, Case T-30/91, [1995] E.C.R. II-1775, ¶ 83; *Imperial Chem. Indus. plc v. Commission*, Case T-36/91, [1995] E.C.R. II-1847, ¶ 93; *Cimenteries CBR v. Commission*, Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, 104/95, [2000] E.C.R. II-491, ¶ 143; *see also* LENAERTS & MASELIS, *supra* note 57, at 1634.

68. *See* Regulation No. 1/2003, art. 27(1), O.J. L 1/1 (2003).

shall provide the complainant with a copy of the non-confidential version of the statement of objections. In other cases, third parties can only request access to documents on which the Commission relies in its provisional assessment.⁶⁹ However, a right of access to these documents might be granted on the basis of Regulation No. 1049/2001 regarding public access to documents of the institutions.⁷⁰ The scope of the right of access may have to be restricted in order to protect business secrets or the confidentiality of other information.⁷¹ In any case, it does not cover internal documents of the Commission,⁷² unless exceptional circumstances require it on the basis of serious indications provided by the parties.⁷³

The main difficulty lies in the need to reconcile the access to the file with the protection of business secrets and confidentiality.⁷⁴ In order to prevent any abuse on the part of an undertaking hiding under the umbrella of confidentiality for the sole purpose of precluding the Commission from proving an infringement, Article 27 of Regulation No. 1/2003 provides that “nothing . . . shall prevent the Commission from disclosing and using information necessary to prove an infringement” of Article 81 EC or of Article 82 EC. In its notice of December 22, 2005 on

69. See Commission Regulation No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, arts. 6-8, O.J. L 123/18 (2004).

70. Regulation No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, O.J. L 145/43 (2001); see also *Mannesmannröhren-Werke AG v. Commission*, Case T-44/00, [2004] E.C.R. II-2223, ¶¶ 43-59; *Verein für Konsumenteninformation v. Commission*, Case T-2/03, [2005] E.C.R. II-1121, ¶¶ 65-115.

71. See *Hercules Chems.*, [1991] E.C.R. II-1711, ¶ 54. “Other confidential information” usually covers information which does not relate to business secrets, but the disclosure of which could cause extremely serious damage to a person or to an undertaking. See *Adams v. Commission*, Case 145/83, [1985] E.C.R. I-3539, ¶ 34; *AKZO Chemie BV & AKZO Chemie UK Ltd. v. Commission*, Case 53/85, [1986] E.C.R. I-1965, ¶ 29.

72. See *Hercules Chems.*, [1991] E.C.R. II-1711, ¶ 54; *BPB Indus. Plc & British Gypsum Ltd. v. Commission*, Case T-65/89, [1993] E.C.R. II-389, ¶ 29; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 420; see also Commission Regulation No. 773/2004, art. 15, O.J. L 123/18 (2004).

73. *British Am. Tobacco Co. Ltd. & R.J. Reynolds Indus. Inc. v. Commission*, Joined Cases 142 & 156/84, [1986] E.C.R. 1899, ¶ 11 (ECJ Order of June 18, 1986); *John Deere Ltd. v. Commission*, Case T-35/92, [1994] E.C.A. II-957, ¶ 31; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 420; see also *Lenaerts & Maselis*, *supra* note 57, at 1631-32.

74. On this issue, see Nicole Coutrelis & Valérie Giaccobo, *La Pratique de l'accès au dossier en droit communautaire de la concurrence: Entre droits de la défense et confidentialité*, *CONCURRENCES—REVUE DES DROITS DE LA CONCURRENCE* 66 (2006) (Fr.).

the rules for access to the file, the Commission also considers that “the need to safeguard the rights of the defense of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties.”⁷⁵

Inculpatory documents reported by the Commission in its decision, which have not been disclosed to the parties during the administrative procedure, or on the basis of which the parties could not have reasonably deduced what conclusions the Commission intended to draw from such documents, cannot be regarded as admissible evidence.⁷⁶ However, this does not automatically lead to the annulment of the decision as a whole, but, at least, to the annulment of the objections submitted by the Commission which can be proven only by reference to such documents.⁷⁷ If the findings of an infringement are sufficiently supported by other evidence which have been disclosed to the undertakings involved during the administrative procedure and on which the parties were put in a position to submit their views, violation of the rights of the defense shall not affect the validity of the contested decision.⁷⁸

It should be added that when the Commission rejects, during the administrative procedure, the request of one of the parties to obtain access to exculpatory documents, this will constitute a violation of the rights of the defense only if it is shown that the administrative procedure might have led to a different result had the requesting party been given access to the documents in question.⁷⁹ The parties are required to show that the restriction to their right of access concretely affected their possibilities to

75. See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the European Economic Area Agreement (“EEA Agreement”) and Council Regulation (EC) No. 139/2004, paras 24-25, O.J. C 325/7, at 11 (2005).

76. See *Allegemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission*, Case 107/82, [1983] E.C.R. 3151, ¶¶ 24-30; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 364.

77. See *Allegemeine*, [1983] E.C.R. 3151, ¶ 30; *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 364; *Imperial Chem. Indus. plc v. Commission*, Case T-37/91, [1995] E.C.R. II-1901, ¶ 71; *Solvay SA v. Commission*, Case T-30/91, [1995] E.C.R. II-1775, ¶ 58.

78. See *Aalborg Portland A/S v. Commission*, Joined Cases C-204, 205, 211, 213, 217, 219/00 P, [2004] E.C.R. I-123, ¶ 73; *Lenaerts & Maselis*, *supra* note 57, at 1632-33.

