EUROPEAN COMMISSION
Competition DG

DG COMPETITION

Best Practices on the conduct

of proceedings concerning Articles 101 and 102 TFEU

1. SCOPE AND PURPOSE OF THE BEST PRACTICES

1. The principal purpose of these Best Practices is to provide guidance for stakeholders and other interested parties on the day-to-day conduct of proceedings before the European Commission ("Commission") concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU")[1] in accordance with Regulation 1/2003[2] and its Implementing Regulation[3]. In this regard, the Best Practices seek to increase understanding of the investigation process and thereby to further enhance the efficiency of investigations and to ensure a high degree of transparency and predictability of the process. The Best Practices cover the main proceedings[4] concerning alleged infringements of Articles 101 and 102 TFEU.

2. Infringement proceedings against Member States based on Article 106 TFEU in conjunction with Articles 101/102 TFEU fall outside the scope of the Best Practices. These Best Practices neither apply to proceedings under the EC Merger Regulation[5] nor to State aid proceedings[6].

3. Cartels, as defined in the Leniency Notice[7], may also be subject to the specific procedures for leniency and settlement procedures.[8] These specific procedures are not

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1 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the TFEU. The two sets of provisions are in substance identical. For the purposes of this document, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate.

2 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 (OJ L 1, 4.1.2003, p.1), as amended by Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (OJ L 68, 6.3.2004, p.1) and Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services (OJ L 269, 28.9.2006, p. 1).

3 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 (OJ L 123, 27.4.2004, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3).

4 The Best Practices do not deal with specific procedures, for example for imposing fines on undertakings having provided misleading information (see Article 23(1) of Regulation 1/2003). The Best Practices neither cover decisions on finding of inapplicability pursuant to Article 10 of Regulation 1/2003 nor decisions on interim measures pursuant to Article 8 of Regulation 1/2003.

5 See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1). See also DG Competition's Best Practices on the conduct of EC Merger Proceedings of 20 January 2004, published at DG Competition's website: http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

6 See Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Art.88) of the EC Treaty (OJ L 83/1, 27.3.1999, p. 1). See also Commission Notice on a Best Practices Code on the conduct of State aid control proceedings, OJ C 135, 16.06.2009, p. 13-20.

7 Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

covered by the Best Practices. Moreover, the specificities of the conduct of cartel proceedings require a number of special provisions, in order, notably, not to interfere with possible leniency applications[9]. These special provisions are indicated where applicable.

4. The Best Practices are structured in the following way. Section 2 sets out the procedure followed during the investigative phase. This part is relevant for any investigation regardless of whether it leads to a prohibition decision (Article 7 of Regulation 1/2003), a commitment decision (Article 9 of Regulation 1/2003) or a rejection of complaint (Article 7 of the Implementing Regulation). Section 3 describes the main procedural steps and rights of defence in the context of procedures leading to prohibition decisions. Section 4 describes the specificities of the commitment procedure. Section 5 covers rejection of complaints. The remaining sections are of general application: Section 6 describes the limits to use of information and Section 7 deals with the adoption, notification and publication of decisions.

5. The Best Practices are notably built upon the experience to date of the Commission's Directorate-General for Competition ("DG Competition") in the application of Regulation 1/2003 and the Implementing Regulation. They reflect the views of DG Competition on Best Practices at the time of publication and will be applied as from the date of publication for on-going[10] and future cases. The specificity of an individual case may however require an adaptation of, or deviation from these Best Practices, depending on the case at issue.

6. Proceedings concerning the application of Articles 101 and 102 TFEU (hereafter generally referred as "proceedings") are in particular regulated by Regulation 1/2003 and the Implementing Regulation. The Notices on access to file[11] and handling of complaints[12], as well as the Hearing Officers' Mandate[13], also contain numerous provisions that are relevant for the conduct of proceedings and that are not included in these Best Practices. As regards submissions of reports of economic experts and submission of quantitative data, reference is made to the Best Practices on the submission of economic evidence. The Best Practices should therefore not be taken as

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[8] Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3); Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases OJ C 167, 2.7.2008, p. 1.

[9] It shall be observed, in that regard, that it is possible for an undertaking to come forward with a leniency application up to the stage of the opening of proceedings, which in cartel proceedings normally takes place simultaneously with the adoption of the Statement of Objections, except in settlement procedures.

[10] With regard to cases which are on-going at the time of the publication of the Best Practices, the latter will only apply to pending procedural steps and not to those already finalised.

[11] 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 C 325, 22.12.2005, p. 7).

[12] Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (OJ C 101, 27.4.2004, p. 65).

[13] Commission Decision of 23 May 2001 on the terms and reference of hearing officers in certain competition proceedings, OJ L 19.6.2001, p. 162.

a full or comprehensive account of the relevant legislative, interpretative and administrative measures which govern proceedings before the Commission[14]. The Best Practices should be read in conjunction with other such measures.

7. The Best Practices do not create or alter rights or obligations as set out in the Treaty on the Functioning of the European Union, Regulation 1/2003, the Implementing Regulation as amended from time to time and as interpreted by the case-law of the Court of Justice of the European Union. The Best Practices also do not alter the Commission's interpretative notices relevant for the conduct of proceedings.[15]

2. THE INVESTIGATIVE PHASE

2.1. Origin of cases

8. A case concerning an alleged infringement of Article 101 or 102 TFEU may be based on a complaint by an undertaking, an individual or exceptionally a Member State.

9. Information from citizens and undertakings are essential in triggering investigations before the Commission. The Commission therefore wishes to encourage citizens and undertakings to inform the Commission about suspected infringements of the competition rules[16]. This can be done either by lodging a formal complaint[17] or by simply providing market information to the Commission. Persons that are able to show a legitimate interest to be complainants, and that submit a complaint in compliance with form C[18], enjoy certain procedural rights. The details of the procedure to be followed are set out in the Implementing Regulation and in the Notice on the handling of complaints. Natural and legal persons, other than complainants, which show a sufficient interest to be heard also enjoy certain procedural rights in accordance with Article 13 of the Implementing Regulation.

10. The Commission may also open a case on its own initiative (*ex officio*), for instance when certain facts have been brought to its attention, or further to information gathered in the context of sector enquiries, informal meetings with industry or the monitoring of markets, or on the basis of information exchanged within the European

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[14] The Best Practices apply exclusively to the Commission's procedures for the enforcement of Articles 101 and 102 TFEU and do not in any way bind the national competition authorities when they apply these provisions.

[15] For example the Notice on the rules for access to the Commission file and the Notice on the handling of complaints.

[16] Or, when appropriate, the relevant national competition authority.

[17] Pursuant to Article 7(2) of Regulation 1/2003. Under Articles 5 to 9 of the Implementing Regulation, formal complaints have to fulfil certain requirements. Information contained in submissions that do not respect these requirements may be taken into account by DG Competition as market information.

[18] See Article 5(1) of the Implementing Regulation.

Competition Network ("ECN"). Cartel cases are often initiated on the basis of an application for leniency[19] by one of the cartel members.

2.2. Initial assessment and case allocation

11. All cases, irrespective of their origin, are subject to an initial assessment phase. During this phase DG Competition examines whether the case merits further investigation[20] and, if so, preliminarily defines the orientation of such investigation, in particular with regard to the parties, the markets and the conduct to be investigated. During this phase, DG Competition may make use of investigative measures such as requests for information in accordance with Article 18(2) of Regulation 1/2003.

12. In practice, the system of initial assessment means that a number of cases will be discarded at a very early stage of the procedure because they are not deemed to merit further investigation. In this regard, DG Competition focuses its enforcement resources on cases in which it appears likely that an infringement could be found, in particular on cases with the most significant impact on the functioning of competition and risk of consumer harm, as well as on cases which are relevant with a view to defining EU competition policy and/or to ensuring coherent application of Articles 101 and/or 102 TFEU.[21]

13. This initial assessment phase also attempts to address, at an early stage, the allocation of cases within the ECN. Regulation 1/2003 introduced the possibility of re-allocating cases to other network members if they are well placed to deal with them. Accordingly, the Commission may reallocate a case to a national competition authority and vice versa.

