

FROM HARD TO SOFT ENFORCEMENT
OF EC COMPETITION LAW
– A BESTIARY OF “SUNSHINE”
ENFORCEMENT INSTRUMENTS

BY

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INTRODUCTION

For a number of reasons – notably its limited administrative resources – the European Commission (“the Commission”) seems to be relying increasingly on methods of competition law enforcement based on informal pronouncements (press releases, oral statements, etc.) and soft law instruments.³ Surprisingly, and in stark contrast with the extensive body of literature devoted to the Commission’s more muscular enforcement initiatives⁴ under Articles 81 and 82

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³Despite the fact that the very idea that sunshine enforcement techniques are on the rise when compared to traditional competition law enforcement mechanisms can be disputed. Indeed, a number of observers have noted that the Commission’s formal enforcement powers have increased with the adoption of Regulation 1/2003. See generally, on soft law instruments, U. MORTH, “Soft Law in Governance and Regulation: An Interdisciplinary Analysis”, *Edward Elgar Pub*, 2004, pp. 37-38.

⁴In particular through the steep increase in the fines imposed in cartel cases and through the numerous Article 82 EC procedures opened lately.

EC and the EC Merger Regulation ("the ECMR"),⁵ the pervasive use of soft law and informal legal instruments in European Community ("EC") competition policy has gone relatively unnoticed.⁶

In our view, these alternative mechanisms of competition law enforcement raise many important legal questions – not only theoretical but also of very significant practical relevance. For instance, is compliance with such instruments mandatory? Are they amenable to judicial review? Can they introduce new legal standards that depart from established case-law? To what extent can they be relied upon as a reference for competitive assessments, etc.?

The aim of this article is therefore to provide a broad picture of the various formal and informal instruments through which the Commission carries out the soft enforcement of EC competition rules. We refer to them as "sunshine" enforcement instruments and explain the reasons behind this label in Section I. We then provide a typology of those various instruments in Section II. Finally, we explore their advantages and drawbacks in Sections III and IV respectively. Section V concludes.

I. – "SUNSHINE" ENFORCEMENT AND ITS RELEVANCE FOR EC COMPETITION LAW

At the end of the XIXth century, in the United States, the railway regulator devised a method of intervention based on the belief that if it disclosed to the public information about any excessive pricing (or profits) by railway companies – in particular through the release of informal statements, reports, studies, etc. – those operators would have no choice but to slash their

⁵ See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, *OJ L 24*, 29.01.2004, pp. 1-22.

⁶ To date, only a limited number of studies have dealt with this issue. See for instance, H.A. COSMA and R. WHISH, "Soft Law in the Field of EU Competition Policy", (2003) *European Business Law Review* 25; In the field of State aid, see M. CINI, "The soft law approach: Commission rule-making in the EU's state aid regime", *Journal of European Public Policy*, 8:2, 2001, pp. 193-196. More generally, see G. FALKNER, O. TREIB, M. HARTLAPP and S. LEIBER, "Complying with Europe: EU harmonisation and soft law in the member states", (2005) *Cambridge University Press*, pp. 221-227, Linda A.J. SENDEN, "Soft law and its implications for institutional balance in the EC", *Utrecht Law Review*, <http://www.utrechtlawreview.org/>, Volume 1, Issue 2 (December) 2005.

prices.⁷ In other words, through the disclosure of information to a large audience (including the customers, suppliers and competitors of railway companies as well as the general public), the railway regulator shone a bright light on the behaviour it wished to influence, thereby giving rise to the expression "sunshine regulation".⁸

Recent trends in the enforcement of EC competition law lead us to believe that sunshine regulation is making its appearance in Europe over a century after its inception. In this paper we use the expression sunshine enforcement loosely to refer to methods of enforcement which aim to reveal to the public not only (i) the anti-competitive behaviour of specific firms, but also (ii) abstract categories of anticompetitive practices through the adoption of general soft law instruments.⁹

First, it appears that the Commission is becoming increasingly vocal in the context of its enforcement of Articles 81 and 82 EC. This is borne out by the "growing" number of press releases, informal statements, academic articles, papers, etc. issued by the Commission itself or authored by Commission officials. Whilst the majority of these public interventions are in theory of a purely informative nature, they have, in practice a variety of other functions.¹⁰ For instance, following the Court of First Instance's ("CFI") dismissal of the appeal brought by Microsoft against the Commission's decision of 2004, Commissioner Kroes made the following statement:

"The Court has upheld a landmark Commission decision to give consumers more choice in software markets. That decision set an important precedent in terms of the obligations of dominant companies to allow competition, in particular in high tech industries".¹¹

⁷ See P.C. CARSTENSEN, "Law and Economics Through History: McCraw's prophet of regulation", (1984) *Harvard University Press*, pp. 885-886; See also C. HENRY, "Public service and competition in the European Union", (1997) *International Advances in Economic Research*, Vol. 3, pp. 265-267.

⁸ See H. DUMEZ et A. JEUNEMAÎTRE, "Les institutions de la régulation des marchés: Etude de quelques modèles de référence", (1999) 1 *Revue Internationale de Droit Economique* 11, p. 20.

⁹ See F. WILCKMANS, F. TUYTSCHAEVER and A. VANDERELST, *Vertical Agreements in EC Competition Law*, Oxford University Press, 2006, pp. 36-41 (title: "Hard and Soft EC competition law").

¹⁰ See G. MAJONE, "Regulation in Comparative Perspective", *Journal of Comparative Policy Analysis: Research and Practice*, 1999, pp. 309-324.

¹¹ See Commission Press Release, Commission welcomes CFI ruling upholding Commission's decision on Microsoft's abuse of dominant market position, MEMO/07/359 of 17 September 2007.

Shortly thereafter, the Commission created on DG Competition's website a page highlighting its enforcement activities in the Information and Communications Technologies ("ICT") sector, thereby sending a message not only to firms in that sector, but also to the public that it intended to "closely monitor the information industry, consumer electronics and internet sectors in order to ensure compliance of market players with EU competition law".¹²

Second, the Commission seems to be making increasing use of soft law instruments to provide legal guidance to firms (but also to the National Competition Authorities ("NCAs") and courts of EU Member States) through a diverse array of curiously named documents, such as staff discussion papers, position papers, non-papers, consultation papers, notices, guidelines, communications, opinions.¹³ Whilst we recognize that these types of instruments are generally designed to assist firms in complying voluntarily with EC competition law (thereby achieving a form of "sunshine" enforcement),¹⁴ our analysis also suggests that they serve another related "sunshine" enforcement purpose: their wide dissemination may increasingly allow suppliers, customers, competitors, or contractual partners of firms whose conduct breaches Articles 81 and 82 EC to detect such breaches and to assist competition authorities in bringing them to an end through follow-on actions on the basis of conventional enforcement mechanisms.¹⁵

While its advantages are obvious, sunshine enforcement may however be a double-edged sword for competition authorities. It is a well-established general principle of EC law that the Commission, in adopting measures that define its future conduct or that interpret the law, places a limit on the enforcement discretion it enjoys.¹⁶

¹² See http://ec.europa.eu/comm/competition/sectors/ICT/overview_en.html.

¹³ From a purely normative standpoint, these soft law instruments are closer to the concept of regulation rather than enforcement in so far as they are general in scope and do not apply the provisions of the EC Treaty *ex post* or contemporaneously to the infringing conduct. In our view, however, they represent a different type of competition law enforcement that takes place *ex ante*. By contrast to traditional forms of regulation, these instruments (i) are not adopted following a formal legislative procedure; (ii) do not give rise to the same rights and obligations; and (iii) are primarily designed to assist competition authorities and courts in applying the competition rules and private parties in complying with them. See, similarly, H.A. COSMA and R. WHISH, *supra* at p. 28.

¹⁴ Of course, our interpretation of the concept of "enforcement" could be criticized, if only because firms complying with the soft law instruments are in principle insulated from formal enforcement actions.

¹⁵ Such as complaints to competition authorities or proceedings brought before national courts.

II. – A REVIEW OF THE VARIOUS “SUNSHINE” ENFORCEMENT INSTRUMENTS

As noted above, the Commission has so far relied on a myriad of “sunshine” enforcement instruments which differ in scope (general v. individual), author (the Commission itself, DG Competition, individual Commission officials, third parties, etc.), purpose (publicity, guidance, etc.) form (written or oral),¹⁷ and binding effect.¹⁸ For this reason, it is difficult to propose a homogeneous typology of “sunshine” enforcement measures based on clear distinguishing features and with bright-line boundaries. We therefore try to group them according to certain obvious common characteristics and order them, where possible, from least to most formal. Based on this subjective classification, we (i) briefly describe each type of legal instrument identified; (ii) examine the goals usually pursued with its adoption; and (iii) consider whether it has binding legal effects on the Commission and/or on third parties.

A. – *Oral statements*

In a world driven by information, Competition Commissioners, individual DG Competition officials and spokespersons often convey enforcement messages to the general public through oral statements. Speeches given at international symposiums, interviews and press conferences offer convenient opportunities to announce new enforcement actions, provide insider explanations of the Commission’s analysis in specific cases, and send warnings to firms suspected of a violation of EC competition law. Whilst over the past twelve years, the three successive Competition Commissioners appear to have been equally vocal – we have found no evidence of an increase in the number of speeches delivered by Competition Commissioners – the content and implications of their public pronouncements seem to be, however, a question of individual person-

¹⁶ On the basis of the principles of legitimate expectations, “estoppel”, legal certainty and “*patere legem quam ipse fecisti*”.

¹⁷ Oral statements are by their very nature less likely to prove authoritative than written acts, which may be circulated more widely.

