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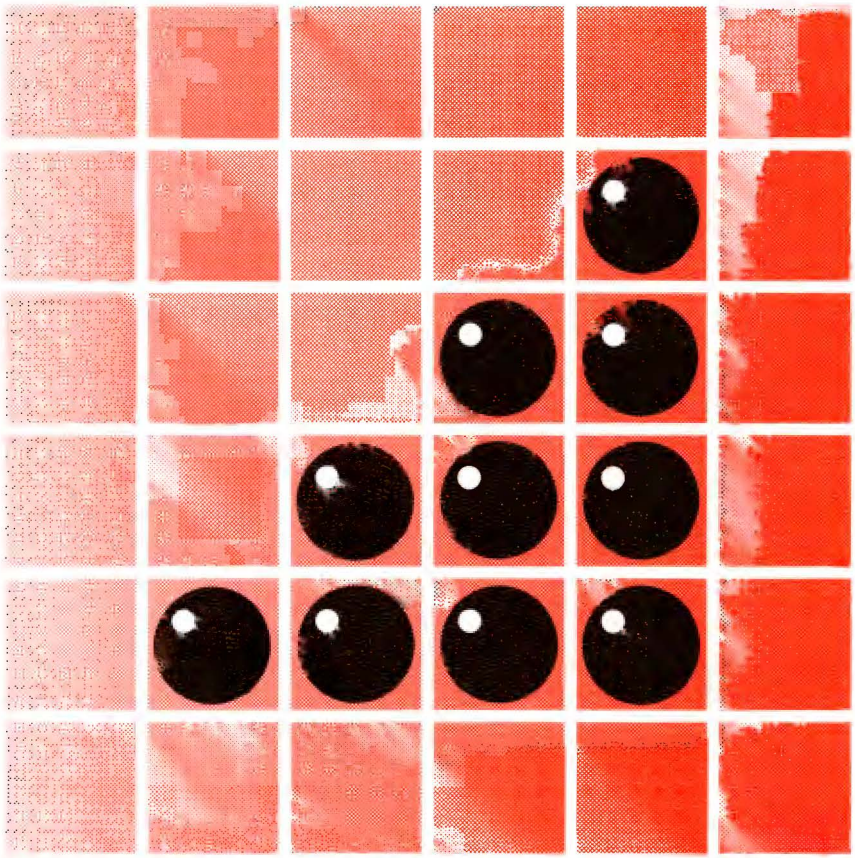
# The European Commission's POWERS OF INVESTIGATION in the enforcement of competition law



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# The European Commission's powers of investigation in the enforcement of competition law

The purpose of this booklet is to provide the general reader with a description of the Commission's investigating powers; the views expressed do not necessarily represent an authentic statement of the Commission's official position.

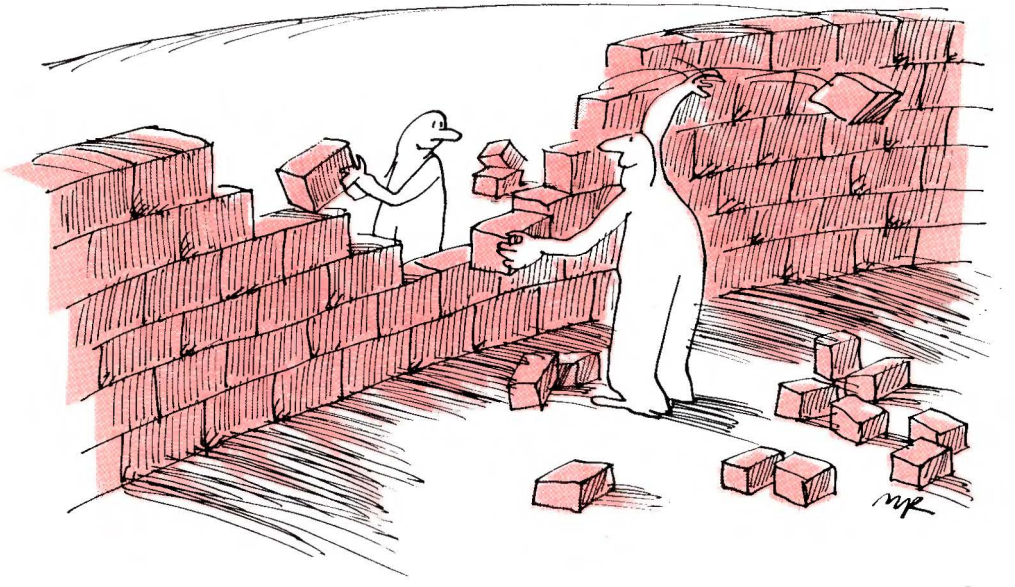
Manuscript completed July 1984

# Foreword

*The countries which signed the Treaty establishing the European Economic Community set out to achieve economic and social progress by acting together to eliminate both public and private barriers hindering trade between them.*

*The Commission of the European Communities has the job of ensuring that the laws of the market economy are respected, and has always sought to put an end to commercial practices which distort the free interplay of competition. Not only do such practices hinder the establishment of a single market covering all the Member States of the Community, they also impede the technical and economic progress indispensable for European firms to survive and compete with those outside the Community.*

*The Commission has therefore pursued a competition policy aimed at preventing firms from acting in ways conflicting with the demands of free competition, and to promote the development of more competitive industrial structures, notably by encouraging cooperation between European firms and especially small businesses.*



*But if the Commission is properly to conduct this double-edged task of prohibiting damaging restrictive practices while at the same time promoting agreements which bring economic benefits, it must be prepared to keep the market under constant observation, and must be very familiar with the economic and legal context in which firms work.*

*To enable it to do this it has been given wide powers to carry out inquiries directly involving firms. The purpose of such investigations is to detect any anti-competitive practices; it can then order that they be ended or allow them to be continued, depending on their positive or negative effects on free competition.*

*The exercise of these powers of investigation, however, does not remove the guarantees which every constitutional State gives to individuals and firms as regards public supervision of their business activities. The EEC Treaty and its implementing legislation impose limits on what the Commission can do. The Commission's own practice and the judgments of the European Court of Justice — whose function it is to ensure that in the application of the Treaties the law is observed — have always sought to guarantee firms the greatest possible measures of objectivity and protection compatible with effective supervision of their conduct on the market.*

*Investigations should be carried on in a spirit of mutual cooperation and comprehension between businessmen and the Commission. When it opens an investigation into the possible existence of anti-competitive practices, the Commission aims to cause as little disturbance as possible to the operation of the firms contacted. Its purpose is to protect the market against such practices, which are damaging for all concerned — producers, traders and consumer alike.*

*The Directorate-General for Competition has drawn up this booklet for European firms, with a view to providing a clear explanation of an aspect of its acitivities which places its administrative departments in direct contact with their managers. The language used has often had to be technical, but the booklet tries to provide the necessary clarification for a proper understanding of what is an essential tool of any competition policy which sets out to safeguard the interests of the European economy as a whole.*

Manfred CASPARI
Director-General for Competition

# Contents

# Introduction

The Treaties which set up the European Community — the Coal and Steel Treaty (European Coal and Steel Community), the EEC Treaty (European Economic Community) and the Euratom Treaty (European Atomic Energy Community) — set out first and foremost to remove the economic barriers between the founding countries so as to establish a single market, known as the 'common market'.

Within this common market, what are now the 10 Member States are trying to establish the so-called four freedoms: the free movement of people, goods, services and capital. The objective is to develop economic activity and to improve the standard of living.

If a large market of this kind is to be created there must first be legislation laying down effective rules of competition which are the same for everyone. All firms must be able to take advantage of the larger size of the market. Big companies must also be prevented from abusing a dominant position, for example by charging discriminatory or abusive prices, refusing to sell to certain traders so as to limit the number of outlets to the detriment of consumers, or arranging mergers which threaten to eliminate competition.

## *1. EEC competition rules*[1]

Competition rules of this kind are covered by Articles 85 and 86 of the EEC Treaty. Those articles prohibit 'all agreements between undertakings, decisions by associations of undertakings and concerted practices' which restrict the free interplay of competition: either by preventing businessmen, even indirectly, from freely deciding their terms of sale, or by preventing them from selecting the goods or services they wish to buy, in complete independence, on the basis of quality and price.

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[1] This booklet deals primarily with the procedures for Commission investigations aimed at applying EEC competition rules, and gives only a brief outline of the rules themselves. The rules are explained in more detail in *EEC competition rules — Guide for small- and medium-sized enterprises,* published in the same series.

Articles 85 and 86 forbid only agreements and practices which may appreciably affect trade between Member States: restrictions whose effects are purely domestic are a matter for the laws of the Member State concerned.

(a) Article 85 bans agreements which restrict competition between two or more firms, when for example they share or partition markets, fix prices or limit production or sales. The ban applies both to horizontal agreements between competitors (for example among producers or among distributors) and to vertical agreements between firms at different stages of the trade (for example between producers and distributors).

(b) Article 86 prohibits firms holding a dominant position in a particular product or service, throughout the common market or in a substantial part of it, from making unfair use of their commercial strength, for example by imposing unfair prices or other terms. Thus it has been held that 'an undertaking which is in a dominant position and ties purchasers or — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article 86'.[1]

(c) Competition policy is not confined to prohibitions: restrictive practices may distort competition, but they may also secure a better organization of the trade and so produce technical or economic effects which work in the public interest. Article 85(3) therefore allows exemption from the ban on restrictive practices for certain agreements between firms which need to join forces in order to secure the economies of scale made possible by a common market of 270 million consumers.

Authorization may be granted where the agreement's restrictive effects are compensated for by certain economic benefits to society, which are listed in Article 85(3).[2]

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[1] Judgment of the Court of Justice in Case 85/76 *Hoffmann-La Roche*, published in the *European Court Reports* [1979] ECR 461.

[2] Article 83(3) allows an agreement prohibited by Article 85(1) to be exempted from the ban, provided it 'contributes 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 . . . does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.'

## 2. *How the Commission applies Articles 85 and 86*

By Regulation No 17[1] the Council of the European Communities made the Commission responsible for taking the measures necessary to apply Articles 85 and 86.

The regulation gives the Commission the right to order firms to put an end to infringements of Articles 85 and 86, and the right to authorize agreements with economic benefits. It also gives the Commission the powers of investigation needed to be able to take these decisions in full knowledge of the facts.

(a) Where the Commission finds that Article 85 or Article 86 has been infringed, it may require the firms concerned to bring such infringement to an end. It may impose fines on firms which have infringed Article 85 or 86, either deliberately or negligently.

(b) Firms may wish to know whether agreements or practices to which they are party, or propose to become party, may lead to action on the part of the Commis-

[1] Council Regulation No 17 of 6. 2. 1962: first regulation implementing Articles 85 and 86 of the Treaty (published in the *Official Journal of the European Communities*, 13, 21. 2. 1962, p. 204; English Special Edition 1959 - 1962, p. 86).

sion, and Regulation No 17 empowers the Commission to certify that there is no infringement, by means of an individual decision adopted at the request of the firms concerned, known as a negative clearance decision.

(c) Lastly, the Commission has sole power to grant exemptions from the ban on restrictive practices where it considers that an agreement is beneficial from an economic point of view.

If an agreement satisfies the four tests of Article 85(3) described above, the Commission grants an exemption. This may be done by individual decision or by means of a regulation exempting a category of agreements considered to satisfy the tests of Article 85(3) (a block exemption).

If the Commission is to grant an individual exemption, it must first be notified of the agreement on a special form (Form A/B, obtainable from the Commission and reproduced as Annex II to this booklet).

Under powers conferred by the Council the Commission has specified certain kinds of agreement which are covered by block exemptions and thus need not be notified. At the present time these are:

(i) specialization agreements;

(ii) exclusive distribution agreements;

(iii) exclusive purchasing agreements;

(iv) patent licensing agreements.

Block exemptions are also in preparation for

(i) research and development agreements;

(ii) motor vehicle distribution agreements.

If the Commission is to act in full knowledge of the facts when it decides whether to terminate infringements of Articles 85 and 86, to give negative clearance or to grant an exemption from the ban on restrictive practices, it must of course have the power to collect all the information needed. Regulation No 17 therefore gives it wide powers of investigation.

The Commission does not use its powers of investigation, however, without first having good grounds for suspecting practices affecting competition, based on information from a number of sources.

# I — How the Commission is informed of restrictive practices

When the Commission decides to open an investigation it generally has certain evidence of conduct on the part of firms which the investigation is intended to substantitate and clarify. Initial evidence of infringements can come to the Commission's attention by various means.

