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March 18,2009
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**BY HAND DELIVERY AND
ELECTRONIC FILING**

The Honorable Vincent J. Poppiti, Special Master
Blank Rome LLP
Chase Manhattan Centre, Suite 800
1201 North Market Street
Wilmington, DE 19801-4226

PUBLIC VERSION

**Re: *Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.*,
C.A. 05-441-JJF: C.A. 05-485-JJF: MDL No. 05-1717-JJF**

Dear Judge Poppiti:

By this application, Intel requests that the Special Master enter a protective order requiring AMD to return and refrain from further use of the European Commission's Statement of Objections ("SO"), a document which was inadvertently produced by Intel in this litigation. The Commission's regulations and the express terms under which Intel originally received access to the SO from the Commission precluded Intel from producing the document to AMD or from making any use of the SO in this proceeding. Contrary to AMD's claims during the March 12, 2009 hearing, Intel does not possess the right to waive unilaterally the Commission's restrictions on usage of the SO and its inadvertent production of the document cannot be so construed.

[REDACTED]

AMD's continued possession and use of the SO in this litigation is improper and should be put to an immediate end.

1. Factual Background. In October 2008, Intel produced an unredacted copy of the SO from the files of an Intel executive as part of its production of documents to AMD in this litigation. This production was inadvertent, insofar as Intel's counsel was not aware that the SO was included in the massive volume of materials produced to AMD. There have been numerous examples of inadvertently produced documents, all of which have been returned to the producing party upon request. Each side has put procedures in place to screen documents, but as in all cases, particularly one of this size, inadvertent productions have occurred. Intel's counsel first received notice that the SO had been produced in this litigation on February 9,2009, when AMD used the SO as the basis for its request for the issuance of letters rogatory.

Upon learning of the inadvertent production of the SO, Intel sent a letter to AMD's counsel on February 11,2009 requesting return of the document pursuant to Paragraph 35 of the Second Amended Stipulation Regarding Electronic Discovery and Format Production. (Ex. A). Having received no response, Intel sent a second letter to AMD's counsel on February 25,2009,

citing relevant provisions of European Community law and again requesting that AMD cease its review and use of the SO in this litigation. (Ex. B). AMD's counsel has not yet responded to either letter but has asserted a right to the SO in its reply filed in connection with its letters rogatory application.

2. Restrictions Placed by the Commission on Disclosure and Use of the SO. The terms under which defendants (such as Intel) may access documents created or obtained by the European Commission in the course of its investigations are set forth in Commission Regulation (EC) 77312004, which governs the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty. This regulation states unequivocally that access to Commission case file documents is granted solely for use in the Commission's own proceedings (and related proceedings in EU Member States). Article 15(4) of Reg. 77312004 reads:

Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty.

(Ex. C). In other words, the express terms under which Intel was originally granted access by the Commission to an unredacted copy of the SO barred Intel from disclosing or making use of the SO in any other context. Intel's possession of the SO under the conditions imposed by the Commission did not confer the right for Intel to produce the document to AMD in this litigation.

The importance that the Commission places on compliance with the use and confidentiality restrictions attendant to access to file materials is highlighted by Paragraph 48 of the Commission's Notice on Access to the File, which reads as follows:

Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings [citing to Articles 15(4) and 8(2) of Reg. 77312004]. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.

(Ex. D).

[REDACTED]

[REDACTED]

(Ex. E).

Based on these express restrictions placed by the Commission on use of the SO, Intel took the immediate steps noted above to retrieve the SO from AMD upon learning of its inadvertent disclosure. Since the March 12 hearing, it has become clear that AMD has no intention of complying with its obligation to return the SO. Accordingly, Intel has been forced to file this motion for a protective order to prevent any further unauthorized use of the SO.

3. Intel Has No Authority to Waive Confidentiality and Use Restrictions Placed on the SO by the Commission. During the March 12 hearing on AMD's request for issuance of letters rogatory, counsel for AMD claimed that the confidential nature of the SO "is a protection that's afforded for the benefit of Intel," that "[i]f Intel chooses to waive it, it can do so," and that "Intel was free to publish the SO...on the front page of the New York Times if it chose to do so." Mar. 12 Hearing Tr. at 42. None of these claims has any basis in fact.

The nature and content of the SO belie AMD's claim that confidentiality restrictions associated with the document are in place only for the protection of Intel. The SO is a document created by the Commission in the course of its investigatory process, which contains confidential materials gathered from Intel, AMD, and many third parties to the investigation, as well as the Commission's own work product. The Commission reasonably views the use restrictions on file documents, including the SO, as necessary to safeguard the integrity of the Commission's investigation and law enforcement process. As noted in a brief filed by the Commission opposing a subpoena by Microsoft to obtain communications between a third-party and the Commission, the restrictions on file documents are grounded in fundamental policy concerns:

the objective of these provisions is to sanction unlawful use of the information obtained, in view of the public interest (efficient law enforcement) and the substantial economic interests at stake.
(Ex. F at page 16).

These public interest concerns extend beyond protection of the confidential information of any one party. If AMD were correct that the confidentiality of the SO was simply a "protection afforded for the benefit of Intel," for example, the Commission would have no reason to prohibit disclosure or use outside of Commission proceedings of the "non-confidential" (redacted) version of the SO, which was provided to AMD pursuant to its status as complainant in the Commission's investigation of Intel. The Commission's regulations

Thus, the confidentiality and use restrictions placed on the SO are not solely for the benefit of Intel and incorporate the Commission's judgment concerning the public interest in the implementation of its investigatory processes.

[REDACTED]

[REDACTED]

Finally, nothing in the Commission's regulations supports AMD's claim that Intel could choose to waive all confidentiality restrictions on the SO at its discretion. The language used in Article 15(4) of Regulation 77312004 and in Paragraph 48 of the Notice on Access to the File is absolute with respect to prohibiting use of file documents outside of the Commission's own proceedings (and in related EU Member State proceedings). AMD itself has made no attempt to solicit the Commission's permission to use the non-confidential version of the SO that it obtained from the Commission's files; that effort, as AMD should know, would be entirely futile.

4. [REDACTED] The clear policy of the European Commission, which bars the release of internal file materials for use in other proceedings, is an expression of sovereign interest that should be afforded due respect by this Court based on considerations of international comity. These comity concerns should be weighted heavily here, given that Intel's production of the SO to AMD was inadvertent. It makes little sense for Intel's inadvertent production of the document to be a determinative factor in whether it may properly be used in this litigation, without due regard for the European Commission's policy interests in restricting access to and use of investigatory file documents.

[REDACTED] Under these circumstances, the Court may also wish to invite the Commission to express its views on the appropriateness of permitting use of the SO in these proceedings.

5. Conclusion. The regulations of the European Commission [REDACTED] [REDACTED] that Intel does not possess the right or authority either to produce the SO in this proceeding or to waive the usage and confidentiality restrictions placed on the document by the Commission. Since AMD has failed either to return the SO to Intel or to seek permission from the Commission for its use in this proceeding, Intel has been left with no other option than to seek a protective order from this Court mandating

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return of the SO and an order barring its continued use in this proceeding. For the reasons stated above, Intel respectfully requests the entry of such a protective order.

Respectfully,

/s/ W. Harding Drane, Jr.

W. Harding Drane, Jr.

WHD:rb

Enclosure

cc: Clerk of Court (via Hand Delivery)
Counsel of Record (via CM/ECF & Electronic Mail)

EXHIBIT A

February 11, 2009

VIA EMAIL AND FEDEX

Nearna Rahmani, Esq.
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, California 90071

Re: Privilege Issues

Dear Mr. Rahmani:

We have identified the following additional document that was inadvertently produced in TIFF format, but which is privileged and/or attorney work product.

69808DOC0024584 – 69808DOC0024820

As agreed, we will produce a privilege log and redacted TIFFs within 30 days. Pursuant to Paragraph 35 of the Second Amended Stipulation Regarding Electronic Discovery and Format Production, our prior inadvertent production of **this document** does not constitute a waiver of any privilege.

AS agreed in the Stipulation, AMD should conduct no further review of this document. If you have any questions or wish to discuss this matter further, do not hesitate to contact me.

Very truly yours,



Thomas J. Dillickrath

EXHIBIT B

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT C

COMMISSION REGULATION (EC) No 77312004

of 7 April 2004

relating to *h e* conduct of proceedings **by** the Commission **pursuant** to **Articles 81** and **82** of **h e** EC Treaty

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the **European** Community.

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in **Articles 81** and **82** of the Treaty ⁽¹⁾, and in **particular** Article **33** thereof,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

- (1) Regulation (EC) No 1/2003 **empowers** the Commission to regulate certain aspects of proceedings for the application of **Articles 81** and **82** of the Treaty. It is necessary to lay down rules **concerning** the initiation of proceedings by the Commission as well as **the** handling of complaints and **the** hearing of the parties concerned.
- (2) According to Regulation (EC) No 1/2003, national court, **are** under an obligation to avoid taking decisions which could run counter to decisions envisaged by the Commission in the same case. According to Article 11(6) of that Regulation, national **competition** authorities are relieved from their competence once the Commission has initiated **proceedings** for the adoption of a decision under Chapter III of Regulation (EC) No 1/2003. In this context, it is important that courts and competition authorities of the Member States are aware of **the** initiation of **proceedings** by the **Commission**. **The Commission should therefore** be able to **make public** its decisions to initiate proceedings
- (3) Before taking oral statements from natural or legal persons who consent to be interviewed, **the** Commission should inform those persons of the legal basis of the interview and its voluntary nature. The persons **interviewed** should also be informed of the purpose of the interview and of any **record** which may be **made**. In order to **enhance** the **accuracy** of the statements, the persons interviewed should **also** be given an **opportunity** to correct the **statements** recorded. Where information gathered from oral statements is exchanged pursuant to Article 12 of Regulation (EC) No 1/2003, that information should only be used in evidence to impose sanctions on natural persons where the conditions set out in that **Article** are fulfilled.