¹⁸ We do not examine other less orthodox – but by no means less effective – forms of intervention such as information purposefully leaked to the press by regulators, etc. See, for a good account of this phenomenon, M. HEIM, “The Impact of the Media on EU Merger Decisions”, (2003) 2 *European Competition Law Review* 49.

ality. Commissioners such as Karel Van Miert or Neelie Kroes are well-known for their powerful – and often controversial – statements.¹⁹

Commission officials cannot, in principle, divulge information or express opinions on the Commission's activities.²⁰ The statements made by individuals employed by the Commission are, however, not all covered by the same rules. First, Commissioners are not civil servants within the meaning of the Staff regulations and enjoy a legal mandate to represent the Commission in public. Second, the Commission's spokespersons, who are called upon to discuss the Commission's activities before the media, enjoy a general authorization, within the meaning of Article 17 of the Staff regulations, to make public statements that convey information received in the line of duty not otherwise available to the public. All other civil servants must obtain the authorization to disclose information on the Commission's enforcement activities. This being said, Commission officials regularly comment in public on ongoing investigations or decisions adopted. In practice, only the highest ranking civil servants – such as Directors General, Deputy Directors General, Directors, Heads of Unit and cabinet members – make such statements. In this context, Commission officials usually take extreme care to ensure that they speak “in a personal capacity”, and that “the views expressed [by them] are not an official position of the European Commission”.

Although the topic has not generated a great deal of interest from legal scholars – perhaps due to the mistaken belief that such oral statements are devoid of legal content or effect – the question whether oral statements have legal implications seems to have been settled by the Community courts. First, in *Air France v. Commission* the CFI confirmed that an oral statement by the Commission's spokesman was a legal act in so far as it produced legal effects and,

¹⁹ For instance, a few months ago, Commissioner Kroes publicly rebuked the United States' Assistant Attorney General for Antitrust for his “totally unacceptable” criticism of the CFI ruling in the *Microsoft* case. See T. BUCK, “Kroes rebuffs US on Microsoft ruling”, *Financial Times*, 19 September 2007.

²⁰ Articles 17(1) and 17a(1) of the Staff Regulations provide as follows: “An official shall refrain from any unauthorised disclosure of information received in the line of duty, unless that information has already been made public or is accessible to the public”; “An official has the right to freedom of expression, with due respect to the principles of loyalty and impartiality”. See Staff Regulations of Officials of the European Communities, available at http://ec.europa.eu/civil_service/docs/toc100_en.pdf.

as such, could be the object of a direct challenge by individual applicants.²¹ In that case, the spokesman had announced that a proposed concentration between two companies fell outside the scope of the ECMR because it did not have a Community dimension.²² Subsequent case-law confirms that formal oral pronouncements by Commission officials are likely to constitute legal acts.²³ By contrast, "off-the-record" statements are immune from judicial scrutiny.²⁴

Second, oral statements may limit the enforcement discretion of the Commission and, as a result, be relied upon by affected parties to challenge a formal Commission decision. In *Roberts and Roberts v. Commission*, the CFI reviewed the substance of a public speech given by a Commission official on specific aspects of the application of competition law to pub contracts.²⁵ The Court sought to determine whether the legal standard applied in a subsequent formal decision adopted by the Commission was consistent with the legal test outlined in the speech. Whilst the Court found no discrepancy between the content of the speech and the decision, the mere fact that it embarked on such an assessment implies that oral statements may be considered as representing the Commission's official policy, and as a result can create legitimate expectations for third parties.

It is therefore clear that oral statements can give rise to a legal duty, on the part of the Commission (and, conversely, to rights ben-

²¹ See Case T-3/93, *Air France v. Commission*, [1994] E.C.R. II-121 at §§46-48.

²² A Commission spokesman had stated publicly that a proposed concentration between British Airways and Dan Air did not meet the turnover thresholds for the application of the ECMR. The statement followed non-binding letters (i) from a Director of the Commission disclaiming that he did not represent the Commission's views and (ii) from the Commissioner for competition. Air France, a competitor, challenged the statement. The CFI considered that the statement could be the subject of judicial review under Article 230 EC. The statement had legal effects on the Member States (it confirmed the jurisdiction of the Member States to review the transaction) and on the firms (which were no longer subject to the requirement of prior notification).

²³ See Case T-52/96 R, *Sogecable v. Commission*, [1996] E.C.R. II-797, where the Court noted that informal comments of the spokesman (confirming a formal Commission decision) were not reviewable. The wording of the case is however, ambiguous. See J. FAULL, "The Spokesman and the Law", in *European Integration and International Co-ordination - Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, Kluwer Law International, 2002 at p. 164.

²⁴ *Idem*.

²⁵ See Case T-25/99, *Roberts & Roberts v. Commission*, [2001] E.C.R. II-1881. See also, Case T-133/95 and T-204/95, *IEEC v. Commission*, [2001] E.C.R. I-3875, in which the Court examined whether speeches delivered by two Commissioners had created legitimate expectations, which would have been subsequently breached as a result of the adoption of a formal Commission decision.

efiting individuals), to abide by its pronouncements in subsequent enforcement initiatives, under pain of being found in breach of general principles of EC law.

Furthermore, in *Volkswagen AG v. Commission*, the CFI considered that an interview given by Commissioner Van Miert in which he revealed that Volkswagen would soon be the subject of an infringement decision and incur a large fine constituted a breach of EC law principles (such as the duty of good administration and the presumption of innocence).²⁶ Although this breach was not sufficient for the Court to annul the decision itself (because it would not have altered the substance of the Commission's findings),²⁷ the ruling suggests that such violations are capable of giving rise to a right to claim damages pursuant to Article 288 EC.²⁸

B. – *Articles written by Commission officials*

Commission officials routinely address issues relating to the enforcement of EC competition law in articles published in generalist²⁹ and scientific reviews, academic treatises,³⁰ etc. In contrast with oral statements – which mainly focus on public policy issues – written articles typically relate to technical and/or case-specific issues of EC competition enforcement. Very often, those articles clarify aspects of the Commission's reasoning underlying particular investigations and decisions that might otherwise have remained unknown. They constitute therefore a useful source of guidance for legal practitioners, who frequently rely upon them to provide advice to their clients.³¹

As noted above, in principle Commission officials write in a personal capacity. Most competition law scholars and practitioners are certainly familiar with the archetypal disclaimer that “the views

²⁶ See Case T-62/98, *Volkswagen AG v. Commission*, [2000] E.C.R. II-2707.

²⁷ *Idem.* at §283.

²⁸ *Id.* at §282 The Court stated: “Moreover, in causing such sensitive aspects of the matters under deliberation to be disclosed to the press, the Commission acted in a manner injurious to the interests of good administration at the Community level precisely inasmuch as it enabled the public at large to have access, during the process of investigation and deliberation, to such information, internal to the administration”.

²⁹ See, for instance, See M. PETITE, “EU Commitment to free competition remains unchanged”, *Financial Times*, 27 June 2007.

³⁰ See, for instance, the competition law treatise edited by J. FAULL and A. NIKPAY, *The EC Law of Competition*, Oxford University Press, 2007.

³¹ See H.A. COSMA and R. WHISH, *supra*, p. 50.

expressed by the author do not necessarily reflect the official position of the European Communities" and that "responsibility for the information and views expressed lies entirely with the author". As a result, their written opinions are not an expression of the Commission's enforcement policy and therefore should not limit the Commission's discretion.

This being said, whilst it is certainly true that articles written by Commission officials in a personal capacity and published in law reviews, for example, do not have legal implications for the Commission,³² in our view a different solution presumably applies to articles that appear in official publications of the Commission. This is because such official publications, by their very nature and regardless of the presence of the customary disclaimers, appear to be endorsed by the institution. For instance, articles published in the widely disseminated *EC Competition Policy Newsletter* (published by the Commission) may create legitimate expectations for firms and their counsels.³³

C. – *Expert reports and third parties studies*

The Commission relies increasingly on reports and studies authored by third parties. In commissioning such reports, the Commission typically seeks expert advice that will allow it to gather data on particular economic sectors or commercial practices,³⁴ to determine the feasibility/desirability of proposed policy reforms,³⁵ to assess the outcome of past enforcement actions in certain fields/sectors,³⁶ or simply to promote the emergence and

³² Although, in practice, and as noted above they convey indications on the views of Commission officials in respect of certain commercial practices, economic sectors or perhaps more controversially ongoing investigations.

³³ The *EC competition policy newsletter* is published three times a year and is made widely available on the Internet. See <http://ec.europa.eu/comm/competition/publications/cpn>.

³⁴ See *Economic impact of regulation in the field of liberal professions in different Member States*, I. PATERSON, M. FINK, A. OGUS *et al.*, Study for the European Commission, DG Competition, January 2003 available at http://ec.europa.eu/comm/competition/publications/prof_services/executive_en.pdf.

³⁵ See *Study on the conditions of claims for damages in case of infringement of EC competition rules*, Comparative report prepared by D. WÆLBROECK, D. SLATER and G. EVEN-SHOSHAN, 31 August 2004 available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/study.html>.

³⁶ See, in the field of maritime transport, *The application of competition rules to liner shipping*, Final report, Global Insight *et al.*, 26 October 2005, available at http://ec.europa.eu/comm/competition/antitrust/others/maritime/shipping_report_26102005.pdf.

discussion of innovative ideas on intricate issues of EC competition policy.³⁷

Those expert reports are generally drafted by third parties (including law firms, academics and research centres, economic and business consultancies) and are thus neither binding on the Commission nor amenable to judicial review.³⁸ They usually contain the following disclaimer: "The study represents its authors' views on the subject matter; views which have not been adopted or in any way approved by the Commission and which should not be relied upon as a statement of the Commission's or its services views".³⁹

In practice, however, several confusing developments in the Commission's practice tend to elevate such expert reports to the rank of authoritative sources of EC competition policy. First, the reports are made widely available to the public, being published by the Office for Official Publications of the European Communities and posted on the Commission's Internet website.