## *1. Complaints*

### (a) Formal complaints

Restrictive practices may be brought to the Commission's attention by complaints on the part of individuals or firms which can show a legitimate interest.

A complaint might be lodged for example by a person not party to an agreement which restricts competition and causes him injury, or by the victim of an abuse of a dominant position, such as a refusal to supply on the part of the sole supplier of the product. Anyone who can show that he is suffering injury or is liable to suffer injury as a result of a restriction of competition must be considered to have 'a legitimate interest' qualifying him to report the suspect practice to the Commission and to ask to have the infringement terminated pursuant to Article 3 of Regulation No 17.

Complaints can be lodged with the Commission on a special form which it has drawn up, known as 'Form C'. Form C has spaces in which to enter the identity of the complainant,[1] a description of the infringement, the reason why the complainant claims a legitimate interest, and evidence of the alleged infringement.

### (b) Informal complaints

These are requests or other messages reporting restrictive practices from individuals or firms who as a rule consider themselves injured but are unwilling to be officially identified as complainants, usually for fear of reprisals.

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[1] Form C is reproduced in Annex I to this booklet.

## 2. *Notification of an agreement for the purpose of obtaining an exemption*

Where firms wish to have an agreement individually exempted from the ban on restrictive practices, they must notify it to the Commission: until the agreement has been notified no exempting decision can be taken.

This formality represents a valuable source of information, as notifications seeking exemption are set out in writing on the form issued by the Commission (Form A/B).[1] The firms must supply information on the parties to the agreement and the essential features of it, and set out the grounds on which in their view exemption may be granted.

## 3. *Inquiries into sectors of the economy*

Article 12 of Regulation No 17 allows the Commission to conduct inquiries into sectors of the economy. If the Commission has reason to believe that in a particular economic sector competition is being restricted or distorted within the common market, it may decide to conduct a general inquiry, and may request firms in that sector to supply the information it needs. This enables it to determine the origin of any restrictions of competition, and to decide whether or not to act under Articles 85 and 86.

To date inquiries of this kind have been conducted in the brewing and margarine industries.

## 4. *Other sources of information*

The Commission may also learn of restrictive practices through questions asked in the European Parliament, newspaper reports, information supplied by the authorities in the Member States, or contacts with trade associations and other organizations such as consumer associations.

The Commission is not bound to proceed against infringements brought to its attention in this way, but here too it may of its own initiative decide to collect more detailed information, particularly when the information it has suggests the existence of serious infringements of competition rules.

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[1]Form A/B is reproduced in Annex II to this booklet.

# II — The investigation: fact-finding by the Commission

In most cases where the Commission considers that practices brought to its notice — by way of complaints, notification of agreements, or other sources of information — may be in violation of competition rules, it needs to obtain additional information if it is to give a ruling on the legality of the practices in question.

Regulation No 17 empowers it to address requests for information to firms and to carry out such on-the-spot investigations as are found to be necessary to secure compliance with the prohibitions imposed by Articles 85 and 86.

## *1. Purposes of investigations*

The Commission may request information from firms for any number of purposes since, under Regulation No 17, it is empowered to request the information and to carry out the investigations necessary to give effect to the principles laid down by Articles 85 and 86 of the EEC Treaty.

Information is thus necessary if the Commission requires it to ascertain whether the practices notified to it are covered by these two articles and whether it has to take a

decision under them. The Commission must therefore, as a general rule, be able to obtain information not only for the purpose of taking a decision on the suspected infringements but also in order to assess the economic and legal circumstances of the agreements that firms have notified to it with a view to securing negative clearance or exemption.

The Commission explains to firms why information requested is necessary by briefly outlining the reasons for its decision to investigate the possibility that the competition rules are being infringed. It may state, for example, that, on the basis of information in its possession, it has good reason to believe that a particular firm is participating in a restrictive agreement between producers, the object of which is to fix prices jointly or to share out markets between the firms involved.[1]

The Commission enjoys a wide measure of discretion in deciding whether information is needed. The Court of Justice, in turn, has only limited power to review whether any particular measures of investigation are necessary for the purpose in view.

According to the Court, the Commission is not required to indicate to the firm concerned what the investigation is expected to uncover, precisely because its findings may change shape in the course of the investigation. It is entitled simply to state the purpose for which the information is needed.

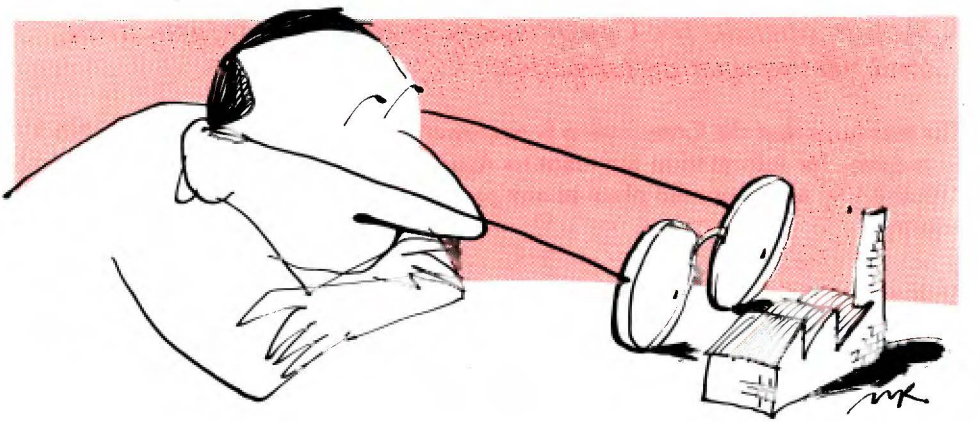
Accordingly, a decision to carry out an investigation may be taken provided details are given of its purpose, to establish circumstances such as to indicate that an infringement may have occurred (e.g. an export ban imposed by a producer on his dealers), and provided the matters to be investigated are specified.

However, the Commission's power to request information is not limitless, irrespective of the value or relevance of the information to the case under investigation. One principle is permanent: measures taken by the authorities must be proportionate to the objectives pursued. The Commission is thus obliged to take steps that are not only necessary but also strictly tailored and limited to the purpose for which it is seeking information. In the final analysis, the nature and extent of that information depend on the seriousness of the suspected practice. The information must relate to the case in point and must neither be arbitrary in nature nor unduly impair the firm's smooth operation.

[1] Examples of reasons given for requesting information from firms and for carrying out investigations are to be found in Annex III.

## 2. *Firms liable to investigation by the Commission*

The provisions of Regulation No 17 impose no restrictions on either the number or the categories of firms that may be investigated by the Commission, which is empowered to obtain information from firms that are party to a restrictive agreement, that are abusing a dominant position or that are being adversely affected by restrictive practices, regardless of whether such practices are those of their suppliers, competitors or customers. When investigating the conduct of a firm in a dominant position on the market, the Commission may, for example, ask companies that do business with it whether they have been treated unfairly. Moreover, the Commission may contact any firm or association of firms, whether or not affected by a restrictive practice, which might possess the information it needs.



To take an example, the Commission carried out an on-the-spot investigation of a trust company that had been appointed to organize and operate on behalf of various firms agreements between manufacturers in different Community countries aimed at fixing prices and uniform terms of sale and at sharing out among manufacturers in a particular Member State the qualities and quantities produced.

The trust company claimed that it was not obliged to submit to the proposed investigation since it was not itself involved in either the production or the marketing of the product in question. The Commission dismissed this argument, arguing on the contrary that the services provided by the company were directly concerned with the circumstances forming the object of the investigation.[1]

[1] Decision of 31 January 1979 — *Fides* (OJ L 57, 8. 3. 1979, p. 33).

While the investigation procedures provided for in Regulation No 17 may be initiated without restriction against any firm established in the Community, the Commission's powers of investigation in respect of firms from non-member countries are limited. Under international law, the Commission is not empowered to conduct outside the bounds of its territorial competence investigations which would impinge upon the national sovereignty of the non-member country in whose territory it was purporting to act. Accordingly, investigations at the premises of such firms are out of the question since they would be a typical example of action by a public authority on the territory of a sovereign State. In such cases, the Commission can simply send out requests for information but, for the same reason as that just mentioned, it is in no position to penalize any refusal to supply the information requested.

## 3. *Action open to the Commission: requests for information and on-the-spot investigation*

The measures that the Commission is empowered to take under Regulation No 17 — requests for information pursuant to Article 11 and investigations pursuant to Article 14 — need not take place in any particular chronological order or order of priority.

An inquiry procedure may begin with either an on-the-spot investigation or a request for information. Examination of the documents obtained by the Commission during an investigation may reveal a need for additional information that will clarify certain of the economic and legal circumstances of the competitive practices at issue. Then again, information obtained in response to a request for information may prompt the Commission to carry out an on-the-spot investigation as a means of supplementing, verifying or comparing the facts in its possession.

## 4. *Liaison with Member States' authorities*

Article 10(2) of Regulation No 17 stipulates that the Commission is to carry out the inquiry procedure — irrespective of whether it was instituted with a view to granting negative clearance or exemption or to establishing infringements of Articles 85 and 86 of the EEC Treaty — in close liaison with the competent authorities, who have the right to express their views on the procedure.

For this reason, at the same time as the Commission sends a request for information to a firm, it transmits a copy of the request to the competent authority of the Member State in whose territory the firm has its head office.

Similarly, in good time before the start of any on-the-spot investigation it has decided to carry out, the Commission informs or, where appropriate, consults the competent authority in the Member State concerned. This consultation requirement arises from the fact that, under certain circumstances, the competent authority may, or indeed must, at the Commission's request, afford the necessary assistance to Commission inspectors to enable them to perform their duties.

# III — Requests for information

The most frequently used form of Commission investigation is the request for information referred to in Article 11 of Regulation No 17.[1] Extensive use is made of such requests at all stages of proceedings, right up to any Commission decision on the lawfulness of practices by the firms under investigation. Several requests for information may accordingly be sent to firms in the course of one set of proceedings.

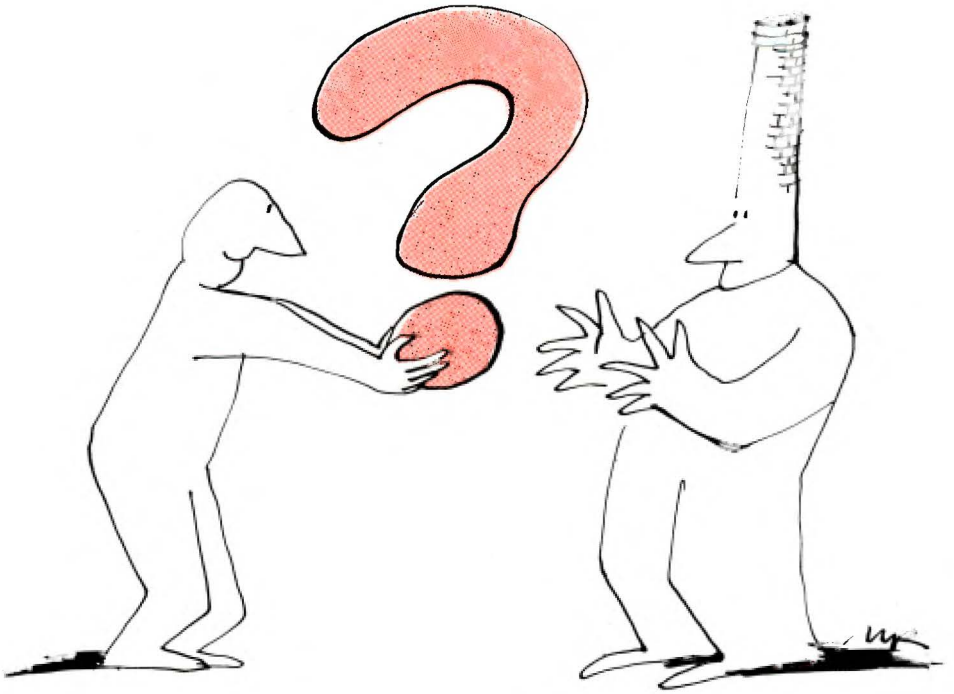
Requests for information are used by the Commission in particular to obtain business information on firms (sales, output, imports, exports, price lists and general terms of sale) or details on agreements or contracts whose existence can hardly be disputed.

## 1. *How are requests for information made?*

Requests for information are made in writing and sent to the firms concerned in the form of a registered letter with advice of receipt or, in urgent cases, by telex. The

[1] Article 11 of Regulation No 17 lays down that:

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.
2. When sending a request for information to an undertaking or association of undertakings the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.
3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.
4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorized to represent them by law or by their constitution, shall supply the information requested.
5. Where an undertaking or association of undertakings does not supply the information requested within the time fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specifiy what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16 (1)(c) and the right to have the decision reviewed by the Court of Justice.
6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.'