- (4) Pursuant to Article 23(1)(d) of Regulation (EC) No 1/2003 **fin**es may be imposed on undertakings and associations of undertakings **where** they fail to rectify within the time limit **fixed** by the Commission an incorrect, incomplete or misleading answer given by a **member** of their staff to questions in **the** course of **inspections**. It is therefore necessary to provide the undertaking concerned with a record of any explanations given and to establish a procedure enabling it to add any rectification, amendment or supplement to the explanations given by the member of staff who is not or was not authorised to provide explanations on behalf of the undertaking. The explanations given by a member of staff should remain in the Commission file as recorded during **the** inspection.
- (5) Complaints are an essential source of information for detecting **infringements** of **competition** rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.
- (6) In order to be admissible for the **purposes** of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.
- (7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that **form** should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No 1/2003.
- (8) Natural or legal persons having chosen to lodge a complaint should **be given** the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.
- (9) Complainants should be granted the **opportunity** of expressing their views if the Commission considers that there are **insufficient** grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already **done** so, it should inform the complainant of the identity of that authority.

⁽¹⁾ OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

- (10) In order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision.
- (11) Provision should also be made for the hearing of persons who have not submitted a complaint as referred to in Article 7 of Regulation (EC) No 112003 and who are not parties to whom a statement of objections has been addressed but who can nevertheless show a sufficient interest. Consumer associations that apply to be heard should generally be regarded as having a sufficient interest, where the proceedings concern products or services used by the end-consumer or products or services that constitute a direct input into such products or services. Where it considers this to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing and to attend the oral hearing of the parties to whom a statement of objections has been addressed. Where appropriate, it should also be able to invite such persons to express their views at that oral hearing.
- (12) To improve the effectiveness of oral hearings, the Hearing Officer should have the power to allow the parties concerned, and other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.
- (13) When granting access to the file, the Commission should ensure the protection of business secrets and other confidential information. The category of 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm an undertaking or person. The Commission should be able to request undertakings or associations of undertakings that submit or have submitted documents or statements to identify confidential information
- (14) Where business secrets or other confidential information are necessary to prove an infringement, the Commission should assess for each individual document whether the need to disclose is greater than the harm which might result from disclosure.
- In the interest of legal certainty, a minimum time-limit for the various submissions provided for in this Regulation should be laid down.
- (16) This Regulation replaces Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty⁽¹⁾, which should therefore be repealed.

⁽¹⁾ OJ L 354, 30.12.1998, p. 18.

- (17) This Regulation aligns the procedural rules in the transport sector with the general rules of procedure in all sectors. Commission Regulation (EC) No 2843/98 of 22 December 1998 on the form, content and other details of applications and notifications provided for in Council Regulations (EEC) No 1027/68, (EEC) No 4056/86 and (EEC) No 3975/87 applying the rules on competition to the transport sector⁽²⁾ should therefore be repealed.
- (18) Regulation (EC) No 1/2003 abolishes the notification and authorisation system. Commission Regulation (EC) No 3385/94 of 21 December 1994 on the form, content and other details of applications and notifications provided for in Council Regulation No 17/3 should therefore be repealed.

HAS ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1

Subject-matter and scope

This regulation applies to proceedings conducted by the Commission for the application of Articles 81 and 82 of the Treaty.

CHAPTER II

INITIATION OF PROCEEDINGS

Article 2

Initiation of proceedings

1. The Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation (EC) No 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a statement of objections or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier.

2. The commission may make public the initiation of proceedings, in any appropriate way. Before doing so, it shall inform the parties concerned.

⁽²⁾ OJ L 354, 30.12.1998, p. 22.

⁽³⁾ OJ L 377, 31.12.1994, p. 28.

3. The Commission may exercise its powers of investigation pursuant to Chapter V of Regulation (EC) No 1/2003 before initiating proceedings.

4. The Commission may reject a complaint pursuant to Article 7 of Regulation (EC) No 1/2003 without initiating proceedings.

CHAPTER III

INVESTIGATIONS BY THE COMMISSION

Article 3

Power to take statements

1. Where the Commission interviews a person with his consent in accordance with Article 19 of Regulation (EC) No 1/2003, it shall, at the beginning of the interview, state the legal basis and the purpose of the interview, and recall its voluntary nature. It shall also inform the person interviewed of its intention to make a record of the interview.

2. The interview may be conducted by any means including by telephone or electronic means.

3. The Commission may record the statements made by the persons interviewed in any form. A copy of any recording shall be made available to the person interviewed for approval. Where necessary, the Commission shall set a time-limit within which the person interviewed may communicate to it any correction to be made to the statement.

Article 4

Oral questions during inspections

1. When, pursuant to Article 20(2)(e) of Regulation (EC) No 1/2003, officials or other accompanying persons authorised by the Commission ask representatives or members of staff of an undertaking or of an association of undertakings for explanations, the explanations given may be recorded in any form.

2. A copy of any recording made pursuant to paragraph 1 shall be made available to the undertaking or association of undertakings concerned after the inspection.

3. In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded pursuant to paragraph 1.

CHAPTER IV

HANDLING OF COMPLAINTS

Article 5

Admissibility of complaints

1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.

Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C.

2. Three paper copies as well as, if possible, an electronic copy of the complaint shall be submitted to the Commission. The complainant shall also submit a non-confidential version of the complaint, if confidentiality is claimed for any part of the complaint.

3. Complaints shall be submitted in one of the official languages of the Community.

Article 6

Participation of complainants in proceedings

1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its views in writing.

2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.

Article 7

Rejection of complaints

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

Article 8

Access to information

1. Where the Commission has **informed** the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its **provisional** assessment. For this purpose, the complainant **may** however not have access to business secrets and other confidential information **belonging** to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles **81** and **82** of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions.

Article 9

Rejections of complaints pursuant to **Article 13** of Regulation (EC) No **1/2003**

Where the Commission rejects a complaint pursuant to **Article 13** of Regulation (EC) No **1/2003**, it shall inform the complainant without delay of the national competition authority which is dealing or has already dealt with the case.

CHAPTER V

EXERCISE OF **THE RIGHT TO BE HEARD**

Article 10

Statement of objections and reply

1. The Commission shall inform the parties concerned in writing of the objections raised against them. The **statement** of objections shall be notified to each of them.

2. The Commission shall, when notifying the statement of objections to the parties concerned, act a time-limit within which these parties may inform it in writing of their views. The Commission shall not be obliged to **take** into account written submissions received after the expiry of that time-limit.

3. The parties may, in their written submissions, set out all **facts** known to them which are relevant to their defence against the objections raised by the Commission. They shall attach any relevant documents as proof of the facts set out. They shall **provide** a paper **original** as well as an electronic copy or, **where** they do not provide an electronic copy, **28** paper copies of their submission and of the documents attached to it. They may propose that the Commission hear persons who may corroborate the facts set out in their **submission**.

Article 11

Right to be heard

1. The Commission shall give the parties to whom it has addressed a **statement** of objections the **opportunity** to be heard before consulting the Advisory Committee referred to in Article 14(1) of Regulation (EC) No **1/2003**.

2. The Commission shall, in its decisions, deal only with objections in respect of which the parties referred to in paragraph 1 have been able to comment.

Article 12

Right to an oral hearing

The Commission shall give the parties to whom it has addressed a **statement** of objections the **opportunity** to develop their arguments at an oral hearing, if they so request in their written submissions.

Article 13

Hearing of other persons

1. If **natural** or legal **persons** other than those referred to in Articles 5 and **11** apply to be heard and show a sufficient interest, the Commission shall **inform** them in writing of the nature and subject matter of the procedure and shall set a **time-limit** within which they may make known their views in writing.

2. The Commission may, where appropriate, invite persons referred to in paragraph 1 to develop **their** arguments at the oral hearing of the parties to whom a **statement** of objections has been addressed, if the **persons** referred to in paragraph 1 so request in their written comments.

3. The Commission may invite any other **person** to **express** its views in writing and to **attend** the oral hearing of the **parties** to whom a statement of objections has been addressed. The Commission may also invite such persons to express their views at that **oral** hearing.

Article 14

Conduct of oral hearings

1. Hearings shall be conducted by a Hearing Officer in full **independence**.

2. The Commission shall **invite** the persons to be heard to attend the oral hearing on such date as it shall **determine**.

3. The Commission shall invite the competition authorities of the Member States to take **part** in the oral hearing. It may likewise invite officials and **civil** servants of other authorities of the Member States.

4. Persons invited to attend shall either appear in person or be represented by legal representatives or by representatives authorised by their constitution as appropriate. Undertakings and associations of undertakings may also be represented by a duly authorised agent appointed from among their permanent staff.

5. Persons heard by the Commission may be assisted by their lawyers or other qualified persons admitted by the Hearing Officer.

6. Oral hearings shall not be public. Each person may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in the protection of their business secrets and other confidential information.

7. The Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.

8. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing. Regard shall be had to the legitimate interest of the parties in the protection of their business secrets and other confidential information.

CHAPTER VI

ACCESS TO THE FILE AND TREATMENT OF CONFIDENTIAL INFORMATION

Article 15

Access to the file and use of documents

1. If so requested, the Commission shall grant access to the file to the parties to whom it has addressed a statement of objections. Access shall be granted after the notification of the statement of objections.

2. The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States. The right of access to the file shall also not extend to correspondence between the Commission and the competition authorities of the Member States or between the latter where such correspondence is contained in the file of the Commission.

3. Nothing in this Regulation prevents the Commission from disclosing and using information necessary to prove an infringement of Articles 81 or 82 of the Treaty.

4. Documents obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81

Article 16

Identification and protection of confidential information

1. Information, including documents, shall not be communicated or made accessible by the Commission in so far as it contains business secrets or other confidential information of any person.

2. Any person which makes known its views pursuant to Article 6(1), Article 7(1), Article 10(2) and Article 13(1) and (3) or subsequently submits further information to the Commission in the course of the same procedure, shall clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known.

3. Without prejudice to paragraph 2 of this Article, the Commission may require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 112003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets.

The Commission may set a time-limit within which the undertakings and associations of undertakings are to:

- (a) substantiate their claim for confidentiality with regard to each individual document or part of document, statement or part of statement:
- (b) provide the Commission with a non-confidential version of the documents or statements, in which the confidential passages are deleted:
- (c) provide a concise description of each piece of deleted information.