79. See *Cimenteries CBR*, [2000] E.C.R. II-491, ¶ 383; *Imperial Chem. Indus. plc v. Commission*, Case T-36/91, [1995] E.C.R. II-1847, ¶ 78; *SA Hercules Chems. NV v. Commission*, Case T-7/89 [1991] E.C.R. II-1711, ¶ 56; *Solvay*, [1995] E.C.R. II-1775, ¶ 68.

defend themselves, i.e., if they had been given access to these documents during the administrative procedure, they could have relied on elements diverging from inferences of the Commission at this stage such that they could have somehow influenced the content of the appraisal made by the Commission in the decision.⁸⁰ The undertaking concerned does not have to show that if it had been given access to the non-disclosed documents, the Commission decision would have been different in content, but only that it would have been able to use those documents for its defense.⁸¹

2. Statement of Reasons

Procedural safeguards under Community competition law also require, at the stage of the administrative procedure, respect for the obligation to state reasons. Article 253 EC provides that: "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" the EC Treaty.⁸² Under Community competition law, this obligation relates to both the finding of an infringement and the fine sanctioning it.

The purpose of the reasoning requirement is "to enable addressees of acts to ascertain whether the decision is materially correct"; it must also "serve as the basis for judicial review of the administration's decision."⁸³ In this way, the obligation to state reasons is linked to the right to an effective judicial remedy and

80. See *Aalborg Portland*, [2004] E.C.R. 123, ¶ 75; *Hercules Chems. NV v. Commission*, Case C-51/92 P, [1999] E.C.R. I-4235, ¶ 81; *Limburgse Vinyl Maatschappij NV v. Commission*, Joined Cases C-238, 244-45, 247, 250-52, 254/99 P, [2002] E.C.R. I-8375, ¶ 318; *Solvay*, [1995] E.C.R. II-1775, ¶ 98.

81. See *Hercules Chems.*, [1999] E.C.R. I-4235, ¶¶ 78, 81; *Limburgse Vinyl Maatschappij* [2002] E.C.R. I-8375, ¶ 318.

82. On the obligation to state reasons, see, e.g., LENAERTS, ARTS & MASELIS, *supra* note 10, § 7-145, at 301-04; Koen Lenaerts & Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 34 COMMON MKT. L. REV. 531, 562 (1997); Luís Miguel Pais Antunes, *La motivation des décisions en droit communautaire de la concurrence*, in DROITS DE LA DÉFENSE ET DROITS DE LA COMMISSION DANS LE DROIT COMMUNAUTAIRE DE LA CONCURRENCE 273 (1994).

83. *Vesterdorf Opinion*, *Rhône-Poulenc SA v. Commission*, Case T-1/89, [1991] E.C.R. II-867, at II-907.

judicial protection.⁸⁴ The jurisprudence of the Court of Justice confirms this reading. According to a consistent body of case law, the purpose of the obligation to state reasons is to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well-founded or whether it is vitiated by a defect which may permit its legality to be contested and to enable the Community courts to review the legality of the decision.⁸⁵

The obligation to state reasons enshrined in Article 253 EC is considered an essential procedural requirement, the infringement of which merits annulment within the scope of Article 230 EC. It constitutes one of the fundamental principles of Community law and can be raised by the Community judicature of its own motion.⁸⁶ It must be remembered that judicial control of the reasoning requirement is limited to verifying whether the decision of the Commission sufficiently specifies the relevant facts and points of law. It does not consist in confirming whether the decision is well-founded or not.⁸⁷ The obligation to state reasons indeed relates to the external validity of the decision.⁸⁸

The requirements to be satisfied by the statement of reasons depend, to a large extent, on the nature of the act in question

84. Pais Antunes, *supra* note 82, at 274.

85. See Dansk Rørindustri A/S v. Commission, Joined Cases C-189, 202, 205-208, 213/02 P, [2005] E.C.R. I-5425, ¶ 462; see also Akzo Nobel NV v. Commission, Case T-330/01, ¶ 45 (CFI Sept. 27, 2006) (not yet reported); Asia Motors France SA v. Commission, Case T-7/92, [1993] E.C.R. II-669, ¶ 30; Archer Daniels Midland Co. v. Commission, Case T-59/02, ¶ 117 (CFI Sept. 27, 2006) (not yet reported); La Cinq SA v. Commission, Case T-44/90, [1992] E.C.R. II-1, ¶ 42; Métropole Télévision SA v. Commission, Case T-206/99, [2001] E.C.R. II-1057, ¶ 44.

86. See Commission v. Chambre Syndicale Nationale des Entreprises de Transport de Fonds et Valeurs (Sytraval), Case C-367/95 P, [1998] E.C.R. I-1719, ¶ 67; Dansk Pelsdyravlerforening v. Commission, Case T-61/89, [1992] E.C.R. II-1931, ¶ 129; *Métropole Télévision*, [2001] E.C.R. II-1057, ¶ 43.

87. See Commission v. Daffix, Case C-166/95 P, [1997] E.C.R. I-983, ¶ 24; *Sytraval*, [1998] E.C.R. I-1719, ¶ 67; GlaxoSmithKline Servs. Unlimited v. Commission, Case T-168/01, ¶¶ 210-13 (CFI Sept. 27, 2006) (an appeal has been lodged against this judgment: GlaxoSmithKline Servs. Unlimited v. Commission, Case C-501/06 P (case pending)); Westfalen Gassen Nederland BV v. Commission, Case T-303/02, ¶ 72 (CFI Dec. 5, 2006) (not yet reported).

