

FIT TO JUDGE?

The European Commission as an Adjudicator  
in the Community Competition Regime

Gordon H. Downie

Florence, August 1989

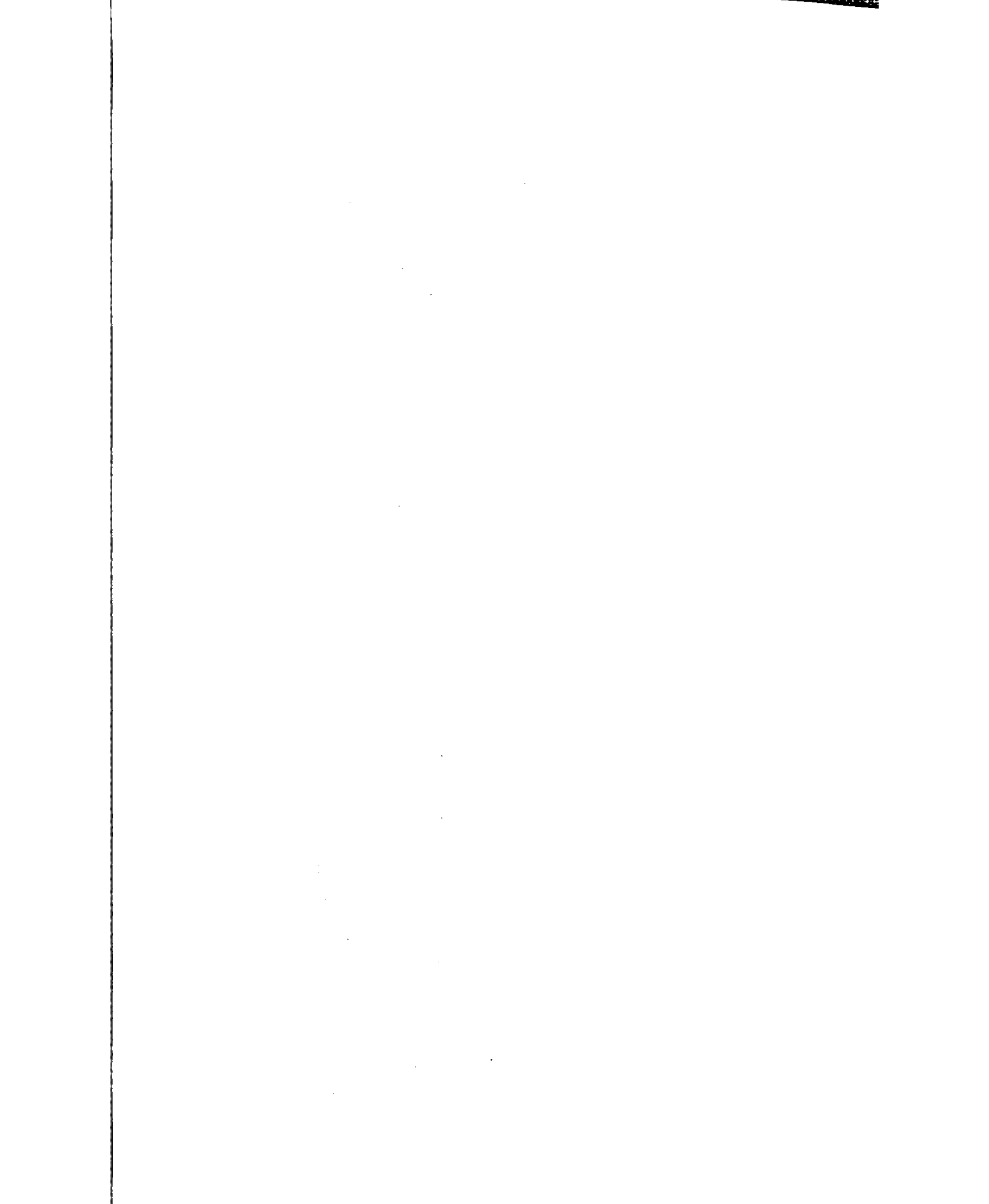
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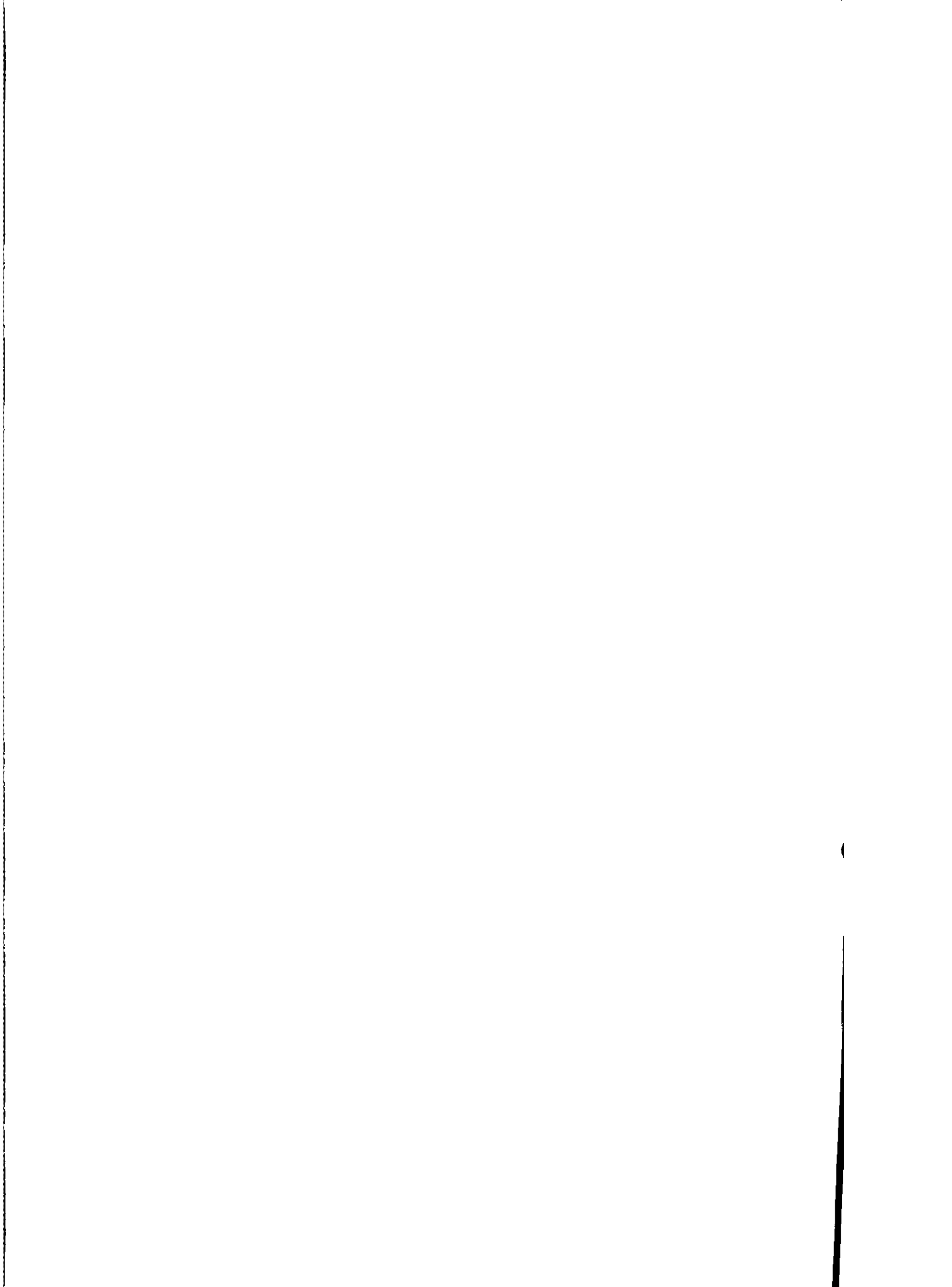
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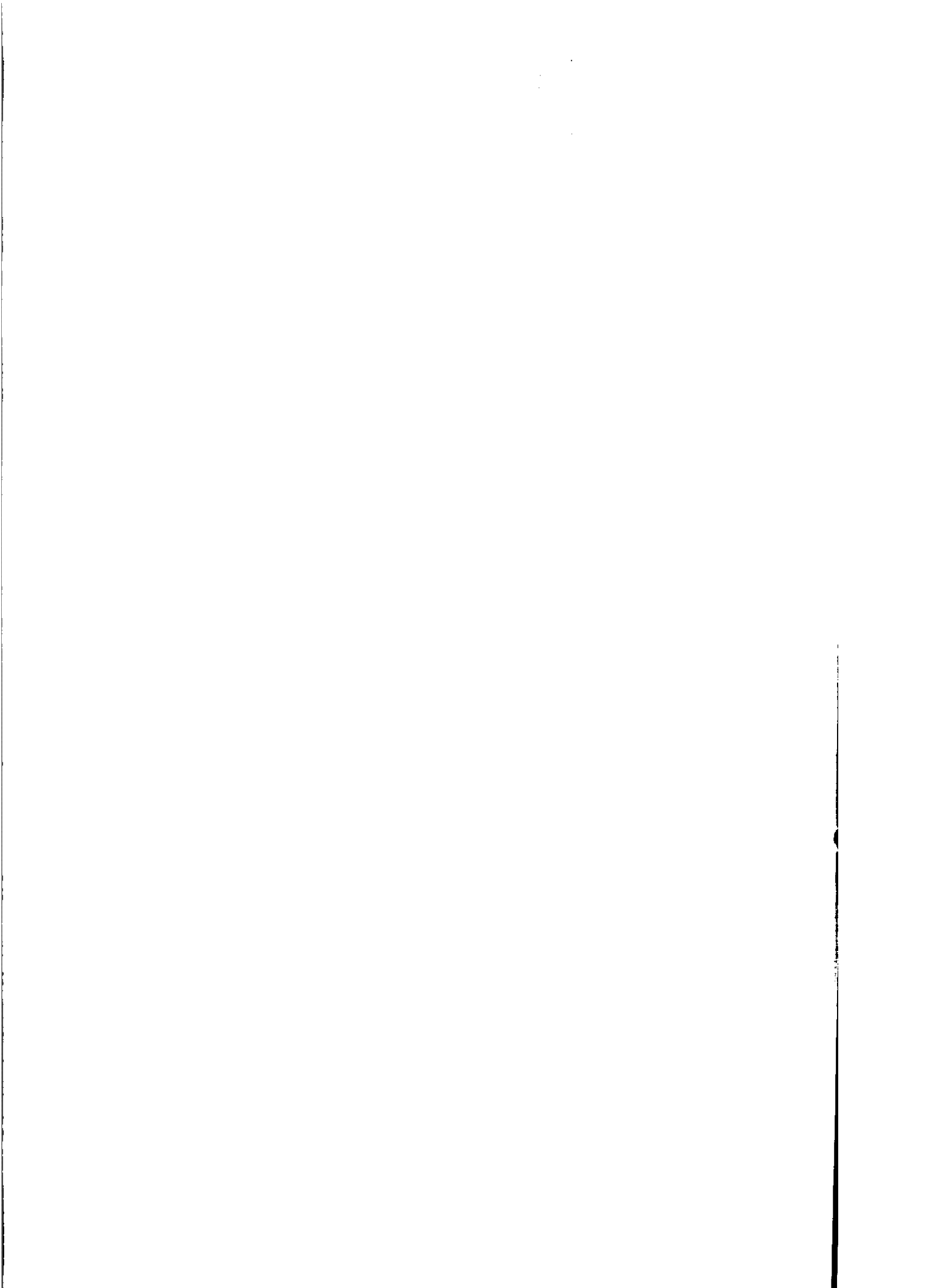


