

European Community Competition Law

A collection of key texts

Foreword

This booklet contains a collection of key texts regarding European Union Competition law. The collection of texts includes the basic Articles on competition contained in the European Community Treaty which is one of the fundamental building blocks establishing the European Community (often also referred to as the European Union). It moreover encompasses key Regulations on Merger Control, Anti-Trust and fundamental procedural safeguards for the parties involved in competition procedures before the European Commission - the main enforcement authority of European Community Competition Law (EC competition law). The compilation of texts moreover includes a number of interpretative Guidelines and Notices issued by the European Commission to assist operators in the European Community to self-assess the compatibility of their conduct with the EC competition law.

1. Introduction to competition rules of the European Union

European Community competition law and policy is designed to ensure that healthy competition in the European Community is not distorted. European Community competition law (i) prohibits anti-competitive practices on the part of undertakings (*i.e.* restrictive agreements and concerted practices), (ii) prohibits one or more dominant companies from improperly exploiting their economic power over weaker companies (called “abuse of a dominant position”). European Community competition law also regulates large company mergers and acquisitions by prohibiting them if they create or strengthen a dominant position on the relevant market which would significantly impede effective competition. In the case of public undertakings and undertakings with special or exclusive rights granted to them by the Member States of the European Community, the Member States are required not to enact nor maintain in force any measure contrary to the EC competition laws.

The “Member States” are the Member States or countries of the European Community, and the “common market” is the market made up of the 27 Member States of the European Community.

To fall within the scope of application of the European Community’s competition rules it is required that the conduct or practice has, or may have, an effect on the relevant market in the European Community. Of course, there are many markets for many different goods and services, so determining the scope of the relevant market can be crucial when assessing the anti-competitive effect of conduct on that market, or whether a merger between companies might have a negative competitive impact in the market(s) affected (see the notice).¹

Anti-competitive agreements and practices come within the jurisdiction of the European Community authorities if they could affect trade between Member States. Therefore, conduct that occurs completely outside the European Community can still have an anti-competitive effect on the relevant market inside the European Community. The national competition rules of the Member States can also be applied simultaneously with the European Community competition rules where the conduct or practice affects both national competition as well as cross-border competition within the European

¹ Commission Notice on the definition of the relevant market for the purposes of Community competition law. *Official Journal C 372, 9.12.1997, p. 5.* See the Notice.

Community. The European Community competition rules can also be applied through the national competition authorities of the Member States. The cooperative implementation of the European Community competition rules by the European Commission and by the national competition authorities, concerning restrictive agreements and concerted practices as well as abuse of a dominant position, is set out in a 2002 Regulation (See the Regulation).²

The European Community rules on competition are laid down in Articles 81 to 89 of the EC Treaty. This publication is based on these articles of the EC Treaty, and considers the following aspects of the European Community competition rules:

- Restrictive agreements and concerted practices: Article 81 of the EC Treaty (see the Article)³
- Abuse of dominant position: Article 82 of the EC Treaty (see the Article)⁴
- Public undertakings and undertakings with special or exclusive rights: Article 86 of the EC Treaty (see the Article)⁵
- Rules applying to state aid: Articles 88 and 89 of the EC Treaty (will not be discussed any further in the publication)
- Merger control rules
- Complaints and Investigations
- Enforcement and Fines
- Judicial review

2. Article 81 of the EC Treaty

2.1 Article 81(1) prohibition

Article 81 (1) of the EC Treaty prohibits agreements and concerted practices between undertakings which *"may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market"*.

Article 81 (1) of the EC Treaty prohibits agreements between undertakings which aim at eliminating competition between undertakings in order to increase the prices and profits of the undertakings concerned without producing any objective counterbalancing advantages. Concerted practices involve coordination among firms which falls short of an agreement. A concerted practice may have the form of direct or indirect contacts between undertakings, with the aim to influence market behaviour or to communicate to each other their future conduct on the market. For example, an exchange of confidential business information that competing businesses would normally not give to their competitors can amount to a concerted practice.

Certain types of agreement are prohibited without exception. This applies in particular to cartels the three common components of which are 1) agreements 2) between competitors 3) to restrict competition.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. *Official Journal L 1, 4.1.2003, p. 1.* See the Regulation.

³ See Article 81.

⁴ See Article 82.

⁵ See Article 86.