14. At the moment of the first investigative measure addressed to them (normally a request for information[22] or an inspection), 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. In the context of requests for information, they will further be reminded of the privilege against providing self-incriminating information and that if the existence of the investigated behaviour was confirmed this might constitute an infringement of Articles 101 and 102 TFEU. At later stages, DG Competition will upon request, inform the parties subject to the preliminary investigation of the status of the case. If DG Competition at a certain stage decides not to investigate the case further (and thus not to open proceedings), DG Competition will, at its own initiative, inform the party/-ies subject to the preliminary investigation thereof.

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[19] See Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17).

[20] The EU Courts have recognised that the Commission is entitled to give differing degrees of priority to the complaints that it receives. This is settled case law since Case T-24/90, *Automec v Commission of the European Communities*, [1992] ECR II-2223, para 85.

[21] The Commission has made public a list of criteria which it intends to use when examining whether or not complaints show sufficient "Community interest". The criteria were published in the Annual Report on Competition Policy 2005, adopted in June 2006. See as well paragraph 44 of the Notice on handling of complaints.

[22] See case T-99/04 *AC Treuhand* v *Commission* [2008] ECR II-1501, para. 56.

15. In cases based on a complaint, DG Competition will endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the receipt of the complaint.[23] This is, however, subject to the circumstances of the individual case and is, in particular, dependent on whether DG Competition has received sufficient information from the complainant or third parties, notably in response to its requests for information, in order for it to decide whether or not it intends to investigate its case further.

2.3. Opening of proceedings

16. The Commission will open proceedings[24] under Article 11(6) of Regulation 1/2003 when the initial assessment phase has been concluded and it has been decided that the case merits further investigation and the scope of the investigation has been sufficiently defined.

17. The opening of proceedings creates clarity as regards the allocation of the case within the ECN[25] and in relation to the parties and the complainant, if applicable. It also signals a commitment on the part of the Commission to actively further investigate the case. DG Competition will thus allocate resources to the case and will endeavour to deal with the case in a timely manner.

18. The decision to open proceedings identifies the parties subject to the proceedings and briefly describes the scope of the investigation. In particular, it sets out the behaviour constituting the alleged infringement of Articles 101 and 102 TFEU to be covered by the future investigation and normally identifies the territory(-ies) and sector(s) in which the behaviour in question takes place.

19. Pursuant to Article 2 of the Implementing Regulation, the Commission may make public the opening of proceedings. DG Competition's policy is to publish the opening of proceedings on its website and issue a press release, unless such publication may harm the investigation.

20. The parties subject to the investigation are informed in writing of the opening of proceedings before such opening is made public.

21. It has to be underlined that the opening of proceedings, does not prejudge in any way the existence of an infringement. The opening of proceedings merely indicates that DG Competition will further pursue the case. This important distinction is made clear in the letter to the parties informing them of the fact that proceedings have been initiated, as well as in all public communications concerning the opening of the case.

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[23] Notice on the handling of complaints, paragraph 61.

[24] According to Article 2 of the Implementing Regulation, the Commission may decide to initiate proceedings with a view to adopting a decision (e.g. a decision finding an infringement or a commitment decision) at any point in time, but no later than the date on which it issues a statement of objections, a preliminary assessment (as referred to in Article 9(1) of Regulation 1/2003) or a notice pursuant to Article 27(4) of Regulation 1/2003, whichever is the earlier.

[25] The opening of proceedings relieves the national competition authorities of their competence to apply Articles 101 and 102 TFEU, see Article 11(6) of Regulation 1/2003.

22. The opening of proceedings does not limit the right of the Commission to extend the scope and/or the addressees of the investigation at a later point in time. This extension is not necessarily done by a separate decision but may also be done at the moment of adoption of the Statement of Objections.

23. In cartel cases, the opening of proceedings normally takes place simultaneously with the adoption of the Statement of Objections (see point 3 above).

2.4. Languages

24. Pursuant to Article 3(1) of Regulation 1/1958[26], the addressees of correspondence from the Commission are entitled to receive such correspondence in one of the languages of the Member State in which they are located.

25. In order to avoid delays due to translation, the addressees may waive their rights to receive the text in the authentic language and to opt for another language (English for instance). Such a "language waiver" shall be signed by a representative of the addressee[27].

26. As regards simple requests for information it is standard practice to send them in English and to include in the cover letter a reference to Article 3(1) of Regulation 1/1958. The addressee is also clearly informed – in the language of the addressee's location – of his/her right to obtain a translation into the language of the addressee's location, as well as his/her right to reply in that language. This practice allows for more expeditious treatment of information requests, while preserving the rights of addressees.

27. The Statement of Objections, Preliminary Assessment and decisions pursuant to Articles 7, 9 and 23 of Regulation 1/2003 are notified in the authentic language of the addressee unless it has signed the above mentioned language waiver.

28. As far as complainants are concerned, requests for information addressed to the complainant will be in the language of their complaint even if this is not the language of the Member State where they are located.

29. During the oral hearing, the Hearing Officer may hear parties in person and witnesses in an EU official language other than the language of proceedings. In that case, interpretation into the language of the proceedings from another official EU language will be provided during the oral hearing.

2.5. Information requests

30. Pursuant to Article 18 of Regulation 1/2003, the Commission is empowered to require undertakings and associations of undertakings to provide it with all necessary information. Information can be requested by letter ("simple request" (Article 18(2))

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[26] EEC Council: Regulation No 1 determining the languages to be used by the European Economic Community (OJ 17, 6.10.1958, p. 385; English special edition: Series I Chapter 1952-1958, p. 59).

[27] It is not sufficient that the lawyer acting for the addressee signs the waiver.

or by decision (Art. 18(3)).[28] It should be underlined that requests for information are regularly sent not only to the undertakings under investigation, but also to other undertakings or associations of undertakings which may have information relevant for the case.

2.5.1. Scope of request for information

31. Pursuant to Article 18, the Commission may require undertakings and associations of undertakings to provide all necessary information. Information is necessary, in particular, if it might enable the Commission to verify the existence of the alleged infringement referred to in the request. The Commission enjoys a wide margin of appreciation in this respect[29].

32. It is DG Competition that defines the scope and the format of the request for information. In certain cases DG Competition might however discuss with the addressees the scope and the format of the request for information. This practice can be particularly useful in cases of requests including quantitative data.[30]

33. When, in a reply to a request for information, undertakings submit irrelevant information (in particular documents which are clearly not related to the subject-matter of the investigation), DG Competition may, in order not to unnecessarily burden the often voluminous administrative file, send back such information to the addressee of the request for information. This should be done at an as early stage as possible after the answer to the request for information and a short notice reporting this fact will be put in the file.

2.5.2. Time limits

34. The request for information specifies what information is required and fixes the time-limit within which the information is to be provided.

35. Addressees are given a reasonable time-limit to reply to the request, according to the length and complexity of the information request. In general, this time-limit will be at least two weeks from the receipt of the request, for a substantial request for information. However, when the scope of the request is limited, for example if it only covers a short clarification of information previously provided or information readily available to the addressee of the request, the time-limit will normally be shorter (less than one week).

36. If it does not appear possible to reply within the time-limit, addressees may ask for an extension of this deadline. Such a request, which can also be lodged in the language of the addressee's location, should be motivated and normally be made in writing,

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[28] Non-respect of a decision requesting information (supplying incomplete information or not respecting the time-limit set out) can lead to fines and periodic penalties, see Articles 23 and 24 of Regulation 1/2003. Submitting incorrect or misleading information could lead to fines being imposed both in case of an Article 18 letter and an Article 18 decision (see Article 23 of Regulation 1/2003).