Second, and more importantly, the terms of reference and questions defined by the Commission – which delineate the experts' mandate – often conceal a pre-determined enforcement choice. For instance, in the field of State aid, the Commission regularly seeks expert advice at advanced stages of its formal investigations to refine its economic understanding of a case.⁴⁰ Similarly, the Commission was arguably already persuaded of the virtues of private

³⁷ See *The Economics of Unilateral Effects*, M. IVALDI, B. JULLIEN, P. REY, P. SEABRIGHT, J. TIROLE, IDEI, Toulouse November 2003, Interim Report for DG Competition, European Commission, available at http://ec.europa.eu/comm/competition/mergers/studies_reports/the_economics_of_unilateral_effects_en.pdf; *Information Exchange among Firms and their Impact on Competition*, Office for Official Publications of the European Community, Luxembourg, 1995, K.U. KUHN and X. VIVES; *New Industrial Economics and Experiences from European Merger Control – New lessons about collective dominance?*, Study commissioned by the European Commission, Office for Official Publications of the European Communities, Luxembourg, 1995, E. KANTZENBACH, E. KOTTMANN and R. KRÜGER; *Minority Share Acquisition: The Impact upon Competition*, Office for Official Publications of the European Communities, Luxembourg, 1986, S. MEADOWCROFT and D. THOMPSON.

³⁸ Pursuant to Article 230 EC, only acts that emanate from European institutions can be challenged through annulment proceedings before the European courts.

³⁹ In addition, it is often provided that: "The European Commission does not guarantee the accuracy of the data included in the report, nor does it accept responsibility for any use made thereof".

⁴⁰ See COMP/2008/F3/003: Appel d'offres relatif à la réalisation d'une étude sur la garantie illimitée de la République française à La Poste; COMP/2008/F3/001: Study to benchmark the cost and profit accounting of certain services provided by Deutsche Post AG (DPAG).

enforcement of EC competition law when it commissioned the extensive Ashurst Study.⁴¹

Third, with the emergence of new institutional models, the dividing line between third-party expert reports and the Commission's own views on EC competition law enforcement is becoming increasingly blurred. The Commission has recently, created *sui generis* organs with permanent advisory duties to which high-profile experts have been appointed. For instance, it created in 2003 the Economic Advisory Group on Competition Policy ("EAGCP"), a discussion forum comprising prominent economists directly appointed by the Competition Commissioner⁴² whose role is to "support DG Competition in improving the economic reasoning in competition policy analysis" and to deliver opinions on "issues of topical interest".⁴³

In sum, the Commission's appropriation, in practice, of third-party reports may create an optical illusion as to their role as well as to the relevance of the policy orientations and legal interpretations contained therein. This also has the potential to exert a significant influence on firms' conduct (and counsels giving legal advice).

D. – Press releases

The Commission usually issues press releases following the adoption of a formal decision under Articles 81 and 82 EC or the ECMR (e.g. decisions finding an infringement and imposing fines, commit-

⁴¹ See N. KROES, SPEECH/05/533 of 22 September 2005, *Enhancing Actions for Damages for Breach of Competition Rules in Europe*, Dinner Speech at the Harvard Club New York, 22nd September 2005: "Our debate in Europe is of rather a different nature. It is not about reducing the excesses of damages actions, not because there aren't any excesses, but simply because we hardly have any actions for damages at all. The recent Ashurst study found that this form of private action is totally underdeveloped in Europe. That is why the Commission – as I said, *convinced by the potential benefits of encouraging private enforcement of the competition rules* – wants to stimulate public debate in Europe on this topic (emphasis added)".

⁴² Upon proposal of the Chief competition economist. See <http://ec.europa.eu/dgs/competition/economist/eagcp.html>.

⁴³ The EAGCP has *inter alia* issued opinions on "Non-horizontal merger guidelines" and on the "Economic approach to Article 82 EC". See <http://ec.europa.eu/dgs/competition/economist/eagcp.html>. Within the framework of the EAGCP, three sub-groups have been set up to work on issues related to anti-trust, mergers and state aid. The advisory groups meet 3-4 times a year in Brussels. Each of these meetings is a full day brainstorming session with typically one core competition policy issue being discussed. Each sub-group presents an "opinion" on a topic commissioned by the Chief Economist, the Director-General or the Commissioner.

ment decisions, decisions imposing remedies, etc.).⁴⁴ In addition, it occasionally adopts press releases to comment on or clarify certain developments in EC and national competition laws (often in the form of "Memos" or "Frequently Asked Questions").⁴⁵

In recent years, the Commission's practice of issuing press releases has witnessed a dual evolution which, in our view, displays some features of sunshine enforcement. First, the number of press releases adopted by the Commission – in particular in the field of Articles 81 and 82 EC ("PR-AT") has steadily increased, as evidenced in the table below.⁴⁶

⁴⁴ In particular, in respect of Decisions adopted pursuant to Articles 7 to 10 of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) *O.J.* L 1/1. See also, C. KERSE and N. KHAN, *EC Anti-trust Procedure*, 5th ed., Thomson Sweet & Maxwell, 2005; L. ORTIZ BLANCO, *EC Competition Procedure*, 5th Ed., Thomson Sweet & Maxwell, London, 2005 at §6-050. The Commission's press releases (and other written information disclosed to the press) are issued by its Directorate-General for Press and Communication. This department is under the authority of the President of the Commission and is headed by a Director General and by the Spokesperson. The Spokesperson is assisted by more than twenty spokespersons responsible for specific portfolios, among which competition policy. See J. FAULL, *supra*, p. 160.

⁴⁵ The Commission increasingly adopts press releases to comment on judgments handed down by the Community courts (such press releases are common in the context of judgments under Article 234 EC) and on measures adopted by other bodies (EC legislation, decisions of NCAs, etc.). For instance, following the CFI's ruling in *Tetra Laval*, the Commission publicly expressed its disagreement with the standard of judicial review endorsed by the Court. See Commission Press Release, Commission appeals CFI ruling on Tetra Laval/Sidel to the European Court of Justice, IP/02/1952 of 20 December 2002. See, more generally, L. ORTIZ BLANCO, *supra*, §4.33. Press releases labelled "Memos" generally seek to clarify legal issues arising from certain cases (the Commission usually issues Memos in the context of settlements when it does not adopt a final decision). Memos describe briefly the facts of the case and the legal approach followed by the Commission, and sometimes provide answers to FAQs. During the *British Airways* proceedings, the Commission explained that its press releases are an important source of guidance for firms, as they convey its stance on certain practices. See Case T-219/99, *British Airways plc v. Commission*, [2003] E.C.R. II-5917 at §62 ("According to the press release on the principles concerning travel agents' commissions, issued on the same day that the contested decision was adopted, that decision constituted a first step in dealing with commissions paid by airlines to travel agents. The principles established in that press release also gave clear guidance for any other airline in a situation similar to that of BA, and the Commission stated that it would take all measures necessary to ensure that those principles were complied with by other airlines in equivalent situations"). In the *Austrian banks cartel* case, the CFI noted that the Commission, through the adoption of a press release, had clarified the state of the law with respect to agreements on bank interest rates. The Court accordingly rejected the allegation that the Commission had been ambiguous and had created legal uncertainty. See Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich AG and others v. Commission*, [2006] E.C.R. II-5169 at §507.

⁴⁶ Authors' calculation based on the press releases available on the Commission's Internet website.

TABLE 1
Number of press releases issued by the Commission
(antitrust and mergers)

	2008 (Jan-May)	2007	2006	2005	2004	2003	2002	2001	2000	1999	1998	1997	1996	1995
PR-AT	38	101	99	77	65	75	58	79	55	41	45	28	25	34
PR-ECMR	60	193	169	150	85	78	82	103	130	139	95	82	34	59

Second, the Commission issues a growing number of press releases in mere procedural matters wholly unrelated to substantive legal issues.⁴⁷ The objectives pursued by the Commission in so doing are less clear. It may be the case that it simply seeks to inform the public. It may also be the case that such press releases pursue ulterior "sunshine" enforcement goals. For instance, the Commission may publish a press release related to an ongoing investigation with a view to inciting parties who may hold information of significance to the case to come forward (*i.e.* an information gathering purpose).⁴⁸ In addition, merely by bringing to the fore the fact that a firm is under investigation, such press releases can create the impression that the Commission has already reached a finding as to the existence of an infringement, and may induce that firm to modify its behaviour (*i.e.* a compliance inducement purpose).⁴⁹

Despite a paucity of relevant judicial precedent, the question whether a press release may contain an indication of the Commission's likely conduct when assessing future cases – and thereby restrict its enforcement discretion – appears to be settled. In *Roberts and Roberts v. Commission*, the Court examined whether a press release issued by the Commission had created legitimate expectations for the applicants challenging a subsequent Commission decision.⁵⁰ After reviewing the content of the press release, the Court found that it had not created such expectations because the legal standard described in it – which the applicants claimed should have been applied in their case – did not apply to the relevant facts. This

⁴⁷ See C. KERSE and N. KHAN, *supra* at §6-050.

⁴⁸ See C. KERSE and N. KHAN, *supra* at §6-050.

⁴⁹ The Commission may for instance inform the public that it has taken the decision to open formal proceedings against a specific firm which it suspects of infringement of the competition rules, without, however, having a sufficiently strong case to adopt, at that stage, a Statement of Objections.

⁵⁰ See Case T-25/99, *Roberts and Roberts v. Commission*, *supra* at §§124 and 130.

being said, the fact that the Court examined whether the challenged decision was consistent with the orientations contained in the press release strongly suggests that such press releases can have a binding effect on the Commission and as a result limit its discretion in enforcing EC competition law.⁵¹

E. – *Commission papers*
(*discussion papers, non-papers, etc.*)

Driven to a large extent by DG Competition, a new breed of “papers” dealing with specific legal issues (and/or economic sectors) has mushroomed in EC competition enforcement. Despite their heterogeneous nomenclature (discussion papers, non-papers, position papers, consultation papers, working papers, etc.), those papers share at least three common features. First, they are authored by services within DG Competition (generally, units or directorates), and as such are not necessarily reviewed by other Commission services (the legal service, for instance),⁵² or by the Commissioners.⁵³

⁵¹Other cases in which the applicants relied on a Commission press release either concerned different legal issues (such as whether a press release constitutes evidence) or did not result in a ruling on the substance. In *General Electric v. Commission*, for instance, the applicant sought to demonstrate that two press releases reporting an interview with the Competition Commissioner had given rise to the “legitimate expectation” that the Commission would clear a merger transaction in exchange for stronger remedies offered by the merging parties. The Court however dismissed the argument on procedural grounds. See Case T-210/01, *General electric v. Commission*, [2005] E.C.R. II-5575 at §53. In *TACA*, the applicants relied on a Commission press release (as well as on various “articles”) as a source of evidence. It was alleged that the press release provided evidence that the Commission had – unlawfully – enforced Article 82 EC to bypass the legislative immunity enjoyed by liner conferences under Article 81 EC. The Court however refused to hold that the alleged circumvention of Article 81 EC was a breach of EC competition law. See Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Container Line AB and others v. Commission*, [2003] E.C.R. II-3275 at §§453 and following. Finally, in *Royal Philips Electronics NV v. Commission*, the CFI held that the adoption of a press release would have given rise to a “duty to state reasons” pursuant to Article 253 EC only if it had contained “a decision which can be the subject of an application for annulment under Article 230 EC”. Accordingly, press releases may encapsulate legal decisions having adverse effects on third parties (a referral decision under Article 9 of the ECMR, for instance). See Case, T-119/02, *Royal Philips Electronics NV v. Commission*, [2003] E.C.R. II-1433 at §392.

