

Facts are chieils that winna ding*

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I. Introduction

This essay reflects on how facts are established for purposes of European competition cases, how these facts are tested when they are inconsistent or disputed, and what improvements might be made. After noting some early characteristics of the Brussels enforcement regime, I describe the means currently available to gather facts, and will note that the Commission is armed with wide, effective and intrusive powers of enquiry, which it uses vigorously. I have picked a few examples of factual controversies to illustrate fact-handling problems (not to re-argue whether the outcome was right on the merits). What should we conclude from the fact that one competition authority or court decides one way, and another reaches a quite different factual conclusion? Both cannot be right, and divergences suggest that different procedures may lead to different outcomes.

In the concluding section, I suggest that as there is a spectrum of different situations where competition law is enforced, ranging from non-confrontational mergers to condemnations and severe punishments, so fact-finding processes could be calibrated to the needs of each situation.

II. Early Practice

In my younger days in Brussels, the European Commission carefully selected which cases would be carried forward to one of its rare decisions. Decisions were chosen as a vehicle to advance the law. They were rarely principally an answer to a specific controversy or problem. The Commission often chose to take up cases on parallel trade, on market integration and on horizontal technical concertation which was basically acceptable (bi-annual trade fairs were a favourite target). Since textual infringements without proven marketplace effects were sufficient to constitute the breach, it was not necessary to investigate the facts exhaustively. The jurisdictional requirement of effect on trade between Member States was almost always satisfied: effects could be the subject of hypothesis. Some decisions took a very long time to emerge (five years was common), and *Ford Agricultural Tractors*,¹ an extreme case, took 17 years to complete. Perfection was the goal of the Commission drafters, under the stern supervision of the Legal Service.



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* The stanza from the 1786 satirical poem "A Dream" by Robert Burns reads thus in the original: "But facts are chieils that winna ding, An' downa be disputed." A modern English translation would read: "Facts are fellows who will not be shaken, and cannot be disputed."

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We are now a far cry from the days in which competition decisions were vehicles for making new law, where formal decisions might number less than ten in one year, and cartels were rarely prosecuted. Broad consensus has developed on a number of key legal principles. In most merger cases and indeed many cases under Article 101 TFEU, only the facts remain.

In abuse of dominance cases, the facts were trumpeted. Dominance cases were no less emotional in those early days than they are now. In cases like *TetraPak*,² *Hoffmann-La Roche*³ and *United Brands*,⁴ there was a smell of sulphur in the air as the facts were described in a fashion which left little doubt as to the abuse, as to the dominance and as to the emotional guilt of the accused company. An innocent reader would wonder how the targets managed to get away with such heinous conduct for such a long time. With hindsight, the facts were probably just as slippery and just as controversial as any today.

III. A New Approach to Drafting Decisions

The advent of the Merger Regulation in 1989 required the preparation of a quite different style of decision.⁵ The Commission was required to take quickly, within five weeks or so, a short decision of five to ten pages that had to be good enough to withstand judicial review. There was a real doubt as to whether the Commission was up to the challenge. But in a short space of time, it became evident that the task had been well-allocated. Those five weeks would involve intense dialogue and controversy, gathering the information, ingesting it, analysing it, and producing conclusions: short, business-like, getting to the essentials briskly. I suggest that in merger cases, despite some spectacular judicial setbacks, the Commission is doing better than in other cases, because the structure of decision-making purifies and intensifies the dialogue and makes it easy and necessary to focus on the core facts. Is there a risk of foreclosure of the fifth biggest producer if the first and third join forces? Will customers suffer? Are the complaints mere grumbings by lazy competitors who are less efficient and ambitious?

One major new source of factual allegations is the confession: the system of according immunity from criminal penalties to the first person who makes a confession of participation in a cartel has thrived in the United States. It has been adopted in Europe, adapted to local needs. The EU version offers immunity from fine or a reduced fine. The regime offers the chance of destabilising cartels by rendering them vulnerable to unpredictable changes of heart by participants (or their employers). The regime also offers a competitor the chance to create immense trouble for its rival, either by accusing it accurately of participation in illegal activities or by embellishing and distorting a description of trivial or imprudent activity by presenting it as grossly infringing.

IV. What Are We Looking For?

Fact-finding today has changed. There is far more information, due to the ease of electronic divulgation. There are more techniques to gather data, as the Commission has been given additional powers of enquiry. There are more sources of information. Competition agencies cooperate with each other intensely and regularly. On-the-spot raids are much more common and more intrusive. There are more experts, economists, specialists in presenting technical information. Economists are regularly members of a large company's team, as are experts in other arts. The volume of material to be consulted is far greater. Files are many times larger than they used to be. We can see much greater sophistication in presenting factual information in a vivid way.

But verbosity does not imply quality; and simplicity does not belie accuracy. I begin this review of how facts are determined with two classic examples drawn from outside the world of competition law, two charts, one helpful, one misleading. The first is a map drawn up by Dr. John Snow recording the location of deaths from cholera in London in 1854.

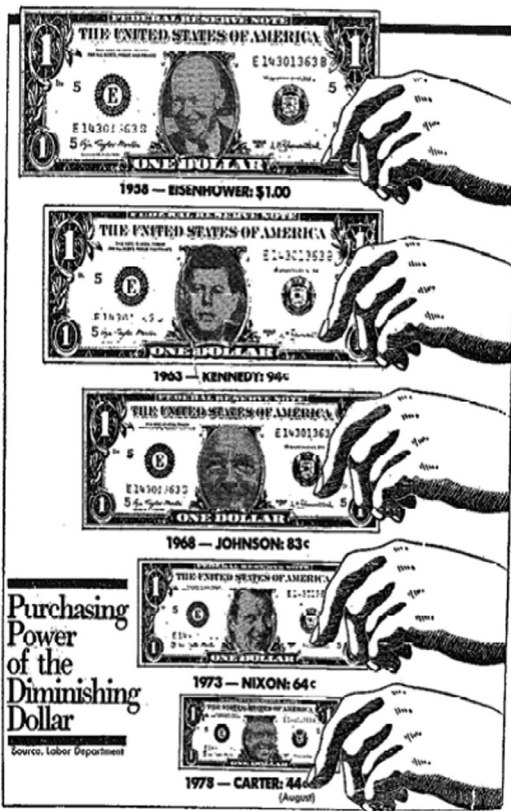


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There were eleven water pumps in the area, each marked with an X. Dr. Snow noted that cholera deaths clustered round the pump in Broad Street (that pump is marked by the X near the "D" of BROAD). He noted that near other pumps there were no deaths or few deaths. The doctor removed the pump handle from the Broad Street pump and the epidemic ended. The graphical presentation illustrated the problem and suggested the remedy.

By contrast, the next figure is an example of a popular political myth, the shrinking banknote. It is commonly argued by those running for political office that the party in power has presided over a shameful decline in the value of the currency. A vivid way of describing this lamentable fact is to show a shrunken banknote, reduced by the supposed diminution of value. I have seen shrinking pounds, dollars and francs in political posters. Thus a change in one dimension is graphically depicted by a reduction in two dimensions: there lies the potential for distortion.

Commonly, a reduction of, say, 10% in value of the currency is reflected by depicting a banknote which is 10% narrower *and* 10% shorter, thus 90x90 as opposed to 100x100. But the note has shrunk to 81%, not 90%, of its predecessor.⁶ The distortion gets worse and worse, as below.



Washington Post, 25 October 1978, page 1

A. Different Kinds of Facts

Analysis of the economic reality of the controversial conduct or proposed merger and the real effects should now dominate the fact-finding exercise. The textual facts are not alone determinative. Competition law disputes will generally turn on a handful of questions of fact, some of which may be hotly disputed. There are several categories of facts, the determination of each of which may call for different tools.

B. Factual Facts

First, simple issues about past events – was Mr X present in the Ritz Hotel in Madrid on 13 January 2006 at the cartel meeting? If so, this can establish a single and continuous infringement of Article 101 TFEU lasting several years. Each year results in an increase of fine of 100%. Correspondingly, a finding that Mr X was not, in fact, present in the Madrid hotel could confirm the interruption of his participation in the cartel.⁷ This could serve to interrupt the infringement, resulting in a considerably lower fine for his employer. As we shall see, there may be evidence suggesting both that he was and was not there that day.

C. Proof of Intention

Second, there is the proof of intention, concertation, planning and subjective intent. Were the prices proposed to wholesalers intended to deter exports? Did the dominant company seek to drive its competitors out of the market? Did Mr X know about the cartel? Did he intend to contribute to the overall common objective of a single and continuous infringement? Did the Brazilian producers agree to stay away from the European market in exchange for comparable restraint on the European side? Intent will require careful interpretation of contemporaneous documents. Leniency statements, questionnaires and dawn raid materials may also throw light on such "subjective" facts.

D. Defining and Understanding the Relevant Market

Does the market include all fruits or just bananas? Is it global, confined to Europe, national or even narrower? The definition of the market can determine whether the merger is approved or blocked. Defining the market can also determine whether a company is dominant. Market definition involves a greater degree of evaluative judgment, and tends to be determined through the use of questionnaires and interviews with experts.⁸

Arguably more important than defining the relevant market is explaining and understanding how the marketplace works. Why do the developers of media players give their products away free?

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What considerations are on the mind of a cardiologist when choosing between a costly but very effective medicine and a cheaper but less successful therapy? What is the economy of a professional sports league?

E. Predictions about the Future, and Warnings of Apocalypse

Fourth, there is prospective analysis and determination of the future effect on competition in merger cases. This will be speculative to a degree and dependent on shades of opinion. Commonly, there will be conflicting opinions, and sometimes harsh disagreement. Future effects will be discerned through questionnaires, expert statements, submissions and advocacy. (Rarely do opposing theorists get instructed to decide between themselves where they do and do not disagree and for what reasons.)

F. Technical Facts

Finally, there are technical facts. What are the relevant costs to assess whether there were sales at a loss and therefore an abuse of dominance? Are there real alternatives to the technology: is it a must-have or a nice-to-have? Is it necessary for third parties to obtain certain technical information to interoperate? Does the ferry company require access to the port in order to compete viably? Would a large increase in parallel trade reduce companies' earnings with a detrimental impact on their research activities? These technical facts can also emerge from documents obtained during dawn raids, questionnaires sent to interested parties, surveys, testimony from experts, and from the correspondence of eloquent lawyers.

V. How Are Facts Gathered?

The entry into force of Regulation 1/2003 gave the Commission more powers to gather facts. How the Commission uses these powers has also changed and is more intrusive than ever before. The Commission asks far more written questions, more detailed, more extensive and more focused than ever before. Deadlines are more severe, penalties are threatened for minor mistakes and penalties are applied if companies fail to reply. It is now possible for the Commission to visit the homes, gardens and cars of individual persons. Inspection visits are now far more of a "rummage" and less of a gentlemanly on-the-spot enquiry than in previous times. Nowadays, dawn raid inspectors decidedly come as prosecutors, tense, tough, expecting to encounter resistance or worse. In this section, I consider these tools and how effective they are in clarifying the facts.

