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Companies Rights in the EC Competition Law Procedure

Table of content

Summary 5
Preface 7
Abbreviations 8
Introduction 9

PART I

Chapter 1: The powers of the Commission under Regulation 17

1.1 Introduction 10
1.1.1 Sources 11
1.1.2 The nature of the Commission's proceedings 11

1.2 Request for information 12
1.2.1 Introduction 12
1.2.2 Article 11 of Regulation 17 12

1.3 Inspections 14
1.3.1 Two types of inspections 14
1.3.2 Surprise inspections (dawn-raids) 16
1.3.3 Oral explanations on the spot 16

1.4 Fines 17
1.4.1 Introduction 17
1.4.2 The Guidelines on setting of fines 17

1.5 Conclusion 18

Chapter 2: The rights of undertakings in the competition procedure

2.1 Introduction 20
2.2 The right to remain silent and the privilege against self-incrimination 21
2.3 The right to necessary legal representation 25
2.4 The right to enter any premises 26
2.5 The right to be heard 27
2.6 Conclusion 29

PART II

Chapter 3: Information: legal professional privilege, business secrets and access to the file

3.1 Introduction 32
3.1.1 The scope of "business record" 32
3.1.2 Limits 33

3.2 Legal Professional Privilege 34

3.3 Business secrets 36
3.3.1 The obligation of professional secrecy 36
3.3.2 Generally about business secrets 38
3.3.3 Article 20(1), use of information obtained by the Commission 38
3.3.3.1 The use of confidential information in Commission proceedings 39
3.3.3.2 The use of confidential information in national proceedings 40
3.3.4 Article 20(2), disclosure of information to third parties 41
3.3.4.1 The Akzo-procedure 43
3.3.4.2 Compliance with the Akzo-procedure 44
3.3.5 Rights conflicting with the protection of business secrets 45
3.3.6 Conclusion 47

3.4 Access to the file
3.4.1 Introduction 49
3.4.1.1 Who are entitled to have access? 49
3.4.1.2 When may an undertaking ask for access to undisclosed documents? 50
3.4.2 The scope of the file 50
3.4.3 Limits to access to the file 52
3.4.4 The Soda Ash judgements 53
3.4.5 The Commission Notice on Internal Rules of Procedure for Access to the File 55
3.4.5.1 Introduction 55
3.4.5.2 Summary of the Access to the File Notice 1997 55
3.4.5.3 Shortcomings of the Notice 57
3.4.6 Enforceability 58
3.4.6.1 Decisions on disclosure 58
3.4.6.2 Decisions on refusal of access to the file 59
3.4.6.3 Enforceability and the Access to the File Notice 60
3.4.7 Is access to the file part of the rights of defence? 61
3.4.7.1 Introduction 61

3.4.7.2 The development of the procedure of access to the file 61
3.4.7.3 A part of the rights of defence? 62
3.4.8 Conclusion 64

Chapter 4: Compliance Programmes

4.1 Introduction 67

4.2 Which companies need to set up compliance programmes? 67

4.3 Why do companies need compliance programmes? 68

4.4 The setting up of a compliance programme 71
4.4.1 Introduction 71
4.4.2 The anti-trust audit 71
4.4.3 The compliance programme 73
4.4.3.1 Company policy guidelines 74
4.4.3.2 Education 75
4.4.3.3 Record keeping 75
4.4.3.4 Disciplinary actions 76
4.4.3.5 Sign off 76

4.5 Control of the compliance programme 76

4.6 Violations of the compliance programme 77

4.7 Conclusion 77

Bibliography 79

Summary

The Commission has been widely criticised for its extensive way of using its powers under Regulation 17, especially since the Regulation is silent on rights that can counterbalance these authorities. If the Commission decides to investigate an alleged infringement of the competition rules, it normally asks the undertaking to produce all necessary information by using either an ordinary request or a request in form of a decision under article 11 of Regulation 17. Article 14 of Regulation 17 gives the Commission the power to carry out either an ordinary inspection or an inspection ordered by a decision. As a result of the Commission's competition policy becoming tougher, it often conducts surprise inspections. Article 15(2) of Regulation 17 gives the Commission the power to impose fines not exceeding 10 per cent of the turnover of each undertaking infringing Articles 85(1) or 86 of the Treaty. The Commission enjoys a wide discretion as to whether a fine should be imposed at all, and as to the level of the fine. However, the Guidelines on Setting Fines for Infringement of Anti-trust Legislation has created a longed for transparency in the area of fines imposed by the Commission[1].

When Regulation 17 was drafted in 1962, little interest was paid to protect the rights of the undertakings. In consequence, the Community Courts have been called upon to state what rights exist for undertakings under the Commission's investigative procedure in competition cases. They have tried to strike a balance between the undertaking's rights of defence and an effective enforcement of the competition rules.

The CFI has acknowledged the existence of a limited form of a privilege against self-incrimination and a right to remain silent in the investigative stage of the Commission proceedings. There have been discussions in the doctrine about an extension of the rights, but the Community Courts seem not to have acted on this.

As Community law stands today, undertakings are given the opportunity to send for their lawyers in the case of an imminent inspection. However, the inspection can still take place without awaiting the arrival of a legal adviser. The European Association of Lawyers has recommended that companies should be allowed a reasonable delay to allow their lawyers to reach the premises.

The right of the Commission to enter the undertaking's premises is subject to strict rules protecting the targeted company. Consequently, a fair balance been achieved between the Commission's investigative powers and the undertaking's rights of defence. Finally, the right to

[1] Official Journal C 009, 14/01/1998 p. 0003-0005.

be heard in article 19 of Regulation 17 is also protected by the 1994 Hearing Officer Terms of Reference Decision, which offers a major contribution to objectivity.

The definition of business records in article 14 of Regulation 17 is extremely wide as all documents found on the premises of the undertaking are deemed to be business records. The Commission's power to examine and copy business records is only limited by the principle of legal professional privilege and the protection of business secrets.
The Commission has no power to request copies of documents containing correspondence, made for the purpose and in the interest of the client's rights of defence, between an undertaking and an independent lawyer entitled to practice before a court in any of the Member States. An extension of the scope of legal professional privilege has been suggested, as unnecessary damage is caused to the undertaking's rights of defence when
correspondence with an in-house lawyer or a foreign lawyer is not protected.
The protection of business secrets is a matter of keeping the balance between one party's interest in maintaining confidentiality and the other party's interest in disclosure. To ensure effective enforcement, both interests need to be satisfied. However, when applying article 20 of Regulation 17, the Commission is not always able to keep this balance. In *Postbank*[2], the undertaking was not able to review the Commission's decision on disclosure of confidential documents to a complainant before the final decision was adopted. Consequently, the Commission was unable to respect the protection of business secrets in the investigative stage as well as in the decision stage of the proceedings.

In the statement of objections, the Commission informs the undertaking of its objections against it. To give its observations on these, the undertaking must have access to all documents in the Commission's file (except for business secrets, internal Commission documents and other confidential documents). In order to ensure compatibility with present case law, especially the *Soda Ash*[3] cases, and to improve the legal security in this rather complex area of law, the Commission has adopted the Access to the File Notice 1997. Unfortunately, the notice does not eliminate the uncertainty that exists regarding the scope of the "file" and undertakings' rights to ask for judicial review of decisions taken by the Hearing Officer. Finally, undertakings can not bring an action against the Commission's decision to refuse it access to its file *during* the proceedings, which seriously harms undertakings' rights of defence. However, an effective sanction against the Commission's infringements of access to the file would sufficiently protect the undertakings.

All companies, whether small or multinational, trading in the EEC or trading with the EEC, should seriously consider the implementation of a compliance programme, which will help the undertaking to avoid infringements of the competition rules. It will also help the undertaking to avoid serious business disruptions by reducing the likelihood of the undertaking paying damages, reducing the level of fines and finally reducing the risk of having an agreement declared void by article 85(2) of the Treaty. A compliance programme can only be effective if an anti-trust audit is

[2] Postbank v. E.C Commission (1997) 4 C.M.L.R. 33.
[3] Case T-30/91, Solvay v. Commission, (1995) E.C.R. II 1775, Case T-36/91, ICI v. Commission (1995) E.C.R. II 1847, Case T-37/91, ICI v. Commission, (1995) E.C.R. II 1901.

conducted, identifying the areas in which there are risks of infringements of the competition rules. Key elements in most compliance programmes are company policy guidelines, continuous education, sign off, a document retention policy and the existence of disciplinary actions.

Preface

My first source of inspiration as regards this thesis on the E.C. Commission's powers and the undertaking's rights in the EC Competition law procedure was Mark Furse, Senior Lecturer in Law at Westminster University. Mark's lectures and articles on E.C. and U.K. competition law made me realise how exciting EC competition law really is, especially in relation to its important connections with economic principles and theories. My second source of inspiration has been Stanbrook and Hooper's film *Competition: fair or foul: organising EC competition law compliance*. This film gave me insight into how little managers in medium sized and large companies really know about the importance of complying with law in general and competition law in particular. This is a real problem since non-compliance can have devastating effects on undertakings' businesses. In order to avoid serious business disruptions resulting from non-compliance, the manager in the film was given the advice to set up a compliance programme. I want to thank Eva Munck Forsberg, lawyer at Wistrand & Landahl in Malmö, Sweden, for giving me a practical and very useful example of how a compliance programme can be set up. I also want to thank her for taking time of patiently answering my questions relating to the necessity and function of compliance programmes.
Last but not least, I want to thank Katarina Olsson, Associate Professor in Law at Lund University, for being my tutor and for agreeing to and putting up with communications taking place from a long distance.

Abbreviations

CFI	The Court of First Instance
C.M.L.R.	Common Market Law Reports
C.M.L.Rev.	Common Market Law Review
ECHR	The European Convention on Human Rights
ECJ	The European Court of Justice
E.C.R.	European Court Reports
E.C.L.R.	European Competition Law Review
E.H.R.R	European Human Rights Reports
E.L.Rev.	European Law Review
Regulation 17	Council Regulation 17/62 of 6 February 1962, first Regulation Implementing Art 85 and 86 of the Treaty, amended by Reg. 59/62, by Reg. 118/63/EEC and by Reg. (EEC) 2822/71.
The Commission	The Commission of the European Community
The EEC	The European Economic Community
The Treaty	The EEC Treaty

Introduction

The purpose of this thesis is to discuss some issues relevant in the EC competition law procedure. As well as giving an academic view of the powers and the rights of the Commission and undertakings in the Community competition procedure, the essay can also work as a practical guide to undertakings when faced with competition issues in their day-to-day business. In order to make this easy to handle, the thesis must be divided into two separate parts.

The first part will deal with the Commission's powers under Regulation 17 (chapter 1) and undertakings' rights in the investigative stage and in the decision stage of the procedure (chapter 2). In order to get information supporting an alleged infringement of the competition rules, the Commission can make a request for information or carry out an inspection. It also has a wide discretion as to the imposition of fines. To counterbalance these powers of the Commission, the undertakings have certain procedural guarantees explicitly stated in Articles 11 and 14 of Regulation 17. I will also examine whether undertakings have been granted any further rights in this area, and in this context I will start of by analysing the possibility of a right to remain silent and a privilege against self-incrimination. The following rights will also be discussed: the right to necessary legal representation, the rights of undertakings in connection with the Commission's right to enter its premises and the right to be heard.
This part will be mainly theoretical, but can also serve as a guideline to undertakings in their overall understanding of the Commission's powers and functions and their own rights and obligations in relation to this.

The second part of the thesis is meant to have a more practical perspective. It will start of by dealing with information in the EC competition law procedure (chapter 3). This is an area of practical importance as the definition of "business records" is especially wide and there will be serious consequences for undertakings supplying the Commission with incorrect information as well as for those undertakings that are not given access to the Commission's file. The chapter will include a description of what information undertakings must disclose to the Commission in the case of a request for information or an inspection by the Commission's officials and what information the Commission on its part can disclose to third parties. It will also deal with what information undertakings need access to in order for them to effectively exercise their rights of defence during the procedure. Consequently, the principle of legal professional privilege, the obligation of professional secrecy, the protection of business secrets and access to the Commission's file are areas that will be analysed in further detail.
Finally, chapter 4 will discuss the practically important question of the necessity, function and contents of compliance programmes. These need to be created for the prevention of costly infringements of the Community competition rules and I will try to motivate why certain vulnerable companies cannot be without one.

PART I

Chapter 1. The powers of the Commission under Regulation 17.

1.1 Introduction

The Community Council has in accordance with article 87 of the Treaty adopted regulations entrusting the enforcement of the competition rules, mainly articles 85 and 86 of the Treaty (as from 1 January 1999, articles 81 and 82 respectively), to the Commission. Regulation 17[4] gives the Commission wide powers to order the termination of infringements of the competition rules (Article 3 of Regulation 17), to make requests for information and undertake investigations (Articles 11 and 14 of Regulation 17) and to impose fines (Articles 15 and 16 of Regulation 17) in order to ensure compliance with the competition provisions. In order to guarantee objectivity, its decisions can be challenged by the CFI under article 173 of the Treaty and appeals may be brought before the ECJ. Regulation 17 also gives the Commission the exclusive power of granting individual exemptions under article 85(3) of the Treaty (Articles 6-8 of Regulation 17). These powers make the Commission the guardian of the Treaty as regards the EC competition law.
National competition authorities and national courts also have the powers to enforce the Community competition law. Following the Commission's increased workload and the principle of subsidiarity[5], the Commission has published two notices on co-operation between the Commission and national courts[6] and the Commission and national competition authorities[7]. The aims of these notices are to secure the involvement of the national courts and competition authorities in the enforcement of Community competition law[8] and also to facilitate a clearer definition of the decentralisation of the enforcement of these rules. Briefly, the result is that the Commission has a discretion only to deal with cases involving a Community interest while national bodies will deal with the remaining cases, excluding questions on individual exemptions under article 85(3).
This essay will only deal with the Commission's enforcement of the Community competition rules, but it is important to understand that national institutions also can enforce the same rules.

The purpose of this chapter about the Commission's powers under Regulation 17 is to serve as an introduction to chapter 2. As such, it is not meant to cover every aspect of the Commission's

[4] Council Reg. 17/62 of 6 Feb.1962, First Reg. implementing Articles 85 and 86 of the Treaty, amended by Reg. 59/62, by Reg. 118/63/EEC, and by Reg. (EEC) 2822/71.
[5] The principle is set out in article 3(b) of the Treaty and is inherent to the division of competence between EC and national competition law, Luiz Ortiz Blanco, EC Competition procedure, at p.12.
[6] Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, Published in O.J. (1993) C 39/6, (1993) 5 C.M.L.R. 95.
[7] Antitrust Enforcement (co-operation with National authorities) Notice 1997, Published at (1997) O.J. C 313/3 (15 October 1997), (1997) 5 C.M.L.R. 884.
[8] Unfortunately, the administrative authorities in Sweden and in the united Kingdom are not able to apply Articles 85 and 86 of the treaty as they do not have the power to apply these Community rules directly.

wide powers in this area. Accordingly, I have decided to limit the presentation to the following three main articles: Articles 11, 14 and 15 of Regulation 17.
Thus, do not expect to find all the answers in relation to the Commission's powers under Regulation 17 in this chapter, as that is far from its intention.

1.1.1 Sources

The basic Community competition provisions applicable to undertakings are articles 85 and 86 of the Treaty. These articles prohibit abuse of a dominant position in the market and agreements restricting competition. This is the foundation of the EC competition policy, which is one of the goals of the European Community according to article 3(g) of the Treaty.
As the primary and secondary law sometimes can be incomplete and incapable of solving all competition law problems, the case law of the Community Courts is an important complementary source in this developing area of Community law.
The case law has developed some general principles of law derived from the legal traditions of the Member States. These should be applied together with the other sources of law. Principles of interest to the competition law procedure are *inter alia:*[9]
* The principle of proportionality - the Commission's acts must be limited to what is strictly necessary in order to reach the aim pursued. This is relevant especially in relation to fines, thus it must be a relationship between the amount of fine on the one hand, and the gravity of the infringement, the size of the undertaking and its responsibility on the other.
* The right to a fair hearing.
* The principle that undertakings' business secrets must be protected.
* The principle that administrative measures must be lawful, i.e. the Commission must state reasons to its decisions in order to make it possible for undertakings to seek judicial review.
* The principle of sound administration, i.e. the Commission must for example ensure that information about an undertaking is not disclosed to a competitor.

1.1.2 The nature of the Commission's proceedings

Before investigating the powers of the Commission and the rights of the undertakings, it is important to have in mind the nature of the Commission's procedure and in what stage of the procedure the undertaking's different rights exist, as this is decisive for the level of powers and rights given to the Commission and to relevant undertakings.

In *Orkem*[10] the administrative process in Regulation 17 was described as consisting of three separate stages. The ***investigative stage*** is the fact-finding stage (articles 11 and 14 of Regulation 17), where the Commission obtains the necessary information to establish whether an infringement exists or not. By serving the parties the statement of objections, the Commission enters the formal proceedings representing the ***decision stage*** (article 19(1), (2) of Regulation 17). This stage is more or less of a quasi-judicial nature, as even though the proceeding is administrative in nature, the parties are guaranteed rights that remind of those in a judicial procedure, e.g. the right to be heard. Finally, the proceedings are completed by the ***penalty stage,*** where heavy fines might be imposed on the undertaking.

[9] The principles mentioned below are set out in Blanco, EC Competition Procedure, at p. 9-10.
[10] Orkem v. E.C. Commission, (1989) E.C.R. 3283, (1991) 4 C.M.L.R. 502.

In *Hoffmann-La Roche*, the Court held that even if the proceedings are administrative, it is a fundamental principle of law to respect the rights of defence in cases that might lead to fines[11]. In the Commission's competition proceedings, the procedural safeguards available to undertakings, varies depending on in what stage of the proceeding it finds itself.
When the process moves from the investigative stage towards the formal proceedings, it progresses from acts of pure administration to a stage giving full effect to rights available in judicial proceedings (the right to judicial review, the right to be heard e.t.c.)[12].

1.2. Request for information.

1.2.1 Introduction

The Commission can obtain information about the undertaking and its agreements through informal inquiries by using internal information or by arranging informal meetings with the relevant undertaking. These oral or written contacts with the undertaking do not constitute a formal request for information as the Commission do not rely on its ordinary investigative powers here. Consequently, the undertaking cannot be fined for giving incorrect or misleading information[13]. The effect is that the Commission sometimes finds it necessary to consider, either on its own initiative or following a complaint[14], formal inquiries according to articles 11 and 14 of Regulation 17.

In *National Panasonic*[15] the Court considered the difference between article 11 and article 14. The purpose behind article 11 is to obtain information in collaboration with the undertaking while article 14 does not necessarily imply prior collaboration on the part of the firm. As article 14 is used when the Commission wants to verify the existence and scope of information already in the Commission's possession, prior co-operation is not necessary. Further, the Commission must not follow any chronological order in using the articles as they represent two independent procedures. Thus, even if the Commission has accomplished an investigation, it has still the power to request information under article11[16]. The Commission can at any stage of the proceedings use these powers, even after the investigation is completed[17].

1.2.2. Article 11 of Regulation 17

The number of written requests for information exceeds by far the number of inspections. As stated above, the request can be made at any stage of the proceedings and often the same undertaking receives several requests in the same procedure. The Commission can also request information from any undertaking having any relationship with the undertaking involved i.e. it can

[11] Hoffman La Roche AG v. E.C Commission, (1979) E.C.R. 461, (1979) 3 C.M.L.R. 211 at para. 9.
[12] Joshua, The Element of Surprise: EEC Competition Investigations under Article 14(3) of Regulation 17, (1983) 8 E.L.Rev. 3, at p. 20.
[13] Blanco, EC Competition Procedure, at p. 98.
[14] Article 3(1), (2) of Regulation 17.
[15] National Panasonic (U.K.) Ltd v. E.C. Commission (1980) E.C.R. 2033, (1980) 3 C.M.L.R. 169.
[16] Ibid. at para. 9.
[17] Kerse, E.C. Antitrust Procedure, at p. 132.

ask the undertaking's competitors, customers, distributors and suppliers to supply it with relevant information.

Article 11 consists of two successive levels of requests: an ordinary request (article 11(3)) and a request in form of a decision (article 11(5)):

Ordinary request: an undertaking is recommended to act upon the Commission's ordinary request for information, as lack of co-operation may increase the level of fines as well as increase the risk for a future dawn-raid. It is also advisable to supply information not directly requested if the relevant information can help to clarify the facts to which the investigation relates[18]. The Commission cannot compel the undertaking to reply to the ordinary request, but if the undertaking decides to do so, it must reply correctly as failing to supply correct information is subject to penalties in article 15(1)(b)[19].

Request in form of a decision: only if the undertaking does not give a complete reply to the ordinary request within the time limit[20], the Commission may send a request for information by binding decision, which compels the undertaking to supply the information correctly. This request is more detailed than the ordinary request, as formal decisions require the Commission to state the grounds on which they are based. The Commission must inform the undertaking of the possibility of seeking annulment of the decision before the Court[21] and of that penalties will be imposed in accordance with Articles 15(1) (b) and Article 16(1) (c) if the information is not supplied at all or if incomplete information is supplied.

Finally, the Commission must send copies of the two types of requests to the competent authorities in the Member States concerned[22].

Under article 11, the Commission has an active role of finding out the truth and the undertaking has a positive duty to hand over all documents, which means that the undertaking must not merely give access to all its business files but it must actually produce the specific documents required and not only allow the inspectors access to its premises[23]. The Commission can ask for all necessary information[24]. "Necessary" means anything that has a relationship with the subject matter of the possible infringement. Thus, a document is seen as necessary if it can bring to light an infringement of the competition rules. The Commission decides what is considered a necessary document[25]. Consequently, an undertaking cannot refuse to supply documents it considers irrelevant. This applies to article 11 as well as to article 14 of Regulation 17.

[18] Blanco, EC Competition Procedure, at p. 112 and 116.
[19] Article 11(3) of Regulation 17.
[20] The time limit can vary depending on the purpose behind the request and the complexity of the question. The most usual time limits are between two and four weeks, Blanco, EC Competition Procedure, at p. 107-109
[21] Article 11(5) of Regulation 17.
[22] Articles 11(2) and 11(6) of Regulation 17.
[23] Fabbrica Pisana v. E.C. Commission (1980) 2 C.M.L.R. 354 at paras. 10-11.
[24] Orkem SA v. E.C Commission (1989) E.C.R. 3283, (1991) 4 C.M.L.R. 502 at para. 23.
[25] AM & S Europe Ltd v. E.C Commission (1982) E.C.R. 1575, (1982) 2 C.M.L.R. 264 at para. 17.

Even if the Court only exercises a limited review of the Commission's wide discretion in this regard,[26] the Commission's powers are limited in several other ways. First, the Commission must respect the rights of defence by stating the legal basis and the purpose of
the request (Article 11(3) of Regulation 17). It must also make clear to the undertaking that heavy penalties may be imposed for supplying incorrect information (Article 15(1)(b) of regulation 17). The Commission fulfils these obligations by giving a brief description of the type of activity investigated which it believes constitute a breach of the competition rules. These obligations are vital as they safeguard the rights of defence of the undertaking at the same time as they enable the undertaking to assess the scope of its duty to co-operate.
Secondly, as it must exist a legal connection between the information requested and the alleged infringement[27], the Commission can only request information which is set out in the request for information. Thirdly, the Commission is not permitted to request information with the purpose of discovering both infringements and evidences at the same. If it acted with this purpose in mind, it would conduct a prohibited act called "a fishing expedition" where the Commission uses a request for certain information in order to get details about other infringements not connected with the on going investigation[28]. Accordingly, before the Commission takes action, there must exist indications of a defined infringement and likewise there can be no justification for a negative clearance or an individual exemption, as such justifications indicate that there does not exist an infringement which need further investigation by the Commission.
Finally, as mentioned above[29], the Commission must observe the principle of proportionality and cause as little inconvenience as possible to the undertaking under investigation. The obligation to disclose information should not represent a burden for the undertaking that is disproportionate to the needs of the investigation[30].

