Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2018)74

Unclassified

English - Or. English

24 November 2018

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

INVESTIGATIVE POWERS IN PRACTICE - Breakout session 2. Requests for Information: Limits and Effectiveness - Contribution from the European Commission

- Session IV -

30 November 2018

This contribution is submitted by the European Commission under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03440401

Investigative Powers in Practice

Breakout session 2. Requests for information: Limits and effectiveness

- Contribution from the European Commission -

1. Investigative Powers of the Commission – RFIS

1. The power to send requests for information ("RFI(s)") is one of the key investigative tools of the European Commission. Almost every investigation – be it an antitrust, cartel or merger investigation – involves issuing several rounds of requests.

2. This background paper provides an insight into DG Competition's practice with regard to RFIs.

1.1. RFIs in the Commission's Antitrust practice

3. RFIs are one of the investigative tools listed in Chapter V of Council Regulation (EC) No 1/2003 (the "Regulation 1/2003"),[1] the others being inspections, interviews and sector inquiries. RFIs play an important role in competition investigations; they are one of the main tools for obtaining evidence of anti-competitive behaviour, together with inspections. In addition, the Commission also obtains evidence from other sources, such as leniency applicants and whistle blowers.

4. The Commission regularly sends requests for information, at several stages of an investigation. The Commission may send RFIs, for instance, in order to:

- Provide explanations on the evidence found for instance during the inspection, provided through leniency requests or obtained through other means;
- Inquire with competitors, customers, suppliers etc. whether they have experienced anticompetitive behaviour from the undertaking(s) under investigation;
- Obtain information from companies located outside the EEA as the Commission cannot verify the information on the spot through an inspection;
- Enable the Commission to establish the liability of a company. The Commission may send a set of specific questions concerning the ownership of a company;
- Verify the value of sales of the product concerned by the investigation and/or the undertaking's annual turnover for the purposes of calculation of fines.

5. The power to send RFIs is set out in Article 18 of Regulation 1/2003. Pursuant to this provision, the Commission may require undertakings and associations of undertakings to provide it with all necessary information. The Commission may address any undertaking or association which might hold relevant information, irrespective of its involvement in the

[1] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1-25.

suspected infringement. The Commission does not have the power to send requests for information to individuals.

6. Article 18 distinguishes between a simple information request and a formal Commission decision obliging a company or association to provide information. An undertaking (or association) is not obliged to respond to a simple request for information.[2] In order to compel an undertaking to provide all necessary information, the Commission may therefore revert to requesting such information by decision. A decision requesting information can be accompanied with periodic penalty payments to enforce the decision in case of a refusal to supply the requested information.[3] An undertaking is under an obligation to cooperate actively with a request for information by decision. It must therefore make available to the Commission all requested information relating to the subject-matter of the investigation.[4]

7. In order to send an RFI, the Commission has to be in the possession of facts that justify the intervention into the private sphere of the undertakings. The power to request information may not be used arbitrarily.

8. Article 18 of Regulation 1/2003 expressly limits the information that can be requested to only what is 'necessary'. In practice, that means that there must exist a connection between the information requested by the Commission and the alleged infringement it investigates.[5] To ensure that an addressee of an RFI can assess whether this connection exists, the RFI must mention the purpose of the request. This entails that the Commission is obliged to indicate the subject of its investigation in the RFI. The Commission has to identify the alleged infringement of the competition rules it is investigating.[6] Indicating the legal basis and the purpose of the request allows an addressee to assess the scope of the duty to cooperate and at the same time to safeguard its rights of defence. The amount of information that the Commission has to provide in this regard depends also on the stage of the investigation.[7]

9. The Court of Justice has confirmed that the Commission has wide discretion to decide, for the purposes of an antitrust investigation, whether particular information is necessary to enable it to bring to light an infringement. Even if the Commission already has evidence or proof of the existence of an infringement, the Commission may use a request for information to enable it to better define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved.[8]

10. In drafting an RFI, the Commission can use any information available, including information obtained through its own investigations, from a leniency applicant(s) or from a whistle-blower.

[2] However, if an undertaking responds, its reply cannot be incorrect or misleading, see Article 23(1)(a) of Regulation 1/2003.