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## INTRODUCTION

### Values and Aims

It has been stated that,

"The process of rational justification always grounds itself ultimately on an assumption of value or the presumed truth of a value judgment which itself is not subject to justification save by way perhaps of circular argumentation"<sup>1</sup>.

The arguments presented in this thesis, accordingly, are grounded on the assumed value of the well known constitutional principle, which can be summed up in the Latin maxim:

#### **Nemo Iudex in Sua Causa**

Moreover, the 'nemo iudex' principle is, in this paper, treated as a necessary corollary of that equally well known constitutional principle - the 'Rule of Law' or 'Government under Law' (whose value is itself presumed).

This thesis aims to explore the significance of the 'nemo iudex' principle in contemporary legal decision-making. In doing so, it shall address two central issues: first, which criteria can we

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1. Lucinda Vandervort, "Political Control of Independent Administrative Agencies", (1979) Law Reform Commission of Canada, 104.



employ to define judicial or adjudicative decision-making and distinguish it from non-adjudicative (more simply, administrative) decision-making?; second, to what extent do the characteristics of adjudication themselves imply structural guarantees of the 'nemo iudex' variety?

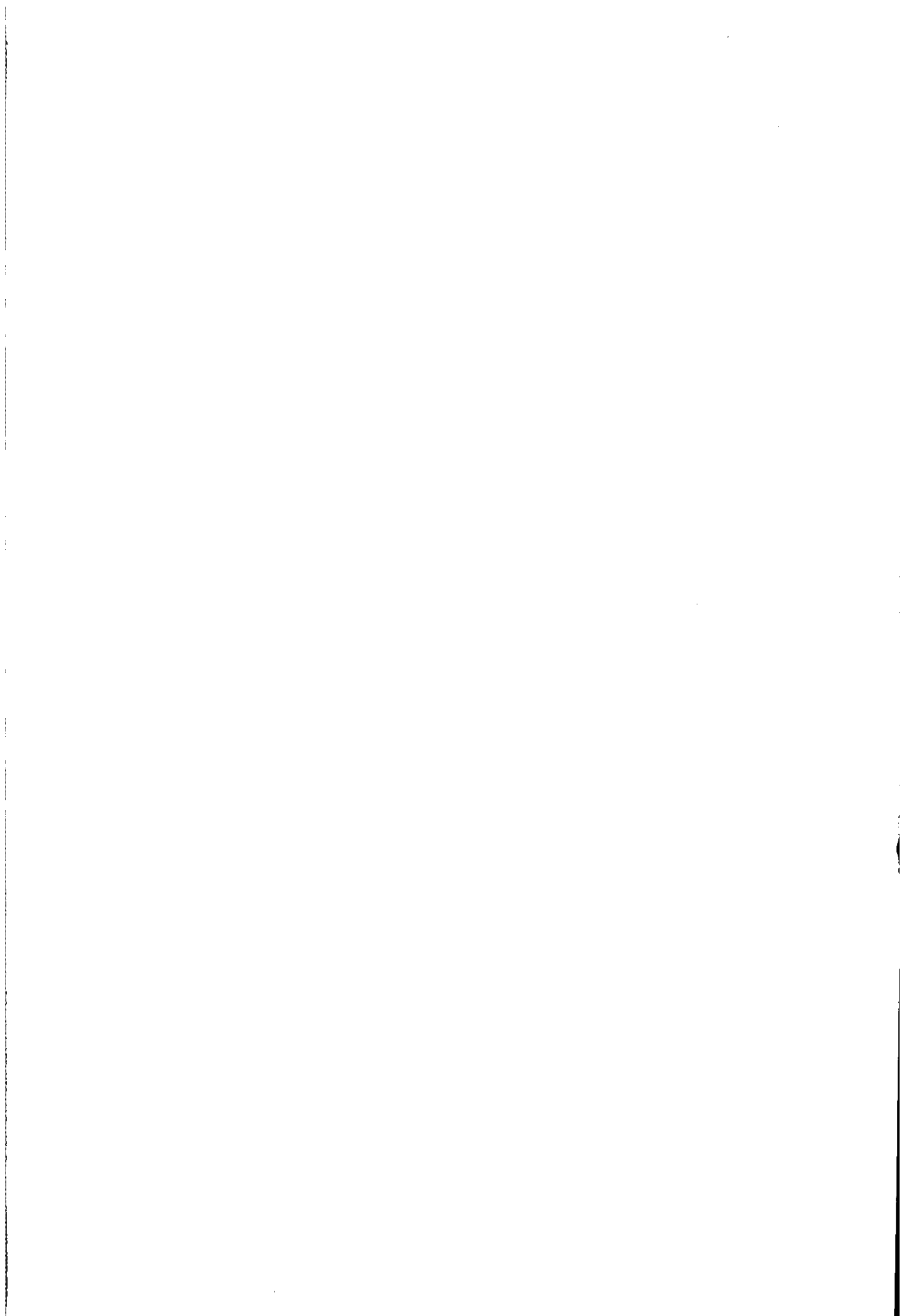
The thesis also aims to combine this theoretical analysis with an examination and critique of the system established by Council Regulation 17/62 EEC for dealing with infringements of Articles 85(1) and 86 of the Treaty of Rome.

### The Methodology used in this Thesis

There are two methods of analysing administrative and adjudicative decision-making: the formal and the functional. The essential difference between the two methods is succinctly noted by an FIDE conference, which, selecting the first rather than the second, stated,

"We ... agreed that the question whether a procedure was to be regarded as 'administrative' [or 'adjudicative'] should depend upon the nature of the authority taking the decision, not upon the subject matter of the decision".

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2. Federation Internationale Pour le Droit Européen (FIDE), "Les garanties fondamentales dans la procédure administrative", Rapports du 8eme Congrès, 22-24 juin 1978, Copenhague 1978, Vol. 3, General Report of J.P. Warner, 2.1 (emphasis added). See also the discussion of the so-called 'English' (functional) and the 'Continental' (formal) approaches to definition - in the context of judicial review - in "Information in EEC Competition Law Cases", J.M. Joshua, 1986 ELRev, 419, 428-429.



Unlike that conference, this thesis will employ a functional, as opposed to a formal, approach in analysing administrative and adjudicative decision-making. In other words, each shall be defined and differentiated according to their inherent nature rather than by reference to the bodies which exercise them. There are two related reasons for adopting this approach.

### The Problem of History

It is the author's opinion that those who discuss administrative and adjudicative decision-making in a formal way encounter serious definitional problems which derive from the historical contingencies of their method. Defining a decision-making power as "administrative" because it is exercised by an Executive Agency and not by a Court of Law presupposes a governmental set-up which is historically specific. Just as one could be certain in the early 19th Century that the decision of a Court was 'judicial', so one could rely on a Ministerial decision being an 'executive' one. The time in question was one in which the division of labour between Executive and Courts was clearly demarcated. The executive branch of Western government then dealt largely with the limited range of discretionary activities involved in the conduct of foreign relations, the safeguarding of national security and the maintenance of public order. The constitutional separation of executive and judicial powers in France following on the events of 1789, for instance, reflects a concern to guarantee this same

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clear division of labour<sup>3</sup>.