1.3. Inspections

1.3.1 Two types of inspections

Article 14(1) gives the Commission the power to examine the books and other business records of the undertaking. The article describes two alternative types of inspections[31]: inspections based on an authorisation, so-called ordinary inspections (article 14(2) of Regulation 17), and inspections ordered by decision of the Commission (article 14(3) of Regulation 17). The Commission has the discretion to decide what type of inspection is most appropriate to each case[32].

In parallel with 11(3) of Regulation 17, *ordinary inspections* are voluntary but once the undertaking has decided to submit to the inspection, it cannot withhold information. Therefore,

[26] Blanco, EC Competition Procedure, at p. 109.
[27] Société Générale v. E.C. Commission (1995) E.C.R. II-545, (1995) 4 C.M.L.R. 594 at para. 40.
[28] Joshua, The Element of Surprise…, (1983) 8 E.L.Rev. 3 at p. 11
[29] See 1.1.1 Sources
[30] SEP v. E.C Commission, (1991) E.C.R. II-1497, (1992) 5 C.M.L.R. 33 at para. 51
[31] Compare with Article 11, where the requests described are two subsequent, not alternative, stages. National Panasonic (U.K.) Ltd. v. E.C. Commission, (1980) E.C.R. 2033, (1980) 3 C.M.L.R. 169 at para. 11.
[32] Hoechst AG and Others v. E.C Commission (1989) E.C.R. 2859, (1991) 4 C.M.L.R. 410 at para. 22.

once agreed, ordinary inspections proceed exactly the same way as inspections pursuant to decisions.
The written authorisation (Article 14(2) of Regulation 17) must state the name and address of the undertaking investigated[33], the names of the Commission officials authorised to undertake the inspection and the subject matter and purpose of the inspection. Finally, the Commission must give details of possible sanctions under article 15(1)(c) of Regulation 17.
The obligations stated above cannot be limited for the sake of effectiveness of the investigation as they are necessary in order to respect the rights of defence of the undertaking. In order to strengthen these rights of the undertaking, the Commission has prepared an explanatory memorandum, delivered together with the authorisation, setting out the rights and obligations of the undertaking and the inspectors during inspections.

Inspections pursuant to a binding decision under article 14(3) are mandatory and undertakings cannot oppose to them.
In theory, undertakings can apply to the CFI for interim measures under article 186 of the Treaty in order to stop the inspectors entering their premises. However, it is unlikely that the CFI would deal with such an application before the inspection is carried out[34].
The decision must specify the same things that are stated in an authorisation under 14(2) as well as tell the date on which the inspection is to begin and the right to appeal against the decision to the Court under article 173 of the Treaty (Last sentence of Article 14(3) of Regulation 17).

The Commission tends to go for mandatory inspections instead of ordinary inspections where undertakings provide incorrect or incomplete information, refuse to respond to a request for information, refuse to agree to an ordinary inspection or having agreed, fail to provide complete information. It also prefers mandatory inspections to ordinary ones if it suspects that a serious infringement has been committed[35].

When an investigation is carried out by the Commission, the national authorities are present as the Commission does almost always seek their assistance under article 14(5) and (6) of Regulation 17 in order to help it to locate and read the relevant documents.
When the Commission inspectors and the national officials arrive, they ask to speak to those in charge of the business. In practice, this means directors, commercial managers, company secretaries, head of relevant departments, or those who seem most appropriate to represent the interests of the undertaking[36]. It is the undertaking and not the Commission that decides who these representatives will be. Subsequently, the Commission hands over the documents necessary for the exercise of their inspection powers. If necessary, they explain to the undertaking its rights and obligations and if requested, a copy of Regulation 17 is given to the firm[37]. The undertaking must now decide whether or not to agree to an ordinary inspection. It is recommended to agree

[33] However, inspectors are not limited by the address stated in the authorisation, but can enter premises owned by the undertaking located elsewhere.
[34] Blanco, EC Competition Procedure, at p. 125.
[35] Joshua, The Element of Surprise…, (1983) 8 E.L.Rev. 3, at p. 4-6.
[36] Blanco, EC Competition Procedure, at p. 141.
[37] Joshua, The Element of Surprise…, (1983) 8 E.L.Rev. 3, at p. 9.

to the inspection, as "opposition" is interpreted widely by the Commission and means any action taken by the undertaking to hamper the inspector's work during the inspection[38].
Either the officials themselves or the representatives of the undertaking search the premises, including the cupboards and archives, for the relevant documents. The undertaking will have to allocate one or more people to this task at least for a day or two. Any deliberate delay of the production of documents will be penalised[39].

1.3.2 Surprise inspections (dawn-raids)

Around 1980, when the Commission's competition policy became tougher, it started to use more effective methods of enforcement, such as surprise inspections (so called dawn-raids). The Commission started to show up at the undertakings' premises without advance notice, which was possible as the Commission must not give the undertaking prior notice of inspections under article 14, even if ordinary inspections are usually announced in advance. Today, the majority of inspections pursuant to a binding decision are surprise inspections[40]. However, the competent competition authorities of the Member States must be given prior notice (Article 14(2) and (4) of Regulation 17).

There have been discussions about the legality of surprise inspections. Proposals have been made under which the Commission would be forced to apply to the ECJ for leave to make a surprise investigation[41]. The legality of these inspections was finally laid down in National Panasonic. In this case the applicant claimed that surprise inspections infringe article 8 of the ECHR, in particular as regards the right to receive advanced notification of the intention to apply a decision against it[42]. The Court held that fundamental rights form an integral part of the general principles of law, the observance of which the Community Courts must ensure. However, the aim of the powers given to the Commission in article 14 of Regulation 17 is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. Accordingly, surprise inspections were held not to infringe the fundamental rights of the undertakings and in order to defend the public interest, they were seen as exceptions to the principle of non-interference by public authorities[43].
The legality of dawn-raids has not only been discussed in relation to the ECHR, but also in relation to the Commission's wide powers under Regulation 17. When the Commission started to carry out its surprise inspections, it was easy for the undertakings to apprehend the Commission's actions as an expansion of its already very wide powers. However, as the dawn-raids are carried out within the legal limits of Article 14 of Regulation 17, (article 14 does not necessarily imply prior collaboration on the part of the firm and the Commission must not give the undertaking prior notice of inspections under article 14), the argument must be seen as ill-founded.

1.3.3 Oral explanations on the spot

[38] Blanco, EC Competition Procedure, at p. 144.
[39] Fabbrica Pisana v. E.C. Commission (1980) 2 C.M.L.R. 354 at paras. 10-11.
[40] Blanco, EC Competition Procedure, at p. 128.
[41] Joshua, The Element of Surprise…, (1983) 8 E.L.Rev. 3, at p.6.
[42] National Panasonic (U.K) v. E.C Commission, (1980) E.C.R. 2033, (1980) 3 C.M.L.R. 169 at para 17.
[43] Ibid. at paras.18-20.

The Commission's inspection powers are set out in article 14(1) of Regulation 17. As the powers set down in article 14 (1)(a)(b) and (d) have already been or will be analysed under more appropriate headings[44], I will at this point only discuss article 14(1) (c) " to ask for oral explanations on the spot".

The aim of seeking oral explanations on the spot is to facilitate the inspections by obtaining additional information. The Commission can ask about anything in connection with the subject matter of the inspection e.g. the location or interpretation of a certain document. However, the Commission cannot ask questions more appropriate to a formal request for information under article 11 of Regulation 17, as in that case, the procedural safeguards mentioned in that article must be observed.

The oral explanation should not be seen as a cross-examination but as a friendly exchange of information, which can be a beneficial opportunity for the undertaking to state its views[45]. If the Commission has not found documents proving the alleged infringements and the oral explanations of the undertaking prove to be convincing, this can influence the subsequent course of the investigation and the Commission might decide to close its file on the case. The representatives of the undertaking should therefore not miscalculate the importance of oral explanations just because they can not be compelled to respond to the Commission's questions. Further, a refusal to provide an explanation can be regarded as opposition to the inspection[46] and a refusal to reply and incorrect replies to a request for oral explanations are penalised under article 15(1)(c) of Regulation 17.

1.4 Fines

1.4.1 Introduction

The Commission can impose fines on the undertaking in accordance with articles 15 and 16 of Regulation 17. The purposes of the fines are to impose a pecuniary sanction on the undertaking for the infringement as well as to prevent a repetition of the offence[47]. By virtue of article 15(1), the Commission may impose fines for procedural infringements of Regulation 17 and article 16 gives it the right to impose periodic penalty payments. Article 15(2) gives the Commission the power to impose a fine not exceeding 10 per cent of the turnover in the preceding business year of each undertaking that, intentionally or negligently, has infringed articles 85(1) or 86 of the Treat. The Commission enjoys a wide discretion both as to whether a fine should be imposed at all, and as to the level of the fine. Even if the CFI has been unwilling to limit or reduce the wide discretion enjoyed by the Commission[48], the undertaking can always try to challenge the level of the fine in an "article 173 procedure".

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[44] The power in article 14(1) (a) and (b) (giving the Commission the right to examine and copy extracts from books and other business records) has already been dealt with above in 1.2.2 and will also be discussed in Chapter 3. Article 14(1) (d) will be analysed in 2.4, as the right to enter any premise, land and means of transport of undertakings is a power more connected to the rights of undertakings in this area. An analysis at this stage would only constitute a repetition of what I already have said or intend to say.

[45] Joshua, The Element of Surprise…, (1983) 8 E.L.Rev. 3, at p.12.

[46] Ibid.

[47] Article 15(2) of Regulation 17: Mark Furse, Fines and the Commission's Discretion, (1995) 2 E.C.L.R 110 at p. 110.

[48] Ivo van Bael, Fining à la Carte: The Lottery of EU Competition Law, (1995) 4 E.C.L.R 237 at p.239.

1.4.2 The Guidelines on setting of fines

The level of fines has increased steadily over time. In Pioneer it was held that the Commission may at any time adjust the level of fines and without giving any prior notice, impose a fine far more heavier than under its previous practice[49]. As a consequence, undertakings have demanded the Commission to make clear on what grounds the level of fines is calculated. They want the Commission's fining policy to be more transparent and it has even been calls for giving the impartial Community Courts, and not the Commission, the power to impose the fines[50]. As a response to this criticism, the Commission in January 1998 published the Guidelines on Setting Fines for Infringement of Anti-trust Legislation[51]. The guidelines aim at creating transparency both with respect to companies and with respect to the ECJ by making it possible to strengthen the coherence of the Commission's fining policy. In this new system, a base sum defined with reference to the duration and the gravity of the infringement (these are the only criteria mentioned in article 15(2) of Regulation 17) will be calculated. This sum will then be raised when aggravating circumstances exist or reduced to take account of attenuating circumstances. In assessing the gravity of the infringement, account is to be taken to its nature[52], its impact on the market and the size of the relevant geographic market. The infringement will then be put into one of three categories: minor infringements (likely fines: 1.000 ECUs to 1 million ECUs), serious infringements (likely fines: 1 million ECUs to 20 million ECUs) and very serious infringements (likely fines: above 20 million ECUs). As regard duration, infringements of short duration (less than one year) do not increase the amount of fines but infringements of medium duration (one to five years) and infringements of long duration (more than five years) will increase the amount determined for gravity with up to 50 per cent and 10 per cent respectively. The basic amount will then increase when aggravating circumstances such as refusal to co-operate with the Commission in carrying out its investigations, retaliatory measures against other undertakings and repeated infringements, exist. The amount will be reduced where attenuating circumstances such as a passive role in the infringement, termination of the infringement as soon as the Commission intervenes and infringements committed as a result of negligence, exist. Other mitigating circumstances to be taken into account are difficult trading circumstances, such as a major recession in the relevant industry, and the existence of a compliance programme[53]. The final amount calculated can not in any case exceed 10 per cent of the world wide turnover of the undertakings.

1.5 Conclusion

[49] Musique Diffusion Francaise SA (Pioneer) v. E.C.Commission (1983) E.C.R 1825, (1983) 3 C.M.L.R. 221 at para. 109.

[50] Ivo van Bael, Fining à la Carte, (1995) 4 E.C.L.R. 237 at p. 243.

[51] Official Journal C 009, 14/01/ 1998 p. 0003-0005 and Commission press release IP (97) 1075 of 3 December 1997, (1998) 4 C.M.L.R. Antitrust Reports 1-196, January 1998, part 1 p. 8-11.

[52] Infringements falling within the categories referred to in article 85(1) e.g. price fixing, sharing markets and tie-ins, are seen as infringements particularly serious in nature, Furse, Article 15(2) of Regulation 17: Fines and the Commission's Discretion, (1995) 2 E.C.L.R. 110, at p.111.

[53] See more about the importance of compliance programmes when to determine the level of fines in "4.3, Why do Companies need compliance programmes?" and in "4.6, Violations of the Compliance Programme".

National courts, national competition authorities and the Commission, all have the power to enforce the Community competition law. However, this essay will concentrate on the main powers given to the Commission to enforce Articles 85 and 86 of the Treaty, as described in Articles 11, 14 and 15 of Regulation 17. These powers make the Commission the guardian of the Treaty as regards the EC competition law.
Besides the rules set down in Regulation 17, the Commission must take into account the case law of the Community Courts as well as several important principles (e.g. the principle of proportionality, the principle that administrative measures must be lawful and the right to a fair hearing) when enforcing the EC competition law.
The administrative process described in Regulation 17 is divided into three separate stages: the investigative stage, the decision stage and the penalty stage. Even if the procedure is administrative in nature, the rights of defence must be respected in cases that might lead to the imposition of fines.
The Commission can ask for all "necessary" information under article 11 of Regulation 17. Even if it is the Commission that decides whether a document is necessary or not and even if the CFI is quite unwilling to limit this discretion enjoyed by the Commission, requests for information under article 11 can not be criticised for being executed without safeguarding the rights of the undertakings. The Commission is forced to respect the rights of defence, as it must state the legal basis and the purpose of the request, only ask for information set out in the request and observe the principle of proportionality. The only threats to the undertaking's rights of defence are the so-called "fishing expeditions", but as it must exist an indication of the identified infringement before the Commission can take action, these can also be avoided.

As article 14 of Regulation 17gives the Commission even greater investigative powers than is afforded to it under article 11, it is interesting to see whether the Commission applies it correctly, thus, does it respect the rights of defence when applying it? The article has been examined in a number of cases in which undertakings have claim that it might be contrary to the rights of defence. In Hoechst the ECJ held that when applying article 14, regard must be had to the rights of defence, as they must be observed also in the preliminary/inquiry stage of the procedure[54]. The aim of the powers in article 14(1) is to enable the Commission to ensure that the rules on competition are applied in the Common Market. For that purpose it must be empowered to undertake investigations to bring to light any infringement of articles 85 and 86 of the Treaty. The ECJ continued and held that even if the scope of the investigations may be very wide and include the right to enter any premises (without such power it would be impossible for the Commission to obtain necessary information when the undertaking refused to co-operate), the rights of defence are adequately protected[55]. The reason is that the Commission must specify the subject-matter and purpose of the investigation as well as respect the appropriate procedural rules laid down in national law when it undertakes an investigation with assistance of the national authorities under article 14(6) Regulation 17[56]. To sum up, the ECJ recognises that the existing procedural safeguards in article 14 are sufficient to protect undertakings' rights of defence. However, it

[54] Hoechst AG v. E.C Commission, (1989) E.C.R. 2859, (1991) 4 C.M.L.R. 410 at para. 16.
[55] Ibid. at paras. 25-27.
[56] Ibid at paras. 28-34.

remains to be seen whether this is correct in relation to all of the different rights of defence[57]. Whatever the case, it is not recommended to try and stop the investigation from taking place by delaying it or by asking for an interim relief as this only will be seen as opposition, resulting in fines being imposed on the undertaking.

Finally, the Guidelines on Fines have created a longed for transparency in the area of fines imposed by the Commission. This is more or less in line with the recommendations of the House of Lords Select Committee on the European Communities[58]. The Committee wants the Commission to fully set out the reasons for the fines being imposed, making them more open to review by the CFI[59]. However, the guidelines do not interfere with the Commission's wide discretion as to the setting of the amount of the fines. This discretion is only limited by the principle of proportionality, the principle of non-discrimination and judicial review[60]. However, it is disputed as to whether the latter can be seen as a limit, as the Community Courts appear to be hesitant to reduce the wide discretion of the Commission.

Chapter 2. The rights of undertakings' in the competition procedure

2.1 Introduction

As has already been explained, to counterbalance the investigative powers of the Commission, the undertakings are afforded certain procedural guarantees[61]. When applying Article 11 of Regulation 17, the Commission can only ask for information set out in the request, and it must state the legal basis and the purpose of a request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information. When carrying out an inspection under Article 14(2) and (3) of Regulation 17, the Commission must produce an authorisation or an order specifying the subject matter and purpose of the investigation and the penalties provided for in Articles 15(1)(c) and 16(1)(d) and the right to have the decision reviewed by the Court of justice.

However, when Regulation 17 was drafted in 1962, little interest was paid to protect any other rights of the undertakings. In consequence, the Community Courts have been called upon to state what rights exist for undertakings under the Commission's investigative procedure in competition cases.

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[57] See more about this in Chapter 2.

[58] The Committee writes reports and gives opinions and recommendations on different Community subjects and highlights the coming trends in (amongst other things) the EC competition law and policy. The Committee seems to have a significant impact on the Commission and the Member States. Virtually all the recommendations that it gave in its report on competition in 1982, were implemented shortly after the report was published. Read more about the Committee's work in Alan J. Riley, EC Competition Procedures Re-evaluated: The House of Lords Reports, (1994) 5 E.C.L.R. 247.

[59] Alan J. Riley, EC Competition Procedures Re-evaluated: The House of Lords Reports, (1994) 5 E.C.L.R. 247 at p.249.

[60] Ivo van Bael, Fining à la Carte…, (1995) 4 E.C.L.R. 237 at p. 238.

[61] See under 1.2.2 and 1.3.1, where these procedural guarantees are described more in detail.

Briefly, the Community Courts have accepted a limited form of a right to remain silent and a privilege against self-incrimination, resulting in a discussion in the doctrine amongst a hand full of writers about whether these rights can be further extended. I will also discuss the right to legal representation during an inspection and whether there might exist a protection of commercial premises against investigations by public authorities. Finally, the right to be heard and the tasks and powers of the Hearing Officer will be analysed.
The Community Courts' familiar pattern of analysis in "rights cases" is to identify the heritage of a special right in the international legal order and in the legal orders of the Member States[62]. Further, they consider whether to give priority to an effective enforcement or whether to give preference to any of the fundamental rights. The result of this balancing seems to depend upon at what stage of the proceedings the undertaking finds itself. Consequently, the level of protection varies at different stages of the procedure. In the investigative stage, the rights and protection of the undertakings are quite weak following the fact-finding role of the Commission, but as the Commission's acts evolve more into those of a judicial body, the trend towards a stronger protection becomes eminent.
Accordingly, undertaking's are afforded a strong protection of their right to be heard, while the other rights (which are mainly activated in the investigative stage of the procedure) must give way to the need of an effective enforcement and are therefore not equally well protected.

Finally I want to remind the reader of the fact that as a result of a lack of case law in this area of competition law and because the discussion in the doctrine has been limited to a handful of writers, it is impossible to give any clear answers regarding the rights I have chosen to discuss. Consequently, in some cases I have left it to the reader to draw his own conclusions.

2.2. The right to remain silent and the privilege against self-incrimination.

Undertakings are obliged to co-operate actively and make available to the Commission all information relating to the subject-matter of the investigation[63]. However, Regulation 17 does not express any right of silence or any right on the part of the firm to refuse to incriminate itself. When Regulation 17 was drafted, the Internal Market Committee of the European Parliament proposed that the right of silence and the privilege against self-incrimination should be afforded to all private parties and companies involved in competition proceedings before the Commission[64]. However, the proposal of incorporating the rights in Regulation 17 was rejected by the Council of Ministers, as there were too many differences regarding the recognition of the principles in the legal systems of the Member States[65]. It was also believed that if undertakings had those rights, the Commission would have problems, in the absence of full search powers to obtain enough

[62] Josephin Shaw, Recent Developments in the field of Competition Procedure, (1990) E.L.Rev., 15(4), at p. 332.
[63] Orkem SA v. E.C Commission, (1989) E.C.R. 3283, (1991) 4 C.M.L.R. 502 at para. 27.
[64] Thomas Jestaedt, The Right to Remain Silent in EC Competition Procedure, in Rights of Defence and Rights of the European Commission in EC Competition Law, a book of the speeches held on the Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p.113.
[65] Thomas Jestaedt, The Right to Remain Silent in EC Competition Procedure, in Rights of Defence and Rights of the European Commission in EC Competition Law, a book of the speeches held on the Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p.113.

evidence of infringements[66], as the Commission then would have to rely on the undertakings involved to provide it with the relevant evidence. Instead, the Council left it to the ECJ to decide the level of protection afforded to undertakings when compelled to disclose information following articles 11(5) or 14(3) of Regulation 17.

About thirty years after the proposal of incorporation, the ECJ was finally called upon to consider whether a privilege against self-incrimination exists in the fact-finding stage of the Commission proceedings. In *Orkem*[67], the ECJ followed its familiar pattern in "rights cases"[68] and looked at whether any common legal principle of Community law, as recognised in most of the Member State[69], acknowledged a right for undertakings not to provide information that can be used to incriminate them. A comparative analysis of the legal systems of the Member States was conducted and the advocate general found that in general, the laws of the Member States only grant this right to private parties charged with an offence in criminal proceedings. The Court therefore concluded that a general right to remain silent does not exist for legal persons in Community competition law[70].
The Court also held that neither the wording of article 6 of the ECHR[71] (which an undertaking in the Commission's investigation procedure can rely on), nor the decisions of the European Court of Human Rights, indicate that article 6 of the ECHR upholds the right to remain silent or the privilege against self-incrimination[72].
However, as the ECJ did not want to simply refuse to recognise a privilege against self-incrimination, it further considered whether certain limits on the Commission's investigation powers were implied by the need to safeguard the rights of defence. It came to the conclusion that the Commission must protect some of the rights of defence even in the preliminary stage of the proceedings and it may therefore not compel the undertaking to provide answers that can involve an admission on its part of the existence of an infringement. Therefore, questions regarding unspecified acts or general measures regarding the alleged infringements usually violate the undertaking's rights. Questions seeking clarification on "every step or concerted measure which may have been envisaged or adopted to support such price initiatives" or require disclosure of the "details of any system or method which made it possible to attribute sales targets or quotas to the

[66] For example, if an undertaking, in accordance with its right to remain silent and a privilege against self-incrimination, had the right not to answer a certain question put to it by the Commission, the Commission would not be able to get all the information it needed to support the alleged infringement and consequently not being able to make of all of its search powers.
[67] Orkem SA v. E.C Commission, (1989) E.C.R 3283, (1991) 4 C.M.L.R. 502.
[68] See under 2.1 Introduction where this familiar pattern is explained in detailed.
[69] Fundamental rights form an integral part of the general principles of Community law: the fundamental rights are the rights that derive from the constitution of the Member States and the European Convention on Human Rights (Walter van Overbeek, The Right to remain Silent in Competition investigations…, (1994) 3 E.C.L.R. 127 at p. 131) and in Case 4/73 Nold v. E.C. Commission, (1974) E.C.R. 491, the ECJ held that the fundamental right form an integral part of the general principles of Community law.
[70] Orkem SA v. E.C Commission, (1989) E.C.R. 3283 (1991) 4 C.M.L.R. 502 at paras. 28-29.
[71] Article 6(1) of the ECHR reads as follows: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
[72] Orkem SA v. E.C Commission, (1989) E.C.R. 3283, (1991) 4 C.M.L.R. 502 at para. 30.

participants" are examples of questions that would be annulled[73]. However, purely factual questions do not enjoy the protection against self-incrimination.