Commission must state, in addition to the purpose of the request, the Community rules under which it is made, and advise the firm of the penalties laid down by Regulation No 17 for supplying incorrect information in response to a request for information (whether binding or not) or failing to supply the information within the time limit fixed in a binding request for information.

## 2. *What constitutes a request for information?*

The request for information is constituted by all the documents sent to the firm pursuant to Article 11, not merely the various questions seeking information. In following up the request, the firm's reply must be assessed as a whole; the appraisal must not be limited to the answers given to the specific questions set out in the Commission's request.

The response to the Commission's request for information must accordingly be regarded as the answers to the Commission's specific questions, information supplied which extends beyond the particular scope of those questions and information supplied by the firm on its own initiative which does not directly relate to any specific question asked by the Commission.

At all events it is obviously in the interests of firms to pass on to the Commission all the information available on the field covered by the request for information. If a firm submits detailed, full information it may avoid having to allow Commission officials to carry out an on-the-spot inspection in order to supplement the information obtained.

## 3. *Simple request for information*

Article 11 of Regulation No 17 lays down a two-stage procedure for requesting information; the first stage is a compulsory preliminary.

The Commission must first of all ask the firms concerned to answer a simple request for information. If this initial step produces no result because the firm fails to reply by the time limit fixed, the Commission may, as a second step, require the information to be supplied by means of a binding decision to which pecuniary penalties are attached if the firm persists in refusing to reply.

However, where the firm freely supplies information to the Commission, it must be correct: under Article 15 of Regulation No 17 the Commission may impose fines on firms supplying incorrect information in response to a request for information, even where it is made as a simple — not a binding — request. If a firm agrees to reply to a simple request for information, it must supply correct information on pain of pecuniary penalties.

## 4. *Request for information in the form of a binding decision*

Where a firm does not supply the information requested within the time limit fixed by the Commission in its first request, or supplies incomplete information, the Commission may require the information by decision. The firm concerned is then obliged to reply on pain of pecuniary penalties.

The binding decision relating to the firm in question must set out in detail the grounds on which it is based. It specifies the information required, fixes an appropriate time limit within which it is to be supplied and refers to the penalties provided for and the right to have the decision reviewed by the Court of Justice.[1]

Firms receiving such a request for information must therefore:

(i) supply a correct answer, on pain of fines, where they decide to reply voluntarily to a simple request for information;

[1] See Annex IV.

(ii) reply in all cases, on pain of pecuniary sanctions, to a request for information by way of decision.

In most cases firms respond voluntarily and without undue problems at the first stage of the request. Requests for information by way of binding decision are seldom made.

## 5. *How much time for a reply?*

The Commission has to fix an appropriate time limit for firms to reply in the light of circumstances. Although Article 11(3) does not explicitly lay down a time limit for replies to simple requests for information, such a requirement does follow indirectly from Article 11(5), which specifies that where a firm has not supplied the information requested 'within the time limit fixed by the Commission', the Commission shall by decision require the information to be supplied.

It stands to reason that any request for information by way of binding decision must also fix an appropriate time limit for reply. Moreover, this is explicitly laid down by Article 11(5). An appropriate time limit means a reasonable time limit in the light of the firm's cirumstances and the nature and amount of information requested. The period fixed usually varies between three weeks and two months, but may be longer if the Commission considers that more time is required to assemble the information.

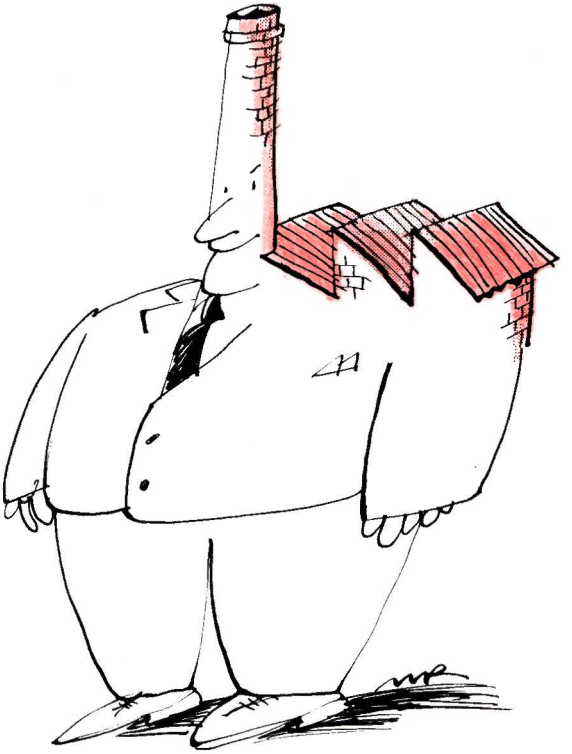
The Commission is seldom aware of the state of the firm's affairs or files or the amount of research needed. For this reason it usually agrees to a firm's request to extend the period allowed for reply where good reason is given.

## 6. *Who has to supply the information on behalf of the firm?*

Article 11(4) lists the persons who are to supply the information requested: the head of the firm or his representative, or, in the case of companies, etc., the persons authorized to represent them by law or by their articles of association.

This provision is designed to ensure that the request is dealt with at a suitable level of responsibility by persons deemed to be competent in handling requests for information.

In practice firms entrust the task of replying to the heads of department possessing the information required (accountants, sales managers, in-house lawyers or independent law firms). Since the information is supplied in the name of the firm, the latter is in all cases bound by the answers supplied and liable for the penalties provided



for if it supplies incorrect information or refuses to supply information. Fines may therefore be imposed and the firm held reponsible even where its managers have not made any move or are not aware of the answers given; it is enough that somebody acted on behalf of the firm.

## 7. *What kind of information?*

Persuant to Article 11 of Regulation No 17 the Commission may obtain information or documents containing the necessary information. The Commission often asks firms for a copy of a particular agreement so as to have the full text available for an initial examination of its compatibility with the EEC Treaty competition rules.

The Commission may sometimes ask for information which the firm does not directly possess but could still supply in another form. Where, for example, the Commission requests a figure for the volume of ex-works deliveries, and the firm has only sales figures available, it is entitled to contact the Commission on receiving the request for information to find out whether it might reasonably notify its sales figures instead of the data originally requested.

## 8. *Pecuniary penalties*

### (a) Fines

Under Article 15(1)(b) of Regulation No 17 the Commission may impose on firms fines of from 50 to 1 000 ECU[1] where, intentionally or negligently, they supply incorrect information or do not supply information within the time limit fixed in a request made by way of binding decision.

*(i) Incorrect information*

Firms must above all endeavour to reply accurately and fully to the various questions set out in requests for information (for example, the firm's sales figures for a given year or exports to the different Member States).

However, the correctness of the information supplied depends both on the accuracy of the information itself and on the impression it conveys to the Commission of the situation under examination. In other words, the correctness of the information depends also on the context of the given case. Information may be incorrect if it gives a distorted picture of the true facts asked for and departs from reality on major points. Where a statement is thus false, or so incomplete that the reply taken in its entirety is likely to mislead the Commission about the true facts, it constitutes incorrect information for which a fine may be imposed.[2]

Let us consider an example: where in justifying the need for the information required the Commission states in its request that the trade relations between the firm concerned and its supplier might involve restrictions on trade between Member States contrary to the rules of competition, and asks for copies of the documents defining the nature of the relationship between the two companies, the firm in question intentionally supplies incorrect information if it replies that there is no written agreement between itself and its supplier, while telexes obtained at the firm's place of business during a subsequent inspection define a business relationship prohibited under Article 85 of the EEC Treaty.[3]

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[1] Council Regulation (EEC, Euratom) No 3308/80 of 16. 12. 1980 replaced the European unit of account by the ECU (European currency unit) in all Community legal instruments. The values in national currencies of one ECU are approximately: BFR 46, DM 2.23, HFL 2.5, UKL 0.59, DKR 8.19, FF 6.86, LIT 1 383, IRL 0.73 and DR 88.

[2] Decision of 25 November 1981 — *Telos* (OJ L 58, 2. 3. 1982, p. 19).

[3] Decision of 17 November 1981 — *Comptoir commercial d'importation* (OJ L 27, 4. 2. 1982, p. 31).

*(ii) Refusal to supply information*

Where a firm fails to supply information within the time limit fixed in a request for information by way of binding decision it is liable to a fine of between 100 and 5 000 ECU, just as if it had supplied incorrect information.

It is for the Commission to establish whether Articles 85 and 86 have been infringed. A firm requested to supply information on an agreement may not refuse to do so on the grounds that it believes the agreement does not affect trade between Member States.

**(b) Periodic penalty payments**

The Commission may also impose periodic penalty payments of from 50 to 1 000 ECU per day in order to compel defaulting firms to supply complete and correct information which it has requested by way of binding decision. The Commission has already made use of these powers in the past.[1]

[1] See Annex V.

Periodic penalty payments may be imposed not only where firms refuse to supply the information requested but also to compel them to supply correct information where an incorrect answer has been given.

The amount of the periodic penalty payment is not fixed at the outset. Regulation No 17 merely states that it may not be less than 50 ECU or more than 1 000 ECU per day, calculated from the date appointed by the decision. The exact amount the firm will finally have to pay is laid down in any subsequent enforceable decision. The Commission may then set the periodic penalty payment at a lower level than that proposed in the initial decision.

In the Commission's experience firms are cooperative in most cases; they supply information in response to a simple request.

However, in exceptional cases, the Commission has had to impose pecuniary penalties for refusal to supply information or the supply of incorrect information.

# IV — On-the-spot investigations

The Commission is empowered under Article 14 of Regulation No 17[1] to have on-the-spot investigations undertaken by its officials.

The nature of the information supplied by a firm in response to a request for information may induce the Commission to visit its premises so as to look more closely into a suspected practice. In some cases, however, the Commission may, for a variety of reasons, decide to undertake an immediate on-the-spot investigation.

The investigation procedure is reminiscent of the two-stage procedure under Article 11 covering requests for information: firstly, the investigation under Article 14(2), whereby the firm is asked to submit to an investigation voluntarily and, secondly,

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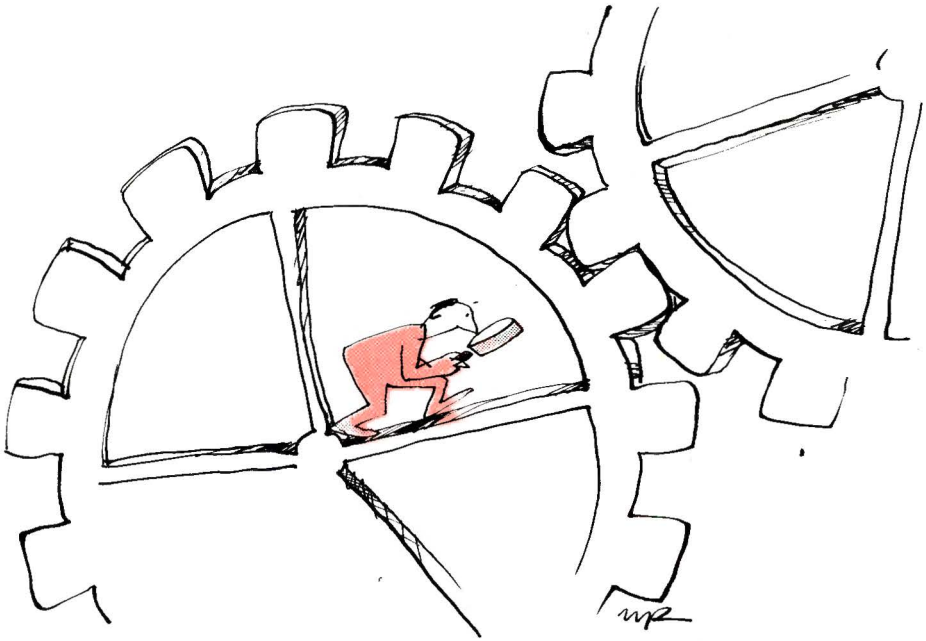
[1] Article 14 of Regulation No 17 reads as follows:
'1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorized by the Commission are empowered:
(a) to examine the books and other business records;
(b) to take copies of or extracts from the books and business records;
(c) to ask for oral explanations on-the-spot;
(d) to enter any premises, land and means of transport of undertakings.
2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 15(1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.
3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice.
4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.
5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.
6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the offcals authorized by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.'



the investigation ordered by way of a binding decision under Article 14(3), which may lead to the imposition of fines or periodic penalty payments.