4. If undertakings or associations of undertakings fail to comply with paragraphs 2 and 3, the Commission may assume that the documents or statements concerned do not contain confidential information.

CHAPTER VII

GENERAL AND FINAL PROVISIONS

Article 17

Time-Limits

1. In setting the time-limits provided for in Article 3(3), Article 4(3), Article 6(1), Article 7(1), Article 10(2) and Article 16(3), the Commission shall have regard both to the time required for preparation of the submission and to the urgency of the case.

2. The time-limits referred to in Article 6(1), Article 7(1) and Article 10(2) shall be at least **four weeks**. However, for proceedings initiated with a view to adopting **interim** measures pursuant to Article 8 of Regulation (EC) No 1/2003, the time-limit may be shortened to one week.

3. The time-limits referred to in Article 3(3), Article 4(3) and Article 16(3) shall be at least two weeks.

4. Where appropriate and upon reasoned request made before the expiry of the original **time-limit**, time-limits may be extended.

Article 18

Repeals

Regulations (EC) No 2842/98, (EC) No 2843/98 and (EC) No 3385/94 are repealed.

References to the repealed regulations shall be construed as **references** to this regulation.

Article 19

Transitional provisions

Procedural steps taken under Regulations (EC) No 2842/98 and (EC) No 2843/98 shall continue to have effect for the purpose of applying this Regulation.

Article 20

Entry into force

This Regulation shall enter into force on 1 May 2004.

This Regulation shall be binding in its **entirety** and directly applicable in all Member States.

Done at Brussels, 7 April 2004.

For the Commission
Mario MONTI
Member of the Commission

ANNEX

FORM C

COMPLAINT PURSUANT TO ARTICLE 7 OF REGULATION (EC) No 1/2003

I. Information regarding the complainant and the undertaking(s) or association of undertakings giving rise to the complaint

1. Give full details on the identity of the legal or natural person submitting the complaint. Where the complainant is an undertaking, identify the corporate group to which it belongs and provide a concise overview of the nature and scope of its business activities. Provide a contact person (with telephone number, postal and e-mail-address) from which supplementary explanations can be obtained.
2. Identify the undertaking(s) or association of undertakings whose conduct the complaint relates to, including, where applicable, all available information on the corporate group to which the undertaking(s) complained of belong and the nature and scope of the business activities pursued by them. Indicate the position of the complainant vis-à-vis the undertaking(s) or association of undertakings complained of (e.g. customer, competitor).

II. Details of the alleged infringement and evidence

3. Set out in detail the facts from which, in your opinion, it appears that there exists an infringement of Article 81 or 82 of the Treaty and/or Article 53 or 54 of the EEA agreement. Indicate in particular the nature of the products (goods or services) affected by the alleged infringements and explain, where necessary, the commercial relationships concerning these products. Provide all available details on the agreements or practices of the undertakings or associations of undertakings to which this complaint relates. Indicate, to the extent possible, the relative market positions of the undertakings concerned by the complaint.
4. Submit all documentation in your possession relating to or directly connected with the facts set out in the complaint (for example, texts of agreements, minutes of negotiations or meetings, terms of transactions, business documents, circulars, correspondence, notes of telephone conversations...). State the names and address of the persons able to testify to the facts set out in the complaint, and in particular of persons affected by the alleged infringement. Submit statistics or other data in your possession which relate to the facts set out, in particular where they show developments in the marketplace (for example information relating to prices and price trends, barriers to entry to the market for new suppliers etc.).
5. Set out your view about the geographical scope of the alleged infringement and explain, where that is not obvious, to what extent trade between Member States < between the Community and one or more EFTA States that are contracting parties of the EEA Agreement may be affected by the conduct complained of.

III. Finding sought from the Commission and legitimate interest

6. Explain what finding or action you are seeking as a result of proceedings brought by the Commission.
7. Set out the grounds on which you claim a legitimate interest as complainant pursuant to Article 7 of Regulation (EC) No 1/2003. State in particular how the conduct complained of affects you and explain how, in your view, intervention by the Commission would be liable to remedy the alleged grievance.

N. Proceedings before national competition authorities or national courts

8. Provide full information about whether you have approached, concerning the same or closely related subject-matters, any other competition authority and/or whether a lawsuit has been brought before a national court, if so, provide full details about the administrative or judicial authority contacted and your submissions to such authority.

Declaration that the information given in this form and in the Annexes thereto is given entirely in good faith.

Date and signature.

EXHIBIT D

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 Council Regulation (EC) No 139/2004

(2005/C 325/07)

(Ten with EEA relevance)

I. INTRODUCTION AND SUBJECT-MATTER OF THE NOTICE

1. Access to the Commission **file** is one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence. Access to the file is provided for in Article 27(1) and (2) of Council Regulation (EC) No 1/2003⁽¹⁾, Article 15(1) of Commission Regulation (EC) No 773/2004 ('the Implementing Regulation')⁽²⁾, Article 18(1) and (3) of the Council Regulation (EC) No 139/2004 (Merger Regulation)⁽³⁾ and Article 17(1) of Commission Regulation (EC) No 802/2004 ('the Merger Implementing Regulation')⁽⁴⁾. In accordance with these provisions, before taking decisions on the basis of Articles 7, 8, 23 and 24(2) of Regulation (EC) No 1/2003 and Articles 6(3), 7(3), 8(2) to (6), 14 and 15 of the Merger Regulation, the Commission shall give the persons, undertakings or associations of undertakings, as the case may be, an **opportunity** of making known their views on the objections against them and they shall be entitled to have access to the Commission's file in order to **fully respect** their rights of defence in the proceedings. The present notice provides the framework for the exercise of the right set out in these provisions. It does not cover the **interpretation** of the provisions in the context of other proceedings. **This notice is without prejudice to the interpretation of such provisions by the Community Courts. The principles set out in this Notice apply also when national Commission forces Articles 53, 54 and 57 of the EEA Agreement⁽⁵⁾.**
2. This specific right outlined above is distinct from the general right to access to documents under Regulation (EC) No 1049/2001⁽⁶⁾, which is subject to different criteria and exceptions and pursues a different purpose.
3. The **term** access to the file is used in this notice exclusively to mean the **access** granted to the persons, undertakings or association of undertakings to whom the Commission has addressed a statement of objections. This notice clarifies who has access to the file for this purpose.
4. The same term, or the **term** access to documents, is also used in the above-mentioned regulations in respect of complainants or other involved parties. These situations are, however, distinct from that of the **addressees** of a statement of objections and therefore do not fall under the definition of access to the file for the purposes of this notice. These related situations are dealt with in a separate section of the notice.
5. This notice also explains to which information access is granted, when access takes place and what are the procedures for implementing access to the file.

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

⁽²⁾ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p. 18-24.

⁽³⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1-22.

⁽⁴⁾ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1-39. Corrected in the OJ L 172, 6.5.2004, p. 9.

⁽⁵⁾ References in this Notice to Articles 81 and 82 therefore apply also to Articles 53 and 54 of the EEA Agreement.

⁽⁶⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43. See for instance Case T-2/03, *Verein für Konsumenteninformation v. Commission*, judgment of 13 April 2005, not yet reported.

6. As from **its** publication, this notice replaces the 1997 Commission notice on access to the file ⁽¹⁾. The new **rules** take account of the legislation applicable as of 1 May 2004, namely the above referred Regulation (EC) No 1/2003, Merger Regulation, Implementing Regulation and Merger Implementing Regulation, as well as the Commission Decision of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings ⁽²⁾. It also takes into account the recent **case** law of the Court of Justice and the **Court** of First Instance of the European Communities ⁽³⁾ and the practice developed by the Commission since the adoption of the 1997 notice.

II. SCOPE OF ACCESS TO THE FILE

A. Who is entitled to access to the file?

7. Access to the file pursuant to the provisions mentioned in paragraph 1 is intended to enable the **effective exercise** of the rights of defence against the objections brought **forward** by the Commission. For this purpose, both in cases under Articles 81 and 82 **EC** and in cases under the Merger Regulation, access is granted, upon request, to the persons, undertakings or associations of undertakings ⁽⁴⁾, as the case may be, to which the Commission addresses its objections ⁽⁵⁾ (hereinafter, 'the parties').

B. To which documents is access granted?

1. The content of the **Commission file**
8. The 'Commission file' in a competition investigation (hereinafter also referred to as 'the file') consists of all documents ⁽⁶⁾, which have been obtained, produced and/or assembled by the Commission Directorate General for Competition, during the investigation.
9. In the course of investigation under Articles 20, 21 and 22(2) of Regulation (EC) No 1/2003 and Articles 12 and 13 of the Merger Regulation, the Commission may collect a number of documents, some of which may, following a more detailed examination, prove to be unrelated to the subject matter of the case in question. Such documents may be returned to the undertaking from which those have been obtained. Upon return, these documents will no longer constitute part of the file.
2. Accessible documents
10. 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. For this purpose they will be granted access to all documents making up the Commission file, as defined in paragraph 8, with the exception of internal documents, business secrets of other undertakings, or other confidential information ⁽⁷⁾.

⁽¹⁾ Commission notice on the internal rules of procedure for processing requests for access to the file in cases under Articles 85 and 86 [now 81 and 82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, OJ C 21. 23.1.1997, p. 3.

⁽²⁾ OJ L 162. 19.6.2001, p. 21.

⁽³⁾ in particular Joint Cases T-25/95 et al., *Cimenteries CBR SA et al. v Commission*, [2000] ECR II-0491.

⁽⁴⁾ In the remainder of this Notice, the term 'undertaking' includes both undertakings and associations of undertakings. The term 'person' encompasses natural and legal persons. Many entities are legal persons and undertakings at the same time: in this case, they are covered by both terms. The same applies where a natural person is an undertaking within the meaning of Articles 81 and 82. In Merger proceedings, account must also be taken of persons referred to in Article 3(1)(b) of the Merger Regulation, even when they are natural persons. Where entities without legal personality which are also not undertakings became involved in Commission competition proceedings, the Commission applies, where appropriate, the principles set out in this Notice *mutatis mutandis*.

⁽⁵⁾ Cf. Article 15(1) of the Implementing Regulation, Article 18(3) of the Merger Regulation and Article 17(1) of the Merger Implementing Regulation.

