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ADMINISTRATIVE PROCEEDINGS IN THE AREA OF EU COMPETITION LAW

NOTE

EN ES 2011
Administrative proceedings in the area of EU competition law

Briefing Note

Abstract

This study provides an overview of administrative proceedings in the area of EU competition law, more in particular, Articles 101 and 102 Treaty on the Functioning of the European Union and merger control, while focusing on different levels of procedural protection for complainants, interested third parties, and parties subject to investigation. It thereby aims to provide insight as to where – at a practical level – the prevailing procedural provisions provide an effective safeguard for the parties involved and where there is scope for improvement. The study concludes that the current body of procedural safeguards is a rich source of inspiration for any envisaged horizontal legislation concerning administrative procedures.
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ECMR</td>
<td>Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the 'EC Merger Regulation')</td>
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<tr>
<td>Form CO</td>
<td>Official form for standard merger notifications</td>
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<tr>
<td>Short Form CO</td>
<td>Official form for simplified merger notifications</td>
</tr>
<tr>
<td>Form RS</td>
<td>Official form for referral requests</td>
</tr>
<tr>
<td>IR</td>
<td>Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (the 'Implementing Regulation')</td>
</tr>
<tr>
<td>MoR</td>
<td>Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the 'Modernization Regulation')</td>
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<tr>
<td>NCA</td>
<td>National Competition Authority</td>
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<td>SO</td>
<td>Statement of objections</td>
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INTRODUCTION

The Working Group on EU Administrative Law is taking stock of the administrative law acquis at EU level. This exercise is performed with the wider objective of developing horizontal administrative procedural rules. The aim is to, where relevant, draw inspiration from past experiences with administrative proceedings in areas of EU law where such administrative proceedings are highly developed.

I was asked to (i) provide an overview of administrative proceedings in the area of EU competition law, more in particular, Articles 101 and 102 Treaty on the Functioning of the European Union (‘TFEU’) and merger control; (ii) focus on different levels of procedural protection for complainants, interested third parties, and parties subject to investigation; and (iii) provide insight as to where – at a practical level – the prevailing procedural provisions provide an effective safeguard for the parties involved and where there is scope for improvement.

Proceedings at the national level, or the scope for judicial review before the European Courts, are not explored. Given the wealth of case-law, the Commission’s decision-making practice and of Commission Notices on distinct aspects of the procedure, the present memo is necessarily limited to a cursory overview, without aspiring to be exhaustive. More detailed guidance can be found in the different Commission Notices regarding, for instance, the ‘handling of complaints’ or ‘access to file’,¹ in the Commission’s ‘Best Practices’ for mergers and antitrust cases respectively,² as well as in a variety of authoritative handbooks focusing specifically on EU competition procedures³.

Given the fundamentally different nature and the practical differences between antitrust and merger procedures, both will be dealt with separately. Section 2 will first look at the antitrust procedure. Section 3 will subsequently elaborate upon the merger procedure.

1. PROCEEDINGS CONCERNING ARTICLES 101 AND 102 TFEU

Proceedings at the EU level concerning Articles 101 TFEU (regarding agreements and concerted practices that are restrictive of competition) and 102 TFEU (regarding abuse of a dominant position) are governed by two key legal instruments, notably Regulation 1/2003 (the Modernization Regulation, hereafter ‘MoR’) and Regulation 773/2004 (the Implementing Regulation, hereafter ‘IR’).

Other relevant Commission documents relevant for EU antitrust proceedings are:

- Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 EC and Council Regulation (EC) No 139/20044
- Notice on the Handling of Complaints by the Commission5
- Commission Notice on cooperation within the Network of Competition Authorities6
- Commission Notice on Immunity from fines and reduction of fines in cartel cases7
- Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/20038
- Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Regulation 1/20039

It should also be noted that the Commission is working on Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU (hereafter ‘Best Practices’) as well as on Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (hereafter ‘Guidance’).10 Both drafts were published for consultation on 6 January 2010.11 Interested parties could submit comments until 3 March 2010.12 At the time of writing of this contribution, 28 February 2011, the final versions of the Best Practices and the Guidance are not yet published. Our contribution will take into account the improvements suggested by the draft Best Practices and Guidance and consider those to be in place already. Suggestions for improvement will, therefore, assume the existence of the

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6 Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C 101/43.
7 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006, C 298/17.
8 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006, C 210/2.
10 At the same date, the Commission also published Draft Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases.
12 See footnote 11.
Best Practices and Guidance. This approach is warranted as the Commission indicated that it would already start applying practices described in the documents.\textsuperscript{13}

EU antitrust proceedings can essentially be initiated as a result of three different events:

- as a result of a \textit{complaint} by an undertaking, an individual or (exceptionally) a Member State (either a formal complaint in accordance with Article 5 IR or a more informal complaint);\textsuperscript{14}

- at the Commission’s \textit{own initiative} \textit{(ex officio)},\textsuperscript{15} or;

- pursuant to information submitted by a cartel member acting as a \textit{whistleblower} in return for immunity/reduction of fines (under the Leniency Notice)\textsuperscript{16}.

At any point in time, the Commission may decide to close its investigation. In the event of an \textit{ex officio} investigation or leniency, such action stops the investigation. However, in case of a formal complaint, further procedural safeguards have been put in place: the complainant is heard, the Commission has to take a decision and, as an ultimate remedy, the complainant can appeal the Commission’s decision to the General Court.

Below we will first describe the investigative phase, i.e., the powers of the Commission and the rights of undertakings under investigation, complainants, and third parties up to the point where the Commission decides (i) to issue a Statement of Objections, (ii) that it intends to close the investigation, or (iii) that commitments may be discussed.

The second part will then focus on particular procedural rights in case the Commission intends to adopt a prohibition decision. Part three will discuss more in detail the procedure for (i) taking a commitment decision and (ii) rejecting a formal complaint. Finally, the last section will set out some considerations on adopting and publishing a decision.

Where useful, we will make suggestions for improvement\textsuperscript{17}.

\textbf{1.1. The investigative phase (first phase)}

\textbf{1.1.1. The Commission’s Powers of Investigation}

Insofar as the Commission decides that a case merits further scrutiny (and does not re-allocate the case to a national competition authority (hereafter ‘NCA’)),\textsuperscript{18} the Commission

\begin{footnotesize}
\textsuperscript{13} Note, however, that the Best Practices do not deal with specific procedures. The Best Practices, at footnote 4 mention imposing fines on undertakings having provided misleading information. Other examples could be, e.g., fines for obstructing the investigation or breaking the seal during a dawn raid. Neither do they cover decisions on finding inapplicability (Article 10 MoR) or decisions on interim measures (Article 8 MoR).

\textsuperscript{14} In order to submit a formal complaint, interested parties should show a legitimate interest in the sense of Article 5 IR and should submit a completed version of Form C, annexed to the implementing regulation.

\textsuperscript{15} Note that investigations started by the Commission as a result of informal complaints, such as e-mails, letters, etc. will also be considered \textit{ex officio} investigations.

\textsuperscript{16} Limited to cartels, the leniency notice does not cover other types of agreements (horizontal or vertical) caught by Article 101, nor abusive behavior prohibited by Article 102. See Commission Notice on Immunity from fines and reduction of fines in cartel cases, \textit{OJ} 2006, C 298/17, § 1.

\textsuperscript{17} Our suggestions for improvement are by no means unique as many of them have also been made in at least one reaction the Commission received during the public consultation on the Best Practices.

\textsuperscript{18} For the concept of best placed competition authority, see the Commission Notice on cooperation within the Network of Competition Authorities, \textit{OJ} 2004, C 101/43, § 8.
\end{footnotesize}
can use its powers of investigation, as laid down in Articles 17-22 MoR. Three such powers are quintessential for present purposes and will be discussed below.

It should be noted that the Commission’s exercise of its investigative powers is not contingent upon the ‘initiation of proceedings’, viz. the formal decision by which the Commission indicates its intention to adopt a decision under Regulation 1/2003 with regard to possible infringements of Article 101 and/or 102 TFEU (Art. 2(3) IR). According to Article 2(1) IR, proceedings may be initiated at any time throughout the investigative phase, but no later than the date on which it issues a preliminary assessment with a view to a ‘commitment decision’ (Art. 9(1) MoR), a statement of objections or a request for the parties to express their interest in engaging in settlement discussions, or the date on which it publishes a concise summary of the case (Art. 27(4) MoR), whichever is the earlier. Unless this would harm the investigation, the decision to open proceedings can be made public (via DG COMP’s website and a press release), albeit that the parties subject to the investigation should be informed first. Complaints may also be rejected without initiating proceedings (Art. 2(4) IR).

1.1.1.1. Requests for information

First, the Commission is empowered to require undertakings and associations of undertakings to provide it with all necessary information. Such request can be addressed to undertakings that are the subject of the investigation but also to any other undertaking the Commission assumes will have relevant information, e.g., competitors, customers, suppliers, market research companies, etc.

The Commission may thereby choose to issue a ‘simple request’ (Art. 18(2) MoR) or a ‘decision’ (Art. 18(3) MoR). The main difference between the two is that in the former case, the addressee of the request is not obliged to respond, whereas in the latter case, there is a legal duty to do so (within the time-limit fixed by the Commission). Experience shows that the Commission mostly uses simple requests, even when it concerns requests addressed to the undertaking(s) under investigation.