A. Questionnaires

Pursuant to both Regulation 1/2003 (Article 18) and Regulation 139/2004 (Article 11), the Commission is empowered to send so-called requests for information to "undertakings" in order to gather "all necessary information." Third parties such as competitors, suppliers and customers, as well as the principal actors, are routinely questioned for their views on the market or the investigated parties' commercial practices. The Commission makes regular and extensive use of its power to send requests for information. Questionnaires can require the collection, review and production of information, documents and data files. The Commission enjoys a wide margin of discretion in determining the breadth of such requests.⁹

In the context of a merger, parties can be sent five or six questionnaires, each with a large number of questions to elicit market share information, sales figures, product description, future business strategy and their own assessment of the market. Addressees include the merging companies themselves, as well as other companies connected to the market but who may have little interest in whether or not the deal is cleared.

The pharmaceutical sector inquiry illustrates the potential intrusiveness of requests for information. The sector inquiry was launched by the Commission in January 2008, on the basis of a concern that competition was not functioning as it should. As the Commission feared destruction of documents, it began with dawn raids.¹⁰ Then a first round of questionnaires was addressed in March 2008 to 43 originator companies and 27 generic companies. The first questionnaire contained 85 questions and ran to over 40 pages. It solicited a broad range of information including financial information, strategy, regulatory data, product information, details of agreements and information on litigation and disputes. In May 2008 the Commission sent out a second round of questionnaires. Between May and November 2008 there were weekly "clarification" questionnaires, requesting companies to expand on answers that had already been given. The entire industry had to allocate substantial resources, both in terms of time and money, to respond to the Commission's questionnaires. One large company had to give more than one million answers to one questionnaire.

Here are some of the questions contained in the first round (the asterisk represented a defined term):

21. Please explain in detail the selection criteria used over the period from 2000 to 2007 to start research for a new prescription medicine* for human use*. In your explanation, please address specifically the role of (i) the projected market size and your turnover;

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(ii) the position of potential competitors in the same market segment; (iii) the projected risks (please specify the “risks”); (iv) your portfolio and technical capabilities (e.g. biopharmaceutical*) and (v) other factors (please specify). Please provide three representative examples showing how you recently selected to start research for a new prescription medicine* for human use* (e.g. submissions to the board of directors/top management). Please explain whether there were any material changes over the last five years.

44. For each litigation procedure*, please indicate:

a) whether your company* launched a patent infringement action (or any other type of action relating to any of your patents – please specify “other”) against the generic company*; (infringement action/other type of patent-related action/not applicable)

...

e) the product(s)* of your company* and that of the generic company* concerned by the litigation* (note: names of products* must exactly match the names of the products* indicated under question 37);

...

g) for **each** patent identified in the preceding question:

i. the category/categories of the patent (i.e. product, process, formulation, first medical use, second medical use and/or utility patent);

...

l) whether your company* paid a compensation to the generic company*; (yes/no) if yes:

i. whether the compensation was ordered by a court; (yes/no)

...

m) the total cost (in Euros) generated on your side by the litigation* (separately for lawyers fees, man-hours of your company*, other);

...

o) whether the generic company* was at any point in time acquired by your company*; (yes/no)

p) if yes to the preceding question, an explanation of when your company* acquired the generic company* and of the reasons why your company* decided to do so;

....

The Commission enjoys a number of important advantages when asking questions. It can punish non-response; it can insist on answers to embarrassing questions; it can review legal advice; and it can raid premises. These various resources will be examined in turn.

The Commission usually sends a “simple” request for information¹¹ rather than a formal decision, which legally requires the addressee to supply the requested information.¹² There is no obligation to reply to simple requests for information. If the addressee chooses to reply, only incorrect or misleading answers constitute a procedural infringement susceptible of attracting a fine.¹³ By contrast, addressees of a formal decision may be fined for submitting incomplete answers. It often happens that in the course of a dialogue, the company feels tepidly about a matter as to which the Commission is passionate. Either because the responses lack conviction or because the delay in producing them convinces the Commission that the company is being laggardly, a formal decision is the sanction.

The duty to reply to decisions requiring information is notably limited by the right against self-incrimination and the protection of legal professional privilege, a field which has stirred lawyers’ passions since *AM&S v Commission*¹⁴ 30 years ago. When the Commission puts forth an embarrassing question, may it compel a response on pain of penalty? The European Courts in Luxembourg and in Strasbourg have taken rather different approaches to the topic of self-incrimination. The right against self-incrimination is limited to questions that are directly incriminating. It does not extend to purely factual questions (“Did Mr Smith attend a meeting in the Ritz Hotel in Madrid on January 13, 2006?”). In an early case, *Orkem*,¹⁵ the ECJ preferred to ground its findings in the rights of defence rather than to recognise a broad right to silence. It limited the protection to direct self-incrimination,¹⁶ in contrast to the ECtHR finding in *Saunders*¹⁷ where inspectors from the UK Department of Trade & Industry had the power to demand (on pain of penalty) a reply to a question which, if answered truthfully, would be damaging. The ECJ distinguished between “those questions [which] are not open to criticism in so far as the Commission seeks factual clarification as to the subject-matter and implementation of those measures” and those which “*compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove*” or “*which related to the purpose of the action taken and the objective pursued by those measures*.”¹⁸ The ECJ authorised the Commission to request factual information on the circumstances in which meetings with competitors were held or the capacity in which the participants attended. In later judgments, the Court distinguished between questions of a purely factual nature and questions requiring the undertakings to admit participation in an infringement or provide

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their legal assessment of a set of facts.¹⁹ Yet, the Court has stated that the self-incriminating nature of any facts requested should be judged solely by the nature of the question, and not in relation to the evidence which the Commission previously held.²⁰ So deciding if the query asks for facts (and should be answered) or an opinion (and need not be answered) will turn on how the Commission phrases the question.

Legal professional privilege (LPP) allows a client to keep secret from the public authority the advice of the client's lawyer. The European Court of Human Rights has held that the ability to communicate with defence counsel without surveillance is included within the rights of defence guaranteed by Article 6 ECHR.²¹ The Court has also held that non-respect of the legal privilege could constitute a breach of the right to respect for correspondence protected by Article 8 ECHR.²² In EU competition law,²³ in the absence of any express statutory provision, LPP has been recognised by the European Courts, but its scope has been narrowly defined.

The Court of Justice recognised the existence of LPP for the first time in 1982, in *AM&S*²⁴ (which was argued twice as the Court found the issues particularly difficult). The Court accepted that written communications between lawyer and client should be protected against compulsory disclosure to European competition authorities, basing its judgment both on the very nature of the legal profession, and its role in the maintenance of the rule of law, and the rights of defence. However, there was no consistency in the laws of the nine Member States on LPP, and indeed the Italian and other civil law members of the Court voiced scepticism about the very concept. So a very narrow exception was created: LPP would be available only to members of a European bar and only to those who were not employed by the client enterprise. There would be no privilege for the advice of third country lawyers or lawyers employed by the client. It was expected that *AM&S* would be a first basis for further extension of the principles,²⁵ but such expectations have been disappointed.

In subsequent cases,²⁶ the Court of Justice and the General Court have slightly amplified but not really altered the scope of LPP, which now applies to the following categories of documents:

- (i) communications to or from independent lawyers which are made for the purposes and in the interests of the client's right of the defence, either after the initiation of proceedings or earlier communications which have a relationship to the subject-matter of the procedure;
- (ii) internal notes made within the company which are limited to reporting the text or summarising the content of such lawyer-client communications; and

- (iii) preparatory documents drawn up exclusively for the purpose of seeking legal advice from an external lawyer in exercise of the rights of the defence.

We have seen cases where the rule has been relaxed in favour of the opinion of a well known US firm. But the concessions are reluctant and grudging. Moreover, the Commission has used advice rendered by in-house counsel (advising against a course of conduct, for example) as proof of guilty intention.²⁷ Worse, when conducting dawn raids, officials routinely go to the legal department, where the files will likely be complete and where there may be incriminating analysis, unprivileged analysis, of legal matters.

The Commission is aware of the sensitivity of its own file. The confidential version of the response will be for the exclusive use of the Commission and will not be disclosed to any other party. By contrast, the non-confidential version of the responses will be part of the Commission's file accessible by the other addressees of a Statement of Objections, if a Statement of Objections is adopted. In principle, complainants and other interested parties do not have access to the full case file. However, the Commission may decide to provide complainants with more than simply a non-confidential version of the Statement of Objections.²⁸ There have also been numerous attempts by private plaintiffs to get access to the Commission's file on the basis of Regulation 1049/2001 – all of which have failed until now. Nowadays, access to file consists in the Commission providing an electronic copy of the entire case file on a DVD. In addition, the external counsels of the addressees of the Statement of Objection are allowed to consult the transcript of oral leniency statements at the Commission's premises. They may take notes but are forbidden from making any mechanical copies.

B. Dawn Raids

The Commission has the power to launch "dawn raids" – unannounced inspections of business premises – during which it may take copies of books and business records.²⁹ Its powers also extend to private homes³⁰ (subject to stricter requirements: "serious violations" of Articles 101 and 102 TFEU; a reasonable suspicion that business records will be located there; and a search warrant from the competent national court).

The possibility to carry out "dawn raids" is the most intrusive of the Commission's powers of investigation. The very nickname given to Commission inspections provides some insight into how such inspections are organised: the Commission officials tend to present themselves at the business premises at the start of the day, often accompanied by officials of the national competition authority and the local police in case the company opposes or obstructs the inspection. The surprise as well as the possibility for Commission officials to rummage through all the files, take copies,

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request documents and ask on-the-spot questions create some tension that needs to be managed with calm professionalism by both sides.

Dawn raids tend to be more intrusive than before. It is nowadays common that they last several days. If so, the officials may seal rooms or boxes of documents to review the following day. Second, the Commission is now systematically accompanied by forensic IT specialists who may make a copy of computer hard drives and review their content later in Brussels. The legality of this practice is being tested on appeal in *Nexans v Commission*.³¹

E-mail messages are a source of vast amounts of data. They have the particularity of being virtually impossible to destroy electronically, and staff routinely write them more hastily and less cautiously than other forms of written communication. Reconciling inconsistent e-mails within a single company is a frequent challenge.

C. Interviews

Pursuant to Article 19 of Regulation 1/2003, the Commission has the power to interview any individual or company about suspected competition law infringements. So the Commission may interview complainants, competitors, customers, suppliers or any individual whose expertise can be useful for the Commission's understanding of the relevant market. The questions are not limited to explanations regarding facts or documents related to the subject matter of the inspection and can extend to anything related to the subject matter of the investigation as a whole.

However, the Commission has no power of constraint under Article 19. Contrary to the dawn raid situation where opposition can be overcome with the help of the national police, nothing is provided in case the individual or the company refuses to answer the Commission's questions.