⁽⁶⁾ In this notice the term 'document' is used for all forms of information support, irrespective of the storage medium. This covers also any electronic data storage device as may be or become available.

⁽⁷⁾ Cf. Article 27(2) of Regulation (EC) No 1/2003, Articles 15(2) and 16(1) of the implementing Regulation, and Article 17(3) of the Merger implementing Regulation. Those exceptions are also mentioned in Case T-7/89, *Heraeus Chemicals v Commission*, [1991] ECR II-1711, paragraph 54. The Court has ruled that it does not belong to the Commission alone to decide which documents in the file may be useful for the purposes of the defence (Cf. Case T-30/91 *Solvay v. Commission*, [1995] ECR II-1775, paragraphs 81-86, and Case T-36/91 *ICI vs. Commission*, [1995] ECR II-1847, paragraphs 91-96).

11. Results of a study commissioned in connection with proceedings are accessible together with the **terms** of reference and the methodology of the study. Precautions may however be necessary in order to protect intellectual property rights.
3. *Non-accessible* documents
- 3.1. Internal documents
- 3.1.1 General principles
12. Internal documents can be neither incriminating, nor **exculpatory** ⁽¹⁾. They do not constitute **part** of the evidence on which the Commission can **rely** in its **assessment** of a **case**. Thus, the **parties** will not be granted access to internal documents in the Commission file ⁽²⁾. Given their lack of evidential value, this restriction on access to internal documents does not prejudice the proper exercise of the parties' right of defence ⁽³⁾.
13. There is no obligation on the Commission departments to draft any minutes of meetings ⁽⁴⁾ with any person or undertaking. If the Commission chooses to make notes of such meetings, such documents constitute the Commission's own interpretation of what was said at the meetings, for which reason they are classified as internal documents. Where, however, the person or **undertaking** in question has agreed the minutes, such minutes **will** be made accessible after deletion of any business secrets or other confidential **information**. Such agreed minutes constitute part of the evidence on which the Commission can **rely** in its assessment of a case ⁽⁵⁾.
14. In the case of a study commissioned in connection with proceedings, correspondence between the Commission and its contractor containing evaluation of the contractor's work or relating to financial aspects of the study are **considered internal documents** and will **thus not be accessible**.

3.1.2 Correspondence with other public authorities

15. A **particular** case of internal documents is the Commission's **correspondence** with other **public** authorities and the internal documents received from such **authorities** (whether from EC Member States (the Member States) or non-member countries). Examples of such non-accessible documents include:
- correspondence between the **Commission** and the competition authorities **of** the Member States, or **between** the latter ⁽⁶⁾;
 - correspondence between the Commission and other public authorities of the Member States ⁽⁷⁾;
 - correspondence between the Commission, the **EFTA** Surveillance Authority and public authorities of EFTA States ⁽⁸⁾;
 - correspondence between the Commission and public authorities of **non-member** countries, **including** their competition authorities, in particular where the Community and a third country have concluded an agreement governing the confidentiality of the information exchanged ⁽⁹⁾.

⁽¹⁾ Examples of internal documents are **drafts**, opinions, **memos** or notes from the Commission departments or other public authorities concerned.

⁽²⁾ Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation, and Article 17(3) of the Merger Implementing Regulation.

⁽³⁾ Cf. paragraph 1 above.

⁽⁴⁾ Cf. judgement of 30.9.2003 in Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and others v Commission (TACA)*, [2003] ECR II-3275, paragraphs 349-359.

⁽⁵⁾ Statements recorded pursuant to Article 19 or Article 20(2)(e) of Regulation 1/2003 or Article 13(2)(e) of Merger Regulation will also normally belong to the accessible documents (see paragraph 10 above).

⁽⁶⁾ Cf. Article 27(2) of Regulation (EC) No 1/2003, Article 15(2) of the Implementing Regulation. Article 17(3) of the Merger Implementing Regulation.

⁽⁷⁾ Cf. Order of the Court of First Instance in Cases T-134/94 et al *NMH Stahlwerke and Othm v Commission* [1997] ECR II-2293, paragraph 36, and Case T-65/89, *BPB Industries and British Gypsum* [1993] ECR II-389, paragraph 33.

⁽⁸⁾ In this notice the term 'EFTA States' includes the EFTA States that are parties to the EEA Agreement.

⁽⁹⁾ For example, Article VIII.2 of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws (OJ No L 95, 27.4.1995, p. 47) stipulates that information provided to it in confidence under the Agreement must be protected 'to the fullest extent possible'. That Article creates an international-law obligation binding the Commission.

16. In certain exceptional circumstances, access is granted to documents originating from Member States, the EFTA Surveillance Authority or EFTA States, after deletion of any business secrets or other confidential information. The Commission will consult the entity submitting the document prior to granting access to identify business secrets or other confidential information.

This is the case where the documents originating from Member States contain allegations brought against the parties, which the Commission must examine, or form part of the evidence in the investigative process, in a way similar to documents obtained from private parties. These considerations apply, in particular, as regards:

- documents and information exchanged pursuant to Article 12 of Regulation (EC) No 112003, and information provided to the Commission pursuant to Article 18(6) of Regulation (EC) No 1/2003;
- complaints lodged by a Member State under Article 7(2) of Regulation (EC) No 1/2003.

Access will also be granted to documents originating from Member States or the EFTA Surveillance Authority in so far as they are relevant to the parties' defence with regard to the exercise of competence by the Commission⁽¹⁾

3.2 Confidential information

17. The Commission file may also include documents containing two categories of information, namely business secrets and other confidential information, to which access may be partially or totally restricted⁽²⁾. Access will be granted, where possible, to non-confidential versions of the original information. Where confidentiality can only be lifted by summarising the relevant information, access will be granted to a summary. All other documents are accessible in their original form.

3.2.1 Business secrets

18. In so far as disclosure of information about an undertaking's business activity could result in a serious harm to the same undertaking, such information constitutes business secrets⁽³⁾. 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.

3.2.2 Other confidential information

19. The category 'other confidential information' includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking. 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. The Court of First Instance and the Court of Justice 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⁽⁴⁾. 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.

⁽¹⁾ In the merger control area, this may apply in particular to submissions by a Member State under Article 9 (2) of the Merger Regulation with regard to a case referral.

⁽²⁾ Cf. Article 16(1) of the implementing Regulation and Article 17(3) of the Merger Implementing Regulation: Case T-7/89 *Hercules Chemicals NV v Commission*, [1991] ECR II-1711, paragraph 54; Case T-23/99, *IR AF 1998 A/S v Commission*, [2002] ECR II-1705, paragraph 170.

⁽³⁾ Judgement of 18.9.1936 in Case T-353/94, *Postbank NV v Commission*, [1996] ECR II-921, paragraph 87.

⁽⁴⁾ The Community Courts have pronounced upon this question both in cases of alleged abuse of a dominant position (Article 82 of the EC Treaty) (Case 7-65/89, *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, paragraph 69, and Case T-5/02 *Laval v. Commission* [2002] ECR II-4381, paragraph 98 et seq.).

20. The category of other confidential information also includes military secrets.

3.2.3 Criteria for the acceptance of requests for confidential treatment.

21. Information will be classified as confidential where the person or undertaking in question has made a claim to this effect and such claim has been accepted by the Commission ⁽¹⁾.
22. Claims for confidentiality must relate to information which is within the scope of the above descriptions of business secrets or other confidential information. The reasons for which information is claimed to be a business secret or other confidential information must be substantiated ⁽²⁾. Confidentiality claims can normally only pertain to information obtained by the Commission from the same person or undertaking and not to information from any other source.
23. Information relating to an undertaking but which is already known outside the undertaking (in case of a group, outside the group), or outside the association to which it has been communicated by that undertaking, will not normally be considered confidential ⁽³⁾. Information that has lost its commercial importance, for instance due to the passage of time, can no longer be regarded as confidential. As a general rule, the Commission presumes that information pertaining to the parties' turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential ⁽⁴⁾.
24. In proceedings under Articles 81 and 82 of the Treaty, the qualification of a piece of information as confidential is not a bar to its disclosure if such information is necessary to prove an alleged infringement (inculpatory document) or could be necessary to exonerate a party (exculpatory document). In this case, the need to safeguard the rights of the defence of the parties through the provision of the widest possible access to the Commission file may outweigh the concern to protect confidential information of other parties ⁽⁵⁾. It is for the Commission to assess whether those circumstances apply to any specific situation. This calls for an assessment of all relevant elements, including:
- the relevance of the information in determining whether or not an infringement has been committed, and its probative value;
 - whether the information is indispensable;
 - the degree of sensitivity involved (to what extent would disclosure of the information harm the interests of the person or undertaking in question)
 - the preliminary view of the seriousness of the alleged infringement
- Similar considerations apply to proceedings under the Merger Regulation when the disclosure of information is considered necessary by the Commission for the purpose of the procedure ⁽⁶⁾.
25. Where the Commission intends to disclose information, the person or undertaking in question shall be granted the possibility to provide a non-confidential version of the documents where that information is contained, with the same evidential value as the original documents ⁽⁷⁾.

C. When is access to the file granted?

26. Prior to the notification of the Commission's statement of objections pursuant to the provisions mentioned in paragraph 1, the parties have no right of access to the file.

⁽¹⁾ See paragraph 40 below.

⁽²⁾ See paragraph 35 below.

⁽³⁾ However, business secrets or other confidential information which are given to a trade or professional association by its members do not lose their confidential nature with regard to third parties and may therefore not be passed on to complainants. Cf. Joined Cases 209 to 215 and 218/78, *Fedetab*, [1980] ECR 3125, paragraph 46.

⁽⁴⁾ See paragraphs 35-38 below on asking undertakings to identify confidential information.

⁽⁵⁾ Cf. Article 27(2) of Regulation (EC) No 1/2003 and Article 15(3) of the Implementing Regulation.

⁽⁶⁾ Article 18(1) of the Merger implementing Regulation.

⁽⁷⁾ Cf. paragraph 42 below.

1. In *antitrust* proceedings under *Articles* 81 and 82 of the Treaty
27. Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission's objections to the parties, in order to ensure the principle of equality of **arms** and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties' replies to the Commission's objections.