Fines may be imposed should the addressee (intentionally or negligently) submit incorrect or misleading information (Art. 23(1) MoR). In addition, in case of a ‘decision’ in the sense of Article 18(3) MoR, fines can be imposed when the addressee submits incomplete information or fails to reply within the fixed time-limit.

In view of the sanctions attached to not fully responding to such requests, procedural safeguards have been put in place. The Commission must state the legal basis and the purpose of the request, specify what information is required, fix the time-limit for reply and identify possible penalties under the MoR. In the latter case, the Commission must also make explicit the right to have the decision reviewed by the Court of Justice.

The Commission enjoys a wide margin of appreciation in requesting information, albeit that it must still have regard to the principle of proportionality and refrain from going on a

\[\text{\footnotesize[]{19}}\quad\text{The opening of proceedings relieves the national competition authorities of their competence to apply Articles 101-102 TFEU (Art. 11(6) MoR). See also Commission Notice on cooperation with the Network of Competition Authorities, OJ 2004, C 101/43, § 52.}\]

\[\text{\footnotesize[]{20}}\quad\text{Best Practices, §§ 16-23.}\]

\[\text{\footnotesize[]{21}}\quad\text{Up to 1% of the total turnover in the preceding business year.}\]

\[\text{\footnotesize[]{22}}\quad\text{An application for annulment must be lodged at the General Court. An appeal against the General Court’s judgment must be filed with the Court of Justice.}\]
complete ‘fishing expedition’. Furthermore, the principle of protection against self-incrimination remains in full force. According to the Commission’s Best Practices, the time-limit set upon the addressees will normally be at least two weeks from the receipt of the request. If the scope of the request is fairly limited, it may, however, be reduced to less than one week. Conversely, addressees may ask for an extension of this deadline through a written and motivated request.

One of the recurring criticisms on the request for information is the language in which the requests are drafted. The Best Practices indicate that the ‘simple requests’ will always be in English. However, this is not always a language that is understood by the recipient of such requests. The cover letter will be in the language of the location of the addressee and will indicate that translations can be requested. In practice, obtaining translations takes time, thus often necessitating a request for extension of the deadline, as explained hereafter. Therefore, proceedings would be streamlined if the time-limit is automatically extended by the time it takes for the translation to arrive at the addressee’s.

Indeed, the time-limits, although not binding in case of a simple request, are often very tight, especially when the request comprises numerous questions on multiple issues. The Best Practices indicate a time-limit of at least two weeks, but in practice it will take an undertaking at least four weeks to respond. This requires asking for an extension of the deadline at least once, which unnecessarily burdens both the undertakings concerned and the Commission. Therefore, automatically granting a month in case of a request does not appear to be exaggerated. Furthermore, when requests are sent out just before a holiday period, it would be wise to automatically extend the deadline by at least the duration of the public holiday.

1.1.1.2. Surprise inspections – dawn raids of undertakings and of private homes

The Commission may also conduct inspections of undertakings and associations of undertakings (Art. 20 MoR). In the course of these ‘surprise inspections’ or ‘dawn raids’, the Commission is notably empowered to enter premises; examine books and other records (including electronic records); take or obtain copies or extracts from them (insofar as relating to the subject-matter and purpose of the inspection); seal premises, books or records to the extent necessary for the inspection, and; ask for explanations of facts or documents and to record the answers. As will be explained in more detail below, the

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24 Explained in more detail below at footnote 44.
27 Imagine twenty requests for information are sent out (a number that is not uncommon), in a worst case scenario the Commission has to respond to twenty requests for extension, sometimes even more if the additional extension is insufficient.
28 Typical examples are requests sent out before the Christmas/New Year holiday or during the summer holidays. Many employees already planned holidays and are not willing to cancel them to respond to questionnaires. Quality of the responses significantly increases when the employees concerned are granted sufficient time to draft them.
29 The sealing of premises may be useful when an inspection continues overnight (Recital 25 MoR suggests that seals should not be affixed for more than 72 hours). In 2008, the Commission imposed a fine of € 38 million on E.ON for breaching a seal during an inspection. See Commission Decision C(2008) 377 final of 30 January 2008 relating to a fine pursuant to Article 23 paragraph 1 lit. e) of Council Regulation 1/2003 for breach of a seal. The decision was upheld by the General Court. See Case T-141/08 E.ON Energie AG v. Commission [2010] ECR I-000.
30 See also Article 4 IR on oral questions during inspections.
31 See footnote 44 and 45.
Commission has to respect legal professional privilege and the privilege against self-incrimination.

By analogy with the two modes for requesting information, the Commission can carry out inspections either on the basis of a ‘written authorization’ (Art. 20(3) MoR) – in which case the undertaking is under no legal obligation to submit to the inspection –, or on the basis of a ‘decision’ by the Commissioner for Competition (Art. 20(4) MoR) – which is compulsory. There is no obligation on the part of the Commission to announce an upcoming inspection, or to first go through the ‘voluntary’ option.32 Most inspections are surprise inspections based on a decision33.

In case of a decision pursuant to Art. 20(4) MoR, undertakings are under a positive duty to assist Commission officials, subject to the limitations imposed by the privilege against self-incrimination and legal privilege. If the undertaking fails to cooperate, penalties may be imposed in accordance with Art. 23(1) MoR.34 In addition, failure to cooperate may be regarded as an ‘aggravating circumstance’ when it comes to setting the fine for an infringement of Article 101 or 102 TFEU. At the same time, in case of opposition, the Commission officials are not entitled forcibly to enter premises or furniture. To this end they will need to rely on the assistance of the Member State, requesting where appropriate the assistance of the police (Art. 20(6) MoR). Under Articles 20(5)-(8) MoR, the Commission can indeed request the assistance of national officials (albeit that this may require authorisation from a judicial authority according to national rules)35.

The Commission’s inspection practice is further explained in the Explanatory note on inspections, which states, among other things, that officials may enter the premises and occupy officers without waiting for the undertaking to consult its lawyer and which indicates that the Commission will only accept a short delay (of some 20-30 minutes) before proceeding if there is no in-house lawyer available.

A controversial issue that may impinge on the rights of defence of the undertaking under investigation is the statement in the abovementioned Explanatory Note on copying information from the hard disk or other data bearers. Indeed, when faced with not having enough time to finalise its inspection, the Commission claims it has the right to make a copy of such data bearer and to put it in a sealed envelope. The envelope is subsequently opened by Commission officials at the Commission’s premises in the presence of representatives of the undertaking concerned. This practice may result in disclosure of information covered by legal privilege, a de facto fishing expedition, etc.

Where the Commission has reason to believe that the individuals responsible for cartels/abusive practices are keeping relevant information at home, it may also, in accordance with Article 21 MoR, conduct inspections at private premises. To that end, the

33 On a practical level, undertakings often allow Commission officials to enter the premises when the inspection is based on a written authorisation. Indeed, a decision can follow very quickly when the written authorisation does not open the doors.
34 Remark: these fines are imposed on the undertaking itself. Regulation 1/2003 does not provide for fines to be imposed on individuals.
35 See also Case C-94/00 Roquette Frères v. Commission, [2002] ECR I-9011.
Commission must obtain the prior authorization of the national judicial authority. The latter authority may not, however, directly challenge the necessity of the inspections.

1.1.1.3. Power to take statements

Under Article 19 MoR and Article 3 IR, the Commission has the power to take statements, by which it can conduct and record interviews with natural or legal persons for the purpose of collecting information. The interviewee is free not to accept the Commission’s invitation and cannot be sanctioned for refusing to be interviewed. Nor can the interviewee be penalized for refusing to answer specific questions, for giving incorrect information, etc. (contrary to what is the case for oral explanations in the course of a dawn raid)\(^\text{37}\).

The interviewee will be reminded, at the beginning of the interview, of the purpose of the interview. The person interviewed will also be informed of the Commission’s intention to make a record of the interview.\(^\text{38}\) A copy of the record will be made available to the interviewee for approval. The Commission can set a time-limit for corrections, after which the recording will be deemed to be the definitive statement.

1.1.2. Rights and role of the investigated parties and the complainant

Against the broad investigative powers described above, legislation, case-law and Commission practice also recognize a role for the investigated parties and the complainant in this phase of the procedure and grant them certain protective rights.

At the outset it is noted that, at the moment of the first investigative measure addressed to them,\(^\text{39}\) undertakings are informed of the fact that they are subject to a preliminary investigation as well as about the subject-matter and purpose of such investigation.\(^\text{40}\) This allows the parties concerned to verify the proportionality of the Commission’s actions and to verify that it does not exceed the boundaries of the investigation (e.g., by copying documents in the course of a dawn raid that are unconnected to the subject-matter of the investigation). Upon their request, DG COMP will also at later stages inform the parties of the status of the case.\(^\text{41}\) In case of complaints, the Commission as a first step often sends a non-confidential version of the complaint to the undertaking(s) that allegedly are infringing Articles 101 and/or 102 TFEU.

