



EUROPEAN COMMISSION

DIRECTORATE-GENERAL FOR COMPETITION

Merger Manual of Procedures

Life of a case

29 November 2024

Merger Manual of Procedures

Internal DG Competition working documents on procedures for the application of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

29 November 2024

The text is made available on the internet:

https://competition-policy.ec.europa.eu/mergers/procedures/procedures-manual_en

NOTICE

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DG Competition's Manual of Procedures for the application of the EU Merger Regulation is an internal working tool intended to give practical guidance to staff on how to conduct an investigation applying the EU Merger Regulation.

The Merger Manual of Procedures does not contain binding instructions for staff, and the procedures set out in it may have to be adapted to the circumstances of the case at hand. The guidance given in the Manual of Procedure does not claim to be complete or exhaustive and not every question that might arise is dealt with, or dealt with in the same level of detail. The content of the Manual of Procedure has not been adopted by the Commission. It is a working tool, which evolves through updates to reflect new experience gained in applying the competition rules of the Treaty, and the Regulations, notices and other guidance adopted thereunder.

In case of divergences between these rules and how these rules are interpreted by the Union Courts, on the one hand, and the Merger Manual of Procedures, on the other hand, the former apply. Staff has been instructed that, in case of doubt, they should always seek instructions from their hierarchy regarding the precise course of action in a particular situation.

The main chapters of the Merger Manual of Procedures are being made public in order to provide greater transparency about the Commission's procedures in applying the competition rules.

The fact that the modules are in the public domain does not change their character as purely internal practical guidance to staff. The published modules therefore do not create or alter any rights or obligations arising under the competition rules of the Treaty and the Regulations, notices and other guidance adopted thereunder. Developments since this version of the Merger Manual of Procedures was published (such as new case law) may not yet be reflected.

Brussels, 29 November 2024

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1. LIFE OF A CASE

1.1. Pre-notification

- (1) The aim of the pre-notification period is to ensure that the (Short) Form CO contains information, which is clear, accurate and substantially complete, to make as much progress as possible for the case team to identify what other information in addition to that contained in the draft (Short) Form CO needs to be collected and to prepare and plan the investigation.

1.1.1. Initial practical steps

1.1.1.1. Initial contacts with the Merger Registry

- (2) The notifying party or its legal representative should use the CTAR to ask for the appointment of a case team. They may add a briefing memorandum or a first draft (Short) Form CO or a first draft Form RS to the CTAR.
- (3) The case language should also be indicated. One of the official languages of the EU should be used. For supporting documents in a non-EU language, a translation into the authentic language of the case (i.e. the language of the notification). For more information on this, please consult the chapter of the Manual on Languages and translation.
- (4) CTARs should be sent to the Merger Registry by email by 12pm on Fridays at the latest, for allocation during the next week.
- (5) The notifying party and its legal representative are advised to not directly contact case teams. If a case team receives a CTAR, they will ask the notifying party or its legal representative to send the CTAR to the Merger Registry.

1.1.1.2. Attribution of new cases with DG Competition

- (6) Each case will be attributed to the responsible unit. It is important to note that a case can be under the responsibility of a certain Directorate and yet under the responsibility of a unit not belonging to that Directorate. For example, if the NACE code belongs to an antitrust unit in E, even if the case is allocated e.g. to unit B4 (in the case of the automotive industry) or to unit D6 (in the case of chemicals), the Director will be the Director of Directorate E. In addition, it is possible that a case is dealt with by another unit due to resource limitations within the normally responsible unit.

1.1.1.3. Naming of cases

- (7) The Merger Registry gives the case a name based on the information provided by the notifying party (or its legal representative if there is a PoA) in the CTAR. Cases are named according to certain rules. The name of a case should be descriptive enough to make clear which companies are involved.
- (8) Code names can be given to pre-notified cases at notifying party's request. In principle, pre-notified not yet announced acquisition plans of quoted companies (e.g. intention to launch a public bid) will, due to their sensitivity, receive a code name. These cases receive a special confidentiality treatment.

1.1.1.4. Potential conflict of interest declarations for case team members

- (9) Because of the sensitive nature of the information received by DG Competition, measures are in place to trace back information flows in case of allegation of insider dealing.
- (10) For each newly created case, each case team member (from the case assistant to the case manager), including each new case team member added during the course of the proceedings, needs to declare whether they have a conflict of interest. As long as a case team member has not declared that there is no conflict, s/he is not part of the case team.

1.1.1.5. Pre-notification contacts with the case team

- (11) The case assistant will contact the notifying party (or its legal representative if there is a PoA) to inform them about the case number and title as well as the composition of the team.
- (12) Depending on the complexity of the case, emails and phone calls between the case team and the notifying party will suffice or meetings will be necessary in order to initiate the case.
- (13) Meetings are held normally only on the basis of a substantial submission (memorandum outlining the main issues) or a draft (Short) Form CO.
- (14) There is no obligation on the notifying party to have any pre-notification contacts. However, the Best Practices on merger control proceedings provide for such contacts, and the notifying party need to be aware of the risk that their notification can be declared incomplete if not containing all necessary information.

1.1.1.6. Timing Issues

- (15) Pursuant to point 9 of the Implementing Regulation and point 10 of the Best Practices on merger control proceedings, *"pre-notification contacts should preferably be initiated at least two weeks before the expected date of notification."* A longer pre-notification period may be necessary in cases that are more complex.
- (16) In application of point 15 of the Best Practices on merger control proceedings, case teams will aim at providing comments to the notifying party or its legal adviser within 5 working days from the receipt of the draft Form CO or any other submissions. In case of voluminous submissions, this time will normally be extended.

1.1.1.7. Notification obligations and security procedures

- (17) In particular case of less experienced parties or legal advisers, case teams may point to the internet pages on the notification obligations and security procedures of DG Competition's website ⁽¹⁾.

⁽¹⁾ Accessible here: https://ec.europa.eu/competition-policy/mergers_en and https://ec.europa.eu/competition-policy/mergers/contact_en.

(18) Any technical questions should be addressed to the Merger Registry.

1.1.2. Content of the draft (short) Form CO

(19) The result of pre-notification discussions should be a complete (Short) Form CO containing all necessary information for the case team to start an investigation.

(20) The information contained in the draft (Short) Form CO should be clear, accurate and substantially complete. In order to ensure that this is the case, the case team will check that all sections of the draft (Short) Form CO are completed and that statements made are clear. The case team will notably check:

- (a) if information is missing or if additional information would be needed;
- (b) if the thresholds of Article 1 of the EU Merger Regulation are met;
- (c) if it constitutes a concentration pursuant to Article 3 EU Merger Regulation and if other jurisdictional or technical issues may arise;
- (d) if a simplified procedure would be likely (pursuant to the Notice on Simplified Procedure), and if so, ask the notifying party or its legal representative to submit a draft Short Form CO.

(21) The case team will discuss the likelihood of competition problems.

(22) The case team will analyse the draft (Short) Form CO in order to distinguish clearly between mere assertions and statements of fact. Such assertions will be further verified during the investigation.

(23) The case team may provide comments on draft (Short) Form COs in writing. The notifying party should submit a new draft with the supplementary information clearly marked (a redline version) prior to final notification.

(24) The case team may request further information or clarification of the new draft and review several drafts before all points are resolved. The notifying party should submit a new draft with the supplementary information clearly marked when replying to such requests.

(25) Pursuant to Section B.4 Annex I to the Implementing Regulation (for the Form CO) and paragraph 13(g) Annex II to the Implementing Regulation (for the Short Form CO), upon request of the notifying party, the Commission may dispense them from the obligation to provide any particular information in the notification. Such 'waiver' is subject to the caveat that the information may need to be supplied later if a need for this arises during the proceedings.

(26) In particular in cases that are likely to present competition problems, case teams may request internal documents, prior to notification.

(27) Contact details are an essential part of the (Short) Form CO. Case teams will request and verify contact details prior to notification.

- (28) In cases that are more complex, economic data is likely to be analysed. Case teams may request quantitative data during pre-notification phase. The CET may be involved already at pre-notification stage.

1.1.3. Pre-notification fact-finding & preparing the investigation

- (29) Pre-notification contacts provide DG Competition and the notifying party with the possibility, prior to notification, to discuss jurisdictional and other legal issues. They also serve to discuss issues such as the scope of the information to be submitted, and to prepare for the upcoming investigation by identifying key issues and possible competition concerns (theories of harm) at an early stage ⁽²⁾. Pre-notification discussions are held in strict confidence ⁽³⁾.
- (30) Normally, the market investigation only starts after the proposed concentration is notified. However, the case team can already begin during pre-notification to collect information about the market and market participants. Market contacts can be initiated prior to formal notification, provided that the notifying party has been informed in advance and have therefore had an opportunity to express their views ⁽⁴⁾.
- (31) In complex cases, and particularly for complex products, case teams can arrange for site visits (most usually at the parties' sites). Site visits can help the team to understand the reality of the market in which the parties operate.

1.2. Notification

- (32) The parties have the right to choose the date of notification –their only obligation is to submit a notification which is substantially correct and complete (per Article 4 Implementing Regulation). Pre-notification contacts are key in this regard.
- (33) To that purpose, pre-notification contacts should be initiated, preferably at least two weeks before the expected date of notification. The extent and format of the pre-notification contacts required is, however, linked to the complexity of the individual case in question. In more complex cases a more extended pre-notification period may be appropriate and in the interest of the notifying party. In all cases it is advisable to make contact with DG Competition as soon as possible as this will facilitate planning of the case (paragraph 10 of the Best Practices on merger control proceedings). For more information on this, please consult the chapter of this Manual on Pre-notification.
- (34) The Communication on the transmission of documents ⁽⁵⁾ stipulates that the transmissions of documents should in principle be sent electronically. Documents submitted electronically that must be signed, such as the (Short) Form CO, must be signed using a QES complying with the requirements set out in the eIDAS. Although not explicitly included in the Communication, if the PoA is submitted electronically it should be QES-signed (as only QES is the equivalent of a wet ink for electronic documents). Per the guidance on DG Competition's [website](#), if

⁽²⁾ Paragraph 6 of the Best Practices on merger proceedings.

⁽³⁾ Paragraph 8 of the Best Practices on merger proceedings.

⁽⁴⁾ Paragraph 26 of the Best Practices on merger proceedings.

⁽⁵⁾ Additional information about the practicalities for notification can also be found on [the practical information](#) page of DG Competition's website.

companies encounter difficulties signing a PoA using QES, the Commission may exceptionally accept different types of electronic signatures.

- (35) Transmissions of more than 10 gigabytes in size may be hand delivered or sent by registered post using an external storage device.
- (36) Furthermore, where transmission via ETrustEx is not technically possible the Commission can exceptionally allow other means of transmission. In such cases, documents may be hand delivered or sent by registered post to DG Competition. If parties choose to use an external storage device, the Short Form CO and PoA on that hard disk drive should be QES-signed. If parties choose to provide a paper copy of the complete submission, it should be wet ink-signed. In that case, the submission must be accompanied by two digital copies of the full submission on external storage devices, as well as a wet ink-signed declaration stating that the signed paper copy and digital copies are identical.
- (37) For electronic submissions, the following specifications shall be adhered to:
 - (e) Documents must be scanned for and free of viruses before submission. The Commission will delete any infected files and dispose of any infected external storage media. Deleted or disposed files may make the submission invalid or incomplete.
 - (f) Documents submitted using EU Sign must not be encrypted. For documents delivered on external storage devices, encryption is strongly encouraged. Encryption should be implemented only on the storage device. Individual documents stored on the device should not be password-protected. Decryption passwords should be sent separately.
 - (g) Documents must be in PDF or XLSX. Documents in PDF must be searchable, either as digitally created PDFs or by having been scanned for optical character recognition (OCR). Documents in XLSX format must be submitted with all underlying data unredacted and all underlying formulas and algorithms intact.
 - (h) The filename of documents should be defined so that the relevant section in the Form CO, Short Form CO, Form RS or Form RM is easily identifiable. Each document filename should also contain the number of the proceeding for which the submission is made. Document filenames must not include special or non-Latin characters, and the complete path must be limited to 250 characters.
 - (i) Every page in a PDF must be marked with corporate identification and consecutive document control numbers (e.g. ABC-00000001).
- (38) For any internal document submitted, these must be submitted in whole, unredacted and in native format; emails and other files must be submitted as separate files (they should not be in 'pst', '.zip' or '.nsf' formats); nsf files should be converted into any 'single' email format (such as '.msg' or '.eml'); all underlying metadata must be intact; no deduplication or email threading software may be used. Once the parties submit a formal notification, the Merger Registry will check the formal

completeness of the notification (signed original, powers of attorney, number of copies etc.).

- (39) Case teams will also check the completeness of the notification as regards its content, making sure that it contains all necessary information.
- (40) If a notification is incomplete in any material respect due to the missing of important information or documents, the Commission may adopt a decision declaring the notification incomplete. If the notification has not been accepted yet, the notification date will be postponed until the missing information has been received. If the deadlines have started running, the notification should be declared incomplete by a decision pursuant to Article 5(2) of the Implementing Regulation.
- (41) The decision typically lists all items which are considered to be missing and explain why the information is considered important for the procedure.
- (42) The prior approval of the Legal Service as associated department is needed for this decision. The involvement of other associated services is described in the Rules of Procedure of the Commission. The general empowerment granted to the Competition Commissioner develops further if there is a distinction on consulting or informing other associated services.
- (43) The power to adopt this decision has been subdelegated by the Competition Commissioner to the Director-General for Competition pursuant to Article 13(3) of the Rules of Procedure of the Commission, to adopt the act on her/his behalf and under his/her responsibility. In case the Director-General for Competition is not available, a deputy can sign instead.
- (44) The case team will inform all Member States of the decision and ESA, if relevant. If a publication of notification had already happened, a new publication of the prior notification of a concentration indicating the date on which the notification became complete is also necessary.
- (45) The notifying party can withdraw their notification. This can be done by way of an email. If the notifying party re-notify the same transaction, the case number will remain the same. If the case is re-notified after withdrawal, a new notification notice should be sent for publication.
- (46) Given the tight and strict deadlines in Phase I procedures, in order not to waste time in Phase I, the case team can already in pre-notification, if appropriate, prepare the draft prior notification of a concentration for the OJ, and obtain waivers for contacting authorities located outside the EEA for exchange of information.
- (47) Following notification, the Merger Registry issues acknowledgement of receipt to the notifying party. It sends the copy of notification to competent Authorities of the Member States, as well as ESA when the cooperation procedure applies (Article 58 of the EEA Agreement). If the case has a non-EU/EEA dimension, the Unit for International Relations within Directorate A will, if appropriate, inform the relevant competition authority.
- (48) The case team prepares the prior notification of a concentration for the OJ in all official languages of the EU, in order to invite third parties to provide useful

information and comments on the case within 10 calendar days of the date of publication in the OJ.

- (49) The case team should also finalise the questionnaires it prepared and send these out shortly after notification.
- (50) If appropriate, the case team should check whether an Article 9 request for referral to the competent authorities of the Member State is expected or appropriate. Such referral can be requested by a Member State on its own initiative or upon the invitation of the Commission within the deadline. For More information on this, please consult the chapter of this Manual on Referral pursuant to Article 9 of the EU Merger Regulation.

1.3. Waivers

- (51) As per the Best Practices on merger control proceedings, the notifying party may in pre-notification request the Commission to waive the obligation to provide certain information that is not necessary for the examination of the case.
- (52) Per paragraph 19 of the Best practices on merger control proceedings, all requests to omit any part of the information specified should be discussed in detail and any waiver has to be agreed with DG Competition prior to notification.