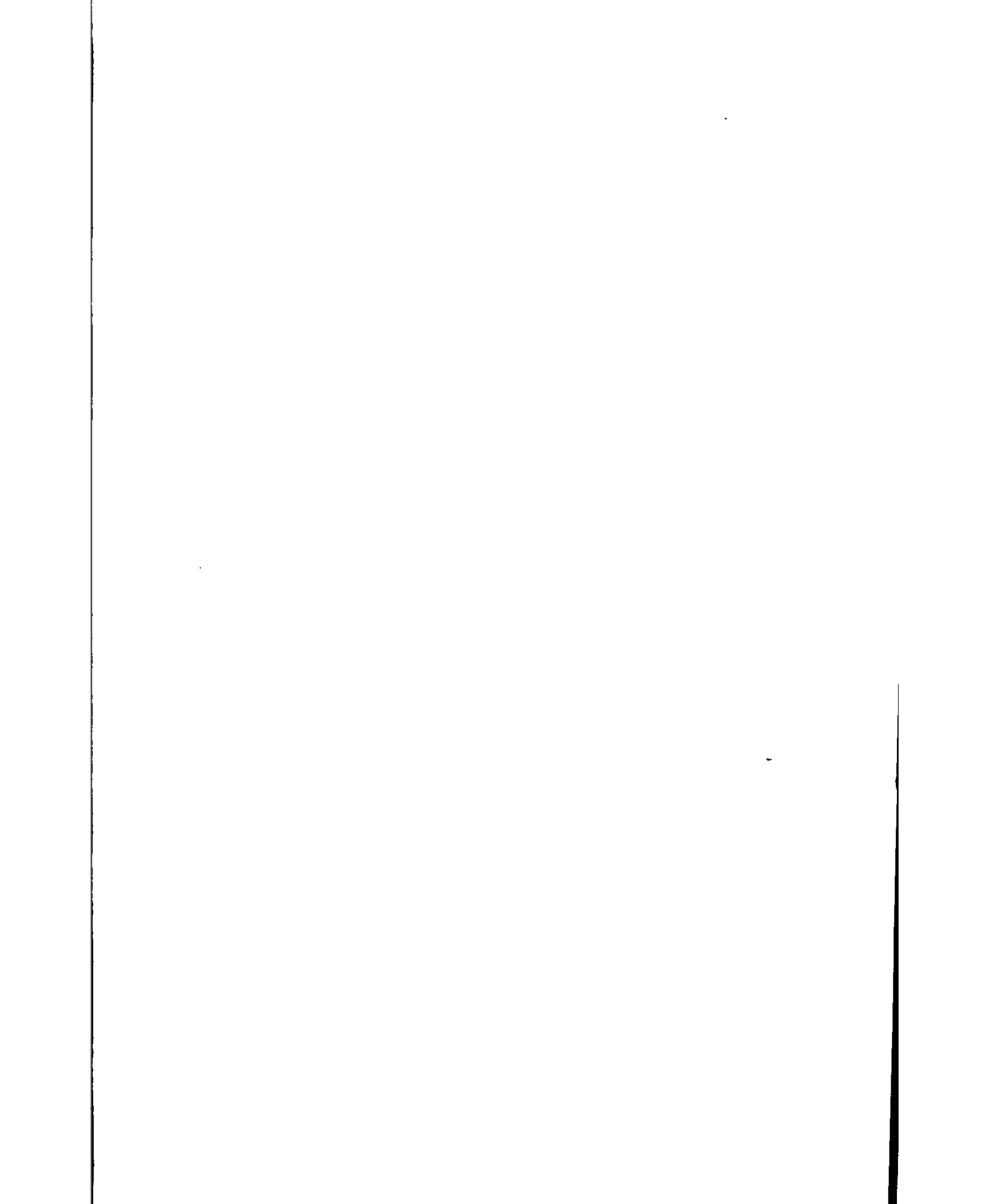
Nowadays, however, it would be dangerous indeed to rely upon such a presupposition. With the rise of the Welfare State, the decisional powers of the executive branch have expanded enormously, intruding into areas which, two hundred years ago, were considered to be the exclusive concern of either the legislative or judicial branches. In fact, the decisions of a Minister (or, more usually, an administrative agency) taken in 1989 are just as likely to bear on those two fields as on the traditional preserves of treaty-making, defence or policing.

The rise of administrative agencies with competences which 'straddle' the traditional divide have caused major problems for those adhering to the formal approach. In the case of France, these difficulties are reflected in the contemporary debate over the inefficacy of the formal bi-partitite classification of 'organes administratifs' and 'organes juridictionnels'<sup>4</sup>. "Le juriste qui aime les catégories juridiques claires et précises", observes Lorthe, "ne manquera pas d'éprouver une certaine

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3. See Constitution of 3 September 1791, Chapter I, Title III, Articles 3, 4 and 5; also Chapter V, Articles 1 and 3.

4. Disquiet about the continuing value of the formal distinction was voiced as early as 1945 by Jacques Mabileau in his, "De la Distinction des Actes d'Administration Active et des Actes Administratif Juridictionnels" Thèse, Paris, at pages 266-267. Recent judicial decisions provoking criticism for their adherence to this formal distinction include: Decision of Conseil d'Etat of 13.3.81 [Recueil Dalloz Sirey (Jurisprudence) 1981, 418, with criticism by C. Gavalda at 421] and Decision of Conseil Constitutionnel of 23.1.87 [Recueil Dalloz Sirey (Jurisprudence) 1988 117, 120, with criticism by R. Drago in La Semaine Juridique (Doctrine) 1987, 3300, para. 7].





insatisfaction dans la mesure où il lui sera impossible de caractériser avec suffisamment de netteté l'organe qu'il étudie"<sup>5</sup>. By employing a functional approach, this thesis aims to use clear and precise legal categories to categorise governmental decision-making (and, in particular, to the EC Commission) more precisely than Lorthe and others using the formal approach find possible.

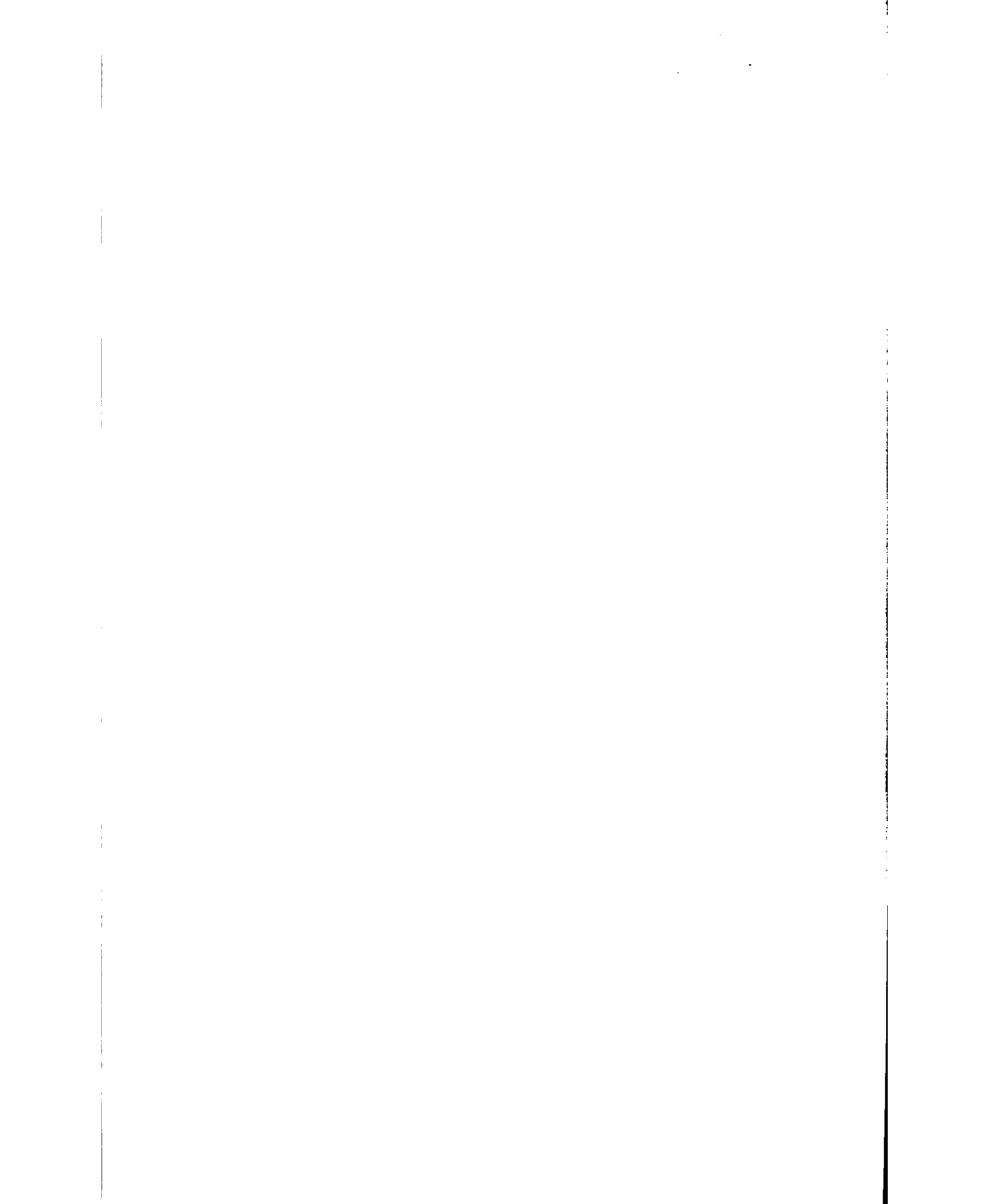
#### Functionalism as a means of building a Powerful Critique of Existing Legal Institutions

The inability of the formal approach accurately to characterise the evolving kinds of legal decision-making is cause for more than mere academic vexation. In addition, its definitional shortcomings render it defective as a tool for criticising the structural guarantees provided by real-life decision-making processes.

If one accepts, as we have, the value of the 'nemo iudex' principle in adjudication, then the choice of which methodology to use in criticising the structural guarantees granted to individuals by a real-life institution becomes an extremely significant one. A formalist methodology necessarily defines as "administrative" all decision-making powers exercised by an executive agency. In contrast, a functionalist methodology, can differentiate administrative and adjudicative power within an executive agency. Accordingly, a 'nemo iudex' critique based on a

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5. "Le Contrôle Administratif Français des Concentrations Economiques", Revue du Droit Publique 1980, 471, 495.



functionalist methodology can be employed against the real-life guarantees provided to individuals by an agency in instances where an analysis depending on the formal approach cannot.

### Structure of the Thesis

The thesis will begin, in chapter one, with an examination of the legal powers of decision-making exercised by the Commission under Council Regulation 17/62 EEC. In chapter two we shall proceed to define, in functional terms, two principal types of legal decision-making: administration and adjudication. This chapter shall also attempt to categorise the Commission's decision-making powers under Regulation 17 in terms of these types. Chapter three is designed to explain the procedure and practice of the Commission in taking an adjudicative decision to apply Article 85(1) or 86 EEC to an individual undertaking (an infringement decision). In chapter four we shall develop the functional analysis introduced in chapter two and examine the structural implications of administrative and adjudicative decision-making. In the light of the conclusions in chapter four, chapter five will discuss the inappropriate structural guarantees provided by the Commission in exercising adjudicative decision-making power under Regulation 17. Chapter five will also discuss the reaction of the Court of Justice to the arguments that this form of inappropriateness is unconstitutional.

In chapter six we shall examine the manner in which the Court of Justice has employed a distinctively 'high-level' approach in reviewing the exercise of adjudicative decision-making under Regulation 17 and we shall assess the degree to which this form of review can compensate for the lack of 'nemo iudex' guarantees at

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first instance, which was highlighted in chapter five. Chapter seven is concerned to show the practical problems encountered by the Court - in terms of the shortage of judicial resources - in undertaking this 'high-level' form of judicial review. The creation of the Court of First Instance in October 1988 is the subject of chapter eight, which examines its modus operandi and its likely contribution to improved 'high-level' judicial review of Commission infringement decisions. Finally, in chapter nine we will take a brief look at the alternatives to ex post facto 'high level' judicial review for rectifying 'nemo iudex' problems in Commission's procedure for adjudicative decision-making under Regulation 17.