[3] Article 24 of Regulation 1/2003.

[4] Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para 27.

[5] Case T-39/90, *Sep v Commission*, ECLI:EU:T:1991:71, para. 25.

[6] Case C-247/14P, *HeidelbergCement AG v Commission*, ECLI:EU:C:2016:149, para 20.

[7] Case C-247/14P, *HeidelbergCement AG v Commission*, ECLI:EU:C:2016:149, para 39.

[8] Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para 15.

11. Article 18(2) of Regulation 1/2003 sets out the procedural requirements for sending a simple request for information to an undertaking or association of undertakings. In this case, the Commission has to state the legal basis and the purpose of the request. The Commission also has to specify what information is required and fix a time-limit within which the information is to be provided.[9] Finally, the Commission sets out the penalties that are provided in Article 23 of Regulation 1/2003 for providing incorrect or misleading information.[10]

12. A request for information *by decision* is subject to the same procedural requirements as a simple RFI.[11] Given the more specific provisions on penalties relating to the supply of information in replies to a request made by decision, the Commission also indicates in the request the penalties provided for in Article 23 (fines) and Article 24 (periodic penalty payments) of Regulation 1/2003 (for more details, see below in Section 3).

13. The Commission has discretion on whether it issues a simple request for information or a formal decision. In using its discretion, the Commission must take the principle of proportionality into account. In the case of RFIs, useful considerations in this regard are the length of the request, the format of the response imposed on the addressees, the stage of the procedure, the nature of the involvement of the addressee, etc.

14. In an RFI by decision, the Commission may not include in the questionnaire any questions which may compel the undertaking to provide answers that may involve an admission of an infringement.[12] This protection against self-incrimination does not apply to documents that are in the possession of the addressee of an RFI. The Commission may therefore compel an undertaking to disclose if necessary such documents even if these may be used to establish an infringement.[13]

15. Addressees of a simple RFI may refuse to reply to questions that they find self-incriminating. In addition, an addressee of a simple RFI may raise the issue with DG Competition and thereafter refer to the Commission's Hearing Officer.[14]

16. The Commission may send RFIs to undertakings located inside and outside of the EEA. In practice however, the Commission has so far refrained from enforcing procedural fines or periodic penalty payments on companies outside the EEA. To effectively use its investigative powers, the Commission frequently resorts to sending the RFI to an EU

[9] Usually a time limit will be at least two weeks from the receipt of the request. In case an addressee of a simple RFI considers that the time provided for its reply is insufficient, it may ask DG Competition for an extension.

[10] Articles 18(2) and 23(1)(a) of the Regulation 1/2003.

[11] In case an addressee of an RFI by decision considers that the time provided for its reply is insufficient, it may ask DG Competition for an extension. If such a request is refused, the addressee may revert to the Hearing Officer. The Hearing Officer shall decide on whether an extension of the time limit should be granted, taking into account the length and complexity of the RFI and the requirements of the investigation. Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the Hearing Officer in certain competition proceedings, OJ L 275, 20.10.2011, Article 4(2)(c) (the "Hearing Officers' Terms of Reference").

[12] Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, paras 34-35.

[13] See also Recital 23 in the preamble to the Regulation 1/2003.

[14] Article 4(2)(b) of the Hearing Officers' Terms of Reference").

subsidiary of the non-EU undertaking requesting the subsidiary to provide the information on behalf of the entire undertaking, including all connected undertakings such as the ultimate parent company and its subsidiaries.

17. Article 28 of Regulation 1/2003 contains a limitation on the use of information by the Commission. It establishes that information collected by the Commission, for instance during an inspection or through an RFI, can only be used for the purpose for which it was acquired.

18. However, this provision does not mean that the Commission has to look the other way when during the investigation of a case it stumbles upon information that points at a further infringement.