88. See Vesterdorf Opinion, *Rhône-Poulenc SA*, [1991] E.C.R. II-867, at II-908: “[I]f a statement of reasons is based on an incorrect legal view or on a wrong assessment of the evidence, this is not therefore a defect in the statement of reasons but, on the contrary, a defect in the legal and factual assessment on which the decision in the case is based.”

and the circumstances of its enactment.⁸⁹ Competition law is undoubtedly one of the areas of Community law where the obligation to state reasons in individual decisions is quite extensive because of the Commission's broad discretion in finding and finding infringements of Community law in this area. In this respect, decisions on substance—such as a decision finding an infringement—must be distinguished from purely procedural decisions. If, for the latter, a concise statement of reasons is sufficient,⁹⁰ for the former, on the contrary, it is necessary to clearly and precisely provide the considerations of facts and law which justify the measure taken.

However, as the Court of Justice and the CFI have consistently held, the Commission is not obliged to adopt a position, in stating the reasons for the decisions which it is required to take in order to apply the competition rules, on all the arguments relied on by the parties concerned. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.⁹¹ Where a decision taken in application of Article 81 EC relates to several addressees, it must include an adequate statement of reasons with respect to each of the addressees, in particular those of them who according to the decision must bear the liability for the infringement.⁹²

The requirements of the reasoning obligation differ as between the part of the decision which relates to the finding of an infringement and the part of the same decision which deals with the fine. As far as the fine is concerned, the obligation to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration.⁹³

89. See *id.* at II-907; *Sytraval*, [1998] E.C.R. I-1719, ¶ 63; *Akzo Nobel*, ¶ 96 (CFI Sept. 27, 2006) (not yet reported); *Archer Daniels Midland*, ¶ 117 (CFI Sept. 27, 2006) (not yet reported); *Limburgse Vinyl Maatschappij NV v. Commission*, Joined Cases T-305-307, 313-316, 318, 325, 328-329, 335/94, [1999] E.C.R. II-931, ¶ 386.

90. See, e.g., *Hoechst AG v. Commission*, Joined Cases 46/87 & 227/88, [1989] E.C.R. 2859, ¶¶ 41-42.

91. See *La Cinq SA v. Commission*, Case T-44/90, [1992] E.C.R. II-1, ¶ 41; *Métropole Télévision*, [2001] E.C.R. II-1057, ¶ 31.

92. See *Akzo Nobel*, ¶ 93 (CFI Sept. 27, 2006) (not yet reported); *All Weather Sports Benelux BV v. Commission*, Case T-38/92, [1994] E.C.R. II-211, ¶ 26.

93. See *Limburgse Vinyl Maatschappij NV v. Commission*, Joined Cases C-238, 244-245, 247, 250-252, 254/99 P, [2002] E.C.R. I-8375, ¶ 463; *Sarrió SA v. Commission*, Case C-291/98 P, [2000] E.C.R. I-9991, ¶ 73.

The statement of reasons must in principle be notified to the persons concerned at the same time as the decision. It must therefore be ascertained whether, at the time of the adoption of the contested decision, the undertakings knew with sufficient certainty that the calculation of the amount of the fines had been made on the basis of elements of which they had knowledge.⁹⁴ In that regard, it must be borne in mind that the extent of the obligation to state reasons is a point of law reviewable by the Court of Justice on appeal, even if the review carried out by the Court of Justice in this context must necessarily take into consideration the facts on which the CFI based its conclusion as to the adequacy or inadequacy of the statement of reasons.⁹⁵

3. Speed of the Proceedings

As a procedural safeguard deriving from the right to a fair trial, the principle of the speed of the proceedings implies an obligation to act within a reasonable time. This principle, which constitutes a general principle of Community law, requires that the Commission acts within a reasonable time in adopting decisions⁹⁶ and, in the context of proceedings brought against a Commission decision, that the CFI acts within a reasonable time in delivering a judgment.⁹⁷

In this context, the reasonableness of a given period must be appraised in light of the circumstances specific to each case

94. See *Dansk Rørindustri A/S v. Commission*, Joined Cases C-189, 202, 205-208, 213/02 P, [2005] E.C.R. I-5425, ¶¶ 463-465.

95. See *Commission v. V*, Case C-188/96 P, [1997] E.C.R. I-6561, ¶ 24; *Dansk Rørindustri*, [2005] E.C.R. I-5425, ¶ 453.

96. See *Gebrüder Lorenz GmbH v. Federal Republic of Germany & Land Rhénanie-Palatinat*, Case 120/73, [1973] E.C.R. 1471, ¶ 4; *Guérin Autos. v. Commission*, Case C-282/95 P, [1997] E.C.R. I-1503, ¶ 38; *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v. Commission*, Case C-105/04 P, ¶ 35 (ECJ Sept. 21, 2006) (not yet reported); *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v. Commission*, Case 223/85, [1987] E.C.R. 4617, ¶¶ 12-17; see also *Irish Sugar plc v. Commission*, Case T-228/97, [1999] E.C.R. II-2969, ¶ 276; *Limburgse Vinyl Maatschappij NV v. Commission*, Joined Cases T-305-307, 313-316, 318, 325, 328-329, 335/94, [1999] E.C.R. II-931, ¶ 121; *Stichting Certificatie Kraanverhuurbedrijf (SCK) v. Commission*, Joined Cases T-213/95 & T-18/96, [1997] E.C.R. II-1739, ¶ 56.