1.3.1. Legal basis and conditions for waivers

- (53) The legal basis for waivers is found in Article 4(2) of the Implementing Regulation. According to Article 4(2), the Commission may wave the obligation for the notifying party to provide any particular information in Form CO and Short Form CO. A waiver will be granted by the Commission when it considers that any such information is not necessary for the examination of the case.
- (54) The possibility to obtain waivers for information that the Commission considers not necessary for its assessment is extended to the Form RS and Form RM in Articles 6(2) and 20(2) of the Implementing Regulation respectively, which stipulate that Article 4(2) shall apply *mutatis mutandis*.
- (55) The Form CO, Short Form CO and Form RS as annexed to the Implementing Regulation introduce a second, non-cumulative condition for obtaining a waiver in paragraphs 4, 13(f) and 3 of these respective forms. Notably, if information required by either Form is not reasonably available to the notifying party, the Commission may grant a waiver also on that ground.

1.3.2. Sections particularly suitable for waivers in Form CO

- (56) The Form CO states in paragraph 5 that the Commission can waive the obligation to submit any particular information, which is not considered as necessary for the assessment of the case. In paragraph 6, the Form CO singles out information referred to in its sections 3.4, 3.5, 3.6, 3.7, 5.5, 5.6 and Section 10 which is considered as particularly suitable for waivers in many cases. While this is meant to be an invitation to the notifying party to consider requesting a waiver for each or several of these categories, there is no such thing as a right to obtain the waiver. A

case-by-case assessment must be made, and the final decision rests with the case team. The categories particularly suitable for waivers are listed below:

- (j) Financial or other support received from public authorities (section 3.4)
- (k) List of all the jurisdictions outside the EEA where the concentration has been or will be notified (section 3.5)
- (l) Affiliated companies with a stake or voting rights of 10% or more (section 3.6)
- (m) Competitors holding shareholding above 10% in any of the parties to the concentration (section 3.7)
- (n) Data that each of the parties to the concentration collects and stores in the ordinary course of its business operations and which could be useful for a quantitative economic analysis (section 5.5)
- (o) Description of the usage in the normal course of business of the data provided in section 5.5. (section 5.6)
- (p) Product differentiation and closeness of competition (section 10)

1.3.3. Requesting a waiver

- (57) Waiver requests must accompany the respective draft Short Form CO, draft Form CO, draft Form RS or draft Form RM and must be made either within the text or in the form of a separate email or letter to the case manager.
- (58) The notifying party must thoroughly motivate waiver requests, explaining why the information is not necessary for the assessment of the case, or why the information is not reasonably available to the notifying party and provide best estimates for the missing data identifying the sources for these estimates.
- (59) The case team should aim at assessing a complete and thoroughly motivated waiver request and reverting to the notifying party within five working days, in line with the Best practices on merger control proceedings. In principle, the case team does not have to justify a rejection of a waiver request and why the information is necessary for the assessment of the case.
- (60) To avoid a situation where the notifying party alleges that a waiver request has been partially or fully accepted by the Commission tacitly or implicitly, the case team is advised to respond to each request in writing. The response should cover the full scope of the request, in particular in case of partial or full rejection.

1.3.4. Effect of accepting a waiver

- (61) If during pre-notification, the case team accepted a waiver request and post-notification the case team discovers that the information concerned is actually necessary for the assessment of the case, it is in principle not possible to declare the notification incomplete. In complex cases, the case team is therefore advised to exercise caution when accepting waivers.

- (62) It is recommended that communications with the notifying party about waivers to be done in writing to avoid confusion.
- (63) Per paragraph 20 of the Best practices on merger control proceedings, if a waiver is granted based on incomplete, incorrect or misleading facts, this does not prevent the case team from declaring the notification incomplete.
- (64) Waiving the requirement for the notifying party to submit certain information in the draft short Form CO, draft Form CO, draft Form RS or draft Form RM does not prevent the case team from requesting this information at a later stage, for example by addressing a RFI pursuant to Article 11 of the EU Merger Regulation.

1.4. Investigation

1.4.1. Introduction

- (65) Market investigations are an essential part of merger control proceedings. They enable the Commission to understand how markets work and as a result assess the competitive impact of a concentration on the relevant markets.
- (66) In order to carry out a market investigation, the Commission has different tools at its disposal, among which requests for information under Article 11 of the EU Merger Regulation.
- (67) The investigation tools available and the procedures for their use are broadly the same in Phase I and Phase II. In Phase II cases, however, the investigation will normally take the form of far more detailed and extensive questionnaires, meetings with the notifying party, other involved parties and third parties and visits. Some very time-consuming tools such as external studies and econometric studies normally cannot be undertaken within the very short Phase I deadlines.
- (68) Typically, the market investigation starts when a case is notified to the Commission. The case team may decide, in the interest of its investigation, that market contacts could be initiated informally prior to notification ⁽⁶⁾.
- (69) On this [website](#), the Investigative Techniques Handbook of the International Competition Network can be found.

1.4.2. Request for information pursuant to Article 11 EU Merger Regulation

- (70) Pursuant to Article 11 of the EU Merger Regulation, the Commission is empowered to require the persons referred to in Article 3(1)(b) of the EU Merger Regulation (i.e. persons already controlling at least one undertaking who acquire control of the whole or parts of one or more other undertakings, undertakings and associations of undertakings), as well as undertakings and associations of undertakings, to provide it with all necessary information.
- (71) Information can be requested by simple letter (simple request (for information) (Article 11(2) of the EU Merger Regulation) or by decision (Article 11(3) of the EU Merger Regulation).

⁽⁶⁾ For more information on this, please consult the chapter of this Manual on Pre-notification.

- (72) Simple requests for information are sent during Phase I and Phase II investigations. Article 11(3) decisions are usually sent in Phase II proceedings and the addressees are generally the undertakings concerned.
- (73) Undertakings are obliged to answer to requests made by decision. They can however refuse to reply to requests for information made by simple letter.
- (74) Pursuant to Article 14(1)(b) and (c) of the EU Merger Regulation, if addressees of a RFI reply to either type of request (i.e. simple letter or Article 11(3) decision) by submitting incorrect or misleading information, they are liable to fines in case they are located inside the EEA. They are also liable to fines if following an Article 11(3) decision, they supply incomplete information or do not supply information within the time limit required.
- (75) Pursuant to Article 15(1)(a) of the EU Merger Regulation, the Commission may also impose periodic penalty payments on undertakings in order to compel them to supply complete and correct information which has been requested through an Article 11(3) decision.

1.4.2.1.1. Information that can be requested per Article 11 of the EU Merger Regulation

- (76) Pursuant to Article 11 of the EU Merger Regulation, the Commission may require undertakings and associations of undertakings to provide it with all necessary information in order to carry out the duties assigned to it by said regulation.
- (77) Information is necessary if it might enable the Commission to assess the effects of the notified operation on competition in the internal market or in a substantial part of it.

1.4.2.1.2. Addressees of Article 11 request for information

- (78) Article 11(1) of the EU Merger Regulation empowers the Commission to request information from persons referred to in Article 3(1)(b), undertakings and associations of undertakings. The Commission can send requests for information to any undertaking or association of undertakings, that is, not only the notifying party but also other involved parties or third parties.
- (79) Article 11(4) of the EU Merger Regulation specifies that the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking concerned. Article 11(4) also adds that lawyers duly authorised may supply the information on behalf of their clients. In that case, the undertaking will remain fully responsible if the information supplied is incomplete, incorrect or misleading.
- (80) The notifying party and the other parties to the concentration can appoint a lawyer. Therefore, simple requests for information are normally addressed directly to the legal representative of those parties.
- (81) As for requests for information to third parties, these are generally sent using the contact details that the notifying party provides in the Form CO. According to 14(d)

of the Form CO, "*contact details must be provided in a format provided by the DG Competition on its website.*" Contact details must also be accurate and incorrect information may be a ground for declaring the notification incomplete. When submitting the Form CO, the notifying party is obliged to provide the following contact details for competitors, customers, recent entrants and potential entrants: the name, address, telephone number, and email address of the head of the legal department (or other person exercising similar functions; and in cases where there is no such person, the chief executive).

- (82) Additional contact details may be requested by the case team with a RFI at any stage of the merger review, and the case team may use other contact details if such contact details have been communicated to the Commission by the recipient in question or are otherwise known to the case team.
- (83) The Commission can send requests for information to undertakings and associations of undertakings in an EFTA State that is member of the EEA, i.e. Norway, Iceland, Liechtenstein (but not Switzerland). Similarly to requests for information to companies located within the European Union, requests for information to undertakings and associations of undertakings in an EFTA State that is member of the EEA can include the threat of imposing fines pursuant to Articles 14 and 15 of the EU Merger Regulation.
- (84) Requests for information may also be sent to undertakings and associations of undertakings outside the European Union. Also, these requests for information can contain a reference to the possible imposition by the Commission of fines and periodic penalty payments.
- (85) Pursuant to Article 11(6) of the EU Merger Regulation, public bodies can also be the addressees of a RFI. However, no fine or periodic penalty payment can be imposed on them.

1.4.2.1.3. Language of Article 11 request for information

- (86) Pursuant to 1/58, addressees of a RFI are entitled to receive them in one of the languages of the Member States where they are located. ⁽⁷⁾
- (87) However, for Article 11(2) requests, in light of the tight deadlines within which the Commission must assess the impact of transactions on competition and as replying to an Article 11(2) request is voluntary, it is standard practice for the Commission to send requests for information in the authentic language (i.e. generally the language of the notification) or in one of the main procedural languages (generally English), though the case team should be prepared to send questionnaires in the languages of the countries concerned upon request. The cover letter is sent in the language of the Member State where the addressee of the questionnaire is located.
- (88) For Article 11(3) requests, absent a language waiver the cover letter and request are sent in the language of the Member States in which the addressee of the questionnaire is located. Nothing prevents annexing a courtesy translation in the language of the case and indicating that the answer may be provided in that

⁽⁷⁾ For more information on this, please consult the chapter of this Manual on Languages and Translation.

language. Requests to third countries will be done in English, except where otherwise agreed.

1.4.2.2. RFI by letter (Article 11(2) of the EU Merger Regulation)

- (89) Article 11(2) RFIs are the most important tool for the Commission's daily investigative work as assigned to it by the EU Merger Regulation.
- (90) RFIs under Article 11(2) (so called “simple RFIs”) are measures as regards which the Commission may not impose any procedural fine under Article 14 EU Merger Regulation if the addressees provide incomplete replies or do not reply at all. However, in case of reply, the addressee has an obligation to provide correct and non-misleading information, as failure to do so could result in fines in accordance with Article 14(1)(b) of the EU Merger Regulation.
- (91) Moreover, Article 9 of the Implementing Regulation indicates that the time limits set out in Article 9(4) and Article 10(1) and (3) of the EU Merger Regulation may be suspended notably if the Commission has to adopt an Article 11(3) decision because the addressee of an Article 11(2) RFI has not provided the requested information, provided that the addressee is the notifying party or an interested party or that the notifying party or an interested party is responsible for the addressee not having responded to the Article 11(2) RFI. In those circumstances, the relevant date for a suspension is the deadline set in the Article 11(2) RFI.

1.4.2.2.1. Drafting and sending Article 11(2) RFIs

- (92) A simple RFI is typically sent electronically either via email (requiring a formal acknowledgment of receipt by the addressee) or through a dedicated application.
- (93) It states the legal basis and the purpose of the RFI. It specifies what information is required and fixes the time-limit within which the information is to be provided. Furthermore, it indicates the penalties provided for in Article 14 EU of the Merger Regulation for supplying incorrect or misleading information. It also requires the addressee to indicate whether it considers that information provided in the reply is confidential. In that case, the addressee has to provide a non-confidential version of the information.
- (94) The case team can request factual elements, quantitative and/or qualitative, as well as documented opinions, related inter alia to market definition and/or the competitive assessment of the proposed transaction. A member of the CET may prepare draft RFIs concerning quantitative data.
- (95) In case third party information is used to draft the RFI, case teams should be aware that they should always be based on non-confidential versions of documents submitted by third parties.
- (96) Note that RFIs sent to public organisations (e.g. national army or a public hospital) and to international organisations (e.g. Intelsat) do not include any reference to fines and penalties as the latter cannot be imposed by the Commission on said addressees.
- (97) Case team registers in the case file documents sent and received.

- (98) Submissions in response to requests for information should usually be requested in electronic format. Especially where voluminous submissions are expected, for example when requesting internal documents from the parties to the transaction, it is recommended that the case team specifies the technicalities of such submissions in the RFI and, where the case team considers it necessary, they may also discuss such modalities with the recipient of the RFI in advance.

1.4.2.2.2. Follow-up of Article 11(2) RFIs

- (99) The recipient of a simple RFI is not under an obligation to reply. Nonetheless, where the recipient does not respond, a reminder should normally be sent. There is no obligation for the case team to contact every recipient of a RFI that has not replied. In particular, where numerous recipients have been contacted for the same purpose (e.g. mass sending of a questionnaire-type RFI), it is understood that not all recipients may reply. The case team may take the reply rate into account when deciding whether and how to contact market participants to remind them of the RFI. Also, the more targeted a RFI is, the more likely it typically is that the case team should find reminding an appropriate step to take in case of non-reply. In particular, RFIs addressed to the parties to the transaction should typically be systematically followed up.
- (100) If so requested by the addressee, an extension of the time-limit may be granted.
- (101) The addressee should provide the reasons for the request for the extension of the time-limit sufficiently in advance to the expiry of the time limit, and in writing.
- (102) If the case team considers that the request is justified, it grants additional time (depending on the complexity of the information asked and other factors) and communicates the new time-limit to the addressee.
- (103) The case team may also agree with the addressee of the request that certain parts of the requested information that are of particular importance or easily available for the addressee will be supplied within a shorter time limit, whereas additional time will be granted for supplying the remaining information. In case a partial extension of the time-limit is granted, the new time-limit is communicated to the addressee.
- (104) The extension of the time-limit is set on a case-by-case basis. Extensions granted by case teams should be considered carefully, as they may have a direct impact on the calculation of the deadline when stopping the clock at a later stage following an Article 11(3) decision if the information remains nonetheless not submitted.
- (105) If undertakings have replied to the request but have not sent a non-confidential version of their reply, the case team will send a reminder. If the undertakings do not comply with their obligations to provide a non-confidential version, particularly if reminded to them, the Commission may assume that the information provided is accessible (see Article 18(4) of the Implementing Regulation).