19. The European Court of Justice has confirmed on several occasions that the Commission is allowed to initiate an investigation in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of anti-competitive conduct.[15] In a new investigation, the Commission is entitled to request fresh copies of the documents obtained during the first investigation and then to use them as evidence in the case to which the second investigation relates, without the rights of defence of the undertakings concerned being affected as a result.[16]

1.2. RFIs in the Commission's Merger review practice

20. For the Commission to effectively carry out its merger investigation within the prescribed time limits, it is very important to have evidence that is accurate, complete and timely submitted. RFIs are one of the investigative tools listed in Council Regulation (EC) No 139/2004 ("the Merger Regulation"), the others being inspections and interviews, and remain the most important tool of obtaining evidence in the Commission's merger review proceedings.[17]

21. Article 11 of the Merger Regulation gives the Commission the investigative power to request information from undertakings and associations of undertakings[18] as well as from Member States[19] in order to gather all necessary information, which includes in particular requests for information addressed to customers, competitors, and suppliers. These powers closely resemble those available under the Regulation 1/2003. In particular, like Article 18 of Regulation 1/2003 in antitrust proceedings, Article 11 of the Merger Regulation distinguishes between a simple information request as well as one that is attached to a formal Commission decision obliging the addressee to provide the information required.

[15] Case C-583/13P, *Deutsche Bahn v Commission*, ECLI:EU:C:2015:404, para 59.

[16] Case T-655/11, *FSL Holdings v Commission*, ECLI:EU:T:2015:383, para 55.

[17] Articles 11 and 13, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22. Article 12, Merger Regulation, empowers competent authorities of the Member States to undertake the investigation on behalf of the Commission. See also the DG Competition Best Practices on the conduct of EC merger proceedings (the "Mergers Best Practices"), para. 27.

[18] Article 11(1) of the Merger Regulation. Exceptionally, the Commission may also request information from individuals controlling one or more undertakings, see Articles 11(1) and 3(1)(b) of the Merger Regulation.

[19] Article 11(6) of the Merger Regulation.

Any request for information must indicate the legal basis for and purpose of the request, the penalties for the supply of incorrect information, and the response date.[20]

22. At several stages of a merger review and on a regular basis, the Commission requests information, for instance in the following situations:

- Firms may consult the Commission on whether their operations may be covered by Community control of concentrations. To be able to give its views, the Commission may request additional information such as regarding turnover, control and company structure;
- During pre-notification contacts, to which the Commission attaches considerable importance even in seemingly non-problematic cases,[21] the Commission seeks to assist notifying parties to submit a complete notification form, and to avoid as far as possible declarations of incompleteness, and to prepare for the upcoming investigation by identifying key issues and potential competition concerns.[22] On this basis, the Commission may request notifying parties to submit additional information about potentially affected markets, allowing for an early market testing of alternative market definitions and/or the notifying parties' position on the market/s in question;[23]
- The Commission may request information from industry participants informally prior to notification, provided "the existence of the transaction is in the public domain and once the notifying parties have had the opportunity to express their views on such measures";[24]
- Upon notification, the Commission will conduct a market investigation, typically reaching out to and collecting the views of competitors, customers and other market participants. This might include questions about the boundaries of the relevant market,[25] the projected effect of hypothetical price increases, the characteristics and dynamics of the affected market, and the competitive effect of the transaction under investigation;
- In complex cases, the Commission may decide to address a comprehensive request for internal company documents to the merging parties. To assist companies in complying with such requests in merger proceedings and make this process more efficient, the Commission is currently preparing "Best Practices on requests for internal documents under the EU Merger Regulation";[26]
- The Commission may also ask for quantitative data to conduct statistical analysis to define markets, establish a counterfactual, assess the potential anti-competitive

[20] Article 11(2) of the Merger Regulation.

[21] Mergers Best Practices, para. 5.

[22] Mergers Best Practices, para. 6

[23] Mergers Best Practices, para. 16.

[24] Mergers Best Practices, para. 26.

[25] Market Definition Notice, paras. 33–34.

[26] Speech by Margrethe Vestager "Fairness and competition", 25 January 2018.

effects of a notified merger, validate efficiency claims or predict the impact of remedies;[27]

- When merging parties submit a remedies proposal, the Commission will consult the authorities of the Member States on the proposed commitments and, when considered appropriate, also third parties in the form of a market test.[28]

23. Already since the reform of the Merger Regulation in 2004, the Commission has adopted an increasingly effects-based assessment of proposed concentrations. While cases have become increasingly complex over time, the Commission has stepped up its efforts to rigorously investigate the different aspects of a case and support all findings with solid qualitative and/or quantitative evidence of the potential effects of a proposed merger. This has led to a progressive increase in the scope of the "market investigation" and the required evidence, including empirical evidence such as internal documents and economic analyses.