As for possible complainants, DG COMP normally endeavors to inform them of the action that it proposes to take within an indicative time frame of four months from the receipt of the complaint.\(^\text{42}\)

During inspections of undertakings or of private homes, as well as during any other phase in the course of an antitrust proceeding, the undertaking(s) are entitled to assistance by legal counsel, either in-house or external. It is not a coincidence that the Commission typically accepts to wait for 20-30 minutes until the external counsel’s arrival before

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37 For the sake of completion, it is noted that under Article 17 MoR, the Commission can also request information (subject to penalties) in the course of a so-called sector inquiry, which may lead to the publication of a sectoral report.
38 Article 3(1) IR.
39 This may be a request for information or an inspection. In general, if an inspection visit is organized, this will occur before the company receives requests for information.
41 Ibid. DG COMP will also inform the parties when it decides not to further investigate a case.
42 Ibid., § 15.
starting an inspection. Such assistance is needed to make sure that the scope of the investigation is respected, and that both types of privilege identified below are not neglected.

Established case-law recognizes that undertakings under investigation can invoke the privilege against self-incrimination. In other words, the duty to actively cooperate with the Commission does not mean that the undertaking has to incriminate itself by admitting to infringements of the competition rules. Undertakings cannot, however, refuse to produce documents on grounds of self-incrimination.

Case-law also recognizes that legal professional privilege (LPP) is attached to communications between the undertaking under investigation and an independent lawyer entitled to practice in one of the Member States (as opposed notably to in-house counsels), insofar as the documents concerned are made for the purposes and in the interests of the clients’ rights of defense. In light of this case-law, the Best Practices explain that it is for the undertaking claiming LPP to adduce elements so as to justify this claim. If the Commission is not convinced, it may decide to order the production of the document(s) in question – a decision against which the undertaking may lodge a request for annulment with the General Court. In many cases, a cursory look by DG Competition officials may be sufficient to convince them that a document is protected by LPP. Should the undertaking be unwilling to allow even a cursory glance at the document and should there be indications that the document may be protectable, the Commission may opt for the ‘sealed envelope’ procedure. Note that the latter statement deviates from the procedure described by the Court of First Instance in Akzo, where it is state that the sealed envelope procedure will, and not may, be applied.

As indicated in the Best Practices, in the course of the investigative phase, the Commission may hold informal meetings (or phone calls) with the parties subject to the proceedings, complainants or third parties (either upon request or at the Commission’s own initiative). In general, the parties, complainants or third parties are invited after such meetings or substantive calls to substantiate their positions in writing. A non-confidential version of any written documentation prepared by the undertakings which attended a meeting held by DG COMP, together with a brief note prepared by the latter’s services, will be made accessible to the parties subject to the investigation at the stage of access to file (cf. infra).

A point of criticism, which came to light in Intel is that the Commission does not draft reports of all meetings it has with undertakings. The wording used in the Best Practices does not alleviate all concerns. It can be presumed that crucial meetings will be reported on. However, in Intel, the content of such an unreported meeting was used as incriminating

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45 Best Practices, §§ 48 et seq.

46 In such scenario, officials may place a copy of the contested document in a sealed envelope and then remove it and bring it to DG Competition’s premises. If the company brings an action for annulment and applies for interim relief, the Commission will not open the envelope and will not read the documents until the EU Courts have decided on this application for interim measures. Best Practices, §§ 50-51.

evidence to find abusive behavior. The Ombudsman therefore stated, at §111: “principles of good administration require that the Commission should ensure that a proper record is made, in some form, and subsequently included in the file, of all the ‘information relating to the subject-matter of an investigation’ that was gathered by the Commission in the course of an investigation”.

The Commission may also, at its own initiative or upon request, invite the (individual) parties subject to the proceedings to so-called State of Play meetings. No State of Play meetings are held with complainants or third parties. One such meeting will normally be held shortly after the opening of proceedings so as to inform the parties of the issues identified and to allow them the opportunity to react initially. A second meeting is generally organized at a more advanced stage in the investigation in order to give the parties an opportunity to understand the Commission’s preliminary views. Exceptionally, the Commission may also take the initiative to invite all parties involved in the investigation to a so-called ‘triangular’ meeting, if it deems it desirable to hear the views of all parties in a single meeting. In addition, it is normal practice to offer the parties subject to the proceedings an opportunity to discuss the case either with the Competition Commissioner, the Director-General, or the Deputy DG for antitrust.

Save in the context of cartel enforcement, the Commission will normally provide the parties with the opportunity of commenting on a non-confidential version of the complaint. It may also request the parties to comment on other key submissions made by the complainant or other parties or to comment on documents found in inspections.

At the end of the investigative phase, the Commission has essentially three options. First, it can issue a Statement of Objections (SO) with a view to adopting a prohibition decision. Second, insofar as commitments are being offered, the Commission may initiate the commitments procedure. Third, if the Commission finds there are no grounds to pursue the case, it may decide to close the case (e.g., by rejecting a formal complaint). Each of these options is further elaborated upon below.

### 1.2. Procedure leading up to a Prohibition Decision (second phase)

Once the Commission has decided to proceed to the second stage of the procedure with the aim of adopting a prohibition decision, the right of the parties under investigation to be heard becomes of key importance. Thus, Article 27(1) MoR emphasizes that the Commission ‘shall base its decisions only on objections on which the parties concerned have been able to comment.’

The current Commission practice already contains a large number of safeguards aimed at protecting the right to be heard. The most important ones will be discussed hereafter.
1.2.1. Hearing Officer

Hearing Officers are officials administratively attached to the Competition Commissioner but which are considered to be independent. They are specifically entrusted with ensuring that the rights of defence are safeguarded. The Hearing Officer is an independent arbiter that can review disagreements arising between DG Competition and a party to the procedure. In order to carry out its tasks, the Hearing officer has been attributed decision-making powers concerning extension of deadlines, access to file and confidentiality. The Hearing Officer also organizes and conducts the oral hearings. They also decide on the admission of third parties to the oral hearings. At the end of the procedure, the Hearing Officer drafts a report on whether the procedural safeguards have been respected throughout the proceedings.

The Hearing Officers’ tasks during the investigative phase are very limited, but they sometimes intervene in discussions concerning the right to be informed about the scope and purpose of the investigation, the privilege against self-incrimination; and the right to be represented by a lawyer. Sometimes they also intervene in confidentiality issues during the first phase. It is generally felt within the legal community that the Hearing Officer’s role only comes into play after issuing the SO, contrary to what may be the perception when reading the Guidance. Indeed, the Hearing Officer should be a protector of the rights of defence throughout the entire procedure. This could be achieved by broadening the current mandate of the Hearing Officer and making sure that he/she is aware of all ongoing investigations.

The Hearing Officer’s decisions are in principle not open to separate judicial review. One exception to this are the ‘Article 9 Letters’ whereby the Hearing Officer does not accept a claim for confidentiality. The Guidance explains in more detail the procedure that must be followed when confidentiality is discussed. This procedure is also referred to as the “Akzo”-procedure. The Hearing Officer verifies first whether the information is confidential per se. If the answer is in the affirmative, the Hearing Officer subsequently carries out a balancing test, weighing the interest in confidentiality for the undertaking against the addressee’s interest to be effectively heard on the information. When the Hearing Officer comes to the conclusion that partial or full disclosure is required, the information provider will be (i) informed via a ‘pre-Article 9 letter’ and (ii) granted a deadline within which to react. If the information provider continues to object to the disclosure, the Hearing Officer – if he maintains his position – will issue the Article 9 decision. The information provider can appeal that decision to the General Court and can request interim measures. The information provider is requested to inform the Hearing Officer of its intentions to initiate such proceedings as the Hearing Officer will wait to disclose the disputed information until the President of the General Court has issued an order.

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54 Terms of Reference, Articles 10, 8 and 9 respectively.
55 Terms of Reference, Article 4(1).
56 Terms of Reference, Article 6 and 7.
57 Guidance, §11.
The function was introduced as a reaction to persistent criticism as to the poor observance of the rights of defence in the course of competition proceedings before the Commission, yet this development has admittedly failed to put an end to these objections.

One of the criticisms that can be voiced is that the Hearing Officer comes from within the ranks of the Commission. As such, it creates at least the impression that a Hearing Officer will not always be impartial.

1.2.2. Statement of Objections (‘SO’) and written reply

An important implication of the parties’ right to be heard in this context pertains to the obligation on the part of the Commission to inform the parties of the case against them. To this end, the Commission will issue a so-called Statement of Objections (SO) (Art. 10(1) MoR), which sets out the Commission’s factual findings, its preliminary legal analysis, as well as the duration and gravity of the alleged infringement of Articles 101 and/or 102 TFEU. The SO will also indicate whether the Commission intends to impose a fine and what behavioral or structural remedies (if any) it is contemplating. While the SO is an important catalyst in the second stage of the proceedings, the factual findings and legal views contained in the SO are not binding upon the Commission. The SO’s purpose is to inform the parties and, based on the parties’ response, the Commission can modify its views on the facts, the legal findings or the amount of the fines. Therefore, the SO is not an act against which an action for annulment can be brought.

By analogy with the parties under investigation, Article 6(1) IR stipulates that complainants shall be provided with a copy of the SO (albeit a non-confidential version) and will be granted the opportunity to express their views. Furthermore, Article 13(1) IR states that other natural or legal persons that apply to be heard and show a sufficient interest may submit their views in writing.

Within the time limit set by the Commission – this may range between a minimum of four weeks (Art. 17(2) IR) to 2 or 3 months for more complex cases – the addressees of a Statement of Objections can submit their written replies. Furthermore, the Commission may give one or more of the parties a copy of (excerpts of) the non-confidential version of the (other) parties’ written replies to the SO and give them the opportunity to comment. The Commission may also decide to do so with respect to complainants and third parties which have a sufficient interest to be heard.