However, the investigation procedure need not necessarily be in two stages. Contrary to the practice in the case of requests for information, the Commission may very well opt for a binding decision ordering an immediate investigation without simply calling on the firm at the outset to submit to an investigation voluntarily.

Article 14 does not, of course, prevent the Commission from carrying out an informal investigation without adopting a decision but it contains nothing to indicate that the Commission may only take a decision within the meaning of paragraph 3 if it has previously attempted to conduct a straightforward investigation.[1]

The procedure is different when it comes to requests for information referred to in Article 11. As expressly stipulated in paragraph 5 of that Article, the Commission may adopt a decision only if it previously sought to obtain the information it needed by way of a request addressed to the parties concerned. Paragraph 3 spells out the main points such a request must contain. By contrast, Article 14 sets no such precondition for initiation of the investigation procedure by way of a Commission decision.

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[1] Case 136/79 *National Panasonic* (1980) ECR 2033.

This difference between Articles 11 and 14 arises from the fact that they each pursue a different purpose. Information sought by the Commission is not normally obtainable without the collaboration of the firms possessing that information. An investigation, on the other hand, does not necessarily imply prior collaboration on the part of the firm in possession of the material facts essential to the investigation.

## *1. Informal investigation*

In practice, an informal investigation pursuant to Article 14(2) of Regulation No 17 is carried out by Commission inspectors on the basis of an authorization to investigate.[1] This document names the Commission inspectors authorized to undertake the investigation. It must also specify the subject matter and purpose of the investigation and the penalties prescribed in Article 15(1) of Regulation No 17 in the event of not all the business records required being produced. A firm that agrees voluntarily to an informal investigation submits by that very fact to all the ensuing obligations, and especially the obligation to produce all the books and other business records required by the Commission inspectors.

The Commission has taken pains to clarify the wording of such authorizations by outlining the purposes of investigations in greater detail than in the past. The degree of detail will, of course, depend in each case on the quality of the information already in the Commission's possession and on the stage reached in the investigation. As a result, firms are better able to grasp the subject matter of the investigation and to check for themselves that the information requested is strictly relevant.

In order to put firms under investigation fully in the picture as regards their rights and obligations, the Commission has prepared a note which is attached to each authorization to investigate and explains the scope and limits of the powers vested in the Commission inspectors.

On arrival at the firm's place of business, the officials authorized by the Commission to carry out an investigation under Article 14(2) show their authorization to the firm's respresentatives. They prove their identity by means of their staff card.

If the firm so requests, they explain before beginning their investigation its subject matter and purpose as well as procedural matters, including confidentiality. Such explanations cannot modify the authorization and may not compromise the purpose of, nor unduly delay, the investigation.

After producing their authorization, the Commission inspectors also draw the attention of the firm's representatives to the provisions of Articles 14 and 15 of Regula-

[1] A specimen authorization to investigate pursuant to Article 14(2) is reproduced in Annex VI.

tion No 17, and especially to the penalties that may be imposed on firms that submit to an investigation but, intentionally or negligently, produce the required books or other business records in incomplete form.

Where a firm refuses to submit to an investigation, the Commission inspectors record its refusal in a minute, a copy of which is given to the firm if it so desires.

The Commission must then resort to a binding decision under article 14(3) in order to oblige the firm to submit to an investigation and to authorize inspection and scrutiny of the relevant business records.

## 2. *Investigation ordered by binding decision*

The Commission initiates this procedure either after encountering a refusal on the part of the firm in question to submit to an informal investigation or at the outset if it suspects the existence of particularly serious infringements and is concerned that

documents or other evidence might disappear, or if the firm has in the past refused to cooperate voluntarily with Commission inspectors.

Unlike investigations based on a simple authorization, investigations ordered by a decision pursuant to Article 14(3) are mandatory, with the firm being required to submit to such an investigation.

The choice of procedure is determined solely by the need for an appropriate investigation in the case in point and is a matter for the Commission.

To give an example, the Commission was obliged to take a decision requiring a firm to submit to an investigation and to allow its relevant business records to be inspected and checked since, in the Commission's view, it was no longer possible to rely on a voluntary disclosure of information on the subject matter of the investigation. The Commission invoked the following circumstances: difficulties encountered during a number of previous investigations, the reticence with which the documents relating to the various restraints on competition discovered had been supplied, and the fact that at least one of the firms involved had falsely declared that the producers had abandoned the concerted practice at issue two years earlier.

Since investigations ordered by decision are binding on the firms concerned, the reasons for carrying them out must be stated accurately and in detail. The decision specifies the subject matter and purpose of the investigation and gives the date on which it is to begin. It also indicates that fines may be imposed where not all the required books or other business records are produced or where the firm refuses to submit to the investigation and that, in the latter case, periodic penalty payments may be imposed. Lastly, the decision makes it clear that proceedings for its annulment may be brought before the Court of Justice.

The Commission thus takes particular care in setting out the grounds on which its decisions to undertake investigations are based.[1]

Like an authorization to investigate, a decision to investigate is accompanied by a note explaining the scope and limits of the powers assigned to the Commission inspectors and setting out the rights of the firms to be investigated.

The Commission inspectors are provided with written authorizations naming them as the persons charged with executing the decision.[2]

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[1] See Annex VII.

[2] The authorization is identical to that reproduced in Annex VI.

They cannot be required to enlarge upon the subject matter of the investigation as set out in the decision or to justify in any way the taking of the decision. They may, however, explain procedural matters, particularly confidentiality, and the possible consequences of a refusal to submit to the investigation.

A certified copy of the decision is handed to the firm's representatives immediately prior to the investigation. The minute of notification[1] serves only to certify that this has been done, and the fact that it is signed in no way implies that the person signing submits to the investigation.

## 3. *Prior notification of firms or unannounced investigations*

The Commission sometimes carries out surprise investigations. In any event, article 14 of Regulation No 17 does not confer on firms the right to be notified in advance of an investigation.

The Court of Justice has confirmed the legality of unannounced investigations, holding that exercise of the investigatory powers vested in the Commission by Regulation No 17 contributes to the maintenance of the system of competition intended by

[1] See the specimen minute reproduced in Annex VIII.

the Treaty, which firms are absolutely bound to comply with, and that in those circumstances it does not appear that Regulation No 17, by giving the Commission the power to carry out investigations without previous notification, encroaches on the private interests of firms, or the privacy of the home and correspondence.[1]

Until 1978, the Commission conducted surprise investigations in only a few cases. The situation has changed somewhat in the meantime since the Commission now likes to gather the maximum amount of evidence of suspected infringements. The result of any proceedings brought before the Court of Justice in respect of decisions establishing the existence of infringements and imposing fines is conditional to a large extent on the accuracy with which the charges brought against firms have been substantiated.

## 4. *The firm's right to take advice*

A firm may consult its legal advisers during an investigation. However, their presence is not a condition for the validity of the investigation, which must not be unduly delayed on this account. The Court of Justice recently upheld the legality of an investigation carried out without awaiting the arrival of a legal adviser.

Firms being investigated have the right to call in their advisers, without prejudice to the other safeguards afforded them under the Community rules of procedure and discussed in Chapter V.

## 5. *Persons authorized to represent firms*

Article 14 of Regulation No 17 is silent on this point, whereas Article 11(4) provides a clear indication of the persons required to supply the information requested.

By definition, investigations consequent upon notification of the firms concerned presuppose the existence of prior contacts between them and the Commission. As a result, the Commission inspectors know in advance who their opposite numbers will be on the day of the investigation and are sure to meet the appropriate people.

In the case of unannounced investigations, however, the Commission inspectors have to find out on the spot who are the firm's representatives they must contact. In practice, they ask to be received by the individuals that appear most likely to satisfy the requirements of the investigation and who occupy a sufficiently senior position in the firm (company secretary, sales manager, head of the appropriate department, etc.).

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[1] Case 136/79 *National Panasonic* (1980) ECR 2033.

It is in any event always the firm's own responsibility to designate competent representatives to deal with requests from Commission inspectors. It is not for the inspectors to assess or dispute the competence or extent of knowledge of the firm's representatives. A firm cannot validly argue therefore that its failure to produce certain documents requested by the Commission inspectors was due to an exceptional combination of circumstances to do with the absence of its general manager or the lack of knowledge on the part of the sales manager. A firm must therefore take steps to ensure that it is represented on the occasion of an investigation by responsible and well-informed persons.[1]

The Commission has attempted to improve the information available on the penalties firms may incur. It has drawn up an explanatory note to be produced by its inspectors on the occasion of each investigation, explaining the extent and limits of their powers as well as the rights of firms being investigated.

## 6. *Role of Member States' authorities*

### (a) They are informed or consulted by the Commission

Before undertaking an informal investigation, the Commission informs the competent authority of the Member State in whose territory the investigation is to be carried out of the investigation's purpose and of the inspectors' identities. This is done in good time — generally two weeks in advance.

If it intends to take a binding decision ordering an investigation, the Commission must first consult the competent authority of the Member State concerned.

### (b) They carry out or assist investigations

This distinction (consultation, and not simply notification of the national authorities by the Commission) arises from the less wide-ranging obligations placed on firms in the event of an informal investigation, which, since it is not binding on the firm and hence not enforceable, merely calls for assistance on the part of the national officials accompanying the Commission inspectors.

However, in the event of a binding decision ordering an investigation, it may be necessary to enforce that decision if the firm refuses to submit to the investigation. Such an eventuality is catered for in Article 14(6) of Regulation No 17, whereby the national authorities are required to become actively involved, and not simply to provide assistance, since the Commission inspectors have no power of coercion over firms.

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[1] Decision of 20 December 1979 — *Fabbrica Pisana* (OJ L 75, 21. 3. 1980 p. 30).

### (c) They undertake investigations themselves

In order to facilitate its task, Article 13 of Regulation No 17 empowers the Commission to request Member States' authorities to carry out the investigations which it considers necessary under Article 14(1) (informal investigations) or which it has ordered by a decision under Article 14(3). If so requested by the Commission or by the competent authority of the Member State concerned, the Commission inspectors may assist the national officials in the performance of their duties.

In practice, scarcely any recourse is had to this possibility. A major reason for this is the transnational nature of the restrictive practices forming the subject matter of investigations. For example, if the Commission has cause to believe that the main European producers in a particular sector are participating in agreements or concerted practices the effect of which is to fix prices and to control or limit production or supplies in the Community, it makes little sense to entrust each of the different competent authorities in the Member States concerned with the task of conducting the necessary investigations. So, to avoid any problems of coordination, the Commission itself carries them out. Moreover, for some inquiries to be effective, investigations often need to be conducted simultaneously at several firms in different Member States. In some cases, the Commission has to undertake investigations at a number of firms in the Community on the same day. Clearly, national administrations would find it difficult to achieve the necessary degree of synchronization.

## *7. Investigating powers of Commission inspectors*

### (a) Access to premises, land and means of transport

Article 14 empowers Commission inspectors to enter any premises, land and means of transport belonging to firms under investigation. They enjoy unhindered access to all the buildings and parts of buildings of firms, which are not allowed to restrict access to particular areas such as conference rooms or offices. As a result, the Commission inspectors may choose which premises they would like to enter.

However, such entry is confined to premises used for business purposes, to the exclusion of the private residence of the chairman or directors.

On the other hand, if they are refused entry, the Commission inspectors may not use force to gain entry. They are required simply to record the refusal and, where necessary, request the national authorities to enforce the binding decision ordering the investigation. The procedures for providing such assistance are laid down in the implementing provisions adopted by Member States.

**(b) Examination of business records**

Entry to a firm's premises by Commission inspectors implies access for the purposes of their investigation to filing cabinets and to the documents in them. However, Commission inspectors have no right of search. The firm's representatives must open the filling cabinets and hand over the documents in them to the inspectors, who are not allowed to remove them from the filing cabinets themselves. Any refusal by the firm's representatives to produce the documents is recorded and the inspectors may ask the national authorities to enforce the decision ordering the investigation.

*(i) What is meant by 'business records'?*

'Business records' means all forms of documentation, written or otherwise, such as correspondence, accounting and financial documents (invoices, balance sheets, etc.), photographs, slides, films, magnetic tapes, cassettes, computer programmes, microfilms, etc. In other words, the Commission inspectors' powers of investigation extend to all means of information storage.