A party will, however, be granted access to documents *received* after notification of the objections at later stages of the administrative **procedure**, where such documents may constitute new **evidence** — whether of an incriminating or of an exculpatory **nature** —, pertaining to the allegations concerning that **party** in the Commission's statement of objections. This is particularly the case where the Commission intends to rely on new evidence.

2. In *proceedings* under the Merger *Regulation*
28. In accordance with *Article* 18(1) and (9) of the Merger Regulation and *Article* 17(1) of the Merger Implementing Regulation, the notifying parties 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 Advisory Committee. In contrast, this notice does not **address** the possibility of the provision of documents before the Commission states its objections to undertakings under the Merger Regulation ⁽¹⁾.

III. PARTICULAR QUESTIONS REGARDING COMPLAINANTS AND OTHER INVOLVED PARTIES

29. The present section relates to situations where the **Commission** may or **has** to provide access to certain documents contained in its file to the complainants in antitrust proceedings and other involved parties in merger proceedings. Irrespective of the wording used in the *antitrust* and merger implementing regulations ⁽²⁾, these two **situations** are distinct — in terms of scope, timing, and rights — from access to the file, **as** defined in the preceding section of this notice.

A. Provision of **documents** to **complainants** in antitrust **proceedings**

30. The Court of First **Instance** has **ruled** ⁽³⁾ that complainants do not have the same rights and guarantees as the parties under investigation. Therefore complainants cannot claim a right of access to the **file** as established for parties.
31. However, a complainant who, pursuant to *Article* 7(1) of the Implementing Regulation, has been **informed** of the Commission's intention to reject its complaint ⁽⁴⁾, may **request** access to the documents on which the Commission has based its **provisional** assessment ⁽⁵⁾. The **complainant** will be **provided access to such documents on a single occasion, following the issuance of the letter informing the complainant of the Commission's intention to reject its complaint.**
32. Complainants do not have a **right** of access to business secrets or other confidential **information** which the Commission has obtained in the **course** of its investigation ⁽⁶⁾.

⁽¹⁾ This question is dealt with in the Directorate General Competition document DG COMP Best Practices on the conduct of EC merger control proceedings, available on the web-site of the Directorate General for Competition: http://europa.eu.int/comm/competition/index_en.html.

⁽²⁾ Cf. *Article* 8(1) of the implementing Regulation, which speaks about 'access to documents' to complainants and *Article* 17(2) of Merger Implementing Regulation which speaks about 'access to file' to other involved parties 'in so far as this is necessary for the purposes of preparing their comments'.

⁽³⁾ See *Case T-17/93 Matra-Hachette SA v Commission*, [1994] ECR II-595, paragraph 34. The Court ruled that the rights of third parties, as laid down by *Article* 19 of the Council Regulation No 17 of 6.2.1962 (now replaced by *Article* 27 of Regulation (EC) No 1/2003), were limited to the right to participate in the administrative procedure.

⁽⁴⁾ By means of a letter issued in accordance with *Article* 7(1) of the Implementing Regulation.

⁽⁵⁾ Cf. *Article* 8(1) of the implementing Regulation.

⁽⁶⁾ Cf. *Article* 8(1) of the implementing Regulation.

B, Provision of documents to other involved parties in merger proceedings

33. In accordance with Article 17(2) of the Merger Implementing Regulation, access to the file in merger proceedings shall also be given, upon request, to other involved parties who have been informed of the objections in so far as this is necessary for the purposes of preparing their comments.
34. Such other involved parties are parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration ⁽¹⁾.

N. PROCEDURE FOR IMPLEMENTING ACCESS TO THE FILE

A. Preparatory procedure

35. Any person which submits information or comments in one of the situations listed hereunder, or subsequently submits further information to the Commission in the course of the same procedures, has an obligation to clearly identify any material which it considers to be confidential, giving reasons, and provide a separate non-confidential version by the date set by the Commission for making its views known ⁽²⁾:
- a) In antitrust proceedings
- an addressee of a Commission's statement of objections making known its views on the objections ⁽³⁾;
 - a complainant making known its views on a Commission statement of objections ⁽⁴⁾;
 - any other natural or legal person, which applies to be heard and shows a sufficient interest, or which is invited by the Commission to express its views, making known its views in writing or at an oral hearing ⁽⁵⁾;
 - a complainant making known his views on a Commission letter informing him on the Commission's intention to reject the complaint ⁽⁶⁾.
- b) In merger proceedings
- notifying parties or other involved parties making known their views on Commission objections adopted with a view to take a decision with regard to a request for a derogation from suspension of a concentration and which adversely affects one or more of those parties, or on a provisional decision adopted in the matter ⁽⁷⁾;
 - notifying parties to whom the Commission has addressed a statement of objections, other involved parties who have been informed of those objections or parties to whom the Commission has addressed objections with a view to inflict a fine or a periodic penalty payment, submitting their comments on the objections ⁽⁸⁾;
 - third persons who apply to be heard, or any other natural or legal person invited by the Commission to express their views, making known their views in writing or at an oral hearing ⁽⁹⁾;
 - any person which supplies information pursuant to Article 11 of the Merger Regulation

⁽¹⁾ Cf. Article 11(b) of the Merger Implementing Regulation.

⁽²⁾ Cf. Article 16(2) of the Implementing Regulation and Article 18(2) of the Merger Implementing Regulation.

⁽³⁾ pursuant to Article 10(2) of the

⁽⁴⁾ pursuant to Article 6(1) of the Implementing Regulation.

⁽⁵⁾ pursuant to Article 13(1) and (3) of the Implementing Regulation.

⁽⁶⁾ pursuant to Article 7(1) of the Implementing Regulation.

⁽⁷⁾ Article 12 of the Merger Implementing Regulation.

⁽⁸⁾ Article 13 of the Merger Implementing Regulation.

⁽⁹⁾ pursuant to Article 16 of the Merger Implementing Regulation.

36. Moreover, the Commission may require **undertakings** ⁽¹⁾, in all cases where they produce or have produced documents, to **identify** the documents or **parts** of documents, which **they** consider to **contain** business secrets or **other** confidential information belonging to them, and **to** identify the **undertakings** with regard to which such documents are to be considered confidential ⁽²⁾.
37. For the purposes of quickly dealing with confidentiality claims referred to in paragraph 36 above, the Commission may set a time-limit within which the undertakings shall: (i) substantiate their claim for confidentiality with regard to each individual document or part of document; (ii) provide the Commission with a **non-confidential** version of the documents, in which the confidential passages are deleted ⁽³⁾. In **antitrust** proceedings the undertakings in question shall also provide within the said time-limit a concise description of each piece of deleted information ⁽⁴⁾.
38. **The non-confidential versions and the descriptions of the deleted information must be established in a manner that enables any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and therefore whether there are sufficient grounds to request the Commission to grant access to the information claimed to be confidential.**

B. Treatment of confidential information

39. In antitrust proceedings, if undertakings fail to comply with the provisions set out in paragraphs 35 to 37 above, the Commission may assume that the documents or statements concerned do not contain confidential information ⁽⁵⁾. The Commission may consequently assume that the undertaking has no objection to the disclosure of the documents or statements concerned in their entirety.
40. In both antitrust proceedings and in proceedings under the Merger Regulation, should the person or undertaking in question meet the conditions set out in paragraphs 35 to 37 above, to the extent they are applicable, the Commission will either:
- provisionally accept the claims which seem justified: or
 - inform the person or undertaking in question that it does not agree with the confidentiality claim in whole or in part, where it is apparent that the claim is unjustified.
41. The Commission may **reverse** its provisional acceptance of the confidentiality claim in whole or in part at a later stage.
42. Where the Directorate General for Competition does not agree with the confidentiality claim from the outset or where it takes the view that the **provisional acceptance** of the confidentiality claim should be **reversed**, and thus **intends to disclose** information, it will **grant the person or undertaking in question an opportunity to express its views**. In such cases, the Directorate General for Competition will inform the person or undertaking in writing of its intention to disclose information, give its reasons and set a time-limit within which such person or undertaking may inform it in writing of its views. If, following submission of those views, a disagreement on the confidentiality claim persists, the matter will be dealt with by the Hearing Officer according to the applicable Commission terms of reference of Hearing Officers ⁽⁶⁾.

⁽¹⁾ In merger proceedings the principles set out in the present and subsequent paragraphs also apply to the persons referred to in Article 3(1)(b) of Merger Regulation.

⁽²⁾ Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation. This also applies to documents gathered by the Commission in an inspection pursuant to Article 13 of the Merger Regulation and Articles 20 and 21 of Regulation (EC) No 1/2003.

⁽³⁾ Cf. Article 16(3) of the Implementing Regulation and Article 18(3) of the Merger Implementing Regulation.

⁽⁴⁾ Cf. Article 16(3) of the Implementing Regulation.

⁽⁵⁾ Cf. Article 16 of the Implementing Regulation.

⁽⁶⁾ Cf. Article 9 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings. OJ L 162 19.6.2001, p. 21.

43. Where there is a risk that an undertaking which is able to place very considerable economic or commercial pressure on its competitors or on its trading partners, customers or suppliers will adopt retaliatory measures against those, as a consequence of their collaboration in the investigation carried out by the Commission⁽¹⁾, the Commission will protect the anonymity of the authors by providing access to a non-confidential version or summary of the responses in question⁽²⁾. Requests for anonymity in such circumstances, as well as requests for anonymity according to point 81 of the Commission Notice on the handling of complaints⁽³⁾ will be dealt with according to paragraphs 40 to 42 above.

C. Provision of access to file

44. The Commission may determine that access to the file shall be granted in one of the following ways, taking due account of the technical capabilities of the parties:
- by means of a CD-ROM(s) or any other electronic data storage device as may become available in future;
 - through copies of the accessible file in paper form sent to them by mail;
 - by inviting them to examine the accessible file on the Commission's premises.
- The Commission may choose any combination of these methods.
45. In order to facilitate access to the file, the parties will receive an enumerative list of documents setting out the content of the Commission file, as defined in paragraph 8 above.
46. Access is granted to evidence as contained in the original file, in its original form: the Commission is under no obligation to provide a translation of documents in the file⁽⁴⁾.
47. If a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. If the services of the Directorate General for Competition are not in a position to accept the request and if the party disagrees with that view, the matter will be resolved by the Hearing Office in accordance with the applicable terms of reference of Hearing Officers⁽⁵⁾.
48. Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings⁽⁶⁾. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.
49. With the exception of paragraphs 45 and 47, this section C applies equally to the grant of access to documents to complainants (in antitrust proceedings) and to other involved parties (in merger proceedings).