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THE POWERS OF THE COMMISSION UNDER THE EEC  
COMPETITION REGIME

Articles 85 and 86 EEC

Articles 85 and 86 of the Treaty of Rome form the basis for the competition law regime of the EEC.

On one hand, Article 85, paragraph 1, prohibits undertakings from participating in restrictive commercial agreements or concerted practices which, inter alia, "have as their object or effect the prevention, restriction or distortion of competition within the common market". On the other, Article 86 prohibits the, "abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it".

Notwithstanding the prohibition of Article 85(1), paragraph 3 of that Article, permits the provisions of paragraph 1 to be declared individually or categorically inapplicable to agreements or concerted practices which do contribute, "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit", and which do not, "impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives [or] ... afford such undertakings the opportunity of eliminating competition in respect of a substantial part of the products in question".





Article 87 EEC

Article 87 EEC requires the Council to adopt legislation to give effect to the principles set out in Articles 85 and 86. Paragraph 2 of Article 87 provides that such legislation shall be designed, inter alia, "to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 by making provision for fines and periodic penalty payments", and, "to lay down detailed rules for the application of Article 85(3)".

The Council has enacted two principal Regulations in discharging its duty under Article 87: Regulations 17/62 and 19/65 EEC.

Regulation 17/62 and 19/65 EEC

Regulation 17/62: Decision Making Powers

Council Regulation 17/62 EEC<sup>6</sup>, enacted under Article 87 EEC, grants to the Commission two broad sorts of decision making powers<sup>7</sup>.

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6. Council Regulation 17/62 of 6th February 1962, OJ (1962) L 13/204.

7. The power of the Commission to certify under Article 2 of the Regulation that, on the facts in its possession, it does not consider there are ground for proceeding under Articles 85(1) or 86 EEC - "negative clearance" - is not included here as a "decision making power".

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It provides by Article 9, paragraph 1 that the Commission has sole power to declare by Article 85(1) EEC inapplicable pursuant to Article 85(3) of the Treaty. However, the Commission is barred from taking such a decision unless and until the relevant agreement or practice has been notified by one or both of the parties [Article 4(1)]. Under Article 8(1) the Commission must issue its decision to disapply Article 85(1) for a specified period and may make the "exempted" status of an agreement or practice subject to certain conditions and obligations. If (a) the facts basic to making the "exemption" decision change; or (b) the parties breach an obligation attached thereto; or (c) the information upon which the decision is based is incorrect or was induced by deceit; or (d) the parties abuse the exemption granted by the decision, then the Commission may, under Article 8(3), revoke<sup>8</sup> or amend its decision or prohibit specified acts by the parties. Breaches of the obligations attached to decisions under Article 8(1) may attract a fine by Commission decision under Article 15(2)(b) of up to 10% of annual turnover. Compliance with a prohibition ordered under Article 8(3) can be compelled by Commission decision under Article 16(1)(b) imposing a periodic penalty payment of between 50 and 1000 units of account per day.

By Article 9, paragraph 2, the Regulation provides that the Commission shall have power, to apply Article 85(1) and Article 86

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8. In cases (b), (c) and (d) revocation can be retroactive [Article 8(3)].

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of the Treaty"<sup>9</sup>. The Commission may exercise this power, "upon application" by Member States or by natural or legal persons who claim a legitimate interest, or, "upon its own initiative" [Article 3(1),(2)]. Decisions in exercise of this power may require undertakings found to have infringed Articles 85(1) or 86, "to bring such infringement to an end" [ibid] and the Commission is empowered by Article 16(1)(a) to impose periodic penalty payments of between 50 and 1000 units of account per day on undertakings to compel them to do so. Independent of the power to order cessation of an infringement, Article 15(2)(a) of the Regulation provides that the Commission may impose fines of up to 10% of annual turnover on undertakings against which it holds to have violated Articles 85(1) and/or 86 EEC.

#### Regulation 19/65: Legislative Powers

Council Regulation 19/65 EEC<sup>10</sup>, also enacted under Article 87 EEC, provides by Article 1 that the Commission may "by regulation declare that Article 85(1) shall not apply to categories of agreements to which only two undertakings are party" and which possess certain other broad characteristics.

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9. Unlike the power to declare Article 85(1) EEC inapplicable, this power was not granted exclusively to the Commission. This was intended to enable national courts to share the burden of enforcing Articles 85(1) and 86 EEC. The Court of Justice, by declaring these provisions directly effective, has emphasised this concurrent jurisdiction (Case 127/73, 'BRT v SABAM [1974] ECR 5, pp 62-63).

10. Council Regulation 19/65 EEC of 2nd March 1965, OJ (1965) L 36/533.

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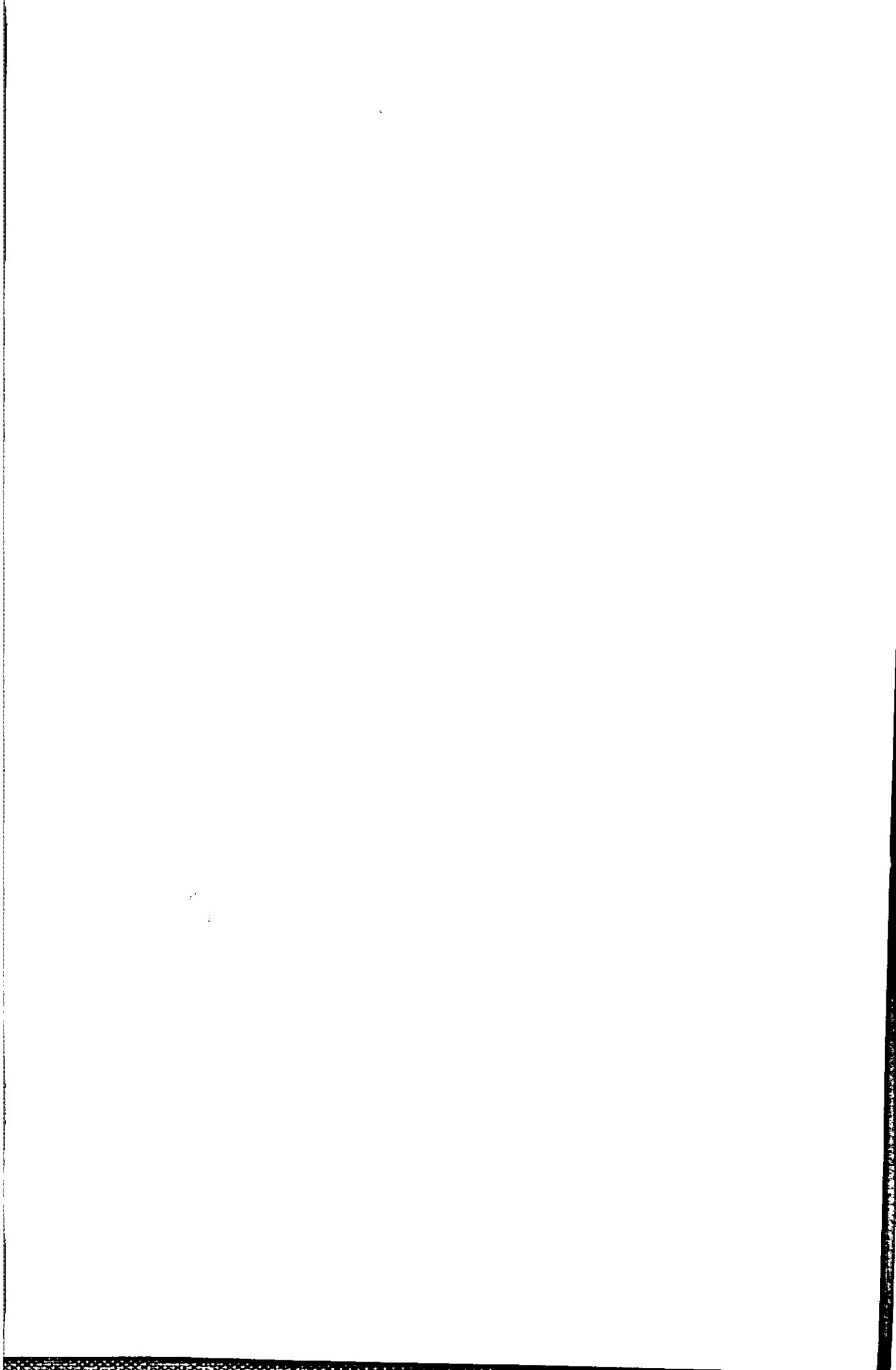
## Summary

In summary, then, we see that the Commission has power, (a)., to apply Articles 85(1) and 86 EEC by decision to individual undertakings (with the option of imposing fines upon them); (b)., to take decisions disapplying Article 85(1) in individual cases pursuant to Article 85(3) EEC; and (c)., to enact regulations which exempt whole classes of agreements or concerted practices from the same prohibition. We can safely distinguish between powers (a) and (b) on one hand, and power (c) on the other. Power (c), with which we are not interested, is a legislative power, (i.e. a power to promulgate general rules of law capable of application to concrete cases) while the other two are examples of decision making power (i.e. power to apply general rules of law in these concrete cases). We shall now proceed to examine the rules of law to which this decision making process must conform, which are imposed by the Treaty and by secondary legislation enacted by the Council and the Commission itself.

Legislative Rules Governing Decision Making under  
Regulation 17/62: Articles 190 and 191  
and Regulations 17/62 and 99/63 EEC

### Article 190

Article 190 of the Treaty provides inter alia that, "[r]egulations, directives and decisions of the Council and of the Commission shall state the reasons on which they are based". It will be clear that Article 190 applies to decisions issued by the





Commission under Regulation 17/62, with respect to the propositions of law and fact upon which they are founded.

#### Article 191

Article 191 of the Treaty provides inter alia that, "[d]irectives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification". Article 191 therefore imposes a clear duty upon the Commission to notify decisions taken under Regulation 17/62 to affected undertakings in order that they can take effect.