Since *Orkem*, there has been a further development, which may lead to a full recognition of the right to remain silent and the privilege against self-incrimination. In *Funke*[74], the Court of Human Rights held that article 6 of the ECHR, at least for someone charged with a criminal offence, may be construed as to cover the right to remain silent and the privilege against self-incrimination. In January 1980, three Strasbourg customs officers, acting on information from the tax authorities in Metz, searched the house of Mr Funke, a German national living in France. During the search, Mr Funke was asked to produce bank statements of his accounts in foreign banks, which he refused. He was fined 1,200 FRF and was ordered to produce the statements. The customs authorities also made an application to have him committed to prison. Mr Funke claimed that, as the authorities had brought criminal proceedings against him, trying to compel him to co-operate in a prosecution against him, they had violated the right not to give evidence against oneself, a general principle inherent in article 6(1) of the ECHR[75].
The European Court of Human Rights held that, even if not expressed in article 6 of the ECHR, the right to remain silent and the privilege against self-incriminations are rights inherent in the article and in this case these rights had been breached[76]. Further, these principles are not only applicable to criminal procedures in a strict sense, but also to administrative procedures, such as customs law:
"the special feature of customs law cannot justify such an infringement of the right of anyone charged with a 'criminal offence' within the autonomous[77] meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself"[78].
The conclusion would be that as Community competition law is held to be administrative in nature[79], Article 6 of the ECHR, which is held to include the right to remain silent and the privilege against self-incrimination, also applies to the Commission's competition procedure, especially since there are those that believe that a penalty of 10 per cent of the annual turnover of the

[73] Ibid. at paras. 32-41
[74] Case of Funke v. France, Series A No 256-A.
[75] Ibid. at para. 41.
[76] Ibid.
[77] An autonomous interpretation of Article 6 of the ECHR means that a certain word, e.g. "criminal charge" should be interpreted independently and give effect to the over all purpose of the Article, which is to protect the rights of individuals.
[78] Ibid. at para. 44. It might be interesting to know the reason why French Customs law was held to be criminal in nature, even if this leads us to a discussion about the interpretation of the ECHR and to further cases decided by the European Court of Human Rights. When deciding the nature of a procedure (which is important in order to see whether Article 6 of the ECHR is applicable), the European Court of Human Rights has held that the important thing is not what the procedure is classified as, but the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring (*Engel* judgement, Court of Human Rights, 8 June 1976, series A No 22, at para. 82). A penalty which is both deterrent and punitive, suffice to show that the offence is, in terms of Article 6 of the ECHR, criminal in nature (Öztürk judgement, Judgement of 21 February 1984, Series A No 73, paras. 48-50) In the *Funke* case, a fine of 1200 FRF was seen as deterrent and punitive, and consequently, the procedure, in this case, was seen as criminal in nature. See also: Walter van Overbeek, The Right to Remain Silent, (1994) 3 E.C.L.R. 127.
[79] See Hoffman La Roche AG v. E.C. Commission, (1979) E.C.R. 461, (1979) 3 C.M.L.R. 211 at para. 9 and Article 15(4) of Regulation 17.

undertaking involved (Article 15(2) of Regulation 17) is definitely seen as both deterrent and punitive[80].

There are arguments[81] that *Funke* can be applied directly to the Commission's competition law procedure, and thereby supersede *Orkem*. One indication of this is could be that the advocate general in *Orkem* looked to tax and customs law in certain Member States that did not have competition rules at the time, in order to determine whether a right to remain silent was recognised in these countries[82]. However, the *Funke* judgement can only supersede *Orkem* to the extent to which judgements of the European Court of Human Rights have any legal effects on the ECJ. The European Union as such is not a party to the European Convention on Human Rights (even if its Members are), but in 1977, the European Parliament, the Council and the Commission jointly declared that they would respect the fundamental rights derived from the constitution of the Member States and the European Convention[83]. Furthermore, the ECJ has stated that the Community cannot accept measures, which are incompatible with the observance of human rights recognised and guaranteed by the European Convention[84]. Because of this development, it has been argued[85] that the Community Courts should bring their interpretation of 6(1) of the ECHR into line with that of the European Court of Human Rights in *Funke*. It would be inconsistent to accept *Orkem* as valid case law and not to follow *Funke*, as this would not be compatible with the observance of a human right recognised and guaranteed by the European Convention[86].

At least at the present time, *Funke* can probably not be extended beyond criminal proceedings, that is, Article 6 of the ECHR can only apply to criminal proceedings and civil proceedings as understood by the case law of the European Court of Human Rights, and as the EC Competition law proceeding is held to be administrative in nature[87], the article cannot be applied here. This is further supported by *Otto BV v. Postbank N.V.*[88], where the ECJ held that undertakings can not rely upon the right to remain silent in relation to economic offences, in particular infringements of

[80] Walter van Overbeek, The Right to Remain Silent, (1994) 3 E.C.L.R. 127 at p. 130.
[81] Thomas Jestaedt, The Right to Remain Silent in EC Competition Procedure, in Right of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p.118 and Walter van Overbeek, The Right to Remain Silent, (1994) 3 E.C.L.R. 127 at p. 132-133.
[82] Thomas Jestaedt, The Right to Remain Silent in EC Competition Procedure, in Right of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p.118. However, the advocate general in *Orkem* came to the conclusion that there exists no general right to remain silent for legal persons in Community competition law, see further the second paragraph of 2.2. The right to remain silent…
[83] Walter B.J. van Overbeek, The Right to Remain Silent in Competition Investigations: The Funke decision of the Court of Human Rights makes Revision of the ECJ's case law Necessary, (1994) 3 E.C.L.R. 127 at p.131.
[84] ERT v. DEP (1991) E.C.R. II-2925 at para. 41.
[85] Walter van Overbeek, The Right to Remain Silent in Competition Investigations…, (1994) 3 E.C.L.R. 127, at p.133, Thomas Jestaedt, The Right to Remain Silent in EC Competition Procedure, in Right of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p.118.
[86] Walter van Overbeek, The Right to Remain Silent in Competition Investigations…, (1994) 3 E.C.L.R. 127, at p.132.
[87] Hoffman La Roche AG v. E.C. Commission, (1979) E.C.R. 461, (1979) 3 C.M.L.R. 211 at para. 9 and Article 15(4) of Regulation 17.
[88] Otto BV v. Postbank N.V., (1993) E.C.R. I-5683.

competition law[89], and in *Société Général* [90], the CFI confirming previous Community case law (i.e. *Orkem*) without even mentioning *Funke*. Thus, it seems as if the CFI denies any consequences of *Funke* in the Community sphere and that *Orkem* is still valid case law. Consequently, undertakings do not have a general right to remain silent and a privilege against self-incrimination, but they do not need to answer questions regarding unspecified acts or general measures.

2.3 The right to necessary legal representation

When the Commission officials have arrived and the firm has decided that it will co-operate with the investigation, the undertaking is given the opportunity to telephone or send for its in-house or out-house lawyer or legal adviser for assistance. However, this right cannot limit the investigation powers of the Commission and an inspection carried out without awaiting the arrival of a legal adviser is considered legal. If the firm has an in-house lawyer, it is normal to wait only five minutes until he arrives[91] and in the case of surprise inspections, the inspectors may agree to wait a reasonable time (which never is more than an hour according to Blanco[92]) until a lawyer arrives. The inspectors will only wait if the undertaking can guarantee that all business records will remain in the same place and that they will not be prevented from entering the premises[93]. If advanced notice has been given of the inspection, the inspectors will not wait for a lawyer.

Consequently, the undertaking's right to have a lawyer present during investigations is a very limited, next to non-existent right. Would it not be possible to stretch the narrow time limits mentioned above in order to make this rather serious and unpleasant situation feel less stressful for the undertaking? Remember, theoretically, an investigation can be carried out in companies which are not themselves under investigation for an infringement but which are simply being investigated because they may hold information which is necessary for the investigation.
As legal representation during the investigation is of real value to the companies involved, the European Association of Lawyers has suggested that companies should be allowed a reasonable delay before the beginning of the investigation to allow their lawyers to reach the premises. Further, it suggests that the Commission should undertake never to close the investigation before the arrival of the lawyer on the premises. Also, if it would not be possible to postpone the beginning of the investigation until the arrival of the lawyer, undertakings should at least be allowed to have their lawyers present when the Commission decides to question any member of the personnel or to remove documents[94].

[89] Ibid at para. 11.
[90] Case T-34/93 Societé Générale v. E.C. Commission, (1995) E.C.R. II-545, (1996) 4 C.M.L.R. 665 at paras. 71-74.
[91] Joshua, The Element of Surprise…, (1983) 8 E.L.Rev. 3, at p. 9.
[92] Blanco, EC Competition Procedure, at p. 143.
[93] Ibid. at p. 143.
[94] "Livre Blance", Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 350-351.

2.4 The right to enter any premises

As Regulation 17 does not in any way limit the inspectors right of access to the undertaking's business premises, they have free access to all buildings, land and vehicle of the undertaking (Article 14(1)(d) of Regulation 17). This includes access to all cupboards and office equipment, including computers.
However, the Commission can never on its own force itself entry to the undertaking's premises, but the undertaking will have to pay fines under articles 15 and 16 if it refuses the Commission entry. Consequently, as the Commission has no power to enter the premises of the undertaking by force or by breaking open locked desks and filing cabinets, national authorities are required to give the Commission the assistance it needs to carry out the inspection, should an undertaking oppose the investigation (Article 14(6) of Regulation 17). In England, the national officials normally apply for a court order (e.g. a search warrant), which gives it and the Commission the right to enter the premises of the undertaking[95]. In Sweden, the presence of the officials of the Kronofogdemyndigheten gives the Commission the right to enter the relevant premises.

Undertakings have claimed that there exists a protection of commercial premises against investigations by public authorities. They base this opinion upon the *Niemietz*[96] judgement by the European Court of Human Rights, where the latter held that article 8 of the ECHR also treats business premises (in this case a lawyer's chambers) as inviolable[97]. Mr Niemietz, a lawyer, had his office searched by the police and by representatives of the Freiburg public prosecutor's office as part of criminal proceedings instituted against one of his clients. The Court held that "the respect for private life" in article 8 of the ECHR includes to a certain degree the right to establish and develop relationships with other human beings. Further, this interpretation of "private life" includes activities of a business nature since firstly, the majority of people have the greatest opportunity of developing relationships with other people in the course of their working lives and secondly, it is not always possible to distinguish clearly an individual's business life from his private life[98]. The Court of Human Rights continued and stated that the word "home" in certain Contracting States, has extended to include business premises, which is consonant with the object and purpose of article 8, namely to protect the individual against arbitrary interference by the public authorities. Also, including business premises in the protection prescribed in article 8 of the ECHR would not in any way limit the Contracting States, as they will still have the opportunity to "interfere" to the extent permitted by article 8(2) ECHR, that entitlement becoming even more far-reaching if business premises are involved[99].

To sum up, has the Community Courts followed the interpretation of the European Court of Human Rights on this issue or may we once more witness a disagreement between the

[95] Blanco, EC Competition Procedure, at p. 145.
[96] Case of Niemietz v. Germany, Series A No 251-B.
[97] Case of Niemietz v. Germany, Series A No 251-B, confirmed in Funke v. France, Series A No 256-A.
[98] Case of Niemietz v. Germany, Series A No 251-B at para. 29.
[99] Ibid. at paras. 30-31.

Community Courts and the Court of Human Rights on the level of protection afforded to undertakings in this administrative proceeding?
In *Hoechst* the ECJ held, after concluding that the legal systems of the Member States differ considerably on this point, that the fundamental right to inviolability of the home cannot be extended to commercial premises[100]. Consequently, no general principle applicable in the national laws of the Member States can be used in the Community legal order regarding protection to business premises. However, the Commission has no power to inspect the homes of executives or directors as this is protected by article 8(1) of the ECHR and undertakings are entitled to a certain degree of protection following the principle of proportionality, constituting a general principle of Community law[101].

2.5 The right to be heard

Undertakings involved in competition proceedings should be treated in accordance with the principle of equality of arms, i.e. undertakings' knowledge of the relevant case must be the same as that of the Commission[102]. Consequently, the right to be heard must be respected in the decision stage of the Commission's administrative proceedings[103]. The *audi alteram partem* principle[104] is implemented in article 19 of Regulation 17 and the undertaking may request for a hearing, giving it the opportunity to make its views known on the objections against it. The Commission has also adopted a Regulation on the hearings provided for in Article 19(1) and (2) of Regulation 17[105]. The regulation deals with four issues: the hearing of the accused undertakings (Articles 1 to 4), the hearing of third parties (Article 5, which basically repeats the wording of Article 19(2) of Regulation 17), the organisation of oral hearings (Articles 7 to 9) and the rejections of complains (Article 6).

The hearing is essentially a written procedure. Once the undertakings have had the opportunity to submit their written comments, the Commission is not obliged to hear them orally[106]. However, undertakings *must* be heard if they have made a request of being heard orally and can show a sufficient interest in giving its views orally. The latter requirement is not necessary if the

[100] Joined cases 46/87 and 227/88 Hoechst AG and Dow Benelux v. E.C Commission, (1989) E.C.R. 2859, (1991) 4 C.M.L.R. 410 at paras. 17-18.
[101] Ibid. at para. 19.
[102] The equality of arms principle was established in the *Soda Ash* judgements, see 3.4.4 The Soda Ash judgements.
[103] Hoffman-La Roche v. E.C Commission, (1979) E.C.R. 461, (1979) 3 C.M..L.R 211 at para. 9. It cannot be respected in the investigative stage of the proceedings, as the Hearing takes place (*if* it is decided that a hearing should take place) first since the statement of objections has been served, that is in the decision stage of the proceedings. In the investigative stage, undertakings have the right to express their views and exchange information with the Commission's officials during the part of the procedure which is called "oral explanations on the spot", see further 1.3.3.
[104] The audi alteram partem principle is a part of the right to a fair trial as guaranteed by Article 6(1) of the ECHR.
[105] Commission Regulation 99/63/EEC of 25 July 1963 on the hearings provided for in Art. 19(1) and (2) of Council Regulation 17.
[106] Mark van der Woude, Hearing Officers and EC Antitrust Procedures: The Art of Making Subjective Procedures more Objective, (1996) C.M.L.Rev. 531-546 at p. 535.

Commission intends impose fines or periodic penalty payments[107], as this in itself is sufficient to give rise to the right to be heard. If the undertaking does not request for a hearing, the Commission is free to decide whether or not to make such arrangements. However, it can never compel the undertaking to attend a hearing.
In practice, the Commission often arranges for a hearing to be made as it tends to interpret "sufficient interest" generously and in the majority of cases, has the intention to impose a fine[108]. Article 9(3) of Regulation 17 provides that the oral hearings are not public, and therefore it is possible to hear persons separately in order to protect business secrets.

As this stage of the procedure is not investigative, the Commission must rely on the facts and arguments put forward in the statement of objections when asking the undertaking to clarify something. Also, the Commission can not use the hearing as a means of obtaining information that it could have obtained by exercising its investigative powers under articles 11 and 14 of Regulation 17[109].

In order to make the oral hearing more objective and impartial by ensuring the protection of the right to be heard, the office of Hearing Officer was created in 1982. The tasks of the Hearing Officer are to prepare, organise and conduct the hearing. He is also in charge of the follow-up of the hearing and prepares a report for the Director-General relating to factual issues and the objections raised against the undertaking concerned. The report records that no violation of the rights of defence has been claimed or happened and may give comments on the possible lack of evidence of the Commission or the withdrawal of certain objections. This report is an internal document of the Commission and undertakings can not comment on the findings of the hearing officer. However, the report does not bind the Commission in any way[110].
In 1994, the mandate of the Hearing Officer was extended[111], and the latter was given decisional powers as an effect of the delegation of some of the Commission's powers. Article 3 to 5 of the binding Commission decision authorise the Hearing Officer, acting on behalf of the Commission, to decide whether a third party should be allowed to be heard, who is to be heard orally and whether certain documents in the Commission's file should be disclosed in order to ensure the proper exercise of the right to be heard. Regarding the latter power, the Hearing Officer's discretion has been limited considerably, as undertakings now (following *Soda Ash*) have full access to the Commission's file, with the exceptions of business secrets, internal Commission documents and other confidential information (the Hercules exceptions). However, the Hearing Officer has still a wide discretion as to whether complainants and third parties can obtain certain documents from the Commission. Article 5 (3) and (4) of the decision incorporates the Akzo-procedure, which the Hearing Officer has to follow when deciding to give access to documents that may contain business secrets. This is an important power, as the right to have access to the

[107] Commission Regulation 99/63, Article 7.
[108] Blanco, EC Competition Procedure, at p.198.
[109] Ibid. at p. 209.
[110] Mark van der Woude, Hearing Officers and EC Antitrust Procedures…, (1996) C.M.L.Rev. 531, at p. 539.
[111] Hearing Officer Terms of Reference (Antitrust Proceedings) Decision, Commission decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission, O.J. L330/67 (21 December 1994), (1995) 4 C.M.L.R. 115.

Commission's file is seen as the essential precondition of an effective exercise of the right to be heard[112].
By ensuring that due account is taken to all relevant facts and arguments raised at the hearing, whether favourable or unfavourable to the parties concerned, the Hearing Officer ensures that the rights of the defence are respected not only during the hearing itself, but during all stages thereafter[113].

Finally, the role of the Hearing Officer is to balance on one hand the need for the Commission (acting in the public interest) to take forward a particular case and on the other hand, the need to respect the rights of defence of the undertakings. Consequently, in order to safeguard the business secrets of the relevant undertaking, customers or competitors often have to leave the room for a short time while the undertaking is questioned about this information[114]. In this way, both the protection of business secrets and the right to be heard can be respected[115].

2.6 Conclusion

Following the administrative nature of the proceedings and the need to keep an effective enforcement, the protection given to undertakings at the investigative stage of the proceeding is limited. However, as the Commission's powers at this stage resemble those of a judicial body, the protection might need to be stronger than it is today[116]. The European Association of Lawyers has therefore recommended some changes in order to improve the protection of undertakings' rights in this area and these recommendations will be presented below. The increased power given to the Hearing Officer has also strengthen the protection considerably.
In *Orkem,* the CFI acknowledged the existence of a privilege against self-incrimination in cases where the questions posed by the Commission aimed at reversing the burden of proof. This limited form of the right puts undertakings in a difficult situation, as they often are not in a position to determine the precise nature of the question posed[117]. Consequently, it has been argued that the Community Courts should follow the judgement in *Funke,* where the Court of Human Rights held that article 6(1) of the ECHR contains an unlimited form of the privilege against self-incrimination and a right to remain silent. The other side of the coin is that this would without doubt render the Commission's investigation powers less effective. It would also force the Commission to make more use of its power to conduct surprise investigations, as the rights mentioned above would make the power of requesting information in article 11 less effective.
The European Association of Lawyers has suggested that the field of application and the scope of the right to silence should be defined in a more precise manner[118]. It therefore suggests that the

[112] Koen Lenaerts and Jan Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process, (1997) C.M.L.Rev 531 at p. 541.
[113] See Articles Article 2(1) and (2) of Hearing Officer Terms of Reference (Antitrust Proceedings) Decision, (1995) 4 C.M.L.R. 115.
[114] See Article 9(3) of Regulation 99/63.
[115] About the conflict between the protection of business secrets and the right to be heard in exceptional cases, see 3.3.5. Rights Conflicting with the protection of Business Secrets.
[116] About this discussion, see above in 1.1.2 The nature of the Commission's Proceedings.
[117] Livre Blance", Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 345.
[118] Ibid. at p. 346.

position of the CFI in *Orkem* should be adapted to the current situation. Since the decision in *Orkem* was taken, several Member States have adopted legislation heavily inspired by article 85 and 86 of the Treaty. Therefore, it can be expected that the competition authorities in these states will be confronted with the defence of the right of silence. As the position adopted by the ECJ in *Orkem* was based on the fact that the right to silence was not sufficiently recognised in the Member States, the comparative analysis of legal systems in *Orkem* should be brought up to date. The European Association of Lawyers also suggests that the Commission should undertake to ask clear and precise questions, the nature of which is not misleading[119].

As regards legal representation during the investigations, I do not believe that it is too much to ask for the realisation of the suggestions recommended by the European Association of Lawyers. As Community law stands today, companies under investigation are not fully guaranteed the right to defend themselves against the charges made against them. Companies should be allowed a reasonable delay before beginning the investigation to allow its lawyer to reach the premises and the Commission should never be allowed to close the investigation before the arrival of the lawyer on the premises. In this way, undertakings would be allowed a reasonable level of legal representation.
The positions differ between the Community Court and the European Court of Human Rights also as regards the protection of business premises[120]. Since the power of the Commission to carry out on-the-spot investigations is beyond discussion (the power is subject to strict rules protecting the targeted undertaking), it is difficult to motivate the application of article 8(1) of the ECHR, as interpreted in *Niemitz*, in the Commission's proceedings[121]. As the Commission is an administrative body, and not a judicial one, it must be given full access to the business premises of an undertaking in order to carry out its fact-finding role effectively. As long as the Commission is not able to force itself entry to the premises, I believe that in this area, a fair balance has been achieved between the Commission's investigative powers and the undertaking's rights of defence.

Even if there is no formal obligation on the parties to have an oral hearing, it should be seen as a genuine opportunity to clarify points which have not been settled during the written procedure, especially since the parties may not be able to take points before the CFI when they have had the opportunity at the oral hearing to make known their views on differences of opinion between them and the Commission[122].
The Select Committee of the House of Lords on the European Communities recommended in its 1993 Report "Enforcement of Community Competition Rules" to increase the powers of the Hearing Officer in order to contribute to the fairness and transparency of competition proceedings. The Committee *inter alia* wanted to increase the number of Hearing Officers and

[119] Ibid. at p. 346-347.
[120] The European Court of Human Rights held in *Niemietz* that Article 8 of the ECHR also treats business premises as inviolable, whilst the ECJ in *Hoechst* said that as the Member States differ considerably on this point, the fundamental right to inviolability of the home cannot be extended to commercial premises. See further 2.4.
[121] Koen Lenaerts and Jan Vanhamme, Procedural Rights of Private Parties in the Community Administrative Process, (1997) C.M.L.Rev 531 at p. 552-553.
[122] Kerse, Procedures in EC Competition Cases: The Oral Hearing, (1994) 1 E.C.L.R. 40 at p.42.

have the Hearing Officer's report sent to the parties[123]. The 1994 Hearing Officer Terms of Reference Decision does reflect the House of Lords' request to increase the Hearing Officer's powers, but not in the way they recommended it to be done. No additional Hearing Officers have been appointed since the present is considered able to handle the work load and the findings of the Hearing Officer are not going to be made public, as this could make him reluctant to express himself freely[124].
Even if the recommendations by the House of Lord were not followed, the new terms of reference offer a major contribution to objectivity. Also, by giving the Hearing Officer the power to take decisions regarding the rights of defence, undertaking's rights in the decision stage of the proceedings are further protected and improved.