⁵²This arguably explains why, for instance, in the DG Competition Paper Concerning Issues of Competition in Waste Management, it is explicitly acknowledged that “the views expressed in the present document are purely those of the Directorate General for Competition at the time of writing”.

⁵³This explains why they are often labeled “Staff papers”. In addition the authors of these papers are not necessarily identified. Most of the time, the papers simply mention “Commission services documents”. See, for instance, Consultation paper on the review of Council Regulation 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport. Note, however, that the author of the paper is often indirectly identifiable as the addressee of the replies to the consultation process.

Second, such papers are generally adopted in the context of the "review" of specific enforcement policies (such as, for instance, the so-called "Article 82 EC review", which seeks to increase the role of economic analysis in abuse of dominance cases).⁵⁴ They are therefore, by their very nature, acts with a provisional status, setting out DG Competition's preliminary views on certain practice(s)/sector(s) and, in certain circumstances, posing questions to stakeholders.⁵⁵ Third, these papers are general in scope, and do not target individual market players.

In contrast with so-called "Green papers" and "White papers", which are formally adopted by the Commission and normally culminate in legislative action,⁵⁶ this other type of Commission paper is not necessarily followed-up by immediate, subsequent, action (*e.g.* adoption of guidelines, decisions, etc.). For instance, the Merger Remedies Study and,⁵⁷ perhaps more importantly, the Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses remain in a state of administrative limbo, more than 2 years after their release.

Despite their lesser status, these heterogeneous papers may serve to better define the boundaries of anticompetitive behaviour, as well as the legal standards applicable. In addition, the wide consultation and discussion process that usually follows their publication can be expected to shed light on the legal issues addressed and make market players more sensitive to the potentially anticompetitive nature of certain business practices.⁵⁸

⁵⁴ See Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, Brussels, December 2005, available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf>. They may also follow expert reports issued by third parties. See, for instance, Consultation paper on the review of Council Regulation 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport, 27 March 2003, available at <http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/en.pdf>.

⁵⁵ See Consultation paper on the review of Council Regulation 4056/86 laying down detailed rules for the application of Articles 81 and 82 of the Treaty to maritime transport, *supra*.

⁵⁶ They usually give rise to a legislative proposal from the Commission to the Council (and possibly the Parliament).

⁵⁷ In October 2005, the Commission issued a self-evaluation document reviewing its policy on merger remedies (its goal was also to determine whether (and where) further improvements were needed). The study followed a process of consultation of firms involved in merger transactions having led to the adoption of remedies. See DG COMP In-House Merger Remedies Study, October 2005 available at http://ec.europa.eu/comm/competition/mergers/studies_reports/remedies_study.pdf.

⁵⁸ See F. WIJCKMANS, F. TUYTSCHAEVER and A. VANDERELST, *Vertical Agreements in EC Competition Law*, Oxford University Press, 2006, pp. 40-41.

As regards their legal status, it should be noted that the papers' authors always seek to shelter the Commission from subsequent legal consequences stemming from their content. For instance, in addition to the usual disclaimer that it "may not, in any circumstances be regarded as stating an official position of the European Commission", the Discussion Paper on Article 82 EC bluntly states that it "has no enforcement status".⁵⁹ In other words, the Commission wishes to remain free to deviate from the legal standards contained in its papers in the course of its enforcement activities. This caution is understandable: papers are provisional documents intended to stimulate debate, and should not fetter the Commission's discretion in subsequent enforcement action (for instance, through the creation of legitimate expectations).

To date, the Community courts have not ruled on the legal effects of this type of document.⁶⁰ In our experience, although the expectations they create may not rise to a level warranting legal protection, it is undeniable that, in practice, such discussion papers, non-papers and the like have a profound influence on the daily work of legal practitioners. This is all the more so in the – not so uncommon – instances where the state of the law is unclear or in a state of flux (e.g. the legal standards applicable to rebates granted by dominant firms).

F. – *Annual reports on competition policy*

Since 1971, the Commission has published an Annual Report on Competition Policy (the "annual report")⁶¹ providing an overview of the main developments in EC competition policy and summarizing changes to EC competition rules that have occurred over the

⁵⁹ See Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, *supra* at p. 1.

⁶⁰ In *British Airways v. Commission*, Advocate General Kokott recalled that the Commission's Discussion Paper on Article 82 EC was bound to comply with the case-law of the Court of Justice (see Case C-95/04 P, Opinion of AG V. Kokott, *British Airways plc vs Commission*, [2007] E.C.R. I-2331 at §28). In *Cementbouw Handel & Industrie BV*, the CFI declined to enter into the debate over the interpretation of the Green Paper on the review of Regulation 4064/89. See Case T-282/02, *Cementbouw Handel & Industrie v. Commission* [2006] E.C.R. II-319. In Case T-312/02, *Meca-Medina and Majcen v. Commission*, [2004] E.C.R. II-3291, at §§46-47, the Court found support in a Commission working paper to conclude that rules regulating doping fell outside the purview of the economic activities covered by Articles 81 and 82 EC.

⁶¹ The annual report on Competition Policy is published by the Commission in response to a request of the European Parliament contained in a resolution of 7 June 1971.

course of the previous year.⁶² The annual report is adopted by the Commission as a whole, in the form of an official "Communication". It is usually preceded by a foreword from the Competition Commissioner.⁶³

Importantly, annual reports show, through selected examples, how the EC competition rules are implemented. In addition, they are often supplemented by various sets of annexes (in the form of Staff working papers), which provide detailed case-specific information, methodological information, statistics, etc. Again, annual reports constitute a useful tool to instigate voluntary compliance with the law.

Whilst they are characterized by their strong policy-making content, annual reports are nonetheless capable of having legal effects. By virtue of their general scope, normative statements made in the context of annual reports have been judged by the Court as capable of having binding effects on the Commission. In the notorious *Hercules v. Commission* case (*Polypropylene*), the applicant alleged that a Commission decision applying Article 81 EC was not adequately reasoned, and thus infringed Article 253 EC (ex Article 190 EC).⁶⁴ In particular, the applicant argued that in adopting an infringement decision, the Commission must take account of the opinion of the hearing officer, even though it is not obliged to follow it. By failing to mention that the hearing officer had delivered his opinion, the Commission decision in question would have been inadequately reasoned. The applicant based its claim on the "decision taken by the Commission to institute the position of the hearing office and from the hearing officer's terms of reference", which had been appended to the Thirteenth report on competition policy. The Court cautiously avoided having to determine whether the hearing officer's terms of reference contained in the Report constituted a decision amenable to judicial review under Article 230 EC. However, the Court went on to consider whether the Commission had followed the procedure pertaining to the hearing officer's intervention as provided in the document annexed to the annual report and found that the Commission had not breached any fundamental

⁶² The annual report is now published in conjunction with the General Report on the activities of the European Union.

⁶³ See, for instance, Report on Competition Policy 2006, 2006 COM(2007)358 final.

⁶⁴ Case T-7/89, *SA Hercules Chemicals NV v. Commission*, [1991] ECR II-711.

requirement contained therein (the Court held that according to the terms of reference, the hearing officer's report is not, for the purposes of Article 190 EC, an opinion which the Commission is required to obtain when taking an infringement decision). In so doing, the Court confirmed that, in a fashion similar to the obligations that may stem from oral statements and press releases, the Commission must abide by the rules it imposes on itself, under pain of breaching the principle of legal certainty.⁶⁵

G. – Sector inquiries

Pursuant to Article 17 of Regulation 1/2003, the Commission can launch "investigations into sectors of the economy and into types of agreements". These wide-ranging investigations are usually referred to as sector inquiries. And the Commission is likely to launch them in particular where "the trend of trade between Member States, the rigidity of prices or other circumstances suggest that competition may be restricted or distorted within the common market".⁶⁶ In contrast with traditional investigations, the Commission does not need to rely on other reasons (such as a suspicion that anticompetitive conduct has occurred) when it decides to open a sector inquiry.⁶⁷ Yet, it holds similar powers and, in particular, the ability to send requests for information to firms and to carry out inspections of business premises.⁶⁸

Importantly, the purpose of sector inquiries is not necessarily to trigger formal enforcement actions. Rather, Article 17 of Regulation 1/2003 provides that the Commission may "publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties". In practice, only a fraction of all sector inquiries carried out to date (*i.e.* in the energy sector,⁶⁹

⁶⁵ See also, for a similar interpretation, Case T-528/93, *Métropole Télévision v. Commission*, [1996] E.C.R. II-649 at §169: "In that case the Commission had in fact made known, through its annual report on competition policy, a number of rules which it had imposed on itself relating to access to the file in competition proceedings".

⁶⁶ See Article 17(1) of Regulation 1/2003, *supra*.

⁶⁷ See L. ORTIZ BLANCO, *supra*, §5.04.

⁶⁸ See Articles 18 and 20 of Regulation 1/2003, *supra*.

⁶⁹ See, on this, <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html>.

financial services,⁷⁰ local loop,⁷¹ leased lines,⁷² roaming,⁷³ 3G media content⁷⁴) have led to formal enforcement action. In most cases, the Commission has published a detailed report identifying instances of market failures as well as raising questions on the existence of anticompetitive business behaviour in the sector investigated.