An important imperfection in the current system is that an undertaking under investigation may not obtain access to the written replies of any of the other undertakings under investigation. Indeed, the wording of the Best Practices appears to leave room for unequal treatment of the undertakings concerned as the Commission “may” decide to grant access to another undertaking’s response. However, as statements made by one undertaking may affect the legal position of another undertaking, access should be organised, just as is the case with submissions made by any undertaking before the SO.

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61 Shortly after receipt of the SO by its addressees, the Commission will normally publish a press release setting out the key issues (with the exception of settlement procedures in the context of cartels). Best Practices, § 79.
62 As will be explained below, complainants do not have access to the Commission’s file.
63 Best Practices, § 87. Upon reasoned request, parties may also request an extension of the deadline (Art. 17(4) IR).
64 Best Practices, § 89.
1.2.3. Access to the file - Confidentiality

In order to prepare their written replies to the SO (cf. infra) and to organize their defense, the addressees of the SO are granted access to the Commission’s file, in accordance with Article 27(2) MoR and Articles 15-16 IR, as elaborated further in the Commission’s Notice on access to file (hereafter ‘Access Notice’). According to well-established case-law ‘access to the file’ is considered an integral part of the right to be heard. It entails an obligation for the Commission to make available to the undertakings under investigation all documents, whether in their favour or otherwise, which it has obtained in the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved. In light of the ‘equality of arms’ between the Commission and the parties investigated, it is not for the Commission alone to decide which documents may be of use for the latter’s defence. Accordingly, the Commission must give the advisers of the undertaking concerned the opportunity to examine all documents which may be relevant so that their probative value for the defence can be assessed.

Case-law holds that for the failure to communicate an exculpatory document to give rise to a breach of the rights of the defence, it is sufficient for the undertaking to show that it would have been able to use the exculpatory document in its defence. As for incriminating documents, the undertaking must show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence.

As indicated in Article 15(2) IR, ‘access to the file’ does not extend to internal documents of the Commission, nor to ‘business secrets’ or ‘other confidential information’. In order to allow for the protection of sensitive information, Article 16 IR provides that parties

65 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005, C 325/07. As a general rule, several provisions emphasize that access to the file is granted on condition that it shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU (E.g., Art. 8(2), 15(4) IR).
68 Case C-204/00 P Aalborg Portland A/S and others v. Commission [2004] ECR I-123, §§ 74-75: “It is sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence (…), in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission’s assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine (…).” Also Case T-161/05 Hoechst GmbH v. Commission [2009] ECR II-3555 and Case T-53/03 BPB v. Commission [2008] ECR II-1333.
70 Access Notice, §18: “In so far as disclosure of information about an undertaking’s business activity could result in a serious harm to the same undertaking, such information constitutes business secrets. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking’s know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy.”
71 Access Notice, §19: “The category ‘other confidential information’ includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking.” This applies e.g. to information whose disclosure would give rise to retaliatory measures against its author.
Remark: a special treatment is moreover provided in respect of corporate statements made by applicants for Leniency. See: Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006, C 298/17, §§ 33-34.
72 Cf. Articles 28 (‘professional secrecy’) and 30 MoR.
making known their views or providing information in the course of the procedure are required to clearly identify any material which they consider to be confidential, giving reasons, and to provide a separate non-confidential version. If parties fail to do so within the specified time, the Commission may assume that the documents or statements concerned are non-confidential (Art. 16(4) IR).

When conflicting views arise as to the confidential nature of certain documents/statements – as is often the case –, the matter will be dealt with by the Hearing Officer.

Given the difficulties relating to access to file and the scope of confidentiality, the Commission’s Best Practices spell out two alternative procedural practices, whereby (for reasons of efficiency) information providers would (partially) waive their rights to confidentiality in return for which the party being granted access would limit access to the information to a restricted circle of persons (e.g., only to external counsel), viz. the ‘negotiated disclosure procedure’ and the ‘data room procedure’73.

By contrast, in accordance with the Court’s AKZO judgment, complainants do not enjoy the same access to the file as the parties under investigation (otherwise undertakings could lodge complaints simply in order to obtain access to other undertakings business secrets).74 Other natural or legal persons that apply to be heard and show a sufficient interest shall be informed by the Commission in writing of the nature and subject-matter of the procedure. However, no access to the file whatsoever is granted.

1.2.4. Oral Hearing

Parties under investigation not only have the right to reply in writing to the Commission’s SO, they also have the right to call for an oral hearing, so as to further develop their written arguments (Art. 12 IR). Oral hearings are held behind closed doors. They are held in the presence of senior management of DG Competition, representatives of the member states and are supervised by the Hearing Officer (Art. 14 IR). The Hearing Officer will report on the hearing (in light of the parties’ right to be heard) to the Competition Commissioner.75 This report, however, is not made available to the parties. Only the Hearing Officer’s (much shorter) final report, which is attached to the draft decision submitted to the College of Commissioners, is made known to the parties.

In addition to the parties’ right to an oral hearing, the Commission76 may also, where appropriate, (and upon request) afford complainants or other natural or legal persons showing a sufficient interest, the opportunity to develop their arguments at the oral hearing of the parties (Art. 6(2) and 13(2) IR). The Commission may also invite other persons to express their views in writing or to attend the oral hearing insofar as deemed useful (Art. 13(3) IR).

It is at the oral hearing that it becomes most evident that the Commission is investigator, prosecutor and judge. Indeed, all three aspects of the Commission’s task come to the fore during the hearing.

76 In fact, the Hearing Officer.
Undertakings under investigation often are under the impression that the oral hearing offers little chance for an actual defence, let alone, are useful to convince the decision-makers not to follow the SO or, as the case may be the SO and the Supplementary SO. The closed door nature of the entire hearing also does not bode well for transparency. In regular court proceedings, the principle is that proceedings are open to the public, except when there is an explicit decision to the contrary.

1.2.5. Supplementary Statement of Objections and Letter of Facts

Finally, when new evidence is identified which the Commission wishes to rely upon, the Commission may adopt a Supplementary Statement of Objections (hereafter “Supplementary SO’) or a Letter of Facts. The aforementioned principles pertaining to the right to be heard apply mutatis mutandis in these scenarios. However, it would appear that access to the file in this scenario is limited and leaves too much discretion to the Commission. Indeed, the process of the Supplementary SO is limited to situations where the Commission finds new evidence justifying the issuance of additional objections or modifying the intrinsic nature of the infringement with which an undertaking is charged. In other words, the wording of the Best Practices do not appear to impose a duty to disclose exculpatory evidence. Although it can be expected the Commission would communicate such information, it would contribute to legal certainty if this duty were to be included in the Best Practices.

Another rights of defence issue can be taken with the letter of facts. These will be sent when additional evidence corroborates the objections already raised. This practice is now finally made public via the Best Practices. Even though its use is limited, it may be considered a limitation on the rights of defence as the addressees have no right to separately dispute and discuss the documents in question.

1.2.6. Possible decisions

The second phase of the antitrust procedure may give rise to a variety of Commission decisions. First, the Commission may adopt procedural decisions, for instance settling the question of the confidentiality of documents. Under Article 8 MoR, the Commission has the power to take decisions ordering interim measures, for instance, by ordering a dominant undertaking to resume supplies to a client. Article 8 MoR nonetheless makes clear that this possibility is limited to cases of urgency due to risk of serious and irreparable damage to competition.

Otherwise, leaving aside for the moment the possibility to adopt commitment decisions under Article 9 MoR (cf. infra), Article 7 MoR allows the Commission to take a decision finding that there is an infringement of Articles 101 or 102 TFEU and requiring the undertakings to bring the infringement to an end. Thus, the Commission can adopt negative decisions, calling upon undertakings to refrain from certain conduct. Furthermore, insofar as proportionate, it can also impose positive behavioral remedies, which it did for example by ordering Microsoft in 2004 to make available certain interoperability

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77  Best Practices, §§ 95-98.
78  Remark: it must be recalled that the Commission may also decide to drop the case at the end of the second phase.
80  The relevant parameters are further elaborated in the European Courts’ case-law. See e.g., Case T-184/01 R IMS Health [2001] ECR II-1.
information through its windows operating system.\textsuperscript{81} If there are no equally effective behavioral remedies available (or if such behavioral remedy would actually be more burdensome for the undertaking), the Commission can exceptionally impose structural remedies, changing the structure of an undertaking, for example, by ordering the divestment of parts of the company. In practice, however, structural remedies are mainly used in the context of commitment decisions (cf. infra).

Article 10 MoR further enables the Commission, ‘where the public interest relating to the application of Articles 101 and 102 so requires’, to find that the cited Articles are not applicable to the case under investigation. Article 10 MoR may be relevant for exceptional cases where there is a need to clarify the law or to ensure its consistent application. In practice, however, the provision has so far remained dead letter.

Articles 23 and 24 MoR spell out the Commission’s competence to impose fines and periodic payments respectively. Fines may relate to either procedural infringements (Art. 23(1)) or to substantial infringements (Art. 23(2)).\textsuperscript{82} Fines for procedural infringements can go up to 1 per cent of the undertaking’s total turnover in the preceding business year. Fines for substantive infringements can go up to 10% of the undertaking’s total turnover in the preceding business year. Periodic penalty payments may be imposed as a means to compel undertakings to put an end to an infringement pursuant to a decision adopted under Article 7 MoR, but also to submit to an inspection etc. Periodic penalty payments shall not exceed 5 per cent of the average daily turnover in the preceding business year per day.