To sum up, as has been rather clear from the previous exposition, in the investigative stage, the procedural safeguards are considerably less numerous. However, as this stage consists of powers given to the Commission which resemble those of a judicial body, should not the procedural guarantees at this stage be similar to those in a judicial proceeding? The European Court has held that the rights of defence must be observed in the investigative stage[125]. So why is the balance between the Commission's powers and the undertakings rights somewhat disturbed at the investigative stage of the procedure?
Some would say that the reason is probably that the Commission would not be able to execute an effective enforcement of the competition rules if undertakings were able to stop the Commission from entering its premises or from taking copies of relevant business records. However, critics of the extensive powers of the Commission do regard the persistent view taken by the Court that the Commission's procedure is administrative in nature, as an excuse for the Commission to keep a lower standard of legal protection in its own proceedings than would be the case in judicial proceedings[126].
The right answer lies probably somewhere between these two extremes. However, after having examined the Commission's powers and the rights of the undertakings in this area (see the following two chapters), I believe that, without having to rewrite the whole of Regulation 17, a rather fair balance has been reached. Unless (in order to make a clear distinction between administrative and judicial duties) the Commission is left only with its investigative powers whilst its right to take decisions on infringements of Articles 85 and 86 of the Treaty is given to the Community Courts (which would result in a rewriting or far-reaching amendments of Regulation 17), a constant weighting of interests will be necessary in this area, as in many other areas, of Community law.

[123] Alan J. Riley, EC Competition procedure Re-evaluated: The House of Lords Reports, (1994) 5 E.C.L.R. 247 at p.249.
[124] Mark van der Woude, Hearing Officers and EC Antitrust Procedures…, (1996) C.M.L.Rev. 531, at p. 545.
[125] Hoechst v. E.C. Commission III, (1989) E.C.R. 2859, (1991) 4 C.M.L.R. 410 at para. 15, Orkem v. Commission, (1989) E.C.R. 3283, (1991) 4 CMLR 502 at para. 33.
[126] Joshua, The Element of Surprise…, (1983) 8 E.L.Rev. 3 p.19-20.

PART II

Chapter 3. Information: legal professional privilege, business secrets and access to the file.

3.1 Introduction

After having discussed to what extent undertakings are guaranteed any other rights besides the rights mentioned in Articles 11 and 14 of Regulation 17, I will concentrate on rights concerning information, which in practice create a lot of difficulties as their scope are not generally known to undertakings. It is very important for the undertaking to know what information it has to disclose to the Commission and also what information in the Commission's possession it is allowed to see, as if a competitor finds out about for example its business secrets, the effects can be very harmful for the relevant undertaking. Consequently, the Community competition law on business secrets, legal professional secrecy and access to the file will be analysed. I will deal considerably more with the complex law surrounding business secrets and access to the Commission's file than with legal professional secrecy, as the legal position concerning the latter is more clarified.

All rights discussed below are activated in the investigative as well as in the decision stage of the Commissions proceeding. During the investigation, the Commission is likely to obtain confidential information and the undertakings involved in the procedure tend to have two conflicting interests in relation to this: defendants want as much information as possible about the allegations held against them, but on the other hand, they expect their business secrets to be protected against disclosure to competitors.
The constant problem in this area is the need of weighing these two conflicting interests. At the same time as the undertaking must be allowed to see all information involved in the investigation, the undertaking being investigated must be guaranteed the protection of its business secrets and confidential information. These interests must be treated equally in order to enable the Commission to perform an effective enforcement. This is not an easy task.
The Commission can approach not only undertakings allegedly implicated in an infringement but also all those undertakings in possession of information regarding the infringement[127]. Therefore the law concerning information in the investigative procedure is relevant not only for those facing the risk of infringing the Community competition law, but for a great group of undertakings.

[127] Blanco, EC Competition Procedure, at p. 121-122.

3.1.1 The scope of "business record"

Article 14(1) (a) and (b) of Regulation 17 gives the Commission wide investigation powers to examine and take copies of or extracts from books and other business records. The definition of business records is extremely wide and includes all documents relating to the commercial activities of the undertaking e.g. correspondence, photographs, films, cassettes, computer programs and their content and videocassette[128]. It also includes hand-written notes, drafts of not yet finalised documents and internal notes of meetings not yet set down in formal records. As a rule, a document is deemed to be a business record if it is found on the premises and in the files of the undertaking[129].

If a *private* document at first sight seems relevant to the investigation, the Commission is able to look at it. This is necessary, as the nature of a document only can be determined until after closer examination and the Commission cannot in advance specify which documents it wants to copy, unless it has been informed about it in a (often anonymous) complaint. However, documents that after examination prove to be entirely private, will not be examined any further or copied by the inspectors[130].

The result of this wide definition of business records is that the Commission can examine and take copies of next to all documents in the undertaking's premises. If the Commission could not do this, its investigative power would be drastically limited and very serious and secret anti-competitive practices, such as cartels, would never be disclosed.

3.1.2 Limits

The Commission's power to examine business records must be limited in order to respect the rights of defence of the undertakings. A limited use of the information disclosed to the Commission is also necessary in order to obtain better and more information because if the undertaking feels satisfied with the protection afforded to its rights of defence, it will definitely be prepared to co-operation more with the Commission.

The limits below *only* relates to what the Commission is allowed to copy and take away from the premises of the undertaking and use in the subsequent stages of the procedure. The Commission is not limited in any way to what it can see or examine, as it must be allowed to examine all documents in order to decide whether they are at all relevant in the investigative procedure. It exists five limits to the Commission's power to examine and copy business records[131]:

- The Commission is only allowed to copy documents that relate directly or indirectly to the subject matter and purpose of the inspection as described in the authorisation or decision. Otherwise, the Commission would be able to "fish" for evidence of other infringements [132].

[128] The European Commission's powers of investigation in the enforcement of competition law, Office for Official Publications of the EC, Luxembourg, 1985 at p. 36-37.
[129] Blanco, EC Competition Procedure, at p. 131.
[130] Ibid.
[131] The putting together of these five limits is the result of my own conclusion about relevant restrictions to the Commission's power to examine and copy business records.
[132] See more in detail about this conduct above in 1.2.2 Article 11 of Regulation 17.

- The Commission cannot use as evidence information which it has obtained unlawfully if a finding of unlawfulness was made by the CFI[133].
- The Commission must make a copy of the relevant document, as it is not allowed to take away the original document from the premises of the undertaking.
- The principle of legal professional privilege[134].
- Business secrets[135].

If the undertaking considers that the Commission has exceeded its powers and not respected the limits, it can register its protest in the record of the inspection, which is made once the inspection is completed[136]. However, it can never prevent inspectors from taking copies, as this will be seen as disturbing the investigation and is subject to the imposition of fines.
I will now start of by discussing legal professional privilege and then carry on to analyse business secrets and access to the Commission's file.

3.2 Legal professional privilege

Regulation 17 is silent on the question whether correspondence between a lawyer and his client can be considered confidential in the Community competition procedure.
In English law, the principle of legal professional privilege exists. Civil law systems do not recognise the legal professional privilege as such, but a similar protection is achieved by imposing on the legal adviser an obligation of "secret professional"[137].
In Community law, it has been held in *AM & S* [138] that Regulation 17 must be interpreted as providing for a protection, which is similar to the concept of legal professional privilege existing in English law. The correspondence between an undertaking and its lawyer forms part of business records in article 14(1) of Regulation 17 but despite this, some business records, especially certain correspondence between undertakings and their lawyers, can be regarded as being of a confidential nature. Accordingly, the principle that the Commission has no power to request copies of documents containing correspondence between undertakings and their lawyers was established in Community law. The Court based this view on the fact that every Member State recognises that every person must be free to consult a lawyer[139].

However, in Community law, the correspondence can only be considered confidential if:
- the communications have been made for the purposes and in the interests of the client's rights of defence,[140] i.e. the legal opinion must be intended as part of the defence of the client in the context of proceedings initiated by the Commission,

[133] Blanco, EC Competition Procedure, at p. 133.
[134] Examined in 3.2.
[135] Examined in 3.3.
[136] Blanco, EC Competition Procedure, at pages 132, 147-148.
[137] Joshua, The Element of Surprise, (1983) 8 E.L.Rev. 3, at p.15-16.
[138] Australian Mining & Smelting Europe Limited (AM & S) v. E.C Commission, (1982) E.C.R. 1575, (1982) 2 C.M.L.R. 264, confirmed in Hilti AG v. E.C Commission (1991) E.C.R. II-1439, (1992) 4 C.M.L.R. 16 at paras. 13-14.
[139] AM & S v. E.C Commission, (1982) E.C.R. 1575, (1982) 2 C.M.L.R. 264 at para. 18.
[140] Ibid. at para. 21.

- the communications have been made with an independent lawyer, i.e. the lawyer cannot be linked to the client by an employment contract[141]. In English law however, the protection is wider as communications with an in-house lawyer are also considered confidential.
- the communications have been exchanged after the initiation of the Commission's procedure or even prior that, if they were connected to the subject matter of the procedure[142],
- the communications are exchanged with a lawyer entitled to practice before a court in any of the Member State[143]. Consequently, the correspondence with a non-Community lawyer is not protected. However, this position may well be re-considered if it is to come before the Court in a new case[144].

Thus, the Commission will not examine any material concerned with the preparation of the actual defence. However, in exceptional cases, even this type of material will be examined, i.e. if there are very good reasons to suspect a fictitious defence or a cover-up[145].

What will happen if the only evidence of the existence of e.g. a cartel is to be found in a letter to an independent lawyer? This situation has not yet appeared in any case, but it seems reasonable to believe that the protection is not absolute in a situation like this. The Commission has an active role finding out the truth and a limited departure from the principle of the lawyer-client confidentiality seems appropriate when its application would lead to an unreasonable result. This is also in accordance with the position in English and American competition law[146].

The judgement in *AM & S* does not deal with the question when the protection could be lost. However, Joshua believes that if the communications between the lawyer and the client are disclosure to third parties outside the company, this might indicate a waiver of the lawyer-client confidentiality. Also, if the documents are left in the undertaking's open files, the protection is probably lost and finally, the protection is presumably also lost if the advice is sought in order to break Community competition law[147].

If differences arise about whether or not a certain correspondence is considered confidential, the undertaking must prove that the communications fulfil the conditions mentioned above[148]. In trying to do so, it can give a description of its general content or produce documents that refer to that special correspondence. The Commission will then decide on whether or not these evidences are sufficient. If they are insufficient and the undertaking refuses to produce the correspondence in question, the Commission can impose pecuniary penalties[149]. Even if this seems harsh, the undertaking can always ask the Community courts for a review of the Commission's decision on confidentiality.

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[141] Ibid.
[142] Ibid. at para. 23.
[143] Ibid. at para. 25.
[144] Blanco, EC Competition Procedure, at p.134.
[145] Joshua, Information in EEC Competition Law Procedures, (1986) E.L.Rev. Vol. 11, 409 at p.423.
[146] Ibid. at p. 424-425.
[147] Ibid. at p. 424.
[148] AM & S v. E.C Commission, (1982) E.C.R. 1575, (1982) 2 C.M.L.R. 264 at para. 29.
[149] Ibid at para. 31.

To sum up, the notion of legal professional privilege in Community competition law is restricted in many ways. The correspondence with an in-house lawyer or a foreign lawyer (i.e. non-Community lawyer) is not protected and communications exchanged prior to the initiation of the proceedings are only protected if they are connected to the subject matter of the procedure. I believe that some of these limits cause unnecessary damage to the undertaking's rights of defence, especially since some of the restrictions seem unwarranted.
Given the importance to legal professional privilege for the respect of the rights of the defence, the European Association of Lawyers has suggested an extension of the scope of legal professional privilege in EC competition law. The association means that it should extend to the benefit of foreign lawyer, originating from a foreign bar and who are also registered with a bar in a Member State of the Community. It also suggests that the privilege should include the relation between the lawyer acting for the company and third parties, as today, the professional legal privilege only covers relations between the lawyer and his client[150]. The privilege should also be extended to university professors who render an opinion or provide notes and finally, it should be extended to notes and advice given even before the initiation of proceedings, as the role of the lawyer is not limited to the defence of his client[151].

I do not believe that the proposals made by the European Association of Lawyers are too extreme, especially since they maintain the balance between the Commission's investigative powers needed to enforce the rules of competition and the respect for the fundamental principle of the right of defence. Besides, not giving foreign lawyers the benefit of legal professional privilege seems close to discriminating.
As the proposals would not affect the effective enforcement of the competition rules, I believe that they are practicable and should be realised the sooner the better.

3.3 Business secrets

3.3.1 The obligation of professional secrecy

Before the scope and the limits of the protection of business secrets are analysed, the difference between professional secrecy and business secrets needs to be explained. The two concepts are often confused even if they represent two completely different things. Article 214 of the Treaty provides that the Community institutions shall not disclose information of the kind covered by the obligation of professional secrecy. Article 20 of Regulation 17, directed at the Commission and the competent authorities of the Member States, implements in the specific context of competition proceedings the obligation in article 214 of the Treaty. Regulation 17 does not define the concept of professional secrecy, but article 214 cites examples of information covered: "information about undertakings, their business relations or their cost components". This is a wide scope and in principle, all commercial information obtained by the Commission in the application of the

[150] Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 344.
[151] Ibid.

Regulation is included, on condition that the information is not in the public domain[152]. This includes definitely business secrets, which are specially dealt with in articles 19(3) and 21(2) of Regulation 17.

Professional secrecy is an *obligation* attached to national and Community officials and covers all information obtained during the proceedings. It even includes documents disclosed to undertakings during the procedure of access to the file.
The protection of business secrets is a *right* enjoyed by undertakings and relates to the activities of the undertaking. The concept of business secrets only covers confidential information that may have been used in the investigations[153]. Thus, as the concept of professional secrecy is broader than that of business secrets, business secrets are included in the scope of professional secrecy. While the latter concept covers all information, the former only applies to some information.

In *SEP*[154], the Court held that article 20 of Regulation 17 provides for a twofold protection, which is complementary in nature and applies to the Community institutions as well as to the national authorities[155].

- 20(1) is about the *use* of the information, acquired as a result of the application of Regulation 17, in the Commission's or the national competition authorities' proceedings.

- 20(2) is about the Commission's *disclosure* to third parties of the information acquired as a result of the application of Regulation 17.

The obligation of professional secrecy is subject to several limitations:

- If the Commission during an investigation incidentally comes across confidential information relating to serious crimes (other than competition infringements), it could be argued that this is not the type of information covered by the obligation of professional secrecy and can therefore be disclosed to the proper authorities[156]. However, the Commission is probably not under an obligation to report it[157].
- The Commission can always legitimately disclose documents covered by professional secrecy to the ECJ[158].
- In accordance with article 19 of Regulation 17, the Commission must ensure a fair hearing. Consequently, in order to prepare their cases properly, defendants must be able to see the evidence held against them[159] and competitors being parties to the hearing must be able to see documents covered by professional secrecy. Article 20(2) also explicitly states that the right to be heard takes precedence over any interest in maintaining the confidentiality.

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[152] Joshua, Balancing the Public Interests: Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedures, (1994) 2 E.C.L.R 68 at p. 69-70.
[153] Blanco, EC Competition Procedure, at p.161.
[154] Samenwerkende Elektriciteitsproduktiebedrijven (SEP) v. E.C. Commission, (1991) E.C.R. II-1497, (1992) 5 C.M.L.R. 33 at para. 55.
[155] Consequently, the protection also applies to situations in article 10(1) of Regulation 17.
[156] Joshua, Balancing the Public Interests: Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedures, (1994) 2 E.C.L.R 68, at p. 70.
[157] Blanco, EC Competiton Procedure, at p. 160.
[158] Ibid.
[159] Hoffman-La Roche v. E.C Commission, (1979) E.C.R 461, (1979) 3 C.M.L.R. 211 at paras. 13-14.

- The Commission must ensure the publication of decisions according to article 21[160].

3.3.2 Generally about business secrets

As stated above, the protection of business secrets is part of the obligation of professional secrecy. Thus, are business secrets to be treated the same way as documents covered by professional secrecy?

As will be described below, documents covered by professional secrecy, or which contain business secrets, afford the same protection under article 20(1) Regulation 17. However, following the *Akzo*-case, documents containing business secrets afford a stronger protection than documents covered by professional secrecy in relation to article 20(2), which regulate the disclosure of confidential documents to third parties.

The definition of business secrets could be a bit of a problem. Regulation 17 does not define the concept and the term does mean different things in different Member States. The establishment of a business secret is not dependent on any actual or financial damage of the activities of the undertaking, but on the nature of the information that bring on an interest of the undertaking to ensure that there is no disclosure of the business secret to a competitor[161]. It is clear that the Commission has given business secrets a broad interpretation, as any document that contains strategic information as to the business activities of the undertaking may be considered a business secret[162]. For example, in *Hilti*[163], documents dealing with profitability, turnover, customer-bases (e.g. names and addresses of customers and customer call records and orders), business practices (e.g. details of distribution and supply policies and statements on the commercial strength of certain products), costs, prices (e.g. discounts offered, actual net sales prices and advantages of the undertaking's products compared with competing products) and market share, were given confidential treatment[164].

Claims for confidential treatment of statements of a general and non-specific nature, i.e. a statement with regard to accidents which had occurred several years earlier involving the applicant's equipment or a non-specific statement about competing products that when used with the applicant's equipment may cause malfunction, are rejected as this sort of information can be predicted by someone with reasonable knowledge of the industry[165]. Further, if owing to the passage of time or for any other reason, the information is no longer commercially important or if it is known outside the firm to which it relates[166], the information cannot be treated as a business secret.

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[160] Article 19 and 21 of Regulation 17 will be discussed more in detail in relation to article 20(2) of Regulation 17.

[161] Hilti AG v. E.C Commission, (1991) E.C.R II-1439, (1992) 4 C.M.L.R. 16 at para. 19.

[162] Access to the File (antitrust) Notice 1997, (1997) 4 C.M.L.R 490 at p. 493.

[163] Ibid.

[164] The classification of the different types of information granted confidential treatment is made by J. Pheasant, Rights of defence and Rights of the European Commission in E.C Competition law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 226-229.

[165] Ibid. at p. 228-229.

[166] Access to the File (Antitrust) Notice 1997, (1997) 4 C.M.L.R 490 at p.493.

3.3.3 Article 20(1), use of information obtained by the Commission

Now, I will discuss more in detail the protection offered to undertakings in article 20(1) and 20(2) of Regulation 17 and whether this protection, with reference to *Postbank*, is sufficient.
The obligation of professional secrecy in article 20(1) covers all types of confidential information, including business secrets. However, I will only deal with the protection of business secrets, as the scope of the protection of the latter is the most controversial, and consequently the most interesting.

Undertakings can not refuse to supply documents containing business secrets, as business secrets disclosed to the Commission are protected by professional secrecy in article 20(1) of Regulation 17. It follows from the same article that information obtained during the investigations must not be used for purposes other than those indicated in the order or in the decision under which the investigation is carried out. This means that information obtained may only be used in order to determine whether the competition rules have been infringed in this particular case or not. This obligation intends to protect the rights of the defence of undertakings.
The procedural requirements, applicable to article 11 as well as to article 14 of Regulation 17, also guarantee that the fundamental rights are respected. Thus, the Commission can only consider "necessary" business secrets and even if the Commission itself decides whether the documents containing business secrets are necessary or not, this discretion is limited by the principle of proportionality as well as by the content of the written authorisation or decision stating the subject matter and purpose of the investigation.

If the disclosure of documents to the Commission undermines the fundamental rights, the disclosure is not permitted[167]. However; generally, the disclosure of business secrets to the Commission does not undermine the fundamental rights. The reason to this is because the Commission only wants to gain access to business secrets in order to obtain evidence, whilst the purpose behind protecting business secrets is something completely different: to prevent competitors from gaining access to them.
Business secrets voluntarily disclosed prior to the decision to initiate an investigation are not protected by article 20(1)[168]. Accordingly, they can be used in national proceedings or in other Community proceedings.

3.3.3.1 The use of confidential information in Commission proceedings

Even if documents covered by professional secrecy in article 20(1) only can be used for the purpose of the relevant request for investigation, the Commission has the right to start a new and separate investigation in order to verify or supplement information it happened to obtain during a previous investigation. However, this is only possible if the information indicates the existence of a breach of the Community competition rules. The Court has permitted such inquiries based on information on conducts not initially investigated into, as the Commission's officials likewise must be able to investigate restrictive practices coming to the notice of them either accidentally or incidentally[169].

[167] Hoechst AG v. E.C Commission, (1989) E.C.R. 2859, (1991) 4 C.M.L.R. 410 at para. 12.
[168] Christian Axelsson, Procedural Safeguards and Judicial Review in EC Competition Law Procedure, at p.19.
[169] Dow Benelux v. E.C. Commission, (1989) E.C.R. 2859, (1991) 4 C.M.L.R. 410 at para. 19.

If the Commission was not allowed to start a procedure based on information it obtained accidentally, undertakings would be tempted to reveal information on other possible practices on their part not under investigation, in order to get immunity from penalties in those areas[170]. This would be an undesired and unfair result, as undertakings committing serious infringements would then be the beneficiaries.

3.3.3.2 The use of confidential information in national proceedings

In accordance with article 10(1) of Regulation 17, the Commission transmits to national authorities copies of documents lodged with the Commission for the purpose of establishing the existence of infringements of articles 85 and 86 of the Treaty. The purposes behind these transmissions are to inform Member States of any procedure initiated against an undertaking situated on their territory as well as allowing the national authorities to give its views on the alleged infringements, enabling the Commission to better evaluate and use the information[171]. To what extent can national authorities use confidential information obtained from the Commission in their own national proceedings?

The restraints in article 20(1) of Regulation 17 apply both to the Commission and to the competent competition authorities of the Member States. From the wording of the article it appears as if information obtained pursuant to articles 11 to 14 is not available for use by national authorities under their own competition laws. However, article 20(1) does not require them to ignore the information given to them completely, but to take it into consideration in deciding whether to initiate a national proceeding or not. There is one limit; facts coming to the notice of national authorities via article 10(1) of Regulation 17 can only be used in national proceedings if their existence are proved in accordance with national rules on evidence and does not derive from documents obtained by the Commission.

However, what will happen if a party wants to use e.g. the statement of objections and the minutes of the hearings (preparatory documents that may contain business secrets) as evidence in related or parallel national proceedings where EC competition law is applicable by direct effect? Has the Commission an obligation to observe article 20 here as well and assure that the document is not used in national proceedings?

In *Postbank*[172] the Commission allowed the complainant to use such document in national proceedings. The Commission issued a statement of objections to the Netherlands Association of Banks concerning an anti-competitive agreement between some of its members. Two complainants, who also brought actions in the Netherlands courts, one against Postbank, were admitted to the hearing before the Commission and given copies of the statement of objections. The complainants then used these statements of objections in the national proceedings. Postbank claimed that the Commission had, by not prohibiting the complainants to use the statements of objections and the minutes of the hearing in national courts, infringed article 20(1) of Regulation

[170] Blanco, EC Competition Procedure, at p. 68.
[171] Kerse, E.C Antitrust Procedure, at p. 174.
[172] Postbank NV v. E.C Commission, (1996) E.C.R. II-921, (1997) 4 C.M.L.R. 33.

17. Thus, Postbank meant that as the information had been used in national proceedings, it had been used otherwise than in the procedure before the Commission[173].