[29] As regards the Commission's discretion in shaping the enquiry, see Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 110; Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 384; Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 212.

[30] See the Best Practices on the submission of economic evidence.

sufficiently in advance of the expiry of the deadline. If DG Competition considers the request to be well founded, additional time (depending on the complexity of the information asked and other factors) will be granted.

2.5.3. Confidentiality

37. The cover letter also requires the addressee to indicate whether it considers that information provided in the reply is confidential. In that case, in accordance with Article 16(3) of the Implementing Regulation, the addressee must substantiate its claims and provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission.

2.6. Meetings and other contacts with the parties and third parties

38. During the investigative phase, DG Competition may hold informal meetings (or conduct phone calls) with the parties subject to the proceedings, complainants, or third parties. Similarly, it will hold State of Play meetings with the parties or may hold triangular meetings as outlined in sections 2.11 or 2.12 below.

39. When a meeting takes place at the request of the parties, complainants or third parties, as a general rule they should submit in advance an agenda of topics to be discussed at the meeting, as well as a memorandum or a presentation covering these issues in more detail. The parties, complainants or third parties are invited after meetings or substantive phone calls to substantiate their statements or presentations in writing.

40. A non-confidential version of any written documentation prepared by the undertakings which attended a meeting held by DG Competition, together with a brief note prepared by the services of DG Competition, will be made accessible in due time to the parties subject to the investigation, i.e. at the stage of access to file, if the case is further pursued. Subject to requests for anonymity[31] this note will mention the undertaking(s) attending the meeting, (or participating in the phone call relating to substantive issues) and the time and topic(-s) covered by the meeting (or such a phone call)[32].

41. DG Competition may, after a meeting or other informal contact with the parties, complainants or third parties, request them to provide information in writing pursuant to Article 18 of Regulation 1/2003 or invite them to make a statement pursuant to Article 19 thereof.

2.7. Power to take statements (interviews)

42. Regulation 1/2003 and the Implementing Regulation establish a specific procedure for taking statements from persons who may be in possession of useful information

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[31] See point 128 below.

[32] The provisions of this section also apply to State of Play meetings and Triangular meetings (see section 2.11 below).

concerning an alleged infringement of Articles 101 and 102 TFEU (see Article 19 of Regulation 1/2003 and Article 3 of the Implementing Regulation)[33].

43. The Commission may, under this procedure, interview by any means, including by telephone or electronic means, any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

44. Before taking such statements, DG Competition will inform the interviewee of the legal basis of the interview and its voluntary nature. DG Competition will further inform the interviewee of the purpose of the interview and of its intention to make a record of the interview. This will in practice be done by handing over a document to be signed by the interviewee explaining the procedure. In order to enhance the accuracy of the statements, a copy of any recording will be made available shortly thereafter to the person interviewed for approval.

45. The procedure to take statements pursuant to Article 19 of Regulation 1/2003 and Article 3 of the Implementing Regulation applies only when it is specifically agreed between the interviewee and DG Competition that the conversation will be recorded as a formal interview under Article 19. It is within the discretion of DG Competition to decide when to propose interviews. A party may however also make a request to DG Competition to have its statement recorded as an interview. Such a request will in principle be accepted, subject to the needs and requirements of the proper conduct of the investigation.

2.8. Inspections

46. In the context of an investigation the Commission has the power to conduct inspections at the premises of an undertaking, or in certain circumstances, also at private premises. DG Competition's practice in relation to inspections at the premises of an undertaking is currently described in an explanatory note available on its website[34].

2.9. Legal Professional Privilege

47. According to the case-law of the European Courts[35,] certain communications between lawyer and client may, subject to strict conditions, be protected by the legal professional privilege ("LPP") and thus be confidential with regard to the Commission, as an exception to the latter's wide powers of investigation and of

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[33] This power to take statements pursuant to Article 19 of Regulation 1/2003 should be distinguished from the power of the Commission, during an inspection, to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers, pursuant to Article 20 of Regulation 1/2003.

[34] See: http://ec.europa.eu/competition/antitrust/legislation/legislation.html

[35] The exclusion of certain communications between lawyers and clients from the Commission's powers of enquiry derives from the general principles of law common to the laws of the Member States as clarified by the EU Courts: Case 155/79 AM&S Europe Limited v Commission ECR [1982] 1575; Order in Case T-30/89 Hilti v Commission ECR [1990] II-163; and Joined cases T-125/03 and T-253/03 Akzo Nobel Chemicals and Akcros Chemicals v Commission, ECR [2007] II-3523, currently under appeal (Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v Commission).

examination in order to uncover infringements of Articles 101 and 102 TFEU[36]. Communications between lawyer and client are protected by LPP provided, notably, that they are made for the purposes of the exercise of the client's rights of defence and they emanate from independent lawyers[37].

48. It is for the undertaking claiming the protection of LPP with regard to a given document to provide the Commission with appropriate justification and relevant material to substantiate its claims, while not being bound to disclose the contents of such document[38]. Redacted versions removing the parts covered by LPP should be submitted. Where the Commission considers that such evidence has not been provided, it may order production of the document in question and, if necessary, impose on the undertaking fines or periodic penalty payments for its refusal either to supply such additional necessary evidence or to produce the contested document[39].

49. In a significant number of cases, a mere cursory look by DG Competition officials, normally during an inspection, at the general layout, heading, title or other superficial features of a document will enable them to confirm or not the accuracy of the reasons invoked by the undertaking. However, an undertaking may be entitled to refuse to allow the Commission officials to take even a cursory look, provided that it gives

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[36] The EU Courts have considered that the protection of the confidentiality of communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence (AM&S, paragraphs 18 and 23). In any event, the principle of LPP does not prevent a lawyer's client from disclosing the written communications between them if he considers that it is in his interests to do so (AM&S, paragraph 28).

[37] AM&S, paragraphs 21, 22 and 27. According to the case-law, the substantive scope of the protection of LPP covers also, further to written communications with an independent lawyer made for the purposes of the exercise of the client's rights of defence, (i) internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice (Hilti, paragraphs 13, 16 to 18) and (ii) preparatory documents prepared by the client, even if not exchanged with a lawyer or not created for the purpose of being sent physically to a lawyer, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence (Akzo, paragraphs 120 to 123). As for the personal scope of the protection of LPP, it only applies to the extent that the lawyer is independent (i.e. not bound to his client by a relationship of employment); in-house lawyers are explicitly excluded from LPP (irrespective of their membership of a Bar or Law Society or their subjection to professional discipline and ethics or protection under national law: AM&S, paragraphs 21, 22, 24 and 27; Akzo, paragraphs 166 to 168; the Akzo judgment is currently under appeal with regard to the exclusion of communications with in-house lawyers from the scope of LPP). Moreover, according to the case-law, protection under LPP applies only to lawyers entitled to practise their profession in one of the EU Member States, regardless of the country in which the client lives (AM&S, paragraphs 25 and 26). Finally, it shall be observed that the protection of LPP covers, in principle, written communications exchanged after the initiation of the administrative procedure that may lead to a decision on the application of Articles 101 and/or 102 TFEU EC or to a decision imposing a pecuniary sanction on the undertaking; this protection can also extend to earlier written communications which have a relationship to the subject-matter of that procedure (AM&S, paragraph 23).

[38] Hence, the mere fact that an undertaking claims that a document is protected by LPP is not sufficient to prevent the Commission from reading that document if the undertaking produces no relevant material of such a kind (Akzo, paragraph 80; see below). In order to substantiate its claim, the undertaking concerned may, in particular, inform DG Competition of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly, it may also mention the context in which the document was found, the way in which it was filed and any related documents (Akzo, paragraph 80).