97. See *Baustahlgewebe GmbH v. Commission*, Case C-185/95 P, [1998] E.C.R. I-8417, ¶ 21; *Limburgse Vinyl Maatschappij*, [2002] E.C.R. I-8375, ¶ 179; *Thyssen Stahl AG v. Commission*, Case C-194/99 P, [2003] E.C.R. I-10821, ¶ 154; *Sumitomo Metal Indus. Ltd. & Nippon Steel Corp. v. Commission*, Joined Cases C-403 & 405/04 P, ¶¶ 115-122 (ECJ Jan. 25, 2007) (not yet reported).

and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities.⁹⁸ This list of criteria is not exhaustive, and the assessment of the reasonableness of a period does not require a systematic examination of the circumstances of the case in light of each of them where the duration of the proceedings appears justified in the light of one of them. In effect, the function of these criteria is to determine if a delay in the treatment of a particular case is justified or not.⁹⁹

It should be observed that the aim of promptness—which the Commission, at the stage of the administrative procedure, and the Community judicature, at the stage of judicial proceedings, must seek to achieve—must not adversely affect the efforts made by each institution to establish fully the facts at issue, to provide the parties with every opportunity to produce evidence and submit their observations, and to reach a decision only after close consideration of the existence of an infringement and of the penalties.¹⁰⁰

As for other grounds based on the rights of the defense, a violation of the principle of the speed of the proceedings can lead to the annulment of the decision finding an infringement of Community competition law only if it is shown that this violation adversely affected the rights of the defense of the undertakings involved. Otherwise, a violation of the obligation to act within a reasonable time does not affect the validity of the administrative procedure.¹⁰¹ Recently, the issue arose as to whether, for the purposes of the obligation to act within a reasonable time, it was necessary to distinguish the period of time preceding the statement of objections and the rest of the administrative procedure. The Court of Justice gave a clear answer to this question and annulled a judgment of the CFI whereby it was held—in the light of the case law of the European Court of Human Rights, according to which the reasonable period of

98. *Baustahlgewebe*, [1998] E.C.R. I-8417, ¶ 29; *Thyssen Stahl*, [2003] E.C.R. I-10821, ¶ 155; *Sumitomo Metal Indus. Ltd. & Nippon Steel Corp.*, ¶ 116 (ECJ Jan. 25, 2007) (not yet reported).

99. *Limburgse Vinyl Maatschappij*, [2002] E.C.R. I-8375, ¶ 188; *Thyssen Stahl*, [2003] E.C.R. I-10821, ¶ 156; *Sumitomo Metal Indus. Ltd. & Nippon Steel Corp.*, ¶ 117 (ECJ Jan. 25, 2007) (not yet reported).

100. *Limburgse Vinyl Maatschappij*, [2002] E.C.R. I-8375, ¶ 234.

101. See *JCB Serv. v. Commission*, Case C-167/04 P, ¶ 72 (ECJ Sept. 21, 2006) (not yet reported).

time provided under Article 6(1) of the ECHR does not run before a person is accused¹⁰²—that the prolongation of the step of the procedure preceding the statement of objections could not, as such, adversely affect the rights of the defense. The Court of Justice considered that, since the excessive duration of the first phase of the administrative procedure may have an effect on the future ability of the undertakings concerned to defend themselves, the assessment of the source of any undermining of the effectiveness of the rights of the defense must extend to the entire procedure and be carried out by reference to its total duration.¹⁰³

B. *Criminal Aspects of the Administrative Procedure*

Fines which may be imposed on undertakings for infringements of Community competition law “do in fact . . . have a criminal law character” and, most of the time, “parties’ submissions can only be understood with the help of the terminology and concepts used in criminal law and procedure.”¹⁰⁴ This analysis explains, to a large extent, the relevance of general principles of substantive criminal law as well as the procedural safeguards specific to criminal procedure in the context of fines as sanctions for infringements of the Community competition rules.

1. General Principles of Substantive Criminal Law

One of the essential principles of substantive criminal law is the principle of legality in relation to crime and punishment. Under this principle, no one can be punished for conduct which is not prescribed as an offense by law, and the sanction or penalties imposed for such offenses must be defined by law: *nullum*

102. See *Corigliano v. Italy*, [1982] E.C.H.R. 10 (Dec. 10, 1982), ¶ 34.

103. *Technische Unie BV v. Commission*, Case C-113/04 P, ¶ 55 (ECJ Sept. 21, 2006) (not yet reported); *Nederlandse Federative Vereniging voor de Groothandel op Elektronisch Gebied v. Commission*, Case C-105/04 P, ¶¶ 49-50 (ECJ Sept. 21, 2006) (not yet reported).

104. *Vesterdorf Opinion*, *Rhône-Poulenc SA v. Commission*, Case T-1/89, [1991] E.C.R. II-867, at 885. On fines under Community competition law, see, e.g., Jean-François Bellis, *La détermination des amendes pour infraction au droit communautaire de la concurrence—Bilan de cinq années d’application des lignes directrices de 1998*, 39 *CAHIERS DE DROIT EUROPÉEN* [C.D.E.] 373 (2003) (Fr.); Damien Geradin & David Henry, *The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts’ Judgments* (Global Competition Law Centre, College of Europe, Working Paper 03/05).

*crimen, nulla poena sine lege.*¹⁰⁵

In the *Citric Acid* cartel case, the CFI was confronted with the very issue of the legality of the fines imposed by the Commission, since the plaintiffs were challenging the provisions of Regulation No. 17 that entitled the Commission to impose fines¹⁰⁶ and were relying to this end on the violation of the principle of legality in relation to crime and punishment.¹⁰⁷ With regard to the question of the validity of Article 15(2) of Regulation No. 17, in the sense that it did not sufficiently define in advance the decision-making practice of the Commission, the CFI first emphasized that the principle of legality in relation to crime and punishment was one of the general legal principles underlying the constitutional traditions common to the Member States and was enshrined in various international treaties, particularly in Article 7 of the ECHR.¹⁰⁸ Then, the CFI considered that in order to avoid an excessive regulatory rigidity and to facilitate the adaptation of the rules of law to the circumstances of a particular case, a certain level of unpredictability should be allowed regarding the sanctions to be imposed for a given infringement. In any case, it found that the Commission did not enjoy unlimited discretion for the setting of the amount of fines in case of infringement of the competition rules because of the ceiling of 10 percent of the turnover of the undertaking laid down in the relevant provision of Regulation No. 17 and because of its Guidelines. Thus, the CFI concluded that a diligent undertaking could adequately predict the method for setting the amount and the amplitude of the fines to be imposed for a given conduct, and the fact that the undertakings were not in a position to know exactly in advance the level of the fine that the Commission would impose in each case was not of a sufficient nature to estab-

105. On this general principle of criminal law, see JEAN PRADEL, *DROIT PÉNAL COMPARÉ* § 42 (1995); JEAN PRADEL & GEERT CORSTENS, *DROIT PÉNAL EUROPÉEN* §§ 294-298, 300 (2d ed. 2002).