To determine whether article 20(1) of Regulation 17 imposes on the Commission the obligation to prohibit an undertaking to produce documents relating to the Commission's procedure in national proceeding, the Court held that the article must be interpreted in the light of the principle of sincere co-operation stated in article 5 of the Treaty[174]. That principle implies that national courts, applying Community competition rules, can seek information from the Commission on the state of any procedure which the Commission may have set in motion. However, the co-operation between the Commission and national courts falls outside the scope of Regulation 17, which governs the relations between the Commission and the authorities of the Member States referred to in article 88 of the Treaty. According to settled case law, these authorities do not include national courts applying 85 and 86 of the Treaty by virtue of their direct effect. Therefore, article 20(1) of Regulation 17 does not impose an obligation on the Commission to prohibit undertakings from producing documents from its administrative procedure in national legal proceedings[175].
In spite of this, the CFI held that undertakings should not fear their business secrets being disclosed in national proceedings, as when the documents from the Commission's procedure are produced in national proceedings, there is a presumption that the national courts will guarantee the protection of the business secrets. This presumption derive from article 5 of the Treaty where the principle of sincere so-operation requires national authorities to uphold the rights conferred on individuals in the Community law, e.g. the protection of business secrets[176].
Further, the CFI held that Postbank's rights of defence in the national court were still protected, as it is for national courts to guarantee the rights of defence of any undertaking whose position is weakened by such information on the basis of national rules of procedure. The national court must for example, make account of the provisional nature of the relevant documents and maybe suspend their proceedings pending the adoption of the Commission's final decision.[177]
Likewise, the undertaking's rights of defence were not undermined in the Commission's proceedings, since the undertaking was not deprived of the right to be informed and heard by the Commission regarding all the matters of fact and law contained in the documents disclosed in the national proceedings[178].

To sum up, the CFI concluded that the disclosure of confidential information in national proceedings applying articles 85 and 86 of the Treaty by direct effect is not protected by article 20(1), but by the principle of sincere co-operation in article 5 of the Treaty. In any event, article 20(1) of Regulation 17 can not be construed as prohibiting any use by national courts of information obtained by the Commission in its administrative proceedings. Further, it is up to the national courts, with the help of national rules of procedure, to guarantee the protection of undertaking's rights of defence. This shifting of responsibility is of course the effect of national

[173] Ibid. at para. 55.
[174] Ibid. at para. 63.
[175] Ibid. at paras. 65-67.
[176] Ibid. at paras. 68-69.
[177] Ibid. at para. 72.
[178] Ibid. at para. 73.

courts enforcing the Community competition rules, something that will be even more common following the notice on co-operation between the Commission and national courts.

3.3.4 Article 20(2), disclosure of information to third parties

Article 20(1) is restricted to information obtained under articles 11 to 14 of Regulation 17. Article 20(2) on the other hand, has no such limit and does even protect from disclosure of information obtained informally by officials of the Commission in the exercise of their duties[179].
Article 214 of the Treaty and article 20(2) of Regulation 17 deal with professional secrecy but the latter article only addresses the duties of the Commission and the competent authorities of the Member States. These institutions and its officials must not disclose information received under Regulation 17 to third parties, unless it is necessary in order to respect the right to be heard (article 19 of Regulation 17) and the publication of decisions (article 21 Regulation 17)[180].

In *SEP*, the undertaking appealed against the Commission's decision to pass the disclosed information requested under article 11(5) of Regulation 17 on to national authorities, thereby giving the state-controlled competitors access to it. SEP claimed that the Commission's action was disproportionate to the objective pursued[181].
The CFI held that the action was not disproportionate, as when the information concerned was transmitted to the appropriate authority by the Commission according to article 10(1) of Regulation 17, confidential treatment of the documents is guaranteed. This follows from article 20 of Regulation 17, which applies not only to the Commission but also to the competent national authorities[182]. SEP appealed and claimed that article 20 only is a formal safeguard and does not provide for an effective protection. The ECJ held that article 20 provides for a twofold protection: the article does not only preclude the disclosure of confidential information outside the section of the authority concerned, but it also precludes circulation of it within the same section. The officials responsible for competition matters are under an obligation not to disclose the information to departments, where the information could be available for competitors[183]. Article 20 offers therefore an effective safeguard of confidentiality, especially since the Member States have a duty under article 5 of the Treaty to fulfil their obligations arising from the articles in the Treaty, in this case from article 20. The obligations of the Member States under article 20 are set out in general, absolute terms and cannot be derogated from[184].

However, the confidentiality of undertaking's information is not only protected by the twofold protection in article 20 of Regulation 17 and by article 5 of the Treaty. Even if the Commission's procedure is administrative in nature, it will result in a decision on the alleged infringement that may lead to the imposition of a fine. This will affect the interests of the parties concerned and therefore they must have the opportunity to be informed of the allegations held against them and to be allowed to present their observations on the facts. The result is that, even if the Commission is not a judicial tribunal, it must respect the basic procedural guarantees found in Community

[179] Chantal Lavoie, Investigative Powers of the Commission, (1992), E.L.Rev 17(1) 20 at p. 30.
[180] 20(2) of Regulation 17.
[181] SEP v. E.C Commission, (1991) E.C.R. II-1497, (1992) 5 C.M.L.R. 33 at paras. 40-43.
[182] Ibid. at para. 53.
[183] Ibid. at paras. 55-56.
[184] Ibid. at para. 57.

law[185]. This means that the obligation of professional secrecy must be weighed against the fundamental rights, i.e. the right to be heard. The outcome will depend on the special circumstances in the case. In some circumstances the fundamental rights will prevail whilst in other circumstances, the fundamental rights can be respected without having to jeopardise the confidentiality.

3.3.4.1 The AKZO-procedure.

What about business secrets? Must their protection also be weighed against the interest of safeguarding the rights of defence? This question was answered in the *Akzo*-case. Here the Commission, following an investigation under article 14(3) of Regulation 17, issued a statement of objections to Akzo, who had been alleged of infringing the competition rules. The Commission also sent the statement of objections to a complainant who needed the document in order to exercise its rights of defence during the hearing pursuant to article 19 of Regulation 17. Akzo objected to this, as the statement of objections contained business secrets, but the Commission disclosed it after deleting those passages which, in its view, contained business secrets. Akzo brought an action to declare the Commission's decision void. After concluding that professional secrecy is subject to article 19, which confers on complainants a right to be heard[186], the ECJ considered the particular position of business secrets:

The right to be heard *"does not apply to all documents of the kind covered by the obligation of professional secrecy. Article 19…and article 21…, both require the Commission to have regard to the legitimate interest of undertakings in the protection of their business secrets. Business secrets are thus afforded a very special protection…It follows that a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets[187]"*.

Further, the ECJ held that it is for the Commission to assess whether or not a particular document contains business secrets. After giving an undertaking the opportunity to state its views, the Commission is to adopt a reasoned decision. However, having regard to the extremely serious damage resulting from improper disclosure of documents to a competitor, the Commission must, before implementing its decision, give the undertaking an opportunity to bring an action before the Court to review the Commission's decision and prevent disclosure of the relevant document[188]. Since the Commission in this case disclosed the information before giving the undertaking an opportunity of review, the Commission's decision was declared void.

To sum up, the Commission has the discretion to decide whether a document contains business secrets or not, but in order to ensure that this discretion does not allow the Commission to act arbitrarily, the CFI (or even the ECJ) may have the final say following the possibility of a the judicial review of the decision in article 173 of the Treaty.

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[185] FEDETAB and Others v. E.C Commission (1980) E.C.R 3125, (1981) 3 C.M.L.R 134 at para. 81.
[186] Akzo Chemie BV v. E.C Commission, (1986) E.C.R 1503, (1987) 3 C.M.L.R 231 at para. 27.
[187] Ibid. at para. 28.
[188] Ibid. at para. 29.

The conclusion is that business secrets are afforded a very special protection, a protection that should not be subject to articles 19 and 21 of Regulation 17. However, this absolute protection is only directed against the disclosure to a third party complainant. The reason is that third parties must be prevented from filing a complaint only with the intention of gaining access to the business secrets of its competitors. If the party requesting the document was the undertaking suspected of the alleged infringement, the Commission might disclose the information, as the undertaking would really need the information for its defence. Thus, following *Akzo*, there is no absolute prohibition to disclose business secrets to *all* parties.
Where did the ECJ find the legal authority for giving this special status to business secrets?
It is not to be founded in an expressed provision of Regulation 17. Instead, the ECJ meant that articles 19(3), 20(2) and 21(2) of Regulation 17 express a general principle recognising this special protection of business secrets[189].

3.3.4.2 Compliance with the Akzo-procedure

The Akzo-procedure is obviously a very important safeguard afforded to undertakings in the competition law procedure. Therefore, it is extremely important that the Commission respects it and gives the relevant undertaking the opportunity to bring an action before the CFI before it takes its final decision. In *Postbank*[190], the Commission ignored to follow the Akzo-procedure and consequently left the undertaking in a very exposed position. The Commission had taken a decision allowing the transmission of the statement of objections and the minutes of the hearing, containing business secrets, to the complainants. The latter then used the documents in national proceedings. The applicant (Postbank) had indicated several times to the Commission that the documents contained business secrets and it even called on the Commission to reverse its decision. The Commission, despite the protests, sent the documents to the complainants. It then failed to inform the applicant of the fact that the complainants had asked it whether it was able to produce the documents in national proceedings, and informed them of this only *after* communicating the decision on the transmission to the complainants.
The CFI held that the transmission of business secrets to a person other than the one that provides the information, may seriously harm the latter's interests. However, article 214 of the Treaty and article 20(2) of Regulation 17 do not require the Commission to prohibit third parties from producing, in national proceedings, documents containing business secrets[191]. Instead, the Commission must take all necessary precautions (e.g. inform the national courts of documents containing business secrets) as well as ensure that the obligation of professional secrecy is not undermined by or during the transmission to national courts. It is then the responsibility of the national courts to guarantee the protection of business secrets[192].
In this case, especially when the undertaking had given notice of the existence of business secrets, the Commission should have given it an opportunity to state its views in accordance with the Akzo-procedure. It should also have given it the opportunity to point out the documents of which the transmission to the national courts might have caused it damage and the nature and the scope of this damage. Further, it should have examined the views of the undertakings and taken all the

[189] Chantal Lavoie, Investigative Powers of the Commission, (1992), E.L.Rev 17(1) 20 at p. 33.
[190] Postbank NV v. E.C Commission, (1996) E.C.R. II-921, (1997) 4 C.M.L.R 33.
[191] See under 3.3.3. where this was discussed more in detail in relation to article 20(1) of Regulation 17.
[192] Postbank N V v. E.C Commission, (1996) E.C.R. II-921, (1997) 4 C.M.L.R 33 at para. 90.

necessary precautions to ensure that their interests were protected. As a result, the Commission failed to follow the procedure indicated by the ECJ in the Akzo-case as well as failed in its obligation of professional secrecy. The decision was therefore annulled.

Even if the Commission has taken all the mentioned precautions, there might be exceptional case where it is not possible for the protection of third parties to be fully ensured. In those cases, the ECJ has held that the Commission may refuse to disclose the documents to national courts. Such a refusal is only justified if it is the only way to ensure the protection of the rights of third parties or where the disclosure of that information would be capable of interfering with the functioning and independence of the Community[193].

To sum up, in *Postbank* the Commission did not infringe article 214 of the Treaty or article 20(2) of Regulation 17, as they are not applicable to the situation described. The Commission is under no obligation to prohibit the disclosure to national courts of documents containing business secrets, as all indirect and direct co-operation between the Commission and national courts falls outside the scope of Regulation 17.
However, if the Commission allows the transmission of documents containing business secrets to national courts without taking the necessary precautions to protect them, it contravenes its obligation of professional secrecy. Accordingly, it has once again been confirmed that business secrets are afforded a very strong protection and that this protection might even prevail over the rights of defence when the two interests clash.

3.3.5 Rights conflicting with the protection of business secrets

The right to be heard, the right to have access to the Commission's file and the obligation to publish certain Commission decisions, are rights which often clash with the protection of business secrets. How should a conflict between these rights be resolved?

The right to be heard is a fundamental principle, implemented in article 19 of Regulation 17, which must be respected in the Commission's administrative proceedings[194]. When a conflict arises during the proceedings, the best solution is obviously to protect both the business secrets and the right to be heard. When the Commission in the statement of objections discloses documents containing business secrets, it only discloses the parts of the documents which do not contain business secrets. This is possible, as it must not state *all* the facts but only the essential facts on which it relies. The result is that both rights can be effectively protected.
Further, as the "article 19-hearing" is not a judicial, but an administrative hearing, it must not follow strict procedural rules. Accordingly, the Commission may use its discretion to determine which procedure it should follow. Therefore, if business secrets must be disclosed during a hearing, the party not disclosing the business secrets could be told to leave the room for a while, whilst the information is being disclosed. Once again, it is possible to respect both the protection of business secrets and the right to be heard.

[193] Ibid. at paras. 91-93.
[194] Hoffman-La Roche v. E.C Commission, (1979) E.C.R. 461, (1979) 3 C.M..L.R 211 at para. 9.

In exceptional circumstances where it might not be possible to respect the right to be heard unless a certain business secret is disclosed, one right might have to prevail over the other.
It was ruled in *Akzo* that business secrets have an absolute protection in relation to complainants, and therefore, if the information is to be disclosed to a complainant, the protection of business secrets prevails over the right to be heard. If however the party requesting access to the business secrets is the undertaking suspected of violating the competition rules, the legal situation is uncertain. Lavoie means that it is in line with *Akzo* that the protection of business secret prevails over the right to be heard, even if it will affect the Commission's ability to effectively enforce the competition rules[195]. On the other hand, Joshua argues that in some circumstances, the public interest of an open and effective fact-finding procedure should prevail. He believes that articles 19(3) and 21 of Regulation 17 clearly envisage a weighing of interests conflicting with each other, and that the court in *Akzo* incorrectly preferred a formalistic, absolute rule above a case by case standard[196]. Therefore, Joshua means that it should not exist an absolute bar to disclosure of business secrets, not even in relation to complainants. Instead, the Commission should ask itself whether it is desirable for the purposes of the procedure to disclose the relevant material, and if so, how is it possible to protect any confidential information contained in the documents[197].

I believe that the view of Lavoie represents a sound solution. First, undertakings expect their business secrets to be protected at this stage of the proceedings. If they were not, undertakings would try not to disclose them to the Commission in the first place. As it is difficult to carry out an effective enforcement of the competition rules without the co-operation of the undertaking, the result would be a very drawn-out fact-finding stage. Secondly, the outcome of *Postbank* indicates that business secrets are afforded a very strong protection that in exceptional circumstances may even prevail over the rights of defence. Finally, the office of the Hearing Officer was specially created in order to see to it that the right to be heard was respected during the hearings. Therefore, it cannot be seen as unreasonable that the protection of business secrets is preferred to the right to be heard in the situations of rare occurrence when the rights happen to really conflict.

The protection of business secrets can also conflict with ***the right to have access to the Commission's file.*** Does the absolute prohibition of disclosure of business secrets (as held in *Akzo)* prevail, or must the rights of defence be safeguarded at all costs?
In the *Soda Ash* judgements[198] this conflict actually arose. One of the involved undertakings claimed that the protection of business secrets can not justify a reduction of the protection of the rights of defence, including the right to have access to the Commission's file. The Commission alleged *inter alia* that the undertaking has no right to see documents containing business secrets

[195] Chantal Lavoie, Investigative Powers of the Commission, (1992), E.L.Rev 17(1) 20 at p. 36.
[196] Joshua, Balancing the Public Interests: Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedures, (1994) 2 E.C.L.R 68, at p. 77-78.
[197] Ibid. at p. 79.
[198] The Soda Ash judgements consist of five judgements but only three of them are relevant in competition law: Case T-30/91, Solvay v. E.C Commission, (1995) E.C.R II 1775, Case T-36/91 ICI v. E.C Commission, (1995) E.C.R II 1847, and Case T-37/91, ICI v. E.C Commission, (1995) E.C.R II 1901.

and documents on which the Commission does not rely [199]. The CFI ruled that the protection of business secrets must be balanced against the rights of defence[200]. However, the CFI seems not to have meant that in some circumstances one right prevails over the other, but by excluding or summarising the confidential parts of a document, exculpatory documents containing business secrets can be shown to the defendant undertaking.

There are two problems with this attitude. First, it can prove difficult in practice to exclude or summarise the confidential parts. However, in such a case, the Commission always has the possibility of sending to the undertaking a list of the relevant documents and allow it to inspect the documents at the Commission's premises[201]. Secondly, the fact that the protection of business secrets must be balanced against the rights of defence may depart from the *Akzo*, where it was held that the protection of business secrets is an absolute principle. This might be the true if you believe that the Commission must decide in favour of either the rights of defence or the protection of business secrets [202]. However, I do not believe that it is necessary for the Commission to decide in favour of one or the other, especially since it is common that both interests can be satisfied at the same time. Besides, the Commission's decision is always subject to judicial review.

Finally, Article 21 of Regulation 17 requires the Commission to ***publish its decisions*** in the Official Journal in order to keep the business world informed of the Commission's interpretation of the Treaty. It must only publish the essential content of the decision but what if the publication would be meaningless to the understanding of the decision without publication of the confidential information? Article 21(2) of Regulation 17 says that the publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets. Thus, the protection of business secrets depends on the legitimacy of the information[203]. Consequently, business secrets that evidence the Commission of a crime or fraud are not protected since there is no legitimate interest in such protection.

To sum up, business secrets are afforded a very high level of protection in relation to the three rights discussed above. However, the level of protection can vary depending on the circumstances, as the protection of business secrets needs to be balanced against the protection of the rights of defence. The Commission may have to disclose business secrets needed to support its case or where its non-disclosure would otherwise materially jeopardise the rights of defence[204].

3.3.6 Conclusion

[199] Case T-36/91 Imperial Chemical Industries plc (ICI) v. E.C. Commission (1995) E.C.R. II 1847 at paras. 46, 53 and 54.
[200] Ibid. at para. 98.
[201] Ibid. at paras. 99-103.
[202] As an example: Blanco means that it is necessary for the Commission to decide in favour of either of the two rights, Blanco, EC Competition Procedure, at p.185-186.
[203] Article 21(2) of Regulation 17 refers to the legitimate interest of the undertakings in the protection of their business secrets.
[204] Kerse, E.C Antitrust Procedure, at p. 150.

Even if the effectiveness of the Commission's competition law enforcement at the fact-finding stage could be affected, I believe that the protection in 20(1) Regulation 17 is insufficient. The only protection afforded to undertakings here are the procedural guarantees and they are not enough.
The requirements as to the subject matter and purpose have been broadly interpreted. The Commission only needs to state in general terms the reasons for the investigation and must not identify precisely the documents to be supplied[205]. The effect of this is that the Commission must not describe the exact legal nature of the presumed infringement or even present the information known to it about the latter. The Commission is therefore able to consider as "necessary" a very broad prospect of documents, including those containing business secrets.
Of course, the undertakings do not need an extensive protection in the investigative stage, as the protection of business secrets is stronger in the later stage of the proceedings. However, it is obvious from *Postbank*, that even at a later stage of the proceeding, the Commission has been unable to respect the strong protection afforded to business secrets. If undertakings are not given the protection they deserve also in the preliminary stage of the proceedings, the Commission's enforcement procedure will be ineffective, as undertakings might end up doing all they possibly can to avoid disclosure of confidential information to the Commission. I do not believe that the Commission wants to witness an extensive use of undertakings' rights to judicial review of the Commission's decision as to confidentiality. This would lead to an even more cost and time consuming enforcement, creating even more criticism against the Commission's extensive investigation powers. As I see it, unless the protection of business secrets is guaranteed at a later stage of the proceeding, undertakings should not be forced to disclose business secrets under the threat of fines. A guaranteed protection at a later stage of the proceedings is probably only achieved if the Community Courts, and not the Commission, deal with the decision stage of the proceedings.

As undertakings must disclose their business secrets in the investigative stage, they have a right to expect full protection against disclosure in the decision stage. The Akzo-procedure represents a good safeguard for this, even if the procedure is considered both complicated and time-consuming. In the *Akzo*-case itself, the judgement on the preliminary issue on confidentiality came all of four years after the original complaint. However, weighing its pros and cons, I believe that this is something we have to put up with in order to be guaranteed an effective protection of the rights of defence. This is even more true after the decision in *Postbank*, which is the most recent example of the Commission's failure to respect the protection of business secrets in accordance with the procedures laid down in *Akzo*. In order for a right of judicial review of the Commission's decision on confidentiality to be effective, it must be exercised immediately, that is before the confidential document is disclosed. In *Postbank*, the undertaking was able to review the Commission's decision first upon adoption of the final decision. The Commission is obviously not able to give full protection to undertakings' business secrets.
The CFI annulled the Commission's decision in *Postbank*, but what if the appellant did not have the time or economic resources to bring an action against the Commission! The illegal disclosure to complainants (who often are competitors) of documents containing its business secrets, could be detrimental to the undertaking's positions in the relevant market or trade. The procedure in

[205] Chantal Lavoie, Investigative Powers of the Commission, (1992), E.L.Rev 17(1) 20 at p. 28.

Akzo needs to be adopted as of routine in all cases of disclosure of a defendant's documents to a complainant, irrespective of whether a claim of "business secrets" has been made or not.

In a situation where the right to be heard, the right of access to the file and the obligation to publish certain Commission decisions clash with the obligation not to disclose business secrets, the latter often prevails. This seems to be in accordance with the *Akzo*- and the *Postbank* - cases. However, one must remember that a conflict between these rights is rarely carried to its extremes, and it is common that both interests can be satisfied at the same time.

3.4 Access to the file

3.4.1 Introduction

On the basis of information obtained from requests and / or inspections, the Commission finally decides what type of decision it will take. The Commission now enters the formal proceedings, where the rights of defence are better protected than in the investigative stage. If the Commission reaches the conclusion that there is no breach of the Community competition rules, it can issue a negative clearance or a comfort letter. However, it might also find clear evidence of an infringement of the competition rules and might need to adopt a decision against the interests of the undertaking. In this case, the Commission must observe the rights of defence as this is a fundamental principle of the Community legal order[206], and allow the undertaking to make observations and be heard before the Commission adopts its final decision (Article 19(1) of Regulation 17). As a consequence, the Commission needs to draw up a statement of objections, informing the undertaking of its objections against it, on which the undertaking may give its observations. The statement of objections consists of the facts and the legal grounds of the infringement, accompanied by the conclusions and the intentions of the Commission. To be able to give its observations on whether the facts were correctly stated or if the legal arguments relied on were well founded, the undertaking needs access to the file of the Commission. The right to be heard can only be secured and meaningful if the undertaking is entitled to have access to the Commission's file.

Over the last ten years the Commission has made available to defendant undertakings the evidence cited in the objections, including any exculpatory material. This procedure has been called "access to file". In practice, access to the file has been granted to the undertakings involved in the procedure by sending with the statement of objections a list of all the documents in the file.

The procedure is an exception to the obligation of professional secrecy, as the latter obligation includes all documents in the file (even those disclosed to the undertakings) and not only those containing business secrets.

3.4.1.1. Who are entitled to have access?

The addressees of a statement of objections have always access to the Commission's file. Third party complainants can also have access to the file as pursuant to article 19(2) of Regulation 17

[206] Case 322/82 Michelin v. E.C. Commission (1983) E.C.R. 3461, (1985) 1 C.M.L.R. 282 at para. 7.

other persons than the undertaking concerned can be heard[207]. This means that customers and competitors (as it is often these that file a complaint with the Commission) of the relevant undertaking may have access to the file when they are parties to the hearing.
It is not yet decided whether a co-defendant has the right of access to documents relating to the cases of the other undertakings involved in the same proceedings. It is reasonable to believe that the case law is at all events not inconsistent with the view that the applicant ought also to have access to documents used against other undertakings. However, the problem is that it is in the public interest to ensure that competitors are not informed of each other's commercial activities and intentions[208]. The solution would be to introduce in Community competition law a provision saying that an undertaking can have access to the confidential information only if it also respects the confidentiality in dealings with its own client[209].