[39] AM&S, paragraphs 29 to 31. The undertaking may subsequently bring an action for the annulment of such a decision, where appropriate, coupled with a request for interim relief (AM&S, paragraphs 32; see below).

appropriate reasons to justify why such a cursory look would be impossible without revealing the content of the document[40].

50. Where, in the course of an inspection, DG Competition considers that the undertaking has provided no evidence or explanations for the purposes of proving that the document concerned is covered by LPP, has only invoked reasons that, according to the applicable case-law, are clearly unfounded to justify such protection, or bases itself on factual circumstances that are manifestly inaccurate, this will not prevent DG Competition from immediately reading the contents of the document and taking a copy of it (without using the procedure of the sealed envelope). However, where, in the course of an inspection, DG Competition considers that the material presented by the undertaking is not of such a nature as to prove that the document in question is protected by LPP under existing case-law, in particular where that undertaking refuses to give DG Competition officials a cursory look at a document, but it cannot be excluded that the document may be protectable, the 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, with a view to a subsequent resolution of the dispute.

51. In cases where the undertaking has claimed the protection of LPP and has provided reasons in order to substantiate its claims, the Commission will not read the contents of the document before it has adopted a decision rejecting this claim and allowing the undertaking concerned to refer the matter to the General Court. Thus, the Commission will not open the sealed envelope and will not read the documents if the company brings an action for annulment and applies for interim relief until the EU Courts have decided on this application for interim measures[41].

52. Undertakings making requests for protection under LPP merely as delaying tactics (i.e., requests that are clearly unfounded) or opposing, without objective justification, any cursory look at the documents during an investigation may be subject to fines pursuant to Article 23(1) of Regulation 1/2003. Similarly, such actions may be taken into account as aggravating circumstances when calculating any fine imposed in the context of a decision imposing a penalty under Articles 101 and/or 102 TFEU[42].

2.10. Information exchange between competition authorities

53. In the context of an investigation the Commission may also exchange information with national competition authorities pursuant to Article 12 of Regulation 1/2003. The Commission's practice in relation to these exchanges is currently described in the Commission Notice on cooperation within the Network of Competition Authorities[43].

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40 Akzo, paragraphs 81 and 82.

41 Thus, DG Competition will wait until the time-limit for bringing an action against the rejection decision has expired before reading the contents of the contested document. However, to the extent that such an action does not have suspensory effect, it is for the undertaking concerned to bring an application for interim relief seeking suspension of operation of the decision rejecting the request for LPP.

42 Akzo, paragraph 89.

43 Official Journal C 101, 27.04.2004, p. 43-53.

2.11. State of Play meetings

54. DG Competition endeavours to give, on its own initiative or upon request, parties subject to the proceedings ample opportunity for open and frank discussions and to make their points of view known throughout the procedure.

55. In pursuit of this goal, and in addition to the information provided in accordance to paragraph 14 above, State of Play meetings will be offered at certain stages of the procedure. The objective of the State of Play meetings, which are completely voluntary in nature, is to contribute to the quality and efficiency of the decision making process and to ensure transparency and communication between DG Competition and the parties, notably to inform them of the status of the proceedings at key points in the procedure. State of Play meetings will only be offered to the parties being investigated and not to the complainant or third parties. If several parties are investigated, State of Play meetings will be offered to each party separately.

2.11.1. Format of the State of Play meetings

56. State of Play meetings may be conducted in the form of meetings at the Commission's premises, or alternatively, if appropriate, by telephone or videoconference. Senior DG Competition management will normally chair the meeting.

2.11.2. Timing of the State of Play meetings

57. DG Competition will normally offer State of Play meetings at several key stages of the case. These correspond, in principle, to the following events:

(1) Shortly after the opening of proceedings: DG Competition will inform the parties of the issues identified at this stage and of the anticipated scope of the investigation. This meeting provides the parties subject to the proceedings with an opportunity to react initially to the issues identified and may also serve to assist DG Competition in deciding on the appropriate framework for its further investigation. This meeting may also be used to discuss with the parties any relevant language waivers that may be appropriate for the conduct of the investigation. DG Competition may at this stage indicate a tentative timing for the case.

(2) At a sufficiently advanced stage in the investigation: this meeting gives the parties subject to the proceedings an opportunity to understand DG Competition's preliminary views on the status of the case after its investigation and on the competition concerns identified. The meeting may also be used by DG Competition and by the parties to clarify certain issues and facts relevant for the outcome of the case.

58. In case a Statement of Objections is issued, the parties will also be offered a State of Play meeting after their reply to such Statement of Objections or after the Oral Hearing, should one be held: the parties will at this meeting normally be informed of the preliminary view of DG Competition on how it intends to further pursue the case.

59. Furthermore, two specific State of Play Meetings will be offered in the context of procedures leading to commitment decisions (see section 4 below).

60. State of Play meetings do not exclude discussions between the parties and DG Competition on substance or on timing issues on other occasions throughout the procedure as appropriate. Similarly, although State of Play meetings as defined above would normally not take place in the context of cartel proceedings, meetings with senior management may also be arranged with the parties in cartel proceedings in order to, when appropriate, discuss important issues related to their case.

2.12. Triangular meetings

61. In addition to bilateral meetings between DG Competition and each individual party, DG Competition may exceptionally also decide to invite all parties involved to a so called "triangular" meeting if DG Competition believes it is desirable, in the interests of the fact-finding investigation, to hear the views of all the parties in a single meeting. Such a meeting could be beneficial for the investigation if, for example, two or more opposing views have been put forward as to key data or evidence.

62. Any triangular meeting would normally take place at the initiative of the Commission and is voluntary for the parties. Triangular meetings are normally chaired by Senior DG Competition management. A triangular meeting does not replace the formal hearing.

63. Triangular meetings, if any, should be held as early as possible during the investigatory phase (after the opening of proceedings and before any issuing of Statement of Objections) in order to enable DG Competition to reach a more informed conclusion as to issues of substance before the Commission decides whether to issue a Statement of Objections. Triangular meetings should be prepared in advance on the basis of an agenda established by DG Competition after consultation of all parties that agree to attend the meeting. The preparation of the meeting may include a mutual exchange of non-confidential submissions between the attending parties sufficiently in advance of the meeting.

2.13. Meetings with the Commissioner or the Director General

64. It is normal practice to offer executive officers of the parties subject to the proceedings an opportunity to discuss the case either with the Director-General of DG Competition, the Deputy Director-General for antitrust, or when appropriate, with the Commissioner responsible for Competition, if the parties so request.

2.14. Review of key submissions

65. In the spirit of encouraging an open exchange of views allowing the parties to make their points in a timely manner, DG Competition will, in cases based on formal complaints, provide the parties, at the latest shortly after the opening of proceedings, with the opportunity of reviewing and commenting on a non-confidential version of the complaint[44]. In case the complaint is rejected at an early stage without further in-depth investigation (e.g. for lack of "Community interest"), DG Competition may however make an exception to this rule.

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[44] A non-confidential version of the reply of the party subject to the investigation to the complaint may thereafter be provided to the complainant.

66. Early access to the complaint may allow the parties to provide useful information at an early stage of the procedure and facilitate the assessment of the case.

67. DG Competition might also, in the interest of the investigation, on a case-by-case basis (both in cases based on formal complaints and *ex officio* cases), request the parties to comment on other key submissions made by the complainant or other parties (for example reports provided by economic experts representing one of the parties or submissions from interested third parties) or to comment on documents found in inspections. Such submissions will however only be shared with the parties at this early stage if DG Competition considers that it would facilitate the assessment of the case and would not risk unduly slowing down the investigative phase.