A cartel agreement need not be formal or written. The term competitors generally refer to companies at the same level of the economy (manufacturers, distributors, or retailers) in direct competition with each other to sell goods or provide services. The aspect of a restriction on competition distinguishes cartel conduct from ordinary business agreements between firms. Further, in describing the typical types of hardcore cartel conduct that is prohibited, four categories of conduct are commonly identified:

- price fixing prices (directly or indirectly);
- output restrictions;
- market allocation; and
- bid rigging.

The ban on anti-competitive agreements and concerted practices in Article 81 of the EC Treaty applies to both 'horizontal' and 'vertical' agreements between actual or potential competitors.

'Horizontal agreements' (cartels), take place between competing undertakings at the same stage in the production or distribution chain. Horizontal cooperation may lead to competition problems, for example when the parties to an agreement agree to fix prices or output, to share markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products. Cartels formed by competitors are amongst the most serious violations of Article 81 of the EC Treaty.

'Vertical' agreements are agreements or concerted practices between two or more undertakings each of which operates at a different stage of the production or distribution chain. A manufacturer and his distributor, or a distributor and retailer, are in a 'vertical' relationship with each other. Vertical agreements affect the conditions under which the parties can buy, sell or re-sell certain goods or services. For example, a manufacturer who restricts the conditions of sale or prices at which his distributor (who purchased product from the manufacturer) must sell the product to the retailer or consumer, would very often be a breach of Article 81 of the EC Treaty and restrictive of competition.

Article 81 of the EC Treaty is not applicable to 'Agreements of minor importance' because the impact of the agreement on intra-Community trade or on competition is not appreciable. The presumption of non-applicability applies with respect to agreements between competitors where the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement. Note, however, that the presumption of the non-applicability of Article 81 of the EC Treaty does not apply in respect of agreements containing hardcore restrictions such as the fixing of sales prices, output limitations or market or customer allocation.

There are moreover exemptions to the prohibition of anti-competitive agreements and concerted practices in Article 81(1) of the EC Treaty, including:

(1) Article 81(3) of the EC Treaty creates an exemption where the practice is beneficial to consumers *e.g.* by facilitating technological advances, but without restricting all competition in the relevant market.

(2) 'Block' exemptions for different categories of agreements. These generally include a list of contract terms which will be permitted if the agreement falls within the relevant category, and a list of those contract terms which are banned if an undertaking wants to take advantage of these safe harbours.

2.1 De minimis – Agreements of Minor Importance

Article 81(1) of the EC Treaty is not applicable where the impact of the agreement on trade within the EC or on competition is not appreciable. In the De Minimis Notice⁶ (see the Notice) the European Commission identifies those agreements, decisions of associations of undertakings, and concerted practices, for which the presumption is that they do not constitute an appreciable restriction of competition, and sets up a threshold for the application of the De Minimis presumption. Note that agreements exceeding the threshold in the De Minimis Notice (rendering the presumption inapplicable) are not necessarily in breach of the competition rules – this, however, has to be assessed on a case-by-case basis.

The presumption of inapplicability of Article 81(1) of the EC Treaty in the De Minimis notice does not apply to certain agreements between competitors. It does not apply to agreements between competitors containing any of the following hardcore restrictions which, have as their object:

- the fixing of prices when selling the products to third parties;
- the limitation of output or sales;
- the allocation of markets or customers;

Nor does the presumption apply to agreements between non-competitors for:

- restrictions relating to the sale price of products (however, maximum or recommended prices are generally allowed);
- restriction of territory or of customers;
- restriction of sales in a selective distribution system; or
- restriction on own suppliers of spare parts as regards the sale of such parts to end users or to independent repairers.

2.2 Article 81 (3) of the EC Treaty - Exemption of Certain Agreements or Practices From the Normal Competition Rules

Article 81(3) of the EC Treaty lays down the conditions for an exemption to the application of Article 81(1) of the EC Treaty prohibiting agreements and concerted practices that may restrict competition within the EC. In particular, the prohibition in Article 81(1) of the EC Treaty (*i.e.* the prohibition on anti-competitive agreements and practices) may be declared inapplicable where the agreements, decisions of undertakings or concerted practices contribute:

- to improving the production or distribution of goods or
- to promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit, and which does not

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; or

⁶ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*). *Official Journal C 368*, 22.12.2001, p. 13. See the Notice.