#### Regulation 17/62: Information Gathering

The Commission is granted a wide selection of information gathering powers by Regulation 17/62. The only occasions on which undertakings are likely to step forward and provide the Commission voluntarily with information are either when they are complaining about the activities of other undertakings, or are notifying details of an agreement or practice for the purpose of obtaining an exemption (i.e. a decision disapplying Article 85(1) in pursuance of Article 85(3) EEC).

Article 11(1) provides that, "in carrying out the duties assigned to it ... [inter alia] by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member

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States and from undertakings and associations of undertakings"<sup>11</sup>. Under Article 11(3), the Commission may request undertakings to produce information which it wishes to see within a specified time limit. In the event that the information requested is not supplied within the time limit, or is supplied in incomplete form, Article 11(5) empowers the Commission to require the supply of the information by decision.

Article 14(1) further provides that in, "carrying out the duties assigned to it ... [inter alia] by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings". Duly authorised Commission officials are empowered by Article 14(1), "(a) to examine the books and other business records; (b) to take copies of or extracts from the books and business records; (c) to ask for oral explanations on the spot; (d) to enter any premises; land and means of transport of undertakings". Investigations may be undertaken either with or without a decision of the Commission. Under Article 14(2), authorised officials producing written authorisation stating the subject matter and purpose of their visit can request the co-operation of an undertaking with an investigation. Under Article 14(3), undertakings can be required to submit to an investigation of premises which is ordered by decision of the Commission, which again states the subject matter and purpose of the investigation. If an undertaking opposes an investigation ordered under Article

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11. Furthermore, Article 12 permits the Commission specifically to undertake inquiries into an entire economic sector of the common market if it suspects that competition within that sector is being restricted or distorted.



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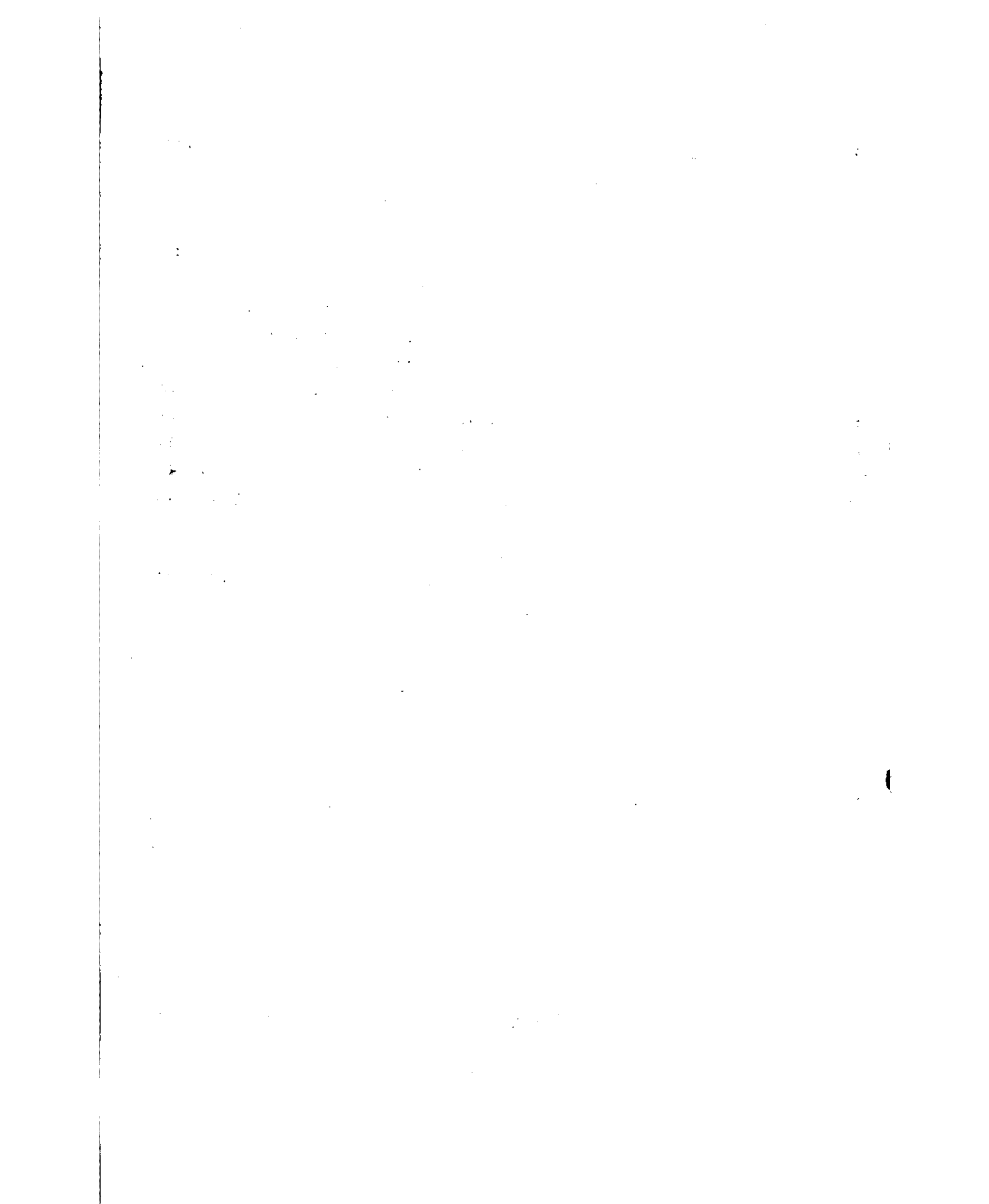
14(3), the relevant Member State is obliged by Article 14(6) to, "afford the necessary assistance to the officials authorised by the Commission".

The Commission is armed with substantial penal weapons to discourage the intentional or negligent obstruction or abuse of its information gathering operation by undertakings. Under Article 15, Undertakings which supply incorrect information under Article 11(3) or (5), or supply incomplete information required under Article 11(5); or which produce business records in incomplete form in an investigation under Article 14(2) or (3), or refuse to submit to an investigation ordered under Article 14(3), may, by decision, be fined from 100 to 5000 units of account. In addition, under Article 16 the Commission may impose periodic penalty payments upon undertakings of from 50 to 1000 units of account per day, in order to compel them to supply complete and correct information required under Article 11(5), or to submit to an investigation ordered under Article 14(3).

#### Regulation 17/62: Decision Preparation

Article 10(3) of Regulation 17/62 provides that before the Commission exercises its decision making power it must consult an Advisory Committee on Restrictive Practices and Monopolies which consists of expert representatives of the Member States. The report of the outcome of this consultation is annexed to the draft version of the Commission decision, but is not made public [Article 10(4)].

Article 19(1) of the Regulation provides that before taking relevant decisions the Commission must give the undertakings



concerned an opportunity to be heard on the matters to which the Commission has taken objection. These matters will be those elements of an agreement or concerted practice against which the Commission proposes to apply Article 85(1) or 86 EEC, or, alternatively, in respect of which the Commission refuses to disapply Article 85(1) EEC. Article 19(2) provides that natural or legal persons demonstrating a sufficient interest to the satisfaction of either the Commission or the competent authorities of the Member States shall also be given the opportunity to be heard. Article 19(3) finally provides that where, inter alia, the Commission proposes to take a decision disapplying Article 85(1) EEC it must also publish a summary of the notified agreement/practice and invite all interested third parties to submit observations within a specified time limit of at least one month.

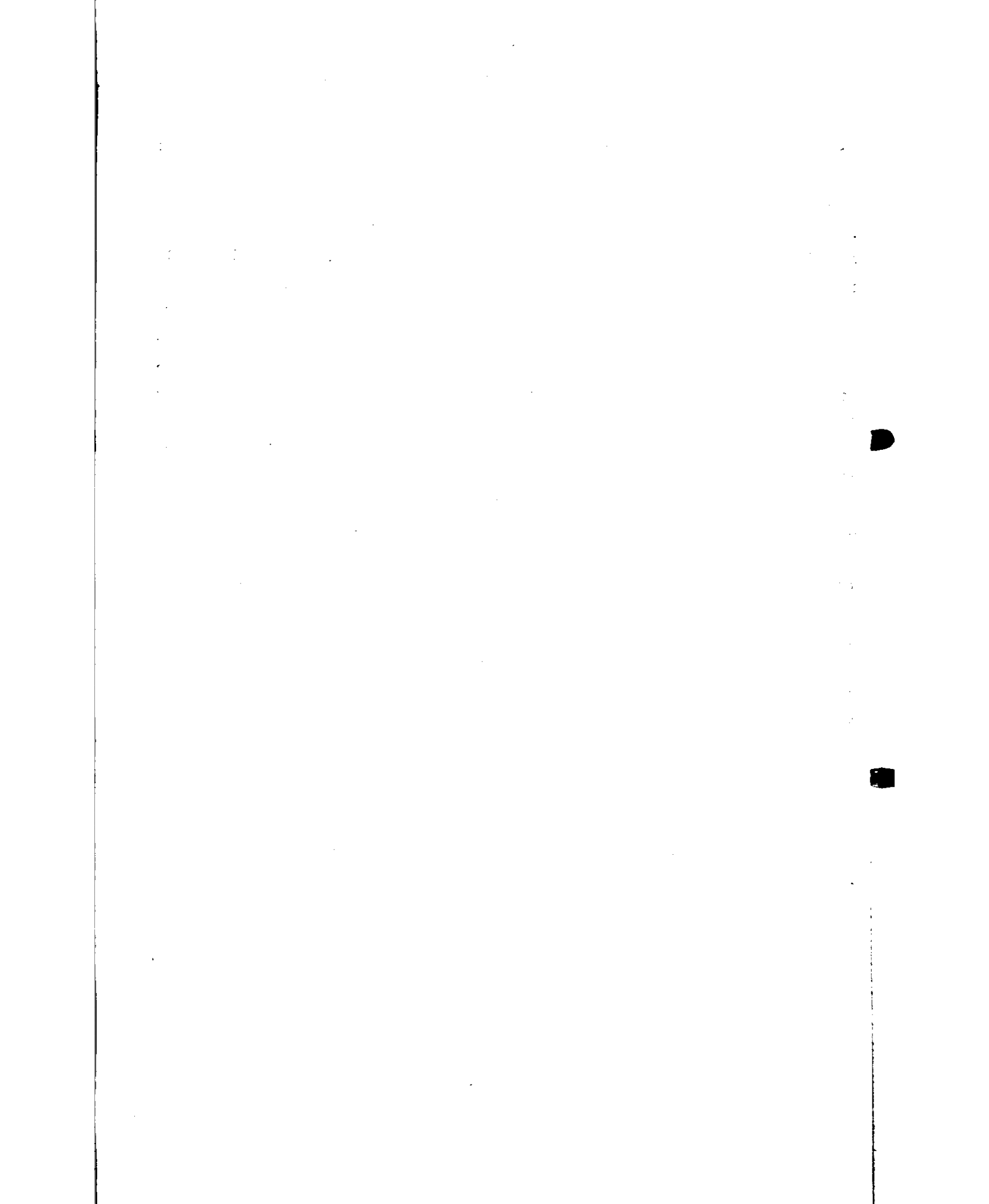
Finally, Article 21 of the Regulation requires the Commission to publish all decisions by which it has applied Articles 85(1) or 86 or 85(3) EEC.