In the same way as traditional sunshine enforcement, the *mere initiation* of sector inquiries has allowed the Commission to bring about significant changes in firms' conduct. For instance, following the initiation of the so-called "leased line investigation", a number of telecoms operators decided to slash the prices of their services immediately.⁷⁵ Similarly, in the context of an informal sector inquiry relating to CD pricing in Germany, the music majors abandoned the practice of publishing minimum list prices.

In addition, the *final report* may cast light on potentially suspicious commercial practices or simply conclude that one or several firms active in the sector under investigation wield significant market power. This disclosure, coupled with the threat of follow-on enforcement actions (by competition authorities and courts),⁷⁶ legislative intervention,⁷⁷ or public opprobrium,⁷⁸ may in and of itself induce changes in the conduct of firms active in the economic sector examined by the Commission.

⁷⁰ See http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/index.html.

⁷¹ See http://ec.europa.eu/comm/competition/sectors/telecommunications/archive/inquiries/local_loop/index.html.

⁷² See http://ec.europa.eu/comm/competition/sectors/telecommunications/archive/inquiries/leased_lines/index.html.

⁷³ See <http://ec.europa.eu/comm/competition/sectors/telecommunications/archive/inquiries/roaming/index.html>.

⁷⁴ See http://ec.europa.eu/comm/competition/sectors/media/inquiries/3G_archive.html.

⁷⁵ See D. CHOUMELOVA and J. DELGADO, "Monitoring Competition in the Telecommunications Sector: European Commission Sector Inquiries", in P.A. BUIGUES and P. REY (Eds), *The Economics of Antitrust and Regulation in Telecommunications*, Edward ELGAR, Cheltenham, 2004 at pp. 273-275.

⁷⁶ See D. WOOD and N. BAVEREZ, "Sector Inquiries under EU Competition Law", *Competition Law Insight*, at p. 4.

⁷⁷ In the context of its energy sector inquiry, the Commission has made reference to possible changes to the European regulatory framework for energy markets.

⁷⁸ In the context of its energy sector inquiry, the Commission clearly insisted, in its Final Report, on the fact that consumers and businesses were being harmed by inefficient and expensive gas and electricity markets. See, for a summary of these findings, <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html>.

H. – *Formal Commission Guidelines,
Notices and Communications*

Over the past fifteen years, the Commission has issued an increasing number of Guidelines, Communications and Notices.⁷⁹ These instruments are adopted by the Commission as a whole and published in the *Official Journal of the European Union* ("OJ"). Examples of such Communications include the Guidelines on vertical restraints, the Guidelines on the applicability of Article 81 to horizontal co-operation agreements, the Commission Notice on the definition of the relevant market for the purposes of Community competition law, the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.⁸⁰

Put simply, the main purpose of these formal instruments is to provide assistance to firms,⁸¹ competitions authorities and national courts,⁸² when engaging in complex competitive assessment.⁸³ They

⁷⁹ See D. GERADIN and N. PETIT, "Judicial Remedies under EC Competition Law: Complex Issues arising from the 'Modernisation' Process", (2005) *Fordham International Law Journal*, pp. 393-439. There is no significant difference between these instruments, which seem to be interchangeable (see, on this, H.A. COSMA and R. WHISH, *supra* at p. 51). In a nutshell, the proliferation of such guidelines, notices and communications is due to the recognition that economic operators need added guidance in light of (i) the requirement, introduced by the adoption of Regulation 1/2003, that firms themselves assess the legality of their business practices and (ii) the increased sophistication of substantive EC competition law resulting in part from the influence of micro-economic analysis.

⁸⁰ Although the Commission's website exhibits most notices, the Commission does not publish a full list of all those in force. However, a list of such notices has been published as an Annex to the Notice on co-operation between the Commission and National Courts. See 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, OJ C 101/54 of 27 April 2004. There are doubts as to whether this list is exhaustive given that a number of notices are not mentioned (sub-contracting, exclusive commercial agents, etc.). It has been suggested that the omitted instruments should now be presumed defunct. See C. COOK and N. KHAN, *supra* at §1-026. For a full list, see VAN BAELE and BELLIS, *Competition Law of the European Community*, 4th Ed., Kluwer Law International, The Hague, 2005, at pp. 1146-1148.

⁸¹ See Commission Notice – Guidelines on Vertical Restraints, OJ C 291/1 of 13 October 2000, at §3: "By issuing these Guidelines the Commission aims to help companies to make their own assessment of vertical agreements under the EC competition rules".

⁸² See 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, *supra* at §8: "National courts may find guidance in Commission regulations and decisions which present elements that are similar to those in a case they are dealing with, as well as in Commission notices and guidelines relating to the application of Articles 81 and 82 EC and in the annual report on competition policy".

⁸³ To that end, they set out the views of the Commission (i.e. its interpretation of statutory and case law). In addition, the Commission often builds on the case-law of the EC Courts, where existing precedent is unclear or where it does not fully answer a specific question. See for instance, Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368/13 of 22 December 2001.

thus pursue enforcement-related goals, *i.e.* they aim to induce firms to comply with EC competition law and to assist courts and competition authorities in applying it.

In addition, in our view, those Communications addressing substantive issues of competition law may also represent a form of sunshine enforcement.⁸⁴ In the decentralized enforcement system instituted by Regulation 1/2003 (and *a fortiori* within the realm of the private enforcement of competition law), competitors, suppliers, customers and governments play a key role in the detection of competition law infringements. It can be argued that the Guidelines, Notices and Communications adopted by the Commission increase the likelihood that those dealing with infringers' will be able to detect anticompetitive behaviour, and attempt to bring it to an end.

In that respect, the Guidelines on the application of Article 81(3) of the Treaty are a case in point. Despite their title – which suggests that they focus solely on the interpretation of the exception provided in Article 81(3) EC – the Guidelines deal at length with substantive issues underlying “the prohibition rule of Article 81(1) EC”.⁸⁵ Similarly, the Guidelines on the applicability of Article 81 to horizontal co-operation agreements devote considerable space to categories – and examples – of unlawful agreements and practices, under the heading “assessment under Article 81(1)”.⁸⁶

From a purely legal standpoint, the most interesting issue raised by these Communications, Notices and Guidelines is perhaps whether they have a binding effect on the Commission.⁸⁷ Generally

⁸⁴ Most of these instruments concern substantive issues of EC competition law. More recently, the Commission has adopted such instruments with respect to procedural matters. See C. COOK and N. KHAN, *supra* at §1-026.

⁸⁵ See L. IDOT, “La qualification de la restriction de concurrence : à propos des lignes directrices de la Commission concernant l'application de l'article 81, §3”, in *La Modernisation du droit de la concurrence* (G. CANIVET), LGDJ, Paris, 2006 at p. 88.

⁸⁶ The Guidelines on Vertical Restraints contain similar provisions, under the heading “negative effects of vertical restraints”. Commission notice – Guidelines on Vertical Restraints, *supra* at §103-114.

⁸⁷ By contrast, the related issue of whether these instruments are amenable to judicial review appears less significant. In *France v. Commission*, the ECJ held that a Commission Notice which aimed at formally interpreting a directive but which surreptitiously introduced new legal obligations could be the subject of an annulment action. See Case C-325/91, *France v. Commission*, [1993] E.C.R. I-3283. This being said, one may argue that challenging illegal guidelines through annulment proceedings is a trivial issue in practice. Guidelines are in themselves incapable of having direct adverse legal effects on firms (unless they are decisions in disguise). Only decisions enforcing Article 81 and 82 EC may have such effect. And, in such cases, the addressee of the

speaking, the likelihood that they will significantly constrain the Commission in an individual case is limited by the fact that such instruments are general in nature. The Commission may thus find an infringement in circumstances where an assessment under the Notice would seem to imply that no such infringement can be established.⁸⁸

This being said, the Court has recognized that Guidelines, Communications and Notices can constrain the Commission's enforcement discretion through a form of "Estoppel".⁸⁹ This principle is encapsulated in the judgment handed down in *Dansk Rørindustri and others v. Commission*:

"The Court has already held, in a judgment concerning internal measures adopted by the administration, that although those measures may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment. Such measures therefore constitute a general act and the officials and other staff concerned may invoke their illegality in support of an action against the individual measures taken on the basis of the measures (see Case C-171/00, *P Libéros v Commission*, [2002] ECR I-451, paragraph 35).

decision can challenge that act directly before the CFI and, during the proceedings, call into question the validity of the guidelines. At any rate, there are doubts that firms can, in the current state of EC law, bring annulment actions against acts of a general nature, such as guidelines. In accordance with established case-law, individual applicants are unlikely to be affected "individually" by an act of a general nature that is not addressed to specific parties. This means that only privileged applicants (i.e. Member States and EU institutions) have legal standing to bring annulment proceedings against such general measures. This state of affairs is open to criticism for several reasons. First, putting aside State aid law, Notices adopted in the field of competition law are exclusively addressed to economic operators whose behaviour is covered by Articles 81 and 82 EC or by the ECMR. The likelihood that Member States or other EU institutions would appeal the adoption of these acts is therefore low. Consequently, there is a risk that these notices would be, *de facto*, shielded from legal review by the Community Courts with the attendant risk that the Commission could seek to take advantage of this vacuum to deliberately extend its powers.

⁸⁸ See M. CINI, "The soft law approach: Commission rule-making in the EU's state aid regime", *Journal of European Public Policy*, 8:2, 2001, pp. 201-202.

⁸⁹ Put simply the Estoppel principle prevents a person from asserting or denying something in court that contradicts what has already been established as the truth. In the past, the Court followed a cautious approach when called to rule on the legal value of Communications. In the *Sugar* case, for instance, the Court accepted a claim that a particular infringement did not warrant a fine because the notice on commercial agents had created the impression that the conduct in question was not prohibited. See Cases 40/48, 50, 54/56, 111, 113 and 114/7, *Coöperatieve Vereniging "Suiker Unie" UA and others v. Commission*, [1975] E.C.R. 1663. In the *Hercules* case, *supra*, the Court considered that the Commission was bound by its pronouncements on access to the file. In Case C-251/98, *Spain v. Commission*, [2002] E.C.R. I-8031, the ECJ considered that the Commission was bound by its Communications on the interaction between the Commission and the Member States. For a more restrictive approach, see *Métropole Télévision*, *supra*.