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

All restrictive agreements that fulfil the above four conditions of Article 81(3) of the EC Treaty are covered by the rule exempting the agreements from the prohibition in Article 81(1) of the EC Treaty. However, severe restrictions of competition are unlikely to fulfil the conditions for exemption in Article 81(3) of the EC Treaty since severe restrictions are usually blacklisted in block exemption regulations or identified as ‘hardcore’ restrictions of competition in European Commission guidelines and notices (See the Notice)⁷. Agreements of this nature generally fail the first two conditions of Article 81(3) of the EC Treaty in that they neither create objective economic benefits nor benefit consumers.

In order to assist participants in the market and their advisers, to determine if their agreements and actions could infringe Article 81 of the EC Treaty, the European Commission has published Guidelines on the application of the competition rules. These include, for example, Guidelines on technology transfer agreements (See the Notice)⁸, on vertical restraints (See the Notice)⁹, on horizontal co-operation agreements (See the Notice)¹⁰, and on certain categories of vertical agreements. These provide assistance and guidance on whether an agreement covered by the guideline might be considered anti-competitive and when it might be the subject of an exemption under Articles 81(3) of the EC Treaty. In particular, these guidelines examine the four conditions of Article 81(3) of the EC Treaty, namely:

- Efficiency gains (*i.e.* improving production or distribution, or promoting technical or economic progress);
- Fair share of benefits for consumers;
- Indispensability of the restrictions;
- No substantial elimination of competition.

2.3 Block Exemptions

Under Article 81(3) of the EC Treaty the European Commission may enact what are known as "block exemption" Regulations. These Regulations define certain categories of agreements that are exempted (*i.e.* the normal competition rules are “declared inapplicable”) as a block under certain specific conditions. If the agreement comes within the terms of the block exemption Regulation it is treated as being in compliance with the competition rules. There are, amongst others, block exemption Regulations for supply and distribution agreements (See the Regulation)¹¹, specialisation agreements, research and development agreements, and technology transfer agreements (See the Regulation)¹².

⁷ Commission Notice - Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08). *Official Journal C 101*, 27.4.2004, p. 97. See the Notice.

⁸ Commission Notice - Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements. *Official Journal C 101*, 27.4.2004, p. 2. See the Notice.

⁹ Commission Notice - Guidelines on Vertical Restraints. *Official Journal C 291*, 13.10.2000, p. 1. See the Notice.

¹⁰ Commission Notice - Guidelines on the applicability of Article 81 to horizontal co-operation agreements. *Official Journal C 3*, 6.1.2001, p. 2. See the Notice.

¹¹ Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. *Official Journal L 336*, 29.12.1999, p. 21. See the Regulation.

¹² Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to

(continued...)

3. Article 82 of the EC Treaty

3.1 Dominance

Article 82 of the EC Treaty states that *"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States"*.

A dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. The dominant position must be held with respect to the whole or at least to a substantial part of the common market. However, the extent of the market to be taken into consideration in a given case will depend on the nature of the product, the products with which it can be replaced, and consumer perceptions.

3.2 Abuse

There is abuse of a dominant position when the conduct of the dominant firm is such that it influences the structure of the relevant market or the degree of competition is weakened through recourse to methods different from those which condition normal competition and has the effect of hindering the maintenance of or growth of competition in the market. This may be so even if such conduct is favoured by a provision of national law.

Abuses are commonly divided into exclusionary abuses, which exclude competitors from the market, and exploitative abuses, where the dominant company exploits its market power by — for example — charging excessive prices. Article 82 of the EC Treaty enumerates certain types of abuse, however, without being exhaustive:

- directly or indirectly imposing unfair prices or other unfair trading conditions;
- limiting production, markets or technical development to the detriment of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject matter of such contracts.

There is no provision under the EC competition rules to exempt for abuse of a dominant position (unlike under Article 81 of the EC Treaty).

4. Merger control

Company mergers and acquisitions can create or strengthen a dominant position which might give rise to an abuse. A merger, acquisition or takeover (called a "concentration") exists (i) where an undertaking acquires exclusive control of another undertaking, or of an undertaking it previously controlled jointly with another undertaking, or (ii) where several undertakings take control of an

categories of technology transfer agreements. *Official Journal L 123, 27.4.2004, p. 11.* See the Regulation.

undertaking or create a new one (this second type is referred to as a “full-function joint venture” (see the Notice).¹³

Very large concentrations that are likely to effect competition in the common market, and as such are of a "Community dimension", must be notified to the European Commission. A merger may not go ahead until it has been notified and declared compatible with the common market.