Since Regulation No 17 assigns to the Commission the powers of investigation necessary to bring to light covert restrictive practices, such as concerted practices not substantiated by official documents, both official and unofficial documents (records, internal memos, minutes of meetings) may be examined.

In addition, the explanatory note attached to authorizations to investigate points out that the firm may draw the Commission inspectors' attention to any favourable details pertaining to the subject matter of the investigation that are to be found in documents other than those requested. Such details thus help to ensure that the information obtained is complete and can be objectively evaluated in the course of the proceedings.

*(ii) What may such records cover?*

Commission inspectors may examine any documents relating to the firm's market activities.

The scope of the inspection will, in practice, be limited by the nature of the product or service affected by the suspected restraints on competition and by the nature of those restraints.

Even so, an assessment of the economic circumstances of the practices at issue will need to take in the more general documents and the statistical data that relate to the firm's activities in the relevant economic sector.

The authorization issued under Article 14(2) or the decision taken under Article 14(3) must specify the subject matter and purpose of the investigation. Article 14 does not, therefore, require that these two instruments identify the business records to be inspected in each case. Clearly, it is only in quite exceptional cases that the Commission is able to specify in advance the documents it would like to examine, by indicating their content, date or other references.

In other words, in order to define the business records it would like to examine, the Commission merely has to describe the nature of the suspected infringement in the authorization or in the decision ordering the investigation. In any event, it is not in a position to know at the outset exactly which documents it will need to inspect since their significance may become apparent only in the course of the investigation.

Thus, the Commission, when defining the business records that will need to be inspected, normally does no more than mention the suspected infringements and request that the business records relating to the subject matter of the investigation be produced.

If, during an investigation, the Commission inspectors make an express request for certain specific documents, it is not sufficient for the firm generally to put all its files at their disposal:

'. . . the obligation on undertakings to supply all documents required by Commission inspectors must be understood to mean not merely giving access to all files but actually producing the specific documents required.'

'Nor can the argument that the Commission's inspectors did not examine the business records of the administration department be accepted, as none of the undertaking's representatives had told them that the documents requested were, or might be, kept in that department and where there was otherwise no reason to suppose that documents of that nature might be found there'.[1]

### (c) Power to take copies of business records

Commission inspectors are entitled to take copies of or extracts from business records.

A firm may ask for a signed inventory of the copies or extracts taken during the investigation by Commission inspectors.

If requested, the Commission will reimburse the cost of any photocopies of documents made available to its inspectors at their request.

### (d) Power to request on-the-spot oral explanations

The right enjoyed by Commission inspectors to request oral explanations is, if anything, an ancillary right, its purpose being to facilitate the investigation, which is concerned primarily with a firm's business records.

In practice, though, oral explanations may prove to be of considerable importance where the examination of business records does not yield any useful information. They are then crucial to the continuation of the investigation.

They may be recorded in writing at the request of the interested parties or of the Commission inspectors. The firm receives a copy of the minute if it so wishes.

The subject matter of oral explanations need not be strictly limited to the documents under examination. Commission inspectors may inquire about the firm's organization, about the products in question and, quite generally, about all circumstances

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[1] Decision of 20 December 1979 — *Fabbrica Pisana* (OJ L 75, 21. 3. 1980, p. 30).

pertaining to the subject matter of the investigation as defined in the authorization or decision. Accordingly, the officials may request on the spot any oral explanation necessary to the investigation.

A general exchange of views not only provides the Commission inspectors with the opportunity to make known their point of view but also allows the firm to state its position and to present any supporting arguments that would have been overlooked.

## *8. Penalties*

### (a) Fines

*(i) Refusal by a firm to comply with a binding decision ordering an investigation*

If a firm refuses to submit to an informal investigation, the Commission inspectors can do no more than record that refusal.

However, a refusal to submit to an investigation ordered by a binding decision means that the firm becomes liable to a fine of between 100 ECU and 5 000 ECU.

Not only point-blank refusals but also veiled refusals, such as manœuvres to delay investigations on a wide range of pretexts, are treated as refusals to submit to an investigation.

*(ii) Production of business records in incomplete form*

The Commission may also impose fines on firms that do not produce all the business records requested by its inspectors.

In this connection, it matters little whether the investigation was carried out on the basis of an informal authorization or pursuant to a binding decision. For example, the Commission imposed the maximum fine of 5 000 ECU on three firms which, while submitting voluntarily to an investigation, had deliberately not produced all the business records requested. Once directors, after taking note of the authorization to investigate, agree to submit to an informal investigation and to all the obligations this might entail, they are required to produce all the business records requested by Commission inspectors.[1]

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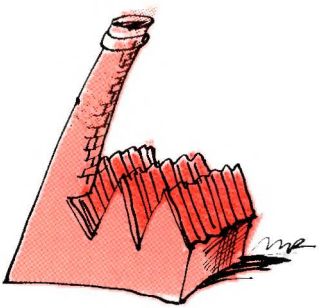
[1] See in particular the Decision of 27 October 1982 — *Fédération nationale de l'industrie de la chaussure de France* (OJ L 319, 16.11. 1982, p. 12).



In the three cases mentioned, the Commission imposed the maximum fine since it took the view that the infringement was particularly serious in that the failure to produce the documents requested had made the Commission's task of ensuring compliance with the EEC Treaty rules on competition more difficult.

### (b) Periodic penalty payments

The Commission may also impose on firms periodic penalty payments of between 50 ECU and 1 000 ECU per day, in order to compel them to submit to an investigation which it has ordered by binding decision.

### (c) Enforcement

A firm that is the subject of a binding decision ordering an investigation cannot lawfully attempt to oppose the investigation, e.g. by refusing the Commission inspectors entry to its premises or by not producing the documents requested. If it nevertheless offers resistance to the inspectors, the Member State concerned is required under Article 14(6) of Regulation No 17 to afford them the assistance necessary to carry out their investigation, on the basis of the laws or regulations it has adopted for this purpose.

The Commission inspectors request the assistance of the competent national authority in writing, mentioning the circumstances prompting the request. In some

Member States, the officials appointed by the competent national authority then provide the necessary assistance directly, if need be with the help of the police.

In other Member States, the national officials must first ask the court competent for the district in question to issue an order permitting enforcement of the investigation.

Enforcement allows the Commission inspectors to conduct their investigation immediately, even where the firm's directors refuse them entry to the firm's business premises.

This is without prejudice to the Commission's right subseqently to impose fines on firms for refusing to comply with a binding decision ordering an investigation.

# V — Safeguards for firms in the investigation procedure

As in any State founded on the rule of law, the investigations conducted by the Commission in monitoring application of the competition rules must provide certain safeguards for firms: confidentiality of correspondence between firms and their lawyers, protection of business secrecy and the right to appeal to the Court of Justice of the European Communities against Commission decisions.

## 1. *Confidentiality of correspondence between firms and their lawyers*

Every citizen must be at liberty to consult his lawyer, whose very profession involves the task of giving independent legal advice to anyone requiring it. The confidentiality of correspondence between lawyer and client must accordingly be protected from Commission investigations. This principle is, however, subject to two conditions: such communications must be made for the purposes and in the interests of a client's right of defence and they must emanate from independent lawyers, that is to say, lawyers that are not bound to the client by a relationship of employment. Moreover, the protection of confidentiality extends only to written communications exchanged after the Commission initiates the procedure or to earlier written communications which have a relationship to the subject matter of that procedure.

Communications giving legal advice on possible application of Articles 85 and 86 of the EEC Treaty normally involve such a relationship.[1]

Where a firm refuses to produce a document on the ground that it is confidential, it must provide the Commission officials with suitable evidence of its claim, although it is not bound to reveal the contents of the document.

For this purpose it may, for instance, produce certain extracts from the document itself, supply other documents, make a formal statement concerning the subject matter of the document, provide written details on its contents or use any other method suited to the circumstances of the case. On the basis of the evidence produced by the firm, the Commission inspectors check whether the document is of such a nature

[1] Case 155/75 *AMS* 1982 ECR 1575.

that it must be treated as confidential. If they consider that this has not been shown, they may require further evidence. Where the firm refuses or the inspectors do not regard the further evidence as cogent, they draw up a minute which must be signed by both parties and, if present, the representative of the competent national authority. The firm receives a copy of the minute.

Where the Commission is not satisfied that the confidential nature of the documents in question has been proved, it is for the Commission to order, under Article 14(3) of Regulation No 17, production of the communications in question and, if necessary, to impose a fine or a periodic penalty payment on the firm, also under Regulation No 17. In this way the Commission censures the firm's refusal to provide the additional proof the Commission needs to establish the confidential nature of the documents, or the refusal to produce communications which the Commission considers not protected by legal privilege.

The firm may appeal to the Court of Justice and at the same time apply for suspension of application of the decision requiring the firm to produce the disputed document or imposing a fine or periodic penalty payment.

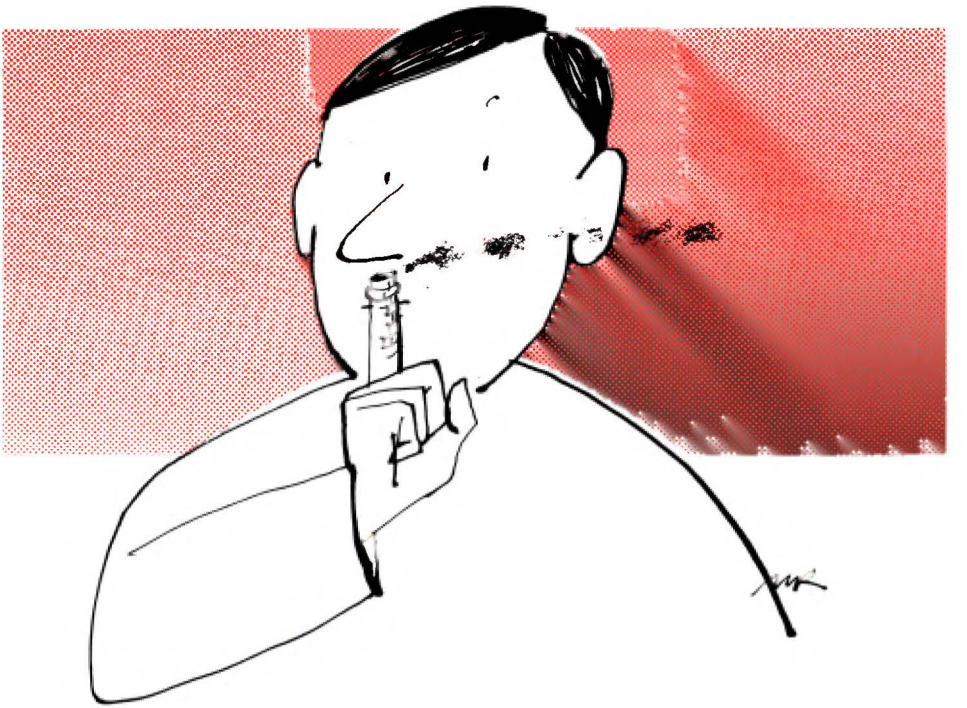
## 2. *Business secrecy*

Article 20 of Regulation No 17 restricts the Commission's use and disclosure of information obtained in the course of its investigations.

### (a) Limits on the Commission's use of information obtained

Article 20(1) of Regulation No 17 lays down that the information acquired by the Commission as a result of requests for information and investigations may be used only for the purpose of the relevant request or investigation: in other words, to establish the existence of any infringements of the Community's competition rules. Firms are thus secure in the knowledge that the information will not be disclosed for other purposes, such as investigations by national authorities of matters concerning taxation, criminal offences, or customs duties.

Assistance given by officials from the competent authorities of the Member States to Commission officials in the course of inspections should in no way discourage firms from producing the business records required or giving the oral explanations requested by the Commission officials, since this information may not be used for the purpose of applying national law.



**(b) Limits on the Commission's disclosure of information obtained**

Article 20(2) of Regulation No 17 further prohibits the Commission and its officials from disclosing the information acquired where it is of a kind covered by the obligation of business secrecy. This means business secrets and information concerning firms' trade relations.

Firms obviously have a completely legitimate interest in preventing disclosure of their business secrets. The Commission takes due account of this when, with the aim of ensuring that firms pay due regard to its powers of investigation, it decides to publish its decisions requiring the production of information, ordering on-the-spot investigations or imposing penalties on account of firm's resistance. The Commission decides to publish its decisions in the public interest, where, for example, a particular point of law is at issue. Clearly, the publication of its decisions may help the Commission to ensure application of the competition rules in so far as firms are properly informed about the powers of investigation it possesses.