Access to the file must be granted when the Commission is going to adopt a decision unfavourable to the undertaking or to the complainants, i.e. access to the file is necessary in infringement procedures as well as when a complaint has been rejected. The Commission must disclose the documents at the time or shortly after the statement of objections has been served and in good time to enable the undertaking to exercise its rights of defence. Documents not shown to the undertaking or documents gathered after the statement of objections has been drawn up, cannot be used against it in the Commission's final decision, as the undertaking has had no opportunity to make known its views on those documents[210]. In *AEG* [211] the Commission was precluded from using as evidence in its decision documents it had not disclosed to AEG for reasons of professional secrecy.

3.4.1.2 When may an undertaking ask for access to undisclosed documents?

In *Soda Ash,* it was held that the Commission must voluntary give the undertaking access to its file and the undertaking must not make a request for it[212]. However, if the Commission has not disclosed to the undertaking a particular document that it wants to see, the undertaking might find it necessary to ask the Commission to make the document available. The undertaking should ask the Commission as early as possible after it has received the statement of objections, and the request must be quite specific, describing the documents it want to see. A request made after the reply to the statement of objections is probably also within the time limit, but a request to see a certain document at the time when the Commission is about to adopt its decision[213], would clearly be unacceptable[214].

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[207] A. Mattfeld, Access to and Communication of the File, in Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p.247-249.
[208] Kerse, E.C Antitrust Procedure, at p.150.
[209] Ibid at p.150. In such a case, the information is used for the right purpose, that is, for the preparation of his defence, and is not illegitimately spread between competitors, which might encourage the creation of cartels.
[210] Ibid. at p. 151.
[211] AEG v. E.C. Commission (1983) E.C.R 3151, (1984) 3 C.M.L.R. 325 at paras. 22-25.
[212] See 3.4.4 about the general principles that were established in the Soda Ash judgements.
[213] The Commission cannot be expected to take into account a request which is made a couple of months after the statement of objection has been served or even after the hearing has taken place.
[214] Ehlermann and Drijber, Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality, (1996) 7 E.C.L.R 375 at p. 383.

3.4.2 The scope of the file

The exact scope of the file is controversial. This is unfortunate as the unsettled scope may affect the safeguard of the rights of defence in a negative sense.

The main problem involves the interpretation of the "file". The Commission and the CFI have different views of its meaning. The former interprets the "file" to include documents upon which the decision was to be taken i.e. the statement of objections, documents supporting the allegations made in the latter (inculpatory documents) and documents upon which the Commission did not rely but which were *clearly* exculpatory (defensive) documents[215].

The CFI however, insists on a wider definition: it is prepared to grant access to the documents stated above as well as any *possibly* exculpatory documents which might be important for the undertakings defence against the Commission's objections, even if they are confidential. In the case of defensive documents being confidential, the CFI means that the Commission might have to provide non-confidential summaries. Further, in a recent case, the CFI has held that the important aspect is not whether the Commission relies on a document but whether the document is truly confidential[216].

In *Soda Ash*, the CFI held that the Commission must not maintain its narrow interpretation of the "file". The documents of relevance are not only those upon which the decision is to be taken, but also documents of importance to the defence of the undertaking i.e. not only inculpatory, but also exculpatory documents not used in the drafting of the statement of objections[217]. The CFI's clear statement in *Soda Ash* may hopefully lead to the final solution of the dispute over the scope of the file.

There have been discussions about accepting a "full access-policy" mainly because undertakings have claim that it is for the defendant and not for the Commission to decide what is relevant to the defence of the undertaking. Consequently, all documents, apart from those containing expressly claimed business secrets, should be available to the undertakings.

The Commission has denied the existence of a general right of a full disclosure of its file[218]. There are several reasons for this. First, a full disclosure would be out of question, as the undertaking must indicate with a sufficient degree of precision what documents it believes may be relevant for the preparation of its defence. Speculative claims that somewhere in the file there might be something useful, cannot be accepted. Secondly, companies should normally not need to see documents obtained from other parties in order to show that the Commission's allegations are unfounded[219]. It is enough for the undertaking to have access to documents helpful for *their* defence. Finally, a full access policy would cause endless delays of the procedure and even so, article 20(2) of Regulation 17 would make a full disclosure legally impossible. The "access to file"

[215] CaseT-36/91 Imperial Chemical Industries plc (ICI) v. E.C.Commission, E.C.R (1995) II 1847 at para. 59.

[216] BPB Industries Plc and British Gypsum Ltd. v. E.C Commission, (1995) E.C.R. I-865, (1997) 4 C.M.L.R 238, at paras. 23-24.

[217] Case T- 36/91 Imperial Chemical Industries plc (ICI) v. E.C. Commission, E.C.R. (1995) II 1847 at paras 107, 108, 111.

[218] Joined cases 43&63/82, VBVB and VBBB v. E.C Commission (1984) E.C.R 19, (1985) 1 C.M.L.R. 27 at para. 25.

[219] Ehlermann and Drijber, Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality, (1996) 7 E.C.L.R 375 at p. 378-379.

procedure is not to be turned into an exchange of sensitive commercial information between competitors[220].

3.4.3 Limits to access to the file.

All documents, whether imposing or removing obligations, must be shown to the undertaking, except documents falling within any of the three following Hercules exceptions: [221]

- *Business secrets* might originate from a complainant company (often a competitor) or from the undertaking complained. The common feature of business secrets is that disclosure adversely affects the commercial interests of the owner of the information. Examples are technical know-how and commercial strategy plans.

- *Internal Commission documents* and correspondence between it and the authorities of the Member States are confidential following article 214 of the Treaty. Internal Commission documents mainly consist of drafts, opinions or memos relating to the ongoing procedure.

- *Other confidential information*, e.g. documents revealing the identification of complainants, military secrets or documents referring to sensitive information which is commercially relevant without being a business secret. Common to information in this category is that the disclosure of these types of documents might have serious consequences (i.e. reprisals) for the relevant undertaking if shown to people who can guess their origin.

In the past, the Community Courts have been reluctant to order the Commission to produce its internal documents[222]. However, this might change following *NMH Stahlwerk*[223], where the CFI ordered the Commission to explain in a detailed manner on what grounds it considered that certain documents qualified as internal should not be disclosed to the relevant undertaking. A further support for a new internal practice on the Commission's internal documents could be the *Soda Ash* cases, where the CFI increased the pressure on the Commission to ensure proper protection of procedural rights.
Finally, the Commission believes that the scope of "other confidential information" must be interpreted broadly. All documents on file covered by the obligation of professional secrecy could

[220] Joshua, Balancing the Public Interests: Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedures, (1994) 2 E.C.L.R 68, at p. 71.
[221] They are called the "Hercules exceptions" because they were summarised in Re the Polypropylene Cartel: Hercules NV v. E.C Commission, (1991) E.C.R. II-1711, (1992) 4 C.M.L.R 84 at para. 54. They are also described in detail in the Access to the File (Antitrust) Notice 1997, (1997) 4 C.M.L.R 490 at p. 493-495.
[222] Ehlermann and Drijber, Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality, (1996) 7 E.C.L.R 375 at p. 383.
[223] NMH Stahlwerke GmbH and others v. E.C Commission, (1997) E.C.R. II-2293, (1997) 5 C.M.L.R 227 at paras. 67-78.

therefore not be disclosed, save if the relevant document contains clearly exculpatory information[224].

3.4.4 The Soda Ash judgements

The Soda Ash judgements[225], are the most important cases for many years on access to the file. In June 1995, the CFI delivered five judgements concerning the alleged sharing of the market for soda ash (a raw material for the production of glass). In two of the judgements[226], Solvay, the market leader on the Continent, and ICI, the market leader in the United Kingdom, abstained from selling in each other's markets. The Commission claimed that this amounted to a concerted practice within the meaning of article 85(1) of the Treaty. The CFI annulled the Commission's decision relating to the alleged concerted practice on the ground that the Commission had not shown to ICI and Solvay certain allegedly confidential documents belonging to the other party. Nor had the Commission prepared a list of all the documents in the soda ash file or provided the undertakings with a non-confidential summary of the confidential documents. The Commission had also used some of the non-disclosed documents in its decision. Consequently, the Commission had not respected the rights of defence of the undertakings following the non-disclosure of specific documents.

In these judgements, the CFI established some important *general principles* regarding access to the file:

- The undertaking does not need to make a request for access to the Commission's file, as the latter should be a non-conditional obligation of the Commission which it should carry out voluntarily[227](besides, Regulation 17 does not provide for such a request to be made).

- It is not for the Commission to decide on its own which documents are exculpatory or useful for the defence of the undertaking. The Commission must give the advisors of the undertaking an opportunity to examine the documents that may be relevant to the defence[228].

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[224] Ehlermann and Drijber, Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality, (1996) 7 E.C.L.R 375 at p. 379.
[225] Case T-36/91 Imperial Chemical Industries plc (ICI) v. E.C. Commission, (1995) E.C.R II 1847, Case T-30/91 Solvay SA v. E.C. Commission, (1995) E.C.R II 1775, Case T-37/91 Imperial Chemical Industries plc (ICI) v. E.C. Commission, (1995) E.C.R II 1901.
[226] Case T-30/91, Solvay SA v. E.C Commission, (1995) E.C.R II 1775, and Case T-36/9I, ICI v. E.C Commission, (1995) E.C.R II 1847.
[227] Case T-36/91, ICI v. E.C. Commission, (1995) E.C.R. II 1847 at para 106.
[228] Ibid. at paras. 91 and 111.

- The protection of business secrets must be balanced against the safeguarding of the rights of the defence. In practice, the Commission should balance these interests by using two alternative methods.

First, it could prepare non-confidential summaries of the documents containing business secrets or other confidential information. The Commission could then annex these, together with other documents it wishes to rely on, to the statement of objections and send it to the undertaking. If preparing non-confidential versions prove to be difficult in practice, it should send to the undertaking a list of the relevant documents and allow it to inspect the documents at the Commission's premises[229]. This gives the defendant undertaking a chance to prepare its defence properly at the same time as any business secrets are adequately protected. Consequently, the Commission cannot justify a refusal to disclose documents by claiming that the undertakings had themselves requested confidential treatment of their documents[230].

- The CFI established the general principle of equality of arms, which means that the undertaking's knowledge of the file used in the proceedings is the same as that of the Commission[231].

The information available to the Commission and the defence should therefore be the same in order to protect the rights of the defence of the undertaking. The CFI seems to have accepted that if the list of documents, attached to the statement of objections, is "sufficiently detailed", the Commission has fulfilled the principle of equality of arms. At present, the lists sent are often not detailed enough, which means that in the future, the Commission will be obliged to draw up more detailed lists and disclose more information to defendant undertakings than before.

- Depending on whether the document is inculpantory or exculpatory, the effect of non-disclosure is different.

In relation to *inculpatory* documents, the CFI confirmed previous case law and held that non-disclosure of this type of documents gives them no value in the continuing process. Thus, the Commission cannot use inculpatory documents as evidence supporting its final decision if the documents have not been disclosed. In relation to *exculpatory* documents, the CFI developed a new idea and held that if this type of documents was not disclosed, the whole decision of the Commission would be annulled. The reason is that it is impossible to know what the result would have been had the exculpatory documents been shown to the undertaking[232].

- In order to find that the rights of the defence have been infringed, it is sufficient for the undertaking to prove that the non-disclosure of the relevant documents might have influenced the course of the procedure and the content of the decision to the applicant's detriment.

[229] Ibid. at paras. 99-103.
[230] Ibid at para. 105.
[231] Ibid. at paras. 93 and 111.
[232] Ibid. at paras. 107-108.

In relation to exculpatory documents, the undertaking must only be able to establish the possibility that exculpatory documents may exist and, had they been disclosed, would have influenced the procedure to the undertaking's detriment[233]. Previously, the applicant was obliged to demonstrate that the result of the proceedings would have been different, had the documents been disclosed[234], which is more difficult to prove.
However, in order to avoid speculative claims that somewhere there must be a document helpful to the defence of the undertaking, the parties must identify categories of undisclosed documents and explain why they might be relevant. Thus, first it is necessary to consider whether the document is relevant to the parties in question, secondly, whether they are excluded by one of the Hercules exceptions.

The general principles stated in the judgements are very important, but how important is difficult to say as the CFI has stressed several times that its decisions were based on the specific circumstances of the case e.g. the objections raised by the Commission[235]. However, today, we know that the Soda Ash judgements have had a very big influence on the Commission's policy in granting access to the file. The purpose of the Commission's Access to the File Notice 1997 is to ensure compatibility between current administrative practice regarding access to the file and the case-law of the Courts, in particular the Soda Ash cases[236].

3.4.5 The Commission Notice on Internal Rules of Procedure for Access to the File.

3.4.5.1 Introduction

In the XXVI Report on Competition Policy (1996)[237], the Commission declared that in the light of the case law of the CFI and the ECJ, in particular the *Soda Ash* cases, and in order to provide greater transparency to firms, the Commission had decided to systematise and clarify its practice regarding access to file. It did so by adopting a notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation No 4064/89[238].
It is extremely good that the Commission has decided to codify its own internal procedure on access to the file in order to ensure compatibility between current administrative practice regarding access to the file and the case law of the Community Courts. Unfortunately, as I will argue below, the complex procedure of access to the file has not been completely clarified and there are areas where the Notice does not adequately reflect all of the Commission's obligations.

3.4.5.2 Summary of the Access to the File Notice 1997

[233] Ibid. at paras.78 and 111.
[234] Musique Diffusion Francaise SA (Pioneer) v. E.C.Commission (1983) E.C.R. 1825, (1983) 3 C.M.L.R. 221 at para. 30.
[235] Case T-36/91, ICI v. Commission (1995) E.C.R II 1847 at paras. 70 and 116.
[236] See the Introduction to the Commission Notice on internal rules of procedure for processing requests for access to the file in cases pursuant to articles 85 and 86 E.C., Articles 65 and 66 ECSC and Regulation 4064/89, (1997) O.J. C23/3 (23 January 1997).
[237] The Commission's XXVI th Report on Competition Policy, 1996, at para. 40.
[238] (1997) O.J. C23/3. From now on the notice will be called "Access to the file notice".

Below, I will only refer to the procedure in relation to competition cases under articles 85 and 86 of the Treaty.
In the introduction to the notice, the Commission makes clear that its task in the area is to reconcile two opposing obligations, namely, that of safeguarding the rights of the defence and that of protecting confidential information concerning firms[239].
The notice deals with two questions: the scope and limits of access to the file and the practical procedure for access. However, the internal rules of procedure relate essentially to the rights of defendant undertakings and do not relate to the rights of third parties or complainants[240].
The Notice starts of by identifying the scope of the "file". It sets out criteria for distinguishing between non-communicable and communicable documents. Undertakings must have access to all of the documents making up the file of the Commission, apart from the *Hercules* exceptions, namely business secrets, internal Commission documents and other confidential information. These exceptions represent the three categories of non-communicable documents and the notice describes in detail their scope and content. All other documents are communicable documents, thus they are accessible to the defendant undertaking.
The Commission emphasises that, in the light of the Soda Ash cases, it is not for the Commission alone to decide which documents are relevant and of use for the undertaking's defence.
The Notice then moves on to introduce the new internal procedure for access to the file.
In order to facilitate access to the file, all undertakings providing information to the Commission will systematically be asked to:
- specify the information they regard as business secrets and the confidential documents whose disclosure could injure them,
- to substantiate their request for confidentiality in writing; and
- to give the Commission a non-confidential version of the documents in question.

Well-founded requests of access to the file will be granted, but the Commission will reserve the right to reconsider the request at a later stage of the proceedings. When the Commission, after an inspection pursuant to articles 14(2) and 14(3) of Regulation 17, realises that some of the documents collected are irrelevant to the case, these will be returned to the undertaking as soon as possible.
If the Commission does not accept a claim for confidentiality, the procedure described in the *Akzo* case, as incorporated into the mandate of the Hearing Officer[241], will be followed.
The list of documents on file will be sent to the undertakings and further indicate the accessibility of each document by stating whether the document falls within any of the following categories: "accessible documents", "partially accessible documents" or "non-accessible documents". The later category of documents (essentially business secrets), will be summarised in the list so that the content and subject of the document can be identified. In that way, the undertaking will be able to determine whether the document is likely to be relevant to its defence and decide whether to request access to it despite that it has been classified as a non-accessible document. The other documents will not need a description of their content since their content will be evident on their face.

[239] See in the Introduction to the Access to the File Notice.
[240] The XXVI th Report on Competition Policy, 1996 at para. 41.
[241] Articles 5(3)-5(4) of Commission Decision 94/810/ECSC, E.C of December 12, 1994, O.J. L330/67.

Contrary to previous practice, internal documents will be placed in a separate, non-accessible file. The Hearing Officer has the power to certify whether the documents therein are internal documents or not. The Notice gives examples of documents regarded as internal.
The practical arrangements for access to the file are also contrary to the common previous practice. The statement of objections will only be accompanied by the evidence adduced and the documents on which the objections are based. As a general rule, the rest of the file will be accessible by way of consultation at the Commission's premises. If the file is not too bulky, the undertaking may be sent all the accessible documents.
Finally, the Commission emphasises that complainants' rights to consult the file are considerably fewer than those of defendant undertakings. Also, the Commission refers to the *BPB*[242]case and observes that, as dominant undertakings can place considerable economic or commercial pressure on their competitors, customers or suppliers, the defendant undertaking's right of access to the file may be greatly restricted if it has been alleged of abusing its dominant position.

3.4.5.3 Shortcomings of the Notice

The introduction of a clear guideline will hopefully speed up the process of granting access to the Commission's file, especially in relation to the systematic production of non-confidential versions of documents containing business secrets[243]. The intention of the Commission is that this new procedure will provide an effective solution to most of the problems in connection with the access to file procedure[244]. The Notice has definitely created a better level of legal security in the area and has improved the protection of the rights of defence of the undertakings.
However, there are indications that the notice does not wholly reflect the recent case law and may even constitute a narrowing of the Commission's practice.
The notice refers to the "file of the Commission (DGIV)"[245]. This definition might be too narrow. The obligation to respect the rights of defence is an obligation on the Commission as a whole. The final decision is an act of the Commission as a whole. It is therefore possible that information received by *any* of the Directorates General (not only by DGIV) may influence the final decision. Therefore, the file must consist of the relevant documents in the possession of the Commission as a whole, and not only those in the possession of DGIV[246].
Further, according to the notice, internal documents will be placed in a separate file. Until now, internal documents have been included in the file (even if they have not been disclosed) and a brief description of them has sometimes appeared on the list of documents. The notice does not indicate that a list of the internal documents will be made available to the defendant. Internal documents may be relevant to an undertaking. Without a list or an indication of the nature of the internal documents, the defendant will not be able to make a reasoned request to the Hearing Officer as to the classification of the documents in the file. Neither will the undertaking be able to

[242] BPB Industries and British Gypsum v. E.C Commission, (1995) E.C.R. II-865, (1997) 4 C.M.L.R. 238
[243] Matthew Levitt, Commission Notice on Internal Rules of Procedure for Access to the File, (1997) 3 E.C.L.R. 187, at p.188.
[244] The Commission's XXVI th Report on Competition Policy 1996, at para. 45.
[245] Access to the File (Antitrust) Notice 1997, (1997) 4 C.M.L.R 490 at p.493.
[246] Matthew Levitt, Commission Notice on Internal Rules of Procedure for Access to the File, (1997) 3 E.C.L.R. 187, at p.189.

see whether the Hearing Officer has carried out his review of the internal file in a correct manner[247].
The reason for this newly introduced rule could be the *NMH Stahlwerk*[248] case, where the CFI held that as a rule, the Commission's internal documents should be disclosed to the undertaking. Further, the Commission must explain in detail the reasons for any non-disclosure of these documents.
Finally, one might ask whether it is fair that dominant undertakings, notwithstanding a potential risk of retaliation, should have their rights of defence curtailed on the basis of the statement of objection[249], which is only the Commission's view on a preliminary and not yet proven allegation[250].

To sum up, the Commission has introduced greater transparency into the procedure for granting access to the file, but there are still several points that need to be further clarified in order to assure defendant undertakings of that they are being fairly treated.

3.4.6 Enforceability

Undertakings must be able to effectively enforce the right to have access to the file against the Commission, otherwise the right is meaningless.
Generally, the Commission can only be the object of proceedings for annulment in the sense of article 173 of the Treaty if its measures have legal effects, binding on and capable of affecting, the interests of the applicant by having a significant effect on his legal position. In the case of decisions or acts drawn up in a procedure involving several stages (such as the procedure under Regulation 17), only measures laying down the final position of the Commission may be contested. Provisional measures are therefore not subject to "article 173-actions"[251].
The general principle of enforceability of the access to the file is that, depending on at what stage of the procedure the undertaking brings an action against a Commission decision, the level of protection afforded to the undertaking's rights of defence will vary.

During the competition law procedure under Regulation 17, the Commission can take different decisions before giving its final decision on the relevant infringement. Below, I will deal with two types of decision that is relevant for the procedure of access to the Commission's file. First, the Commission may take a decision not to grant the undertaking access to certain documents in its file because the documents in question are classified as confidential (decision on disclosure). Secondly, it may decide to refuse the undertaking access to some or all of its file (decision on refusal). These decisions are the effect of measures taken by the Commission, which are of different nature and have different legal effects on the undertaking's interests. As a result, an undertaking that wants to bring an action against any of these decisions before the CFI, must do so at different stages of the procedure.

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[247] Ibid. at p.189.
[248] NMH Stahlwerke GmbH and others v. E.C Commission, (1997) E.C.R. II-2293, (1997) 5 C.M.L.R 227 at paras. 67-78.
[249] See 3.4.5.2. Summary of the Access to the File Notice.
[250] Matthew Levitt, Commission Notice on Internal Rules of Procedure for Access to the File, (1997) 3 E.C.L.R. 187, at p.190.
[251] Cimenteries CBR SA v. E.C Commission, (1992) E.C.R. 2667, (1993) 4 C.M.L.R 259 at para. 28.

3.4.6.1 Decisions on disclosure

There might be several reasons why the Commission must take a decision on disclosure (or non-disclosure) of documents:

- Even if the undertaking to which the documents belongs has raised no objection, the Commission might not want to show a certain document to other parties in the procedure. Exchange of information between undertakings can result in restrictions of competition between undertakings and create cartels, the latter being the main target of the Commission's war against competition law infringements.
- An undertaking may refuse disclosure of documents the Commission wants to disclose to third parties. The documents involved are often those establishing an infringement of the Community competition rules.
- The undertakings may take the view that they are entitled to see documents not shown to them.

The reason behind a conflict of interests between the relevant undertaking and the Commission is often that a certain document contains confidential information, such as business secrets. In a conflict between the protection of business secrets and access to the file[252], the Commission will start of by trying to achieve a compromise with the undertaking and ask for a non-confidential version of the document in question. If the undertaking refuses to do this or if the new version of the document does not reflect the content of the original one, only then will the Commission take a reasoned decision informing the undertaking of the Commission's intention to disclose the content of the document.

When can a decision on disclosure be challenged? In *Akzo,* where the Commission had decided that certain documents were not confidential in nature and could therefore not be communicated to the complaining party, the ECJ held that the Commission's decisions on disclosure of certain documents to third parties were seen as sufficiently independent from the Commission's final decision[253] and could therefore be challenged even before the final decision was taken. The ECJ gave the following reasons: first, as improper disclosure of confidential documents to a third party would have an irreversible effect on Akzo and could not be remedied by an annulment of the final decision[254], and secondly, as Akzo's rights of defence would not be sufficiently protected if Akzo was able to bring an action against the Commission's decision only after the final decision was taken, Akzo had the right to bring an action before the CFI under article 173 of the Treaty.