1.4.2.3. RFIs by decision (Article 11(3) of the EU Merger Regulation)

1.4.2.3.1. General principles and content

- (106) Pursuant to Article 11(3) of the EU Merger Regulation, the Commission can adopt a decision requiring companies to provide the information requested. It is the only investigative measure to legally oblige an addressee – be it a party to the concentration or a third party – to provide the requested information.
- (107) A decision under Article 11(3) of the EU Merger Regulation may have two important consequences.
- (108) First, it may lead to the suspension of the review periods. Article 10(4) of the EU Merger Regulation clarifies that the review period is suspended only “*owing to circumstances for which one of the undertakings in the concentration is responsible*”.
- (109) Second, an Article 11(3) decision may lead to the imposition of fines and/or periodic penalty payments.
- (110) From a practical point of view, pursuant to Article 9(2) of the Implementing Regulation, the Commission is not required to send a simple RFI first, in order to adopt a decision under Article 11(3) EU Merger Regulation. Typically, the Commission however proceeds by having an Article 11(3) decision preceded by an Article 11(2) RFI.
- (111) In view of the strict legal deadlines of merger control proceedings, and the importance of respecting those deadlines for an efficient EU system of merger control, the Commission limits the adoption of Article 11(3) decisions to cases where they are deemed necessary.
- (112) The Article 11(3) decision must:
- (q) state the legal basis and the purpose of the request;
 - (r) specify what information is needed;
 - (s) fix the day by which the requested information has to be provided;
 - (t) indicate the possibility of imposing fines according to Article 14(1)(c) if the addressee supplies incorrect, incomplete or misleading information or does not supply information within the required time-limit (the Commission may by decision impose on the undertakings a fine not exceeding 1% of the aggregate turnover of the undertaking concerned within the meaning of Article 5 of the EU Merger Regulation);
 - (u) indicate or directly impose the penalties provided for in Article 15(1)(a) if the addressee supplies incomplete or incorrect information (the Commission may by decision also impose on an undertaking periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertakings concerned within the meaning of Article 5 of the EU Merger Regulation, for each working day of delay calculated from the date set in the decision);

- (v) indicate the right to have the decision reviewed by the EGC according to Article 263 TFEU and warn that such judicial proceedings shall not have suspensive effect unless expressly accorded by the EGC (Article 278 TFEU).
- (113) The decision requesting information is addressed to the undertaking(s) (via their legal representatives, as the case may be) and follows to a large extent the same rule of language as for the letter requesting information. Decisions to the notifying party are in principle sent in the language of the proceedings (see Article 3(4) of the Implementing Regulation). Decisions to other companies within the EU should be sent in the official Union language of the Member State where the company is located (see Article 3 of Regulation 1/58 which provides that "*Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State*").
- (114) As for simple requests for information, the owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, shall supply the information requested on behalf of the undertaking or the association of undertakings concerned. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.
- (115) The decision takes effect upon its notification to the undertaking (Article 297 TFEU).
- (116) If an Article 11(3) decision is combined with a decision setting (the provisional amount of) periodic penalty payments pursuant to Article 15(1)(a), the Article 11(3) decision specifies the provisional level of the daily penalty payments (up to 5% of the average daily turnover in the preceding business year). The final amount of the penalty will then be fixed in a second decision pursuant to Article 15(2) ⁽⁸⁾, based on the level of penalty payments per working day fixed in the preceding Article 11 (3) decision. However, if the information has been provided, the Commission may calculate the periodic penalty payment on the basis of a lower amount as fixed in the preceding Article 11 (3) decision (Article 15(2) of the EU Merger Regulation).
- (117) The Commissioner in charge of competition is empowered to adopt decisions pursuant to Article 11(3) and Article 15(1)(a) in the name of the Commission. The Commissioner has sub-delegated to the Director-General for Competition the power to adopt a decision requesting information under Article 11(3) of the EU Merger Regulation. In case the Director-General for Competition is not available, a deputy can sign instead. However, the Commissioner has not sub-delegated the power to adopt a decision imposing (provisional) periodic penalty payments on undertakings or associations of undertakings.
- (118) The prior approval of the Legal Service as associated department is needed. The involvement of other associated services is described in the Rules of Procedure of the Commission. The general empowerment granted to the Competition

⁽⁸⁾ See Chapter XX – Fines and penalty payments.

Commissioner develops further if there is a distinction on consulting or informing other associated services.

- (119) As mentioned above, an Article 11(3) decision may trigger a suspension of the review periods. Pursuant to Article 10(4) of the EU Merger Regulation, the time limits for Phase I and Phase II review shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11(3) of the EU Merger Regulation.
- (120) Pursuant to Article 9(1) of the Implementing Regulation, the grounds for suspending the review periods are the following:
- (w) information which the Commission has requested pursuant to Article 11(2) EU Merger Regulation from the notifying party or any other involved party, as defined in Article 11 of this Regulation, is not provided or not provided in full within the time limit fixed by the Commission (Article 9(1)(a) of the Implementing Regulation);
 - (x) information which the Commission has requested pursuant to Article 11(2) of the EU Merger Regulation from a third party is not provided or not provided in full within the time limit fixed by the Commission owing to circumstances for which the notifying party or any other involved party, as defined in Article 11 of this Regulation, is responsible (Article 9(1)(b) of the Implementing Regulation);
 - (y) the notifying party or any other involved party, as defined in Article 11 of this Regulation, has refused to submit to an inspection deemed necessary by the Commission on the basis of Article 13(1) EU Merger Regulation or to cooperate in the carrying out of such an inspection in accordance with Article 13(2) of that Regulation (Article 9(1)(c) of the Implementing Regulation);
 - (z) the notifying party has failed to inform the Commission of material changes in the facts contained in the notification, or of any new information of the kind referred to in Article 5(3) of this Regulation (Article 9(1)(d) of the Implementing Regulation).
- (121) Per Article 9(3) of the Implementing Regulation, time limits are suspended for the following periods:
- (aa) in the cases referred to in paragraph 1, points (a) and (b), for the period between the expiry of the time limit set in the simple RFI, and the receipt of the complete and correct information required by decision or the moment when the Commission informs the notifying party that, in light of the results of its ongoing investigation or market developments, the information requested is no longer necessary (Article 9(3)(a) of the Implementing Regulation);
 - (bb) in the cases referred to in paragraph 1, point (c), for the period between the unsuccessful attempt to carry out the inspection and the completion of the inspection ordered by decision or the moment when the Commission

informs the notifying party that, in light of the results of its ongoing investigation or market developments, the inspection ordered is no longer necessary (Article 9(3)(b) of the Implementing Regulation);

- (cc) in the cases referred to in paragraph 1, point (d), for the period between the occurrence of the change in the facts referred to therein and the receipt of the complete and correct information (Article 9(3)(c) of the Implementing Regulation);
 - (dd) in the cases referred to in paragraph 2 for the period between the expiry of the time limit set in the decision and the receipt of the complete and correct information required by decision or the moment when the Commission informs the notifying party that, in light of the results of its ongoing investigation or market developments, the information requested is no longer necessary (Article 9(3)(d) of the Implementing Regulation).
- (122) The suspension of the time limits will end with the receipt of complete and correct information required in the Article 11(3) decision, pursuant to Article 9(3) of the EU Merger Regulation. Therefore, upon submission of information by the addressee of the Article 11(3) decision, the case team is advised to expeditiously carry out a preliminary assessment as to the completeness and correctness of the information provided. Where obvious incompleteness or incorrectness is observed, the case team should aim at communicating that to the addressee of the Article 11(3) decision as soon as feasible. In case of voluminous submissions in particular, the case team may provide such comments in batches and may flag its immediate concerns to the addressee of the Article 11(3) decision even if the review of the submission was still ongoing. It is not excluded that the incompleteness or incorrectness of information may only be found out later, for example following the submission of additional information or information by another undertaking. The case team may make appropriate reservations when communicating to the notifying party that the suspension of the time limit for Phase II investigation is lifted.
- (123) In line with Article 9(4) of the Implementing Regulation, the suspension of the time limit shall begin on the working day following the day on which the event causing the suspension occurred. It shall expire at the end of the day on which the reason for suspension is removed. Where such a day is not a working day, the suspension of the time-limit shall expire at the end of the following working day.
- (124) Article 9(3) of the Implementing Regulation in effect also provides that the Commission can restart the clock *ex officio*. In that case, as mentioned the time limits are suspended until the moment when the Commission informs the notifying party that, in light of the results of its ongoing investigation or market developments, the information requested is no longer necessary.

1.4.2.3.2. Procedural steps

- (125) One has to distinguish decisions requesting information without imposing periodic penalty payments, and decisions requesting information and imposing (provisional) periodic penalty payments.

- (126) For decisions requesting information without (provisional) periodic penalty payments, the procedure is typically composed of a preliminary phase (Article 11(2) simple request) and the adoption of the decision phase.
- (ee) *Preliminary phase: Article 11(2) simple RFI:* As indicated above, prior to the adoption of an Article 11(3) decision, the Commission typically (but not necessarily) requests the undertaking to provide the information by simple request pursuant to Article 11(2) EU Merger Regulation. In light of the consequences that the adoption of an Article 11(3) decision may have (suspension of the review periods and imposition of fines/periodic penalty payments), before issuing the Article 11(3) decision, the Commission grants the undertaking a reasonable deadline for replying to the simple RFI.
 - (ff) *Adoption of the decision requesting information:* If the addressee of the Article 11(2) simple RFI does not provide the requested information within the deadline, the Commission may decide to adopt a decision pursuant to Article 11(3) EU Merger Regulation. This is the only legal manner to oblige a company to provide information. As indicated above, the Commission may also adopt an Article 11(3) decision without a prior simple RFI.
- (127) Decisions adopted pursuant to Article 11(3) EU Merger Regulation are not published. A copy of the decision is without delay forwarded to: the competition authority of the Member State in whose territory the seat of the undertaking concerned is situated; the competition authority of the Member State whose territory is affected (Article 11(5) of the EU Merger Regulation); and ESA if an undertaking in an EFTA country party to the EEA agreement is concerned.
- (128) For decisions requesting information and imposing (provisional) periodic penalty payments, the procedure is normally composed of a preliminary phase, and two phases – a first one with a first decision requesting information imposing (provisional) penalty payments in its operative part, and a second one with a second decision fixing the final amount of the penalties. The AdCom is not consulted on the Article 11(3) decision, but it must be consulted before an Article 15 decision imposing the final periodic penalty payment is adopted (Article 19(3) of the EU Merger Regulation).
- (gg) *Preliminary phase: Article 11(2) simple RFI:* As in the case of the adoption of Article 11(3) decision without periodic penalty payments, prior to the adoption of an Article 11(3) decision with provisional periodic penalty payments, the Commission usually requests the undertaking to provide the information by simple request pursuant to Article 11(2) of the EU Merger Regulation.
 - (hh) *First phase: first decision requesting information imposing (provisional) penalty payments in its operative part:* The decision pursuant to Art. 15(1) of the EU Merger Regulation is adopted by empowerment procedure by the Commissioner for competition after consultation with the Legal Service. The decision sets the provisional amount of the penalties (up to 5% of the average daily turnover in the preceding business year per working day) and fix the starting date (normally the deadline for supply information).

(ii) *Second phase: second decision fixing the final amount of the penalties*, pursuant to Art. 15(2) of the EU Merger Regulation: The procedural steps are as follows:

- As soon as the time limit to supply information under the Article 11(3) decision has expired, an administrative letter is sent to the undertaking reminding the financial consequences of the non-compliance with the decision.
- Once the information has been supplied (after the expiration of the deadline mentioned in the first decision, otherwise there is no second decision), a SO indicating the calculation of the final amount of the penalties is drafted and sent for consultation (Article 18(1) of the EU Merger Regulation).
- Once the approval of the Legal Service is received, the SO is adopted by empowerment procedure by the Commissioner in charge of Competition policy and notified to the undertaking by the Secretariat-General. If the addressee has satisfied the obligation which the periodic penalty payments was intended to enforce, the definitive amount of the periodic penalty payment may be fixed at a figure lower than that which would arise under the original decision (Article 15(2) of the EU Merger Regulation).
- Access to the file is limited to the RFI which was at the origin of the envisaged decision and the subsequent correspondence on this matter with the undertaking concerned.
- An oral hearing may take place (if requested by the parties on whom it proposes to impose a fine or periodic penalty payment) (Article 14(3) of the Implementing Regulation).
- The case team prepares the draft decision, which requires the approvals of the Legal Service and of the Commissioner.
- The AdCom is consulted of the draft decision.
- The decision is adopted by the College.
- The decision is notified by the Secretariat-General to the addressees together with the Hearing Officer Final Report if relevant and AdCom Opinion.
- The decision is communicated to the Member States and ESA, if EEA relevant case (Article 11(5) of the EU Merger Regulation).
- A press release can be published.
- The decision is published (Article 20(1) of the EU Merger Regulation).
- The Commission proceeds to the recovery of the penalty payment.

(129) For more information on this, please consult the chapter of this Manual on the Specific procedures of Article 14 and 15 of the EU Merger Regulation.

1.4.2.4. Evaluation of the information received

(130) Once most of the replies have been received, the case team evaluates the comments received. Depending on the importance and complexity of a case and the number and extension of the replies, it can be useful to prepare a summary of the replies received.

(131) The case team will evaluate the information collected through the market investigation and its impact on the assessment of the case.

1.4.2.5. Treatment of confidential information

(132) Pursuant to Article 18 of the Implementing Regulation, anyone who submits information to the Commission pursuant to Article 11 of the EU Merger Regulation or otherwise, shall identify any material it considers to be confidential, giving reasons, and providing a separate non-confidential version by the date set by the Commission.

(133) When requesting or requiring information pursuant to Article 11 of the EU Merger Regulation, the case team is advised to usually simultaneously request or require that confidentiality claims are indicated and, where appropriate, a non-confidential version of a response or other document is provided, in particular when sending requests for information to third parties.

1.4.2.6. Decision imposing fines or penalties

(134) Fines may be imposed according to Article 14 of the EU Merger Regulation by decision on the persons referred to in Article 3(1)(b) of the EU Merger Regulation, undertakings and associations of undertakings where intentionally or negligently:

(jj) they supply incorrect or misleading information in response to a simple request made pursuant to Article 11(2) of the EU Merger Regulation (Article 14(1)(b) of the EU Merger Regulation); or

(kk) in response to a request made by decision adopted pursuant to Article 11(3) of the EU Merger Regulation, they supply incorrect, incomplete or misleading information or do not supply information within the required time-limit (Article 14(1)(c) of the EU Merger Regulation).

(135) Periodic penalty payments according to Article 15(1)(a) of the EU Merger Regulation) may be imposed by decision on the persons referred to in Article 3(1)(b) of the EU Merger Regulation, undertakings and associations of undertakings in order to compel them to supply complete and correct information which has been requested by decision pursuant to Article 11(3) of the EU Merger Regulation.

(136) For more information on this, please consult the chapter of this Manual on the Articles 14 and 15 procedures to impose fines or penalties.

1.4.3. External studies

- (137) Depending on the needs of the case, the case team may consider that a special study or survey should be commissioned to external experts. As preparing such studies or surveys will usually take considerable time, the case team is advised to plan such studies well ahead where needed, including discussing with the senior management and contacting the relevant unit responsible for financial and resource management within DG Competition.

1.4.4. Site visit and inspections

- (138) The case team may conduct visits to the production, research and other premises of the parties to the transaction or third parties in agreement with the party concerned ('site visits'). Such visits are often useful in order to get a deeper understanding of the market and the products concerned, in particular in complex cases and those involving potential remedies. The case team should aim to discuss such visits with the undertakings concerned in time, considering the need for organising such visit.
- (139) In exceptional cases, it may be necessary to collect information by an unannounced inspection ('dawn raid'). Pursuant to Articles 12 and 13 of the EU Merger Regulation, the Commission may conduct such inspections, or request that the competent authorities of the Member States conduct them. The decision in that regard is adopted by empowerment procedure by the Commissioner in charge of Competition policy.

1.4.5. Interviews

- (140) Pursuant to Article 11(7) of the EU Merger Regulation, the Commission may interview any natural or legal person who consents to be interviewed. Such interviews are typically conducted by telephone or other electronic means, or at the Commission premises, in which case the case team shall state the legal basis and the purpose of the interview. In exceptional situations, the case team may request or agree with the interviewee that the interview is conducted in another location if the needs of the case so require or allow.
- (141) Interviews can be particularly useful when the investigation benefits from interaction between the case team and the interviewee and help avoid the need for a series of requests for information.
- (142) In line with the most recent case law, and in particular the Intel (C 413/14 – Intel v Commission) and Qualcomm (T-235/18, Qualcomm v Commission) rulings of the European Courts (both relating to antitrust procedure, but applied *mutatis mutandis*), to respect the rights of defence the Commission is required to take minutes of all (formal and informal) meetings with third parties. These minutes must not be just succinct notes; they must give meaningful indications of the content of the discussion, and indicate the information gathered. These minutes should also be shared with the interviewed parties for them to confirm their accuracy.