68. The review of key submissions will not be offered in the context of cartel enforcement (see point 3 above).

2.15. Possible outcomes of the investigation phase

69. Once, through the investigation measures described above section 2.5 to 2.8, DG Competition has reached a preliminary view of the main issues raised by a case, different procedural paths may be envisaged:

- The Commission may decide to proceed towards the adoption of a Statement of Objections with a view to adopting a prohibition decision with regard to all or several of the issues identified at the opening of proceedings (see section 3 below).

- The parties subject to the investigation may consider offering commitments suitable to address the competition concerns arising from the investigation, or at least show their willingness to discuss such possibility; in that case, the Commission may decide to engage in proceedings leading to a commitment decision (see section 4 below).

- The Commission may also decide that there are no grounds to continue the proceedings and close it with regard to all or some of the parties. If the case originated via a complaint, the Commission shall, before closing the case, give the complainant the possibility to express its views (see section 5 on rejection of complaints).

70. When closing a case after proceedings have been formally opened, DG Competition, in addition to informing the parties, will normally indicate the fact of the closure on its website and/or issue a press release stating that it has been decided not to further pursue the case. The same applies in cases where proceedings have not been formally opened but DG Competition has already made public the fact that it was investigating the case (e.g. by having publicly confirmed certain inspections). If the case is closed with regards only to certain parties subject to the investigation (notably in cartel cases) DG Competition will normally indicate the closing of the case regarding these parties in the press release issued at the time of the adoption of the final decision against the remaining parties.

3. PROCEDURES LEADING TO A PROHIBITION DECISION

71. The following sub-sections concern the procedures which may lead to a prohibition decision. An important procedural step in this regard is the adoption of a Statement of Objections. It should however be noted that the adoption of a Statement of Objections does not prejudge the final outcome of these procedures. It may well lead to the

closing of the case without the adoption of a prohibition decision or a commitment decision.

3.1. Right to be Heard

72. The right of the parties to the proceedings to be heard before a final decision affecting their interests is taken is a fundamental principle of EU law. The Commission is committed to ensuring that the effective exercise of the right to be heard is respected in its proceedings[45].

73. The Hearing Officers have the function of ensuring that the right to be heard is safeguarded in competition proceedings[46]. The Hearing Officers carry out their tasks in full independence of DG Competition, and disputes arising between the latter and any party subject to the proceedings can be brought before the Hearing Officers for resolution.

74. In addition to dispute resolution, the Hearing Officer is directly involved in certain parts of antitrust proceedings, including in particular the organisation and conduct of the oral hearing, if one is held. After the oral hearing, and taking into account the parties' written replies to the Statement of Objections, the Hearing Officer reports to the Commissioner responsible for Competition on the hearing and the conclusions to be drawn from it. Moreover, prior to a final decision being taken by the College of Commissioners, the Hearing Officer informs it whether any procedural issues of significance have arisen and, in particular, whether the right to be heard has been respected during the administrative proceedings. The final report is sent to the parties subject to the proceedings, together with the Commission's final decision, and is published in the Official Journal of the European Union.

3.1.1. Statement of Objections

75. Before adopting a decision adverse to the interests of the addressees, in particular, a decision finding an infringement of Article 101 and 102 TFEU and ordering its termination (Article 7 of Regulation 1/2003) and/or imposing fines (Article 23), the Commission shall give the parties subject to the proceedings the opportunity to be heard on the matters to which the Commission has objected[47]. The Commission shall thus adopt a Statement of Objections and notify it to each of the parties subject to the proceedings.

3.1.1.1. Purpose and content of the Statement of Objections

76. The Statement of Objections sets out the preliminary position of the Commission regarding the alleged infringement of Articles 101 and/or 102 TFEU, after its in-depth investigation. Its purpose is to inform the parties concerned of the objections raised

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[45] Article 27 of Regulation 1/2003, mentioned above.

[46] Commission Decision of 23.05.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162 19.06.2001, p.21. See also the Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU.

[47] Article 27 of Regulation 1/2003. This covers also decisions ordering interim measures (Article 8) or fixing the definitive amount of periodic penalty payments (Article 24(2)).

against them with a view to enabling them to exercise their rights of defence in writing and orally (at the hearing). It thus constitutes an essential procedural safeguard which ensures that the right to be heard is observed. The undertakings concerned shall be provided with all the information they need to defend themselves effectively and to comment on the allegations made against them.

77. The Statement of Objections shall also clearly indicate whether the Commission intends to impose fines on the undertakings at the end of the procedure (Article 23 of Regulation 1/2003). In these cases, the Statement of Objections will refer to the relevant principles laid down in the Guidelines on setting fines.[48] In the Statement of Objections the Commission shall indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and that the infringement was committed intentionally or by negligence. To the extent possible, the Statement of Objections will also mention the facts that may give rise to aggravating and attenuating circumstances. Although there is no legal obligation in that regard, the parties will be invited to comment on all elements of importance for any subsequent calculation of fines, should the objections be upheld, including the relevant sales figures to be taken into account.

78. If the Commission intends to impose remedies on the parties, the Statement of Objections shall indicate the envisaged remedies that may be necessary to bring the infringement effectively to an end. The information given should be sufficiently detailed to allow the parties to defend themselves on the necessity and proportionality of the remedies. If structural remedies are envisaged, in accordance with Article 7(1) of Regulation 1/2003, the Statement of Objections shall spell out why there is no equally effective behavioural remedy or why any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.

3.1.1.2. Transparency

79. In order to enhance transparency of the proceedings, the Commission will publish a press release setting out the key issues in the Statement of Objections shortly after the Statement of Objections is received by its addressees, with the exception of settlement procedures in the context of cartels. This press release will explicitly state that the issuing of the Statement of Objections does not prejudge in any way the existence of an infringement.

3.1.2. Access to file

80. The addressees of the Statement of Objections are granted access to the Commission's investigation file, in accordance with Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of the Implementing Regulation, so on the basis of that evidence, they can express their views effectively on the preliminary conclusions reached by the Commission in its Statement of Objections.

81. The modalities of access to the file, as well as detailed indications on the type of documents that will be accessible and confidentiality issues, are covered by a separate

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[48] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003, Official Journal C 210, 1.09.2006, p. 2-5.

Notice[49]. The Hearing Officers shall decide on disputes between the parties, the information providers and DG Competition over access to information contained in the Commission's file in accordance with this Notice. Lastly, special rules govern access to corporate statements in cartel cases and settlement procedures[50].

82. Efficient access to file to a large extent also depends on the cooperation of the parties and other undertakings having provided information included in the file. All undertakings providing information in the context of a particular case, and in particular the parties, have to indicate in each submission whether they consider that information provided is confidential. If information is considered to be confidential, the information provider shall, in accordance with Article 16(3) of the Implementing Regulation, substantiate its claims and to provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission. It should be underlined that in the case of a persistent failure to provide a non-confidential version, it may be assumed that the documents do not contain confidential information.[51]

83. Further to the possibilities contemplated in the Notice on access to the file, two additional procedural practices may be used for the purpose of alleviating the burden on the parties to redact their submissions in relation to confidential information. These procedural practices may be offered by DG Competition where it considers it to be useful, and is typically done in cases where there are a limited number of undertakings. Both procedural practices can be beneficial not only for the party being granted access to file but also for the information providers since they would not have the burden of redacting their confidential material.

84. In certain cases, especially those with a very voluminous file, DG Competition might accept the use of a negotiated disclosure procedure. Under this procedure, the party being granted access to file agrees bilaterally with interested third parties to receive the entirety of the information they have provided to the Commission and is contained in the Commission's file including confidential information (instead of only being given access to the redacted version of their submissions). The party being granted access to file limits access to the information to a restricted circle of persons (to be decided on a case-by-case basis). To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, it would have to accept to exercise its rights in such a way in order to enable such negotiated access to file. Equally, information providers whose information is accessed via this procedure would have to waive their rights to confidentiality vis-à-vis the Commission to the extent necessary for the proper conduct of this procedure.