⁽¹⁾ Cf. paragraph 19 above.

⁽²⁾ Cf. Case T-5/02, *Tetra Laval vs. Commission*, [2002] ECR II-4381, paragraph 98, 104 and 105.

⁽³⁾ Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65.

⁽⁴⁾ Cf. Case T-25/95 et al., *Cimenteries*, paragraph 635.

⁽⁵⁾ Cf. Article 8 of the Commission Decision of 23.5.2001 on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001, p. 21.

⁽⁶⁾ Cf. Articles 15(4) and 8(2) of the Implementing Regulation, respectively, and Article 17(4) of the Merger Implementing Regulation.

EXHIBIT E

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT F

**UNITED STATES DISTRICT CO
DISTRICT OF MASSACHUSET**

IN RE:)

APPLICATION OF **MICROSOFT**)
CORPORATION)

Civil Action 06-MBD-10061 (MLW)

MEMORANDUM OF THE COMMISSION OF THE EUROPEAN COMMUNITIES
IN SUPPORT OF NOVELL, **INC.'S** MOTION TO QUASH

The Commission of the European Communities (hereinafter "European Commission" or "Commission") respectfully submits this Memorandum in support of Novell, Inc.'s ("Novell") motion to quash the subpoena served by Microsoft Corporation ("Microsoft"). The European Commission respectfully submits that denying Novell's motion to quash and permitting the discovery requested by Microsoft would contravene principles of international comity since, in this case, the Commission is not receptive to the judicial assistance sought by Microsoft pursuant to 28 U.S.C. §1782 and, indeed, believes that enforcement of Microsoft's subpoena would pose a serious risk that the Commission's rules and procedures concerning **competition** law enforcement would be circumvented.

I. INTRODUCTION

A. Background On the Institutional Structure of the Commission And its Decision-Making Process.

The European Commission will first provide a brief explanation of the institutional structure put in place by the relevant international treaties and agreements that established the European Union. For purposes of the present proceedings, the relevant treaty is the Treaty

establishing the European Community (see consolidated version in OJ C 325, 24.12.2002, p. 33.)

The main institutional provisions of this Treaty may be summarized as follows.

The Member States have agreed to transfer a large part of their sovereign powers in many areas to the European Community. The competences transferred are exercised by the European Parliament and the Council of Ministers acting as co-legislator on the basis of proposals submitted by the European Commission. The European Commission, which is one of the institutions of the European Community, is its basic executive and administrative organ. Among its functions is to ensure the effective enforcement of and compliance with the provisions of the Treaty, a role which is referred to as the "guardian of the Treaty" (see Article 211 of the EC Treaty). The Commission's responsibilities within the organizational structure of the European Community extend to a wide range of subject areas. Functionally, the Commission's powers include proposing legislation, managing and implementing European Union policies, budget and law enforcement. In a number of areas, the Commission has been granted powers to enforce directly the Treaty regulations and decisions promulgated pursuant to it.

Although it has no legal personality itself, which is vested with the European Community, the Commission is also entrusted with the task of representing the European Community on the international stage, including in contexts of litigation like in this case where the European Community's interests are at stake or likely to be affected.

With regard in particular to competition law and policy, the Treaty conferred on the Commission substantial ~~decision-making~~ powers. Through the Directorate-General for Competition (hereinafter "DG Competition"), which is one of the of the Commission's internal

departments¹, the Commission enforces the Treaty's provisions relating to competition law. These provisions include, in particular, Article 81 (relating to **anti-competitive** agreements, including cartels), Article 82 (relating to abuse of dominant position), Article 87 (relating to market-distorting state aid), and specific legislation regulating concentrations of undertakings with Community dimension (i.e. mergers).

B. Microsoft's Application For Discovery Before The District Court.

The European Commission has been informed that on March 3, 2006, Microsoft filed an **ex parte** application pursuant to 28 U.S.C § 1782 in this Court requesting the Court to endorse a subpoena to Novell to produce documents. The Commission has also been informed that the Court issued an order on March 7, 2006, **authorizing** Microsoft to serve the subpoena and authorizing Novell to file a motion to quash. The Commission has further learned that the Court held a hearing on March 28, 2006 and provisionally ordered Novell to produce certain of the documents requested in Microsoft's subpoena. On March 30, 2006, pursuant to the Court's instruction, Novell and Microsoft agreed that the scope of **Microsoft's** subpoena to Novell would be modified to request the following:

"Novell shall produce all **non-privileged** documents in its possession, custody or control as of the date of service of the original subpoena on Novell, that constitute or summarize communications between Novell, the Commission, the Monitoring Trustee, OTR or any other third party known or believed by Novell to have been retained by the Commission, relating specifically to or referencing the subject matter of the SO, namely Microsoft's compliance or alleged failure to comply with its obligations under Articles 5(a) and (c) of the 2004 Decision to provide complete and accurate technical documentation embodying the Interoperability Information."

¹ **Dt Competition**, as an internal **department** of the **European Commission**, has no **power** to act autonomously. The **actions and law enforcement activities** it **undertakes** are carried out **under** the prior **authorization** and on **behalf** of the **European Commission**. the Commission **being** the **decision making organ** of the **European Community** in areas of competition law.

The Commission also has been informed that the Cowt suspended issuing its provisional order of March 28,2006 until April 6,2006 to offer *inter alia* the Commission an opportunity to authoritatively present its position on Microsoft's (revised) discovery request.

The European Commission is grateful for this opportunity and, by the present Memorandum, would like to state its position authoritatively on Microsoft's discovery request and Novell's motion to quash.² The Commission believes that Microsoft's request raises very important issues and problems of law and policy, in particular as regards the enforcement of the rules on access to material in the Commission's file and rights of a defendant in the Commission's antitrust investigations.

II. FACTUAL AND LEGAL BACKGROUND

A. The Framework Within Which The European Commission Carries Out Its Antitrust Investigations.

The Commission's powers of enforcement in competition law are set out in Council Regulation 112003 (OJ No L 1, 4.1.2003, p. 1, a copy of which is attached as Exhibit B).³ Regulation 112003 provides specific means for investigating suspected **infringements** of competition law, notably by issuing formal requests for information, taking oral statements, conducting **on-site** inspections, etc. Regulation 112003 is further implemented by Commission Regulation No. 77312004, which sets out more precise rules governing certain procedural issues in competition law enforcement before the Commission.

It is well established in European Community law, in general, and competition law, in particular, that the rights of defense and the right to be heard of potentially affected entities and individuals are properly respected. As the European Cowt of Justice has held in its judgment in connection with Hoffman-La Roche Co. AG v. Commission, [1979] ECR 461: "**observance of**

² A copy of the Authority issued by the Commission in this matter is attached hereto as Exhibit A

³ Council Regulation 1/200 replaced Council Regulation No. 17/62.

the right to be heard is in all proceedings in which sanctions, in particular fines or penal@ payments, may be imposed a fundamental principle of Community law which must be respected [...]”⁴

In line with this judgment and established case law of the European Court of Justice and the Court of First Instance, the Commission has put in place a number of procedural rules which guarantee the application of the principle of equality of arms, the protection of the rights of defense and due process in proceedings before the Commission. In particular, the rules on access to material in the Commission's file were adopted for the purpose of enabling potentially any affected party to effectively exercise their rights of defense in Commission competition proceedings.

The "Commission's file" in a competition law investigation (hereinafter also referred to as "the file") consists of all documents, which have been obtained, produced and/or otherwise assembled by the Commission, during the investigation phase.⁵ Access to the file is granted to adversely affected parties in proceedings before the Commission. The access is granted to all documents making up the Commission's file, with the exception of internal documents, business secrets of other entities or other confidential information.⁶ This access is granted after a Statement of Objections has been addressed to the party concerned setting out the Commission's provisional findings from the investigation concerning a potential violation of the competition

⁴ Judgment of the Court of February 13, 1979 in Case 85176, Hoffmann-La Roche & Co. AG v. Commission [1979] ECR 461, a copy of which is attached as Exhibit C.

⁵ See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, and Articles 53, 54 and 57 of the EEA Agreement and Regulation (EC) No 13912004.01 2005/C 325, 22.12.2005, p. 7 ("Notice on access to file"), at paragraph 7, a copy of which is attached as Exhibit D. This notice replaces an earlier but similar Commission Notice of 1997 on access to file; see OJ C 23 of 23.01.1997.

⁶ "Internal documents" can be neither incriminating nor exculpatory. They do not constitute part of the evidence on which the Commission can rely in its assessment of a case. Thus, the parties will not be granted access to internal documents in the Commission file. Given their lack of evidential value, this restriction on access to internal documents does not prejudice the proper exercise of the parties' right of defense. See Commission Notice on access to file, at paragraph 3.1.

rules.⁷ Obviously there are certain limitations to access. The European Court of Justice has confirmed that *"the Commission is allowed to preclude from the administrative procedure evidence which has no relation to the allegations of fact and of law in the Statement of Objections and which therefore has no relevance to the investigation."*⁸

Where an adversely affected party believes that the Commission's Services (i.e. in this case DG Competition) have erroneously or unlawfully withheld documents which are necessary for its defense, it may make a request to the Hearing Officer for a decision to enable it to have access to such documents. The Hearing Officer is responsible for safeguarding the rights of defense of the parties concerned in Commission proceedings.⁹ The Hearing Officer, from administrative and functional points of view, is not an official of DG Competition. He or she is independent and directly attached to the office of the Commissioner in charge of competition policy.¹⁰ The Hearing Officer reports to the competition Commissioner and ultimately the Commission.