The procedure described above is called the Akzo-procedure and the same procedure is used when an undertaking wants to challenge the confidentiality of a document[255]. The procedure is used rarely as it is both complex and slow. Besides, a compromise is usually reached anyway.

In any event, it has become the standard procedure and is important as it helps safeguarding the rights of defence of the undertakings.

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[252] See also: 3.3.5 Rights Conflicting with the Protection of Business Secrets.

[253] Thus, it was not seen as a provisional measure. See 3.4.6. Enforceability, paragraph 1.

[254] AKZO Chemie BV v. E.C Commission, (1986) E.C.R. 1503, (1987) 1 C.M.L.R. 231 at para. 20.

[255] See 3.3.4.1 The AKZO- procedure.

3.4.6.2 Decisions on refusal of access to the file

The decision discussed above must be distinct from the decision where the Commission refuses to make available some, or all, of its file.

In *Cimenteries*[256], standards for the enforceability of access to the file was set down by the Commission. In 1989, the Commission carried out an investigation into the existence of concerted practices or agreements aimed to divide markets, in the European cement industry. The Commission decided to initiate proceedings against 76 undertakings but statements of objections were not communicated in their entirety to each of the 76 undertakings. The undertakings claim that by acting this way, the Commission had refused some of them access to all the documents in the file (subject to the *Hercules*-exceptions) and thereby infringed their rights of defence.

The CFI held the complaint to be inadmissible and stated that, even though refusing access to the file may constitute an infringement of the rights of defence, the measure only produces limited effects, characteristic of a preparatory measure forming part of a preliminary administrative procedure. Only measures immediately and irreversibly effecting the legal situation of the undertakings concerned are of such a nature as to justify, *before* completion of the administrative procedure, the admissibility of an action for annulment[257]. Consequently, a statement of objections can not be regarded as a decision in the sense of article 173 of the Treaty and can therefore only be challenged in the context of the final decision.

The reason for this position seems to be that the Commission, at any point of time, may modify or withdraw its statement of objections. It may also, if it finds it necessary, reopen the procedure to grant access to its files. Any attack on the statement of objections would therefore be too hasty[258], except in one case: under exceptional circumstances (where the Commission's measure lack even an appearance of legality), such acts can be attacked[259].

3.4.6.3. Enforceability and the Access to the File Notice

How does the new notice on access to the file deal with the enforceability of the right to have access to the Commission's file?

Since 1994, the Hearing Officer can be entrusted with the arbitration of disputes on the making available of specific documents as well as issues on confidentiality, in particular requests from third parties to have access to documents claimed to be confidential. The Hearing Officer is also the one putting into practice the Akzo procedure[260]. The Notice states that the "final assessment" of the accessibility of documents for which confidential treatment has been claimed, is to be made by the Hearing Officer in accordance with his mandate.

The problem is that the notice does not mention whether the decision taken by the Hearing Officer on the accessibility of documents for which confidential treatment has been claimed can be challenged by undertakings before the CFI in accordance with the Akzo-procedure[261]. Maybe

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[256] Cimenteries CBR SA v. E.C Commission, (1992) E.C.R. 2667, (1993) 4 C.M.L.R 259.

[257] Ibid. at para 42. See also 3.4.6. Enforceability, paragraph 1.

[258] Ibid. at paras. 34 and 36.

[259] International Business Machines Corporation (IBM) v. E.C Commission, (1981) E.C.R III 2639, (1981) 3 C.M.L.R. 635 at para 23.

[260] The Akzo-procedure is incorporated into the mandate of the Hearing Officer by Articles 5(3)-5(4) of Commission Decision 94/810/ECSC, E.C. of December 12, 1994, O.J. L330/67.

[261] Matthew Levitt, Commission Notice on Internal Rules of Procedure for Access to the File, (1997) 3 E.C.L.R. 187, at p.190.

the Commission thought it was too obvious to mention. However, nothing can be considered too obvious to mention, especially following *Postbank* where the Commission did not respect the Akzo-procedure at all![262].
Notwithstanding, the notice should probably not be read as excluding the possibility of a right to judicial review. Surely, the Hearing Officer's mandate must be regarded as introducing a further level of protection into the procedure and not abolishing the right to have judicial review.
Assuming that the right to judicial review still exists, the Notice does not mention at what time during the proceeding the undertaking is able to bring its action to the CFI. The *Akzo* case states that in order for the judicial review to be effective, it must be exercised immediately, i.e. before disclosure actually takes place rather than upon adoption of the final decision.

Finally, the notice does not deal with the possibility of the undertaking to bring an action against the Commission's decision refusing it access to its file.
However, as this is something that the undertaking only is allowed to do *after* the Commission has given its final decision on the relevant competition issue[263], it is understandable that the Commission does not deal with this question in a notice describing the procedure *during* one of several procedural stage in the competition law procedure.

3.4.7 Is access to the file part of the rights of defence?

3.4.7.1 Introduction
The granting of access to the file has no legal basis in Regulation 17. The procedure of access to the file was first mentioned in the Commission's Twelfth Report on competition Policy in 1982. Since then, the procedure giving undertakings access to the Commission's file has developed and constitute today an important part of the competition law procedure. However, the question remains whether it is seen as a fundamental principle of Community Competition law or whether it only constitutes an obligation which the Commission has imposed on itself.
Depending on what the right is classified as, there are different practical effects on the part of the undertakings.

Cimenteries[264] is believed to be the first case giving the right to have access to the Commission's file an appropriate legal place within the system of procedural rights in competition matters. This case was followed by *BPB*[265], where Advocate General Léger emphasised the importance of *Cimenteries* and the new grounds set down in that case.

3.4.7.2 The development of the procedure of access to the file
Until 1980, if the documents were not already known to the parties, only documents containing the evidences of the alleged infringements were provided to them[266]. Consequently, documents entered into the possession of the Commission during the investigation, but which had not been

[262] See 3.3.4 Article 20(2), Disclosure of information to third parties.
[263] See 3.4.6.2. Decisions on Refusal of Access to the File.
[264] Cimenteries CBR SA v. E.C Commission (1992) E.C.R 2667, (1993) 4 C.M.L.R 259.
[265] BPB Industries PLC and British Gypsum Ltd v. E.C Commission, (1995) E.C.R.-I 865, (1997) 4 C.M.L.R 238.
[266] Ehlermann and Drijber, Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality, (1996) 7 E.C.L.R 375 at p. 377.

used in the drafting of the statements of objections, were never showed to the undertakings. This practice was regarded as unsatisfactory and in its Twelfth Report on Competition Policy, the Commission announced a procedure aimed at organising access to its files[267]. It stated that it now had the intention to permit the undertakings involved in a procedure under Regulation 17 to inspect the file regarding their cases. In *Hercules*, the CFI held that the Commission has an obligation to make available to the undertakings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigations save the three Hercules-exceptions[268]. In the same case it was held that the Commission can not depart from rules it has imposed on itself[269] i.e. the obligation it imposed on itself in the Twelfth Report on Competition Policy.

One year later, in *Cimenteries*[270] the CFI held that access to the file is one of the procedural guarantees intended to protect the rights of defence and to ensure, in particular, the right to be heard. The purpose of the procedure to grant access to the Commission's file is to give the undertakings concerned knowledge of all evidence contained in the file. This will give them the chance to effectively express their views on the conclusions of the Commission as they result from the statements of objections.

The Court furthermore stated that the observance of the rights of the defence in a procedure which may lead to sanctions, is a fundamental principle of Community law, which must be respected in administrative proceedings such as the one in question[271].

3.4.7.3 A part of the rights of defence?

On the one hand, there are those who believe that the right to have access to the Commission's file is inseparable from and dependent on the right to be heard. Joshua means that access to the file is not a procedural right in itself but must be tailored to the right to be heard[272] and Ehlermann and Drijber use the judgement in *Cimenteries* in confirmation of their view that access to the file is a way of ensuring that the right to be heard is observed[273].

On the other hand, many lawyers[274], amongst them Advocate General M. Philippe Léger, mean that *Cimenteries* can be interpreted in a different way, thus giving the right of access to the file the status of an independent right that is part of the fundamental principles of Community law. This interpretation would represent a development in the case law of the CFI. Léger means that the CFI in *Cimenteries*, unlike in *Hercules*, no longer bases its recognition of the right to access to the file solely on the Commission's self-imposed obligation in the Twelfth Report on Competition Policy. Instead, access to the file is seen as one of the procedural safeguards intended to protect

[267] Twelfth Report on Competition Policy, 1982, at pages 40 and 41.
[268] Hercules v. E.C Commission (1992) E.C.R II 1711, (1992) 4 C.M.L.R 84 at para. 54.
[269] Ibid. at para. 53.
[270] Cimenteries CBR SA v. E.C Commission (1992) E.C.R 2667, (1993) 4 C.M.L.R 259.
[271] Ibid. at paras. 38-39.
[272] Joshua, Balancing the Public Interests: Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedures, (1994) 2 E.C.L.R 68, at p. 71.
[273] Ehlermann and Drijber, Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality, (1996) 7 E.C.L.R 375 at p. 377.
[274] A. Mattfeld, Access to and Communication of the File, in Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 246-247.

the rights of the defence[275]. Contrary to previous case-law, it therefore seems as if the CFI has created a new dogmatic basis and classified the right to have access to the Commission's file as being part of the right of the defence, and consequently part of fundamental Community law[276].
Advocate General Léger means that this development should be endorsed, as giving the right of access to the file the status of a fundamental principle of Community law, is in fact merely to fall in step with a process which is already fully under way[277].
Further, several Member States, amongst them France, Germany and England, already recognise such a principle and there can be no reason not to give this rule the status of a fundamental principle of Community law when the Commission is quite willing to impose it upon itself.
Another strong reason to sustain the mentioned development is that the announcement made by the Commission in its Twelfth Report on Competition Policy can not provide a satisfactory basis for a right of access to the file. An authority which imposes rules upon itself may at any moment change those rules. A principle so important for the rights of defence of the undertakings cannot be left to the discretion of the Commission[278].
To sum up, as Kerse observes, the debate has yet to be settled as to whether, and to what extent, access to the file is a fundamental right or a right dependant on the Commission's discretion[279].

As regards this debate about whether the right of access to the file is an obligation which the Commission has imposed on itself or whether it is part of the rights of the defence, the Access to the File Notice 1997[280] uses next to the same terms as those used by the CFI in *Cimenteries*. In the introduction to the notice it is held that: *"Access to the file which is one of the procedural safeguards designed to ensure effective exercise of the right to be heard……"*. [281]
The acceptance of the right to have access to the file as being part of the right of the defence and consequently, as being part of fundamental Community law, is further supported by the fact that the notice does not anywhere refer to the Commission's self-imposed obligation in the Twelfth Report on Competition Policy as being the basis of the right of access to the file.
Anyhow, whatever your opinion on this issue, it might be interesting to notice the practical effects of an upgrading of the right to access the Commission's file as part of the procedural guarantees.
In line with this upgrading, the protection of the right to have access to the file would need a stronger protection. If the right is no longer left to the Commission's discretion but forms part of undertakings rights of defence, undertakings must be able to enforce this right more effectively

[275] BPB industries Plc and British Gypsum Ltd v. E.C Commission, opinion Léger A.G, (1995) E.C.R. I-865, (1997) 4 C.M.L.R 238 at para. 106.
[276] A. Mattfeld, Access to and Communication of the File, in Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 246-247.
[277] BPB Industries Plc and British Gypsum Ltd v. E.C Commission, (1995) E.C.R. I-865, (1997) 4 C.M.L.R 238 at para. 112.
[278] Ibid. at paras.103-105.
[279] Kerse, E.C Antitrust Procedure, at p.147.
[280] Commission notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 E.C., Articles 65 and 66 ECSC and Regulation 4064/89, O.J. C23/3 (23 January 1997).
[281] Compare the wording in the notice with Cimenteries CBR SA v. E.C Commission, (1992) E.C.R. II-2667, (1993) 4 C.M.L.R 259 at para. 38.

compared to what is possible today. An enlargement of the circle of people having access to the Commission's file and/or a more severe sanction imposed on the Commission for infringing the right to have access, would therefore be motivated.
As the situation stands today, only the addressee of a statement of objection and third party complainants have access to the file. It is not yet decided whether a co-defendant in competition proceedings has the right to have access to documents concerning all undertaking's involved in the procedure, or only in respect of documents relating to its "own" part of the statement of objections[282]. Maybe it would be reasonable if also co-defendants were included in the circle of people having complete access to the Commission's file[283].
The sanction imposed on the Commission for infringing the right to have access to the file is normally not a complete annulment of its entire decision. Thus, if the Commission has used a document against a co-defendant and the latter did not have the possibility to comment on it as he or she did not have access to certain parts of the file, the only sanction imposed on the Commission would be that the document cannot be used to the disadvantage of the co-defendant. This does not provide a sufficient protection. Only a complete annulment of the Commission's decision would give the right to access the necessary importance and relevance in the relevant administrative proceedings[284]

3.4.8 Conclusion

It is impossible to talk about access to the Commission's file without mentioning the *Soda Ash* judgements, which made clear a lot of differences and ambiguities regarding this issue. Amongst other things, a final solution has hopefully been reached on the controversial issue of the scope of the "file". Following a wider interpretation of the scope, the Commission will be obliged to respect the rights of defence in a greater extent than has previously been the case. This may lead to administrative inconveniences, but the CFI has ruled that this must be put second to the rights of the defence[285]. Further, the principle of equality of arms was also established in *Soda Ash*. However, one might wonder whether a company is really put in a disadvantageous position if it has not been shown *all* the documents of the file. A lot of the documents in the file are clearly irrelevant to the undertaking as the Commission, due to time constraints during the inspections, cannot avoid gathering papers that on closer examination prove to be irrelevant to the case. Further, companies are much better informed about their industry and their behaviour in that market than the Commission is. They will therefore not be put in a disadvantageous position if the principle of equality of arms, a traditional criminal law principle, is not applied in the Community competition law procedure[286].
The most significant effect of *Soda Ash* is that it has and will have a very important influence on the Commission's future policy in granting access to the file. In fact, the purpose behind the

[282] See 3.4.1.1 Who are entitled to have access?
[283] A. Mattfeld, Access to and Communication of the File, in Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 247.
[284] Ibid. at p. 248.
[285] Case T-36/91, ICI v. E.C. Commission (1995) E.C.R II 1847 at para. 112.
[286] Ehlermann and Drijber, Legal Protection of Enterprises: Administrative Procedure, in particular Access to Files and Confidentiality, (1996) 7 E.C.L.R 375 at p. 381.

drafting of the Commission's Access to the File Notice 1997 was to ensure compatibility with present case-law, in particular, the Soda Ash case.
The Access to the File Notice 1997 has created an improved level of legal security in this previously so complex area of competition law. The Notice was eagerly awaited, especially by the House of Lords Select Committee on the European Communities, which in 1993 recommended the Commission to publish a notice setting out its legal and procedural rules on access to the file[287]. The Commission has drafted an easily manageable notice, which fairly balances the equally important interests of an effective enforcement of the competition law and the protection of the rights of the defence of undertakings. However, there is still some uncertainty surrounding the scope of the "file" and it had also been highly appreciated if the Commission had taken an interest in the recommendations given by the House of Lords Select Committee on the European Communities, advocating the introduction of procedures designed to enable decisions on matters such as access to the file to be speedily adjudicated by a judge of the CFI[288].
Further, the notice states that its purpose is to ensure compatibility between current administrative practice regarding access to the file and the case law of the ECJ and the CFI, in particular the *Soda Ash*-case. In that case, why bother producing a notice on access to the file with the aim of making clear the currant legal position if it does not cover everything? I can not see the logical reason behind not stating, even if it might seem obvious to the Commission, that undertakings have the right to judicial review of the decisions of the Hearing Officer. Again, undertakings investigating into what rights they might have in the competition law procedure, might believe that they do not have a right to judicial review. These sort of "mistakes" create legal uncertainty and may put the Commission in a less favourable light than it might deserve.

As regards the enforceability, by taking the view that undertakings can not bring an action against the Commission's decision to refuse it access to its file *during* the proceedings, the CFI rather accepts a violation of the right of the defence during the course of the Commission's competition law procedure than run the risk of stopping the procedure altogether or forcing the Commission to restart it[289].
This approach might be too practical, putting the rights of the defence of the undertakings in second place. However, if undertakings had the opportunity to bring an action against the Commission's decision on non-disclosure *before* the final decision, a redrafting of Regulation 17 and a redefinition of the status of the Hearing Officer would probably be necessary. Furthermore, the question is if the latter legal changes are at all necessary in order to protect the interests of the undertaking. It is the Commission rather than the undertaking that suffers from the way the law stands today, as the former runs the risk of having its final decision annulled on the ground that its non-disclosure of documents was unjustified[290].

[287] Alan J. Riley, EC Competition Procedures Re-evaluated: The House of Lords Reports, (1994) 5 E.C.L.R 247 at p. 249.
[288] Kerse, E.C Antitrust Procedure, at p. 152.
[289] A. Mattfeld, Access to and Communication of the File, in Rights of Defence and Rights of the European Commission in EC Competition Law, Symposium organised on 24 and 25 January 1994 by the European Association of Lawyers, at p. 253.
[290] BPB Industries PLC and British Gypsum Ltd v. E.C Commission, opinion Léger A.G., (1995) E.C.R. I-865, (1997) 4 C.M.L.R. 238 at para. 118.

Finally, if the undertakings had the opportunity to challenge the Commission's decisions on refusal of access to the file, they might be tempted to use this opportunity to drag out the proceeding in their interest.
Being concerned about the protection of undertakings' interests, I believe that a solution of the problem regarding the non-enforceability of the Commission's decisions on refusal of access to the file could be to introduce a sufficient sanction against the Commission's infringements. The effect of not letting undertakings bring an action against the Commission's refusal during the course of the procedure, turns the right into a weak weapon. Undertakings that are unable to comment on documents used against them are seriously harmed. If access to the file is not afforded a stronger protection, the confidence in the Commission and its powerful investigative powers will be lost. In order to give the rights of defence a greater protection, the annulment of the entire decision of the Commission, instead of only setting aside as evidence the non-communicated document, would provide a fair resolution. This is also in line with the CFI's recognition of the right to have access to the file as part of the rights of defence. This gives for the first time the right to have access to the file an appropriate legal place within the system of procedural rights of undertakings in competition matters.

To sum up, if the Commission does not give the undertakings access to its file, it is obliged either to abandon the proceedings taken against the undertakings or to resume them giving the undertakings concerned a further opportunity to give their views on the objections made against them in the light of the new information they now have access to. Consequently, the Commission runs the risk of having its final decision completely overturned as an effect of not ensuring proper access to its files[291]. This is a problem which the CFI has finally started to be observant of and it seems as if the CFI, by highlighting the risks of the Commission in this area, wants to make clear that these kind of problems can best be resolved at an early stage of the proceedings. Thus, the Commission should make sure that the undertakings concerned have access to all documents relevant to their defence.
It feels reassuring that the CFI has noticed the problems surrounding the non-disclosure of documents and I hope that this in the future can give rise to a greater respect of the access to the file procedure. This is important, especially when the level of fines imposed on undertakings following infringements of the Community competition law is constantly rising. Undertakings must have the possibility to create a strong and valid defence against the objections of the Commission.

[291] Cimenteries CBR SA v. E.C Commission, (1992) E.C.R. II 2667, (1993) 4 C.M.L.R. 259 at para. 47.

Chapter 4. Compliance Programmes

4.1 Introduction

The antitrust laws in the United States have a very broad application at the same time as they are enforced by heavy sanctions such as criminal sanctions, injunctive actions, private actions for treble damages and even jail sentences. For these reason and because competition is seen as the operating principle for the US economy[292], anti-trust compliance has always been an important focus of United State lawyers.
In the EEC, the great sanctions existing in US antitrust law are not present, but fines imposed by the Commission have increased substantially over the years. As the fines increase, the visibility of the Commission's enforcement powers will probably bring more complaints from third parties and the likelihood of violations being discovered will also increase. Notwithstanding, lawyers both in the United Kingdom and Sweden, can testify to undertaking's generally low degree of understanding of certain very fundamental concepts under the competition laws and of the serious consequences should they happen to breach the rules. One reason might be that they believe that only very big companies will be affected by the rules, something which is totally wrong. One might ask why companies are being defectively informed about this. In-house and out-house lawyers do have the necessary knowledge, but do they know how to make undertakings realise the importance of the competition rules to their business operations? Undertakings need to understand that compliance with the competition rules can give rise to economic benefits and profits and even develop their financial status in the market where they operate.
In this essay, I have tried to explain the extent of the Commission's enforcement powers and the scope of undertaking's right and obligations in relation to these. The general impression is that the Commission's powers in the competition procedure are very wide and the undertaking's rights of defence cannot always be protected in the way they wish they could be. Consequently, in order to prevent undertakings from being caught under the Community competition rules and subsequently being investigated by the Commission, undertakings need to take the Community competition rules seriously and realise the necessity of complying with them in order to avoid heavy fines and business disruptions. One way of doing this is to adopt and implement a compliance programme. Undertakings should not learn about the content of the Community competition rules first when they have already infringed them, but need to learn about them for the prevention of any future infringements.

4.2 Which companies need to set up compliance programmes?

All companies trading in the EEC and those trading with the EEC should be aware of that they are subject to the Community competition rules wherever they are situated and whatever their size. The Commission is just as likely to strike out against small companies as it is against

[292] David H. Marks, Setting up an Anti-trust Compliance Programme, (1988) E.C.L.R. 88 at p. 89.

multinational companies, even if the risk of heavy fines will be greater in respect of a company with a large turnover[293]. A lot of companies will never have to face Community competition issues in their daily business transactions e.g. because their transactions are exclusively national. However, as a consequence of new technological developments (e.g. the Internet) and the creation of the European Single Market based on the principle of free movement of goods, services, workers and capital, the commercial policies in Europe are becoming more and more internationalised. Today, even very small undertakings mainly trading nationally need to know of the Community competition rules. There are a lot of companies in risky positions that ought to have a bigger interest and knowledge of competition issues than they have today.

The Agreements of Minor Importance Notice 1997 Notice has the effect of screening off undertakings from the scope of articles 85 and 86 if the goods or services of the undertaking do not represent more than 5% of the relevant market in horizontal agreements and not more than 10% of the relevant market in vertical agreements[294]. However, an undertaking falling outside the scope of the Community competition rules still have to take notice of them as it can never know if its business will become as successful as making it one day to fall outside the scope of the *de minimis* rule. There are, for example, medium sized companies in the computer sector, which have rapidly gone from strength to strength. Whilst growing, they are unlikely to have thought about the competition rules

If a company considers or knows that it may be dominant within its special branch, it should seriously consider an anti-trust audit and subsequently, if necessary, implement a compliance programme. A dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition, and the undertaking will have to be particularly careful in its activities[295].

Where a company acquires another, it is of great value to the purchasing company to know where itself stands under the Community competition rules and to what extent the acquired company has been complying with the competition rules. The fact is that the purchasing company will be liable for the maintenance of infringements after completion, as well as for the previous infringements of the acquired company[296]. The purchasing company may be able to sue on the acquired company's warranty that it has not infringed the competition rules. However, such warranties are often only for a limited period and the purchasing company is still the one responsible for the possible infringement[297]. It is therefore recommended to do an audit soon after completion to find out about any competition problems that might exist.
Thus, managers in medium-sized and big companies need seriously to consider the necessity of carrying out an audit and then to establish a compliance programme.