85. Access to file may also be granted through a so called "data room" procedure organised by DG Competition. Under this procedure, part of the file, also including

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[49] Notice on the rules for access to the Commission file, mentioned above.

[50] Commission Notice on Immunity from fines and reduction of fines in cartel cases (mentioned above), paragraphs 31 to 35 and Commission Notice on the conduct of settlement procedures (mentioned above), points 35 to 40.

[51] See Article 16(4) of the Implementing Regulation.

confidential information, is gathered in a room, the data room, at the Commission's premises. Access is thereafter given to this room, to a restricted group of persons, normally the external counsel or the economic advisers of the party, under the supervision of a Commission official. The external counsel may record information contained in the data room but may not disclose any confidential information to their client. To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, it would have to accept to exercise its rights in such a way in order to enable the use of such a data room procedure. Equally, information providers whose information is accessed via this procedure would have to waive their rights to confidentiality vis-à-vis the Commission to the extent necessary for the proper conduct of this procedure. Should either side unduly refuse to waive their right to access to file or their right to confidentiality to the extent it would be necessary to implement the data room procedure, this waiver can be replaced by a decision pursuant to Articles 8 or 9 of the Hearing Officer's Mandate.

3.1.3. Written reply to the Statement of Objections

86. Pursuant to Article 27(1) of Regulation 1/2003, the Commission shall give the addressees of a Statement of Objections the opportunity of being heard on matters on which the Commission has taken objection. The written reply gives the parties subject to the proceedings the opportunity to set out all facts known to them which are relevant to their defence against the objections raised by the Commission.

87. The time-limit for the reply to the Statement of Objections will take into account both the time required for the preparation of the submission and the urgency of the case.[52] The addressee/-s of the Statement of Objections have the right to a minimum period of four weeks to reply in writing[53]. A longer period than the minimum foreseen by the Implementing Regulation (normally, a period of two months inclusive) will be granted where the circumstances of the case so require, in particular in complex cases, in cases with a voluminous file or where holiday periods affect the ability of a party subject to the proceedings to reply.

88. An addressee of a Statement of Objections may, within the original time-limit, seek an extension of the deadline to reply by means of a reasoned request to the Hearing Officer.

89. The Commission may, in the interests of fair and effective enforcement, give one or more of the parties a copy of the non-confidential version (or specific excerpts thereof) of the (other) parties' written replies to the Statement of Objections and give them the opportunity to submit their comments. The Commission may also decide to do so in appropriate cases with respect to complainants and third parties which have a sufficient interest to be heard.

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[52] See Case T-44/00 Mannesmanröhren-Werken AG [2004] ECR II-2223, para. 65.

[53] See Article 17(2) of the Implementing Regulation. For the rule applicable to settlement procedures, see Article 10a of the Implementing Regulation.

3.1.4. Rights of complainants and interested third parties

90. Complainants are closely associated with the proceedings. Pursuant to Article 6(1) of the Implementing Regulation, they are entitled to receive a non-confidential version of the Statement of Objections and DG Competition shall set a time limit in which the complainant may make its views know in writing.

91. Upon application the Commission shall also hear other natural or legal persons, which can demonstrate a sufficient interest in the outcome of the procedure in accordance with Article 13 of the Implementing Regulation. The decision on the right of such parties to be heard is taken by the Hearing Officer. Should such third persons be admitted to the proceedings, they shall be informed in writing of the nature and subject matter of the procedure and a time limit shall be set in which they may make their views known in writing.

3.1.5. Oral Hearing

92. The parties to which a Statement of Objections has been addressed may, in their written reply, and within the same time limit, request an oral hearing.

93. The oral hearing allows the parties to develop orally their arguments which have already been submitted in writing and to supplement, where appropriate, the written evidence, or to inform the Commission of other matters that may be relevant. Indeed, the fact that the hearing is not public guarantees that all attendees can express themselves freely and without constraint.

94. In view of the importance of the oral hearing, it is the practice of DG Competition to ensure continuous presence of senior management *(Director or Deputy Director General)* in oral hearings in antitrust cases, together with the case team of Commission officials responsible for the investigation. The competition authorities of the Member States, the Chief Economist's team, and associated Commission services, including the Legal Service, are also invited to attend by the Hearing Officer.

3.1.6. Supplementary Statement of Objections and Letter of Facts

95. If, after the Statement of Objections has been issued, new evidence is identified which the Commission intends to rely upon, the undertakings in question shall be given an opportunity to present their observations on these new aspects.

96. If the new evidence justifies the issuance of additional objections or the intrinsic nature of the infringement with which an undertaking is charged is modified, the Commission shall notify this to the parties in a supplementary Statement of Objections. Before doing so, a State of Play meeting will normally be offered to the parties. The rules on setting the deadline for reply to a Statement of Objections apply (see above), although a shorter deadline will typically be set in this context.

97. If, however, the new evidence only corroborates the objections already raised against the undertakings in the Statement of Objections and provided DG Competition intends to rely on this new evidence, it will bring it to the attention of the parties concerned by

a simple letter ("letter of facts")[54]. The letter of facts gives undertakings the possibility to take position on the new evidence within a fixed deadline and this position will be recorded in writing[55]. A request for an extension of this deadline may be made to the Hearing Officer, by means of a reasoned request.

98. The procedural rights which are triggered by the sending of the initial Statement of Objections apply mutatis mutandis in case a Supplementary Statement of Objections is issued, including the right of the parties to request an oral hearing. Access to the evidence gathered after the initial Statement of Objections up to the date of the Supplementary Statement of Objections will also be provided. In case a letter of facts is issued, access will in general be granted to evidence gathered after the Statement of Objections up to the date of the said letter of facts. However, in cases where the Commission only intends to rely upon specific evidence that concerns one or a limited number of parties and/or isolated issues (in particular those regarding the determination of the amount of the fine or issues of parental liability), access will be provided only to the parties directly concerned and to the evidence upon which the Commission intends to rely.

3.2. Possible outcomes of this phase

99. If, having regard to the parties' replies given in writing and/or at the oral hearing and on the basis of a thorough assessment of all information obtained up to this stage the objections are substantiated, the Commission will proceed towards adopting a prohibition decision.

100. If, however, the objections at this stage are not substantiated, the Commission will close the case. In this case, the information measures described above in paragraph 62 would also apply. The Commission could also decide to withdraw certain objections and to continue towards a prohibition decision for the remaining part.

4. COMMITMENT PROCEDURES

101. Article 9 of Regulation 1/2003 introduces the possibility for undertakings to submit voluntarily commitments that are intended to address the competition concerns identified by the Commission. If the Commission accepts these commitments[56], it may adopt a decision which makes them binding on the parties subject to the proceedings. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine[57].

102. The main difference between a prohibition decision pursuant to Article 7 and a commitment decision pursuant to Article 9 of Regulation 1/2003 is that the former

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[54] When the Commission merely communicates to a party a non confidential version (or specific excerpts thereof) of the other parties' written replies to the Statement of Objections and gives it the opportunity to submit their comments (see paragraph 89 above), this does not constitute a letter of facts.

[55] See Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraphs 28-37.

[56] The Commission has discretion as to whether it accepts the commitments offered by an undertaking.

[57] See Recital 13 of Regulation 1/2003; the Commission does not apply the Article 9 procedure to cartels.

contains a finding of an infringement while the latter makes the commitments binding without concluding on whether there was or is still an infringement. A commitment decision concludes that there are no longer grounds for action by the Commission. Moreover, commitments are offered by undertakings on a voluntary basis. By contrast, in Article 7 prohibition proceedings, the Commission imposes remedies (and/or fines) on undertakings.