#### Regulation 99/63

Commission Regulation 99/63<sup>12</sup> was enacted under Article 24 of Regulation 17/62, which provides that the Commission shall have power, inter alia, to adopt implementing provisions concerning the hearings prescribed by Article 19(1) and (2).

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12. Commission Regulation 99/63 of 25th July 1963, OJ (1963) L 127/2263.





Implementing Article 19(1) of Regulation 17/62, Article 2 of the Commission Regulation provides that before taking a decision the Commission shall inform undertakings in writing of objections raised against them. Under Article 4, decisions of the Commission may deal only with those objections in respect of which the relevant undertakings have been afforded the opportunity of making known their views. These written objections must also fix a time limit within which the relevant undertakings may inform the Commission of their views concerning the objections raised. Article 3 provides that such views are to be expressed in writing. Written comments may include a request to be heard orally<sup>13</sup> and, by Article 7(1) such requests shall be honoured if the undertakings show a sufficient interest or are the proposed recipients of a financial sanction. Article 7(2) also permits the Commission to hear any other person it chooses, e.g. a person cited by an undertaking to be in possession of corroborative evidence.

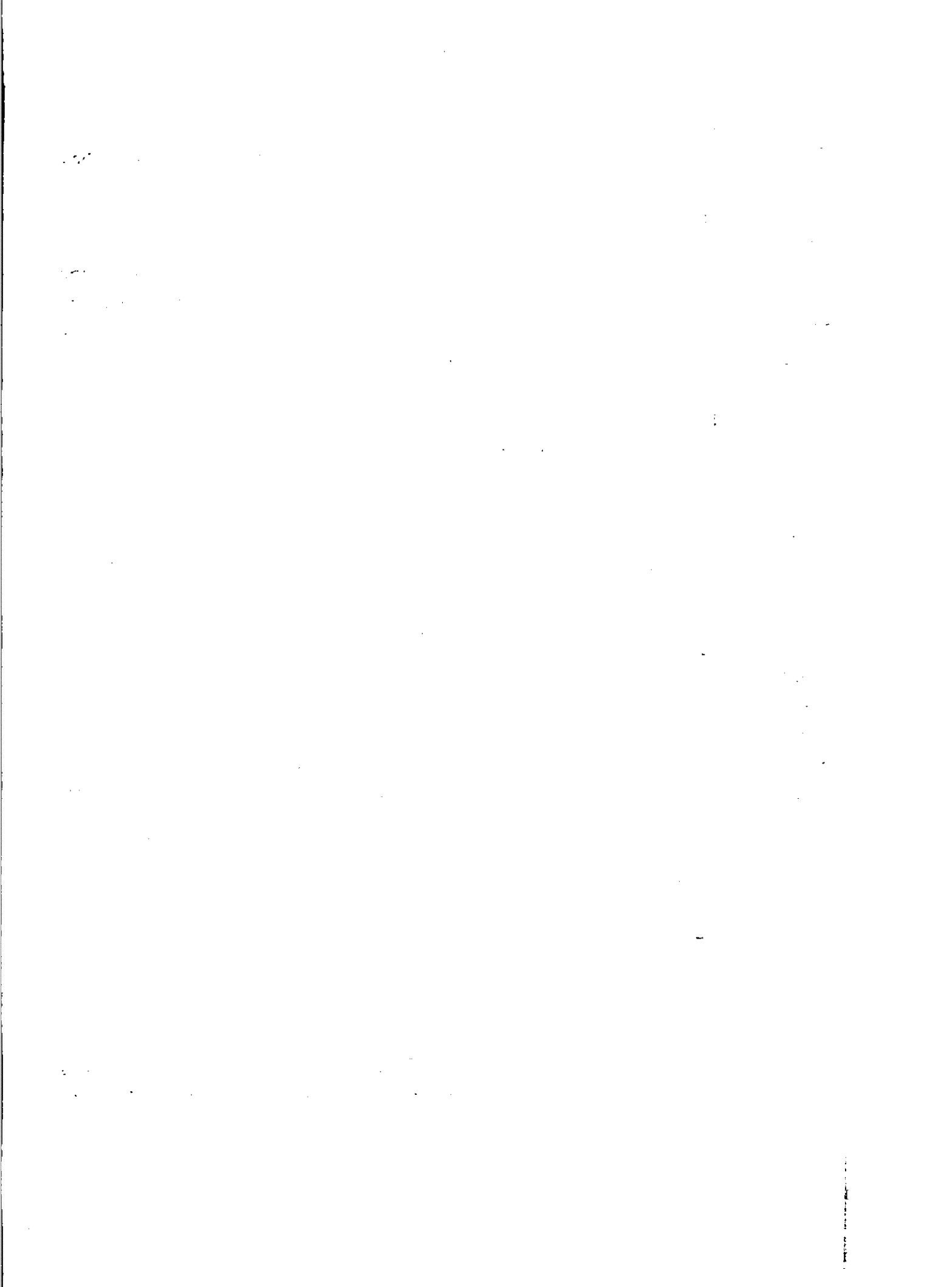
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Implementing Article 19(2), Article 5 provides that third parties demonstrating sufficient interest who apply to be heard before decision making must be afforded an opportunity to make their views known in writing within a time limit fixed by the Commission<sup>14</sup>. If these third parties so request, then, under Article 7, they are entitled to an oral hearing if they show

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13. And may include a request that corroborating witnesses be heard, [Article 3(3)].

14. The time limits which the Commission can fix under Articles 2 and 5 are required by Article 11 to, "have regard both to the time required for preparation of comments and to the urgency of the case", and to be at least two weeks long.



sufficient interest or if the Commission exercises its discretion to hear them under Article 7(2).

Oral hearings are governed by Article 9, which provides that they are to be conducted, "by the persons appointed by the Commission for that purpose"<sup>15</sup>. Hearings are not open to the public [Article 9(3)]. The statements made by those heard at the hearing are minuted and approved by them [Article 9(4)].

Relationship of the Court of Justice and the  
Commission under the Competition Regime

Article 175: Failure to Act

Article 175, paragraph 3, of the Treaty provides inter alia that, "[a]ny natural or legal person may ... complain to the Court of Justice that an institution of the Community has [in infringement of the Treaty] failed to address to that person any act other than a recommendation or an opinion". This action may only be brought if the institution has been called upon to act by that person and has failed to "define its position" within two months<sup>16</sup>. If an

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15. Oral hearings are currently conducted by the "Hearing Officer", an operative of DGIV who has no other part in the decisionmaking or investigative process. The creation of the post of Hearing Officer was announced in the Thirteenth Report on Competition Policy.

16. Article 175(2) EEC, which further provides that the action for failure to act must be brought within two months of the institution's failure to define its decision.



action under Article 175 EEC is well founded and the failure to act in question has been declared contrary to the Treaty, the institution is obliged by Article 176 EEC to take measures necessary to comply with the judgment of the Court.

The failure of the Commission to provide an undertaking with a decision indicating whether or not it is disapplying Article 85(1) EEC from an agreement to which he is party can consequently form the basis for an action under Article 175 EEC. In addition, the Court has held that an complainant seeking the application of Article 85(1) or 86 against an undertaking has a sufficiently direct and individual interest in the outcome of the case that he may proceed against the Commission under Article 175(2) in order to have his complaint definitively dealt with<sup>17</sup>.

#### Article 173: Decisional Legality

Article 173, paragraph 2, of the Treaty provides that, "[a]ny natural or legal person may [on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers] ... institute proceedings [in the Court of Justice] against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former". The Court of Justice has stated that, with regard to the definition of "decision", any "measure which produces legal

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17. Case 125/78, 'GEMA v Commission' [1979] ECR 3173, pp 3188-3190, paras. 14-23 of judgment.

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effects touching the interests of the [persons] by bringing about a distinct change in their legal position" is capable of being attacked before it<sup>18</sup> and, specifically, that a definitive notification issued by an institution (of the same sort as that to which an individual is entitled under Article 175(2) EEC) can also constitute such an act<sup>19</sup>.

These proceedings must be instituted, according to Article 173(3), "within two months of the publication of the measure, or of its notification to the plaintiff, or, in absence thereof, of the day on which it came to the knowledge of the latter, as the case may be".