The assurance thus given to the firms involved that their interests concerned with the maintenance of business secrecy will not be placed at risk (since the disclosure of confidential information is prohibited) enables the Commission to acquire the maxi-

mum information needed for fulfilment of its monotoring task, without firms being able to withhold their consent.

A firm could not refuse to supply information even on the ground that the persons supplying such information could be convicted under the criminal law of a State where the disclosure of business secrets is a criminal offence. Even where the supply of information may be regarded, under the criminal law of that State, as a disclosure prohibited on pain of penalties, this cannot stand in the way of fulfilment of the obligations imposed on firms by the Commission in its efforts to ensure observance of the competition rules.

Similarly, a trust company cannot refuse to comply with a decision ordering investigations on the ground that it cannot supply information to the Commission without the explicit authorization of its principals.[1]

## 3. *Judicial review of Commission decisions concerning investigations*

Where the Commission adopts decisions requiring information from firms or ordering them to submit to investigations, the firms may bring an action for annulment before the Court of Justice of the European Communities in accordance with Article 173 of the EEC Treaty.

To allow for the effective use of this appeal procedure, the above-mentioned decisions must refer to the right to have the decision reviewed by the Court of Justice (Articles 11(5) and 14(3) of Regulation No 17).

The Court has unlimited jurisdiction in actions brought against decisions imposing fines or periodic penalty payments for failure to comply with requests for information and investigations ordered by way of decision; the Court may quash, reduce or increase the fine or penalty payment imposed.

[1] Decision of 31 January 1979 — *Fides* (OJ L 57, 8. 3. 1979, p. 33).

# VI — After the investigation:[1] the final decision

On the basis of the facts thus assembled, the Commission assesses whether the firms investigated have or have not infringed Articled 85 and 86. It may then declare the restrictice practice prohibited (Article 3 of Regulation No 17), or issue a negative clearance (Article 2), or grant an exemption (Article 6).

## *1. Initiating proceedings*

Any reference to 'initiation of proceedings' pursuant to Articles 2, 3 or 6 of Regulation No 17 does not refer to just any step taken by the Commission, such as acknowledging receipt of an application for negative clearance or a notification for the purpose of obtaining an exemption; the initiation of proceedings is a formal act by which the Commission announces its intention of adopting a decision under these articles.

It takes the form of a Commission letter sent to the authorities in the Member States, notifying them of the Commission's intention of reaching a decision on the lawfulness of the conduct of the firms concerned:

> Case No . . .
>
> Initiation of proceedings
>
> Dear Sir,
>
> I have the honour to inform you that on . . . the Commission initiated proceedings in the case referred to above, with the legal effects flowing from Article 9(3) of Council Regulation No 17.
>
> Yours faithfully,

[1] The action taken following an investigation will be described only briefly here. The reader may wish to refer to the booklet already mentioned, *EEC Competition rules — Guide for small and medium-sized enterprises.*

The effect of Article 9(3) referred to is that once the Commission has initiated proceedings under Articles 2, 3 or 6, the national authorities are no longer competent to apply Articles 85(1) and 86 of the Treaty to the firms concerned.

## 2. *Decisions declaring anti-competitive practices prohibited*

Before an anti-competitive practice can be declared prohibited, there must first be a preparatory stage in which the Commission holds an open debate with the firms concerned, giving them the opportunity of stating their point of view, so as to guarantee the rights of the defence.

The powers of investigation conferred on the Commission by Articles 11 and 14 of Regulation No 17 do not come to an end when this preparatory stage opens, however.

The Commission may, and in some cases must, carry out further investigations during the preparatory stage, if during the proceedings it becomes clear that this is necessary.

The Commission will frequently make a request for information under Article 11 in order to check statements made by a firm in the course of the preparatory stage, or to complete its information before deciding whether or not the firm has in fact committed the alleged infringement.

The Commission has gone so far as to make requests for information under Article 11 even after adopting a decision finding that an infringement had been committed, where an action had been brought before the Court of Justice to have the decision annulled.

*Statement of objections*

Once it is in possession of evidence that the firms investigated have committed an infringement of the competition rules, the Commission gives them the opportunity of putting forward their views on the objections to their conduct which it proposes to include in its final decision.

The Commission accordingly sends the firms a statement of objections, informing them of the infringements alleged against them and the action it proposes to take. The statement of objections tells firms that they may present their defence in writing, and then at a hearing.

*Access to files*

To facilitate the exercise of the rights of the defence at this stage of the proceedings, the Commission allows them access to the file on their case at its headquarters.

*Written comments by firms*

If the firms wish to reply to the objections raised against them, they may supply written comments setting out any matter relevant to their defence, within a time limit set by the Commission (usually one or two months, depending on the complexity of the case).

*Hearing*

Where the parties do request a hearing in their written comments, the Commission will let them put forward their arguments orally, if they can show that this could be in their interests or if the Commission proposes to impose fines or periodic penalty payments on them.

As an improvement to the hearing procedures the Commission on 1 September 1982 created the post of Hearing Officer. The Hearing Officer is responsible for the preparation of hearings; he presides over them, and ensures that the firms can present their case as fully as possible on all points he considers relevant.

*Consultation of the Advisory Committee*

After the hearing, the Commission must consult the Advisory Committee on Restrictive Practices and Dominant Positions, which is made up of civil servants from the Member States. The members of the Committee represent their Member States, with whom the Commission operates in close and constant liaison. The Committee is an advisory one: the Commission must consult it, but is not obliged to accept its opinion.

A report of the outcome of the consultative proceedings is annexed to the draft decision.

*Final decision*

After it has completed all these preparatory steps, the Commission is in a position to adopt its final decision in full knowledge of the facts.

If, despite the arguments put forward by firms during the preparatory stage, the Commission takes the view that they have indeed committed an infringement of Articles 85 and 86 of the EEC Treaty, it orders them to bring the infringement to an end at once; and it may impose fines, depending on the gravity and duration of the infringement.

Where the firms have been able to show that there was no infringement, however, the Commission closes the file without adopting a formal decision.

## 3. *Negative clearance and exemption*

Proceedings with a view to the adoption of a final decision do not necessarily lead to a declaration that the practice in question is prohibited: after it has studied the agreements notified to it, the Commission may find they are not prohibited (negative clearance), or grant an exemption from the ban on restrictive practices where, despite restrictions on competition, an agreement does produce economic benefits (exemption).

In either of these cases the proceedings are shorter: there is no statement of objections, because there is no real infringement, and no hearing, unless the Commission asks the firms to delete from the agreements they have notified restrictive clauses which are not indispensable to the attainment of the legitimate objectives, in which case the firms must have the opportunity of showing why they think these clauses are justified.

## 4. *Informal decisions*

Many cases which come before the Commission end in an amicable settlement, particularly if the firms in question voluntarily put an end to the contested practices. The number of formal decisions taken by the Commission is generally about 12 a year, while the amicable settlements reached usually run into hundreds.

The Commission has recently introduced a new procedure intended to speed up the handling of applications for negative clearance by means of an administrative letter closing the file on the case (a 'comfort letter'), whose declaratory value has been enhanced by means of publication in the Official Journal of the Communities. These letters inform the parties that the Commission does not propose to take any action under the competition rules, and that the file will therefore be closed.

This new procedure has also been extended to notifications made for the purpose of obtaining an exception pursuant to Article 85(3) of the Treaty. In appropriate cases

the Commission publishes the essential contents of the notified agreement, inviting comments from third parties. In the light of the reactions to the publication it decides either to close the procedure by way of an administrative letter, so as to simplify and shorten the procedure, or to carry on with proceedings culminating in a formal decision. An administrative letter will be sent only if the undertakings involved agree to the procedure being closed in this manner. It states that the Directorate-General for Competition does not consider it necessary to follow the formal procedure through to the proposal of a decision under Article 85(3) in accordance with Article 6 of Regulation No 17.

These letters are merely administrative papers, which do not have the binding effects of a decision, but they may serve as an indication both to the parties and to national courts.

# VII — Judicial review of final Commission decisions

Final Commission decisions on the lawfulness of restrictive practices within the scope of the EEC competition rules are subject to review by the Court of Justice of the European Communities. Firms to whom decisions are addressed, or who are otherwise directly concerned, may bring an action to have the decision annulled pursuant to Article 173 of the EEC Treaty. The Court has also been given unlimited jurisdiction in regard to Commission decisions imposing financial penalties: the Court may set them aside, reduce them, or increase them.

The Court of Justice may, if it considers that circumstances so require, order that application of the decision be suspended.

Commission decisions imposing a fine or periodic penalty payment are enforceable under Article 192 of the EEC Treaty: they can be enforced under the rules of civil procedure in force in the State in which the firm concerned is based, so that it may be in the interests of a firm which is contesting a fine or periodic penalty payment to ask the Court to make an order of this kind suspending application of the decision.

# ANNEXES

# ANNEX I a)

This form and the supporting documents should be forwarded in ten copies together with proof in duplicate of the representative's authority to act.

If the space opposite each question is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM C

To the
**COMMISSION**
**OF THE EUROPEAN COMMUNITIES**
Directorate-General for Competition
200, rue de la Loi – 1049 Brussels

**Application for initiation of procedure to establish the existence of an infringement of Articles 85 or 86 of the Treaty, submitted by natural or legal persons pursuant to Article 3 of Council Regulation No. 17 of 6 February 1962**

***I. Information regarding parties concerned:***

1. Name, forenames and address of person submitting the application. If such person is acting as a representative, state also the name and address of his principal; for an undertaking, or association of undertakings or persons, state the name, forenames and address of the proprietors or members; for legal persons, state the name, forenames and address of their legal representatives.

   Proof of representative's authority to act must be supplied.

   If the application is submitted by a number of persons or on behalf of a number of persons, the information must be given in respect of each applicant or principal.

2. Name and address of persons to whom the application relates.

## II. Details of the alleged infringement:

Set out in detail, in an Annex, the facts from which, in your opinion, it appears that there is infringement of Articles 85 or 86 of the Treaty.

Indicate in particular:

1. The practices of the undertakings or associations of undertakings to which this application relates which have as their object or effect the prevention, restriction or distortion of competition or constitute an abuse of a dominant position within the common market; and

2. To what extent trade between Member States may be affected.

## III. Existence of legitimate interest:

Set out — if necessary in an Annex — the grounds on which you claim a legitimate interest in the initiation by the Commission of the procedure provided for in Article 3 of Regulation No. 17.

## IV. Evidence:

1. State the names and addresses of persons able to testify to the facts set out, and in particular of persons affected by the alleged infringement.

2. Submit all documentation relating to or directly connected with the facts set out (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars).

3. Submit statistics or other data relating to the facts set out (and relating, for example, to price trends, formation of prices, terms of transactions, terms of supply or sale, boycotting, discrimination).

4. Where appropriate, give any necessary technical details relating to production, sales, etc., or name experts able to do so.

5. Indicate any other evidence of the existence of the alleged infringement.

**V.** Indicate all approaches made, and all steps taken, prior to this application, by you or any other person affected by the practice described above, with a view to terminating the alleged infringement (Proceedings commenced before national judicial or administrative bodies, stating in particular the reference numbers of the cases and the results thereof).

---

We, the undersigned, declare that the information given in this form and in the ..... Annexes thereto is given entirely in good faith.

At .....

Signed:

.....

.....

.....

.....

.....

.....

.....

.....

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Directorate-General for Competition

Brussels .....
200, rue de la Loi

To

## Acknowledgement of Receipt

(This form will be returned to the address inserted above if one copy thereof is completed by the applicant)

Your application for a finding of infringement of Articles 85 or 86 of the Treaty, dated .....

(a) Applicant:

.....

.....

(b) Infringing parties

.....

.....

was received on .....

and registered under No. IV .....

*Please quote the above number in all correspondence.*

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Directorate-General for Competition

FORM C

# Explanatory Note

## to the form of application for the finding of an infringement

Legal or natural persons claiming a legitimate interest may make an application formally inviting the Commission to find that certain practices constitute an infringement of Articles 85 or 86 of the Treaty. For this purpose they may use the form provided and send it to the Commission. The information requested in the form may also provide the basis for a communication of facts only or for a more indication that certain practices contravene the said Articles, without formal application being made for any procedure to be commenced. In such a case the Commission may, on the basis of the facts alleged, open of its own motion an enquiry and, where appropriate, find that there has been infringement.

### Information under heading No. I

The details supplied under this heading must enable the persons or undertakings or associations of undertakings or persons concerned to be identified, together with their addresses so that the Commission knows to whom to address itself when requesting information, or when verifying or having it verified. In particular, the capacity in which the applicant is acting must be stated, i.e. whether as an undertaking or consumer, member of a commercial company or firm, legal representative of a legal person, or authorized representative of an undertaking or association etc.