24. Requests for information can be extensive[29] and involve a large number of companies. In Essilor/Luxottica, the Commission received replies from more than 3 000 opticians in its investigation concerning the sale of spectacle frames and lenses.[30]

25. In drafting RFIs, the merger notification is mainly used as the basis and starting point of the investigation. The Commission identifies information missing, such as possible market segmentations and drafts RFIs to the notifying party in this respect. It then cross-checks this information with market participants such as the parties' customers and competitors during the market test.

26. Depending on the sector, the Commission has gathered knowledge and experience over time, enabling it to identify quickly what information is missing from the Form CO as well as potential problematic cases. This also facilitates the drafting of RFIs.

27. Finally, similar to Article 28 of Regulation 1/2003, Article 17 of the Merger Regulation establishes that information collected by means of an RFI shall only be used for the purpose for which it was acquired. Although information or documents collected in the context of a different investigation cannot be automatically reused, the Commission may request the documents again by drafting a separate RFI, in any following case.

[27] See Best Practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases, para. 51.

[28] Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, Official Journal C 267, 22.10.2008, p. 1-27.

[29] See, e.g., Case M.2389 - Shell/DEA, Commission decision of 20 December 2001 (Commission's request for information to certain third parties numbered over 20 pages and exceeded 100 questions). Schneider T-310/01 and T-77/02, paras 100-104: GC confirmed that the Commission acted reasonably by stopping the clock for failure to respond to a 322-question RFI with a deadline of 11 working days.

[30] Case M.8394 - Essilor/Luxottica, Commission decision of 1 March 2018, para 25.

2. RFIs addressed to third parties

28. As indicated previously, the Commission may address any undertaking or association of undertakings which might hold relevant information, irrespective of its involvement in the suspected infringement or merger. During the investigation the Commission can reach out by means of addressing one or multiple RFIs to different actors such as competitors, customers, trade associations, market experts, regulatory authorities, member states, national competition authorities etc. Article 18 of Regulation 1/2003 and Article 11 of the Merger Regulation do not distinguish between RFIs addressed to third parties or those addressed to the parties themselves.

29. RFIs sent to third parties may be extensive and include over 100 respondents, such as customers of the parties. In Caterpillar/MWM, the Commission sent Article 11(3) decisions to a trade association that had been requested to provide statistical market share data and to a competitor of the merging parties that had been requested to provide bidding data deemed "critical for the market definition exercise".[31]

30. The Commission obtains, in the course of its investigation, both quantitative and qualitative information, some of which serves as evidence underpinning the reasoning in the Commission's Statement of Objections. Data collected from third parties (e.g. cost and price data, sales data, bidding data, margins etc.) often constitute business secrets which are by nature confidential. In accordance with Article 339 of the Treaty on the Functioning of the European Union, the Commission has a general duty to protect confidential information that could seriously harm the undertaking if disclosed.[32] As per Article 17(2) of the Merger Regulation and Article 28(2) of Regulation 1/2003, information acquired through the application of these regulations of the kind covered by the obligation of professional secrecy shall not be disclosed.[33]

31. On the other hand, as part of their rights of defence, addressees of a Statement of Objections[34] have the right to access the Commission's file.[35] The rationale behind access to the Commission's file is to allow the addressees of the Statement of Objections an opportunity, before a decision is taken, to examine the evidence in the Commission's file so that they are in a position to express their views on the conclusions reached in the Statement of Objections on the basis of that evidence and defend themselves against these objections.

[31] Case M.6106 - Caterpillar/MWM, Commission decision of 18 October 2011, para. 15.

[32] This principle is also endorsed by case law, for instance, in Case T-210/01, *General Electric Company v Commission*, [2005] ECR II-05575, paras 631 and 650.

[33] See Article 17(2) of the Merger Regulation.