The Commission’s policy on setting fines is further explained in the 2006 Fining Guidelines,\textsuperscript{83} which notably identify possible aggravating or mitigating circumstances, and which acknowledge that an undertaking’s ‘inability to pay’ may exceptionally result in a reduction being granted. Another important Commission instrument concerns the 2006 Leniency Notice.\textsuperscript{84} This document spells out the terms and conditions under which undertakings may obtain immunity from fines when they are the first to submit evidence that enables the Commission to find a competition law infringement, or may obtain reduction in fines when they produce information of ‘significant added value’. A more in-depth analysis of these mechanisms is beyond the aim of the present memo. Suffice it to note that in light of the European Courts’ unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or period penalty payment (recognized in Article 31 MoR), there is considerable case-law as to the legal principles governing fining, such as the \textit{ne bis in idem} principle or the proportionality principle\textsuperscript{85}.

Although the Leniency Notice will not be discussed in more detail, it is cause for some concern, also as regards due process and the right of defence. Many recent cartel decisions are the result of immunity or leniency applications. In other words, hardcore cartels are uncovered as a result of one or more undertakings’ initiative, rather than the Commission’s market scrutiny. As the information is sent to the Commission, and undertakings also submit corporate statements confessing their wrongdoing, there is little reason for the Commission to thoroughly investigate whether all statements and claims made actually

\textsuperscript{81} For an example of a judgment finding that the Commission has violated the proportionality principle when imposing behavioral remedies, see T-395/94 \textit{Atlantic Container Line AB v. Commission} [2002] ECR II-875.

\textsuperscript{82} The limitation period is laid down in Article 25 MoR; the limitation period for the enforcement of penalties in Article 26 MoR.

\textsuperscript{83} Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, \textit{OJ} 2006, C 210/2.

\textsuperscript{84} Commission Notice on immunity from fines and reduction of fines in cartel cases, \textit{OJ} 2006, C 298/17.

correspond to reality. Indeed, in view of the high stakes involved – fines often amount to many million Euros – undertakings have an incentive to produce (i) evidence that allows the Commission to carry out an inspection or find an infringement of Article 101 TFEU\(^86\) or (ii) evidence that has a significant added value with respect to the evidence the Commission already has in its possession.\(^87\) For companies it becomes very difficult to defend itself against statements from an immunity applicant when there is no documentary evidence available. These statements, however, may result in the finding that a cartel, e.g., lasted longer or encompassed a company that effectively already had exited the cartel, thus resulting in higher fines for that company than might otherwise have been the case.

1.2.7. The settlement procedure

While applications for leniency have virtually no effect on the conduct of the procedure or the scope of the right to be heard,\(^88\) the situation is somewhat different in respect of cartel cases where the Commission follows the settlement procedure. Note that the Best Practices are not applicable to settlement or leniency/immunity procedures\(^89\).

The settlement procedure was introduced in 2008 in order to enable the Commission to deal with complex cases more efficiently. In essence, it constitutes a simplified procedure, whereby undertakings unequivocally acknowledge their liability for a competition law infringement in return for an (additional)\(^90\) reduction of 10% on the fine that would otherwise have been imposed. The particular features of the settlement procedure are laid down in Article 10a IR and in the Commission’s Settlement Notice\(^91\).

Under Article 10a(1) IR, the Commission may initiate the settlement procedure by inviting parties to indicate within a given time limit whether or not they are prepared to engage in settlement discussions. The undertakings will be informed by the Commission of the objections it envisages to raise against them; the evidence relied upon; non-confidential versions of any specified accessible document listed in the case file at that point in time, insofar as a request by the party is justified for the purpose of enabling the party to ascertain its position, and; the range of potential fines.

If settlement discussions progress, the Commission may set a time limit within which the parties may submit (orally or in writing) a final settlement submission, acknowledging their liability and indicating the maximum fine they would accept. In reaction thereto, the Commission may notify a statement of objections to the parties. Upon the parties’ subsequent replies to this statement of objections, confirming their commitment to settle, Article 10a IR allows the Commission to proceed, without any other procedural step, to the adoption of an infringement decision. On the other hand, the Commission is free to discontinue settlement discussions at any time (Art. 10a(4) IR).

Under the settlement procedure, investigated undertakings consent to a curtailment of their right to be heard. Thus, they confirm that they will in principle not request access to the file or request an oral hearing (Art. 12(2) IR and 15(1)a IR). The (potential) procedural rights of other actors may also be affected as a result. Thus, in cases where the settlement

\(^{86}\) This is, next to being the first, a condition for immunity.

\(^{87}\) This is one of the conditions for leniency.

\(^{88}\) See, however, as regards corporate statements of leniency applicants, Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006, C 298/17, §§ 33-34.

\(^{89}\) Best Practices, §3.

\(^{90}\) Remark: the settlement procedure can fully be combined with applications for leniency.

\(^{91}\) Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Regulation 1/2003, OJ 2008, C 167/1.
procedure applies, complainants will not receive a copy of the non-confidential version of the SO, but will simply be informed in writing of the nature and subject matter of the procedure (Art. 6 IR).

The Commission adopted its first settlement decision on 19 May 2010 in the DRAM cartel. In the meantime, the Commission has also adopted a so-called ‘hybrid’ settlement decision, i.e., a settlement decision in a case where not all of the cartel participants agreed to settle (thus at least reducing the aspired efficiency gains). It may finally be observed that while actions for annulment are unlikely, undertakings are not legally prevented from lodging an action for annulment against settlement decisions.

1.3. **Other aspects of the Commission’s antitrust procedure**

1.3.1. Closing of a case without any decision

As indicated earlier, the Commission may also at any stage of the proceedings decide to close the case. In such scenario, the parties having been subject to investigative measures will be informed thereof. If proceedings have been formally opened, or if DG Competition has otherwise made public the fact that it was investigating a given case, the fact of the closure will similarly be made public on the Commission’s website and/or via a press release.

1.3.2. Procedure leading up to a Commitment Decision

In cases where the Commission intends to adopt an infringement decision without, however, imposing fines (thus excluding hardcore cartels), the Commission may also opt for the commitment procedure. The essence of this procedure consists in the fact that the Commission does not find an actual infringement of competition law, but rather adopts a decision under Article 9 MoR, rendering binding (for a specified period) the behavioral and/or structural remedies offered by undertakings on a voluntary basis.

As the Best Practices indicate, undertakings may at any point in time signal their interest in discussing commitments (and preferably at an early stage). A State of Play meeting will then be offered to the parties with the aim of assessing the ‘genuine willingness’ of the undertakings to offer effective remedies. If the meeting is constructive, the Commission will normally issue a Preliminary Assessment (replacing the SO), summarizing the competition concerns at stake.

After receiving the Preliminary Assessment, the parties will normally have one month to formally submit unambiguous and effective commitments. If need be, a trustee can be appointed to monitor the implementation.

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93 Commission Press Release IP/10/985, 20 July 2010 (with regard to the animal feed phosphates cartel).
95 Best Practices, § 70.
96 For the latter undertakings, the commitment procedure offers a possibility to escape a formal condemnation. From the Commission’s perspective, the procedure allows for faster proceedings and lower administrative costs. In addition, it sometimes allows the Commission to clarify its views on certain issues quicker than it would have been able to had it followed the regular procedure.
97 Best Practices, §§ 104 et seq.
98 It may also be the case that an SO was already sent to the parties. This in itself does not exclude that commitments may still be accepted.
Before rendering the commitments binding, the Commission will first market test them. To this end, the Commission publishes the full text of the commitments on its website and issues a press release setting out the key concerns and the proposed remedies. Interested third parties are invited (sometimes actively) to submit their observations within a fixed time-limit (of no less than one month).

After market-testing, a second State of Play meeting will be held. Should the market test engender a positive response, the Commission may proceed to adopting an Article 9 Decision. Otherwise, the Commission may revert to the Article 7 procedure. It may also be that the undertaking(s) offer(s) a modified version of the commitments, which then are also market-tested. Under certain conditions (e.g., in case of non-compliance with the remedies), the Commission may also reopen proceedings after having issued a commitment decision (Art. 9(2) MoR).

1.3.3. Rejection of complaints

Special rules apply when an investigation has been opened as a result of a formal complaint (by means of the submission of a 'Form C') by any 'natural or legal person who can show a legitimate interest.' The Commission is not obliged to handle complaints within a specific time limit, provided that it acts within a reasonable period. The Notice on Handling Complaints nonetheless indicates that the Commission proposes to take on a complaint within an indicative time frame of four months (§ 61).

Apart from the complainant’s right to be heard in the course of the procedure as considered above, the Commission, insofar as it does not wish to pursue a case, will first inform the complainant in a meeting or by phone that it has come to the preliminary view that the case (1) lacks ‘Community interest’; that (2) the complaint is insufficiently substantiated, or that; (3) the Commission has a lack of competence to deal with the case.