The undertakings or associations of undertakings to which the application relates and which the applicant believes to be parties to the infringement must be indicated by name.

### Information under heading No. II

As it forms the basis for the subsequent procedure, the information requested under this heading must be set out in detail and in logical sequence. The product which is the subject of the practices in question must be indicated, together with the effect of the said practices in the applicant's sphere of activity.

### Information under heading No. III

The information supplied under this heading should show in what way the applicant has a legitimate interest in the initiation of a procedure. All natural or legal persons and all associations of such persons who are directly or indirectly affected by the infringement may claim such an interest. Undertakings or associations of undertakings, at whatever stage of economic activity they operate, may be affected, as may private individuals as consumers or groups of consumers. Detailed information is necessary to enable the Commission to determine whether the applicant has a legitimate interest.

If the Commission rejects the application on the ground that the applicant appears to have no legitimate interest, it may, on the basis of the facts set out, initiate of its own motion the procedure for ascertaining whether infringement has taken place.

### Information under heading No. IV

The information requested under this heading relates to all evidence known to the applicant which can be produced to support the accuracy of the facts set out under heading No. II. This will avoid the extensive enquiries which the Commission would otherwise have to make, and the delays associated therewith, which would slow down the progress of the procedure.

The names and addresses of the persons referred to must be given exactly so that they may be contacted without difficulty. Moreover such persons should be able to testify to the facts set out from their own personal knowledge.

Documents should as far as possible be originals.

Apart from the examples given above, applicants may submit to the Commission any evidence which they consider appropriate.

### Information under heading No. V

The information requested under this heading is intended to acquaint the Commission with all the measures which to the applicant's knowledge have been taken up to the present time with the object of bringing about the cessation of the practices in question.

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# ANNEX II a)



This form and the supporting documents should be forwarded in eleven copies together with proof in duplicate of the representative's authority to act.

If the space opposite each question is insufficient, please use extra pages, specifying to which item on the form they relate.

**FORM A/B**

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES
Directorate-General for Competition
Rue de la Loi, 200
**1049 BRUSSELS**

**A. Application for negative clearance pursuant to Article 2 of Council Regulation No. 17 of 6 February 1962 relating to implementation of Article 85(1) of the Treaty.**

**B. Notification of an agreement, decision or concerted practice under Articles 4 and 5 of Council Regulation No. 17 of 6 February 1962.**

I. *Information regarding parties*

1. Name, forenames and address of person submitting the application or notification. If such person is acting as representative, state also the name and address of the undertaking or association of undertakings represented and the name, forenames and address of the proprietors or partners or, in the case of legal persons, of their legal representatives.

   Proof of representative's authority to act must be supplied.

   If the application or notification is submitted by a number of persons or on behalf of a number of undertakings, the information must be given in respect of each person or undertaking.

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2. Name and address of the undertakings which are parties to the agreement, decision or concerted practice and name, forenames and address of the proprietors or partners or, in the case of legal persons, of their legal representatives (unless this information has been given under I(1)).

   If the undertakings which are parties to the agreement are not all associated in submitting the application or notification, state what steps have been taken to inform the other undertakings.

   This information is not necessary in respect of standard contracts (see Section II 1(b) below).

---

3. If a firm or joint agency has been formed in pursuance of the agreement, state the name and address of such firm or agency and the names, forenames and addresses of its legal or other representatives.

---

4. If a firm or joint agency is responsible for operating the agreement, state the name and address of such firm or agency and the names, forenames and addresses of its legal or other representatives.

   Attach a copy of the statutes.

---

5. In the case of a decision of an association of undertakings, state the name and address of the association and the names, forenames and addresses of its legal representatives.

   Attach a copy of the statutes.

6. If the undertakings are established or have their seat outside the territory of the common market (Article 227(1) and (2) of the Treaty), state the name and address of a representative or branch established in the territory of the common market.

II. *Information regarding contents of agreement, decision or concerted practice:*

1. If the contents were reduced to writing, attach a copy of the full text unless (a), (b) or (c) below provides otherwise.

   (a) Is there only an outline agreement or outline decision?

   If so, attach also copy of the full text of the individual agreements and implementing provisions.

   (b) Is there a standard contract, i.e., a contract which the undertaking submitting the notification regularly concludes with particular persons or groups of persons (e.g., a contract restricting the freedom of action of one of the contracting parties in respect of resale prices or terms of business for goods supplied by the other contracting party)? If so, only the text of the standard contract need be attached.

   (c) If there is a licensing agreement of the type covered by Article 4(2)(2b) of Regulation No. 17, it is not necessary to submit those clauses of the contract which only describe a technical manufacturing process and have no connection with the restriction of competition; in such cases, however, an indication of the parts omitted from the text must be given.

2. If the contents were not, or were only partially, reduced to writing, state the contents in the space opposite.

---

3. In all cases give the following additional information:

(a) Date of agreement, decision or concerted practice.

(b) Date when it came into force and, where applicable, proposed period of validity.

(c) Subject: exact description of the goods or services involved.

(d) Aims of the agreement, decision, or concerted practice.

(e) Terms of adherence, termination or withdrawal.

(f) Sanctions which may be taken against participating undertakings (penalty clause, expulsion, withholding of supplies, etc.).

---

III. *Means of achieving the aims of the agreement, decision or concerted practice:*

1. State whether and how far the agreement, decision or concerted practice relates to:

— adherence to certain buying or selling prices, discounts or other trading conditions

— restriction or control of production, technical development or investment

— sharing of markets or sources of supply

— restrictions on freedom to purchase from, or resell to, third parties (exclusive contracts)

— application of different terms for supply of equivalent goods or services.

---

2. Is the agreement, decision or concerted practice concerned with supply of goods or services

(a) within one Member State only?

(b) between a Member State and third States?

(c) between Member States?

---

IV. *If you consider Article 85(1) to be inapplicable and are notifying the agreement, decision or concerted practice as a precaution only:*

(a) Please attach a statement of the relevant facts and reasons as to why you consider Article 85(1) to be inapplicable, e.g., that the agreement, decision or concerted practice

1. does not have the object or effect of preventing, restricting or distorting competition; or

2. is not one which may affect trade between Member States.

(b) Are you asking for a negative clearance pursuant to Article 2 of Regulation No. 17?

---

V. *Are you notifying the agreement, decision or concerted practice, even if only as a precaution, in order to obtain a declaration of inapplicability under Article 85(3)?*

If so, explain to what extent

1. the agreement, decision or concerted practice contributes towards

— improving production or distribution, or

— promoting technical or economic progress;

---

2. a proper share of the benefits arising from such improvement or progress accrues to the consumers;

---

3. the agreement, decision or concerted practice is essential for realising the aims set out under 1 above; and

---

4. the agreement, decision or concerted practice does not eliminate competition in respect of a substantial part of the goods concerned.

---

VI. *State whether you intend to produce further supporting arguments and, if so, on which points.*

---

The undersigned declare that the information given above and in the ..... annexes attached hereto is correct. They are aware of the provisions of Article 15(1)(a) of Regulation No. 17.

.....

Signatures:

..... .....

..... .....

..... .....

EUROPEAN COMMUNITIES
COMMISSION

Directorate-General for Competition

Brussels, .....

200, rue de la Loi

To

## Acknowledgement of receipt

(This form will be returned to the address inserted above if completed in a single copy by the person lodging it).

Your application for negative clearance dated .....

Your notification dated .....

concerning:

(a) Parties:

1. .....

2. ..... and others

(There is no need to name the other undertakings party to the arrangement)

(b) Subject .....

.....

.....

(brief description of the restriction on competition)

was received on .....

and registered under No. IV .....

Please quote the above number in all correspondence.

# ANNEX II b)

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Directorate-General for Competition

FORM A/B

## Explanatory Note

### A. Application for negative clearance

Any undertaking which is a party to an agreement, decision or concerted practice and which, under Article 2 of Regulation No. 17 of 6 February 1962, applies for a negative clearance with regard to Article 85 (1) of the Treaty establishing the European Economic Community, must complete Form A/B, replying in the affirmative to question IV (b). In dealing with applications for negative clearance the Commission will make its decision essentially on the basis of information supplied by the undertakings themselves, whilst taking into account information supplied by third parties and other information which is already in its possession or comes to its attention.

An application for negative clearance cannot serve as a notification.

### B. Notification and application for exemption under Article 85 (3)

Any undertaking which is a party to an agreement, decision or concerted practice covered by Article 85 (1) and wishes to invoke the provisions of Article 85 (3) must complete Form A/B, replying in the affirmative to question V (1). To be in order, the notification must contain the information requested in the form. However, the form need only be completed and sent in by one participating undertaking or by its representative. Notification is not obligatory in the case of agreements, decisions and concerted practices falling within Article 4 (2) of Regulation No. 17. These include, for example, agreements in respect of which the undertakings party thereto are established in one Member State only and which do not relate to imports or exports, licensing agreements, agreements relating to standards or types, and agreements for the carrying out of joint research. However, so that their legal status may be determined, and the benefit of the provisions of Article 15 (5) of the Regulation be obtained in respect of them, such agreements may be voluntarily notified, also by using Form A/B.

A notification made for the purpose of obtaining the legal advantages conferred by Article 85 (3) will not be treated as an admission on the part of the persons concerned that the conditions of Article 85 (1) are fulfilled. In cases where there is doubt on this point, the persons concerned may set out under heading No. IV of the form the facts and grounds which cause them to question whether Article 85 (1) applies. It is thus possible to submit an application for negative clearance (replying to question IV (b) in the affirmative) and at the same time make a notification as a precaution only (replying to question V (1) in the affirmative).

#### *Information requested under heading No. I*

The information supplied under this heading must enable the persons and undertakings concerned, and their addresses, to be accurately identified so that the Commission knows to whom to address itself when requesting information, or when verifying or having it verified. If the application or notification is not being made by all the undertakings concerned, details should be given of the manner in which the application or notification has been made known to the other undertakings. Any opinions expressed by the latter may be added.

#### *Information requested under heading No. II*

The information sought under heading No. II should convey, apart from what appears in the Annexes, an outline of the contents of the agreement, decision or concerted practice.

#### *Information requested under heading No. III*

The information sought under heading No. III should describe precisely the means used to achieve the aims of the agreement, decision or concerted practice by the undertakings which are parties thereto. If any means are used other than those listed under this heading, precise details must be given. In cases of notification it is in the interests of the participating undertakings, having regard to the provisions of Article 15 (5) of Regulation No. 17, to reply with the utmost precision to the questions under this heading. Exemption from the fines imposable under Article 15 (2) (a) applies only in respect of actions falling within the activities described in the notification.

#### *Information requested under heading No. IV*

In supplying the information requested under heading No. IV the persons concerned must set out the reasons why the agreement, decision or concerted practice:

*a)* does not have as its object or effect the prevention restriction or distortion of competition within the Common Market;

*b)* is not likely to affect trade between Member States.

#### *Information requested under heading No. V*

In supplying the information requested under heading No. V the undertakings concerned must set out the arguments in support of their application for Article 85 (3) to be applied.

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To substantiate the application of Article 85 (3), an Annex must be supplied containing all such information, data and descriptions as will enable the Commission to find:

*a)* that the agreement, decision or concerted practice has, for example, as its object or effect:

- the improvement of the quality or distribution of the product,
- the introduction of new technical processes,
- economic progress (indicate in this case what kind of progress; for example, reduction in costs);

*b)* that the improvements and progress achieved benefit not only the parties to the agreement, decision or concerted practice but also the consumers; this could be demonstrated, for example, by the fact that the price of the product or service has been reduced;

*c)* that the measures taken or the means employed by the undertakings which are parties to the agreement, decision or concerted practice are indispensable in order, for example, to reduce costs or improve the quality of the product or service;

*d)* that there are, for example, a large number of independent undertakings, not bound by the agreement, decision or concerted practice, who sell or supply on a considerable scale similar or identical products or services, and that as regards a substantial volume of the products or services competition is accordingly not eliminated.

In the interests of the undertakings concerned, the information supplied by them should be as complete as possible so as to enable the Commission to consider whether the conditions of Article 85 (3) are satisfied.