[34] Issued pursuant to Article 13(2) of Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ L 133, 30.04.2004, p. 1) as amended (the "Merger Implementing Regulation") or Article 10(1) of the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18-24 (the "Antitrust Implementing Regulation").

[35] See Article 18(1) and (3) of the Merger Regulation, Article 17(1) of the Merger Implementing Regulation, Article 27(2) of Regulation 1/2003 and Article 15(1) and (2) of the Antitrust Implementing Regulation.

32. In principle, access to the Commission's file is granted by giving the addressees of a Statement of Objections access to an electronic version of all documents contained in the Commission's file, with the exception of internal documents and business secrets and other confidential information.[36]

33. Notwithstanding this, in antitrust proceedings confidential information may exceptionally be disclosed when such disclosure is necessary to prove an infringement of Articles 101 or 102 TFEU,[37] or to safeguard the rights of defence of the parties.[38] As regards merger proceedings, pursuant to Article 18(1) of the Merger Implementing Regulation, the Commission may exceptionally consider the disclosure of confidential information necessary for the purpose of the procedure. In merger cases, taking into account the administrative nature of the procedure and the need for speed, the Commission has usually considered such disclosure exceptionally necessary only in relation to information that the Commission relied upon in the Statement of Objections. In antitrust and merger proceedings, confidential information will not be disclosed when the rights of defence of the parties may be effectively exercised on the basis of non-confidential versions of the documents in the Commission's file.

34. Therefore, the Commission requests a non-confidential version of the response to the RFI by the data provider for access to file purposes. If this is not feasible (e.g. the data may be of quantitative nature, or exceptionally of a qualitative nature such as internal strategy documents of competitors, and it may not be possible to provide, in a timely manner, a meaningful non-confidential version) it will try to organise a data room, whereby documents in the Commission's file are made accessible to an addressee of a Statement of Objections in a restricted manner, i.e. by limiting the number and/or category of persons having access and the use of the information being accessed to the extent strictly necessary for the exercise of the rights of defence. This is only done after having obtained express approval of the data provider.[39] In addition, for antitrust, a voluntary confidentiality ring may be proposed by the Commission. Such a ring allows for the review of confidential versions of the documents by the external counsel of the addressee of the Statement of Objections.

35. In case of persisting disagreement between the Commission and the addressees of a Statement of Objections,[40] or the data provider,[41] in relation to the disclosure of confidential information, including via a data room, the matter may be brought before the Hearing Officer.[42] The Hearing Officer may take a decision on the basis of Articles 7 and

[36] See Article 18(3) of the Merger Regulation, Article 27(2), 3rd sentence of Regulation 1/2003 and Article 15(2), 1st sentence of the Antitrust Implementing Regulation.

[37] See Article 15(3) of the Antitrust Implementing Regulation.

[38] See also in this context point 24 of the Access to File Notice.

[39] See Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation.

[40] See Article 7(1) of the Hearing Officers' Terms of Reference.

[41] See Article 8(2) of the Hearing Officers' Terms of Reference.

[42] As set out in recitals 8 and 15 to the Hearing Officers' Terms of Reference, the Hearing Officer acts as an independent arbiter between DG Competition and the respective parties to solve disputes

8 of the Hearing Officers' Terms of Reference, respectively, including the ordering of the disclosure of confidential information in a data room under the conditions laid down in Article 8(4) of the Hearing Officers' Terms of Reference.

3. Sanctions for non-compliance

36. Undertakings which are being investigated under Regulation 1/2003 have no right to evade the investigation. On the contrary, the undertaking in question is subject to an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation.[43] Similarly, in merger cases, notifying parties are required to "make full and honest disclosure to the Commission of the facts and circumstances which are relevant for taking a decision on the notified concentration".[44] Case teams with sector-specific knowledge will review all submissions and cross-check them against those made by other market participants. Inspections also enable the Commission to check the accuracy of submitted information, although these are used less often in merger cases. Both Regulation 1/2003 and the Merger Regulation provide for sanctions for not complying with requests for information, whether that is a simple RFI or an RFI by decision.