1.4.6. Request for and use of information from national competition authorities (Article 11(6) of the EU Merger Regulation)

- (143) In the context of a merger control proceedings and for the purposes of the enforcement of the EU Merger Regulation, the Commission may also obtain information from national authorities.
- (144) Pursuant to Article 11(6) of the EU Merger Regulation, at the request of the Commission the governments and competition authorities of the Member States shall provide the Commission with all the necessary information to carry out the duties assigned to it by said Regulation.
- (145) The Commission has rarely recourse to these types of formal requests.
- (146) When sent, a RFI under Article 11(6) of the EU Merger Regulation never contains a reference to Article 14 or Article 15 of the EU Merger Regulation. This is because Articles 14 and 15 only applies to certain persons, undertakings and associations of undertakings.
- (147) The Commission also can send a RFI to competition authorities and government of third countries.

1.5. Access to file

- (148) Access to file is an important procedural stage in merger cases aiming at reconciling two opposing obligations, namely that of safeguarding the rights to be heard of the notifying party or other parties and that of protecting business secrets from information providers e.g. respondents to the Art. 11 letters and complainants in particular.
- (149) Access to file is a measure of pure administration, involving no other Commission services. The Hearing Officers play a role, particularly where confidentiality claims are disputed and also the Legal Service may be consulted on specific access to file issues.
- (150) Importantly, the Commission can use only non-confidential information in its decisions.

1.5.1. Legal framework

- (151) The right of the parties to have access to the file and use of documents are laid down in Article 18 of the EU Merger Regulation and Article 17 Implementing Regulation.
- (152) The rules defining the scope of the confidential information are laid down in Article 18 of the Implementing Regulation.
- (153) The Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and the Notice on Access to File explains the principles relating to access to file as well as the treatment of confidential information.

1.5.2. *Timing of access to file*

- (154) Access to file is granted upon request and following notification of the SO.
- (155) In practice, access to file is granted within one working day after the notification of the SO to the notifying party.
- (156) In accordance with Article 18(1) and (3) of the EU Merger Regulation and Article 17(1) of the Implementing Regulation, the notifying party will be given access to the Commission's file upon request at every stage of the procedure following the notification of the Commission's objections up to the consultation of the AdCom, when new documents are placed in the file.

1.5.3. *Beneficiaries of access to file*

- (157) The EU Merger Regulation and Implementing Regulation clearly defines the beneficiaries of access to file.
- (158) A first beneficiary is the addressee of the SO: Article 18(3) of the EU Merger Regulation and Article 17(1) of the Implementing Regulation clearly provide that *"the Commission shall grant access to the file to the parties to whom it has addressed a SO, for the purpose of enabling them to exercise their rights of defence. Access shall be granted after the notification of the SO."*
- (159) The purpose of providing access to the file is for the notifying party to acquaint itself with the information in the Commission's file, so that, on the basis of this information, it can effectively express its views on the preliminary conclusions reached by the Commission in its SO.
- (160) A second category is involved parties to the proposed concentration. Article 17(2) further provides that *"The Commission shall, upon request, also give the other involved parties who have been informed of the objections access to the file in so far as this is necessary for the purposes of preparing their comments."*
- (161) Other involved parties (such as the seller) within the meaning of the Implementing Regulation can get access to the file only in so far as this is necessary for their rights to be heard. It is exceptional that other involved parties request access to the file (since, in practice, their legal representatives are involved in the process with the purchaser). The position of the target of a hostile takeover bid is however special and in previous cases (for example M. 4439, Ryanair/Aer Lingus) the target was considered to be an 'other involved party' within the meaning of the Implementing Regulation and of paragraph 34 of the Notice on Access to File. Accordingly, the target has access only to key documents such as the Article 6 (1) (c) decision and the SO.

1.5.4. Scope of access to File

1.5.4.1. Principles

- (162) The parties must be able to acquaint themselves with the information in the Commission's file, so that, on the basis of this information, they can effectively

express their views on the preliminary conclusions reached by the Commission in its objections.

- (163) The 'Commission's file' in a competition investigation consists of all documents 'obtained, produced and/or assembled' by DG Competition during the investigation that has led the Commission to raise its objections. The term 'documents' includes all forms of information media.
- (164) To allow for this access, the Registry stores all documents related to the merger case on its file, in their original format. It is highly important that the case file is complete.
- (165) If a document that does not belong to the merger case is filed by mistake, it can be deleted. In that case, the access to file will show that a document was deleted, and will explain that this document was removed because it does not belong to this merger case ("Assigned to the wrong case").
- (166) If multiple versions of an identical document are filed, these duplicates can either be deleted or made non-accessible explaining that "duplicate of ID xxxx" and making the cross reference to the accessible version.
- (167) Per paragraphs 10 and 11 of the Notice on Access to File, access will be granted to all documents making up the Commission file, with the exception of internal documents, business secrets of other undertakings, or other confidential information.
- (168) Practically, the documents of the file are classified in the following categories: 'internal', 'non-accessible' (NA), 'accessible' (A), 'notifying parties' (N), 'EC premises' (e.g. for documents with copyright, for data room documents) or by default 'undefined'.
- (169) The notifying party has access to all the documents that are part of the Commission's file with the exception of internal documents, business secrets or other confidential information.
- (170) If the notifying party has provided a waiver to that end, documents on the file which were received from or sent to it or the Target (commonly referred to as notifying parties' documents) will not be made available to them during the access to file as it is considered that the notifying party already has the respective documents.
- (171) With regard to documents exchanged with the other involved parties (such as the seller), treatment of their documents will be handled on a case-by-case basis. Indeed, in some instances, the seller may share the same lawyers as the notifying party. In this case, the seller may provide the Commission with a waiver whereby it agrees that the Commission gives access to the notifying party to all the documents, without deletion of the confidential information. In such case, it can be further agreed with the notifying party not to provide access to the seller's documents. These documents are already in the possession of the legal representatives they share with the seller.
- (172) As mentioned, no access is given to internal documents, business secrets of other undertakings, or other confidential information.

- (173) **Commission's internal documents** are for instance the Open Case Form, notes to the Commissioner, internal emails (e.g. exchanges within the case team or between the case team and other Commission services), spreadsheets with calculations made by the case team, drafts, inter-service consultations, exchanges with CET, exchanges with other services in the Commission.
- (174) **Communication with third parties.** E-mails sent to and received from information providers, handouts provided at meetings or brochures (including annual reports) annexed to information providers' replies, as well as information publicly available (e.g. through Internet or databases) need to go on the file. This also means that if the case team receives unsolicited information from information providers (such as letters or reports from lobby groups, letters supporting the merger, complaints received by the Cabinet (the cover letter should be classified separately as internal document), this should be included in the file and made accessible to the parties.
- (175) In line with the most recent case law, and in particular the Intel (C 413/14 – Intel v Commission) and Qualcomm (T-235/18, Qualcomm v Commission) ruling of the European Courts (both relating to antitrust procedure, but applied *mutatis mutandis*), to respect the rights of defence the Commission is required to take minutes of all (formal and informal) meetings with third parties. These minutes must not be just succinct notes; they must give meaningful indications of the content of the discussion, and indicate the information gathered. These minutes should also be shared with the interviewed parties for them to confirm their accuracy.
- (176) If any of this information contains however confidential information, a non-confidential accessible version has to be requested/prepared. Concretely, after receipt of the information, or finalisation of the minutes, these are sent to the person or undertaking in question for agreement and identification of any business secrets or other confidential information. Consequently, draft minutes and confidential minutes will be classified as "non accessible". Only non-confidential versions of the agreed minutes will be classified as "accessible".
- (177) Normally, **all outgoing Article 11 RFIs** are considered to be accessible documents. For requests to third parties, should the questions be based on confidential information shared earlier during the procedure, these questions might be (partially) confidential.
- (178) **Studies ordered by information providers** (in general complainants) can be considered as part of that company's property and do not need to be made accessible if the company in question has requested the document not to be disclosed. It is however clear that, in case the Commission has relied on such studies to make its assessment, submission of a non-confidential version of the study is required. Access should not be restricted to the results of the study, but also to the underlying methodology. However, intellectual property rights must be respected.
- (179) A specific remark is to be made on Studies which the Commission has ordered. When external experts are commissioned in connection with proceedings, correspondence between the Commission and the external expert constitutes, in principle, internal documents.

- (180) These include evaluation of the contractor's work or documents relating to financial aspects of the study, including the draft of the report, are considered internal documents and will thus not be accessible.⁽⁹⁾ However, the results of a study commissioned in connection with proceedings as well as documents that are necessary to understand the methodology applied in the study or to test its technical correctness are accessible.
- (181) When accessible documents are mixed with internal documents, the original documents should be marked as internal and the case team should split the documents in two distinct parts, one to be classified as accessible and the other as internal; the originator ('from/to' field) can be marked as DG COMP. However, in the explanatory letter provided to the notifying party with the access to file documents, a special mention of this issue shall be made
- (182) **Correspondence with other public authorities.** As regards written communication from/to or among other public authorities, for instance national competition authorities, other public authorities in the Member States, ESA and public authorities in the EEA EFTA States, public authorities of non-member countries including their competition authorities (See point 15 of the Notice on Access to File), in principle these are considered to be internal documents, whether it concerns Member States or non-member countries.
- (183) However, where the parties concerned request so, they should be given access to the request for referral from a national authority, with the exception of any business secrets or other confidential information, if that national authority agrees to this.
- (184) **Confidential information** is either defined as business secrets or as other confidential information.
- (185) **Business secrets** are confidential information about an undertaking's business activity the disclosure of which could cause serious harm to that undertaking. Examples of information that may qualify as business secrets include: technical and/or financial information relating to an undertaking's know-how, methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy. See Notice on access to file, para. 18.
- (186) **Other confidential information** is information other than business secrets, insofar as its disclosure would significantly harm a person or undertaking. Notice on access to file, para. 20, includes explicitly military secrets in the category of other

⁽⁹⁾ See Access to file notice point 14 and Cases T-209/01 and T-210/01, General Electric / Honeywell: In relation to Professor Choi's report, which was the basis of the Commission's theory on mixed bundling, the CFI noted that the Commission's refusal, founded on a request for confidentiality made by Rolls-Royce, to grant access to the data on which the Choi model was based had no effect on the outcome of the administrative procedure. The CFI considered that the Commission is entitled to seek different opinions, including the opinions of external experts, in order to check the accuracy of its analysis. To the extent that the Commission does not rely on the opinion of such an expert in its SO and its final decision as evidence substantiating its case against an undertaking, the opinion remains no more than a view expressed by a single person and assumes no particular significance in the context of the administrative procedure. Such a view, even though expressed by an expert, cannot therefore be regarded as either favourable or adverse evidence (para 671). If the documents in question had been regarded as forming part of the Commission's actual case file, they would have been classified as internal documents, given their status and content, and the applicant would therefore not have had access to them (para 672).

confidential information. Depending on the specific circumstances of each case, this may apply to information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers.

- (187) The EGC and the CJEU have acknowledged that it is legitimate to refuse to reveal to such undertakings certain letters received from their customers, since their disclosure might easily expose the authors to the risk of retaliatory measures. The Union Courts have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 82 of the EC Treaty) (Case T-65/89, BPB Industries and British Gypsum [1993] ECR II-389; and Case C-310/93P, BPB Industries and British Gypsum [1995] ECR I-865), and in merger cases (Case T-221/95 Endemol v Commission [1999] ECR II-1299, para. 69, Case T-5/02 Laval v. Commission [2002] ECR II-4381, para. 98 et seq., Case T-210/01 – General Electric Company v Commission [2005] ECLI:EU:T:2005:456, para. 630 et seq.; Case T-834/17 – United Parcel Service v Commission [2022] ECLI:EU:T:2022:84, para. 144 et seq.). Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous. (See paragraph 19-20 of the Notice on Access to File)
- (188) All correspondence with third parties on confidentiality is also not accessible.
- (189) Business secrets and other confidential documents lose their classification as confidential documents if they are already known outside (See paragraph 23 of the Notice on Access to File). By way of example, the Commission does not normally accept the following type of information as business secrets and other confidential information:
- (ll) data from or about another company (such as price announcements, sales data etc. other than received pursuant to a contract with that company which foresees confidentiality; general references to a non-disclosure agreement do not suffice to justify the confidentiality of such data);
 - (mm) information made known outside the company concerned (such as price targets, increases, dates of implementation and customer names, if made known to third parties).
- (190) Similarly, the Commission does not normally accept confidentiality for information that has lost its commercial importance, for instance due to the passage of time. As a general rule, parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential (See paragraph 23 of the Notice on Access to File).
- (191) **Personal data** have to be processed fairly and lawfully pursuant to EUPDR and GDRP. In principle, the names and positions of employees/other persons involved should be deleted from the non-confidential version of the decision.

1.5.4.2. Handling confidentiality requests

- (192) To avoid time-consuming clarification of confidentiality issues, the following principles apply:

- (nn) The information provider should be asked for a non-confidential version with a deadline for reply;
 - (oo) If the information provider does not react to the request within the deadline, a reminder should be sent indicating that in the absence of any reaction the Commission may assume that the documents or statements concerned do not contain confidential information (pursuant to Art. 18(4) Implementing Regulation), and setting a further deadline for reply;
 - (pp) If the information provider does not reply to the reminder, the information is presumed accessible (per Article 18(4) Implementing Regulation), except the information that is obviously confidential as defined in the Access to file Notice (pt.18-20). In case of doubt about a business secret, the case team should raise the issue with the Hearing Officer. In those cases, the Commission prepares a non-confidential version itself and places it in the file without sending this version to the information provider for agreement.
- (193) Obviously confidential information also has to be removed from the accessible version pursuant to the Commission's professional secrecy obligation not to use arbitrarily confidential information in competition law enforcement nor to misuse such information for official purposes unconnected with competition law. According to Case T-198/03 Bank Austria Creditanstalt AG, point 71; also Case T-474/04, Pergan, para 65 *et seq.* in order to fall under the obligation of professional secrecy the information must be known only to a limited number of persons and be liable to cause serious harm to the person who provided it or to third parties if disclosed. Furthermore, the interests liable to be harmed by disclosure must, objectively, be worthy of protection.
- (194) **Confidentiality claims:** In case the confidentiality request cannot be accepted by the Commission, but the provider of information insists, the confidentiality claim procedure (also called "Akzo-procedure"¹⁰) has to be followed in accordance with Article 8 of the Hearing Officer's Terms of Reference.
- (195) In practice, the Hearing Officer may send a 'pre Article 8' letter.
- (196) If the company concerned still objects to the disclosure of this information, but the Commission finds that the information should not be protected and may therefore be disclosed, that finding must be stated in a reasoned decision of the Hearing Officer (Article 8 Decision). This decision is adopted by delegation procedure by the Hearing Officer and notified to the concerned company.
- (197) The company concerned is thereby given the opportunity to bring an action before the EGC, with a view to having the Commission's assessment reviewed.
- (198) The company concerned must inform the Hearing Officer within a given time limit from the day of notification of the Article 8 decision whether they intend to lodge an appeal with the EGC, and to apply for interim measures.