D. Leniency Confessions

In the 1980s, antitrust enforcement overseas by the US was a frequent source of friction between otherwise friendly democracies. The friction disappeared with the discovery of "positive comity" and the notion that the US and the European Commission could in parallel pursue cartels on their respective territories. The success of the American amnesty programme led to the Commission's adoption of a somewhat similar regime, reflecting the Brussels administrative reality. After some 15 years of experience, scores of cartels or alleged cartels have been brought to the attention of the European Commission, and fines totalling billions have been imposed.

The European leniency programme³² aims at encouraging cartel members to race to confess. The first conspirator to confess involvement and provide the Commission with information about the cartel and its co-conspirators is granted complete immunity from fines (immunity is nevertheless subject to full cooperation throughout the proceedings, no destruction of evidence and termination of the confessor's involvement in the infringement).³³ Subsequent confessions by other members of the alleged cartel may receive a substantial reduction of fine if the applicant provides the Commission with evidence "which represents significant added value with respect to the evidence already in the Commission's possession."³⁴ In its decision, the Commission determines whether the evidence provided by the undertaking did indeed represent significant added value with respect to the evidence already in its possession.³⁵ If the notion of "added value" is met, subsequent leniency applicants receive a reduction in the fine on a sliding scale depending on who was the first through the door. Once immunity has been granted, the first undertaking to provide added value gets a reduction of 30%–50% of the fine; the second gets a reduction of 20%–30% and subsequent undertakings get a reduction of up to 20%.³⁶

Practice is now well-developed. After some preliminary discussions with the Commission to ascertain whether it would be the first undertaking to apply for leniency, the undertaking's external lawyer contacts the Commission via a dedicated telephone line to apply for leniency and immediately to reveal the basic information about the cartel, or to apply for a marker safeguarding for a limited period of time the applicant's place in the queue. The counsel would shortly thereafter meet the case team at the Commission's premises. He would read a corporate statement which would be tape-recorded. The oral corporate statement describes the infringement on the basis of the internal investigation carried out by the leniency applicant. It will list all problematic competitor contacts chronologically and by affected product and geographic market, providing the date, location, attendees and content of the discussions for each contact. It may also contain a more general description explaining how the various contacts were linked together to form part of a single pattern. The lawyer typically returns to the Commission to update, correct or supplement the corporate statement as the internal investigation by the client unfolds. Corporate statements could also be sent directly by fax to the Commission. Oral statements are generally preferred to avoid the risk that the company would possess a written copy of its "confession" to the Commission, which copy might be discoverable by a plaintiff in a follow-on damages claim. If the case goes forward, other parties have audio access to corporate leniency statements at the Commission premises. They may take notes but not copies.

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Corporate leniency statements are not a first-hand description of the relevant facts by the persons directly involved. They reflect the conclusions of the undertaking's internal investigation. They are a presentation made on behalf of an undertaking applying for leniency. They may be – but not necessarily – accompanied by statements made by individuals directly involved in the infringement. Most statements are made by independent lawyers.

Both the Commission and the European Courts consider that leniency applications constitute very reliable evidence and are particularly credible on the ground that they are self-incriminatory. The Court has held that “statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence.”³⁷ The European Courts have also dismissed the allegation that the possibility to obtain a reward might incentivise leniency applicants to distort the evidence.³⁸ The Court has held that the risk of losing the benefits of its leniency application if discovered constitutes a sufficient threat for the leniency applicants not to mislead the Commission. I respectfully disagree.

Confessing or not confessing are each defence strategies for a company facing a delicate choice. One is not more credible or liable to be correct than the other. Pleading guilty in the strong hope of receiving no fine or a reduced fine is as much in the interests of the declarant as is pleading not guilty in the hope of receiving no fine or a reduced fine as a result of a finding of no infringement or strong attenuating circumstances. In both cases, an undertaking chooses to present a set of facts in a certain way, either to demonstrate the existence of an infringement or its non-existence. That the confession reveals bad things were done is not a reason to deem it correct and convincing. Corporate leniency statements should be treated in the same way as other corporate statements.

My contention is not that corporate leniency statements have no value. It is that they should not presumptively be accorded higher value than other corporate statements denying the infringement or responding to a request for information. They are evidence, but not conclusive evidence.

The General Court has acknowledged that “some caution as to the evidence provided voluntarily by the main participants in an unlawful agreement is generally called for, considering the possibility that they might tend to play down the importance of their contribution to the infringement and maximise that of others.”³⁹ In addition, the General Court held in *JFE Engineering* that the Commission cannot exclusively rely on one leniency statement that is contradicted by other companies, unless it is corroborated by other evidence:

“[...] it must be borne in mind that, according to the case-law of the Court of First Instance, an admission by one undertaking accused of having participated in a cartel, the accuracy of which is *contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof* of an infringement committed by the latter *unless it is supported by other evidence* [...]”⁴⁰

I suggest that the leniency system presents an important risk in that it offers an opportunity to cause damage to a rival by implicating it in wrongdoing. Embellishment of imprudent gossip exchanges into a grave conspiracy is one problem; speculating about what “others,” “the Japanese,” or “the Swedes” are thought to be doing is another.

A striking example of the risks of the evidence produced in leniency applications arose in *Gas Insulated Switchgear*.⁴¹ In Europe, the Commission initiated its case based upon a leniency application relying on declarations made by Mr Erik Mayr, a former employee of ABB, one of the participants in the alleged cartel. Both the Commission and the General Court accepted that the oral account given privately to Commission staff by Mr Mayr, under the direction of his lawyer, was valid and convincing evidence of an anticompetitive agreement. ABB received full immunity. He accused a large number of companies of being involved. In Brussels Mr Mayr was never cross-examined or publicly questioned on the “evidence” that he provided. Other companies denied what he said. The alleged conspiracy was prosecuted in New Zealand, where the agency has to prove the infringement before a judge. ABB brought Mr Mayr to New Zealand as requested, and he told his story. He was subjected to cross-examination before the New Zealand High Court. The case was promptly dismissed. One of the reasons was Mr Mayr's lack of credibility as a witness.⁴² In rejecting the allegations, Mr Justice Woodhouse concluded that:

As this cross-examination proceeded I formed an impression that Mr Mayr was seeking to maintain an unrealistic position.⁴³ Mr Mayr's evidence on this topic was not convincing. In recording that conclusion I am not intending to suggest that Mr Mayr was being deliberately misleading. What I am now recording is the view I developed as the cross-examination of Mr Mayr on this topic progressed. I noted this...when recording some of the evidence. The position he was seeking to maintain, to the effect that “budget enquiry” encompassed any sort of enquiry save for a request for technical assistance, was unrealistic. Mr Mayr was the principal witness for the Commission. He had worked from 1975 until

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2004 for ABB, the cartel member that had informed the European Commission and the New Zealand Commerce Commission of the existence of the cartel and agreed to give evidence for the Commerce Commission in return for immunity. Mr Mayr seemed to me to be determined to maintain a position which seemingly needed to be maintained, but which could not realistically be maintained. *The impression I formed when the evidence was being given was that Mr Mayr was somewhat over-zealous.* Related to this was the fact that Mr Mayr had devoted a considerable part of his working life entirely to cartel business and he seemed determined to present the cartel as a highly successful organisation which embraced all aspects of the GIS industry.⁴⁴

It is remarkable that evidence given by the same man, in the same case, about the same misconduct, can be dismissed as unreliable by a well-trained judge in the court of a friendly democracy, but be accepted as wholly reliable in EU proceedings by the Commission.

The problem of embellishment and of over-zeal in leniency applications reflects the truth that sometimes the making of a leniency request can principally be a means of harming a competitor. In the *Bananas* decision,⁴⁵ an imprudent exchange of market gossip between employees of two competitors in one city was successfully exploited by Chiquita in a leniency confession to accuse its competitor, Dole, of participation in a cartel. The Commission was not impressed by the allegations first voiced. The original accusation was embellished in successive versions of the confession until the Commission was finally persuaded to take up the case and investigate. The investigation revealed imprudence, not a cartel. However, the Commission held that the regular exchange of pricing information alone was capable of constituting a concerted practice, since those companies could not have failed to take account of the information received from competitors when determining their conduct on the market.

I suspect that the case was pressed to a final decision in recognition of the resources devoted to it rather than the seriousness of the conduct.⁴⁶

E. Complainants and Other Sources

The other major “passive” source of evidence for the Commission, especially for Article 102 cases, is the complaints system.⁴⁷ (In former days, parallel traders were frequent complainants under Article 101 TFEU, but the Commission now rarely pursues vertical distribution controversies.) The complaints system encourages those affected by competition problems to bring evidence to the Commission and seek its intervention.

Magill TV Guide,⁴⁸ NDC⁴⁹ and Sun Microsystems⁵⁰ were each complainants in celebrated cases on compulsory duty-to-deal. The Commission is the favourite recipient of important complaints about competition law infringements, more so than is the case in the United States, where civil courts are the normal venue for the resolution of antitrust disputes.

Complaints are useful and valuable. They originate from companies that have an intimate knowledge of market realities. They can draw the Commission’s attention to commercial practices that could otherwise remain unnoticed. However, it is also important to recognise that complainants follow their own agenda. They are not disinterested. Complaints are often used for leverage in bilateral commercial disputes. In a number of cases, complainants eventually reached an out-of-court settlement before or just after the Commission concluded its investigation.⁵¹ It is evidently important to resist the risk of capture by the complainant. The Commission is well aware of this risk.

The *Intel* case provides guidance regarding the duties of the Commission when it conducts interviews. The Commission alleged that Intel abused its dominant position by its policies on rebates and discounts to computer manufacturers in that it created expectations that there would be disproportionate loss of discounts if a computer manufacturer were to procure some of its needs from Intel’s rival. In the course of its investigation, it had a meeting with a senior executive from Dell, whose assertions were contrary to the Commission’s theory of the case. However, there was no trace of the existence of that meeting in the file and the Commission failed to disclose the meeting, of which Intel learned through discovery from Dell in the parallel US litigation. When asked about the meeting, the Commission initially suggested it had not taken place. It then acknowledged having had such a meeting, but added that it was not obliged to take notes of meetings with complainants or third parties where the information transmitted was not to be used in a forthcoming decision⁵² and that a note which was taken referring to the meeting, which was subsequently placed in the file, was part of its internal investigation and therefore should not be accessible to Intel. Intel submitted a complaint to the European Ombudsman.

After a lengthy enquiry, the Ombudsman concluded that “by failing to make an adequate written note of the meeting [...] the Commission infringed principles of good administration.” The Ombudsman went on to say that “it would be in the interests of good administration for the Commission to instruct its staff to ensure that a proper internal note, which should be placed in the file, is made of the content of the meetings or telephone calls with third parties concerning important procedural issues.”⁵³

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The European Ombudsman's finding of maladministration is a rare event in a competition case. In my view, the Ombudsman's decision confirms that, when gathering information in an Article 19 interview, the Commission has a duty to remain independent, objective, and impartial despite its role as prosecutor.⁵⁴ Once the relevance for the proceedings of information provided at a meeting is established, the Commission should record the meeting's contents, even if the Commission considers that it yielded no additional inculpatory information that it intends to use. The Commission cannot decide to exclude from the file information that is relevant, especially if it is exculpatory.