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[293] Frances Graupner, Anti-trust Compliance Policy- Who Needs it?, The Business Law Review, January 1988 p.17-21, at p. 17.
[294] Agreements of Minor Importance Notice of 9 December 1997, O.J., 1997, C372/3, (1998) 4 C.M.L.R 192 at para. 9.
[295] Michelin v. E.C Commission, (1983) E.C.R. 3461, (1983) E.C.R. 3461 at para. 57.
[296] Clive Stanbrook and John Ratcliff, EEC Anti-trust Audit, (1988) E.C.L.R. 334 at p. 339.
[297] Ibid. at p. 340.

4.3 Why do companies need compliance programmes?

It is important for the undertaking to consider the Community competition rules when planning its production and marketing policy, as a failure to comply with competition law can cause a lot of costs and problems to undertakings. Below, I will present the main reasons why compliance with the Community competition law is essential.

- The Commission has the power to impose a fine of up to 10% of the undertaking's turnover for the previous year if it infringe, deliberately or negligently, the competition rules[298].

I believe that the increased tendency of the Commission to impose fines up to very large figures is the main reason why companies should consider the adoption of compliance programmes.
The level of the fine decided by the Commission can be challenged by the relevant undertaking following Article 173 of the Treaty. However, the CFI has been unwilling to limit or reduce the wide discretion to impose fines enjoyed by the Commission e.g. it allowed the fine of 75 million ECU's imposed on Tetra Pak stand even though this fine was three times higher than any fine which had hitherto been imposed on a single company[299]. More recently, in *Volkswagen* the Commission imposed a fine of 102 million ECU's following the operation of an export ban on new cars[300].
Further, article 15(2) of Regulation 17 refers to infringements committed either intentionally or negligently. This makes threats of fines relevant even for the most right-minded undertaking.

- The 10% turnover limit is based on the turnover of the entire group world wide and for all products and is not limited to the company's turnover in the relevant market[301].

This is the principle of economic unity. However, if the infringement has effected only a small part of the undertaking's activities, the fine may be reduced in accordance with the principle of proportionality[302].

- Community competition law affects agreements even if they are confined to undertakings in a single Member State[303].

Even if the undertaking only deals within a single Member State, it is easy to prove that an infringement of the Community competition rules has an effect on trade between Member States. The effect is that a very wide range of undertakings could be directly affected by the Commission's fining policy.

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[298] Article 15(2) of Regulation 17.
[299] Ivo van Bael, Fining à la Carte, (1995) 4 E.C.L.R. 237, at p. 239.
[300] The Community v. Volkswagen AG and Others, (1998) 5 C.M.L.R 33 at article 3 of the Commission's decision, O.J. L. 124, 25/04/ 1998 p. 60-108.
[301] Musique Diffusion Francaise SA v. E.C Commission, (1983) E.C.R. 1825, (1983) 3 C.M.L.R 221 at paras.117-119.
[302] Ibid at para. 121.
[303] Brasserie de Haecht SA v. Wilkin (No.1), (1967) E.C.R 407, (1968) C.M.L.R. 26, at paras. 4-5.

- Provisions in contracts restricting competition rules may become automatically void following article 85(2) the Treaty. This will have harmful effects on the undertaking's production and distribution.

Invalidity of key agreements constitutes a serious risk of business disruption. As soon as an action of an undertaking falls within the scope of article 85(1) of the Treaty, the risk of the entire agreement or part of the agreement being declared automatically void is eminent. In addition, the scope of article 85(1) of the Treaty is so wide that invalidity may even affect agreements that do not have any significant anti-competitive consequences[304]. Therefore, it is an important aspect of any compliance programme to educate how agreements are to be drawn up in order not to fall foul of the invalidity sanction[305].

- In addition to pay heavy fines, the undertaking might have to pay damages to those affected by the undertaking's unlawful conduct.

Undertakings cannot bring an action for damages for losses suffered as a result of infringements of Articles 85 and 86 before the Commission. Such claims can only be brought before national courts[306].

In order to delegate some of its workload to national courts, the Commission has during recent years encouraged private actions for damages for breaches of competition law. An effective compliance programme can reduce the likelihood of a private plaintiff suing the undertaking for damages.

- The cost of responding to a Commission investigation can be substantial.

Any investigation by the Commission will cause a significant disruption to the undertaking's business management. The undertaking must instruct one or more of its employees to stop carrying out their ordinary tasks and instead assist the Commission as well as the defence lawyers in assembling and producing all the relevant business records. The senior management is also involved, taking the overall responsibility in explaining to the Commission what they have done and why they did it. It is said that the IBM lost its position as the world-leading computer company to Microsoft as a consequence of being investigated heavily by US competition authorities. IBM did not have time to keep up with its competitors whilst being occupied (during several years) preparing its defence. Further, a company will often be required to prepare its defence in a very short time period. In major cases, the Commission has only given the undertaking three months for this task[307]. In order to get ready on time, several lawyers will be needed, often resulting in enormous legal costs.

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[304] However, the wide scope of Article 85(1) will hopefully be limited following the Commission's Green Paper on Vertical Restraints in EC Competition Policy, COM (96) 721 Final.

[305] Julian Armstrong, Compliance Programmes, (1995) 3 E.C.L.R. 147 at p.149.

[306] See: the Commission Notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty, Published in O.J. (1993) C 39/6, (1993) 5 C.M.L.R 95.

[307] Frances Graupner, Anti-trust Compliance Policy- Who Needs it?, The Business Law Review, January 1988 p.17-21, at p. 18.

- An effective compliance programme may substantially reduce the fine imposed on an undertaking which has infringed the competition rules[308].

In *National Panasonic* the Commission stated:

"Regard must however also be take of the fact that the company has taken urgent steps to regulate the overall marketing policies of its subsidiaries in the EEC. This constructive attitude adopted by the management of the company since at least 1981, has been taken into account in assessing the amount of the fine".[309]

Against this background, it should be clear that a company is better of implementing a compliance programme, or at the least conducting an audit, than ignoring compliance with the competition rules. An additional factor to be taken into account is that any breach of the competition rules is likely to cause a long-term deterioration in the relationship between the company and the market in which it operates. A loss of reputation may be difficult to overcome as it may undermine business confidence in the company for a long time to come.

Instead, an anti-trust audit and a subsequent implementation of a compliance programme will focus the minds of those concerned on the scope of the competition issues relevant for their business. Managers might know the basic principles, but a compliance programme will help them in practice to appreciate the full implications of the rules. This will help the company to prepare for and prevent any breach of the competition rules.

4.4 The setting up of a compliance programme

4.4.1 Introduction

To be able to set up an effective compliance programme, a comprehensive review of the undertaking's activities in the light of the competition rules is needed. This is called an anti-trust audit, which aims at identifying the areas in which there exist a risk that the undertaking might infringe the competition rules. The audit has a certain resemblance to the investigation conducted by the Commission. This is good as it has the effect of preparing the undertaking for the worst. The audit results in a report to the management and the in-house lawyers of the undertaking and the latter then decides whether the audit needs to be followed up with a compliance programme.

A compliance programme can be set up in different ways, but key elements in almost every compliance programmes are company policy guidelines, education, a document retention policy, the existence of disciplinary actions taken against breaches of the competition rules and sign off. These elements will be discussed in detail below in 4.4.3.

4.4.2 The anti-trust audit.

The extent of the audit will depend on the size of the company and the nature of its activities. While a medium-sized company may operate from one single location with a limited number of products, a multinational company may operate in different countries through different subsidiaries

[308] National Panasonic (UK) Ltd v. E.C Commission (1980) E.C.R 2033, (1980) 3 C.M.L.R. 169 at paras. 66-68. More recently, in Case T-77/92 Parker Pen Ltd v. E.C Commission (1994) E.C.R. II-549, (1995) 5 C.M.L.R. 435, the existence of a compliance program was one factor that brought about a reduction in the fine imposed.

[309] National Panasonic (UK) Ltd v. E.C Commission (1980) E.C.R 2033, (1980) 3 C.M.L.R. 169, at para. 28.

and with a lot of different products. In the latter case, a greater investigation is required in order to understand the company's activities in its relevant market.
Further, some companies may only have limited time and money to devote to an audit and might only want a more specific review of e.g. their distribution practice, while others might want a complete audit of all their business practices[310].
Before starting the audit, the lawyers conducting it need to make sure that they understand the company's business, the products involved and the nature of the market in which it operates. The in-house lawyer has normally the best knowledge of the operations of the business and will therefore have the biggest prospect of identifying potential problem areas.

An audit consists of two parts: questions to the management and a document review. Competition law issues and the way they affect each specific department of the undertaking will be discussed with the personnel in the departments where the potential problems may exist. The departments most likely to be affected by competition issues in their day-to-day business are e.g. sales-, marketing and advertising-, customer service- and market research departments. Discussions about issues like sales, pricing, distribution and intellectual property rights should be with both junior and senior management as the former may well be under pressure to get results and not be aware of the consequences of infringing the competition rules[311].
During the discussions with the relevant staff, the lawyers involved should prepare a list of files which need to be reviewed. A full document review will then be undertaken. The most important categories of files to investigate are normally the marketing files (especially those relating to marketing policy), files concerning competitors and their pricing and marketing strategies, files on distribution agreements with agents, distributors and franchisees, customer files (communications and complaints) and files on trade associations (minutes of meetings and material distributed by the trade associations)[312]. Doubtful issues discovered as a result of the document review should be discussed with the employees responsible.

The audit results in a report to the management and to the in–house lawyers. Care should be taken in drafting the report as it from an anti-trust point of view is considered a very sensitive document. All documents created as part of the anti-trust audit should be destroyed or remitted to the office of a lawyer not employed by the undertaking[313] because if the Commission finds out that the undertaking has conducted an audit and does not comply with it, it might impose very heavy fines on the undertaking.

To sum up, an audit will only be effective if all the relevant information is disclosed and the personnel fully explain and share their uncertainties with the lawyers involved. An audit may be both time and cost consuming, resulting in disruption of business as well as legal costs. However, the benefits outweigh these drawbacks, as infringements that no one would have recognised without an audit may be revealed and save the company future expenses in the shape of potential fines and damages.

[310] Clive Stanbrook and John Ratcliff, EEC Anti-trust Audit, (1988) E.C.L.R. 334 at p. 336.
[311] Ibid. at p. 337.
[312] David H. Marks, Setting up an Anti-trust Compliance Programme, (1988) E.C.L.R. 88 at p. 109.
[313] Following the AM & S- case and the legal professional privilege in the EEC, see above 3.2 Legal Professional Privilege.

4.4.3 The Compliance Programme.

If the lawyers conducting the anti-trust audit believe that there exists a need to implement a compliance programme, they must first be convinced that the senior management of the company is committed to strict compliance with laws in general and competition rules in particular. Further, an effective compliance programme can only be achieved if the management is willing to discipline any employee who violates the company's competition policy.

The purpose of a compliance programme is first to identify employees having anti-trust exposure and explain to them that compliance is a core value to the organisation and that conducts violating the competition rules may result in disciplinary actions. Secondly, the compliance programme should identify areas of contact with competitors and trade associations as well as identify the type of transactions which are likely to involve anti-trust concern. Finally persons in the legal department of the company or outside the company which employees can contact when having questions relating to anti-trust compliance, should be identified[314].

The employees risking anti-trust exposure have hopefully been identified during the audit. These are normally:

- Employees engaged in sales and marketing functions at all levels of the business, especially those dealing with termination of customer contracts, credit decisions and pricing policy as they risk being engaged in price fixing and agreements to allocate customers. The most important group to monitor is managers or salesman having a salary based directly on the profits they generate. This provides the greatest incentive for taking illegal risks[315].
-Employees engaged in purchasing (especially where there are relatively few competing purchasers within the area of purchasing) and employees engaged in manufacturing who often attend trade association meetings.
-Employees engaged in licensing of intellectual property rights and
-Employees dealing with corporate planning, such as acquisition- and marketing plans.

The most obvious contact with competitors occurs at trade associations meetings. When setting up a compliance programme, lawyers should make sure that no information restricting competition could be exchanged between competitors. The compliance programme should give examples of issues that can not be discussed at trade meetings and instruct the employee what to do if a competitor poses such a question. Besides the trade associations meetings, it can be difficult to identify other types of competitor contacts. This is a problem as, from a competition point of view, these sorts of contacts could be even more dangerous. While trade meetings are at least subject to some control, informal meetings can easily get out of hand if the conversation should turn to any business subject. However, by reviewing employees expense accounts and long distance telephone records, it might be possible to identify these other types of competitor contacts[316].

[314] David H. Marks, Setting up an Anti-trust Compliance Programme, (1988) E.C.L.R. 88 at pages 92 and 107.
[315] Ibid. at p. 92-93.
[316] Ibid. at p. 95.

As stated above, depending on the demands of the undertaking, a compliance programme can be set up in different ways. However, key elements in most compliance programmes are:

- Company policy guidelines, which describe the relevant competition rules and what to do if the Commission arrives to investigate,
- Continuous education on the requirements of the competition rules of all those in a position to commit the undertaking to a breach of the rules,
- A well thought out programme covering the retention and routine destruction of business records,
- A confirmation of the fact that disciplinary actions will be taken against anyone breaking the undertaking's policy,
- Sign off: a procedure where a certificate is obtained from the employees certifying they are unaware of any breach of the undertaking's policy.

4.4.3.1.Company policy guidelines

Every compliance programme should have some written material[317] which can be reviewed by employees identified as having anti-trust exposure.

I have had the valuable opportunity to look at the written material of a compliance programme which Eva Munck Forslund, lawyer at Landahl & Wistrand in Malmö, has prepared as a part of a compliance programme set up for a big Swedish company. In the introduction to the policy, the aim is explained: the policy has been prepared in order to give a summary of the competition rules, especially those relevant for this particular undertaking. Further, the policy should function as a warning signal, identifying areas of the business which might have problems complying correctly with the competition rules.

The policy is directed at all those within the organisation that, in one way or the other, might be affected by the competition rules in their day-to-day duties.

As the policy cannot answer all types of questions, the employees are requested not to hesitate to contact the in-house lawyers when they are uncertain of the answer to any competition issue.

The policy which was set up for the big Swedish company, starts of by explaining why it is necessary for a dominant undertaking to set up a compliance programme and what the sanctions are for breaches of the competition rules.

A summary of the general competition rules is then given and the different paragraphs are explained in detail. Practical examples applicable to the specific undertaking are used, which make the rules more easily understood. It is important that the rules are explained in such an obvious and pedagogical way, as those that will read and understand them will certainly not be lawyers. Further, the rules relevant to undertakings in dominant positions are explained and several examples of illegal actions and practices are given. An area of specific problem for this particular undertaking was how the company would be able to allow discounts off the price without infringing the competition rules. As a consequence, a detailed explanation is given about why companies cannot co-operate on discounts and which discounts a dominant undertaking can or cannot allow its customers, suppliers or distributors.

[317] This material has many names and could be called either the company compliance policy or the compliance manual. I prefer the company compliance policy.

Further, the reasons behind and the contents of a policy covering retention and routine destruction of business records are presented and employees are requested to be careful about what they write down and what material they decide to put on file.
Finally, the Commission's different investigative powers are briefly explained and guidelines are given on what the employees need to do should the undertaking be investigated by the Commission. The message given here is clear: Always co-operate with the Commission!

To sum up, the message that leavens all through the policy is that employees should not hesitate to contact the in-house lawyers as soon as any competition problem occurs within their department. Otherwise, the effort of setting up a compliance programme in order to prevent any future infringements of the competition rule would be wasted.

4.4.3.2. Education

It will not be sufficient with a company compliance policy. The company will also have to have a continuous education of all those in a position to commit the undertaking to a breach of the competition rules. Different approaches can be used e.g. letting lawyers (either in-house lawyers or independent lawyers) conduct legal seminars on the principles of competition law and discuss recent changes of the law and what impact those changes may have on the undertaking's business[318]. Further, some undertakings have developed written learning materials including written tests, to illustrate competition issues and increase the awareness of the latter. Something very useful and easily manageable is the use of videos.

4.4.3.3 Record keeping

A policy covering the retention and routing destruction of business records is a key element of every compliance programme. It serves three purposes: First, an undertaking being investigated cannot answer to a request from the Commission that the relevant documents do not exist or have already been deliberately destroyed. The only answer the Commission will accept is that the documents have been properly destroyed in accordance with the document destruction programme[319]. Secondly, keeping business records that are not necessary for business reasons costs money, e.g. the storage costs of retaining unnecessary documents and the cost of time spent looking for the relevant document amongst the vast amount of documents lacking business purposes. Thirdly, an effective document retention programme will reduce the risk of being caught by the Commission, as such a programme will result in a general understanding of the fact that there is no such thing as "private" documents. All documents found on the premises of the undertaking, including personal documents, are categorised as business records and may therefore be included in a request for information by the Commission.
A document retention programme needs to be uniformly applied throughout the company and include *all* employees at any level of the organisation. Otherwise, there is a risk that only selected documents will be destroyed, something that might be difficult to explain to the Commission. A compliance programmed needs to be capable of being suspended. From the moment the undertaking receives the request for information, all documents must be retained until the undertaking is informed about what categories of documents the Commission wants it to produce.

[318] Julian Armstrong, Compliance Programmes, (1995) 3 E.C.L.R. 147 at p.152.
[319] Julian Armstrong, Compliance Programmes, (1995) 3 E.C.L.R. 147 at p.152.

4.4.3.4 Disciplinary actions

One of the tests used by the Commission in deciding whether a compliance programme is genuine or not, is the "heads on sticks-test". The Commission will want to know who was responsible for the infringement and what disciplinary actions were taken against the employee[320]. Thus, if a compliance programme is to be of any use at all to the company, the senior management must be prepared to impose disciplinary action on any employee breaching the competition rules.

4.4.3.5. Sign off

In order to make sure that all employees understand the threat of disciplinary actions against those breaching the compliance rules, it is useful to require the employees to sign an annual certificate, certifying that they have read and understood the company compliance policy and are unaware of any breach of the latter. The managers will sign for those whom they are responsible, but employees will also sigh for themselves[321].

4.5 Control of the compliance programme

Lawyers are the ones setting up compliance programmes and should also to some extent supervise its implementation. Their task is rather to prevent an anti-trust problem from arising than trying to correct it afterwards.

As regards the audit, there are mixed views as to whether the in-house lawyer or the independent lawyer should perform it. The in-house lawyer has the advantage of having a long-standing experience in and insight into the relevant business. On the other hand, an outside lawyer may question practices which have been taken for granted within the company for many years. He can also bring a degree of specialist experience which the in-house lawyer might lack[322]. The best solution is consequently if the in-house lawyers, in co-operation with the outside lawyers, conduct the audit. However, as mentioned before[323], it is important that the anti-trust audit report is left with the independent lawyer. The reason is the decision in *AM & S*, where it was held that only communications between a client and an independent lawyer (that is, not employed by the company), admitted to a Bar in an EEC Member State, are covered by legal professional privilege. Thus, communications (e.g. an anti-trust audit report) between a client and an independent lawyer are protected from disclosure to the Commission.

Both in-house lawyers and independent lawyers can have the supervisory authority (e.g. helping with the continuing compliance by conducting legal seminars) over the compliance programme. The in-house lawyer knows the business of the company and the people in it better than any outside lawyer possibly could and will therefore be able to deal with the potential problems on a very early stage. However, if the legal department of the company does not have sufficient legal personnel to provide the continuous education, the outside lawyer will have to play a greater role.

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[320] Ibid. at p.151.
[321] Ibid at p. 152
[322] Clive Stanbrook and John Ratcliff, EEC Anti-trust Audit, (1988) E.C.L.R. 334 at p. 338.
[323] See 4.4.2 The anti-trust audit.

Finally, it is important to keep in mind the lack of legal professional privilege for communications with an in-house lawyer when seeking advice on a competition issue.

4.6 Violations of the compliance programme

If it is discovered that a violation of the compliance programme has been committed, the undertaking must make sure that the individual involved withdraw from or terminate the violation and is faced with disciplinary actions. The disciplinary actions can consist of termination of employment, change of job or reduction of salary[324]. However, if the undertaking fails to terminate the illegal conduct and the Commission finds out about it, the Commission may disregard the mitigating value of the compliance programme and consider the illegal conduct as a deliberate violation, resulting in very heavy fines. A senior Commissioner has made the following statement: *"if a company has a compliance programme and is nevertheless found guilty of an anti-trust infringement, the existence of such a programme can hardly be considered to be a mitigating factor. Perhaps the Commission should be entitled to assume that the infringement has been committed intentionally"*[325].
On the other hand, Commissioner Peter Sutherland has stated that the existence of a compliance programme constitutes a prima facie indication of that the violation of the competition rules was committed by negligence rather that deliberately[326].
Because of these conflicting statements, it is difficult to know the Commission's opinion on this. However, I believe that the setting up and existence of a compliance programme should not in any way be held against the undertaking. To maintain the view that a violation of a compliance programme entitles the Commission to assume that an intentional infringement has been committed, is clearly the wrong message to be sent to undertakings. By its nature, the existence of a compliance programme should not cause more harms than good.

4.7 Conclusion

A compliance programme should be part of a larger effort to explain and promote compliance with law in general and competition law in particular.
There are many reasons for setting up a compliance programme. A compliance programme, tailored in accordance with an undertaking's needs and demands, and followed up by an ongoing legal oversight, will help the undertaking to avoid infringements of the competition rules. It will also help to mitigate the effects of infringements by reducing the level of fines as well as reducing the likelihood of the undertaking paying damages.
The difficult issue should not be whether to have a programme or not, but how to set up an effective one. A programme will only be effective if it is applied uniformly throughout the company. Managers will normally participate in a compliance programme if their superiors are equally participating. However, as has been stated above, this is not always the case as the

[324] David H. Marks, Setting up an Anti-trust Compliance Programme, (1988) E.C.L.R. 88 at p. 112.
[325] See: Ivo van Bael, Fining à la Carte, (1995) 4 E.C.L.R. 237 at p. 239 and Furse, Article 15(2) of Regulation 17: Fines and the Commission's Discretion, (1995) 2 E.C.L.R. 110 at p. 113.
[326] This was stated in a speech made in Brussels, May 21, 1987 according to Frances Graupner, Anti-trust Compliance Policy- Who Needs It?, The Business Law Review, January 1988 p.17-21, at p.19, 21.

middle or junior management can be under pressure to increase sales and profits while not being aware of the consequences of infringements. In order to make these managers directly involved in enforcing the compliance programme, some US companies have encourage participation by considering it in the employees compensation or bonuses[327]. Maybe the method of encouraging participation by incentives could be something that European companies could imitate when they experience compliance
problems.

To sum up, the business community need to understand that compliance with law is a business objective, and not a constraint on the business imposed by lawyers. Compliance must be part of the culture of the company and accepted as part of everyday behaviour[328].

[327] David H. Marks, Setting up an Anti-trust Compliance Programme, (1988) E.C.L.R. 88 at p. 106
[328] Compliance Programme, Julian s Armstrong, note 305 at p.151.

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Case of Engel, Series A No 22

Case of Funke v. France , Series A No. 256-A (1993) 16 E.H.R.R. 297

Case of Niemietz v. Germany, Series A No 251-B

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Legislation

The EEC Treaty

The EEC Treaty, signed in Rome 25 March 1957, entered into force 1 January 1958.
Relevant articles: Articles 3(b), 5, 85, 86, 88, 173, 186 and 214 of the Treaty.
From 1 January 1999 : Article 85 will be called article 81 and Article 86 will be called Article 82.

Regulations

Council Regulation 17/62 of 6 Feb. 1962, First Regulation Implementing Arts 85 and 86 of the Treaty, amended by Regulation 59/62, by Regulation 118/63/EEC, and by Regulation (EEC) 2822/71.

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Notices

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