¹⁰ As first set out by the Court of Justice in Case 53/85 Akzo v Commission [1986] ECR p. 1965

- (199) If the company concerned has lodged an action for annulment and applied for interim measures before that deadline, the Commission cannot disclose the relevant information until the Court has taken a decision on the request for interim relief.
- (200) The document needs to be classified as confidential or non-confidential in the file, in line with the result of the procedure.

1.5.4.3. Documents received through the whistle-blower tool

- (201) Entities or persons willing to share information with the Commission concerning for instance an ongoing merger investigation may contact DG Competition by several means depending on whether or not they are willing to reveal their identity.
- (202) In case they are willing to reveal their identity, these entities may send an email to comp-whistleblower@ec.europa.eu or contact DG Competition by phone.
- (203) In case they are not willing to reveal their identity, they may send an anonymous message by using the [whistle-blower page](#). This page allows DG Competition to receive messages on an anonymous basis from any market participant or person. The whistle-blower has the possibility to tick a box in order to get a reply from DG Competition and establish a channel of communication. If such box is not ticked, DG Competition will not be able to contact directly the whistle-blower in case for instance a clarification is needed on the information provided. The whistle-blower needs to log into the tool in order to communicate with DG Competition. These contacts may allow DG Competition to negotiate with the whistle-blower the confidentiality/anonymity of the information provided and may lead to a non-confidential version agreed with the whistle-blower (which should be filed as Accessible).
- (204) The information received via the whistle-blower tool is registered on the file as “anonymous”. If the Parties get access to the file, they will see that these documents have been received anonymously. The Hearing Officer has indicated that DG Competition does not need to indicate that the information was received via the whistle-blower scheme, but needs to indicate in comments that it was received on the condition of anonymity (Adams case - Case 145/83).
- (205) DG Competition does not need to inform the Parties to a merger that some information has been received via the whistle-blower tool. The Hearing Officer has also confirmed that no information should be disclosed which could reveal directly or indirectly the identity of the informants.
- (206) DG Competition can quote the information received anonymously in its decision and refer in a footnote to the anonymous origin of the information, to the extent that this information does not reveal the identity of the whistle-blower. However, DG Competition may have to assign little evidentiary value to the information if it does not know the exact source/identity.
- (207) As a matter of best practice, DG Competition should inform the whistle-blower that some of the information provided will be used for the investigation/decision if this is the case, to the extent possible. This might be an issue however in those cases in which the whistle-blower does not tick the box to get a reply.

- (208) In addition, if the information is to be used in the Commission's assessment, a non-confidential anonymous version of the submission should be included on file. Access to this version will have to be given in the context of a possible access to the file.
- (209) Teams are advised to try to obtain the same information obtained from the whistleblower tool from the Parties through other means (to the extent that the whistleblower's identity will not be revealed through such requests), for instance by sending a RFI.

1.5.5. Procedure of granting access to file

- (210) In the cover letter of the SO, the parties are informed that if they want to have access to the file, they have to make a request.
- (211) The parties receive the accessible file, which includes the electronic copy of all accessible documents, the index and an explanatory note.
- (212) The parties have to sign a confirmation of receipt.
- (213) After the parties have analysed the accessible information, they may come back to the case team for an explanation of why certain information has been classified as non-accessible.
- (214) In case the case team cannot reach an agreement with the parties on the above issues, the case team should get in contact with the Hearing Officer. If the parties come to the conclusion, on the basis of the list of contents that they received, that they require specific non-accessible documents to prepare their defence, they may make a motivated request to the Hearing Officer (see *i.a.* Case T-834/17 – United Parcel Service v Commission [2022] ECLI:EU:T:2022:84, para. 156 et seq.).
- (215) This procedure applies equally to the further access to file, which must be given up to the consultation of the AdCom, when new documents are placed in the file.

1.5.6. Data room

1.5.6.1. Concept of a data room

- (216) In the course of its assessment, and particularly in relation to its duty to allow the notifying party as well as the other involved parties to exercise their right to be heard, exceptionally, a Data Room may be set up.
- (217) For example, empirical analysis sometimes requires the Commission to review highly confidential data provided by different market participants. To be useful as evidence in a merger procedure, the notifying party as well as the other involved parties must be able to verify the Commission's methodology and conclusions drawn from the data. In a regression analysis, this includes in principle both the methodologies applied by the Commission and the general structure and nature of the data itself. Depending on the type of data used, this can raise difficult confidentiality issues. In bidding analyses, even individual data points may reveal information about competitors' bidding strategies and any leaks may thus be highly damaging for the affected firms. Other types of pricing data may also contain highly

confidential business secrets collectively, but individual data points (such as the prevailing air fare on a given day and route) in isolation may be somewhat less sensitive. The Commission has, thereby, developed a 'data room' procedure.

- (218) In these very exceptional circumstances, where no accessible version can be prepared of confidential documents that are absolutely necessary for the case (and for the reasoning of the SO), it is possible to agree with the notifying party and with the providers of the confidential documents (Target or Third Party) to provide access to the confidential documents under specific rules notably by giving access to these documents in a data room.
- (219) Essentially, a 'data room' procedure enables the notifying party as well as the other involved parties' economic (and/or legal) advisors to verify the Commission's analysis while simultaneously maintaining the necessary confidentiality.
- (220) In principle, third parties need to be contacted beforehand and should give their consent to their data being used in a data room. It is recommended in this respect to discuss the appropriate arrangements beforehand with the merger case support and policy unit, and if necessary, the Hearing Officer's team.

1.5.6.2. Data room rules

- (221) The data room rules need to be adjusted to the specifics of each case. However, as a general rule, the Commission provides the notifying party as well as the other involved parties' external economic advisors with access to several PCs in a data room on the Commission's premises, equipped with econometrics software, the necessary data sets and a log of the regressions used to support the Commission's case. There is no network connection, and no external communication is allowed. Also, external data storage devices cannot be connected to these Commission laptops.
- (222) The economic advisory team is permitted to remain in the room during normal working hours and if justified, access should be provided for consecutive working days (typically two to three working days).
- (223) The economic advisory team is strictly prohibited from taking copies, notes or summary of the documents and may remove from the data room only a final report, which is verified by Commission officials.
- (224) Each member of the economic advisory team signs a Confidentiality Agreement and is presented with the Conditions of Special Access to the Data Room before entering the data room.
- (225) A Commission representative must be present in the data room at all times. If possible, the data available on the PCs should be of such nature that it is not necessary for the Commission official(s) to view the computer screens at all times. However, where even individual data points are sensitive, this may be necessary to ensure, for example, that the raw data is not seen by the economists. Depending on the type of data, certain descriptive statistics may also have to be excluded.

- (226) The PCs or notebooks are provided by DG Competition's IT-Service. Consultants must not use any of their own storage devices. WIFI, Bluetooth and similar connections must be disabled.
- (227) The economists' final report is intended to enable them and the notifying party and/or the other involved parties to verify the veracity and accuracy of the Commission's analysis and the nature of the underlying data. However, it must not reveal any business secrets. What constitutes a business secret must be assessed carefully in each case.
- (228) Documents which are part of the data room will not be copied on the CD Rom for the notifying party.

1.5.7. Inadvertent disclosure of confidential information

- (229) If despite all these safeguards and checks, confidential information is inadvertently disclosed to an unauthorised party, the matter is very serious and the person realising the mistake needs to treat it accordingly. It is essential for the case team to report quickly and to take the appropriate remedial measures.
- (230) If there are still documents being prepared (for example, remedies market test) for a subsequent access to file, the distribution of these documents to the parties should be halted.
- (231) Immediately after becoming aware of the incident, the case team should assess the scope of disclosure of the confidential and internal information.
- (232) The case team should request the unauthorised party to return the document(s), to confirm and ensure destruction of all copies made and to ensure non-use in order to minimize the possible damage caused by the disclosure. The case team should also inform the originator that confidential information has been disclosed.
- (233) If the inadvertently disclosed information also concerns other parties (e.g. other competition authorities) the case team should keep them duly informed about the incident and about remedial actions taken and keep them up to date on whether all parties have returned the information.
- (234) In any event, the case team should determine the way in which to make the necessary correction in the non-confidential version of the case file.

1.6. Remedies

- (235) The notifying party may offer remedies (also referred to as 'commitments') to the Commission, whereby it modifies the notified transaction to resolve the competition concerns identified by the Commission.
- (236) In Phase I, it thereby seeks to avoid a Phase II investigation, while in Phase II, it thereby seeks to avoid a prohibition decision.
- (237) The Notice on Remedies provides guidance on how to deal with such proposed modifications, i.e. with commitments.

(238) In addition, the Commission's Best Practice Guidelines for Divestiture Commitments and Standard Models for Divestiture Commitments and Trustee Mandate published on DG Competition website provide further guidance.

1.6.1. *Legal requirements of remedies*

1.6.1.1. Legal requirements for Phase I remedies

(239) Overall, in line with recital 30 of the EU Merger Regulation and paragraph 9 of the Notice on Remedies, commitments have to entirely eliminate the competition concerns, should be proportionate yet comprehensive, and should be effective from all points of view. Furthermore, they must be capable of being implemented effectively within a short period of time (see also Case T-282/02 *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64, §307; Case T-210/01 *General Electric v. Commission*, EU:T:2005:456, §52; and Case T-87/05 *EDP v. Commission*, EU:T:2005:333, §105).

(240) Commitments submitted in Phase I must be sufficient to clearly rule out 'serious doubts' within the meaning of Article 6(1)(c) EU Merger Regulation. In addition, per paragraph 81 of the Notice on Remedies commitments acceptable in Phase I should be designed in a way to provide a straightforward answer to a readily identifiable competition concern (i.e. in such a manner that no in-depth investigation is required).

(241) Paragraphs 78 and 79 of the Notice on Remedies further provide that Phase I commitments must:

(qq) be submitted in due time;

(rr) be signed by a person duly authorised to do so;

(ss) be sufficiently detailed, i.e. must fully specify the substantive and implementing commitments entered into by the notifying party;

(tt) be accompanied by a duly completed Form RM providing detailed information on the content and the implementation of the Commitments and an explanation of how the commitments will resolve the competition concerns identified by the Commission; and

(uu) be accompanied by a non-confidential version for the purposes of market testing them with third parties. The non-confidential version of the commitments must allow third parties to fully assess the workability and the effectiveness of the proposed remedies to remove the competition concerns.

1.6.1.2. Legal requirements for Phase II remedies

(242) Paragraph 91 of the Notice on Remedies provides that Phase II commitments must meet the following requirements:

(vv) They shall address all competition concerns and fully specify the substantive and implementing commitments entered into by the notifying party;

- (ww) They shall be signed by a person duly authorised to do so;
 - (xx) They shall be accompanied by a duly completed Form RM providing detailed information on the content and the implementation of the commitments and an explanation of how the commitments will resolve the competition concerns identified by the Commission; and
 - (yy) They shall be accompanied by a non-confidential version for the purposes of market testing them with third parties.
- (243) In addition, also these remedies must be submitted in due time and be signed by a person duly authorised to do so.
- (244) In Phase II where a SO has not been issued, commitments must resolve any serious doubts identified in the Article 6(1)(c) decision. In the event an SO has been issued, the commitments submitted should be adequate to remove the objections maintained after the SO and the oral hearing.

1.6.2. Timing of remedies

- (245) The timely submission of remedies by the notifying party leads to an automatic extension of legal deadlines for initiation of proceedings or adoption of decisions.

1.6.2.1. Phase I remedies: timing and deadlines

- (246) The submission of remedies is usually preceded by (a) SoP meeting(s) or teleconference(s) during which the case team normally informs the notifying party of the competition concerns arising from the case.
- (247) These contacts with the notifying party should take place in good time before the deadline for submission of commitments. Pursuant to paragraph 33 of the Best Practices on merger control proceedings, a SoP meeting will be offered within 15 working days after notification.
- (248) If time allows, the notifying party is encouraged to submit remedies as well as the Form RM in draft form at an early stage to promote a dialogue on the suitability of the remedies to resolve the concerns identified.
- (249) Pursuant to Article 19(1) of the Implementing Regulation, remedies must be submitted to the Commission no later than 20 working days from the date of receipt of the notification.
- (250) Following the submission of commitments in Phase I, the time limit for initiating proceedings and for decisions under Article 6(1)(b) is extended from 25 to 35 working days (Article 10(1) of the EU Merger Regulation).
- (251) The Commission will refuse to accept remedies if they have been officially submitted for the first time after the legal deadline of 20 working days. The submission of commitments after the 20 working days deadline also does not trigger the extension of the legal deadline for adoption of the decision by 10 working days.

1.6.2.2. Phase II remedies: timing and deadlines

- (252) In Phase II, the notifying party can submit remedies at any time after the initiation of proceedings, subject to the following.
- (253) According to Article 10(2) of the EU Merger Regulation, decisions pursuant to Article 8(1) (clearance) and 8(2) (conditional clearance) shall be taken as soon as it appears that the serious doubts referred to in its Article 6(1)(c) decision (that is, the decision to initiate proceedings) have been removed (see paragraph 92 of the Notice on Remedies). The Commission may thus clear the concentration with commitments even without issuing a SO or conducting an oral hearing.
- (254) However, the notifying party can also offer commitments after the SO and the oral hearing during which it is given an opportunity to be heard in response to the Commission's SO. The case team aims at informing the notifying party as soon as possible after the oral hearing if it is considering dropping or amending certain objections. The commitments submitted have to be sufficient to remove the competition concerns maintained after the SO and the oral hearing.
- (255) Pursuant to Article 19(2) of the Implementing Regulation, the remedies are to be submitted to the Commission no later than 65 working days from the date of initiation of proceedings.
- (256) The submission of remedies in Phase II might extend the deadline for the Commission to take a final decision, depending on the time in the procedure when the commitments are submitted. Indeed, the time limit for taking a decision pursuant to Article 8(1) to (3) is extended from 90 to 105 working days from the date of initiation of proceedings (Article 10(3) of the EU Merger Regulation), unless these commitments have been offered less than 55 working days after the initiation of proceedings.
- (257) If the modified commitments are submitted on or after working day 55, even if the initial offer was submitted before working day 55, the time limit for the decision is also extended to 105 working days, provided that the modifications are not very minor.
- (258) The new legal deadline will then be 105 working days instead of 90 working days, without prejudice to any further extension upon request by the notifying party or by the Commission with the agreement of the notifying party pursuant to Article 10(3), second subparagraph, of the EU Merger Regulation.
- (259) Per paragraph 94 of the Notice on Remedies, the Commission is not obliged to accept remedies after the legal deadline for remedies (i.e. 65 working days from the date of initiation of proceedings). Per Article 19(2), fourth paragraph Implementing Regulation, the Commission may however in exceptional circumstances extend the 65 working days period, upon a fully justified request by the notifying party submitted within the above-mentioned 65 working day period.
- (260) As explained in paragraph 88 of the Notice on Remedies, when planning to submit commitments for the first time after the time limit for their submission, the notifying party must request an extension of the time limit for the submission of commitments and set forth the exceptional circumstances that they consider justify

an extension. Where the parties make such request, the case team is advised to immediately verify whether such exceptional circumstances are present.

- (261) In line with paragraph 88 of the Notice on Remedies, the Commission can accept such late remedies provided that there is sufficient time left to make a proper assessment of the proposal (including a market test where applicable) and to allow adequate consultation of the Member States (i.e. to organise an AdCom meeting foreseen in Article 19(5) EU Merger Regulation) and third parties.
- (262) The Commission normally will not extend the period for adopting a final decision where the request for extension is presented after the deadline for submitting remedies, i.e. after working day 65.
- (263) When rejecting late commitments in the final decision, the case team should not only note that the commitments were submitted after the time limit for submitting commitments but to also briefly explain why the commitments cannot be accepted.