If, in reaction hereto, the complainant does not withdraw the complaint, the Commission shall inform the complainant by a formal letter that there are insufficient grounds for acting and will set a time-limit (of at least four weeks) for written observations (Art. 7(1) IR). In this context, the complainant also has the right to request access to the documents on which the Commission bases its provisional assessment (albeit that this access shall not

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99 Both the Commission and the undertakings concerned may at any time decide to discontinue commitment negotiations.
100 On the application of the principle of proportionality to the Commission’s margin of discretion in accepting commitments as well as on the procedural rights of interested parties, see: Case C-441/07 P European Commission v. Alrosa [2010] ECR-000.
101 Art. 5 IR (and Annex). Remark: interested parties may also decide merely to inform the Commission of their concerns, without, however, submitting a formal complaint. In such scenario their procedural rights will be more limited. Undertakings are also required to submit their complaint to the authority most likely to be well placed to deal with the case (e.g., an NCA). Guidance on who is best placed can be found in the Commission’s Notice on cooperation with the NCAs ([2004] O.J. C-101/43, §§ 8-15).
102 The requirement of a ‘legitimate interest’ is broadly interpreted in existing case-law. See e.g. Case C-125/07 Erste Bank der österreichischen Sparkassen v. Commission, [2009] ECR 1-08681. Examples of potential complainants can be found in the Commission’s Notice on the Handling of Complaints by the Commission under Article 81 and 82 EC, OJ 2004, C 101/65, §§ 35-40 (referring a.o. to consumer associations or local or public authorities).
104 The notion of ‘Community interest’ reflects the discretion of the Commission in prioritizing cases before it when allocating resources. The relevant criteria are spelled out in the Notice on Handling Complaints at § 44. See also Case T-24/90 Automec Srl v. Commission [1992] ECR II-2273.
105 E.g. because the alleged infringement is unlikely to have any effect on trade between Member States and/or because an NCA is dealing, or has dealt, with the case.
106 See Article 17(2) IR. In accordance with Article 17(3) IR, the complainant may request an extension of the time-limit.
extend to business secrets and other confidential information of other parties) (Art. 8 IR). If the complainant does not react within the set time-limit, the complaint shall be deemed to have been withdrawn (Art. 7(3) IR). If the complainant does respond, the Commission must either initiate a procedure (if the submissions are convincing), or decide to reject the complaint by formal decision pursuant to Article 7(2) IR. This decision is then open to judicial review by the General Court.

1.3.4. Adoption and publication of decisions

Finally, a word on the adoption and publication of final decisions pursuant to Articles 7, 9 and 23 MoR. All these decisions are adopted by the Commission, upon proposal of the Competition Commissioner. Parties are provided with a certified copy of the full text of the decision as well as a copy of the Hearing Officer’s final report. Complainants shall receive a non-confidential version of the decision.

After adoption of the decision, a press-release will normally be issued and a summary of the decision will be published. In addition, pursuant to Article 30(2) MoR, a non-confidential version of the decision will be published as soon as possible on DG COMP’s website. Decisions rejecting complaints, which are of general interest, may also be made public on DG COMP’s website.

1.4. General remark on the decision making process of DG COMP

As already mentioned, the Commission currently combines the role of investigator, prosecutor and judge. This combination has been criticized in the past and opposition has become stronger in view of the fines that are being imposed on companies, particularly in the area of cartels and abuse of dominant position.

A number of member states (e.g., Belgium and Sweden) have a system where one entity carries out the investigation and drafts a SO. However, as a next step, the case is brought before an (administrative) court which then will hear all parties concerned. It is that court that will ultimately decide on the fines. Such a system appears more in line with the requirements of impartiality and independence in the proceedings as required in Article 6(1) of the European Convention on Human Rights.

It is to be expected that a challenge of a Commission decision based on this argument will be launched now that it is likely that the European Union will become a member of the ECHR as a result of the Lisbon Treaty.

2. THE EU MERGER PROCEDURE

Contrary to antitrust investigations discussed in the previous chapter, merger control proceedings are adhering to very strict timelines. Nevertheless, it is fair to say that the procedural rights of the notifying party(ies) are safeguarded to a large extent. This is the case, mainly, because of the existence of pre-notification contacts with the Commission, regular state of play meetings, multiple informal contacts, the existence of an SO, the right to a hearing, etc. Furthermore, the Commission has been put on "high alert" after the then Court of First Instance (now General Court) annulled a number of Commission decisions. This showed that effective judicial scrutiny of the Commission’s merger decisions occurs.

In accordance with Article 4(1) of the EC Merger Regulation (hereafter ‘ECMR’), every ‘concentration’ as that term is understood in Article 3 ECMR and further explained in the Commission’s Jurisdictional Notice – which exceeds the turnover thresholds laid down in Articles 1(2) and 1(3) ECMR and which is therefore deemed to have a ‘Community dimension’, must be notified to the European Commission. Concentrations with a Community dimension should normally be notified prior to their implementation and following the conclusion of a binding agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notifications may also be submitted at an earlier stage if the undertakings concerned demonstrate a good faith intention to conclude an agreement, or; in the case of a public bid, the acquirer has publicly announced an intention to make such a bid (Art. 4(1) ECMR).

Notified concentrations may not be put into effect or completed unless and until they have been declared compatible with the common market by the Commission or are presumed to be compatible due to the absence of a timely decision of the Commission (Art. 7(1) ECMR). Breach of the stand-still obligation may give rise to penalties not exceeding 10 per cent of the aggregate turnover of the undertaking(s) concerned (Art. 14(2)(b) ECMR). Upon reasoned request, the Commission may nonetheless permit (conditional) derogations from the standstill obligation (Art. 7(3) ECMR). Article 7(2) ECMR also provides for an automatic derogation from the standstill obligation in a limited number of specific cases.

Notification in principle involves the submission of a completed Form CO together with the necessary supporting documents.

Given the large amount of information that ought to be included in a Form CO and given the concomitant workload for notifying parties, Annex II to the (Merger) Implementing Regulation identifies certain notifications that, in principle, do not raise substantial competition concerns, and which may therefore be notified by means of a Short Form CO.

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108 See also footnote 119 below.
112 The calculation of turnover thresholds is further explained in Article 5 ECMR and in Part C of the Jurisdictional Notice.
113 In cases of mergers or acquisitions of ‘joint’ control, notifications should be submitted jointly by the parties involved. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings. (Art. 4(2) ECMR).
114 This may, for example, be helpful in order to allow rescue operations of undertakings in difficulties.
(such notifications will in turn result in a short-form decision). The Commission may nonetheless insist on the submission of a more lengthy Form CO if it considers that the conditions of Annex II are not fulfilled, or if it deems this necessary for an adequate investigation of possible competition concerns. Conversely, the Commission may waive the obligation to provide any particular information or documents, or with any other requirement specified in Form CO or Short Form CO, where it deems such obligations or requirements not necessary for the examination of the case (Art. 4(2) MIR).

2.1. The different stages of EU Merger Proceedings

2.1.1. The pre-notification stage

The Commission’s Best Practices on Merger Proceedings (hereafter ‘Merger Best Practices’) invite undertakings to contact the Commission prior to actual notification to discuss various jurisdictional and other legal issues, even in seemingly non-problematic cases. Pre-notification contacts should preferably be initiated at least two weeks before the expected date of notification (depending on the complexity of the case). They should be launched with a submission which allows the case-team to engage in a preliminary examination of the background of the transaction and its possible impact on competition. The aforementioned submission may give rise to oral or writing comments on the part of the Commission, but may also give rise to one or more pre-notification meetings.

Irrespective of whether pre-notification meetings take place, the parties are encouraged to provide a substantially complete draft of the notification at least five working days before filing a formal notification, so as to allow the Commission to comment on its adequacy.

The pre-notification stage, which takes place in strict confidence, serves various purposes. It allows parties to obtain the Commission’s views on jurisdictional issues (e.g., to assess whether the concentration indeed has a ‘Community dimension’); on the completeness of the notification (thus avoiding unnecessary delays) and the possibility of ‘waivers’ from the strict requirements of Form CO, as well as; on the appropriateness of the submission of a Short Form CO. Pre-notification contacts also allow for a more ‘tailor-made’ notification, in that the notifying party/ies can properly address concerns identified by the case-team.

In the course of the pre-notification stage, undertakings may also, through the submission of so-called ‘Reasoned Submissions’ (using the Form RS in Annex III to the (Merger) Implementing Regulation), request the application of a case allocation mechanism laid down in Articles 4(4) ECMR and 4(5) ECMR. The former Article provides that where a concentration has a Community dimension, the notifying parties may, prior to notification to the Commission, make a reasoned submission that a concentration may significantly affect competition in a distinct market in a Member State and should therefore be examined in whole or in part in that Member State. The latter Article deals with the converse situation: when concentrations do not have a Community dimension, but are capable of being reviewed under the national competition laws of at least three Member States, undertakings may indeed request that the concentration be examined by the Commission.

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115 E.g. when there is no horizontal or vertical overlap between the parties, or when a part is to acquire sole control of an undertaking over which it already has joint control. See also: Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation No. 139/2004, OJ 2005, C-56/32.
In both scenarios, the Commission informs all Member States without delay. The Member States concerned by the request have 15 working days to signal their consent/opposition. If the relevant Member State (Art. 4(4) ECMR) or one of the relevant Member States (Art. 4(5) ECMR) opposes the transfer, the request will be rejected. Otherwise, in case of a request under Article 4(4) ECMR, the Commission has a period of 25 working days from receiving the Form RS to determine whether or not to refer the case to the Member State identified. Furthermore, if no relevant Member State objects to a request under Article 4(5) ECMR (in a timely manner), the request will similarly be granted.