37. In the case of simple RFIs, the Commission may impose fines not exceeding 1% of the total turnover in the preceding business year where undertakings or associations, intentionally or negligently, supply incorrect or misleading information.[45] Respectively, in case of a decision requesting information, the Commission may impose fines not exceeding 1% of the total turnover in the preceding business year where undertakings or associations, intentionally or negligently, supply incorrect, incomplete or misleading information, or fail to supply information within the required time-limit.[46] The Commission may also impose by decision a periodic penalty payment not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the decision to compel undertakings or associations to supply complete and correct information.[47]

38. In setting the amount of the fine, the Commission takes account of the nature, gravity, and duration of the infringement, as well as any aggravating or mitigating circumstances.[48] In a final infringement decision in antitrust cases, the Commission may

about access to the Commission's file and the protection of business secrets and other confidential information.

[43] Case C-374/87, *Orkem v Commission*, ECLI:EU:C:1989:387, para 27.

[44] Recital 5 of the Implementing Regulation.

[45] See Articles 18(2) and 23(1)(a) of the Regulation 1/2003 and Articles 11(2) and 14(1)(b) of the Merger Regulation.

[46] See Articles 18(3), 23(1)(b) and 24(1)(d) of the Regulation 1/2003 and Articles 11(3) and 14(1)(c) of the Merger Regulation.

[47] See Article 24(1)(d) of the Regulation 1/2003 and Article 15(1)(a) of the Merger Regulation.

[48] See Article 23(3) of the Regulation 1/2003; and Article 14(3) of the Merger Regulation.

regard the provision of incorrect, misleading or incomplete answers to an RFI in itself also as an aggravating circumstance.[49]

39. The above sanctions have so far not been applied under Regulation 1/2003.[50] Even though the Commission has not yet used its powers to sanction undertakings or associations under Regulation 1/2003, it will not hesitate to do so if the circumstances of a case would require this. A parallel can be drawn in this regard to the procedural infringements relating to the inspections of the Commission. There, the Commission has imposed sanctions in four cases since 2007.[51]

40. As regards sanctions under the Merger Regulation, most recently, in May 2017, the Commission fined Facebook EUR 110 million for providing misleading information in connection with its acquisition of WhatsApp.[52] The information was relevant to the question of whether Facebook could automatically match Facebook users' accounts with WhatsApp users' accounts. In both Form CO and a response to a Commission information request, Facebook had contended that user matching was not possible. The Commission subsequently approved the transaction unconditionally in November 2014.[53] It later came to the Commission's attention that this statement was incorrect and that Facebook employees had been aware of the possibility to engage in user matching. In these circumstances the Commission determined that Facebook had been "at least negligent" in making incorrect statements on a matter relevant to the Commission's investigation and concluded that Facebook committed two separate infringements, i.e. the provision of incorrect and misleading information in the merger notification form and in the replies to a Commission's request for information.

41. It should also be noted that a phase I clearance decision under the Merger Regulation can be revoked where it is based on incorrect information, or was obtained by

[49] See point 28 of the Guidelines of the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C 2010/2.

[50] Under the predecessor of Regulation 1/2003, Regulation 17, the provision of incorrect, incomplete or misleading replies was considered several times as an aggravating factor or sanctioned in a standalone procedural infringement.

[51] In Case AT.38432, Sony's fine was increased by 30% for obstructing the Commission's investigation during on-site inspections at its premises. In Case AT.39326, E.ON received a EUR 38 million fine for breach of a seal during an inspection. In Case AT.39793, EPH was fined EUR 2.5 million for obstruction during the inspection and in Case AT.39796, Suez was fined EUR 8 million for the breach of a seal during an inspection. Recently, the Commission has issued a statement of objections against ZSSK in Case AT.40565 for an alleged obstruction during an inspection.

[52] Facebook/WhatsApp, Case M.8228, Commission Press Release IP/17/1369 of 18 May 2017. In addition, in July 2000, the Commission fined Mitsubishi Heavy Industries EUR 50 000 for failing to supply information on a proposed joint venture between Kvaerner and Ahlstrom during a phase II investigation under the Merger Regulation notwithstanding "repeated requests" (Commission Press Release IP/00/764 of 12 July 2000 concerning Case M.1431 - Kvaerner/Ahlstrom). The Commission also imposed a periodic penalty payment totalling EUR 900 000. In July 2004, the commission fined Tetra Laval EUR 45 000 for supplying incorrect information in response to an RFI under the Merger Regulation (Case M.3255 - Tetra Laval/Sidel, Commission decision of 7 July 2004).