1.6.3. Submission and transmission of remedies

1.6.3.1. Submission and registration of remedies

- (264) **Standard Model Text.** Commitments should be submitted in the format of the Standard Model for Divestiture Commitments, which the notifying party can find on DG Competition website (it can also be forwarded to the parties upon request).
- (265) The Standard Model for Divestiture Commitments may have to be adapted to the requirements of the case at hand. In particular, adaptations are necessary where divestiture of partial ownership of a business is concerned; where the divested business is not stand-alone but is carved out of the retained businesses; where the assets being divested are a mix-and-match package from the acquirer and the target; or where licences or other non-structural/behavioural remedies are proposed.
- (266) In order to facilitate the tasks of the case team of comparing the submitted commitments against the standard text, the notifying party should provide a redline version of their commitments comparing their text against the standard text. Section 3 of the Form RM also requests the notifying party to identify any deviations from the model commitments text.
- (267) **Form RM.** The commitments should be accompanied by a duly completed Form RM, a form which is an annex to the Implementation Regulation and which requires the notifying party to provide detailed information on the content of the commitments offered, the conditions for their implementation and their suitability to remove the identified competition concerns. ⁽¹¹⁾
- (268) For commitments consisting in the divestiture of a business, the notifying party has to describe in detail how the business to be divested is currently operated.
- (269) **PoA.** The commitments must be signed by a duly authorised officer or legal representative of the undertakings concerned.

⁽¹¹⁾ See [Annex IV](#) of the Implementing Regulation.

- (270) In case the commitments are signed by external legal representatives, the case team is advised to check that the general PoA given by the notifying party for the submission of the Form CO covers the submission of commitments. If this is not the case, the submission of the commitments must be accompanied by a special PoA for the submission of the commitments, signed by a duly authorised officer or legal representative of the notifying party.
- (271) **Procedure for the submission of commitments and Form RM.** The notifying party shall submit the commitments and Form RM in line with the instructions included in the Communication on the submission of documents.
- (272) **Non-confidential version(s) of the commitments** (possibly more than one). The notifying party should simultaneously submit (via email to the case team) a non-confidential version of the commitments, which is suitable for distribution to third parties for market test purposes.
- (273) The divestiture periods are usually treated as confidential. To the extent that the notifying party seeks to exclude other information from the market test version, all other confidentiality claims must be duly justified by the notifying party. Essential elements, which are necessary for third parties to accurately evaluate the effectiveness of the remedies cannot be covered by confidentiality claims. More than one non-confidential version may be required depending on the identity of the recipients of the market test, should the commitments be market tested.
- (274) Finally, the notifying party should provide a version of the commitments to be sent to other Commission services and Member States in which only divestiture periods are deleted.

1.6.3.2. Informing involved Commission Services and Member States

- (275) Without undue delay, the case team sends the Form RM and the commitments (with annexes) to associated and other involved services of the Commission, as well as to the Member States, including EEA Member States when appropriate (Article 20(1) Implementing Regulation). The case team also informs the Unit International Relations if the case has a wider than EEA dimension.
- (276) The case team sends the electronic copy of the commitments specifically provided for this purpose, i.e. the version where only the divestiture periods and/or deadlines are deleted.
- (277) The commitments (after deletion of divestiture periods and/or deadlines) forwarded to Member States are usually accompanied, or followed up, by an explanatory note to the attention of the Member States, highlighting the main features of the commitments submitted by the parties and providing a preliminary assessment of their likely effectiveness in addressing the competition concerns identified during the procedure.
- (278) In Phase II, the case team is advised to keep also the Hearing Officer informed about commitments. To that effect, the case team should send the commitments to the Hearing Officer when sending them to other Commission services as well. The Hearing Officer should receive the full commitments, but with divestment periods redacted.

1.6.4. Market testing of remedies

1.6.4.1. Decision to market test remedies

- (279) The Notice on Remedies (paragraphs 80 for Phase I and 92 in connection with 80 for Phase II) foresees that the Commission will consult third parties "*when considered appropriate*". This margin of discretion means that it is up to the case team to propose to conduct a market test and, if so, how extensive it will be.
- (280) Normally, a market test will be carried out unless the commitments are clearly insufficient to address the identified competition concerns.

1.6.4.2. Preparing and sending the market test

- (281) Normally, the case team market tests the proposed remedies by sending questionnaires to third parties in order to assess inter alia the likely effectiveness, viability and workability of the proposed remedies.
- (282) It is important to reserve sufficient time for the preparation of the market test and for the analyses of its results. Market tests are carried out under considerable time constraints and third parties might not respond within the given time. The procedure must be efficiently managed in order to guarantee the quality and objectivity of the questionnaire and the conclusions.
- (283) **Selection of the market participants to be consulted.** All those market participants who may be expected to be in the position to provide a meaningful answer, should normally be consulted.
- (284) Usually the market test questionnaire is sent to all those customers and competitors, associations or other third parties that have been involved in the market investigation. Some other third parties may be included if there is a specific reason and the objectivity or confidentiality of the market test would not be endangered.
- (285) In any event, the sample should in principle contain both customers and competitors.
- (286) **Confidentiality restrictions**, which might sometimes exist in a specific case as regards the sample of the market test questionnaire recipients, due to specific circumstances of the notifying party, must be respected.
- (287) In any event, recipients of the market test questionnaire must sign a statement declaring that they will keep the information received confidential and will use it only for the purposes of answering to the market test.
- (288) Vice-versa, recipients of the market test questionnaire should be invited to also provide a non-confidential version of their own submissions for the purpose of a possible access to file by the notifying party.
- (289) **Drafting the market test.** A market test includes a written questionnaire addressed to third parties as well as a non-confidential version of the commitments attached to it (no business secrets or other confidential information as well as no divestiture periods and other deadlines).

- (290) The case team should make sure that the version of the commitments provided by the notifying party for the purpose of the market test, despite the elimination of certain business secrets, still contains sufficient information as to allow the recipients of the market test to make a meaningful assessment of the proposed remedies. Normally, the confidentiality declarations to be signed by the market test recipients should provide sufficient assurance to the notifying party that its legitimate interest of keeping sensitive commercial information regarding the proposed remedies confidential, is safeguarded.
- (291) The questionnaire normally contains the following parts:
- (zz) Introduction including the basic facts of the transaction in question as well as a clear summary of the (potential) competition concerns which have been identified, and for the removal of which the commitments have been submitted.
 - (aaa) Summary of the proposed commitments. All assets to be divested, all other structural commitments as well as all behavioural commitments should be listed in a summarised, but clearly structured form. The text must be objective and accurate, and it should not include any remarks or assessment by the Commission.
 - (bbb) The detailed questions as regards the capability of the proposed commitments to remove the identified competition concerns. This part of the questionnaire addresses the substantive issues, which need to be tested.
- (292) The purpose of the market test is not to communicate to third parties the Commission's assessment of the commitments that have been submitted, but to make third parties aware of the competition concerns raised and the commitments submitted, and allow them to judge the commitments themselves.
- (293) **Documents to be prepared.** The third parties consulted via the market test will generally receive via a specific electronic tool of the Commission (i) the questionnaire, (ii) an explanatory letter, (iii) a confidentiality declaration and (iv) a non-confidential version of the Commitments.
- (294) **Language.** The same arrangements apply in the market test procedure as for the initial market investigation, namely: the market test is normally sent in the language of the case but the case team should be prepared to send questionnaires in the languages of the countries concerned upon request. To this end, a machine translation can be useful, but should be checked by a native speaker to correct any elements which would interfere with the understanding of the questionnaire. Moreover, machine translations should always clearly be marked as such.
- (295) As to the text of the commitments, in case a translation is needed, the case team should request the parties to provide such translations to ensure that the text accurately reflects the parties' original intentions.
- (296) **Deadline.** As a general rule, third parties are given a deadline within which to reply, depending on the amount of information sought in the questionnaire and on the calendar of the procedure (usually 3-5 working days). Some (but limited) flexibility

may be allowed, at the discretion of the case team, if/when contacted by third parties requesting extension.

1.6.4.3. Results of the market test

- (297) Once most replies have been received, the case team should immediately begin assessing the responses to the market test. The case team is advised to begin the assessment of the market test immediately once replies come in. It can be useful to prepare a summary of the replies received, depending on the needs of the case.
- (298) When analysing third parties replies, the case team crosschecks the statements with its expected particular market and industry knowledge.
- (299) If replies from third parties are unclear, the case team may contact them again in order to clarify the issue and to find out about their position. The case team will keep record of these clarifying discussions if they are carried out orally.
- (300) The case team informs the Commissioner of the results of the market test.

1.6.4.4. Providing feedback on the market test

- (301) After completion of the market test and analysis of the results, the case team discusses the results of the market test with the notifying party, usually through a SoP meeting, a telephone conference or videoconference (paragraphs 31 and 33e of the Best Practices on merger proceedings).
- (302) At this SoP meeting, the case team relays to the notifying party the main comments/responses from third parties.
- (303) Subsequently, if the shortcomings of the proposed commitments do not constitute fundamental flaws and can be fixed, the notifying party can informally submit new drafts of the commitments to address the concerns expressed by the case team.
- (304) The notifying party can submit more than one formal proposal. If the commitments are modified following the market test, a new formal submission will be necessary.
- (305) In Phase II, when an SO has been issued, the case team should be prepared to give the parties full access to the non-confidential replies of third parties to the market test, on an ongoing basis and in any event in due time. The case team is thus advised to promptly follow-up with non-confidential versions of market test replies where needed. Alternatively, the case team can give a non-confidential summary of market test results to the parties for access to file purposes, in particular where the deletion of business secrets in the original replies would not be sufficient to protect legitimate confidentiality concerns of third parties. The summary is drafted in an objective manner to correctly reflect the views of third parties without confusing them with the Commission's opinion or assessment, respecting the business secrets, any other confidential information and the anonymity of the respondents. Whether the summary could indicate which replies have come from customers, which from competitors, is to be decided according to the industry and the number of third parties in question, as even this information might sometimes lead to revealing the identity of the respondents. In some cases, where respondents reasonably regard their views on the proposed remedies as confidential vis-à-vis the notifying party,

access to the full text of the replies may nevertheless be given by eliminating the identity of individual respondents, as well as other information from which the author of the reply may be identified. However, this option may be excluded in cases where the authors of the individual replies can be easily identified despite such anonymisation, for example because there is only a small number of players in a market.

1.6.5. Modification of the remedies

- (306) **In Phase I**, only limited modifications are possible after the 20 working days deadline.
- (307) If the case team considers that the market test in Phase I has not satisfactorily confirmed that the commitments are adequate to resolve the competition concerns, while the market test has indicated that the shortcomings of the proposed commitments do not constitute fundamental flaws and can be fixed, the Commission may discuss limited modifications with the notifying party to try to address the doubts and concerns derived from the case team's assessment and/or expressed by third parties.
- (308) Given that Phase I remedies are designed to provide a clear-cut answer to a readily identifiable competition concern, the Commission can only accept limited modifications to the proposed commitments. Such modifications, presented as an immediate response to the results of the market test, may include clarifications, refinements and/or other improvements designed to ensure that the commitments are workable and effective.
- (309) The Commission can only accept such modifications when it has been able to carry out a proper assessment of those commitments (paragraph 83 of the Notice on Remedies).
- (310) If the case team concludes that the commitments are still insufficient and/or in light of the fundamental flaws they would require more than limited modifications, it will generally be necessary to initiate proceedings under Phase II.
- (311) **In phase II**, if the notifying party submits only limited modifications to the commitments, in particular in order to address the shortcomings identified after the market test, the case team may decide that a second market test is not necessary. Member States need to be consulted on any revised commitments. The case team should prepare an explanatory note and allow sufficient time for this consultation.
- (312) However, if major changes/improvements to the commitments prove necessary in Phase II, a second market test may be necessary, unless the case team is confident that all substantial comments and suggestions for improvements by third parties have been incorporated in the new version, following the discussions between the case team and the notifying party. The same procedure as for the first market test is to be followed. Member States need to be consulted on the revised commitments. The case team should prepare an explanatory note and allow sufficient time for this consultation.
- (313) Importantly, the Notice on Remedies significantly limits the scope for accepting modifications of commitments if they are submitted after the deadline (i.e. after day

65). The Notice on Remedies (paragraph 94) foresees that the Commission may only accept such modified commitments:

(ccc) where it can clearly determine – without the need for a further market test (i.e. on the basis of its assessment of information already received in the course of the investigation, including the results of prior market testing) - that such commitments fully and unambiguously resolve the competition problems identified and

(314) when there is sufficient time for proper consultation of Member States. This consultation of the Member States normally requires that the Commission has to be able to send a draft of the final decision, including an assessment of the modified commitments, to the Member States not less than 10 working days before the AdCom (see paragraph 94, footnote (6) of the Notice on Remedies). The Commission will normally reject modified commitments, which do not fulfil those conditions. When rejecting late commitments in the final decision, the case team should not only note that the commitments were submitted after the time limit for submitting commitments but to also briefly explain why the commitments cannot be accepted.

1.6.6. Outcome following submission of remedies

1.6.6.1. Outcome following submission of remedies in Phase I

(315) Where the assessment of the remedies confirms that the proposed commitments remove the grounds for serious doubts, the Commission conditionally clears the merger in Phase I.

(316) The conditional clearance decision shall normally include a section:

(ddd) describing the main elements of the commitments submitted by the notifying party,

(eee) assessing their suitability to resolve the competition concerns identified in the course of the investigation, and

(fff) explaining the expected remedial effect of the commitments on the affected markets.

(317) The conclusions of the decision must also identify which commitments constitute ‘conditions’ and which ones constitute ‘obligations’ (see paragraph 19 of the Notice on Remedies). The requirement for achievement of the structural change of the market is a condition (for example, that a business is to be divested). The implementing steps which are necessary to achieve this result are generally obligations on the parties, e.g. such as the appointment of a trustee with an irrevocable mandate to sell the business.

(318) The legal consequences of a breach of a condition are different from those resulting from the breach of an obligation. ⁽¹²⁾

⁽¹²⁾ For more information on this, please consult the chapter of this on Remedies.

- (319) The final text of the commitments is attached to the decision in an annex, and thus forms an integral part of the Commission's decision in the case.
- (320) The Member States and, in cooperation cases under the meaning of Protocol 24 to the EEA Agreement on cooperation in the field of control of concentrations, the ESA receive a confidential version of the decision and the attached commitments from which the divestiture periods have been deleted.
- (321) Where the assessment of the remedies confirms that the proposed commitments do not remove the grounds for serious doubts on this basis, the Commission adopts a decision to initiate Phase II proceedings pursuant to Article 6(1)(c) of the EU Merger Regulation.
- (322) The Article 6(1)(c) decision shall include:
- (ggg) a description of the commitments submitted by the notifying party and
 - (hhh) set out the reasons why the Commission has concluded that they are insufficient to remove the serious doubts identified in the course of the investigation.
- (323) There is no need to attach the text of the proposed commitments to the Article 6(1)(c) decision.
- (324) The commitments considered to be insufficient for Phase I clearance can constitute the working basis for discussions with the parties during Phase II.
- (325) If the Commission's final assessment of a case shows that there are no competition concerns in one or more markets, the case team informs the notifying party accordingly and it may withdraw the unnecessary commitments for such markets. If the notifying party does not withdraw them, the Commission will normally ignore them in the decision. In any event, such commitment proposals do not constitute a condition for clearance.