It should finally be observed that the Merger Regulation also provides for other flexible mechanisms for the transfer of merger reviews from the Commission to the national level and vice versa\textsuperscript{117}. These mechanisms, however, are triggered at the initiative of either the Commission or the national authorities (rather than the undertakings concerned) after actual notification. A more in-depth review falls beyond the scope of the present memo.

2.1.2. Phase I investigations

Upon receipt of a formal notification, the Commission will initiate the Phase I investigation and will publish a notice in the Official Journal\textsuperscript{118} as well as on DG COMP’s website. Within a period of 25 working days following the receipt of a complete notification,\textsuperscript{119} the Commission will then have to conclude its preliminary examination of the case, so as to adopt one of the following decisions: (1) a decision pursuant to Article 6(1)(a) ECMR, finding that it does not have jurisdiction; (2) a (conditional) clearance decision pursuant to Article 6(1)(b) allowing the concentration to go through, or; (3) a decision pursuant to Article 6(1)(c) initiating the Phase II investigation\textsuperscript{120}.

When the undertakings concerned offer commitments with a view to rendering the concentration compatible with the common market or where the Commission receives a request from a Member State to refer the case to it, the 25-day time limit will be extended by an additional 10 working days (Art. 10(1) ECMR). In addition, Article 9 MIR acknowledges that the time period may be suspended under certain circumstances for instance when the Commission has ordered investigative measures or when the parties fail to inform the Commission of material changes in the facts.

The large majority of notifications are cleared unconditionally in the course of the Phase I investigation. However, clearance decisions may also be adopted after the notifying parties have modified the notified transaction and/or put forward certain commitments (Article 6(2) ECMR), which are subsequently rendered binding by the clearance decision. Insofar as the Commission has ‘serious doubts’ within the meaning of Article 6(1)(c) ECMR with regard to the compatibility of the concentration, it will normally provide the notifying parties an opportunity to take part in a ‘State of Play’ meeting before the expiry of 15 working days into Phase I\textsuperscript{121}. If the Commission fails to adopt a decision within the legal

\textsuperscript{117} Articles 9, 21(4) and 22 ECMR. See also the Commission Notice on Case Referral in respect of concentrations, \textit{OJ} 2005, C 56/2.

\textsuperscript{118} Article 4(3) ECMR.

\textsuperscript{119} According to Article 5(2) MIR, where the information, including the documents, contained in the notification is incomplete in any material respect, the Commission shall inform the notifying parties without delay. In such cases, the notification shall only become effective (thus triggering the different time-limits) on the date on which the complete information is received by the Commission. See also: Merger Best Practices, § 23.

\textsuperscript{120} On the communication and publication of these decisions, see: Art. 6(5) ECMR.

\textsuperscript{121} Merger Best Practices, § 33. Such meeting may enable the notifying undertakings to propose certain remedies.
time-limit, the notified concentration shall be deemed to have been cleared (Art. 10(6) ECMR).

2.1.3. Phase II investigations

Insofar as the Commission has serious doubts with regard to the compatibility of the concentration with the common market, it initiates the in-depth ‘Phase II’-investigation, the aim of which is to assess whether the concentration could ‘significantly impede effective competition’, in particular as a result of the creation or strengthening of a dominant position.

Again, the Merger Regulation sets out strict time limits, the respect for which is of crucial importance given the commercial interests at stake. In principle, the Commission has a period of 90 working days following the initiation of Phase II to make its assessment (Art. 10(3) ECMR). This time period may be extended by 15 working days where commitments are offered by the parties after the 54th working day, and/or by (another) 20 working days where the parties so request, or at the request of the Commission with the consent of the parties. By analogy with what is the case for Phase I investigations, the Phase II time limits may be suspended in the scenarios identified in Article 9 MIR (e.g., a party refuses to submit to an inspection ordered by the Commission).

At the end of the proceedings, the Commission may adopt one of the following decisions: (1) a decision pursuant to Article 8(1) ECMR unconditionally clearing the concentration; (2) a conditional clearance decision under Article 8(2) ECMR, attaching certain conditions and obligations intended to ensure that the undertakings comply with the commitments they have entered into vis-à-vis the Commission, or; (3) a prohibition decision pursuant to Article 8(3) ECMR, declaring the concentration incompatible with the common market.

Any Phase II proceeding should be concluded by means of a decision under Article 8 ECMR, unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration (Art. 6(1)(c) ECMR). The legal framework governing the offering of commitments as well as the procedural rights of the parties involved and third parties are further dealt with below.

2.2. The powers of the Commission

Both in the course of Phase I and Phase II, the Commission can have recourse to a variety of investigative measures which by and large correspond to those available in the context of antitrust proceedings (cf. supra). Thus, under Article 11 ECMR, the Commission can request information from the undertakings which are a party to the concentration or from third parties (e.g., customers, suppliers, competitors), either by means of a simple request or through a decision compelling the addressee to supply the information concerned. In both cases, the Commission must notably indicate the legal basis and purpose of the request and set a time-limit for reply.

122 Such request should be made within 15 days and can be made only once (Art. 10(3) ECMR).
123 On the communication and publication of these decisions, see: Art. 8(8), 20 ECMR.
124 Guidance as to how parties may demonstrate that the transaction has been abandoned can be found in the Jurisdictional Notice (§§ 119-120). The Commission will have exceeded its powers if, in spite of the fact that the parties abandoned the concentration, it nonetheless adopts a prohibition decision. See Case T-310/00 MCI v. Commission [2004] ECR II-3253.
The Commission can also interview natural or legal persons that consent to be interviewed for the purpose of collecting information (Article 11(7) ECMR). It can similarly launch inspections at undertakings’ premises (both premises of the parties concerned as well as of third parties) (Art. 13 ECMR) or request the NCAs to do so (Art. 12 ECMR). As with antitrust proceedings, inspections can be based on a written mandate (in which case the addressee is not obliged to submit) or on a decision (which is binding on the addressee). The activities which the inspectors can undertake (e.g., sealing of premises, making copies, etc.) are essentially the same as in antitrust procedures. On the other hand, contrary to Regulation 1/2003, the Merger Regulation does not refer to the possibility of launching inspections at private premises. Contrary to antitrust enforcement, inspections at the undertaking’s premises are extremely rare practice, this would occur only if a company is suspected of breaching commitments or

As indicated earlier, non-compliance with investigative measures may result in a suspension of the time-limits on the part of the Commission (Art. 9 MIR).

By analogy with Articles 23 and 24 MoR (antitrust proceedings), Articles 14 and 15 ECMR spell out the Commission’s competence to impose fines and periodic payments respectively.\(^\text{125}\) The relevant rules are by and large identical. Fines may relate to either procedural infringements (Art. 14(1)) or to substantial infringements (Art. 15(2)). Fines for procedural infringements (e.g., the submission of incorrect or misleading information) can go up to 1 per cent of the undertaking’s total turnover in the preceding business year. Fines for substantive infringements (e.g., violations of the stand-still obligation) can go up to 10% of the undertaking’s total turnover in the preceding business year. Periodic penalty payments may be imposed as a means to compel undertakings to comply with the conditions imposed in a conditional clearance decision (Phase I or Phase II), or in the context of a conditional derogation from the standstill obligation, but also to compel undertakings to submit to an inspection etc. Periodic penalty payments shall not exceed 5 per cent of the average daily turnover in the preceding business year per day.

Furthermore, where a concentration is declared incompatible with the common market and the parties have already completed the transaction – either because the transaction was not notified or because the stand-still obligation was violated\(^\text{126}\) –, the Commission disposes of comprehensive powers, including the power to adopt interim measures (Art. 8(5) ECMR) or to adopt restorative measures (Art. 8(6) ECMR). Thus, the Commission may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore effective competition, or may order ‘any other appropriate measure’.\(^\text{127}\) The aforementioned powers can also be exercised when a concentration is implemented in breach of a condition or obligation.

Finally, Phase I or Phase II clearance decisions may be revoked by the Commission if it is discovered that they rest on false information for which one of the undertakings was responsible or information obtained by deceit, or where the undertakings concerned committed a breach of an obligation attached to the decision (Articles 6(3) and 8(6) ECMR). The Commission will then re-examine the transaction in the context of a renewed Phase I or Phase II proceeding.

\(^\text{125}\) Fines and/or periodic payments can only be imposed after the parties have been heard. See: Art. 18(1) ECMR, Article 14(3) MIR.

\(^\text{126}\) According to Article 7(4) ECMR, the validity of transactions that are implemented in breach of the stand-still obligation hinges on the Commission deciding on its compatibility with the common market.

\(^\text{127}\) See e.g. Case T-80/02 Tetra Laval v. Commission [2002] ECR II-4519, § 36.
2.3. The parties’ right to be heard and the role of third parties

2.3.1. The right to be heard and access to the file

Article 18(1) ECMR provides that, before taking a final adverse Phase II decision\textsuperscript{128} (other than a non-conditional clearance decision), the Commission shall give the persons and undertakings concerned the opportunity to make known their views on the Commission’s objections to the transaction. Article 18(3) ECMR explicitly emphasizes the rights of the defence of the parties directly involved, asserting that the Commission shall base its decision only on objections on which the parties have been able to submit their observations. Article 18(4) ECMR adds that natural or legal persons showing a ‘sufficient interest’ shall be entitled, upon application, to be heard. Insofar as it deems this necessary, the Commission is free to hear other natural or legal persons.