This sort of controversy is an intrinsic risk when too many functions are attributed to a single case team.⁵⁵ Before the hearing takes place, the same case team is responsible for investigating the case, compiling the file, deciding whether to send out a Statement of Objections, considering whether the defence of the accused company is convincing, drafting the condemnation and discussing the penalty. The Commission acts in effect as a prosecutor, investigator and decision-maker in competition cases, an attribution of multiple functions which makes its fact-finding duties more difficult.

F. Evidence Obtained in Other Investigations

It is evident that a prosecutor's life will be easier if the prosecutor can ride on another's prosecution. Can the Commission rely upon evidence obtained in other, unrelated cases before other jurisdictions? In *Dalmine*⁵⁶ the Italian authorities had transmitted to the Commission various pieces of evidence obtained in a separate criminal case against the company, which the Commission then used in its competition case. The Court of First Instance ruled that the question of whether such information could be transmitted legally was one for national law, not EU law. The implication is that any lawful evidence that arrives at the offices of the Competition Directorate General may be used validly as evidence by the Commission.

One consequence of the reforms brought about by Regulation 1/2003 has been an immense increase in cooperation between competition agencies. National competition authorities and courts of the EU Member States must inform the Commission when they have received information, started an investigation or brought a prosecution where the alleged offence has an EU dimension.⁵⁷ Regulation 1/2003 requires the transmission of documents that are necessary for assessing a case in which the Commission would like to submit observations. It also demands the transmission of judgments applying Article 101 or 102 TFEU for information purposes and makes provision for the Commission to ask national courts to play a role in the context of an inspection of undertakings and associations of undertakings.⁵⁸

The Commission may also glean a large amount of information from cooperation with non-EU competition authorities if it enters into an agreement to that effect. The most important example of this is the Cooperation Agreement between the Commission and the US competition authorities – the Department of Justice and the Federal Trade Commission.⁵⁹ This cooperation involves informing the other about illegal activities which affect their respective jurisdictions. A number of the global cartels prosecuted by the Commission were the subject of earlier investigations in the US, for example the *Vitamins Cartel*⁶⁰ and the *Citric Acid Cartel*.⁶¹

Cooperation is intensified if the parties agree to grant a waiver allowing the authorities to exchange information which would otherwise be protected. Even where there is no voluntary waiver, parties can be required to produce information in the context of discovery in civil proceedings.⁶² US rules on discovery are very far-reaching. So-called "protective orders" can govern the use of confidential information.⁶³ A protective order allows third parties to protect legitimately confidential information from discovery, but such protection is subject to extensive constraints. Immense volumes of documents in other jurisdictions can be litigious assets if they can lawfully be produced.

G. How Satisfactory Are These Tools?

The Commission has sufficiently broad powers at its disposal to gather the information it needs for its investigation. Thus, the Commission's fact-finding tools are satisfactory in terms of capture. However, the fact-finding process remains unsatisfactory in terms of right of defence and rigour of analysis. The entire fact-finding procedure is inquisitorial. The defendants have the right to express their views in writing in response to the Statement of Objections, but no true confrontation between the various parties as to crucial controversies will necessarily occur.

This lack of confrontation is particularly unsettling with regard to leniency. I consider that the leniency confession that can be made by lawyers without accompanying testimonies by employees is the least satisfactory. As described above, leniency statements are given extremely high evidentiary value by the Commission and even the Courts. Defendant companies that wish to challenge a corporate leniency statement have no access to the actual witnesses whose testimonies underlie the corporate statement. At the hearing, there is not even a compulsory confrontation between the points of view of the various companies. Such confrontation may occur, but not even the most pugnacious defendant lawyer can insist upon it.

The Ombudsman's findings as to *Intel* and the case law on access to file constitute a reminder that the Commission is not entirely free to decide what to include and what to exclude from the

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file. As soon as a piece of information is relevant for the case, it should be included whether it is inculpatory or exculpatory and regardless of whether the Commission intends to use it in its SO. However, in practice, the Commission does not necessarily look for evidence “à charge et à décharge.” This is why the absence of an adequate oral hearing before an independent adjudicator makes the fact-finding procedure so disappointing.

However, that is not to say that the Commission does not have effective fact gathering tools at its disposal. I consider the process of dialogue on the circumstances of a contemplated merger to be extremely satisfactory in terms of getting to the heart of the matter. Generally all interested parties, as well as third parties in the same market, are consulted. The discussion is intense, with several questionnaires sent out to several undertakings and scores of telephone conversations with Commission officials to clarify points of uncertainty or disagreement. All this happens in a short, sharp burst, with merger decisions being concluded in a matter of weeks. There is an intense period of discussion and then the decision-maker renders its conclusions. This can be contrasted with the lack of intense visible dialogue in antitrust hearings in Brussels.

VI. Examples of Factual Controversies

In this section I consider instances where there has been a big controversy about certain facts. Their relevance is to suggest that conclusions as to finely balanced factual controversies demand intense reflection and the confrontation of opposing views.

A. *United Brands* – Market Definition Controversies

In *United Brands*⁶⁴ the Commission issued a decision finding that United Brands had abused its dominant position by prohibiting the resale of bananas while still green, refusal to supply, and charging different prices in different Member States.⁶⁵ A crucial issue which ultimately determined the outcome of the case was whether bananas were a separate product market, or whether bananas formed part of a wider fresh fruit market. If bananas were part of a wider market, United Brands could not have been considered “dominant.” However, the Commission took the view that bananas formed a separate product market, and the ECJ ultimately accepted this view.

The Commission considered that the key question was “not to decide whether bananas can be replaced by other fruit but to decide what degree of substitutability is required under competition law for two or more products to be regarded as constituting a single ‘product market.’”⁶⁶ In support of its position that bananas were not sufficiently substitutable with other fruits, the Commission relied on two expert studies from the UN Food and Agriculture Organisation (“FAO”) from 1969 and 1973,

which showed consumer expenditure on bananas. In addition, the Commission listed the “special characteristics” of bananas (physical, functional and economic, i.e. “Only a banana ... tastes like a banana!”⁶⁷), and concluded that “no other fruit possesses all these characteristics. Bananas are particularly apt to satisfy constant needs.”

The Commission’s arguments were hotly contested by the applicants. In their view the banana market is part of the fresh fruit market, since “bananas are reasonably interchangeable by consumers with other kinds of fresh fruit: for example, apples, oranges, grapes, peaches, strawberries etc. and these other kinds of fruit offered on the same stalls or shelves at comparable prices can be substituted for bananas at the level of consumption, distribution and wholesale trade.”⁶⁸ In support of their submission, the applicants produced some graphs to the Court, which showed that bananas sell best in March through mid June, when other fruits are only available in small quantities at relatively high prices.

They also dealt with two studies made by the FAO which had been submitted by the Commission as evidence to show that the banana market is a separate market. However, on the basis of the same factual information, United Brands drew the opposite conclusions on the product market. United Brands also relied on a more recent study of the FAO from 1975 entitled “Price Elasticity of Bananas at Retail” and a study of the Belgian apple market⁶⁹ which showed the seasonal peak periods of fresh fruit.

On the basis of the statistical evidence submitted in these studies,⁷⁰ as well as the factual qualities of bananas submitted by the Commission, the ECJ supported the Commission’s view that bananas belonged to a separate product market:

The specific qualities of the banana influence customer preference and induce him not to readily accept other fruits as a substitute.

The Commission draws the conclusion from the studies quoted by the applicant that the influence of the prices and availabilities of other types of fruit on the prices and availabilities of bananas on the relevant market is very ineffective and that these effects are too brief and too spasmodic for such other fruit to be regarded as forming part of the same market as bananas or as a substitute therefore.⁷¹

Since the banana is a fruit which is always available in sufficient quantities the question whether it can be replaced by other fruits must be determined over the whole of the year for the purpose of ascertaining the degree of competition between it and other fresh fruit.

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The studies of the banana market on the court's file show that on the latter market there is no significant long term cross-elasticity any more than – as has been mentioned – there is any seasonal substitutability in general between the banana and all the seasonal fruits, as this only exists between the banana and two fruits (peaches and grapes) in one of the countries (West Germany) of the relevant geographic market.

The Court also accepted the Commission's somewhat less scientific arguments on the edentulous, accepting that, "The banana has certain characteristics, appearance, taste, softness, seedlessness, easy handling, a constant level of production which enable it to satisfy the constant needs of an important section of the population consisting of the very old, the young, and the sick."⁷²

I am doubtful if the Commission or the Court would be so confident today, but the case is an excellent vehicle for teaching, and a warning that narrow market definitions are never excluded.

B. *Rambus* – Differing Views of The Same Facts

Rambus was a tiny innovative company founded in 1990 by two professors of electrical engineering who believed they could solve the "bottleneck" then threatening the development of the computer industry. The speed of computer microprocessors had been increasing at a much faster pace than the speed at which DRAM devices (Dynamic Random Access Memory) could transfer and store the data worked on by the microprocessor. (Imagine a calculator which has to wait for numbers to be presented for processing and then carried back to the correct pigeon-hole to await the next operation.) The Rambus founders invented a revolutionary design that doubled the speed of DRAMs compared to traditional memory devices. Now, this was a design, not a physical reality. Rambus had no manufacturing plant. It was a pure engineering research company which hoped to licence its technologies to DRAM manufacturers.

Some readily took licences, while others expressed scepticism about the novel, radical technology offered by such an outsider company. The business model of major DRAM manufacturers differed from Rambus: leading JEDEC⁷³ members used to cross-licence their technologies, swapping licences rather than paying each other royalties. By contrast, Rambus, as a pure innovator company, could not enter into such cross-licences and was interested in obtaining royalties. It applied for patents in Europe and the US. Rambus wanted to persuade people to use its new technology. So round the table at JEDEC meetings there were representatives of companies who made and sold DRAM devices, who bought and sold them, and who designed them. Each would have a different goal in setting the standard for making devices in the future.

Rambus attended a number of meetings of JEDEC from 1991 to 1996. There were many discussions of a variety of technologies. In 2000, four years after having left JEDEC, Rambus started to claim royalties from DRAM manufacturers on the ground that JEDEC-compliant DRAMs were infringing some of its patents issued after 1996. The DRAM manufacturers complained to the US FTC and the EU Commission that Rambus had engaged in a "patent ambush." They accused Rambus of having failed to disclose its patent applications or its intention to file patent applications when its technologies were being discussed at JEDEC. They claimed that Rambus's conduct effectively deprived JEDEC members of the opportunity to develop an alternative standard that did not depend on Rambus's technology.

Rambus denied any wrongdoing. Rambus argued that it was under no duty pursuant to JEDEC rules to disclose its patenting intentions, which were business secrets, and that the JEDEC members were very well aware of its intention to patent its technologies: Rambus is a pure innovator company; royalties constitute its only income; it had already licenced its technology to some DRAM manufacturers; and, when asked, it had expressly refused to confirm that it had no patent pending on the relevant technology. Since JEDEC elected to incorporate the technology in the standard despite being put on notice, JEDEC members could not reasonably have believed that no royalties would be charged. So said Rambus.