1.6.6.2. Outcome following submission of remedies in Phase II

- (326) Where the assessment of the remedies confirms that the proposed commitments remove the serious doubts (if no SO has been issued yet) or the competition concerns raised in the SO, the Commission will adopt an Article 8(2) conditional clearance decision, after consultation with the authorities of the Member States.
- (327) There should be sufficient time for consulting the authorities of the Member States and prepare an explanatory note to the Member States assessing why the commitments are sufficient to facilitate the consultation.
- (328) Commitments form an integral part of the draft clearance decision under Article 8(2) of the EU Merger Regulation, by way of annex, submitted to the Member States for consultation.
- (329) The decision shall include a section describing the main elements of the commitments submitted by the notifying party, an assessment of their suitability to solve the competition concerns identified in the various affected markets in the course of the investigation, and the expected remedial effect of the commitments

on the affected markets, but should not mention any divestiture period or other deadlines.

- (330) Contrary to Phase I conditional clearance decisions (where this is done only in the conclusions), Article 8(2) conditional clearance decisions normally identify in the operative part of the decision which Commitments constitute "conditions" and which ones constitute 'obligations' (see paragraph 20 of the Notice). The conclusions of the decision shall also make reference to these conditions and obligations.
- (331) If commitments are insufficient, a draft prohibition decision under Article 8(3) of the EU Merger Regulation is forwarded to the Member States for consultation.
- (332) The case team must allow sufficient time for such consultations and prepare an explanatory note to the Member States assessing why the commitments are insufficient to facilitate the consultation.
- (333) The decision shall include a description of the commitments submitted by the notifying party and explain the reasons for which they were considered insufficient to solve the competition concerns identified in the SO. The commitments are not attached to the decision.

1.6.6.3. Publication of remedies

- (334) The case team should strive to ensure that an agreed non-confidential version of the commitments (with or without the Commission's decision) is available on DG Competition's website expeditiously after adoption of the decision. This is important to provide transparency to third parties at least on the text of the commitments as soon as possible since the implementation process normally gets underway pretty much immediately following the adoption of the Commission's decision.
- (335) The case team should endeavour to expedite the publication of the non-confidential version of the conditional clearance decision so that the Commission's reasoning on the commitments contained in the decision is also known to third parties as soon as possible.
- (336) Ideally the decision and the commitments should be published together at the same time, but in case of delays over agreeing the non-confidential version of the decision the non-confidential text of the commitments can be published separately in the meantime with the following notice: *"DISCLAIMER: This is an interim text of the non-confidential version of the commitments in Case M.XXXX – ... / The text is made available for information purposes only and does not constitute an official publication. The full text of the decision and the commitments in Annex will be published on DG Competition's website"*.

1.6.7. *Monitoring Trustee*

1.6.7.1. Approval of Monitoring Trustee, mandate and outline workplan

1.6.7.1.1. Introduction

- (337) As the Notice on Remedies indicates (paragraph 123), generally the commitments have to foresee that the notified concentration can only be implemented once the monitoring trustee is appointed, after being approved by the Commission.
- (338) The procedure for the appointment of the trustee is laid down in the commitments and it usually follows the one outlined in the Standard Model for Divestiture Commitments.⁽¹³⁾
- (339) Normally at the latest two weeks after the effective date (usually the date of the decision), the notifying party submits one or more proposed candidate(s) for the Commission's approval.
- (340) The divestiture trustee should be appointed well ahead of the end of the first divestiture period, normally at least one month ahead of the end of the first divestiture period. To that end, the notifying party must submit one or more proposed candidate(s) for the Commission's approval.
- (341) The monitoring trustee and divestiture trustee can be the same person and can be approved by the Commission both as monitoring and as divestiture trustee already at the beginning of the first divestiture period.

1.6.7.1.2. Content of notifying party's Monitoring Trustee proposal

- (342) As regards the content of the notifying party's proposal, this should generally contain:
- (iii) a reasoned submission in support of their proposed candidate(s);
 - (jjj) the draft mandate(s) (paragraph 126 of the Notice on Remedies);
 - (kkk) (an) outline work plan(s). In cases where both the monitoring trustee and the divestiture trustee are approved by the Commission already at the beginning of the first divestiture period, the work plan should, in principle, cover both the first divestiture period and the trustee divestiture period. However, as regards the work plan for the trustee divestiture period, it may be useful to require the trustee to provide an updated version of the work plan at the latest one month prior to the end of the first divestiture period; and
 - (lll) an indication of whether the proposed trustee(s) is to act as monitoring or divestiture trustee or both (paragraph 18(a) to (c) of the Standard Model for Divestiture Commitments).

⁽¹³⁾ See also paragraphs 123 and following of the Notice on Remedies.

1.6.7.1.3. Assessment of the Monitoring Trustee proposal

- (343) The notifying party shall supply the case team with all the necessary information for it to verify that the proposed candidates meet the trustee requirements (paragraph 125 of the Notice on Remedies).
- (344) The case team assesses the proposed candidates based on the following requirements:
- (mmm) it (they) is (are) independent from the parties;
 - (nnn) if they (it) possess(es) the necessary qualifications and professional experience to carry out the entrusted mandate; and
 - (ooo) if it (they) is (are) not, or shall not become, exposed to any conflict of interests (paragraph 124 of the Notice on Remedies and paragraph 17 of Standard Model for Divestiture Commitments).
- (345) The Commission will have discretion in the selection of the trustee (paragraph 124 of Standard Model for Divestiture Commitments).
- (346) The case team also assesses the draft mandate(s) and work plan(s) with the parties and the proposed trustee(s).
- (347) The case team can request additional information/clarification from the parties and/or the proposed trustee(s) as regards the above criteria. If the information is particularly important to the assessment, the case team can request the information by means of an Article 11 RFI.
- (348) In some cases, a pre-selection meeting with the proposed trustee(s) can prove useful (at the discretion of the case team).

1.6.7.1.4. Agreement on Monitoring Trustee's mandate and outline workplan

- (349) Since the approval of the monitoring trustee must include the draft mandate, the case team must normally agree it with the proposed candidate(s) and the parties before the appointment of the monitoring trustee.
- (350) Parties should use the Standard Model Trustee Mandate ⁽¹⁴⁾ and tailor it to the case at stake, for example by foreseeing additional duties and/or obligations. This model is available on DG Competition's website, but can also be sent upon request.
- (351) The final trustee mandate and the outline work plan is often the product of discussions with both the parties and the trustee(s), to ensure that the trustee mandate provides the trustee with all the powers it needs to carry out its mandate and contains nothing that would compromise the ability of the trustee to perform its functions.
- (352) The notifying party is responsible for remunerating the trustee under the mandate (see Article 20a of the Implementing Regulation). Accordingly, the remuneration of the trustee is usually agreed upon between the parties and the trustee without any

⁽¹⁴⁾ Available at http://ec.europa.eu/competition/mergers/legislation/best_practice.html.

significant intervention on the part of the case team. However, the remuneration structure agreed between the notifying party and the trustee must be such as to not impede the trustee's independence and effectiveness in fulfilling the mandate (see paragraph 126 of the Notice on Remedies). Therefore, the case team should in any case check that the level and method of remuneration are sufficient to make sure that the trustee will be able to fulfil its tasks thoroughly and independently.

- (353) The functions of the trustee are usually laid down in Section E.II of the Standard Model for Divestiture Commitments (paragraphs 22 to 25).

1.6.7.1.5. Approval and (publication of) appointment of the Monitoring Trustee

- (354) The approval of the proposed monitoring trustee (and of its draft mandate including the outline work plan which must be annexed thereto) is communicated, in the form of a letter, to the notifying party. The prior approval of the Legal Service is not needed for this letter.

- (355) Since the approval of the trustee must include the draft mandate, the case team normally agrees it with the proposed candidate(s) and the notifying party before the appointment of the trustee.

- (356) However, this can be time consuming, particularly where there are several proposed trustees who are equally suitable with varying draft mandates. Therefore, on a case-by-case basis it is possible to approve the proposed trustee(s) and outline work plan subject to agreement on draft mandate in a first step and then approve draft mandate, agreed by the parties with their chosen trustee, in a second step.

- (357) In this situation, each of the candidates must satisfy the conflict of interest criteria and must be prepared to sign the conflict of interest provisions of the standard mandate.

- (358) The notifying party must normally appoint the trustee, within one week of the Commission's approval of the proposed trustee, the draft mandate, and the outline work plan. The notifying party must submit proof of appointment, through a submission of a certified copy of the executed mandate and outline work plan to the Commission.

- (359) As mentioned, in this respect, the commitments normally provide that the notifying party may not close the notified concentration before the monitoring trustee has been appointed (see paragraph 123 of the Notice on Remedies).

- (360) After the appointment by the notifying party, the identity of the trustee is also published on DG Competition website under the respective case number, so as to allow third parties to contact the trustee. The notifying party and the trustee should normally be made aware that it is published.

1.6.7.2. Rejection of Monitoring Trustee

- (361) If the notifying party proposes only one monitoring trustee and the proposed monitoring trustee does not appear to be an appropriate candidate, the case team is advised to informally communicate this to the notifying party and ask to reconsider its proposal and to propose one or more alternative candidates.

- (362) If the notifying party insists on the proposed candidate, a formal rejection will be necessary. The case team informs the notifying party via a reasoned letter that the Commission intends to reject the proposed trustee. This letter should give the opportunity to make their views and arguments known to the Commission before the rejection decision is adopted. The notifying party should be given sufficient time to reply.
- (363) The notifying party should be requested to provide a non-confidential version of the letter to the Commission. The non-confidential version of the letter should be sent to the proposed trustee in order to allow him to make known its views and comments to the Commission. The trustee should be granted sufficient time to reply.
- (364) If the notifying party's arguments do not change the case team views, the Commission adopts a rejection decision. The prior approval of the Legal Service is needed for this decision. The involvement of other associated services is described in the Rules of Procedure of the Commission. The general empowerment granted to the Competition Commissioner develops further if there is a distinction on consulting or informing other associated services.
- (365) The power to adopt this type of decision has been subdelegated by the Competition Commissioner to the Director-General for Competition, pursuant to Article 13(3) of the Rules of Procedure of the Commission, to adopt the act on her/his behalf and under his/her responsibility. In case the Director-General for Competition is not available, a deputy can sign instead.
- (366) The rejection decision must explain the reasons why the proposed candidate(s) is (are) not suitable and must address the notifying party's comments on the reasoned letter informing the parties of the Commission's intention to reject the trustee.

1.6.7.3. Agreement on Monitoring Trustee's detailed workplan

- (367) As mentioned, the outline work plan which the notifying party must submit with their trustee proposals must be agreed in parallel to the draft mandate and annexed thereto. However, this is without prejudice to the trustee's obligation to propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the decision (paragraph 23(i) of the Standard Model for Divestiture Commitments).
- (368) Soon after the appointment of the trustee, and in any event together with the submission of the first monitoring report, the case team should agree the detailed work plan with the trustee and the notifying party.
- (369) This two-stage procedure is due to the fact that, before the trustee is formally appointed, it may prove impracticable for the proposed trustee(s) to develop a detailed work plan because the trustee invariably needs to get acquainted with the specificities of the case and the implementation of remedies, before it may be able to propose a detailed work plan.
- (370) The detailed work plan should cover each of the duties and obligations of the trustee listed in paragraphs 23 to 25 of the Standard Model for Divestiture Commitments. The commitments and/or the trustee mandate may foresee further duties, according

to the specific features of the case, in which case the detailed work plan should cover those as well (see also paragraph 119 of the Notice containing a non-exhaustive list of the tasks of the monitoring trustee).

- (371) The trustee should submit a draft detailed work plan soon after its appointment, which is open to discussions with the case team together with the trustee and/or the notifying party.
- (372) A ‘kick-off’ meeting(s) with the trustee and/or the notifying party (either together or separately as deemed appropriate) is (are) highly recommended at this stage in all but the simplest of cases. In such kick-off meetings, the case team should normally explain the circumstances of the case; the object of the commitments; agree how the trustee will carry out the various tasks under the mandate; decide on the format of the trustee's periodic reports; decide on how to handle interim *ad hoc* compliance issues.
- (373) As regards the work plan for the divestiture trustee, the trustee should draft this work plan independently. The notifying party should not be involved in either the drafting of the work plan or its implementation.
- (374) If the trustee was appointed both as monitoring trustee and as divestiture trustee already at the beginning of the first divestiture period, it may be useful to require the trustee to provide an updated version of its initial work plan for the trustee divestiture period at the latest one month prior to the end of the first divestiture period.

1.6.7.4. Replacement, discharge and/or re-appointment of Monitoring Trustee

- (375) The procedure for the replacement, discharge and/or re-appointment of the trustee is usually the one laid down in Section E.IV of the Standard Model for Divestiture Commitments (paragraphs 31-33).
- (376) The trustee may be removed and/or replaced if it ceases to perform its functions or for any other good cause (e.g. exposure to a conflict of interest) (paragraphs 31 and 32 of the Standard Model for Divestiture Commitments).
- (377) Otherwise, the trustee cannot cease to act unless it has been formally discharged by the Commission (paragraph 33 of the Standard Model for Divestiture Commitments). Typically, the trustee requests its discharge following its final report in which it certifies that all the Commitments with which it has been entrusted have been implemented (see paragraph 127 of the Notice on Remedies). Where certain longer-term commitments remain pending, the trustee should include in its report a full description of all pending commitments. The case team may at this stage hold a debrief-meeting with the trustee to verify the fulfilment of all obligations. Such a meeting is particularly recommended in complex or difficult cases or in cases where there are pending commitments. The case team may recommend discharge of the trustee even where there are pending commitments where these are considered to be minor or largely self-executing.
- (378) Notwithstanding its discharge, the Commission may require the re-appointment of the trustee if it subsequently transpires that the Commitments have not been fully and properly implemented (see paragraph 127 of the Notice on Remedies).

(379) The procedure to be followed here is the same as for the approval of the trustee; with as outcome a letter.

1.6.8. *Monitoring of remedy implementation*

(380) The duties and obligations of the parties are laid down in paragraphs 26 to 30 of the Standard Model for Divestiture Commitments.

(381) The trustee has, *inter alia*, to report on a regular basis to the Commission on its monitoring activities (paragraph 23(vi) of the Standard Model for Divestiture Commitments and paragraph 119 last indent of the Notice on Remedies).

(382) In these reports, the trustee should in particular highlight those issues, which may be controversial as regards the parties' compliance with the conditions and obligations attached to the decision (e.g. hold-separate, preservation, separation, or divestiture process obligations etc.).

(383) Based on the trustee's reports, the case team may decide to contact the notifying party and/or third parties to investigate those concerns and may propose possible solutions.

(384) The case team request further information from the trustee on its reports, wherever necessary. It can also instruct the trustee to take particular actions or to monitor with particular attention any issue that it may consider relevant (paragraph 22 of the Standard Model for Divestiture Commitments).

(385) The trustee has to prepare a non-confidential version of its reports, from which all third-party confidential information is removed, and release those to the parties.

(386) The trustee monitors the progress of the divestiture process to make sure that potential purchasers are granted sufficient access to information. Nevertheless, the case team should verify that the information disclosed to prospective purchasers is not inconsistent with the commitments, whenever publication of the non-confidential commitments is delayed.

(387) It may happen that the monitoring trustee requests the case team whether the firm/company to which it belongs can be engaged by the notifying party (although with different individuals or subsidiaries) in order to carry out the divestiture work for the same parties on assets which are not covered by the commitments. This normally constitutes a conflict of interest and should therefore in principle not be allowed.