The basic principles of Article 18 ECMR are further elaborated in Articles 11-18 MIR. These Articles generally distinguish between three categories, notably ‘the notifying parties’, ‘other involved parties’, and ‘third persons’. While the notion of ‘notifying parties’ is fairly straightforward, ‘other involved parties’ refers to parties to the proposed concentration other than the notifying parties (such as the seller and the target). ‘Third persons’ are ‘natural or legal persons, including customers, suppliers and competitors, that demonstrate a ‘sufficient interest’ (in particular members of the administrative or management bodies of the undertakings concerned or the recognized representatives of their employees, as well as consumer associations).

First, as for the notifying parties, their right of defense is catalyzed by the issuing of a Statement of Objections (SO), which is addressed to them in writing, and which sets out the objections of the Commission in respect of the transaction (Art. 13(2) MIR). ‘Other involved parties’ are moreover ‘informed in writing’ of the Commission’s objections (without receiving the full SO). ‘Third persons’ are normally supposed to apply in writing to be heard themselves, after which the Commission shall inform them in writing of the ‘nature and subject matter of the procedure’ (Art. 16(1) MIR). Where third parties do not make an application to be heard, the Commission is under no obligation to keep them informed.\textsuperscript{129} The Commission may also invite other third parties to submit their observations at its own initiative. In each of the aforementioned scenarios, the Commission will set a time limit for reply\textsuperscript{130}.

When submitting their comments to the Commission’s objections, both the notifying parties and ‘other involved parties’ are entitled to request the opportunity to develop their arguments in a formal oral hearing (Art. 14(1)-(2) MIR). ‘Third persons’ will similarly be afforded the opportunity to participate in a formal hearing, insofar as they so request and the Commission deems this appropriate (without having an actual right thereto). Otherwise, the Commission is free to invite other natural or legal persons to a formal hearing on its own initiative (Art. 16(3) MIR). By analogy with antitrust proceedings, oral hearings are supervised by a Hearing Officer and take place behind closed doors.

Prior to the issuing of a Statement of Objections, there is no formal right of access to the Commission’s file, albeit that the Commission generally aims to give the notifying parties access to non-confidential versions of key documents (such as third party submissions\textsuperscript{128} The article also refers to decisions under Article 6(3) ECMR, Article 7(3) and Articles 14-15 ECMR.\textsuperscript{129} Case T-96/92 CCE de la Société Générale des Grandes Sources v. Commission [1995] ECR II-1213.
contradicting the parties’ own contentions) at an earlier stage in Phase II. Once an SO has been issued, the notifying parties have a formal right to request access to the Commission’s file (Art. 17(1) MIR) in accordance with the Commission’s Access to File Notice. The scope of the access to the file is *mutatis mutandis* the same as in antitrust proceedings and does not extend to documents containing business secrets, other confidential information or internal documents of the Commission or other authorities. ‘Other involved parties’, have a right of access to the file insofar as this is necessary for the purpose of preparing their observations (Art. 17(2) MIR). Third parties have no right of access to the file as such. The Commission’s Best Practices nonetheless foresee the possibility that third parties may be provided with an edited non-confidential version of the SO.

In order to enable the Commission to comply with its obligation to respect professional secrecy (Art. 17 ECMR), Article 18(2) MIR states that any person making known its views or comments or submitting information to the Commission in the course of the merger procedure shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission. Article 18(3) MIR adds that the Commission may also require persons and undertakings to identify any part of the SO, case summary or formal decision which contains business secrets. Disputes concerning (non-)confidentiality may be referred to the Hearing Officer.

2.3.2. Other aspects regarding the involvement of the undertakings concerned and of third parties

Apart from the strict provisions on the right to be heard and access to the file, the Merger procedure foresees in various formal and informal ways in which the undertakings concerned as well as third parties may be involved. Thus, as indicated earlier, already in the pre-notification stage, the notifying parties may meet with the Commission in the context of so-called pre-notification meetings. It is also possible that the Commission will, prior to notification, initiate informal market contacts to obtain information from relevant persons, undertakings or authorities. Such pre-notification contacts/enquiries would only take place, however, if the existence of the transaction is in the public domain and once the notifying parties have had the opportunity to express their views on such measures.

Upon notification, the concentration is published in the Official Journal in accordance with Article 4(3) ECMR. It is customary in such scenario for the Commission to invite third parties to comment within a short period, usually 10 days from the date of publication. In addition, the Commission may actively solicit comments from third parties with a sufficient interest, e.g., by sending out questionnaires. In doing so, the Commission may make use of the different investigatory instruments at its disposal (cf. supra). When the notifying parties offer commitments (cf. infra), the Commission will similarly ‘market test’ these by allowing interested third parties to share their views in this respect.

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130 The Commission shall not be obliged to take into account comments received after the expiry of a time limit which it has set (e.g. Art. 13(2) MIR.
131 Merger Best Practices, § 45.
132 Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 EC and Council Regulation 139/2004, OJ 2005, C-325/7. The notifying parties will also be given the opportunity to have access to documents received after the issuing of the SO (Merger Best Practices, § 43).
133 Merger Best Practices, § 36.
It should finally be observed that the Commission’s Best Practices foresee the possibility of organizing ‘State of Play’ meetings with the notifying parties. ‘State of Play’ meetings take place on a voluntary basis and are normally offered at five different points in the Phase I and Phase II procedure:

- before the expiry of 3 weeks into Phase I, where it appears that ‘serious doubts’ within the meaning of Article 6(1)(c) ECMR are likely to be present;
- within 2 weeks following the adoption of the Article 6(1)(c) decision;
- before the issuing of an SO;
- following the reply to the SO and the oral hearing, and;
- before the Advisory Committee meets.

DG COMP may similarly invite other involved parties or third parties, together with the notifying parties to participate in ‘triangular meetings’.

2.4. Commitments

Where a notified transaction gives rise to serious competition concerns, the parties may avert a negative decision by the Commission by offering remedies that fully and effectively remove the cited concerns. Commitments may be offered both in the course of Phase I and in Phase II. In Phase I, commitments should be submitted within 20 working days from the date of notification (Art. 19(1) MIR). In Phase II they should normally be submitted within 65 working days from the initiation of Phase II proceedings (Art. 19(2) MIR). Depending on the date of submission, this may lead to an extension of the regular time-limits for the treatment of cases in Phase I or Phase II (Art. 10 ECMR).

Commitments may be either structural or behavioral, albeit that given that the Merger Regulation is directed at the maintenance of a competitive market structure and given the fact that behavioral commitments may be harder to monitor, preference is given to the former. Further information on the appropriateness of remedies can be found in the Commission’s Remedies Notice. The Commission has also published model texts for divestiture commitments and trustee mandates, together with a series of best practices guidelines.

Insofar as ‘market testing’ gives rise to a positive outcome, the Commission may render a clearance decision to which certain obligations or conditions are attached (Art. 6(1)(b) or Art. 8(2) ECMR).

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135 Merger Best Practices, §§ 30 et seq.
137 In Phase II, however, it is for the Commission to demonstrate that the proposed remedies are insufficient (rather than for the parties to prove that they eliminate the competition concerns). See Case T-87/05 EDP v. Commission [2005] ECR II-3745.
3. CONCLUSIONS

As evidenced by this report, there is a well-developed corpus of hard and soft law governing enforcement proceedings concerning Articles 101 and 102 TFEU as well as merger control. As the European Commission’s decisions in both fields have an important impact on the undertakings concerned, effective safeguards of the procedural rights of all parties involved are required.

In the field of merger control, most concerns have been acquiesced by measures taken by the Commission over the years.

In the area of Articles 101 and 102 TFEU, however, there is still ample room for improvement. The main criticisms can be summarized as follows. First, the Commission unites the functions of investigator, prosecutor and judge. This puts into doubt the independence and objective nature of the entire procedure. The creation of the Hearing Officer is a step in the right direction, but his powers are limited, especially before the sending of the SO. Moreover, the Hearing Officers are all Commission officials which again raises questions about their independence. Second, access to the file and general transparency of the proceedings should be further improved. Again, the Best Practices alleviate some concerns, but more should be achieved in this respect. Indeed, companies, especially in cartel or abuse of dominance investigations often face an investigation covering many years. In the meantime the companies face uncertainty, which could be lessened if even in these proceedings stricter timetables are adhered to.

Notwithstanding room for improvement, the European Union’s strongly developed body of procedural safeguards in the area of competition law enforcement can serve as an inspiration for horizontal legislation on administrative proceedings. Having an institutionalised practice whereby (i) companies and citizens are aware of the scope, aim and content of administrative proceedings carried out against them, (ii) are granted access to the investigative file, (iii) are appraised of the status of the investigation/administrative proceeding at defined intervals (i.e., state of play meetings and other informal contacts with the administration), (iv) are given the possibility to defend themselves against a pending administrative measure (i.e., Statement of Objections, a hearing, etc.), and (v) have at least a minimal guarantee of objectiveness, correctness, confidentiality, etc. of the proceedings (via the institution of a Hearing Officer), are the minimal requirements for an administrative proceeding operating under the rule of law and intending to respect the rights of defence as well as other procedural rights of the parties involved.
DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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