Significant legal differences exist between an attempted monopolisation case under the Sherman Act and an abuse of dominant position under Article 102 TFEU. Notably, Article 102 TFEU constrains those who are dominant, not those who wish to become dominant. Nevertheless, the relevant facts were identical in both jurisdictions and the key factual questions at the heart of the case were the same: were the JEDEC members deceived by Rambus's conduct? Did they expect Rambus to disclose its intent to patent certain technologies?

The first authority to rule on that question was the Chief Administrative Law Judge of the FTC ("ALJ"), who dismissed on 23 February 2004 the FTC's monopolisation complaint against Rambus after a 54-day trial.⁷⁴ The ALJ concluded, as regards the question of deception, that "a person of ordinary skill in the art or a patent lawyer reviewing the '898 application or PCT application would have realized that Rambus might have claims broad enough to cover programmable CAS latency, programmable burst length, dual-edge clocking, and on-chip DLL [these were the inventive steps pioneered by the founders of Rambus]."⁷⁵

The full FTC decided to reverse the findings of the ALJ in August 2006 and concluded that Rambus infringed US antitrust law.⁷⁶ It concluded that "By hiding the potential that Rambus

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would be able to impose royalty obligations of its own choosing, and by silently using JEDEC to assemble a patent portfolio to cover the SDRAM and DDR SDRAM standards, Rambus's conduct significantly contributed to JEDEC's choice of Rambus's technologies for incorporation in the JEDEC DRAM standards and to JEDEC's failure to secure assurances regarding future royalty rates – which, in turn, significantly contributed to Rambus's acquisition of monopoly power.”⁷⁷

On appeal, the Court of Appeal of the D.C. Circuit quashed the FTC decision. The Federal Circuit held that “if these members perceived the duty to encompass any patent or application with a vague relationship to the JEDEC standard, the record would likely contain a substantially greater number of disclosed patents and applications.”⁷⁸ The US Court of Appeal, like other US courts, also considered that JEDEC's patent disclosure policies suffered from “a staggering lack of defining details,”⁷⁹ and rejected the idea that Rambus was subject to a clear duty to disclose.

In parallel proceedings before a California court, Rambus sought damages for patent infringements against DRAM manufacturers (Hynix, Micron and Nanya), who raised in their defence various antitrust arguments. In March 2008, at the end of a trial analysing a mass of evidence for the most part the same as had previously been submitted to the FTC, the jury in the US District Court for the Northern District of California reached a conclusion directly opposite to the FTC decision and unanimously found in favour of Rambus.⁸⁰ To the question “did JEDEC members share a clearly defined expectation that members would disclose relevant knowledge they had about patent applications or the intent to file patent applications on technology being considered for adoption as a JEDEC standard?” the jury responded “NO.”⁸¹ Similarly, the jury responded “NO” to the question “Did Rambus utter half-truths about its intellectual property coverage or potential coverage of products compliant with synchronous DRAM standards then being considered by JEDEC by disclosing some facts but failing to disclose other important facts, making the disclosure deceptive?”

On the other side of the Atlantic, the Commission elected to believe the complainants' version, that they had been ambushed, the version favoured by the FTC Commissioners. In its Statement of Objections, it asserted that Rambus held a dominant position on the ground that the industry was locked in to JEDEC standards and that Rambus had abused its dominant position. On the specific question of deception, the Commission also considered that Rambus was under a duty to disclose its patent applications and its intention to patent technologies discussed at JEDEC meetings notably on the basis of the “expectations of other participants.”⁸² The defence of Rambus evoked the considerations relied on by the ALJ, and the founders told their stories of the

early days, the struggles by a small team to convince licencees and the technological challenges. The hearing involved much interesting debate about complex technology, but also a lot of more frustrating bald PowerPoint assertions where lawyers offered conclusions (although one witness appeared in a short video clip). Ultimately the Commission declined to find any infringement and closed its proceedings by an Article 9 commitments decision whereby Rambus undertook to offer licences over the contested technology to its rivals on attractive terms, indeed hoping that they would start paying.

Debating which fact-finder was correct and which was not is not useful for purposes of this paper. But let us note that the review of the same factual circumstances by five separate entities did not lead to the identical outcome. According to one point of view, the *Rambus* saga is an example of patent ambush and deception of an SSO by an enterprise which wished to promote its technology. According to another point of view, the *Rambus* saga is an example of patent hijack by members of an SSO, well aware of Rambus's intention to patent technologies.

The case was an attractive one to advance the law on standard setting organisations, so it is possible that those in charge of deciding were tempted to consider what the law would have been if the facts required legal intervention. It is noteworthy in the *Rambus* case that the same result was reached in the proceedings with the more extensive fact-finding (ALJ, D.C. Circuit Court and the US District Court) whereas the two administrative proceedings both led to the opposite conclusion (FTC and Commission, each with an interest in making new law?). Fact-finding procedures whereby some confrontation is organised between the various parties are likely to be superior in reliability to inquisitorial administrative ones. The fact that such contradictory conclusions can be reached about the same set of facts constitutes a real problem in multi-jurisdiction proceedings. It offers an unsuccessful plaintiff another chance to make its case but forces a successful defendant to defend itself once more as the same dispute unfolds before another forum.

C. *Italian Flat Glass*

*Italian Flat Glass*⁸³ was one of the earliest cartel cases considered by the CFI. The judges examined afresh the physical evidence relied on by the Commission in its decision. The oral hearing in the CFI was notably tense. The Court demanded the physical production of original documents from the Commission. The hearing was adjourned to allow the bringing to Luxembourg of the original documents that had been seized by the Commission staff. There followed lengthy consideration by the CFI of the evidence described in the contested decision.⁸⁴ The Court observed serious

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flaws in the Commission's case, and even evidence of manipulation of handwritten notes by the authority. Questioning by the bench was particularly severe, which was reflected in the judgment:

The Court considers that it is self-evident and indisputable that the tenor of the note is changed completely by the omission of those nine words. With those nine words the note could be taken as clear evidence of a competitive struggle between SIV and FP on the one hand and VP on the other. At the hearing, the Commission tried in vain to supply an objectively justifiable reason for the deletion of those words.⁸⁵

The CFI carefully worked through the documentary evidence relied upon by the Commission to prove an infringement. It drew different conclusions to those of the Commission, attributing less probative value to the evidence in the case file than the Commission. It found, for example, that the Commission had "cut and pasted" a table of customer classification from a document received from one of the parties, on the one hand, and the Commission's own reconstruction of customer classification in the case, on the other.⁸⁶ It further found that the Commission had inferred proof of an infringement for a longer duration than it logically should have from a hand-written note of 12 July 1983: while the note could evidence collusion prior to that date, it could not evidence collusion afterwards.⁸⁷ Lastly, it found that while two contemporaneous notes could evidence a concerted practice, or at least detailed discussion between two parties, they did not on their own demonstrate participation in an earlier agreement, as the Commission had inferred.⁸⁸ While the CFI did not prescribe criteria as such, it did strongly imply that contemporaneous documents are of a highly probative nature, but that the conclusions to be drawn from them must not go beyond what logic permits.

The fact that a document was drafted at the same time as the alleged infringement, before the prospect of an investigation, "in tempore non suspecto" was a source of particular credibility:

The Court considers that it is not credible that the letter, written in tempore non suspecto, does not reflect the true situation, namely that Mr Giordano (VP) did not attend the meeting held on 7 November 1984 and that VP did not wish to participate in such meetings, still less initiate them.⁸⁹

The relevance of the case for present purposes is that it shows in acute form the risks associated with an inquisitorial procedure where the same officials are responsible for compiling the file, putting the questions, framing the accusations, rejecting the defences and drafting the condemnation. Understandably, but worryingly, the case team and its hierarchy will not be easily persuaded at the Hearing that, after having pursued the case for several years, they were all mistaken all along.

D. *Kaučuk* – A Modern Example of Judicial Correction to Commission Fact-finding

In *Kaučuk*⁹⁰ the General Court took an interventionist approach towards the Commission's appraisal of the facts, annulling the infringement decision against Unipetrol a.s. and Synthos Kralupy a.s. (formerly Kaučuk a.s.), and overturning the fines. Thirteen companies had been fined in 2006 for alleged participation in a cartel for synthetic rubber, primarily used in tyre production. Unipetrol and its then-subsidiary, Kaučuk, were fined €17.55 million for alleged participation through Kaučuk's agent, Tavorex.

In the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure, the Court requested the Commission to produce certain evidentiary documents.⁹¹ It heard oral argument in October 2009. In a concise judgment, the Court dismissed the Commission's factual assessment that Tavorex had participated in the cartel. The Court recognised the difficulty for the Commission in gathering documentary evidence to illustrate cartel participation, and the need to deduce facts from circumstances:

It is normal for the activities entailed by anti-competitive practices and agreements to take place clandestinely, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. It follows that, even if the Commission discovers evidence explicitly showing unlawful contact between traders, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.⁹²

However, the parties called into question the Commission's allegation that Tavorex had been present at key meetings at which the cartel arrangements were discussed. The Commission had relied on an expense report in respect of drinks paid for in the hotel bar where the cartel participants had met, but the report did not mention Mr T, the Tavorex representative among the guests invited for drinks. The Court also found that the journey between Prague and Frankfurt which Mr T would have had to make to attend the gathering "would have required a special effort."⁹³ As a result of these factors, as well as other circumstantial information submitted by the parties and not rebutted by the Commission, the Court concluded that: "the evidence set out in that part of the contested decision which relates to cartel meetings is not sufficient to support the conclusion that that undertaking participated in the unlawful agreements at issue."⁹⁴

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The Court held that where factual evidence proving cartel participation is lacking or insufficient, this must operate to the advantage of the accused: "Any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed."⁹⁵

This last confirmation is a welcome reminder of the quasi-criminal nature of prosecutions of cartels. The broader relevance of the case is that it shows the risks of drawing conclusions about contested facts without the advantage of direct confrontation between those holding opposing views of the facts.

E. *Microsoft* – Fact-finding in Relation to Complex Technical Questions

The *Microsoft* case involved numerous hotly debated factual matters concerning the design of computer operating systems, how software functions, the role of directories in networks of servers, how personal computers evolved over 20 years, whether it is "tying" to add new technical functionalities as standard, and other topics. On 17 September 2007 the Grand Chamber of the CFI rendered judgment,⁹⁶ upholding the Commission's Decision of 24 March 2004⁹⁷ which found that Microsoft had abused its dominant position in two respects: not supplying a competitor with technology to enable the development of servers which would function perfectly in a Windows environment; and bringing out a new version of Windows with built-in media player functionality while not leaving on the market the unimproved version, such that other media players might be less likely to be loaded by users independently. The remedy for the first offence was to research, then document, in several thousand pages, then licence for a reasonable royalty, how parts of the Windows server operating system worked. The remedy for the second was to bring out a specially designed version of Windows from which media functionality had been removed.