106. See Regulation No. 17: First Regulation implementing Articles 85 and 86 [now Articles 81 and 82] of the Treaty, art. 15(2), O.J. English Spec. Ed. I, 8 (1959-1962), as modified by Council Regulation No. 1216/99, O.J. L 148/5 (1999); now, Regulation No. 1/2003, O.J. L 1/1, art. 23(3) (2003).

107. See *Jungbunzlauer AG v. Commission*, Case T-43/02, ¶¶ 37-68 (CFI Sept. 27, 2006) (not yet reported). In this case, the issue was specifically whether this principle, as enshrined in Article 7 of the ECHR and in the legal orders of all the Member States, required that a legislative act, which conferred on the administration the power to inflict a fine, defined the amount in a sufficiently precise manner.

108. See *id.* ¶¶ 69-81.

lish that Article 15(2) of Regulation No. 17 violated the principle of legality.¹⁰⁹

Another essential general principle of criminal law is the principle of non-retroactivity of criminal laws. In accordance with this principle, any conduct which leads to a sanction must be set down as a criminal offence defined by law before or at the very time it has been committed, and the sanction imposed can only be the one defined by the law as it stands when the offence is committed: *nullum crimen, nulla poena sine lege praevia*.¹¹⁰ The principle of non-retroactivity of criminal laws is enshrined in Article 7 of the ECHR as a fundamental right and constitutes a general principle of Community law.¹¹¹

The Community courts have held that this principle must be observed when fines are imposed for infringements of the competition rules and that it requires that the penalties imposed correspond to those fixed at the time when the infringement was committed.¹¹² As a result of the Commission's having applied its Guidelines on the method of setting fines¹¹³ immediately after their adoption, several undertakings argued that this constituted an infringement of the principle of non-retroactivity of criminal laws by operating an increase in the fines entailed by the new method of setting the amount of fines provided by the Guidelines.

On appeal from the judgment of the CFI, the Court of Justice, sitting as a Grand Chamber, considered that a change in an enforcement policy, in this instance the Commission's general competition policy in the matter of fines, especially where it comes about as a result of the adoption of rules of conduct such

109. *See id.* ¶¶ 82-91. Recently, the Court of Justice has in substance confirmed this approach, in particular for the possibility to take into account a repetition of the infringement for the fixing of the amount of a fine as far as seriousness is concerned. *See Groupe Danone v. Commission*, Case C-3/06 P, ¶¶ 26-30 (ECJ Feb. 8, 2007) (not yet reported).

110. On this general principle of criminal law, see PRADEL, *supra* note 105, § 42; PRADEL & CORSTENS, *supra* note 105, §§ 299, 301.

111. *Dansk Rørindustri A/S v. Commission*, Joined Cases C-189, 202, 205-208, 213/02 P, [2005] E.C.R. I-5425, ¶ 202.

112. *Id.*

113. Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the Treaty establishing the European Coal and Steel Community ("ECSC Treaty"), O.J. C 9/3 (1998). These guidelines have recently been replaced by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, O.J. C 210/2 (2006).

as the Guidelines, may have an impact with regard to the principle of non-retroactivity.¹¹⁴ Nevertheless, the Court of Justice ruled that the modification introduced by the Guidelines was reasonably foreseeable at the time when the infringements concerned were committed and that the undertakings must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past. In applying the Guidelines in the contested decision in question to infringements committed before they were adopted, the Commission did not breach the principle of non-retroactivity.¹¹⁵

2. General Principles of Criminal Procedure

Community competition law calls not only for the application of some general principles of substantive criminal law as mentioned above, but also for the observance of essential safeguards which characterize any criminal procedure. First, it is worth mentioning the principle under which no one can be compelled to incriminate oneself: *nemo se ipsum accusare tenetur*.¹¹⁶ That principle and, more broadly, the right to remain silent signify another example of the increasing relevance of the rights of the defense in competition law because of the “criminal” nature of the fines which are imposed on undertakings by the Commission.¹¹⁷

The Court of Justice has considered that this principle, as interpreted by the case law of the European Court of Human Rights, applies only to a limited extent in Community competition law. Thus, the Court ruled that the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or an-

114. *Dansk Rørindustri*, [2005] E.C.R. I-5425, ¶ 202.

115. *Id.* ¶¶ 226-232; see also *Archer Daniels Midland Co. v. Commission*, Case C-397/03 P, [2006] E.C.R. I-4429, ¶¶ 19-26; *Groupe Danone v. Commission*, Case C-3/06 P, ¶¶ 87-93 (ECJ Feb. 8, 2007) (not yet reported); *Archer Daniels Midland Co. v. Commission*, Case T-329/01, ¶¶ 38-49 (CFI Sept. 27, 2006) (not yet reported) (an appeal has been lodged against this case: *Archer Daniels Midland Co. v. Commission*, Case C-510/06 P (case pending)); *Archer Daniels Midland Co. v. Commission*, Case T-59/02, ¶¶ 41-54 (CFI Sept. 27, 2006) (not yet reported).