1.6.9. *Enforcing compliance with remedies*

(388) **Finding of solutions.** In the course of the implementation of the commitments, the Commission may be faced with implementation problems, which can be brought up by the trustee, the parties or also third parties.

(389) If disputes arise with third parties, one should draw a distinction between disputes that affect the effective implementation of the commitments to achieve their objectives, for which the Commission is responsible, and purely commercial disputes between the parties and third parties.

- (390) In a first step, the case team should be prepared to find a solution for such problems, which allows for a proper implementation of the commitments in line with their purpose.
- (391) Should it transpire during the implementation that the commitments do not actually work to achieve their intended purpose or cannot do so in a timely and effective manner, the case team should try to find a solution with the notifying party. In this respect, where necessary, the notifying party may apply under the ‘Review Clause’ for modification or substitution of the commitments. The procedure to enact the review clause is the same as mentioned above.
- (392) **Enforcement instruments.** Where the case team is unable to persuade the notifying party to comply with the commitments voluntarily, there are a number of enforcement instruments. These provisions vary depending on whether commitments are offered in Phase I or Phase II and whether the violated provisions of the commitments have been qualified a condition or an obligation in the Commission decision.
- (393) In cases of a breach of an obligation attached to an Article 6(1)(b) in connection with Article 6(2) decision, or an Article 8(2) decision, the Commission may revoke its original clearance decision by way of Article 6(3) or Article 8(6)) respectively without being bound by any time limits.
- (394) In cases of a breach of a condition, the compatibility decision is no longer applicable (see paragraph 20 of the Notice on Remedies). In such circumstances, the Commission may:
- (ppp) first, take interim measures appropriate to maintain conditions of effective competition pursuant to Article 8(5)(b) EU Merger Regulation. The procedure is the same as for all other interim measures under Article 8(5) of the EU Merger Regulation. In short, since normally interim measures must be taken urgently, Article 18(2) provides for the possibility of adopting interim measures without previously giving the notifying party the opportunity to make known its views. They take effect immediately and remain effective until they are confirmed, modified or repealed by a ‘final’ decision on interim measures. Such a final decision is only necessary if the notifying party contests the ‘interlocutory’ interim measures taken;
 - (qqq) second, if the conditions of Article 8(4)(b) of the EU Merger Regulation are met, the Commission may require the undertakings concerned to dissolve the concentration, or where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration the Commission may take any other measure appropriate to achieve such restoration as far as possible. The Commission may also, in line with Article 8(7), take a decision pursuant to Article 8(1)-(3) of the EU Merger Regulation. In cases of breach of a condition or obligation attached to an Article 6(1)(b) in connection with Article 6(2) decision or an Article 8(2) decision, the Commission may impose fines not exceeding 10% of the

aggregate turnover of the undertakings concerned. The procedure for this is the same as for all other fines under Article 14(2).⁽¹⁵⁾

- (395) In cases of non-compliance with an obligation imposed by an Article 6(1)(b) in connection with Article 6(2) decision or an Article 8(2) decision, the Commission may impose periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertakings concerned. The procedure for this is the same as for an Article 14(2) decision.
- (396) Periodic penalty payments may be imposed to compel the parties to comply with the obligations imposed by the Article 6(2) decision or Article 8(2) decision. The fixing of the exact amount of such payments involves two stages: (i) in its first decision, pursuant to Article 15(1), a provisional decision is taken whereby the Commission establishes that there was a failure to act and imposes the periodic payment by fixing the daily rate from a date set in the decision; (ii) a second final decision is necessary pursuant to Article 15(2) which fixes the final total amount to be paid (i.e., daily rate multiplied by working days, less a possible reduction under Article 15(2)). Prior to a decision based on Article 15(2), an SO has to be issued and the AdCom has to be consulted.
- (397) Pursuant to Article 15(1)(d), in cases of non-compliance with measures ordered by Article 8(4) or (5) decision, the Commission may also impose periodic penalty payments not exceeding 5% of the average daily aggregate turnover of the undertakings concerned. The procedure for this is the same as for all other fines under Article 15(1) of the EU Merger Regulation.

1.6.10. Post-decision review/modification of the remedies

- (398) Pursuant to Section F (paragraph 43) of the Standard Model for Divestiture Commitments (the 'Review Clause'), the parties may request the Commission to review and modify certain aspects of their original commitments, if they can show good cause.
- (399) This request shall be accompanied by a report from the monitoring trustee, who shall, at the same time send a non-confidential copy of the report to the notifying party.
- (400) Specifically, the Commission may, where appropriate:
- (rrr) grant an extension of the time periods in the commitments: the review clause is most commonly used to deal with requests for an extension of the divestiture periods, since these periods typically determine the time frame within which the main commitment to divest must be complied with. In general, in order to show good cause, the notifying party must demonstrate that it was unable to meet the original deadlines despite its best efforts.
 - (sss) waive, modify or substitute or more of the undertakings in the commitments, generally if the notifying party can show exceptional circumstances. Typically, the notifying party will be able to justify the

⁽¹⁵⁾ For more information on this, please consult the chapter of this Manual on the Specific procedures of Article 14 and 15 of the EU Merger Regulation.

request by showing intervening circumstances which could not have been foreseen at the time of the decision (*e.g.* market conditions which render the obligations virtually impossible to meet). The request for waivers of one or more ‘obligations’ may involve a wide range of provisions in the commitments, such as: reporting obligations; trustee requirements; purchaser requirements; non-compete and non-solicitation provisions; and ring-fencing requirements.

- (401) Moreover, the Notice on Remedies points to the possibility of including a special review clause in the text of the commitments in cases where, at the time of the adoption of the decision, the Commission for particular reasons cannot anticipate all contingencies in relation to the implementation of the commitments (see paragraph 75 of the Notice on Remedies).
- (402) Procedurally, the notifying party may be obliged in such cases to propose a change to the commitments in order to achieve the result defined in the commitments, or the Commission may itself, after hearing the notifying party, modify the conditions and obligations to this end.
- (403) The formal steps involved in dealing with requests under a review clause follow the procedure used for the approval/rejection of a proposed purchaser or, to the extent a waiver or modification of commitments relates to the essential parts of the commitments, the procedure used to adopt the initial commitments decision.

1.6.11. Approval/Rejection of Remedy Purchaser

- (404) The procedure and criteria for approval/rejection of the proposed purchaser are laid down in Section D (paragraphs 14 and 15) of the Standard Model for Divestiture Commitments.
- (405) The notifying party is in charge of the sale process in the so-called ‘first divestiture period’ and proposes a purchaser (with a separate reasoned opinion from the trustee), while the divestiture trustee proposes a purchaser in the “trustee divestiture period”, should the notifying party fail to sell within the first divestiture period. However, in most cases, the notifying party will divest one or more businesses within the first divestiture period.
- (406) The notifying party must submit one (or more) proposed purchasers and the sale & purchase agreement(s) (including any ancillary arrangements such as supply or licensing agreements) for the Commission's prior approval before they can close their transaction with their chosen purchaser. The notifying party must also submit a fully documented and reasoned memorandum in support of their proposed candidate(s) (paragraph 101 of the Notice on Remedies; Section D of Standard Model for Divestiture Commitments, paragraph 15). The reasoned memorandum should include a summary of the main provisions of the final sale & purchase agreement(s) (including any ancillary arrangements such as supply or licensing agreements) as well as certified copies of the executed documents between the parties and the proposed purchaser(s).
- (407) The notifying party must send the trustee a copy of their documented proposal. Within one week of receiving this, the trustee submits to the Commission its reasoned opinion on the suitability of the proposed purchaser, the viability of the

divested business after the sale, whether the sale is done in a manner consistent with the commitments, in particular whether the sale of the divested business without one or more assets or personnel affects its viability after the sale (paragraph 23(vii) of the Standard Model Divestiture Commitments).

- (408) The criteria for the assessment of the proposed purchaser(s) are laid down in Section D of the Standard Model for Divestiture Commitments (paragraph 14), namely: independence of the parties, financial resources, proven expertise and incentive to develop the divested business and not creating *prima facie* competition or other regulatory concerns. The notifying party needs to demonstrate satisfactorily to the Commission that the proposed purchaser meets the above-mentioned requirements and that the business is sold in a manner consistent with the commitments.
- (409) In addition, Section D (paragraph 15) of the Standard Model for Divestiture Commitments allows the Commission to approve the sale of the divested business, even if it excludes certain assets or personnel that were specifically included in the original divestiture package. For example, this will be the case where the proposed purchaser already possesses these assets or personnel, if such a modification does not affect the viability and competitiveness of the divested business after the sale. In such cases, the case team should verify the request with the prospective purchaser to ensure that the purchaser does not in fact require such assets. These issues should be dealt with in the opinion from the trustee.
- (410) The case team will verify that the proposed purchaser(s) meet(s) the purchaser requirements in the commitments and that the sale & purchase agreement(s) (including any ancillary arrangements such as supply or licensing agreements) is consistent with the effective and timely implementation of the commitments. In doing so, the case team will:
- (ttt) check the trustee's opinion on the parties proposal(s) and the sale & purchase agreement(s) including any ancillary agreements;
 - (uuu) request by means of an Article 11 RFI the purchaser's business plans, financial information, past track record, justification for any on-going links between the parties and the proposed purchaser;
 - (vvv) discuss modifications to the sale & purchase agreement(s), including any ancillary agreements to ensure their consistency with the effective and timely implementation of the letter and spirit of the commitments;
 - (www) organise *ad hoc* meetings with the proposed purchaser(s) (with or without the participation of the notifying party and/or the trustee) if it is considered useful to ascertain their suitability;
 - (xxx) request the notifying party to provide additional information regarding their retained business and/or the proposed candidate(s), if necessary.
- (411) If the purchaser(s) meet(s) the purchaser requirements in the commitments and that the sale & purchase agreement(s) (including any ancillary arrangements such as supply or licensing agreements) is consistent with the effective and timely

implementation of the commitments, the Commission will adopt a decision approving the purchaser.

- (412) The prior approval of the Legal Service as associated department is needed. The involvement of other associated services is described in the Rules of Procedure of the Commission. The general empowerment granted to the Competition Commissioner develops further if there is a distinction on consulting or informing other associated services.
- (413) The power to adopt a purchaser approval decision has been subdelegated by the Competition Commissioner to the Director-General for Competition pursuant to Article 13(3) of the Rules of Procedure of the Commission, to adopt the act on her/his behalf and under his/her responsibility. In case the Director-General for Competition is not available, a deputy can sign instead.
- (414) If that is not the case and the notifying party does not amend/improve/clarify their proposal(s), the Commission will reject the proposed purchaser(s). In particular, the case team will inform the notifying party via a reasoned letter of this and will state its reasoning. The notifying party should be given the opportunity to make its views and arguments known to the Commission before the rejection decision is adopted. A non-confidential version of the letter, agreed with the notifying party, can be sent to third parties (such as the potential buyer) for comments. If the notifying party's arguments do not change the case team's views, the Commission will adopt a decision rejecting the proposed purchaser.
- (415) Decisions on purchaser approval are published on DG Competition website. No notice is published in the OJ.
- (416) Subsequently, the case team should check that the notifying party provides proof of the closing of the divestiture to an approved purchaser within the requisite deadline by submitting a certified copy of the closing memorandum and ancillary documents. Upon receipt of such documents, the case team should verify that closing has taken place in a manner consistent with the effective and timely implementation of the commitments.

1.6.12. Other relevant issues

1.6.12.1. « Fire sale » in the trustee divestiture period

- (417) If the notifying party has failed to reach a binding agreement with a potential purchaser within the first divestiture period, under the Standard Model Divestiture Commitments (paragraphs 30 and 31), the divestiture trustee should take over from the notifying party and manage the divestiture process with the aim of selling the divested business (at no minimum price) within the trustee divestiture period.
- (418) As mentioned, the divestiture trustee can be the same person or team as the trustee in charge of monitoring in the interim, in which case it is normally appointed at the same time and through the same mandate. Otherwise, the divestiture trustee is to be appointed by the parties upon approval by the Commission (by basically the same procedure as for the appointment of the trustee above). The notifying party has to make a proposal no later than one month before the end of the first divestiture period.

- (419) The divestiture trustee must report to the Commission each month on the progress of the divestiture process and forward a copy of its reports to the monitoring trustee as well as a non-confidential copy to the notifying party.
- (420) The purchaser and sale & purchase agreement proposed by the trustee shall also be approved by the Commission, through the same procedure as for the notifying party during the first divestiture period.

1.6.12.2. Long term monitoring of behavioural commitments

- (421) Although divestitures are in principle the preferred remedy, they are not the only remedy possible to eliminate certain competition concerns. In some cases, for example, a divestiture may simply not be possible.
- (422) Nevertheless, also for other remedies divestitures are the benchmark in terms of effectiveness and efficiency. Other remedies should therefore be accepted only in circumstances where the other remedy proposed is equivalent in its effects to a divestiture (see paragraph 61 of the Notice on Remedies).
- (423) This being said, commitments offered by the notifying party may, for example, take the form of long term (i.e. 10 years or more or even open-ended) behavioural commitments, including in particular commitments foreseeing the granting of access to key infrastructure and networks, key technology and essential inputs (see paragraphs 62-66 of the Notice on Remedies) or the termination or change of existing exclusive agreements.
- (424) Effective implementation may require, in these cases, long-term monitoring activities. The most suitable arrangements are to be carefully decided on a case-by-case basis.
- (425) In such cases, case teams should favour self-executing commitments over ones that require elaborate, time consuming or cumbersome monitoring activities, which may disproportionate resources in return for marginal benefits.
- (426) Otherwise, the appointment of a reliable trustee or the establishment of adequate dispute resolution procedures becomes particularly important to assist the case team with monitoring implementation.
- (427) Other non-structural types of remedies, such as promises by the notifying party to abstain from certain commercial behaviour (e.g. bundling products), will generally not eliminate the competition concerns. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation (see also paragraph 13, 14 and 17 of the Notice on Remedies).
- (428) These types of non-structural commitments should therefore be accepted only exceptionally in specific circumstances, such as in respect of competition concerns arising in non-horizontal cases (see paragraph 69 of the Notice on Remedies).

1.7. Publication of decisions

1.7.1. Overview of publications

- (429) In addition to the information on publication included in each of the relevant chapters of this Manual, hereunder an overview on the publication of the different types of acts is included.
- (430) Concretely, a Notice of Article 6(1)(a), 6(1)(b), 6(1)(c) and 6(2) decisions, a summary of Article 8 and 14 decisions, and 8(4) decisions are published in the OJ.
- (431) Furthermore, Article 4(4), 4(5), Article 5(2), Article 6(1)(a), 6(1)(b), 6(2), Article 7, Article 8, Article 9, Article 14, Article 22, buyer approvals and decisions under the review clause are published on DG Competition's website.

1.7.2. Corrigenda of decisions

- (432) In case an adopted decision contains mistakes, corrections will be implemented following the relevant procedure.
- (433) If the publication on the website (non-confidential version of the full text of the decision) and/or in the OJ (non-confidential summary of the decision) has not yet taken place, case teams can create a consolidated version of the original text and its correction for these purposes.
- (434) If the publication has however already taken place, case teams should prepare an additional publication of the correction.
- (435) In case of clerical mistakes, discovered before the publication of the non-confidential version and for which a formal correction via adoption of a corrigendum is not necessary, the correction is indicated in the non-confidential public version (via footnote: "* Clerical mistake: should read as ...").