The core question to be answered with respect to the compulsory licensing part of the case was whether there was sufficient interoperability between competing and interactive products. In essence, were there grounds for believing that the level of interoperability between hardware or software in a Windows environment was inadequate? Was there a serious problem, a market failure?⁹⁸

The *Microsoft* case could fairly be called the competition case of the last decade. It was a huge honour for the many lawyers who were involved in it. From start to finish, it presented richly complex factual questions. I will mention one family of questions, which presented several fact-finding challenges.

It was agreed that Microsoft enjoyed a position of dominance as to operating systems for PCs. Microsoft did not enjoy a dominant position as to operating systems for servers to coordinate networks of PCs. A number of companies supplied servers, including Sun, Novell, IBM and others, and had done so for longer than Microsoft. The Commission also conceded that interoperability between servers of different brands did exist, but not well enough for Microsoft's competitors. It claimed that practical interoperability was imperfect, so as to prevent competitors from competing "viably." The degree of interoperability in force was "insufficient to enable competitors to viably stay in the market."⁹⁹

Before getting to the legal question of whether the legal criteria for compulsory licencing could be expanded by reference to the important goal of enhancing interoperability, it was necessary to consider the factual question of whether in actual practice existing levels of interoperability were good, adequate but could be improved, or were inadequate to sustain long-term viable competition, or were wholly inadequate.

Microsoft argued that in practice, heterogeneous networks were common: inside large users of computing resources they were routine, almost universal. Customers may use an IBM directory server with Windows file servers or other servers, or vice versa; or use two separate directory services for separate parts of the business, with the engineering department using UNIX servers and the sales department using Windows servers. Customers who used the new Windows directory service, Active Directory, also used other servers in separate networks from Linux, IBM, Novell and Sun. There were plenty of examples showing how big organisations use different server operating systems for different functions or for different parts of the organisation. They worked together. Without interoperability few customers would buy servers or server operating systems.

Microsoft supplied the Commission with about 50 statements from large users of computing power, describing how they resolved the challenge of having a heterogeneous network. The Commission sent out Article 11 letters to a number of others. Details came from one European army, a navy, two national police forces, six government agencies, NATO, a large city, three other international organisations and 31 large companies, most of them household names.¹⁰⁰ They used a wide variety of hardware and software. So Microsoft argued that the interoperability problems of having different servers were solvable, whether the servers perform only "work group" tasks or perform twenty tasks simultaneously. Problems did arise but were capable of solution. So in the real world every hour of every day in every city in Europe, hundreds of thousands of servers and millions of client PCs interoperated successfully.

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The Decision said that reverse engineering of the characteristics of Microsoft operating systems was too slow, that disclosures by Microsoft were not enough and that customers were worried about interoperability. There was intense debate and expert evidence over whether the questions to customers from the Commission about their views as to interoperability were truly neutral or tended to suggest the desired reply. Indeed, two experts in polling opinions asserted that the questionnaires were biased towards confirming customers were worried about interoperability.

There was a subsidiary question presented by the technical characteristics of a key part of the Windows server operating system, namely Active Directory. A distinction was drawn by Microsoft between communications between servers with a view to communicating data back and forth, and communications between multiple servers working as one to provide a single network service, in this case directory or file and print. Servers performing the Active Directory function act as a team of identical entities doing a single job collectively, such that for the user the group functions in the same way as a traditional mainframe computer operating a single directory. Because each server must act in exactly the same way (“thinks alike,” to use a human analogy), whenever the network encounters a problem there is no need to issue instructions, no need to consult; the server which is best placed to act self-selects and addresses the problem. These servers exhibit “crowd behaviour” such that only an identically-programmed server can participate in delivering their functionality collectively.

Thus the word “interoperability” had at least two meanings during the factual enquiry. It could mean the capacity of hardware and software from different vendors to communicate efficiently, which in fact happened routinely. Or it could mean the internal communications between servers in the same network whereby the servers separately but collectively perform a service. That kind of functional communication was limited to the products of one vendor.

For a server from one vendor to replace seamlessly another vendor’s server confronts the physical fact that equivalent functionality and identical logic producing identical behaviours are necessary for certain purposes.”¹⁰¹ The technology that Microsoft should have revealed and had to disclose enables that functional equivalence. The Decision’s effect, though not its primary goal, was to enable a licensee to build a product which would accurately imitate the functionality of a Windows server when executing certain network functions – directory services and file and print services (though not when it is executing any other services).

There were thus dozens of factual questions about interoperability. A few are noted here:

- What significance should attach to the fact that many users of computing power use servers and PCs from competing suppliers, which routinely work together?
- Was commercially efficient or adequate (but less-than-perfect) interoperability as between products from competing suppliers a sufficiently serious problem in fact to justify a compulsory licence? What level of adequacy of interoperability would exclude the necessity of such a licence?
- What was the relevance of the fact that for certain complex products, total interoperability can only be achieved by allowing the requesting party to make a functional copy of that part of the dominant company’s product?

It must have been very difficult for non-technical persons to master these conflicting factual questions. No one could deny that interoperability was an important policy goal. There was little common ground on what sort of interoperability (communication between products as in “talking to” a member of another team, or communication between members of the same team who perform identically when the team must do certain tasks) or on whether the supposed lack of interoperability justified creating new competition law offences.

F. *Intel* – Inconsistency in Determining the Value of Various Types of Evidence

The *Intel* case is famous for the immense fine of €1.06 billion which the Commission imposed on Intel.¹⁰² The accusation was that Intel’s policies in dealing with certain manufacturers of certain lines of computers tended to foreclose its rival AMD, in that customers were under the impression that if they elected not to buy from Intel for one line of computers they might see their discounts from Intel regarding other lines diminish disproportionately. Intel was also accused of agreeing with a European retailer that it would stock only PCs made by Intel.

One debated and difficult factual question – amongst many – was the Commission’s finding that Intel payments to Media Saturn Holding (MSH), Europe’s largest PC retailer, were conditioned on MSH selling exclusively Intel-based PCs from October 2002 to December 2007. There was considerable factual controversy over proving this unwritten exclusivity arrangement between Intel and MSH: Intel claimed it did not exist; the Commission claimed that it did. MSH had never tested the issue with Intel – so it was not immediately clear whether the sale of AMD-equipped

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computers would have resulted (as the Commission asserted) in a reduction of the amount of Intel's contribution payments to AMD. Intel denied that there was any such understanding. The Commission had amassed an extensive range of documentary evidence provided by MSH in its submission and collected during dawn raids conducted at both MSH's premises and Intel's premises.¹⁰³ The documents were not at all consistent. In determining which to rely on, the Commission had a preference for statements from senior employees, especially those at management level; and contemporaneous documents written close-to-the-fact.¹⁰⁴ It said that "no evidentiary value" attached to submissions made earlier than a subsequent submission.¹⁰⁵

However, there were plenty of e-mails, some pointing one way, some pointing another. There were e-mails written by junior employees who had no personal knowledge of the relevant negotiations between the OEMs and Intel, and contradictory contemporaneous messages from senior employees. The Commission relied on those which suggested that exclusivity had been agreed upon. But there were numerous inconsistent messages.

For instance, the Commission cited an e-mail sent by a junior Lenovo procurement employee to a supplier in December 2006, stating that "Lenovo cut a lucrative deal with Intel. As a result of this, we will not be introducing AMD products in 2007 for our Notebook products." However, a senior Lenovo manager disagreed: "Why we told them we 'cut a lucrative deal with Intel'? The reason we stop AMD NB is because of we need to reduce product complexity and reduce cost at this time, it has nothing to do with Intel! ... We should not let [them] have a wrong message on this."

Intel demonstrates how difficult it is to distinguish between the various items of evidence, and raises many interesting questions: what is the evidential value of the speculation of young employees as compared to that of more senior people? Is a contemporaneous and fresh e-mail always more persuasive and reliable? Is what a person says personally more or less reliable than what a person says on behalf of his company? How to take into account the fact, known to most of us, that e-mail exchanges, like blog postings, are often written casually and without much reflection? I suggest that, where there are hundreds of inconsistent e-mails, it is very difficult to be satisfied that one reading or another is obviously correct. Why should a confession made later be deemed convincing whereas a later communication on something else is less reliable? Why should junior people or senior people be less or more reliable? Especially where the accused enjoys something akin to the presumption of innocence (and that is another topic altogether), deciding such finely-balanced disputes calls for better procedures than those currently in force at the Commission.

I observe that when a company prepares a lengthy response to a request for information from the Commission, and when a company prepares a leniency confession, each statement will be a corporate act. Lies are unlikely, disputable assertions may be likely, and helpful background will also be supplied. The fact-finding hazard is that unwelcome assertions (unwelcome in the sense of inconsistent with theories already espoused) may be accorded little weight or discarded because they are not contemporaneous, or not fresh in time or otherwise are not persuasive. A good way of reaching a convincing conclusion would be to hear the witnesses and compare the weights of their testimonies.

Certain commentators have tried to discern what types of proof will be considered especially persuasive by the European Courts, notably Kerse and Khan in their book on EC antitrust procedure.¹⁰⁶ They cite contemporaneous written documents as being the traditional form of proof relied upon by the Commission, and consider that the Courts will generally find this the most convincing since it was drafted in *tempore non suspecto*. However, European Courts in recent years have also become accustomed to considering oral statements in the form of leniency statements on the (unpersuasive in my respectful opinion) grounds that such confessions are intrinsically likely to be right. The General Court will go beyond evidence drafted contemporaneously, and consider the body of evidence as a whole, and not just individual pieces in isolation.¹⁰⁷ This is also true of the Court of Justice.¹⁰⁸

I have separately argued that there is no reason for any factual determination individually to be accorded any particular deference by an appellate court, and that there is no reason to exempt from normally rigorous judicial scrutiny the Commission's determination of what a mass of facts, taken in their totality, proves.¹⁰⁹

Each of the sources of information described above (questionnaires, leniency statements, complaints, etc.) is interesting, but none is perfect. Each comes from a party that wishes to promote a particular point of view, and even the strongest endeavours to be neutral will always be coloured by a certain degree of unintentional bias. The nature of legal argumentation means that even the most careful and scrupulous fact-finding may yield uncertainly confident conclusions. It is not the case that any well-informed, intelligent person who is properly trained will reach the same conclusion from looking at the same set of evidentiary material.

In the US and the EU, the *Microsoft* cases – decided on the same facts – go in different directions. Sometimes this is a result of differences in law, but sometimes it turns on how the facts are analysed. I have mentioned *Rambus*. Different entities may assess the same facts differently. In the brewery case about Mr Crehan,

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the English High Court¹¹⁰ and the ECJ¹¹¹ and the Commission approached matters differently. The European Commission, after five years of discussion on whether to grant negative clearance, failed to reach a final decision. The impression of those who participated in the court proceedings, which considered big constitutional principles, was that Mr Crehan was a victim who deserved compensation. But the judge in the English court who tried the case concluded that Mr Crehan was an honest man who had been unfortunate and had lost money despite his efforts to make his business succeed, but that his problems were not attributable to breaches of the competition rules. Such cases only look easy with the benefit of hindsight. True, we cannot aspire to perfection, and not every decision in every case will be right every time. But that does not mean that no reform is necessary.