116. On this principle, see PRADEL & CORSTENS, *supra* note 105, at § 353.

117. See *Hüls AG v. Commission*, Case C-199/92 P, [1999] E.C.R. I-4287, ¶ 150.

other undertaking, the existence of anti-competitive conduct.¹¹⁸ The Community courts have nevertheless held that the Commission may not, by way of a request for information, adversely affect the rights of the defense of the undertaking. Consequently, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.¹¹⁹

Recently, the Court of Justice observed that since the judgment in *Orkem v. Commission*,¹²⁰ there have been further developments in the case law of the European Court of Human Rights which the Community judicature must take into account when interpreting fundamental rights. The Court stated, however, in that regard that those developments were not such as to put in question the statements of principle in *Orkem*.¹²¹ It follows that the undertaking concerned must, if the Commission so requests, provide the Commission with documents which relate to the subject-matter of the investigation, even if those documents could be used by the Commission in order to establish the existence of an infringement. As long as the Commission's request for information is not such as to require the undertaking to admit its participation in infringements of the Community competition rules, there is no violation of the rights of the defense.¹²²

It should be added that the principle not to incriminate oneself raises specific issues in Community competition law in the context of the Commission's leniency policy, which consists of encouraging undertakings to actively cooperate with the Commission at the investigation stage or else to run the risk of very high fines. Since undertakings are not at all compelled to cooperate with the Commission and are free to do so or not, with the risk not to get a reduction of the fine on the basis of the leniency notice, the principle not to incriminate oneself is not violated in

118. See *Mannesmannröhren-Werke AG v. Commission*, Case T-112/98, [2001] E.C.R. II-729, ¶ 65; *Orkem v. Commission*, Case 374/87, [1989] E.C.R. 3283, ¶ 34.

119. See *Commission v. SGL Carbon AG*, Case C-301/04 P, [2006] E.C.R. I-5915, ¶ 42; *Mannesmannröhren-Werke AG*, [2001] E.C.R. II-729, ¶ 67; *Limburgse Vinyl Maatschappij NV v. Commission*, Joined Cases T-305-07, 313-316, 318, 325, 328, 329 & 335/94, [1999] E.C.R. II-931, ¶ 449; *Orkem*, [1989] E.C.R. 3283, ¶¶ 34-35.

120. *Orkem*, [1989] E.C.R. 3283.

121. See *SGL Carbon*, [2006] E.C.R. I-5915, ¶ 43; *Limburgse Vinyl Maatschappij*, [2002] E.C.R. I-8375, ¶¶ 274-276.

122. See *SGL Carbon*, [2006] E.C.R. I-5915, ¶¶ 44-46.

this context.¹²³

Second, it is necessary to highlight the right to withdraw a voluntary admission of an infringement. Under this right, the accused can always withdraw, before the court, a prior voluntary admission. This right is widely recognized in criminal law; it is in general excluded in civil matters, however. In Community competition law, the question is whether an undertaking is entitled to modify its submissions by which it has admitted an infringement, that is to say, whether it may contest before the Community courts facts that this undertaking has admitted before the Commission.

This question arises specifically in the context of the cooperation of the undertakings for leniency purposes. In its 1996 leniency notice, the Commission undertook to grant a reduction of 10 percent to 50 percent of the fine that would have been imposed if an undertaking had not cooperated where, after receiving a statement of objections, such undertaking informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.¹²⁴ Even if this scheme is not expressly provided in the subsequent leniency notices of the Commission,¹²⁵ nothing precludes the Commission from granting a reduction for an undertaking's non-contestation of anti-competitive conduct alleged in the statement of objections.¹²⁶ Obviously, such a scheme greatly facilitates the task of

123. *See* *Roquette Frères SA v. Commission*, Case T-322/01, ¶ 266 (CFI Sept. 27, 2006) (not yet reported). Most recently, see *Dalmine SpA v. Commission*, Case C-407/04 P, ¶ 34 (and the cases cited therein) (ECJ Jan. 25, 2007) (not yet reported). In his Opinion in this case, Advocate General Geelhoed underscored: "The right of a legal or natural person under investigation concerning possible infringement to the competition rules of the EC Treaty not be compelled to incriminate oneself belongs to the principles of the right to a fair trial, under which the rights of the defense must be respected," with "the key element of this principle being . . . that no one can be *compelled* to incriminate oneself." According to the Advocate General, it follows that "if there is no pressure, the party involved in the investigation is in a position to decide freely if and how it shall answer the questions asked." Opinion of Advocate General Geelhoed, *Dalmine SpA v. Commission*, Case C-407/04 P, ¶¶ 23, 25 (ECJ Jan. 25, 2007) (not yet reported) (official English translation not yet available).

124. *See* Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. C 207/4 (1996).

125. *See* Commission Notice on Immunity from fines and reduction of fines in cartel cases, point D, second indent, O.J. C 298/17 (2006); Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. C 45/3 (2002).

126. Either in the framework of the last leniency notice or, for infringement other than cartels, in the framework of the Guidelines on setting the amount of fines which

the Commission in case of proceedings brought before the CFI, the center of gravity of the litigation logically becoming not the issue of the existence and the evidence of an infringement, but rather, the issue of the amount of the fine.¹²⁷ Notably, the Court of Justice has held that such a scheme did not affect the rights of the defense.¹²⁸ Although the case law of the CFI could appear unsettled on this point,¹²⁹ the Court of Justice has, at least impliedly, recognized the right of an undertaking, having been granted a fine reduction for admission to the Commission of facts constituting anti-competitive conduct, to contest the same facts before the CFI.¹³⁰

Third, the principle of *non bis in idem*¹³¹ should also be underlined. This principle constitutes a fundamental principle of

leave the possibility to the Commission to grant the reduction of a fine “where the undertaking concerned has effectively cooperated with the Commission.” See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, para. 29, O.J. C 210/2 (2006).