103. The main advantages of commitment decisions are a swifter change on the market to the benefit of consumers as well as lower administrative costs for the Commission. For the parties subject to the proceedings, faster proceedings and the absence of a finding of an infringement may be attractive.

4.1. Initiation of commitment discussions

104. Undertakings may contact DG Competition at any point in time to explore its readiness to dispose of the case by means of a commitment decision. DG Competition encourages undertakings to signal at the earliest possible stage their interest in discussing commitments.

105. A State of Play meeting will be offered to the parties at that moment. DG Competition will indicate to the undertaking the timeframe within which the discussions on potential commitments should be concluded and will present to them the preliminary competition concerns arising from the investigation.

106. That meeting and the following steps of the procedure may be conducted in an agreed language on the basis of a "*language waiver*" by which the parties accept to receive and submit documents in a language other than the language of the country in which they are located (see above section 2.4.).

4.2. Preliminary Assessment

107. Once DG Competition is convinced of the genuine willingness of the undertakings to propose commitments effectively suited to address the competition concerns, a Preliminary Assessment will be issued. Pursuant to Article 9 of Regulation 1/2003 the Commission summarises in the Preliminary Assessment the main facts of the case and identifies the competition concerns that would warrant a decision requiring that the infringement is brought to an end.

108. The Preliminary Assessment will serve as a basis for the parties to formulate appropriate commitments addressing the competition concerns expressed by the Commission, or to define previously discussed commitments better.

109. In case a Statement of Objections was sent to the parties, it is not excluded that commitments may still be accepted. In these circumstances, a Statement of Objections fulfils the requirements of a Preliminary Assessment, as it contains a summary of the main facts as well as an assessment of the competition concerns identified.

110. The Commission and the undertaking(s) concerned may decide at any moment during the commitment discussions to discontinue the negotiations. The Commission will then normally continue formal proceedings pursuant to Article 7 of Regulation 1/2003.

4.3. Submission of the commitments

111. After receiving the Preliminary Assessment, the parties will have normally one month to formally submit their commitments

112. The parties can offer commitments of a behavioural or structural nature. They should address the competition concerns identified. Commitments which are not related and do not remedy these concerns will not be accepted by the Commission.

113. Commitments shall be unambiguous and self-executing. If need be, a trustee can be appointed to assist the Commission in their implementation (monitoring and/or divestiture trustee). Furthermore, when commitments cannot be implemented without the agreement of third parties (e.g. pre-emption right of an undertaking that would not be a suitable buyer under the commitments), the undertaking should submit evidence of such agreement by the third party.

4.4. The "market test" and subsequent discussions with the parties

114. In accordance with Article 27(4) of Regulation 1/2003 the Commission shall market test the commitments before making them binding by decision. It shall publish in the Official Journal of the EU a notice ("market test notice") containing a concise summary of the case and the main content of the commitments, respecting the obligations under professional secrecy[58]. It will also publish on the website of DG Competition the full text of the commitments[59] in the authentic language. The undertaking submitting the commitment is encouraged to also provide DG Competition with a translation of the full text of the commitments in English. If provided in a timely manner, such translation will, for convenience, be published together with the version in the authentic language. In case of differences between the text in the authentic language and the translation, the version in the authentic language prevails. In order to enhance transparency of the process, the Commission will also publish a press release setting out the key issues of the case and the proposed commitments. Without prejudice to the results of the market test, the Commission will not proceed with the publication of the market test notice, if it is not convinced that the commitments offered *prima facie* address the competition concerns identified.

115. Interested third parties are invited to submit their observations within a fixed time-limit. This shall not be less than one month in accordance with Article 27(4) of Regulation 1/2003.

116. DG Competition may also actively promote the market test, i.e. send the market test document to third parties which can potentially be concerned by the outcome of the case (e.g. consumer associations). DG Competition will also inform in writing the complainant of the market test and invite it to submit comments.

117. After receipt of the replies to the market test, a State of Play meeting will be organised with the parties. It will inform the parties orally or in writing of the substance of the replies.

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[58] Article 28 of Regulation 1/2003.

[59] Non-confidential version.

118. Where the market test reveals that competition concerns identified by the Commission have not been addressed or that changes in the text of the commitments are necessary to make them effective, this will, to the extent that such results may justify considering that the commitments are insufficient, be brought to the attention of the undertakings offering the commitments. If the problems can be addressed and if the undertaking is willing to do so, an amended version of the commitments shall be submitted. Otherwise, the Commission will revert to the Article 7 procedure.

5. PROCEDURE FOR REJECTION OF COMPLAINTS[60]

119. As described above, formal complaints are an important tool to trigger cases and shall be duly examined by the Commission. If however, after appropriate assessment of the factual and legal circumstances of the individual case, the Commission comes to the conclusion that a complaint will not be further pursued, it may be rejected according to the grounds and procedure set out below.

5.1. Grounds for rejection

120. Complaints can be rejected for a number of different reasons, such as lack of "Community interest", lack of competence or lack of an infringement.

121. Rejections for lack of "Community interest"[61] concern in particular complaints where, *g*iven the limited likelihood of establishing the proof of the alleged infringements and the substantial investigatory resources which the Commission would have to invest in order to obtain the evidence for their existence, allocating the resources necessary to further investigate the case would be disproportionate, in light of its expected limited impact on the functioning of the internal market and/or the possibility to have recourse to other means (e.g. national courts)[62].

122. The Commission may also reject complaints for lack of substantiation (when the complainant fails to submit a minimum of prima facie evidence necessary to substantiate an infringement of Articles 101 and/or 102 TFEU) or on substantive grounds (in the absence of an infringement). It may also be rejected for lack of competence as the alleged infringement is unlikely to have any effect on trade between Member States.

123. If a national competition authority is dealing or has already dealt with the same case[63], the Commission shall inform the complainant accordingly. In such a situation, the complainant may withdraw the complaint. If the complainant upholds the complaint, the Commission may reject it by decision pursuant to Article 13 of Regulation 1/2003

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60 See also Commission Notice on the handling of complaints (mentioned above).

61 Cf. in particular Case T-24/90, *Automec II*, [1992]CR II-2223 and Case C-119/97 P, *Ufex*, [1999]R I-1341.

62 The Commission Notice on the handling of complaints lists in point 44 certain criteria that can be used in isolation or combination for rejections on the grounds of lack of "Community interest". Moreover, the Commission identified in its 2005 Report on Competition Policy some criteria that it could use to decide whether or not there is "Community interest".

63 The notion of same case essentially implies: same infringement, same product market, same geographic market, at least one of the same undertakings, same period of time.

and in accordance with Article 9 of the Implementing Regulation[64]. If a national court is dealing or has already dealt with the same case, the Commission may reject the complaint for lack of "Community interest"[65].

5.2. Procedure

124. If the Commission, after careful examination of the case, comes to the conclusion not to pursue the case for any of the reasons mentioned above, it will first inform the complainant in a meeting or by phone that it has come to the preliminary view that either (i) the case lacks "community interest", (ii) the complaint has not been adequately substantiated or (iii) after a thorough consideration the Commission concludes that there is no evidence of an infringement. The complainant may then withdraw the complaint. Otherwise, the Commission shall inform the complainant by a formal letter that there are insufficient grounds for acting and set a time-limit for written observations[66]. The time-limit shall be at least four weeks[67]. Where appropriate and upon reasoned request made before the expiry of the original time-limit, the time-limit may be extended[68]. In this context, the complainant has also the right to request access to the documents on which the Commission bases its provisional assessment[69].

125. If the complainant does not react to the above mentioned letter of the Commission within the set time-limit, the complaint shall be deemed to have been withdrawn pursuant to Article 7(3) of the Implementing Regulation. The complainant shall be informed accordingly.