That case-law applies a fortiori to rules of conduct designed to produce external effects, as is the case of the Guidelines, which are aimed at traders.

In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects (emphasis added).⁹⁰

Therefore, just as is the case with oral statements and press releases, a Commission decision that departs from principles or legal interpretations contained in existing Guidelines, Communications and Notices can be challenged on the grounds that it infringes general principles of EC law, such as the duty of good administration, protection of legitimate expectations or legal certainty.⁹¹

I. – Guidance letters

Recital 38 of the preamble to Regulation 1/2003 allows companies to seek the informal view of the Commission where the application of Article 81 or 82 EC to a given practice is uncertain (*e.g.* because the legal standard is unclear) or raises novel questions.⁹² The Commission has specified in its “Notice on informal guidance relating to novel questions” the circumstances in which it would provide such guidance.⁹³

Guidance letters have the potential to become a prime example of “sunshine” enforcement. They are aimed at a vast audience (the Notice states that “Guidance letters will be posted on the Commission’s website”), and thus may be an effective tool to promote voluntary compliance with competition law and uncover types of anti-competitive behaviour that were hitherto not evident.⁹⁴

⁹⁰ See Case, C-189/02 P, *Dansk Rørindustri and others v. Commission*, [2005] E.C.R. I-5425, at §§209-211.

⁹¹ It would be perhaps more advisable, as a matter of judicial policy, to clearly recognize that the principles of Estoppel or “*patere legem quam ipse fecisti*” are general principles of EC law.

⁹² This possibility was in fact created in response to concerns that, with the abolition of the requirement to notify agreements brought about by Regulation 1/2003, undertakings would no longer be able to clarify their legal position by subjecting a given agreement to Commission examination.

⁹³ See Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), *OJ C* 101/78 of 27 April 2004.

⁹⁴ *Idem* at §21.

Despite this potential, four years after their introduction, Guidance letters remain shrouded in mystery. Rather surprisingly, the Commission has never used them. If the role of such guidance letters is to clarify obscure or novel issues of competition law, it can perhaps be argued that the Commission is reluctant to crystallize a solution – that will bind it in the future⁹⁵ – in cases where a trial and error approach (through individual decisions) would be more advisable.

J. – *Inapplicability decisions*

Article 10 of Regulation 1/2003 allows the Commission to adopt *ex officio* decisions finding that Articles 81 and 82 are not applicable to certain practices.⁹⁶ Such inapplicability decisions adopted under Article 10 do not, strictly speaking, represent the *enforcement* of Articles 81 or 82 EC. This being said, we believe that Article 10 decisions constitute indirect enforcement decisions in so far as they define the boundary between lawful and unlawful behaviour.

Inapplicability decisions could prove useful “sunshine” regulation instruments (*i.e.* they can ensure voluntary compliance with EC competition law) as suggested by the language of Regulation 1/2003 itself, which provides that such decisions are “declaratory” in nature.⁹⁷

Nevertheless, the Commission is yet to adopt its first inapplicability decision. Just as is the case with Guidance letters, the reasons for its unwillingness to do so are unclear. Perhaps, as noted above, it is due to a fear that they may limit not only the Commission’s margin of discretion but also that of other competition authorities in formal enforcement cases.⁹⁸

⁹⁵ Pursuant to the principles established by the ECJ in *Dansk Rørindustri and others v. Commission*, *supra* the Commission is arguably obliged to conform to orientations contained in its guidance letters when carrying out subsequent enforcement activities.

⁹⁶ Unlike Guidance letters which are requested by undertakings themselves.

⁹⁷ An act is regarded as “constitutive” when it modifies a legal situation. An act is considered as “declaratory” when it simply acknowledges a legal or factual situation. See G. CORNU, *Vocabulaire Juridique*, PUF, 3rd Ed., 2000.

⁹⁸ Findings of inapplicability are binding on national competition authorities and national courts in so far as Article 16 of Regulation 1/2003, which prohibits these bodies from taking decisions that conflict with the Commission’s interpretation of EC law, also appears to cover these types of decisions. See Article 16 of Regulation 1/2003, *supra*.

III. – THE VIRTUES OF SUNSHINE ENFORCEMENT INSTRUMENTS

A. – *Providing guidance*

In the debates preceding the adoption of Regulation 1/2003, many scholars and practitioners expressed fears that the abolition of the system of mandatory notification of agreements to the Commission would deprive firms of a significant source of guidance, represented by comfort letters and Article 81(3) EC decisions.⁹⁹

It can be argued that the Commission's increasing reliance on the wide array of sunshine regulation instruments described in the previous sections has contributed to dispelling many of those concerns. These instruments have indeed provided useful guidance on substantive aspects of EC competition law to firms facing the intricacies inherent in the competitive assessment of their own behaviour. For instance, our experience suggests that the Discussion paper on Article 82 EC has proved invaluable in helping firms with significant market power and their advisors devise business strategies compliant with EC competition law in fields where the applicable legal standard is far from clear (such as rebates and tying).

In addition, due to the time required to expunge confidential information from formal infringement decisions – and very often to translate them – a number of years often passes between the date of adoption of such decisions and their publication in the *OJ*. In many instances, the Commission can compensate for these shortcomings by issuing detailed press releases or by summarizing the most salient aspects of its decisions in a variety of instruments (*e.g.* articles, annual reports on competition policy, etc.). By resorting to such sunshine instruments the Commission is able to clarify its interpretation of EC competition law in a timely fashion.

⁹⁹ See *e.g.* F. MONTAG and T. JANSSENS, "Article 81(3) in the context of modernisation – a lawyer's view", in D. GERADIN (Ed.), *Modernisation and enlargement: two major challenges for EC competition law*, Intersentia: Antwerp, Oxford, 2004; H. BOURGEOIS, "The impact of modernization on companies and their counsels", in D. GERADIN (Ed.), *ibid.*; V. POWER, "Representing clients after the modernisation of EC competition law", (2003) *I.C.C.L.R.* 335; H.M. GILLIAMS, "Modernisation: from policy to practice", (2003) 28 *European Law Review*, 451.

B. – Improving detection of anticompetitive behaviour

By increasing the awareness and understanding of the role of EC competition law, “sunshine” enforcement instruments play a key role in the detection of anticompetitive conduct.¹⁰⁰ Although those effects are difficult to quantify, it is likely that the multiplication of public pronouncements on various competition law topics has allowed private economic actors to identify specific instances of anticompetitive conduct and take action against them before such infringements are detected by competition authorities.

For instance, one can speculate about the extent to which the flurry of press releases, speeches, statements and articles that followed the Commission’s 2004 Microsoft decision,¹⁰¹ contributed to the recrudescence of complaints alleging abuses in other markets not only against Microsoft, but also against other large firms active in dynamic markets.¹⁰²

C. – Reducing the Commission’s administrative burden

The Commission has often stated that it has limited administrative resources to deal with the workload imposed by its ever-increasing attributions. The adoption of Regulation 1/2003 represented the most far reaching attempt to alleviate that burden and

¹⁰⁰ See G.S. BECKER, “A theory of competition among pressure groups and political influence”, (1983) *The Quarterly Journal Of Economics*, Vol. 98, pp. 371-400.

¹⁰¹ See the 24 Commission Press Releases published on the European Union website from 10 February 2000 to 27 February 2008, at http://ec.europa.eu/comm/competition/antitrust/cases/index/by_nr_75.html. See, also, N. KROES, *Press conference on imposing penalty payments on Microsoft – introductory remarks*, European Commission, Brussels, 12th July 2006; N. KROES, *Introductory remarks on CFI ruling on Microsoft’s abuse of dominant market position*, Press conference, Brussels, 17th September 2007; N. KROES, *Introductory remarks on Microsoft’s compliance with March 2004 antitrust decision*, Press conference, Brussels, 22nd October 2007; N. KROES, *Decision to impose € 899 million penalty on Microsoft for non-compliance*, Introductory remarks at press conference, Brussels, 27th February 2008. See e.g. N. BANASEVIC, J. HUBY, M. PENA CASTELLO, O. SITAR and H. PIFFAUT, Commission adopts Decision in the Microsoft case, *EC Competition Policy Newsletter*, 2004, 2, pp. 44-48; C. MADERO, N. BANASEVIC, C. HERMES, J. HUBY and T. KRAMLER, The Court of First Instance rejects Microsoft’s request for interim measures concerning the Commission’s decision of 24 March 2004, *EC Competition Policy Newsletter*, 2005, 1, pp. 53-58; N. BANASEVIC, A. BARBERÁ DEL ROSAL, C. HERMES, T. KRAMLER, I. TAYLOR and F. VERZELEN, Commission imposes a penalty payment pursuant to Article 24(2) of Regulation 1/2003 on Microsoft, *EC Competition Policy Newsletter*, 2006, 3, pp. 27-29; T. KRAMLER, C.-C. BUHR and D. WYNS, The judgment of the Court of First Instance in the Microsoft case, *EC Competition Policy Newsletter*, 2007, 3, pp. 39-44. See e.g. European Commission, *EU competition policy and the consumer – a new brochure describing the basic concepts of European competition policy*, 2004.

¹⁰² See B. VESTERDORF, “Article 82 EC: Where do we stand after the Microsoft judgement?”, available at <http://www.icc.qmul.ac.uk/GAR/Vesterdorf.pdf>.

allow the Commission to focus on the most serious infringements of competition law. With the increased reliance on a number of instruments identified in this paper, the Commission could achieve similar goals. In so far as “sunshine” enforcement instruments encourage firms voluntarily to comply with the law and assist NCAs and courts in properly applying Articles 81 and 82 EC, they have the potential to diminish the number of cases before the Commission. In this respect, Notices, Guidelines, Communications, Guidance letters, Articles, Papers are particularly relevant.