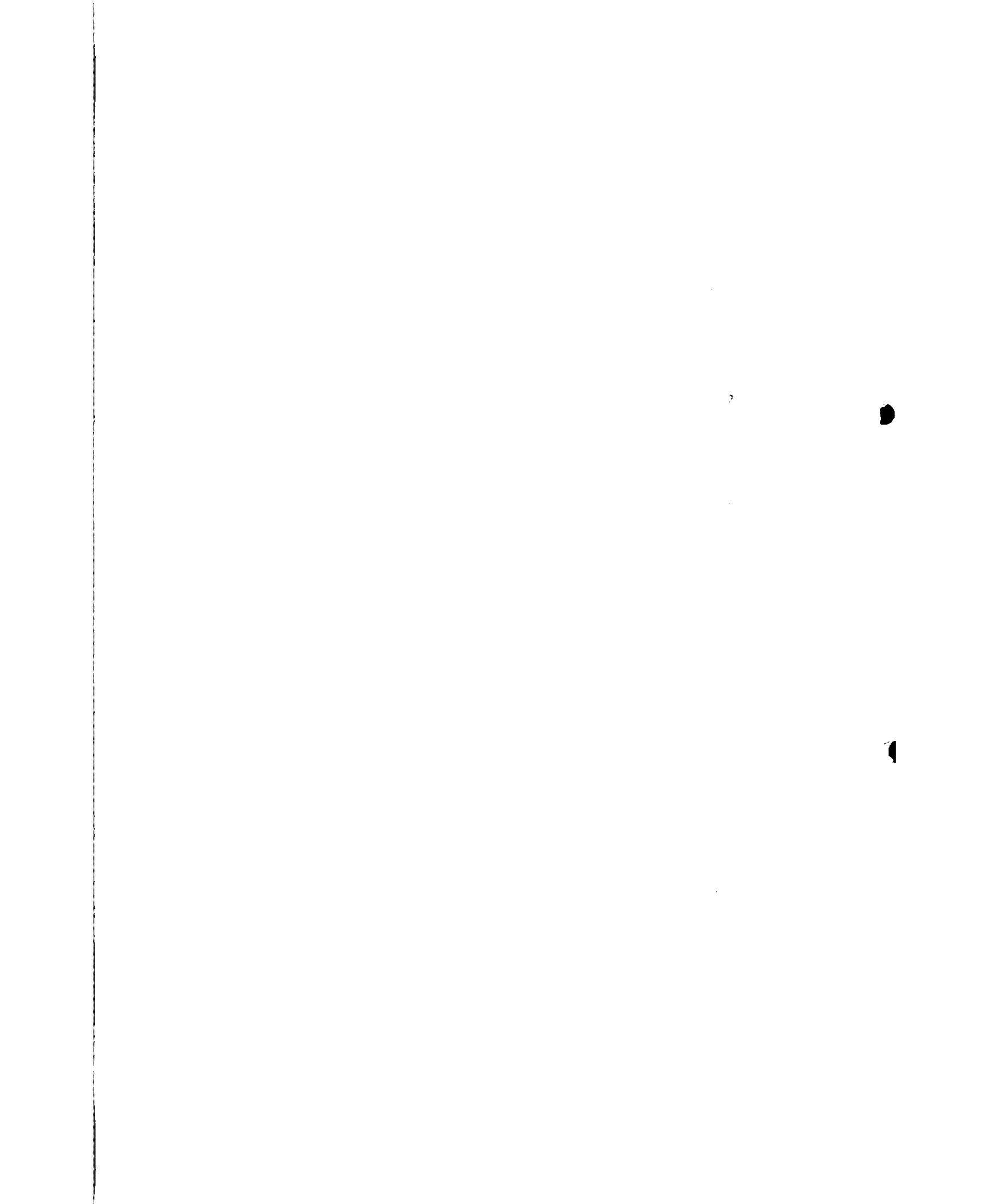
It is obvious that the decisions which the Commission is empowered to take under Regulation 17/62 are susceptible to attack under Article 173(2) by their recipients. Moreover, it is important to note that not only addressees of decisions can institute proceedings under this Article and that, therefore, those like complainants with a sufficiently well defined and strong interest in the decisional process also have standing<sup>20</sup>.

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18. Joined Cases 8-11/66, 'Cimenteries v Commission, [1967] ECR 75, at p. 91.

19. Case 210/81, 'Demo-Studio Schmidt v Commission', [1983] ECR 3045, at p. 3063.

20. In Case 26/76, 'Metro v Commission', the Court of Justice held that a complainant, whose complaint about an anti-competitive agreement was rejected by the Commission, possessed such a qualifying interest to attack the decision of the Commission to disapply Article 85(1) from that agreement. [1977] ECR 1875, at p. 1901.





## Article 172: Decisional Equity

Article 172 of the Treaty provides that, "[r]egulations made by the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations". Accordingly, Article 17 of Regulation 17/62 provides that the Court shall exercise this jurisdiction in respect of, "decisions whereby the Commission has fixed a fine or periodic penalty payment", and expressly empowers it to, "cancel, reduce or increase the fine or periodic penalty payment imposed".

The Court may, therefore, review what can be called the 'sentencing policy' of the Commission in imposing financial sanctions on undertakings. Unlike its jurisdiction under Article 173 EEC, the unlimited jurisdiction of Article 172 enables it to assess the equity of a Commission decision, in so far as it relates to the deservedness of a pecuniary sanction.



A FUNCTIONAL ANALYSIS OF THE COMMISSION'S  
DECISION-MAKING POWERS

Introduction

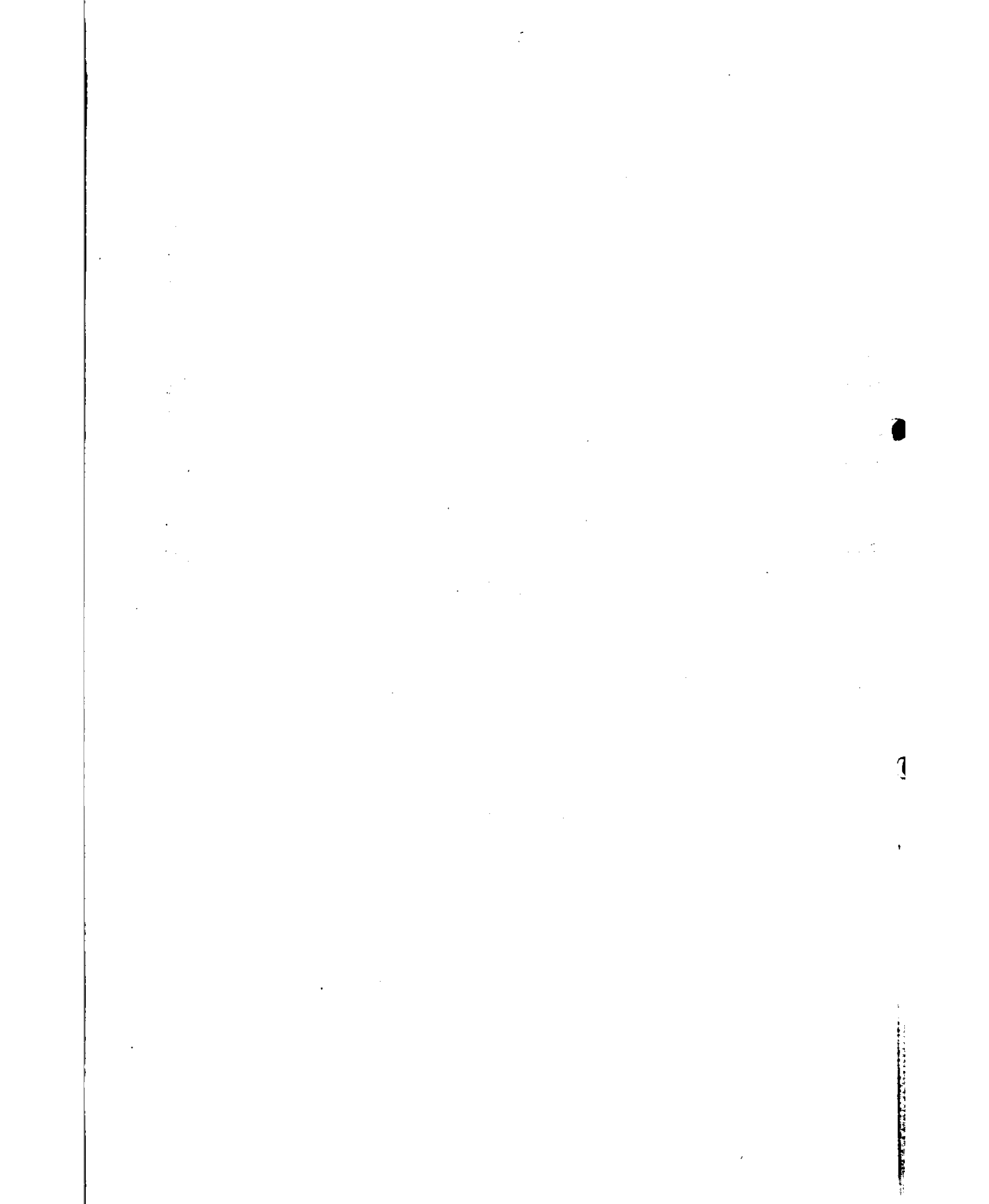
We have already seen that the powers which the Commission exercises under the Treaty rules governing the anti-competitive conduct of undertakings can be divided into two large groups: on one hand, is the power to enact measures of general application, such as 'block exemptions', which we characterised as a "rule-making" power; on the other hand, we have the power to apply rules of general application to individual undertakings on a case by case basis, such as by applying Article 85(3) or 85(1) EEC to them, which we characterised as a "decision-making" power.

In this section it shall be demonstrated that within the scope of this decision-making power one can legitimately distinguish between the "rule-applying" or adjudicatory power exercised under These: Articles 85(1) and 86 EEC and the "policy-applying" or administrative power exercised under Article 85(3) EEC.

The Two Kinds of Legal Decision Making

Adjudication and Administration Compared

To a large extent, the decision-making activities of all State officials; their application of rules of general application to



individual cases; are indistinguishable in a functional sense. Martin Shapiro, for instance, has pointed out:

"The congruence of administering and judging must be specially noted..... Both the judge and administrator apply general rules to particular situations on a case by case basis. Both tend to rely heavily on ... fixed decisional procedures, written records and legalised defence of their decisions. Both are supplementary law makers engaged in filling in the details of more general rules. Both are front-line social controllers for more distant governing authorities"<sup>21</sup>.