126. If the submissions of the complainant in response to the above mentioned letter of the Commission, does not lead to a different assessment of the complaint, the Commission shall reject the complaint by formal decision pursuant to Article 7(2) of the Implementing Regulation.

6. LIMITS ON THE USE OF INFORMATION

127. Information exchanged in the course of these procedures, in particular in the context of access to file and review of key submissions, is granted by the Commission on the condition that it shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU.

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64 Point 25 of the Commission's Notice on the handling of complaints.

65 See Annual Report on Competition Policy 2005, adopted in June 2006, p.25 ff.

66 Article 7(1) of the Implementing Regulation; Pt. 68 of the Commission's Notice on the handling of complaints.

67 Article 17(2) of the Implementing Regulation.

68 Article 17(3) of the Implementing Regulation.

69 Article 8 of Regulation of the Implementing Regulation; Pt.69 of the Commission's Notice on the handling of complaints.

128. At all stages of the proceedings, the Commission will respect genuine and justified requests from complainants or from information providers regarding the confidential nature of their submissions or contacts with the Commission, including, in some cases, the fact of their identity, in order to protect their legitimate interests (in particular in case of fears of retaliation) and to avoid discouraging them from coming forward to the Commission.[70]

129. Commission officials and the members of the Advisory Committee are bound by the obligation of professional secrecy set out in Article 28 of Regulation 1/2003. They are therefore prohibited from disclosing any information of the kind covered by this obligation which they have acquired or exchanged in the context of the investigation and the preparation of, and the deliberations in, the Advisory Committee. As regards the Advisory Committee, its members also may not reveal the opinion of the Advisory Committee prior to its publication, if any, or any information concerning the deliberations which led to the formulation of the opinion.

7. ADOPTION, NOTIFICATION AND PUBLICATION OF DECISIONS

130. All final decisions pursuant to Article 7, Article 9 and Article 23 of Regulation 1/2003 are adopted by the Commission, upon proposal of the Commissioner responsible for competition policy.

131. Immediately after the decision has been adopted, the parties shall be informed of the decision. DG Competition endeavours to send a courtesy copy of the working document to the parties. A certified copy of the full text of the decision as well as a copy of the final report of the Hearing Officer shall then be notified to the parties by express courier service.

132. A press-release will be published after the adoption of the decision by the Commission. The press-release describes the scope of the case and the nature of the infringement. It also indicates (if appropriate) the amount of fines for each undertaking concerned and/or the remedies or commitments accepted.

133. A non-confidential version of the decision will be sent to the complainant.

134. The summary of the decision, the Hearing Officer Report as well as the Opinion of the Advisory Committee shall be published shortly after the adoption of the decision in the Official Journal of the European Union in all official languages[71].

135. In addition to the requirements set out in Article 30(1) of Regulation 1/2003, DG Competition will also endeavour to publish a non-confidential version of the decision in the authentic languages as soon as possible on its website. For that purpose, the addresses of the decision will normally be asked to provide the Commission with a non-confidential version of the decision within two weeks together with their approval of the summary. Should disputes arise regarding the extraction of business secrets, a provisional full version of the decision excluding the accepted extracted information as well as the disputed information could be made

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[70] See Article 16(1) of Regulation 1/2003.

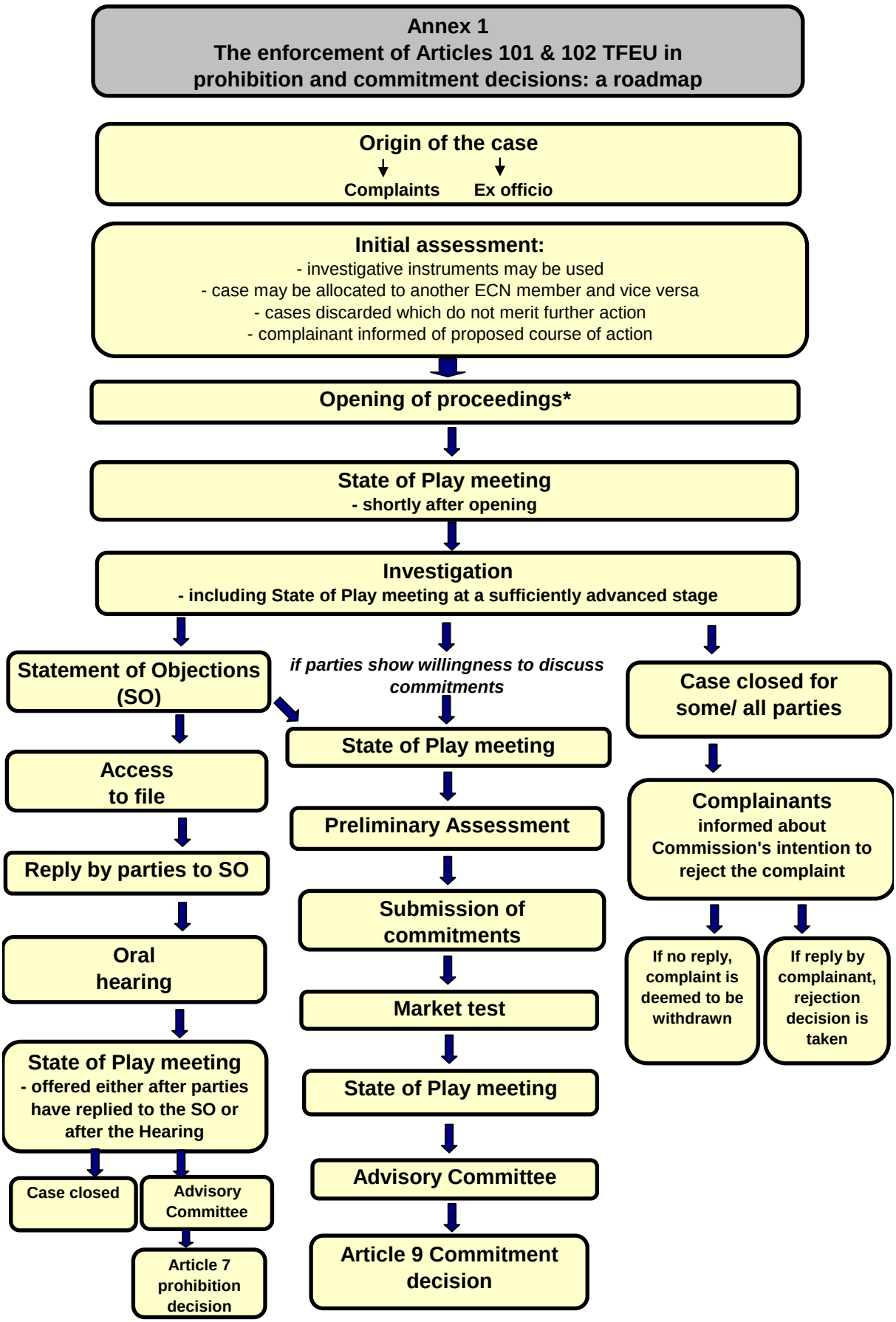
[71] With the exception of Irish (*see* Article 2 of Council Regulation N°920/2005 of 13 June 2005).

available on DG Competition's website in any of the official languages in expectation of a final settlement regarding the disputed parts.

136. In the interest of transparency, the Commission intends to make public on its website its decisions rejecting complaints (pursuant to Article 7 of the Implementing Regulation) which are of general interest.

8. FUTURE REVISION

137. These Best Practices may be revised to reflect changes to legislative, interpretative and administrative measures or due to case law of the EU Courts, which govern EU competition law or any experience gained in applying such framework. The Commission further intends to engage, on a regular basis, in a dialogue with the business and legal community and other stakeholders on the experience gained through the application of Regulation 1/2003 and its Implementing Regulation in general, and these Best Practices in particular.



* With the exception of cartel proceedings, where the opening of proceedings normally takes place simultaneously with the adoption of the SO