The Merger Regulation (EC) No 139/2004 (see the Regulation)¹⁴ requiring notification applies to all "concentrations" (mergers) with a "Community dimension". There is a Community dimension where:

- the combined aggregate worldwide turnover of all the companies is more than EUR 5 000 million, and;
- the aggregate Community-wide turnover of each of at least two of the companies is more than EUR 250 million, unless each of the companies achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Any merger that does not meet these thresholds nevertheless can still have a Community dimension where:

- the combined aggregate worldwide turnover of all the companies is more than EUR 2 500 million;
- in each of at least three Member States, the combined aggregate turnover of all the companies is more than EUR 100 million;
- in each of at least three Member States, the aggregate turnover of each of at least two of the companies is more than EUR 25 million, and;
- the aggregate Community-wide turnover of each of at least two of the companies is more than EUR 100 million; unless each of the companies achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Mergers are appraised with a view to establishing whether or not they are compatible with the common market. The object of requiring such mergers or “concentrations” to be notified is to ensure that one or a group of companies do not significantly impede effective competition by buying or otherwise taking control of their competitors. A merger which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded will be declared incompatible with the common market. This also applies to the establishment of a joint venture constituting a merger which has as its object or effect the coordination of the competitive behaviour of companies that remain independent.

The European Commission has issued various notices and guidelines regarding merger notifications, including those on the assessment of horizontal mergers (see the Guideline)¹⁵, the calculation of

¹³ Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. *Official Journal C 66*, 2.3.1998, p. 1. See the Notice.

¹⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). *Official Journal L 24*, 29.1.2004, p. 1. See the Regulation.

turnover (see the Notice)¹⁶, and the concepts of “concentration” (see the Notice)¹⁷, “undertaking concerned” (see the Notice)¹⁸, and “full-function” joint ventures (see the Notice)¹⁹ in the context of the merger control rules.

Mergers with a Community dimension must be notified to the European Commission not more than one week after the agreement, publication of the take-over bid or acquisition of a controlling interest²⁰. However, because of the short time limits for assessment of the merger, and the considerable amount of material that must be provided, the Commission encourages contact with the Commission well before formally notifying the merger. Undertakings intending a merger with a Community dimension should follow the “Best Practices on the Conduct of Merger Control Proceedings” published by the Commission’s Directorate General for Competition on its webpage²¹.

The European Commission examines a merger notification as soon as it is received, and:

- where it concludes that the merger does not fall within the scope of the Regulation, it records that finding by means of a decision;
- where it finds that the merger, although falling within the scope of the Regulation, does not raise serious doubts as to its compatibility with the common market, it declares that it is compatible with the common market;
- where it finds that the merger does fall within the scope of the Regulation and does raise serious doubts as to its compatibility with the common market, it decides to initiate proceedings. As part of these proceedings the European Commission provides notifying parties an opportunity to put forward their arguments orally in a formal hearing. The undertakings concerned may, within the time limits applicable, propose remedies (See the Notice).²² (e.g. divestment of part of a business) to the European Commission with a view to having the merger approved. The European Commission may, in the light of any remedies made, declare the merger compatible with the common market.

The initial decision on compatibility with the common market must be taken within one month. However, if the European Commission decides to initiate proceedings and investigate further, it has another four months (and in exceptional circumstances five months) in which to adopt a final decision.

¹⁵ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03). *Official Journal C 31*, 5.2.2004, p. 5. See the Guidelines.

¹⁶ Commission notice on calculation of turnover under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. *Official Journal C 66*, 2.3.1998, p.25. See the Notice.

¹⁷ Commission notice on the concept of concentration under Council Regulation (EEC) 4064/89 on the control of concentrations between undertakings. *Official Journal C 66*, 2.3.1998, p. 5. See the Notice.

¹⁸ Commission Notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings *Official Journal C 66*, 2.3.1998, p. 14. See the Notice.

¹⁹ Commission notice on the concept of full-function joint ventures under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings. *Official Journal C 66*, 02.03.1998, p. 1. See the Notice.

²⁰ Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. *Official Journal L 24*, 29.01.2004, p. 1. See the Regulation.

²¹ DG Competition ‘Best Practices on the conduct of merger control proceedings.

http://ec.europa.eu/comm/competition/mergers/legislation/regulation/best_practices.pdf See the Best practices.

²² Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98. *Official Journal C 68*, 2.3.2001, p.3. See the Notice.