The Hearing Officer, once properly seized of a request by an interested party, has the power to decide *inter alia* whether to grant or refuse access to the documents sought. A decision by the Hearing Officer to authorize or not to authorize the disclosure of certain documents to a party concerned is ultimately susceptible to judicial review by the Court of First Instance and the European Court of Justice. Similarly, an entity which considers that certain of the documents in the Commission's file contain its business secrets that should not be disclosed to the defendant seeking access, can appeal directly a decision by the Hearing Officer authorizing access to the

⁷ See Notice on access to file, supra, at paragraph 10.

⁸ See Judgment of the Court of Justice of January 7, 2004, in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland, [2004] ECR, not yet reported, at paragraph 126, a copy of which is attached as Exhibit E.

⁹ See Articles 1 and 8 of the Commission Decision of May 23, 2001 on the terms of reference of hearing officers in certain competition proceedings, OJ 2001 L 162, 19.6.2001, p. 21 (hereinafter "the Hearing Officer Decision"). Currently, there are two persons serving as Hearing Officers.

¹⁰ See Article 2 of the Hearing Officer Decision, supra.

Court of First Instance and the European Court of Justice.¹¹

Documents obtained through access to the file cannot be used for any purpose other than the proceedings applying competition law before the Commission or in proceedings before the European courts. This safeguard is contained in Article 15 of Regulation 77312004, which stipulates that documents obtained through access to file may only be used "*[...]for the purposes of judicial and administrative procedures for the application of Articles 81 and 82 of the Treaty.*" Furthermore, the European Commission Notice on access to file states that:

"Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action."¹²

It is important to note that the Commission makes that obligation and the attending sanctions clear in a standard letter to all concerned and their counsel, when addressing to them a Statement of Objections and providing access to file.

B. The Proceedings Against Microsoft Pursuant To Article 24 of Regulation 112003.

On March 24, 2004, the Commission adopted a decision in Case COMP/C-3137.792 – Microsoft ("the Decision"), in which it concluded that Microsoft had abused its dominant position in PC operating systems by:

- (i) refusing to provide interoperability information necessary for competitors to be able to effectively compete in the work group server operating system market, and
- (ii) tying its Windows Media Player with the Windows PC operating system.

The Commission imposed a fine of 497,196,304 on Microsoft and ordered it to bring the above-mentioned **infringements** of Article 82 EC to an end (Article 4 of the Decision). In particular, the Decision ordered Microsoft to supply interoperability information to interested

¹¹ See Article 9 of the Hearing Officer Decision, *supra*.

¹² Commission Notice on access to file, p. 7.

undertakings on reasonable and **non-discriminatory terms** and conditions ("the interoperability remedy", Article 5 of the Decision), and to offer a **full-functioning** version of its Windows PC operating system which does not incorporate Windows Media Player ("the tying remedy," Article 6 of the Decision).

The Decision also provided for the establishment of a mechanism to monitor proper and accurate implementation, including the appointment of a Monitoring Trustee, whose role is to provide expert advice to the Commission on Microsoft's compliance with the Decision. Microsoft was granted a deadline of 120 days to implement the interoperability remedy, and a deadline of 90 days to implement the tying remedy.

The obligations imposed by the Decision on Microsoft were suspended, pending the Court of First Instance's consideration of Microsoft's request for interim measures. Microsoft's application for interim measures was, however, dismissed by the President of the Court of First Instance on December 22, 2004.¹³ Consequently, Microsoft is under an obligation to comply with the Decision without delay.

On July 28, 2005, the Commission adopted another decision **concerning** the monitoring mechanism contained in Article 7 of the Decision.¹⁴ The July 2005 decision sets out, in particular, the framework under which the Monitoring **Trustee**, mentioned earlier, will work. Subsequent to this July 2005 decision, the Commission invited Microsoft to put forward candidates for appointment as Monitoring Trustee. On October 4, 2005, on the basis of a short list of candidates submitted by Microsoft itself, the Commission appointed as Monitoring **Trustee** by common agreement with Microsoft, Professor Neil Barrett, a British computer science expert.

¹³ Order of the President of the Court of First Instance of December 22, 2004 in Case T-201104 R, Microsoft v Commission, [2004] ECR, not yet reported.

¹⁴ See doc. C (2005) 2988 final.

It is important to clarify at this stage that Article 24 of Council Regulation 112003 grants the Commission the power to impose on parties daily penalty payments, not exceeding 5% of the average daily **turnover** of the parties concerned in the preceding business year. The purpose is to compel parties to put an end to infringement of Article 81 or 82 EC Treaty following a prohibition decision taken against them by the Commission pursuant to Article 7 of Regulation 112003 (see Article 24(1)(a)).

In this context, the Commission, on the basis of an opinion on the Technical Documentation from the **firm, OTR** ("Organization and Technology Research"), which is an outside technical expert **firm** retained by the Commission to assist it on technical issues, decided to open proceedings against Microsoft in order to compel it to comply with its obligations stemming from the Decision. Consequently, on November 10, 2005, the Commission issued another decision against Microsoft, pursuant to Article 24(1) of Regulation 112003 ("the Art 24(1) Decision"), for failure to comply with **the** interoperability provisions of its March 2004 Decision. This November 2005 decision is the first step in a procedure leading to the imposition of daily penalty payments pursuant to Article 24 of Regulation 112003. By means of this November 2005 decision, a penalty payment of up to 2 million per day was imposed on Microsoft, **from** December 15, 2005, in the event that it is established that Microsoft did not to comply with Article 5(a) and (c) of the Decision, **i.e.** its obligations to: (i) supply complete and accurate interoperability information, and (ii) to make that information available on reasonable terms, as explained earlier.

In the meantime, the Monitoring Trustee had been appointed and assumed his advisory functions. In light of his reports on **the** state of the Technical Documentation provided to the Commission by **Microsoft** in response to the Art 24(1) Decision, the Commission, on December

21,2005, adopted a Statement of Objections against Microsoft. This December 2005 Statement of Objections took the preliminary view that Microsoft had not yet complied with its obligation to supply complete and accurate interoperability information. A hearing was held at the request of Microsoft on March 30-31,2006 on the objections raised in the December 2005 Statement concerning compliance with the interoperability remedy.

III. ARGUMENT

In Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), the United States Supreme Court articulated the factors that a Court should consider when it rules on an application pursuant to 28 U.S.C. § 1782(a). According to the Supreme Court, a District Court may *inter alia* take into account: "*the receptivity of the foreign government or the court or agency abroad to U.S. federal-court assistance,*" and also "*whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.*" (*Id.* at 264) (emphases added).

The Commission respectfully submits that, in this case, it is not receptive to U.S. federal-court assistance for essentially two reasons: (1) the Commission does not require assistance ~~from~~ the United States federal courts under 28 U.S.C. § 1782(a) because the Commission has the power to lawfully obtain ~~from~~ Novell all documents relevant to its investigation; and (2) Microsoft's discovery request under 28 U.S.C. § 1782(a) is seen rather as an attempt to circumvent established rules on access to file in proceedings before the Commission.

A. There Is No Need Here For United States Federal Court Assistance.

It should first be noted that, contrary to what is suggested in the Court's preliminary order of March 28,2006, the Commission has the legal power, under Article 18 of Council Regulation No 112003, to "*require undertakings and associations of undertakings to provide all necessary information*" whether or not they are the target of an investigation or suspected of an

infringement of the competition **rules**. Indeed, the Commission has such powers and exercises them very frequently. If the parties or thud parties do not provide the requested information, the Commission can order and has many times in the past ordered production and imposed heavy fines, under Article 23 of Regulation 1/2003 (and Article 15 of the preceding Regulation 17/62), in order to induce compliance.

The Commission has made use of its powers to gather information and obtained from Novell the information which it deemed relevant in the present proceedings. More precisely, Novell was one of the companies which evaluated the technical documentation provided by Microsoft in regard to the interoperability remedy. Following this first evaluation, the Commission addressed a request for information, pursuant to Article 18 of Regulation No. 1/2003, to Novell on October 4,2005. Novell responded to this request on October 13, 2005. The information gathered by means of this request was relied upon in the December 21,2005 Statement of Objections addressed to **Microsoft**.¹⁵

This information gathering power of the Commission, under Article 18 of Regulation No. 112003, does not and did not depend on Novell being a party to the Commission proceedings against Microsoft. Novell is in any event an "interested third party: pursuant to Article 13 of Regulation No 773/2004, in the proceedings against Microsoft. Moreover, Novell, as an "interested third party: was also heard at the oral hearing held at the request of Microsoft on March 30-31,2006.

In sum, the Commission has all the power to request any information from Novell or any other third company at any time that is relevant to the proceedings in the Microsoft case. Therefore, the Commission authoritatively submits to the District Court that it does not need, in

¹⁵ See paragraph 22 of the Statement of Objections. For the precise formulation of the questions raised, see footnote 23 of the Statement of Objections.

the present case, judicial assistance **from** the United States federal courts under Section 1782(a). Indeed, the Commission has already exercised these powers in the present case to gather **from Novell** all the information it deemed necessary in the context of the relevant proceedings in the Microsoft case concerning the interoperability remedy.

B. Ordering Discovery Would Circumvent The European Community Rules On Access To File.

In the Commission's view, a discovery request under 28 U.S.C. §1782(a) relating to an ongoing investigation risks circumventing the established rules and procedures applicable to access to file in proceedings before the European Commission chiefly for the following reasons.

1. *Microsoft's rights of defense are adequately protected by the applicable European rules on access to file.*

The Commission submits that Microsoft's rights of defense, in relation to the objections raised in the December 2005 Statement of Objections for failure to comply with the interoperability remedy, are adequately protected by the existing rules on access to file that are routinely applicable to all parties subject to such competition law proceedings before the European Commission.