[53] Facebook/WhatsApp, Case M.7217, Commission decision of 3 October 2014.

deceit.[54] The Commission may then make a new decision without being bound by the original timetable.[55]

42. In merger cases, where companies fail to provide information formally requested by the Commission, the time periods prescribed in the Merger Regulation can be suspended until such time as the requested information has been provided in full. The Commission has applied this provision of the Merger Regulation in both Phase I and Phase II proceedings.[56] Suspending the merger review timetable remains exceptional and is observed only in a handful of very complex in-depth investigations, representing 1 to 2% of all merger reviews per year.

43. In addition, the Commission requires the submission of notifications that are correct and complete,[57] and the Form CO will not be deemed complete if it contains "incorrect" or "misleading" information.[58]

4. Impact of large amounts of data produced as a response to RFIs

44. In its investigations, the Commission is more and more faced with large amounts of data. The increased amount of data available and potentially relevant in a data-driven environment poses significant challenges but also offers opportunities to root the Commission's decision in a broad and reliable factual basis.

45. It is for the Commission to define the scope and the format of the request for information. Where appropriate, the Commission might discuss with the addressees the

[54] Article 6(3) of the Merger Regulation. See, e.g., Case M.1397 - Sanofi/Synthelabo, Commission decision of 16 May 1999 and subsequent Press Release IP/99/255 of 12 April 1999, where five weeks after its decision under Article 6(1)(b) clearing the merger, the Commission pursuant to Article 6(3)(a), revoked its decision approving the concentration.

[55] Article 6(4) of the Merger Regulation.

[56] See, e.g., Case M.6381 - Google/Motorola Mobility, Commission decision of 13 February 2012, paras. 2 and 129; Case M.6106 - Caterpillar/MWM, Commission decision of 18 October 2011, para. 15; Case M.5830 - Olympic/Aegean Airlines, Commission decision of 26 January 2011, para 5; Case M.6992 - Hutchison 3G UK/Telefonica Ireland, Commission decision of 28 May 2014, para. 11; Case M.7009 - Holcim/Cemex West, Commission decision of 5 June 2014, paras. 19 and 21 (time periods suspended twice); Case M.7061 - Huntsman Corporation/Equity Interests held by Rockwood Holdings, Commission decision of 10 September 2014, para. 16; Case M.7421 - Orange/Jat.ztel, Commission decision of 9 May 2015, para. 14 (time periods suspended twice); and Case M.7278 - General Electric/Alstom, Commission decision of 8 September 2015.

[57] Introduction, para. 1.3 of the Form CO; and Article 4(1) of the Merger Implementing Regulation.

[58] Article 5(4) of the Implementing Regulation. As explained in BP/Erdölchemi: "The notification is the basis and the starting point of the Commission's investigation of a merger case. It determines to a large extent the approach of the Commission towards the case and the areas and focal points of its investigation. Incorrect and misleading information creates the risk that important aspects relevant for the competitive assessment of the transaction are neither investigated nor analysed by the Commission, and its final decision consequently is based on incorrect information. In assessing mergers, the Commission is subject to extremely tight deadlines. In this framework it is essential for the Commission's work that it can focus its investigation on the relevant issues from the very beginning of the procedure, based on comprehensive and correct information provided in the notification." Case M.2624, Commission decision of 19 June 2002, para. 48.

scope and the format of the RFI. Especially in cases involving quantitative data this may be particularly useful. In 2011, the Commission released a staff working paper on best practices for the submission of economic evidence and data collection. In addition, in cases where the reply is likely to be extensive, the Commission could consider to request first a listed overview of the documents available. Upon review of this list the Commission could as a second step request a selection of the underlying documents.[59]

46. In antitrust cases, if the Commission is faced with large amounts of information which is manifestly irrelevant, it may return such information to the addressee. This should be done as early as possible after having received the reply.[60] This may vary in merger cases, taking into account the administrative nature of the procedure and the need for speed.