VII. Conclusions

I have three general remarks, and then offer a classification of different fact-finding situations. First and foremost, fact-finding in competition matters is a very appropriate topic for academic enquiry. It is right and proper that we are concerned about how facts are gathered and determined, and the reliability of those determinations. Unless the process is done well, the decisions will in most cases be flawed. Worse, there is a lack of legitimacy for private enforcement if it depends on public enforcement which has flawed fact-finding processes. Competition law demands the credibility of rigorous fact-finding by the public authority. The outcome of a proceeding is clearly influenced by its procedural framework. Rigorous fact-finding procedures whereby some confrontation occurs are likely to lead to better decisions.

Second, factual disputes are approached differently in the civil and the common law judicial traditions, and that partly explains the heat of the debate. Common law cases are driven by facts. A trial in an Anglo-Saxon court hugely depends on how the facts emerge. Intense cross-examination of witnesses is matched by severely restrictive rules on the admissibility of evidence. Plaintiffs and defence alike leave their day in court exhausted, but feeling as if all grievances have been fully aired. In contrast, the civil law tradition places more emphasis on the judge as the arbiter of the facts. Parties present the judge with lots of written documents and oral statements, and it will then fall on him to reach a personal "conviction." Ultimately, the civil law judge will not "find" the facts, but will assess the facts as presented before him. American and British clients are much more comfortable with a procedure which effectively confronts opposing views. That does not mean that any proceeding which lacks cross-examination is defective.

Third, there is probably a tension between perfection and efficiency. On the one hand, competition law is meant to make markets function better. If we are too passionately concerned

about procedural perfection, the machinery might become paralysed by perfectionism. Indian competition law has suffered from endless procedural opportunities for appeal.

These are questions of how the economy works. Official agencies have to get on with it. We need decisions within a reasonably short period that are taken reasonably carefully. We can only ask the Commission to do its best. Competition law is meant to help the process of competition. Brisk decisions are an important element of this process, yet careful fact-gathering is key to the perceived validity of the process. It cannot be correct that only cross-examination lasting days can assure the adequate confrontation of witnesses proffering alternative versions of the truth: on the other hand, some greater level of rigour in fact-finding than currently applies in Brussels seems essential. A competition law decision can have major consequences for companies, shareholders, employees and their families. A fine can mean lost jobs. An accusation of unlawful conduct in a competition case can lead to national prison. It should not be a light matter to find a company guilty of a breach of economic law.

Is there any principled method of reconciling the tension between perfect rigorous thoroughness and brisk efficiency?

A. Different Circumstances: Different Norms?

Competition cases fall into different categories, each with a parameter and role in society. Competition law can be used to regulate, or to make markets more efficient, or to constrain public sector power, or to constrain subsidisation by the public sector, or to police how markets function, or to punish grave breaches, or to indemnify. I suggest that the best practices as to fact-gathering might vary considerably depending on the kind of role being discharged by the law. Putting it crudely, if competition law involves pursuing economic crimes and punishing the guilty, then the fact-gathering needs to be of the utmost rigour; whereas if it involves tweaking how a market functions and if there is no question of repressive punishment, a different level of intensity of factual enquiry may be appropriate.

B. Mergers: Intense Debate Followed by Pragmatic Conclusions

If this is a valid hypothesis, we might start with mergers falling under Regulation 139/2004. Contrary to the fears of many, the Commission has mastered the process more successfully than its US competitors. There is an intense, short, vigorous burst of questioning and answering. All those with something to say get a chance (or an obligation) to give their views. Officials and the merging parties exchange dozens of calls and hundreds of e-mails. The goal of the month of energy is to reach a solid conclusion which will survive judicial review or to decide that four more

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months are necessary to be sure. The process is satisfactory in the sense that all inputs are welcome and the debate is intense and short-lived. A negative conclusion involves no accusation of bad faith, only a conclusion that consummation of the proposed merger would likely work against the public interest.

C. State Aids: A Special Case

State aids are handled very differently. The dialogue is largely inter-institutional. The Member State and the Commission courteously exchange shadow-box punches for years, largely excluding the beneficiary of the alleged aid who will have to repay it if it turns out to have been unlawful. The enquiry often relates to how to characterise the state measures, and the state will often present a very particular (not to say controversial) version of the economic goals and value of the measures. The procedure's weaknesses relate more to the sidelining of the beneficiary than to the effectiveness of the fact-finding of the Commission.

D. Commitment Decisions: Bargaining to End a Problem

Then there are commitment decisions under Article 9. These are opportunities for the Commission to nudge, bully, threaten and pressure companies to make concessions to settle a case by tendering commitments according to a theory of the case which might or might not be upheld on appeal. The concessions can involve major changes in commercial policy (spinning off assets or distribution networks, supplying competitors with technical data, or licensing technology for an agreed royalty). The company may be aggrieved but will often accept the compromise of a negotiated deal as opposed to the uncertainty of a condemnation and an appeal process lasting four or five years. Some lesser level of fact-finding rigour may be appropriate. The Commission's goal is to make the market work better, and a compromise allows all those concerned to plan for a new environment. Speed and the absence of condemnation may justify a lowering of the standards of certainty applicable to establishing the facts which were the basis of the accusation. (Having assisted some negotiators of commitments based on very uncertain factual assumptions, I am very reluctant to espouse a general principle.)

E. Condemnations and Penalties: The Severest Consequences Needing the Greatest Rigour

Then we come to the condemnations: for example, the finding that a cartel existed and that named companies participated, and the imposition of shame, public stigma and condemnation, as well as a massive fine. Alternatively, the condemnation may relate to the unilateral abuse of a dominant position. In these circumstances, most especially when a fine is imposed, the function and the nature of the decision is punitive and repressive. The most rigorous level of care in fact-finding is necessary.

At this moment, the European Commission's decisions in this last and most celebrated category are not adequate. There is often no confrontation at all between competing testimonies, or only a limited presentation of alternative views too late in the proceedings to be effective. The hearing is one of the late rites in the final stages of the case. Functionally, it is a process to be endured by the prosecutors in order to reach the final circulation within the Commission hierarchy and adoption of the condemnation decision. The hearing is far too late to play an important role in the fact-finding. The accused person and the accuser may not even see each other in the hearing. The Hearing Officer lacks the power to summon witnesses. There would be ways of improving the hearing, and thereby improving both the formal procedural credibility of the process, as well as sharpening the reliability of the factual story.

Without these and other modifications, the "criminal" or repressive end of the spectrum of competition enforcement is imperfect and needs reform. By contrast, if enforcement consists in taking rapid decisions on major mergers, or negotiating the terms of concessions which should open up market opportunities for others, some lack of robustness and definitiveness in the factual determinations may be understandable and forgivable. This topic is important.