Indeed, once it received the above-mentioned Statement of Objections, Microsoft requested access to the file and to the documents identified in the annex to the Statement of Objections, including all the documents exchanged between the Commission **services** and the Monitoring Trustee and all the documents exchanged between the Commission's Services and the company OTR in relation to all matters covered by the Statement of **Objections**.¹⁶ By letter of January 30, 2006, Microsoft requested further **access** to the Commission's file pertaining to the correspondence between the Commission, on the one hand, and third parties such as the companies Sun, Oracle, IBM and **Novell**, on the other hand. Furthermore, Microsoft requested

¹⁶ E-mail from Jean-Yves Art, Microsoft's Director of Competition EMEA, of December 23, 2005.

access to file reflecting the discussions that have taken place between third parties, in particular Sun, IBM and OTR, and the Monitoring Trustee.¹⁷

Following Microsoft's request, the Hearing Officer took the position that the correspondence between the Commissions' services, on the one hand, and the Monitoring Trustee and OTR, on the other hand, constitute internal documents which, according to the applicable rules and provisions explained earlier, are in principle not accessible to Microsoft.¹⁸ By contrast, after confidentiality waivers had been provided by those undertakings participating as third parties, Microsoft was given timely access to communications between the Commission and those third parties that related to the issues raised in the Statement of Objections of December 21, 2005.¹⁹

The Commission has, therefore, given to Microsoft access to all third party documentation in its possession, to which Microsoft is lawfully entitled. However, by letter of March 2, 2006, Microsoft specifically requested to have further access to *"any material submitted by its adversaries to the Trustee and OTR."*²⁰

In order to verify whether this further request by Microsoft was well-founded, the Commission asked the company OTR and the Monitoring Trustee to disclose and transmit to the Commission any documents they had received directly, without the Commission's knowledge, from third parties or from Microsoft in carrying out their respective duties, as well as any minutes they may have taken as regards communications with third parties or with Microsoft.

¹⁷ Letter from Microsoft's counsel Ian Forrester to the Hearing Officer of January 30, 2005.

¹⁸ Correspondence between the Commission and the experts is **only** rendered accessible if it is necessary for understanding the **methodology applied** in the **experts'** reports or for **testing** their technical correctness. Accordingly, the Hearing Officer took the view that one piece of this **correspondence was** indispensable **for** Microsoft's **defense** and ensured that access was effectively granted to it.

¹⁹ Letter from the Hearing Officer to Ian Forrester of February 8, 2006, a copy of which is **attached** as Exhibit F.

²⁰ **Letter** from Georg Berrisch, **Microsoft's** counsel, of **March 2, 2006**, a copy of which is attached as Exhibit G.

In line with well established case law," the Commission, upon receipt of these documents from the Monitoring Trustee, verified whether third parties could lawfully claim confidentiality on any of the documents exchanged with the Trustee. After having examined the confidentiality claims of third parties, the Commission transmitted to Microsoft, by letter of March 28,2006, all the communications between third parties and the Monitoring Trustee for which no reasonable confidentiality claims were made by the parties and which related to the objections raised in the December 2005 Statement of Objections. ²²

As regards communications between the company OTR and third parties, OTR has confirmed in writing to the Commission that no such communications relating to the Statement of Objections have occurred which are not documented in the Commission's file and to which Microsoft has therefore not already been granted access. Therefore, it came as a surprise to the Commission that Microsoft had decided to turn to a United States federal court for assistance under 28 U.S.C §1782 in order to gain access to the file, which it had one day earlier (i.e. on March 2,2006) sought to obtain from the Commission and with respect to which a proceeding was pending before the Hearing Officer. ²³

The Commission submits that Microsoft's rights of defense in relation to the objections raised in the December 2005 Statement of Objections have been and are sufficiently and adequately protected. If Microsoft considers that its rights of defense or any other right is being violated or not respected in this case, it can bring the matter before the Court of First Instance for

²¹ See Judgment of the Court of June 24, 1986 in Case 53/85, AKZO Chemie BV and AKZO Chemie UK Ltd v Commission [1986] ECR 1965, a copy of which is attached as Exhibit H.

²² Letter of March 28, 2006 from Cecilio Madero, Head of Unit, DG Competition, to Georg Berrisch, Microsoft's counsel, a copy of which is attached as Exhibit I.

²³ In fact, at the time of writing the present intervention, the Hearing Officer has already replied to almost all of Microsoft's requests for access to file. What the Hearing Officer is still cross-checking is whether some of the correspondence between the Commission and the experts is necessary for Microsoft's defense and needs therefore to be rendered accessible. Moreover, Microsoft has not exhausted the possibility it has to turn again to the Hearing Officer with regard to the decision he has taken that certain documents submitted by third parties are confidential and unrelated to the case, if it considers it appropriate and necessary for its defense.

judicial review. Therefore, Microsoft's application under Section 1782(a) does not appear to be a genuine and reasonable request, but rather an attempt to circumvent the rules on access to file which are routinely applicable to all parties in proceedings of this nature before the Commission.

2. ***There is a serious risk that granting the discovery requests to Microsoft under 28 U.S.C. §1782(a) relating to an ongoing antitrust investigation is affirmatively harmful to the Commission's sovereign interests.***

The Commission further submits that the discovery requests made by Microsoft under 28 U.S.C. §1782(a) from other participants in the Commission's proceedings, if granted, would seriously compromise the Commission's powers of investigation and competition law enforcement.

First, the Commission submits that there is a potential risk of subversion of the regulatory limits on an antitrust defendant's access to file containing information which the Commission gathers in its investigation. Those limits are lawfully imposed by the European Community, in the exercise of its sovereign regulatory powers in its territory and pursuant to the public interest. Indeed, as a general rule, the Commission is bound by an obligation of confidentiality which exists under the EC Treaty,²⁴ and which applies *inter alia* to protect confidential information and business secrets obtained from entities and individuals under its information gathering powers. As a result, there are certain elements of the Commission's files (as explained, internal documents, commercial information and business secrets) to which a defendant is denied access, typically by way of appropriate redaction.²⁵ Should defendants in antitrust investigations before the Commission be granted discovery requests under 28 U.S.C. §1782(a), there would be a serious risk that the confidentiality limitations resulting from the rules on access to file would not be fully respected, for example where the relevant United States rules concerning confidential or

²⁴ See the Treaty Establishing the European Community, Article 287.

²⁵ See Sections IV.B. and C., paragraphs 39-49, of the Commission's Notice on access to file, *supra*.

otherwise privileged documents differ **from** those applicable in the European Community. The careful balance to be carried out on the basis of the facts of each individual proceeding between the defendant's right to access to file and the information provider's right to confidentiality could be seriously jeopardized. In the same vein, the protection space for internal Commission deliberations, contributing to the quality of the decision making, could be jeopardized should internal Commission documents be disclosed to parties through collateral proceedings in the United States courts.

Second, the rules governing the conduct of competition law proceedings before the Commission impose restrictions on the purposes for which the documents obtained through access to file can be used. As explained, Article 15 of Commission Regulation 7731/2004 stipulates that documents obtained through access to file may only be used “[...] *for the purposes of judicial and administrative procedures for the application of Articles 81 and 82 of the Treaty.*” Furthermore, the Commission's Notice on access to file states that: *“Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.”*²⁶ As already explained, the objective of these provisions is to sanction unlawful use of the information obtained, in view of the public interest (efficient law enforcement) and the substantial economic interests at stake. Therefore, the Commission submits that there is a serious risk that the documents, which are subject to a discovery request under 28 U.S.C. §1782(a), may not be protected at all or not protected to the same extent by the rules applicable in other jurisdictions. This is another likely scenario in which the specific rules on

²⁶ 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 Council Regulation (EC) No 139/2004, in OJ 2005/C 325, 22.12.2005, p. 7.

access to file that the Commission has lawfully placed on defendants subject to competition law enforcement in the European Community could be **circumvented**.²⁷

Third, a Commission decision granting or **refusing** access to file to a defendant in a competition law case is subject to judicial control by the Court of First Instance and the European Court of Justice. These courts have emphasized that the right to access to file is "*a corollary of the principle of respect for the rights of the defense*."²⁸ However, these courts have also emphasized that not every failure by the Commission to disclose a document to a defendant constitutes a breach of the rights of **defense**.²⁹ It is for the Community judiciary to finally establish whether a "*document which was not disclosed might have influenced the course of the proceedings and the content of the Commission's decision*,"³⁰ which could lead to the annulment of the Commission's decision. **Therefore**, a discovery order by a United States federal court granting access to documents to which the Commission has not granted access would risk interfering seriously with the above-mentioned review by the European Courts concerning the rights of defense and, thus, is likely to circumvent well-established domestic **rules** on judicial review in the European Community.

C. Conclusion

In conclusion, the European Commission submits that if the Court were to deny Novell's Motion to Quash and permit the discovery requested by Microsoft, there would be a serious risk

²⁷ The list of examples contained in this intervention is not exhaustive as to the potential areas where differences between the European Community's and the United States' legal systems are likely to occur. Another example is that the Commission and companies established in the European Community are under obligations as to the treatment of so-called "personal data" contained in documents and information exchanged. See, respectively, Regulation (EC) No. 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001, p. 1), and Directive 95/46 on the Protection of Individuals with regard to the Processing of Personal Data (OJ L 281, 23.11.95, p.31).

²⁸ See Judgment of the Court of January 7, 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S, [2004] ECR, not yet reported, at paragraph 68.

²⁹ See Judgment of the Court of January 7, 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S, [2004] ECR, not yet reported, at paragraphs 72 and 74, a copy of which is attached as Exhibit E.

³⁰ See Judgment of the Court of January 7, 2004 in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S, [2004] ECR, not yet reported, at paragraph 76.

of contravening principles of international comity by interfering with law enforcement and sovereign policy choices in the handling of competition law proceedings in the European Community. The European Commission considers that it already has all the necessary powers to obtain the information and documents relevant for its competition law enforcement and it has, in fact, exercised its powers in this case. The European Commission also considers that **Microsoft's** rights of defense are adequately protected by the rules applicable in the European Community.

The European Commission, therefore, respectfully submits that it is not receptive to the judicial assistance requested by Microsoft under 28 U.S.C. § 1782(a) because the discovery request in this case is unjustified, unduly intrusive and poses a serious risk of circumventing the applicable rules on access to file in competition law investigations in the European Community.

Respectfully submitted,

Commission of the European Communities
By its Attorneys,

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Dated: April 5, 2006

CERTIFICATE OF SERVICE

I certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as ~~non-registered~~ participants on April 6, 2006.

/s/ Michelle D. Miller

EXHIBIT G

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT H

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT I

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT J

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT K

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**