5. Article 86 of the EC Treaty: Public undertakings and undertakings with special or exclusive rights

The Member States of the European Community control numerous public undertakings performing important services and have granted special or exclusive rights to certain undertakings (e.g. basic electricity, telecommunications, postal services, transport, water and waste removal services). These undertakings are often crucial to the common market and their actions can have a significant impact on competitive conditions.

According to Article 86(1) of the EC Treaty: *"In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular ...Articles 81 to 89."*

Article 86(2) of the EC Treaty allows some exceptions to the general competition rules, in that *"undertakings entrusted with the operation of services of general economic interest"* are only subject *"...in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community."*

The European Commission has indicated that its approach to the regulation of competition involving undertakings performing services of general economic interest (sometimes called "essential services") or undertakings having special rights is conditioned by:

- (i) neutrality as regards the public or private ownership of such undertakings;
- (ii) Member States' freedom to define what they regard as services of general economic interest; and
- (iii) restrictions of competition must not exceed what is necessary to ensure effective fulfilment of the relevant task.

In general terms, when applying the rules on competition to services of general economic interest a distinction is made between the infrastructure and the services provided. Although it would often be difficult to establish a second infrastructure to compete with the existing one, it is possible to create conditions of fair competition in respect of the service provided. In its approach to the sectors where special and exclusive rights or services of general economic interest are prevalent, the European Commission has developed the concept of legally separating the provision of the network from the commercial services using the network. In such an approach, the infrastructure becomes a means of creating a market for competing services. While the right to exclusive ownership may continue as regards the infrastructure itself (the telephone or electricity network for example), those companies with an exclusive right to the infrastructure (monopolists) must grant fair access to third parties as regards the services offered, so that for example, the telephone network operator must allow telephone service providers (whether voice, data or internet) fair access to the network on non-discriminatory terms. When applying EC competition law, the European Commission always takes account of the special obligations placed on any organisation benefiting from 'monopoly rights'. This approach ensures that there is fair competition without handicapping the State-funded provider, which is obliged to provide services in the public interest even where this is not profitable.

The European Community has enacted specific rules on liberalising many of the sectors where special rights and essential facilities are prevalent. The principle of requiring fair access by third parties to the infrastructure on non-discriminatory terms was behind the rules established for liberalisation of the energy (*i.e.* gas and electricity production and distribution), postal services, telecommunications and transport sectors. In these industries, monitoring fair network access by all suppliers is essential to allow the consumer to choose the supplier offering the best conditions.

The European Commission's liberalisation policy is based on Article 86(3) of the EC Treaty which allows it to address appropriate directives or decisions to the Member States. The European Commission supervises Member States to ensure that exclusive or special rights are compatible with the European Community rules on competition.

6. Complaints and Investigations

To properly control mergers with a Community dimension, and to ensure that the rules on competition concerning agreements, decisions of associations of undertakings and restrictive practices (Article 81 of the EC Treaty) and abuses of a dominant position (Article 82 of the EC Treaty), are applied, the European Commission has a number of powers to take decisions, to conduct investigations and to impose penalties.

Any person, including a consumer, can make a complaint (See the Notice)²³ to the European Commission that the competition rules are being broken. The European Commission can commence an investigation of suspected anti-competitive conduct after having received a complaint from participants in the market or from others, or after having received observations from other regulatory authorities. The European Commission may also commence an investigation on its own initiative if it suspects a breach of the EC competition rules.

Where the trends of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be being restricted or distorted within the common market, the European Commission is able to conduct a sector inquiry into a particular sector of the economy or into a particular type of agreement across various sectors.

Whether the European Commission is investigating individual companies or an entire industry sector, it may request information, take statements, conduct inspections, and enter premises, land and vehicles, if a reasonable suspicion exists that books or other records related to the business and to the subject-matter of the inspection might be held there. The European Commission has the power to examine the books and other records related to the business, take copies of or extracts from such records, and seal any business premises and books or records for the period of the inspection. It may also ask any representative or member of staff for information and record their answers. Failure to cooperate with the European Commission in its investigations can result in considerable fines.

Inspections by the European Commission are always done in cooperation with the national competition authorities of the Member States. Indeed, there is close cooperation between the European Commission and national competition authorities (including the national courts) on all

²³ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty. *Official Journal C 101*, 27.4.2004, p. 65. See the Notice.

aspects of European Community competition law and its enforcement, mainly through the ‘Network of Competition Authorities’ (See the Notice).²⁴

In order to ensure a proper right of defence, the European Commission, after conducting an investigation and before taking a decision, shall give the undertaking or associations of undertakings in question an opportunity of being heard on the aspects to which the European Commission objects (See the Regulation).²⁵ Moreover, the parties concerned also have the right of access to the Commission file, which is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of defence, with the exception of internal documents, business secrets of other undertakings, or other confidential information (See the Notice).²⁶ The same applies when the European Commission is contemplating prohibiting a merger under the merger control regulation.