127. See *Tokai Carbon Co. Ltd. v. Commission*, Joined Cases T-236, 239, 244-246, 251-252/01, [2004] E.C.R. II-1181, ¶ 112.

128. See *Compañía española para la fabricación de aceros inoxidables SA (Acerinox) v. Commission*, Case C-57/02 P, [2005] E.C.R. I-6689, ¶¶ 89-90; *ThyssenKrupp Stainless GmbH v. Commission*, Joined Cases C-65 & 73/02 P, [2005] E.C.R. I-6773, ¶ 53.

129. See *Archer Daniels Midland Co. v. Commission*, Case T-224/00, [2003] E.C.R. II-2597, ¶¶ 226-227; *Adriatica di Navigazione SpA v. Commission*, Case T-61/99, [2003] E.C.R. II-5349, ¶¶ 208-209; *Minoan Lines SA v. Commission*, Case T-66/99, [2003] E.C.R. II-5515, ¶¶ 357-358; *Tokai Carbon*, [2004] E.C.R. II-1181, ¶ 108; *Scandinavian Airlines Sys. AB v. Commission*, Case T-241/01, [2005] E.C.R. II-2917, ¶¶ 232-241; *Groupe Danone v. Commission*, Case T-38/02, [2005] E.C.R. II-4407, ¶ 509 (on appeal brought against this latter judgment, the Court of Justice has not dealt with this issue. See *Groupe Danone v. Commission*, Case C-3/06 P (ECJ Feb. 8, 2007) (not yet reported)).

130. See *Minoikes Grammes ANE (Minoan Lines SA) v. Commission*, Case C-121/04 P, ¶ 66 (ECJ Order of Nov. 17, 2005) (unpublished); *Adriatica di Navigazione SpA v. Commission*, Case C-111/04 P, ¶ 91 (ECJ Order of Feb. 16, 2006) (unpublished); *Srintzis Lines Shipping SA v. Commission*, Case C-110/04 P, ¶ 63 (ECJ Order of Mar. 30, 2006) (unpublished). The Court of Justice ruled that the fact that an undertaking which has been granted a reduction in its fine in recognition of its cooperation, subsequently seeks the annulment of the decision finding the infringement of the competition rules and imposing a penalty on the undertaking responsible for the infringement, this could not entail a new assessment of the extent of the reduction which had been granted, such action being a normal consequence of the exercise of the remedies provided for in the Treaty and the Statute of the Court of Justice.

131. On this principle, see PRADEL, *supra* note 105, § 42; PRADEL & CORSTENS, *supra* note 105, §§ 50-53. Specifically in competition law, see WOUTER P.J. WILS, *PRINCIPLES OF EUROPEAN ANTITRUST ENFORCEMENT* 93-128 (2005).

Community law,¹³² which is enshrined in Article 4(1) of Protocol No. 7 of the ECHR¹³³ and which has been reaffirmed in Article 50 of the Charter of Fundamental Rights of the European Union.¹³⁴ The principle of *non bis in idem* precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has already been penalized or declared not liable by a previous unappealable decision.¹³⁵

In general, the application of this principle is subject to the threefold conditions of identity of the facts, unity of offender and unity of the legal interest protected. Under this principle, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset.¹³⁶ The application of this principle therefore presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed. In this way, the principle of *non bis in idem* merely prohibits a fresh, in-depth assessment of

132. See *Gutmann v. Commission*, Joined Cases 18 & 35/65, [1966] E.C.R. 149, at 172; *Boehringer Mannheim GmbH v. Commission*, Case 7/72, [1972] E.C.R. 1281, ¶ 3; *Limburgse Vinyl Maatschappij NV v. Commission*, Joined Cases C-238, 244-245, 247, 250-252 & 254/99 P, [2002] E.C.R. I-8375, ¶ 59; *SGL Carbon AG v. Commission*, Case C-308/04 P, [2006] E.C.R. I-5977, ¶ 26.

133. According to Article 4(1) of Protocol No. 7 of the ECHR, “no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

134. See Charter of Fundamental Rights of the European Union, *supra* note 40, art. 50: “[N]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.”

135. See *Limburgse Vinyl Maatschappij*, [2002] E.C.R. I-8375, ¶ 59. On the basis of Article 4 of Protocol No. 7 of the ECHR, *supra* note 133, the scope of the principle is limited to the courts of one State. Therefore, it does not exclude, in principle, that the same person be condemned for the same infringement in another State. See *Archer Daniels Midland Co. v. Commission*, Case T-224/00, [2003] E.C.R. II-2597, ¶¶ 85-86; *Tokai Carbon Co. Ltd. v. Commission*, Joined Cases T-236, 239, 244-246, 251-252/01, [2004] E.C.R. II-1181, ¶ 130; see also *Archer Daniels Midland Co. v. Commission*, Case C-397/03 P, [2006] E.C.R. I-4429, ¶¶ 48-52.