47. In recent years, in its merger practice, the Commission has relied increasingly on internal documents obtained through RFIs and, where necessary, the Commission has suspended the administrative timetable to give merging parties sufficient time to gather those documents.

48. Internal documents help the Commission to get a better understanding of the rationale of the transaction, the main features and trends of the companies and sectors at stake and ultimately of the merger's potential impact. They are thus instrumental in ensuring that decisions are sound and grounded on all relevant facts and evidence, both when concerns are raised and when potential anticompetitive effects are dispelled.[61]

49. As organisations become more and more data-driven and as software tools evolve, the Commission requests and reviews more internal documents when evaluating potentially anti-competitive mergers, particularly in phase II merger investigations. The Commission aims at ensuring and enhancing the effectiveness of its substantive review of merger cases, whilst avoiding imposing on those concerned an excessive, unnecessary or disproportionate burden by these requests for internal documents.

50. Requesting, obtaining and analysing internal documents entail challenges, from adequately designing the request and ensuring its adequate timing to searching for the most relevant evidence in the documents gathered, as well as assessing whether the response is timely and complete and treating the often numerous claims of exclusion of documents on grounds of Legal Professional Privilege. The Commission has progressively developed its practice in that regard.

[59] In Case T-5/00, *FEG and TU v Commission*, ECLI:EU:T:2003:342, para 87, the General Court held that undertakings and associations of undertakings are under a general duty of care which requires them to ensure the proper maintenance of records in their books and files and to make the necessary evidence available in the event of legal or administrative proceedings. In replying to a request for information, undertakings and associations therefore have to act with greater diligence and take all appropriate measures in order to preserve such evidence as might reasonably be available to them.

[60] See Article 9 of the Hearing Officers' Terms of Reference.

[61] As an illustration, internal documents played a significant role in raising and supporting concerns regarding the impact of the Dow/DuPont merger on innovation, as well as in determining the precise concerns and the scope of the necessary remedies in Ball/Rexam. Conversely, internal documents were instrumental in order to dispel a theory of harm based on potential competition in Wabtec/Faively. See Case M.7932 - Dow/DuPont, Commission decision of 27 March 2017; Case M.7567 - Ball/Rexam, Commission decision of 15 January 2016; and Case M.7801 - Wabtec/Faiveley Transport, Commission decision of 4 October 2016.

51. First, merging parties are encouraged to cooperate actively and in full at an early stage, notably in pre-notification, in order to better target the request and avoid a time squeeze at a later stage of the merger review procedure. Such cooperation, particularly during pre-notification, may involve, amongst others: (i) discussing suitable ways to target requests as much as possible without negatively affecting the aims and effectiveness of the Commission's investigation, (ii) sharing, where appropriate, a draft request for internal documents for further discussion on the appropriate scope and for the purpose of estimating the volume of responsive documents, and (iii) discussing a timetable for submitting responsive documents on a rolling basis starting in pre-notification.

52. Even well-targeted requests for internal documents can produce responses with large volume of data. These are typically submitted to the Commission in digital form, via external hard drives. To ensure the smooth and efficient processing and avoid any delays in the merger review procedure, the documents submissions must comply with certain technical instructions. For instance, documents should be virus-free, searchable (OCRed), not encrypted and structured in predefined folders. Another element that reduces the volume of documents submitted to the Commission is document deduplication, whereby identical documents belonging to the same submission or the same folder of the submission, are eliminated.

53. To help the Commission to process large submissions and to facilitate the document search and review process, requests for internal documents typically require the production of a "load file" containing metadata about the documents produced and accompanying the internal documents submission.

54. In both antitrust and merger investigations, the Commission uses specific software to manage large volumes of data. This makes it possible to search through gigabytes of documents of any format, identify key issues during investigations, manage the evidence in a case file, and share intelligence among the team. Given the need for speed in merger investigations and the limited timeframe within which the investigation is conducted, this IT tool decreases the time of document review and enables case teams to work faster and more efficiently.

55. Further solutions such as artificial intelligence and technology-assisted review are currently being explored. Such solutions would enable the Commission to limit the amount of data received as a response to requests for internal documents by identifying the documents that are most responsive to predefined topics without placing any additional burden to merging parties.