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Endnotes

- 1 Case No IV/31.400 – Ford Agricultural, Commission decision of 15 December 1992, O.J. L 20/1 (1993).
- 2 Case No IV/31.043 – Tetra Pak I (BTG licence), Commission decision 88/501; on appeal see Tetra Pak Rausing v Comm'n, Case T-51/89, 1990 ECR II 309.
- 3 Case IV/29.020 – Vitamins, Commission decision 76/642; on appeal see Hoffmann-La Roche v Comm'n, Case 85/76, 1979 ECR 461.
- 4 Case IV/26.699 – Chiquita, Commission decision 76/353; on appeal see United Brands Company a.o. v Comm'n, Case 27/76, 1978 ECR 207.
- 5 Council Regulation (EC) No 4065/89 on the control of concentrations between undertakings, now replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EU Merger Regulation"), O.J. L 24/1 (2004).
- 6 These and many other examples are described in E.R. Tufté, *Visual Display of Quantitative Information* (Graphics Press 2004).
- 7 See, e.g., Case No COMP/F/38.889 – Gas Insulated Switchgear, Commission decision, C (2006) 6762 final, 24/01/2007, Sections 6.6.1.1. and 6.6.1.2.
- 8 See Paul Craig, *EU Administrative Law*, OUP (2006) at p. 432.
- 9 The Commission is, however, bound by general principles of EU law in discharging its duties, such as proportionality. See *Cemex and others v Comm'n*, Case T-292/11R; *Holcim AG and Holcim Ltd v Comm'n*, Case T-293/11R; *Cementos Portland Valderrivas v Comm'n*, Case T-296/11R; and *HeidelbergCement AG v Comm'n*, Case T-302/11R: Orders of the President of the General Court, 29 July 2011. Such principle has, however, been only very rarely invoked with success as to the burdens imposed by a questionnaire.
- 10 Commissioner Kroes, European Union Press Release SPEECH 08/18, Commission launches sector Inquiry into Pharmaceuticals (16 January 2008). While document destruction is a legitimate concern when investigating a hard-core violation of EU competition law, it does not seem to constitute a sufficient justification when the stated goal is to survey the functioning of an entire industry sector. The Commission's public remarks about there being "something rotten" seem equally to have been a regrettable error.
- 11 Article 18(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1 (4 January 2003); Article 11(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L 24 (29 January 2004).
- 12 Article 18(3) of Regulation 1/2003; Article 11(3) of Regulation 139/2004.
- 13 Article 23(1) of Regulation 1/2003; Article 14(1) of Regulation 139/2004.
- 14 *AM & S v Comm'n*, Case 155/79, 1982 ECR 1575.
- 15 *Orkem v Comm'n*, Case 374/87, 1989 ECR 3283.
- 16 *Id.* at paras. 28–33.
- 17 *Saunders v United Kingdom*, ECtHR, 1997 EHRR 313.
- 18 *Orkem v Comm'n*, Case 374/87, paras. 34–35, 38.
- 19 See also *Limburgse Vinyl Maatschappij a.o. v Comm'n (PVC II)*, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, 2002 ECR I-8357, para. 273. An undertaking cannot also be required to assess its compliance with the antitrust rules.
- 20 *Limburgse Vinyl Maatschappij and Others v. Comm'n (PVC II)*, Joined Cases C-238/99 et al., para. 458.
- 21 *S. v Switzerland*, ECtHR, judgment of 28 November 1991, 1992 EHRR 670, para. 48.
- 22 *Campbell v United Kingdom*, ECtHR, judgment of 25 March 1992, 1993 EHRR 137, paras. 46, 54.
- 23 Each of the 27 EU Member States has its own legal rules regarding legal privilege. These differ from the EU rules. England, Scotland and Ireland have rules which are more akin to the US regime than is the case for continental Europe. National laws are not discussed in this note.
- 24 *AM & S v Comm'n*, Case 155/79, 1982 ECR 1575.25 See I. Forrester, *Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the AM&S Judgment*, 20 *Common Market L. Rev.* 75 (1983).
- 26 See in particular Order of 4 April 1990 in *Hilti v Comm'n*, Case T-30/89, 1990 ECR II 163 and *Akzo Nobel Chemicals a.o. v Comm'n*, Joined Cases T-125/03 and T-253/03, 2007 ECR II 3523.
- 27 Case No IV/33.802 – *BASF Lacke & Farben AG, and Accinauto*, O.J. L 272 (1995) p. 16, para. 56; Case No. IV/30.979 – *Decca Navigator System*, O.J. L 43 (1998) p. 27, paras. 25, 27, 108.
- 28 Article 6 of Regulation 773/2004; *AKZO Chemie BV and AKZO Chemie UK Ltd v Comm'n*, Case 53/85, 1986 ECR 1965, para. 27.
- 29 Article 20 of Regulation 1/2003.
- 30 Article 21 of Regulation 1/2003.
- 31 *Nexans France and Nexans v Comm'n*, Case T-135/09, O.J. C 141 (20 June 2009), p. 48.
- 32 Commission Notice on immunity from fines and reduction of fines in cartel cases, O.J. C 298, (8 December 2006), pp. 17–22 ("Leniency Notice").
- 33 Leniency Notice, point 8.
- 34 Leniency Notice, point 24; *Solvay SA v European Comm'n*, Case T-186/06, judgment of 16 June 2011, para. 365 (which refers to the equivalent text in the previous Leniency Notice).
- 35 Leniency Notice, point 23(a).
- 36 Leniency Notice, point 26.
- 37 See e.g. *JFE Engineering Corp. a.o. v Comm'n*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, 2004 ECR II 2501, para. 211.
- 38 *Peróxidos Orgánicos v Comm'n*, Case T-120/04, 2006 ECR II 4441, para. 70.
- 39 *Id.* at para. 70. (emphasis added).
- 40 *JFE Engineering Corp. a.o. v Comm'n*, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00, 2004 ECR II 2501, para. 219 (emphasis added). See also *Enso-Gutzeit v Comm'n*, Case T-337/94, 1998 ECR II 1571, para. 91.
- 41 Case No COMP/F/38.899 – Gas Insulated Switchgear, Commission decision of 24 January 2007 (notified under document number C(2006) 6762 final), O.J. C 5, 10 January 2008; and judgments of 3 March 2011 in *Siemens v Comm'n*, Case T-110/07; *Areva and Others v Comm'n*, Case T-117/07; *Areva and Others v Comm'n*, Case T-121/07; and *Siemens and VA Tech Transmission & Distribution v Comm'n*, *Siemens Transmission & Distribution v Comm'n* and *Siemens Transmission & Distribution and Nuova Magrini Galileo v Comm'n*, Joined Cases T-122 - 124/07. See also judgments of the General Court of 12 July 2011 in *Hitachi and others v Comm'n*, Case T-112/07; *Toshiba v Comm'n*, Case T-113/07; *Fuji Electric Co Ltd v Comm'n*, Case T-132/07; and *Mitsubishi Electric v Comm'n*, Case T-133/07.
- 42 See *NZ Commerce Commission v Siemens*, Judgment of Woodhouse J, 28 October 2010, CIV 2007-404-2165.
- 43 *Id.* at para. 127.
- 44 *Id.* at para. 140.
- 45 Case No COMP/39.188 – *Bananas*, Commission decision of 15 October 2008, O.J. C 189/12 (2009).
- 46 On this point, see I. Forrester, J. MacLennan and A. Dawes, *EC Competition Law 2007 – 2009*, 29 *Oxford Yearbook of European Law*, 363–480 (2010).
- 47 See generally Commission Notice on handling of complaints by the Commission under Article 81 and 82 of the EC Treaty, O.J. C 101/65 (2004).
- 48 Case No COMP IV/31.851 — *Magill TV Guide/ITP, BBC and RTE*, Commission Decision 89/205, O.J. L 78/43 (1989).
- 49 Case No COMP D3/38.044 — *NDC Health / IMS Health: Interim measures*, Commission Decision 2002/165/EC, OJ L 59/18 (2002).
- 50 *Microsoft v Comm'n*, Case T-201/04, 2007 ECR II 1491.

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- 51 Microsoft/RealNetworks settlement dated 11 October 2005; Intel/AMD settlement dated 12 November 2009; Rambus/Samsung settlement dated 18 January 2011.⁵² See *Atlantic Container Line and others v Comm'n*, Joined Cases T-191/98 and T-212/98 to T-214/98, 2003 ECR II 3275, paras. 349–59; and *Group Danone v Comm'n*, Case T-38/02, 2005 ECR II 4407, para. 66.
- 53 Ombudsman's decision, available at, <http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark>.
- 54 *Atlantic Container Line v Comm'n*, Joined Cases T-191, 212, 214/98, 2003 ECR II 3275, para. 404.
- 55 See I. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, E.L. Rev. 817 (2009).
- 56 *Dalmine v Comm'n*, Case C-407/04, 2007 ECR I 829, para. 86.
- 57 Commission Notice on the co-operation between the Commission and the Courts of the EU Member States in the application of Articles 81 and 82 EC, O.J. C 101/54 (2004).
- 58 Article 15 of Regulation (EC) No 1/2003.
- 59 This cooperation is primarily based on the 1991 Cooperation Agreement and the 1998 Positive Comity Agreement. See Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws – Exchange of interpretative letters with the Government of the United States of America, O.J. L 95/47 (1995), and Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, O.J. L 173/28 (1998).
- 60 COMP/E-1/37512 – Vitamins, O.J. L 6/1 (2003).
- 61 COMP/E-1/36.604 – Citric Acid, O.J. L 239/18 (2002).
- 62 On discovery, see K. Norlander, *Discovering Discovery: US Discovery of EC Leniency Statements*, 25 ECLR 644 (2004).
- 63 Federal Rules of Civil Procedure, Rule 26(c)
- 64 *United Brands Company and United Brands Continentaal BV v Comm'n*, Case 27/76, 1978 ECR 207.65 Commission Decision No IV/26.699 – Chiquita, O.J. L 95/1 (1976).
- 66 *United Brands judgment*, p. 225.
- 67 *Id.* at p. 226.
- 68 *Id.* at p. 224.
- 69 Study by the Institut Économique Agricole Belge (*Le marché de la pomme en Belgique, Analyse globale de la fluctuation des prix à la production de 1950 to 1957 – Jansen (1969)*).
- 70 *United Brands judgment*, paras. 14–15
- 71 *Id.* at paras. 20–21.
- 72 *Id.* at para. 31.
- 73 Joint Electron Devices Engineering Council, a US standard setting organisation (SSO) active in semiconductors that included, among others, all major DRAM manufacturers. Since 1999, the organisation has been known as JEDEC Solid State Technology Association.
- 74 Chief ALJ of the FTC, initial decision of 23 February 2004, In the matter of Rambus, Docket 9302.
- 75 *Id.* at 207.
- 76 FTC, decision of 2 August 2006, In the matter of Rambus, Docket 9302.
- 77 *Id.* at p. 119.
- 78 *Rambus Inc. v. Infineon Technologies AG*, 318 F.3d 1081, 1101 (Fed. Cir. 2003). Only a small number of patent applications were disclosed. In addition, Mr Grossmeier of Cray testified on that question that “They were not. They were not. No, I did not expect that someone would [disclose applications].” 3 March 2009 Findings of Fact and Conclusions of Law, *Hynix v Rambus* N.D. Cal, C-00-20905 RMW, p. 28.
- 79 *Infineon*, 318 F.3d, Annex 22, at 1102; *Rambus v FTC*, Court of Appeals for the District of Columbia 07-1086; *Hynix v Rambus*, Findings of Fact and Conclusions of Law of 3 March 2009, D.C. Cal. C-00-20905 RMW Judge Whyte.
- 80 N.D. Cal., Jury verdict of 23 March 2008, *Hynix v Rambus* C-00-20905 RMW
- 81 N.D. Cal., Jury verdict of 23 March 2008.
- 82 *Decision*, para. 41.
- 83 *Società Italiana Vetro SpA and others v Comm'n*, Cases T-68/89, T-77/89 and T-78/89, 1992 ECR II 1403.
- 84 *Id.* at 1403, para. 95.
- 85 *Id.* at para. 93.
- 86 *Id.* at para. 205.
- 87 *Id.* at para. 213.
- 88 *Id.* at para. 219.
- 89 *Id.* at para. 238.
- 90 *Kaučuk a.s. v European Comm'n*, Case T-44/07, judgment of 13 July 2011.
- 91 *Id.* at para. 34.
- 92 *Id.* at para. 49.
- 93 *Id.* at paras. 53–58.
- 94 *Id.* at para. 64.
- 95 *Id.* at para. 48.
- 96 *Microsoft v Comm'n*, Case T-201/04, 2007 ECR II 3601.
- 97 Case No COMP/C-3/37792, Commission decision 2007/53/EC of 24 March 2004 relating to a proceeding pursuant to Article 82 and Article 54 of the EEA Agreement against Microsoft Corp.
- 98 I have separately written on this question. See I. Forrester, *Victa placet mihi causa: the compulsory licensing part of the Microsoft case*, in *Microsoft on Trial: Legal and Economic Analysis* (L. Rubini ed., 2010).
- 99 *Microsoft Decision*, op.cit., para. 589 and footnote 712.100. Among others: Akzo Nobel, Alitalia, Carrefour, the City of Vienna, Nokia, Novo Nordisk A/S, Royal Dutch/Shell Group, the UK Inland Revenue.
- 101 One interested party in the case was the open source SAMBA project, under which a number of devotees created not a new server operating system product for sale in the market, but an open source and free functional replica or “clone” of the Windows Server operating system, for use in Windows networks.
- 102 Case COMP/37990-Intel, Commission decision of 13 May 2009, hereinafter “Intel Decision.”
- 103 *Id.* at para. 624.
- 104 *Id.* at paras. 626 –77, 788.
- 105 *Id.* at para. 766.106 See C. Kerse and N. Khan, *EC Antitrust Procedure*, (5th ed. 2005) at paras. 8-039 et seq.
- 107 See *Marlines v Comm'n*, Case T-56/99, 2003 ECR II 5225; appeal dismissed; *Marlines v Comm'n*, Case C-112/04, Order of the Court of 15 September 2005, O.J. C 10/5 (2006). See also *ICI v Comm'n*, Case 48/69, 1972 ECR 619, para. 68; *Thyssen Stahl v Commission*, Case T-141/94, 1999 ECR II 347, para. 175.
- 108 *PVC II*, Joined Cases C-238/99 P etc, 2002 ECR I 8375, paras. 513–23.
- 109 See I. Forrester, *A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review*, in *European Competition Law Annual 2009: Evaluation of Evidence and Its Judicial Review in Competition Cases* (C.D. Ehlermann and M. Marquis eds., 2010).
- 110 *Bernard Crehan v Inntrepreneur Pub Company and Brewman Group Limited* (High Court). Judgment of 26 June 2003, 2003 EWHC 1510 (Ch).
- 111 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, Case C-453/99, 2001 ECR I 6297.

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