136. See *SGL Carbon*, [2006] E.C.R. I-5977, ¶ 29; *Fédération Nationale de la Coopération Bétail et Viande (FNCBV) v. Commission*, Joined Cases T-217 & 245/03, ¶ 340 (CFI Dec. 13, 2006) (not yet reported); *Archer Daniels Midland Co. v. Commission*, Case T-59/02, ¶ 61 (CFI Sept. 27, 2006) (not yet reported); *Aalborg Portland A/S v. Commission*, Joined Cases C-204, 205, 211, 213, 217 & 219/00 P, [2004] E.C.R. 123, ¶ 338.

the alleged commission of an offence which would result in the imposition of either a second penalty, in addition to the first, in the event that liability is established a second time, or a first penalty in the event that liability not established by the first decision is established by the second.¹³⁷

This principle may be relied on in different ways in Community competition practice. In a first series of cases, the issue was whether the principle of *non bis in idem* excluded the possibility of a sanction by the Commission after a sanction had been inflicted by a national authority of a Member State for the very same infringement. In the *Walt Wilhelm* case, the Court of Justice accepted the possibility that two procedures being conducted separately could lead to the imposition of consecutive sanctions, but ruled that a general requirement of natural justice demanded that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.¹³⁸ In any case, the question is now different in the context of Regulation No. 1/2003, as both Community and national authorities apply the same rules for agreements and practices which may affect trade between Member States.¹³⁹

In a second series of cases, the Court of Justice was confronted with the question whether the principle of *non bis in idem* was applicable to situations where the Commission had adopted a new decision finding an infringement whereas a prior decision based on the same facts had been annulled on procedural grounds. In this context, the Court of Justice ruled that, since:

The application of that principle presupposes that a ruling has been given on the question whether an offence has in fact been committed or that the legality of the assessment thereof has been reviewed . . . it does not in itself preclude the resumption of proceedings in respect of the same anti-competitive conduct where the first decision was annulled for procedural reasons without any ruling having been given on the substance of the facts alleged¹⁴⁰

137. See *Limburgse Vinyl Maatschappij*, [2002] E.C.R. I-8375, ¶¶ 60-61.

138. *Walt Wilhelm v. Bundeskartellamt*, Case 14/68, [1969] E.C.R. I, ¶ 11; see also *Tréfileurope Sales SARL v. Commission*, Case T-141/89, [1995] E.C.R. II-791, ¶ 191; *Sotralentz SA v. Commission*, Case T-149/89, [1995] E.C.R. II-1127, ¶ 29.

139. On this point, see Emil Paulis & Céline Gauer, *Le règlement n° 1/2003 et le principe du ne bis in idem*, *CONCURRENCES—REVUE DES DROITS DE LA CONCURRENCE* 32 (2005) (Fr.).

140. *Limburgse Vinyl Maatschappij*, [2002] E.C.R. I-8375, ¶¶ 60, 62. Thus, the adop-

Finally, in a third series of cases, the undertakings involved relied on the principle of *non bis in idem* or, more precisely, on a corollary to this principle, namely that concurrent penalties concerning the same facts should be taken into account,¹⁴¹ in order to obtain the deduction of the fine paid outside the Community from the fine imposed by the Commission or at least a reduction of the latter fine. These pleas have always been rejected. The Community courts have indeed considered that either the legal orders in question were different and protected different legal interests,¹⁴² or that the plaintiff was not able to establish the identity of facts on the basis of which the fines had been imposed¹⁴³ or the unity of the offender.¹⁴⁴

CONCLUSION

In view of the foregoing remarks, the treatment of important issues of evidence and procedure in European Community competition law, which have largely been inspired by the seminal *Vesterdorf* Opinion in the *Polypropylene* case, demonstrate that over the past sixteen years, the relevant case law and Community legislation have developed so as to strike a balance between that of safeguarding the effectiveness of the rights of the defense of undertakings involved in competition law proceedings and that of ensuring the full effectiveness of the enforcement of the European competition rules, infringements of which the Commission is charged to uncover and sanction in the face of often covert behavior exhibited by many such undertak-

tion by the Commission of a new decision after the annulment of a first decision for lack of evidence can only take place if this new decision is based on new facts or on the discovery of new facts. For such an interpretation, see Wils, *supra* note 131, at 104.

141. See *Archer Daniels Midland Co. v. Commission*, Case C-397/03 P, [2006] E.C.R. I-4429, ¶ 46; *SGL Carbon*, [2006] E.C.R. I-5977, ¶ 27.

142. See *Buchler & Co. v. Commission*, Case 44/69, [1970] E.C.R. 773, ¶¶ 52-53; *SGL Carbon*, [2006] E.C.R. I-5977, ¶ 29. See also *Gencor v. Commission*, Case T-102/96, [1999] E.C.R. II-753, ¶¶ 103-106; *Tokai Carbon Co. Ltd. v. Commission*, Joined Cases T-236, 239, 244-246, 251-252/01, [2004] E.C.R. II-1181, ¶ 134; *Roquette Frères SA v. Commission*, Case T-322/01, ¶ 281 (CFI Sept. 27, 2006) (not yet reported); *Jungbunzlauer AG v. Commission*, Case T-43/02, ¶ 287 (CFI Sept. 27, 2006) (not yet reported); *Archer Daniels Midland Co. v. Commission*, Case T-59/02, ¶ 63 (CFI Sept. 27, 2006) (not yet reported).

143. See *Boehringer Mannheim GmbH v. Commission*, Case 7/72, [1972] E.C.R. 1281, ¶ 5; *Archer Daniels Midland Co.*, [2006] E.C.R. I-4429, ¶ 53-66; *Archer Daniels Midland Co. v. Commission*, Case T-224/00, [2003] E.C.R. II-2597, ¶ 101.

144. See *Fédération nationale de la coopération bétail et viande (FNCBV) v. Commission*, Joined Cases T-217 & 245/03, ¶ 344 (CFI Dec. 13, 2006) (not yet reported).

ings. It is in this way that the legacy of the Vesterdorf Opinion will continue to contribute to the procedural “due process” of law in the field of European Community competition law for the years to come.