D. – *Decision-making efficiency*

The adoption of “sunshine” enforcement instruments is much less cumbersome than that of legislative measures. As a result, they allow the Commission to be much more nimble in the course of its enforcement duties. The swift and timely regulation they are able to provide increases the efficiency of the Communities decision-making process and stands in stark contrast with the arcane and time-consuming traditional legislative procedure (see table below). Notwithstanding this, several sunshine enforcement instruments seem to suffer from the same shortcomings (*e.g.* the Discussion paper on Article 82 EC which is still to result in the adoption of guidelines on the application of Article 82 EC).¹⁰³

TABLE 2
Timeframe for the adoption of general soft law instruments

<i>Type of instrument</i>	<i>Date of Commission draft (equivalent to legislative proposal)</i>	<i>Date of effective adoption</i>	<i>Duration</i>
Guidelines on non horizontal mergers	May 2007	28 November 2007	5 months
Guidelines on horizontal mergers	11 December 2002	16 December 2003	1 year
Guidelines on article 81(3) EC	3 October 2003	27 April 2004	6 months
Guidelines on technology transfer agreements	3 October 2003	7 April 2004	6 months

¹⁰³ See *Global Competition Policy*, Apr-08 (2) and, in particular, L. LOVDAHL-GORMSEN, “Will There Be Article 82 Guidelines and What Are the Implications?”; CANI FERNÁNDEZ and ALBERT PEREDA, “Will There Be Guidelines On Article 82 of the EC Treaty?”; D. GERARD, “The Commission on Velvet: Why it will probably not issue Article 82 guidelines any time soon”.

E. – *Enhancing competition advocacy*

Competition Commissioners and in particular Commissioner Kroes have regularly emphasized the importance of developing a strong competition culture in the EC.¹⁰⁴ The proliferation of soft law instruments which are then extensively disseminated to the public increases the visibility of competition policy for the general public and thus contributes to its effectiveness (through possible follow-on actions). In addition, such wider understanding of the role and virtues of competition law by the public does not serve a mere informative purpose: it can be expected to increase the legitimacy of a field of the law where enforcement entails the imposition of quasi-criminal penalties and where the Commission's action is routinely met with virulent criticism at Member State level.

IV. – THE VICES

OF SUNSHINE ENFORCEMENT INSTRUMENTS

A. – *Poor substantive quality*

Very often, the substantive quality of soft law instruments leaves much to be desired. Their language may not be ideal, the legal standards and reasoning murky, the terminology inconsistent with previous practice, etc. These shortcomings negate many of the benefits expected from them.¹⁰⁵ For instance, Guidelines, Notices and Communications, are not always useful. Their degree of authority depends on a number of elements: outcome of the consultation process, wording, formal clarity, etc. Furthermore, those soft law instruments that are general in nature and designed to cover abstract categories of anticompetitive conduct are sometimes difficult to apply to a particular case.¹⁰⁶ In that respect the Guidelines

¹⁰⁴ See e.g., Report prepared by the Advocacy Working Group, *Advocacy and Competition Policy*, ICN's Conference Naples, Italy, 2002; N. KROES, *The Competition Principle as a Guideline for Legislation and State Action – the Responsibility of Politicians and the Role of Competition Authorities*, 12th International Conference on Competition, Bonn, 6th June 2005; P. LOWE, "Preserving and Promoting Competition: a European Response", Speech, St Gallen Competition Law Forum, 11 May 2006; N. KROES, *Competitiveness – The common goal of competition and industrial policies*, SPEECH/08/207 of 18th April 2008.

¹⁰⁵ See European Consumer Law Group, "Soft Law and the Consumer Interest", ECLG/071/2001, March 2001, pp. 12-21.

¹⁰⁶ See C. COOK and N. KHAN, *supra*, at §1-026. To address these problems, some guidelines provide examples to clarify the analysis of particular cases.

on Article 81(3) EC, which suggest that companies perform a burdensome and complex economic analysis to determine whether the agreements they concluded are lawful (balancing pro-competitive benefits with anticompetitive effects), are a case in point.¹⁰⁷

B. – *Decision-making opacity*

The increased efficiency in the decision-making process allowed by sunshine enforcement instruments is also their Achilles heel. As a result of their simplified adoption process, a number of such instruments (in particular, guidelines and other general instruments) are not subject to the scrutiny of the other Community institutions. This may be a cause of concern where these measures not only frame the margin of discretion enjoyed by the Commission in the implementation of competition policy, but also lead to the imposition of new legal obligations on firms, thereby concealing quasi-legislative choices (*e.g.* the guidelines on corrective measures which clearly favour structural remedies over behavioural ones). Moreover, although the release of a Commission draft document is usually followed by a wide consultation process (involving different stakeholders such as consumer and trade associations, legal experts) guaranteeing a certain degree of accountability, the Commission is under no duty to justify its policy choices or give reasons where it ignores the views volunteered by third parties.

C. – *Regulatory mess/inconsistencies*

The proliferation of sunshine enforcement instruments leads to a fragmentation of legal sources which complicates the task of those practising EC competition law. To address this issue, the Commission has recently sought to aggregate various Notices and similar Communications dealing with related subjects into single “consolidated” notice(s).¹⁰⁸

¹⁰⁷ See Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, *OJ*, C 101, 27.04.2004, pp. 97-118.

¹⁰⁸ See Commission Consolidated Jurisdictional Notice under Council Regulation (EC) N° 139/2004 on the control of concentrations between undertakings of 10 July 2007, which replaces (i) the Notice on the concept of concentration; (ii) the Notice on the concept of full-function joint ventures; (iii) the Notice on the concept of undertakings concerned; and (iv) the Notice on calculation of turnover.

In addition, two (or more) different sunshine enforcement instruments may contain inconsistent legal standards or positions. For instance, the press release issued following the adoption of the Commission 2004 infringement Decision against Microsoft states that the Commission assessed Microsoft's behaviour under the "rule of reason".¹⁰⁹ As noted by different commentators, this statement is not in line with the views formally expressed by the Commission in its Guidelines on the application of Article 81(3), which suggest that such a "rule of reason" tests does not exist in EC competition law.¹¹⁰ Such inconsistencies are in all likelihood due to the fact that different instruments are drafted by different individuals and often not subject to wide-ranging internal consultation or reviewed by an overarching organ that would attempt to ensure coherence.

D. – *Avoid judicial review*

The question whether sunshine enforcement instruments are amenable to judicial review is of critical importance. The conventional view, which may be shared by the Commission, is that since only formal enforcement decisions taken at the "end of the chain" actually affect the rights and obligations of individual companies directly, accountability would be sufficiently ensured via judicial review of these formal, final decisions (*i.e.* infringement decisions, etc.).¹¹¹

Certain authors, such as Larouche and De Vijser, have criticized this view, contending that it ignores the practical realities of economic regulation. Soft law instruments and other forms of informal action influence the scope and exercise of the powers of a number of public authorities such as national courts, NCAs and national regulatory authorities ("NRAs"). A Commission Communication interpreting the substance of EC competition law will, for instance, influence the enforcement activities – and in particular, the content of the decisions – adopted by the NCAs. It can therefore be argued that the rule of law would be better served if those acts were sub-

¹⁰⁹ See *Microsoft – Questions and Answers on Commission Decision*, MEMO/04/70 of 24 March 2004.

¹¹⁰ See VAN BAELE & BELLIS, *supra* at note 205, p. 82.

¹¹¹ This issue is explained at length by Larouche and De Vijser in a paper concerning electronic communications regulation. See P. LAROCHE and M. DE VIJSER, "The triangular relationship between the Commission, NRAs and National Courts Revisited", *Communications & Strategies*, 10 January 2006.

ject to a certain degree of judicial scrutiny and the Commission held accountable for them.¹¹²

*E. – Increase legal uncertainty
or promote controversial legal standards*

In certain instances, the Commission will be tempted to offer guidance on the application of Articles 81 and 82 EC that finds little support in the legal standards established by the Community courts' case-law. These novel interpretations will very often not give rise to criticism as regards the substantive solutions they entail because, for instance, the case-law is no longer considered sound in light of contemporary economic analysis.

This being said, the guidance thus offered will by definition create legal uncertainty. At least for this reason, these sunshine enforcement instruments are controversial. For instance, in the opinion delivered in *British Airways*, AG Kokott dismissed a novel legal standard relating to the assessment of rebates granted by dominant firms proposed by the Commission in the Discussion Paper on Article 82 EC and recalled that the applicable test remains the one defined by the Community Courts.¹¹³ Subsequently, the Commission and its officials appear however to have either tried to reconcile the existing case-law with the pronouncements contained in the Discussion Paper or applied a new market foreclosure test suggested in the Discussion Paper.¹¹⁴ Whichever the case may be, the Commission has sought to justify its choices through a variety of press releases and articles published in academic reviews and in the EC com-

¹¹² By contrast, however, we do not share the pessimism of these authors, when they consider that recommendations, guidelines and other soft-law instruments are immune from judicial scrutiny. The current state of the case-law allows, to a certain extent, to initiate annulment proceedings against soft law instruments. The fact that Article 230 EC does not expressly mention those acts does not, as confirmed by the Court in the landmark *ERTA* case, insulate them from judicial scrutiny. See Case C 22/70, *Commission v. Council*, [1971] E.C.R. I-263 at §42 ("all acts adopted by the institutions, whatever their nature or form, which are intended to have legal effects"). As a matter of principle, informal pronouncements and soft law instruments can be brought to justice, if they (i) are definitive (and not preparatory); (ii) have been adopted by a Community institution (in the present case, the Commission); and (iii) produce legal effects on a person's situation and affect that person in an adverse manner. See also Case C 294/83, *Les Verts v. Parliament*, [1986] E.C.R. 1339 at §24 which states that those acts "intended to have legal effects vis-à-vis third parties" can be challenged on the basis of Article 230 EC.

¹¹³ See *supra*.