7. Enforcement: Fines

Upon finding of a breach of the competition rules, the European Commission may impose penalties on undertakings and associations of undertakings. In particular, the European Commission may impose fines of up to 10% of the total worldwide turnover realised in the preceding business year by each of the undertakings which

- participated in the infringement where they infringe Article 81 or 82 of the EC Treaty,
- implement a concentration in contravention of the merger control regulation,
- contravene a European Commission decision ordering measures to be taken, or
- fail to comply with a commitment made binding by a decision of the European Commission.

In fixing the amount of the fine, the European Commission must take account of the gravity and the duration of the infringement (see the Guidelines)²⁷. In cartel cases the European Commission will grant immunity from fines to the first undertaking that notifies a cartel in which that undertaking takes part, subject to continuing cooperation in subsequent action by the European Commission (see the Notice)²⁸. Other members of the cartel can also have their fines reduced if they cooperate with the European Commission more than is legally required of them.

²⁴Notice on cooperation within the Network of Competition Authorities. *Official Journal C 101*, 27.04.2004, p. 43. See the Notice.

²⁵ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. *Official Journal L 123*, 27.4.2004, p. 18. See the Regulation.

²⁶ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 *Official Journal C 325*, 22.12.2005, p. 7. See the Notice.

²⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. *Official Journal C 210*, 1.9.2006, p. 2. See the Guidelines.

²⁸ Commission notice on immunity from fines and reduction of fines in cartel cases. *Official Journal C 298*, 8.12.2006, p. 17. See the Notice.

The European Commission may also impose on undertakings and associations of undertakings periodic penalty payments not exceeding 5% of their average daily turnover in the preceding business year per day, and calculated from the date appointed by the decision, in order to compel them to:

- put an end to an infringement,
- comply with a decision ordering interim measures,
- comply with a commitment made binding,
- supply complete and correct information which it has requested,
- submit to an inspection which it has ordered.

Where the undertakings have met the obligation which the periodic penalty payment was intended to enforce, the European Commission may subsequently decide to reduce the definitive total amount.

Finally, the European Commission may impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year where, intentionally or negligently:

- they supply incorrect, incomplete or misleading information in response to a request or do not supply information within the required time-limit,
- they produce the required books or other records related to the business in incomplete form during inspections or refuse to submit to inspections which have been ordered,
- they refuse to reply to a question or reply in an inaccurate, incomplete or misleading manner,
- seals affixed by officials authorised by the European Commission have been broken.

8. Judicial Review: Appeals

The European Commission, and more precisely the Directorate General for Competition of the European Commission, is the primary body responsible for taking decisions to enforce the competition rules of the European Community Treaty so that competition in the common market is not distorted. Appeals against European Commission decisions are heard by the European Court of First Instance.

Rulings made by the Court of First Instance may, within two months, be subject to an appeal, limited to questions of law to the European Court of Justice. The appeal may be on the grounds of lack of competence of the Court of First Instance, a breach of procedure which adversely affects the interests of the appellant, or the infringement of European Community law by the Court of First Instance. If the appeal is justified and procedurally admissible, the Court of First Instance's judgement is rescinded by the Court of Justice.

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- 2) COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. *Official Journal L 1, 4.1.2003, p. 1,*
- 3) COMMISSION REGULATION (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. *Official Journal L 123, 27.4.2004, p. 18,*
- 4) COMMISSION REGULATION (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements. *Official Journal L 123, 27.4.2004, p. 11,*
- 5) COMMISSION NOTICE on the definition of the relevant market for the purposes of Community competition law. *Official Journal: OJ C 372, 9.12.1997p.5,*
- 6) Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) (1) (2001/C 368/07) *Official Journal C 368, 22.12.2001, p. 13,*
- 7) Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03). *Official Journal C 45, 19.2.2002, p. 3,*
- 8) Notice Guidelines on the application of Article 81(3) of the Treaty. *Official Journal C 101, 27.4.2004, p. 97,*
- 9) Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. *Official Journal C 210, 1.9.2006, p. 2.,*
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