In deciding whether or not the conditions of Article 85 (3) are fulfilled, the Commission will have regard essentially to economic considerations. For this reason participating undertakings should give the completest possible survey of their economic situation. The points set out below may serve to indicate the kind of information which could be of importance to the Commission in coming to a decision. Obviously it will not be necessary in every case to give all the items of information mentioned; it will be decided according to each particular case which items are relevent. In the last resort the Commission will decide and where necessary will request additional information. However, in their own interests, undertakings should give the completest possible survey in order to avoid requests for additional information. The most important of the questions which could influence a decision are those concerning:

*a)* the size of the participating undertakings, their turnover for the product or service in question, and what share it represents of the total production or supply of the product or service in question;

*b)* the economic situation on the market concerned;

*c)* the structure of the market concerned (degree of concentration, problems of adapting in the Common Market, etc.);

*d)* the volume of trade between Member States on the market concerned and the influence of the agreement on such trade;

*e)* effects of the agreement on the market (for example, on prices, quality, quantities, distribution methods, consumer choice);

*f)* the degree of competition subsisting between the parties under the agreement;

*g)* the degree of competition subsisting between persons who are not parties to the agreement.

Such information may subsequently be demanded at any time if it is not included in the notification.

The form makes provision for further information to be supplied; in particular it is possible to send later on, either supporting documents or actual answers to the questions listed above.

Undertakings may, of course, supply any other information which they consider may be useful to give a complete picture of the case.

### *Information requested under headings IV and V*

In the form it is stated expressly that the information must be correct. The signatories to the application declare expressly that they are aware of the provisions of Article 15 (1) (a) of Regulation No. 17 which provides:

"The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5 000 units of account where, intentionally or negligently, they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Articles 4 or 5".

## ANNEX III

# *Examples of grounds for requests for information and investigations*

## Request for information under Article 11 of Regulation No 17/62

'Whereas:

. . .

The information the Commission has requested is 'necessary' within the meaning of Article 11(1) of Regulation No 17. The Commission cannot assess any restrictive effects which the agreements and understandings may produce unless it knows their full wording, including the names of the contracting parties, and their commercial grounds.

Whether or not the agreements expressly regulate trade between Member States is irrelevant here. Article 85(1) catches not only agreements whose object is to restrict competition, and which may affect trade between Member States, but also those merely having the effect of doing so, so that an agreement cannot be assessed by reference to its wording alone. Moreover, it is for the Commission to decide whether Article 85 is being infringed. An undertaking asked to supply information on an agreement may not refuse on the ground that in its opinion the agreement has no effect on trade between Member States.

To be able properly to pursue the proceedings, the Commission also needs to know what is the legal form of N, who are its members, what share each of them holds, and who represents N in dealings with third parties'.[1]

## Investigation under Article 14 of Regulation No 17/62

'Whereas:

. . .

The Commission has obtained documentary evidence and other information indicating that National Panasonic (UK) Ltd has required trade customers not to re-export National Panasonic and Technics products to other EEC Member States;

The Commission therefore has grounds for believing that National Panasonic (UK) Ltd has participated and is still participating in agreements and concerted practices the object and effect of which is to insulate national markets within the EEC from the competitive effect of parallel imports from other Member States;

If established, the foregoing would constitute a serious infringement of Article 85 of the EEC Treaty . . .

In order for the Commission to ascertain all the relevant facts and circumstances a decision must be adopted requiring National Panasonic (UK) Ltd to submit to an investigation and to produce the requisite business records'.[1]

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[1] Decision not published; this English translation is unofficial.

[2] Decision of 22 June 1979 — *National Panasonic (UK) Ltd (quoted by Mr Advocate-General Warner [1980] ECR 2063).*

## ANNEX IV

# *Example of a request for information in the form of a binding decision*

'THE COMMISSION OF THE EUROPEAN COMMUNITIES,

. . .

whereas:

the Director-General for Competition sent a letter requesting information, which he is duly authorized to do, to Asphaltoïd-Keller SA . . . pursuant to Article 11(3) of Council Regulation No 17;

the Director-General has not yet received any answer to this request for information, and the time limit set for such an answer is long past;

the information requested is necessary in order to enable the Commission to assess whether Article 85 of the EEC Treaty is being complied with;

the Commission considers that for purposes of Article 11(5) of Regulation No 17 one month is sufficient time in which to supply the information;

Article 15(1)(b) and Article 16(1)(c) of Regulation No 17, the text of which is attached as an annex to this Decision, empower the Commission by decision to impose on undertakings or associations of undertakings:

(a) fines, where they . . . do not supply information within the time limit fixed by a decision taken under Article 11(5); and

(b) periodic penalty payments, calculated from the date appointed by the decision, in order to compel them to supply complete and correct information which it has requested by decision taken pursuant to Article 11(5),

HAS ADOPTED THIS DECISION:

*Article 1*

The Commission hereby requests Asphaltoïd-Keller SA . . . to supply the following information and papers . . .

*Article 2*

The information requested in Article 1 shall be supplied within one month of the day on which the addressee is notified of this Decision.

. . .

*Article 4*

This Decision is addressed to Asphaltoïd-Keller SA . . .

Application may be made to the Court of Justice of the European Communities, Luxembourg, for review of this Decision as provided in the Treaty establishing the EEC, and in particular Articles 173 and 185 thereof.'[1]

[1] Decision of 2 July 1981 — *Asphaltoïd-Keller* (OJ L 161, 1971, p. 32; English was not at that time an official language of the Communities, and this English translation is unofficial).

## ANNEX V

# *Decision imposing a periodic penalty payment for delay in supplying information*

'THE COMMISSION OF THE EUROPEAN COMMUNITIES,

. . .

Whereas:

. . .

. . . measures should be taken to limit as far as possible the duration of CSV's refusal to comply with the request for information. Periodic penalty payments should therefore be imposed pursuant to Article 16 of Regulation No 17 for each day beyond a time limit which, having regard to the circumstances of the case, may reasonably be set at 80 days from the notification of this Decision. In view of the size of the firms concerned and of the grounds for their refusal to supply information, the amount of the penalty payment may reasonably be fixed at the equivalent in Dutch florins of 1 000 units of account per day of delay. The calculation of the sum due, taking into account the date on which the liability to pay commences, shall be reserved for a later decision of enforcement.

HAS ADOPTED THIS DECISION:

*Article 1*

Centraal Stikstof Verkoopkantoor BV (CSV) shall forward to the Commission:

. . .

*Article 2*

The information called for in Article 1 shall be supplied within 80 days from the day on which the addressee receives this Decision.

*Article 3*

In conjunction with the obligation to supply the information specified in Article 1 there shall be imposed a periodic penalty payment of the equivalent in Dutch florins of 1 000 units of account per day of delay beginning on the 81st day following that of the notification of this Decision.

*Article 4*

This Decision is addressed to Centraal Stikstof Verkoopkantoor BV, Thorbeekelaan 360, 2025 The Hague, The Netherlands.

Application may be made to the Court of Justice of the European Communites, Luxembourg, for review of this Decision as provided in the Treaty establishing the European Economic Community, and in particular in Articles 173 and 185 thereof'.[1]

[1] Decision of 25 June 1976 — CSV OJ L 192, p. 27.

# ANNEX VI

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Directorate-General for Competition

Brussels, .....

## AUTHORISATION TO INVESTIGATE

Mr. .....

holder of internal service pass No. .....

is hereby authorized to carry out an investigation at .....

.....

for the purpose of .....

.....

.....

.....

To this end, he has been invested with the powers set out in Article 14 Paragraph 1 of Council Regulation No. 17/62, of 6 February 1962 (Official Journal of the European Communities No. 13 of 21 February 1962).

The Commission, with reference to Article 14 Paragraph 2 of Council Regulation No. 17/62, hereby draws attention to the provisions of Article 15 Paragraph 1 (c) of that Regulation (1).

For the Commission,

(1) *The Commission may, by decision, impose fines of from 100 to 5000 units of account on undertakings or associations of undertakings which, while submitting to an investigation, intentionally or negligently produce the required books or other business records in incomplete form (Article 15 Paragraph 1 of Regulation No. 17/62 of the Council of the EEC).*

11743/1973

Provisional address: Rue de la Loi 200, B–1040 Brussels – Telephone 35 00 40-35 80 40 – Telegraphic address: «COMEUR Brussels» – Telex: «COMEURBRU 21 877»

## ANNEX VII

# *Decision requiring a firm to submit to an investigation*

'THE COMMISSION OF THE EUROPEAN COMMUNITIES,

. . .

Whereas:

There are sufficient grounds for suspecting that agreements for the maintenance of local prices and for restricting interpenetration are being applied on the common market for heavy forgings weighing over four tonnes. Such agreements and restrictions are contrary to Article 85 of the EEC Treaty, as is the contract-sharing which is also suspected.

In order to ascertain the facts the Director-General for Competition gave orders on 14 January 1977 that investigations should be made at several undertakings and associations of undertakings pursuant to Article 14 of Regulation No 17.

The checks which were due to be carried out on 18 January 1977 at the Vereinigung deutscher Freiformschmieden (hereinafter called 'the Union'), in the presence of a representative of the competent German authorities, could not be carried out because the Union refused to submit to the investigation unless they were authorized by a Decision of the Commission of the European Communities.

A Decision must therefore be adopted requiring the Union to submit to the investigation and in particular to allow the requisite business records to be examined.

Articles 15(1)(c) and 16 (1)(d) of Regulation No 17, the full texts of which are annexed to this Decision, empower the Commission by decision to take action against undertakings by:

(a) imposing fines where undertakings intentionally or negligently produce the required books or other business records in incomplete form during investigations under Article 14, or refuse to submit to an investigation ordered by decision pursuant to Article 14 (3);

(b) imposing periodic penalty payments calculated daily from the day appointed by the Decision, in order to compel them to submit to an investigation which it has ordered by decision pursuant to Article 14 (3).

HAS ADOPTED THIS DECISION:

*Article 1*

(1) The Vereinigung deutscher Freiformschmieden is hereby required to allow an investigation to be made in its business premises in Düsseldorf. In particular, it is required to allow the Commission's officials authorized for the purpose of this investigation to enter its premises during normal office hours and to produce the requisite business records for examination by those officials.

(2) . . .

*Article 2*

The investigation shall be carried out in the business premises of the Union in Düsseldorf and shall begin on 13 December 1977.

*Article 3*

This Decision is addressed to the Vereinigung deutscher Freiformschmieden, Düsseldorf. It shall be notified by being handed over personally to a representative of the Union by the Commission's officials authorized for the purpose of the investigation immediately before the investigation is to begin.

*Article 4*

Proceedings against this Decision may be instituted in the Court of Justice of the European Communities in Luxembourg in accordance with Article 173 of the EEC Treaty. Pursuant to Article 185 of the EEC Treaty, such proceedings shall not have suspensory effect'.[1]

[1] Decision of 8 December 1977 — *Vereinigung deutscher Freiformschmieden* (OJ L 10, 13. 1. 1978, p. 32).

## ANNEX VIII

# *Minute of notification of Commission Decision*

On . . . at . . . o'clock, the undersigned:

. . .

officials of the Directorate-General for Competition of the Commission of the European Communities,

and holders of service cards nos . . . and . . .

presented themselves at the premises of the following undertaking:

. . .

in the presence of Mr . . .

representing the competent authority of the relevant Member State for the purpose of Article 14(4) of Regulation No 17.

The officials notified to the above-mentioned company the decision adopted on . . . by the Commission of the European Communities in application of Article 14(3) of Regulation No 17 of the Council of 6 February 1962 (Official Journal of the European Communities, No 13 of 21 February 1962) and handed a certified copy of the original to Mr . . .

in his capacity as . . .

Mr . . . signed the present minute as an acknowledgement of notification of the said decision.

Done at . . .

Commission officials

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# EUROPEAN COMMUNITIES - INFORMATION

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Højbrohus
Østergade 61
Postbox 144
1004 København K
Tlf.: 14 41 40

DEUTSCHLAND

Zitelmannstraße 22
5300 Bonn
Tel. 23 80 41

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Telex 5218135

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61, rue des Belles-Feuilles
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GRÈCE

2, Vassilissis Sofias
T.K. 1602
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NEDERLAND

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Den Haag
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London SW1P 3AT
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Windsor House
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THAILAND

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UNITED STATES

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Suite 707
Washington, DC 20037
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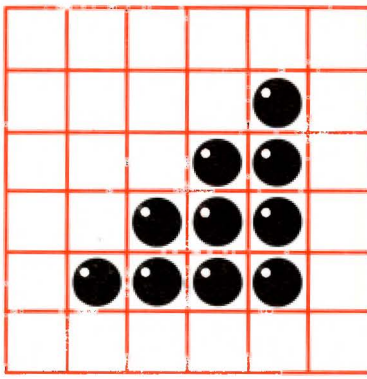

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