¹¹⁴ See *Prokent-Tomra*, Commission decision of 29 March 2006, Case COMP/E-1/38.113, not yet published.

petition policy newsletter.¹¹⁵ One such article in particular, concerning a specific infringement decision, stated as follows :

"[the case] was analysed following the previous case law of the European Court of Justice, in addition to being based and supported by economic analysis in the spirit of the recently publicised DG Competition Discussion paper on the application of Article 82 to exclusionary abuses. The case can be considered an important step towards the envisaged reform of the application of Article 82 EC Treaty".¹¹⁶

To complicate matters further, a leading competition economist has forcefully argued that it is doubtful that the Commission applied, in that specific case, an effects-based approach analysis and in particular, the foreclosure test suggested in the Discussion Paper as claimed.¹¹⁷ In sum, despite the Commission's guidance, some of the principles applicable to the analysis of Article 82 EC cases remain as nebulous as ever.

*F. – Discipline market players
without taking a formal decision*

In a world driven by information, investors, customers, suppliers, etc. tend to react vigorously to any signal that may affect the market, no matter how insignificant it may be. In that respect, the mere announcement that a firm is being investigated by the Commission – from which no inference can be drawn that the firm in question committed an infringement – can potentially have a whole host of negative and unintended consequences.

For instance, the Commission's increasing practice of disclosing information on steps of a mere procedural nature taken in the context of its enforcement activities can prove extremely harmful to the firms under investigation. In particular, the public announcement that the Commission has opened formal proceedings against a firm will often be misconstrued as signifying that the adoption of a Statement of Objections – setting out the Commission's preliminary view that an infringement has occurred – is

¹¹⁵ See Commission Press Release, *Commission imposes € 24 million fine on Tomra group for abuse of dominant position*, IP/06/398 of 29 March 2006; See F.P. MAIER-RIGAUD, "Article 82 Rebates : Four Common Fallacies", mimeo, available on www.ssrn.com;

¹¹⁶ F. MAIER-RIGAUD and D. VAIGAUSKAITE, "Prokent/Tomra, a textbook case? Abuse of dominance under perfect information", *EC Competition Policy Newsletter*, 2, 2006, p. 19.

¹¹⁷ See D. RIDYARD, "The Tomra decision – A disappointing start to the effects-based era of Article 82 enforcement", *Competition Law Insight*, 13 February 2007.

imminent.¹¹⁸ The Commission seems to be fully aware of this potential for mischief and is therefore careful to explain that the initiation of formal proceedings means only that the Commission will pursue its investigation “as a matter of priority” and does not in any way prejudice the final outcome of the analysis.¹¹⁹ This notwithstanding, this practice will often harm significantly many firms investigated by the Commission. A recent study by G. Langus and M. Motta shows, for instance, that the announcement to the market of a dawn raid has a strong and statistically significant effect on the firm’s share price, with its cumulative average abnormal return being approximately – 2 %. One cannot exclude that the heightened public attention, market focus and pressure brought to bear by investors may, in many cases, induce a firm under investigation to commit to amend its behaviour in order for a competition authority to close even incipient proceedings. This may be an area of real concern where any change in a firm’s behaviour is unwarranted given that a full investigation would in all likelihood have found no evidence of infringement.

In light of the risks identified above, it is clear that competition authorities should exercise the utmost caution when making such public announcements. In that respect, the record of the British NCA, the Office of Fair Trading (“OFT”), is worth mentioning. In a 2007 public announcement, the OFT erroneously suggested in a press release that a firm had committed several infringements of UK competition law.¹²⁰ The firm initiated defamation proceedings. In April 2008, the OFT acknowledged that its press release con-

¹¹⁸ Until recently the Commission initiated formal proceedings simultaneously with the adoption of a Statement of Objections. A new trend seems to be emerging whereby the initiation of formal proceedings precedes and is therefore decoupled from the adoption of a Statement of Objections. In such cases, the initiation of formal proceedings constitutes a mere procedural measure which does not imply – and for that reason should not suggest – that a Statement of Objections will be adopted.

¹¹⁹ See Commission Press Release, *Antitrust : Commission initiates formal proceedings against Qualcomm*, MEMO/07/389 of 1st October 2007.

¹²⁰ See OFT Press Release, *Wm Morrison Supermarkets plc : an apology*, 54/08 of 23 April 2008. The OFT issued a press release at the same time as a Statement of Objections against a number of large supermarkets and dairy processors, among which Morrisons. However, the press release incorrectly suggested that Morrisons was the subject of a provisional OFT finding of infringement in relation to milk, cheese and butter over a two year period (2002 and 2003), and that Morrisons had previously been warned by the OFT against anti-competitive behaviour. In fact, the OFT has not made any provisional finding of infringement against Morrisons in relation to the supply of butter and cheese. Nor had Morrisons been accused of any price fixing activity after 2002. The only allegation involving Morrisons related to liquid milk products in 2002.

tained "serious errors". It issued a new press release expressing its sincere apologies for the publication of erroneous, defamatory allegations and agreed to pay £100,000 in settlement of the defamation action.

G. - "*Buying*" time

Finally, the adoption of sunshine enforcement instruments may, in certain instances, be perceived as merely allowing the Commission to buy time. For instance, the Commission is under a legal duty (as guardian of the Treaty) to apply competition law and to act in a timely fashion in the interests of "good administration". In cases where its actions have been less than immediate, it may be tempted to defuse any criticism by issuing a press release of a merely procedural nature. Similarly, the publication of a consultation paper in an area where a clarification of competition policy appears long overdue may allow the Commission to devote more time to a thorough examination of the topic in question.

V. - CONCLUSION

The proliferation of sunshine enforcement instruments has pros and cons, supporters and detractors. Whilst its virtues in providing much needed guidance in certain nebulous areas of EC competition law as well as its contribution to the effectiveness of the Commission's enforcement activities are apparent and should not be called into question, its pitfalls are less well-known.

In our view, the Community courts bear significant responsibility in ensuring not only that the Commission does not abuse the wide margin of discretion it enjoys, but also that the Commission's reliance on soft law instruments does not prove inconsistent with higher sources of Community law.

ANNEX. – TYPOLOGY OF SUNSHINE ENFORCEMENT INSTRUMENTS

	Author	General/ Individual (G/I)	Content		Publication			Binding nature		Possibility to bring annulment proceedings under Article 230 EC		Possibility to bring damages claims under article 288 EC
			Policy	Technical	Official Journal	Others	Not published	Binding on the Commission	ECJ/CFI precedent	Is the measure a challengeable act?	ECJ/CFI precedent	
Oral state- ments	Commis- sioner; Com- mission spokespers ons; Com- mission officials	G/I	x	x		x		x (If the author represents the Commis- sion)	x CFI T-25/99, <i>Roberts and Roberts v. Commission</i> ; CFI T-133/95 and T-204/95, <i>IEEC v. Commission</i>	x Depends on whether the statement is a formal pro- nouncement or an "off- the-record" statement CFI T-52/96 R, <i>Sogecable v. Commis- sion</i>	x CFI T-3/ 93, <i>Air France v. Commis- sion</i> CFI T-62/ 98, <i>Volkswa- gen AG v. Commis- sion</i>	x CFI T-62/ 98, <i>Volkswa- gen AG v. Commission</i>
Articles written by Commis- sion offi- cials	Commis- sion offi- cials	G/I	x	x		x		x Arguably yes, where such articles seem to be endorsed by the Commis- sion (e.g. articles pub- lished in the <i>EC Competi- tion Policy Newsletter</i>).	No	Unlikely	No	Unclear

	Author	General/ Individual (G/I)	Content		Publication			Binding nature		Possibility to bring annulment proceedings under Article 230 EC		Possibility to bring damages claims under article 288 EC
			Policy	Technical	Official Journal	Others	Not published	Binding on the Commission	ECJ/CFI precedent	Is the measure a challengeable act?	ECJ/CFI precedent	
Expert reports and third party studies	Third parties	G/I	x	x		x	x	Unclear	No	Unclear	No	No
Press releases	Commis- sion	G/I	x	x		x		x	x CFI T-25/99, <i>Roberts and Roberts v. Commission</i>	A press release may nonetheless be challenge- able if, in fact, it con- stitutes a decision in disguise	x CFI T-119/ 02, <i>Royal Philips Electron- ics NV v. Commis- sion</i>	Yes
Commis- sion papers (discus- sion papers, non- papers, etc.)	Units or Directo- rates within DG COMP	G	x	x		x		Yes	No	Unclear	No	No

	Author	General/ Individual (G/I)	Content		Publication			Binding nature		Possibility to bring annulment proceedings under Article 230 EC		Possibility to bring damages claims under article 288 EC
			Policy	Technical	Official Journal	Others	Not published	Binding on the Commission	ECJ/CFI precedent	Is the measure a challengeable act?	ECJ/CFI precedent	
Annual reports on competition policy	Commis-sion	G/I	x	x		x		x	x CFI T-7/89, <i>Hercules v. Commission</i> ; T-528/93, <i>Métropole Télévision v. Commission</i>	Unclear	No	Unclear
Final report following sector inquiries	Commis-sion	G/I	x	x		x		Yes	No	Unclear	No	Unclear
Formal Commis-sion Guide-lines, Notices and Communica-tions	Commis-sion	G	x	x	x			x	x ECJ 40/48, 50, 54/56, 111, 113, 114/7, " <i>Suiker Unie</i> " and <i>Others v. Commission</i> , ECJ C-251/98, <i>Spain v. Commission</i> , ECJ C-189/02, <i>P Dansk Rørindustri and others v. Commission</i>	x	x ECJ C-325/91, <i>France v. Commis-sion</i>	Yes

	<i>Author</i>	<i>General/ Individual (G/I)</i>	<i>Content</i>		<i>Publication</i>			<i>Binding nature</i>		<i>Possibility to bring annulment proceedings under Article 230 EC</i>		<i>Possibility to bring damages claims under article 288 EC</i>
			<i>Policy</i>	<i>Technical</i>	<i>Official Journal</i>	<i>Others</i>	<i>Not published</i>	<i>Binding on the Commission</i>	<i>ECJ/CFI precedent</i>	<i>Is the measure a challengeable act?</i>	<i>ECJ/CFI precedent</i>	
Guidance letters	Commis- sion	G/I		x		x		Yes	No	Likely	No	Likely
Inapplica- bility decisions	Commis- sion	I		x	x			Yes	No	Likely	No	Likely