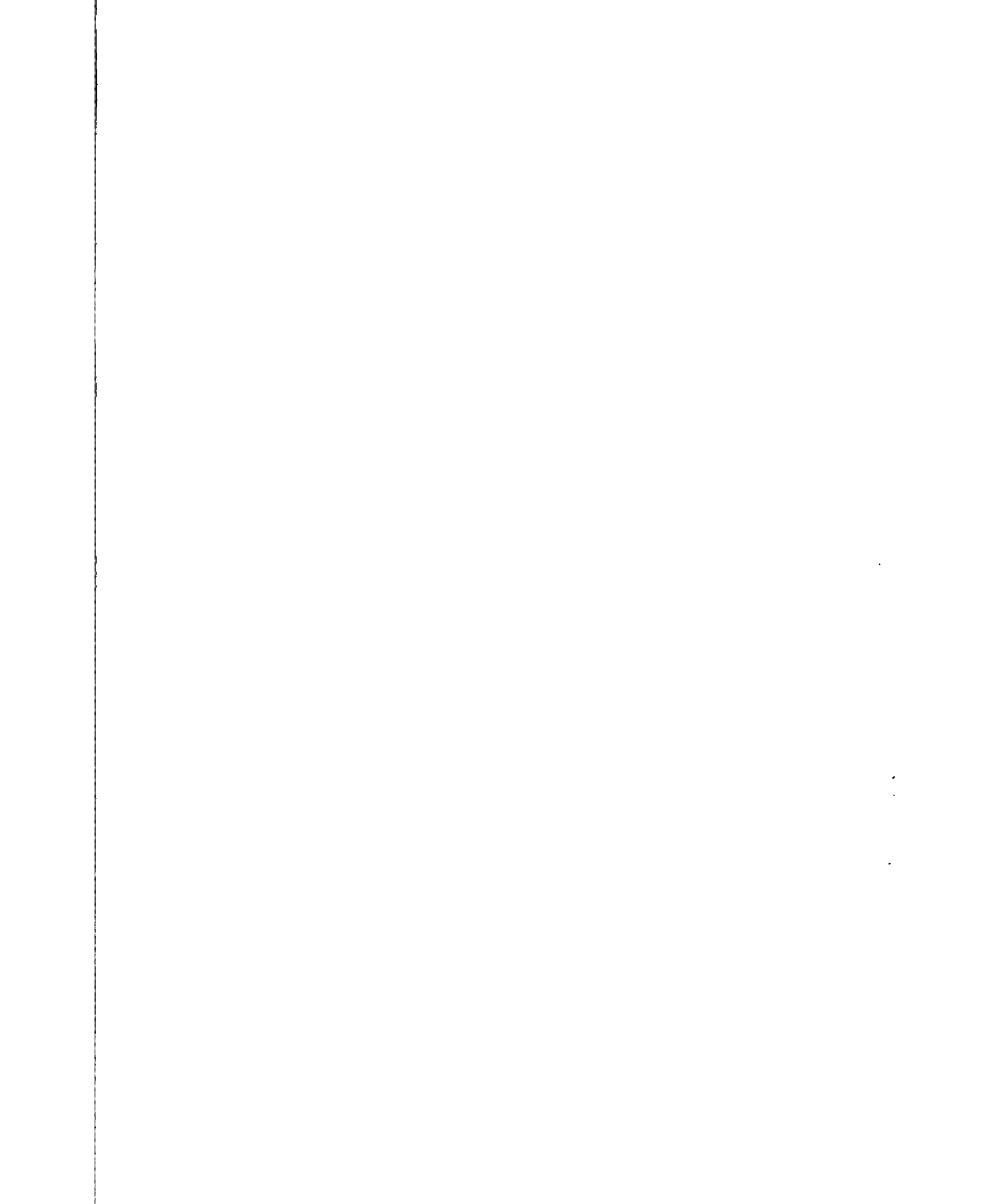
This 'congruence' cannot be disputed in general terms: the functions of both the criminal court judge and the immigration officer, for example, can be validly defined as the 'concretisation' of legal norms in individual cases. However, when one examines the 'concretisation' process more closely, it becomes apparent that this un-differentiated approach is too crude and that significant categories within decision-making, which correspond to functions of adjudication and administration, do exist.

#### Adjudication and Administration Contrasted

Perhaps one of the simplest statements about the difference between adjudication and administration was given by MJC Vile, when he, "sum[med] up the primary functions of government as rule-making, a discretionary function, rule-application, and

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21. "Courts: a Comparative and Political Analysis" 1981 University of Chicago Press, 20 (emphasis added).



authoritative rule-interpretation"<sup>22</sup>. If we put aside his norm creating functions of "rule-making" and "authoritative rule-interpretation" (the function, par excellence, of the appellate courts) we are left with the decisional functions of "rule-application" and "a discretionary function", which, in this analysis, correspond respectively to adjudication and administration.

*What is discretion in his mind?*

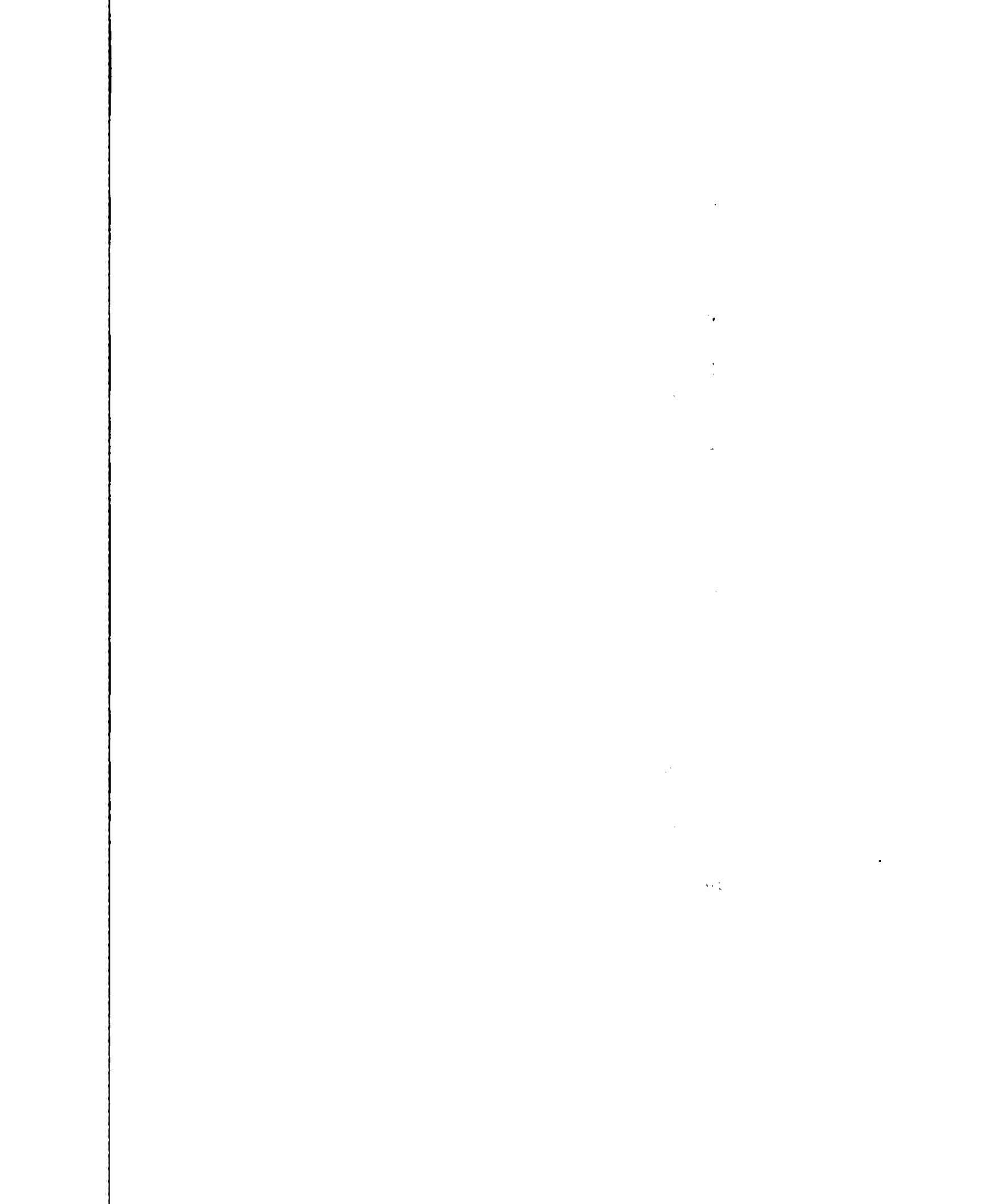
In his classification, Vile correctly identifies the key distinction between the two functions as that of decisional restraint. Whereas adjudication implies a certain rigidity of the decision maker in applying a rule, administration accords the decision maker an element of 'discretion' or freedom in his task.

But what do we mean, in terms of the legal system, when we talk about decisional restraint? Moreover, what is the relationship between the rules of the legal system and discretion?

Closedness and Past-Orientation  
as an Index of Decisional Rigidity

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22. "Constitutionalism and the Separation of Powers" 1967, Oxford, Clarendon Press, 329. This paper emphatically endorses Vile's conviction that, "[t]here is nothing sacred, or divine about the trinity of legislative, executive, and judicial powers in earlier theory" (ibid., 345-46). In his opinion, formal classification of governmental power of which the classical tri-partite one is merely an example, "is a matter of procedures which are felt to be necessary to meet current needs" (ibid).





In which decisions can we expect decisional rigidity as opposed to decisional flexibility? It is suggested that in order to answer this question one must examine the relative "closedness" of the set of legal rules under which a particular decision-making power is exerciseable.

Closedness is defined by Frederick Schauer, for example, as, "the capacity of a system to decide cases within the confines of that system"<sup>23</sup> ; a capacity derived from the high degree of clarity and precision of the language of the system's rules. Consequently, a closed system is classified as one, "whose operations require recourse only to the norms of the system and to accepted linguistic and observational skills"<sup>24</sup>. In other words, due to the clarity and precision of a closed legal system, the norms from which a decision maker may legitimately derive his conclusions are exclusively legal; as Schauer puts it,

"[Precise legal r]ules block consideration of the full array of reasons that bear upon a particular decision in two ways. First, they exclude from consideration reasons that might have been available had the decisionmaker not been constrained by a rule. Second, the rule itself becomes a reason for action, or a reason for decision"<sup>25</sup>.

It will be clear, of course, that 'closed reasoning' in this sense is identical to the ideal type of 'formally rational' decision-

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23. "Formalism", 97 Yale LJ (1988), 509, 535-536.

24. *ibid.*, 535.

25. *ibid.*, 537.

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making isolated by Max Weber last century<sup>26</sup>. Decision-making in a closed system implies formal rationality.

A second index of decisional rigidity, it is suggested, is the orientation to the past of the legal system under which adjudicative decisions are made, or, as Daniel Gifford puts it, the, "deference which the judge is expected to show the past"<sup>27</sup>.

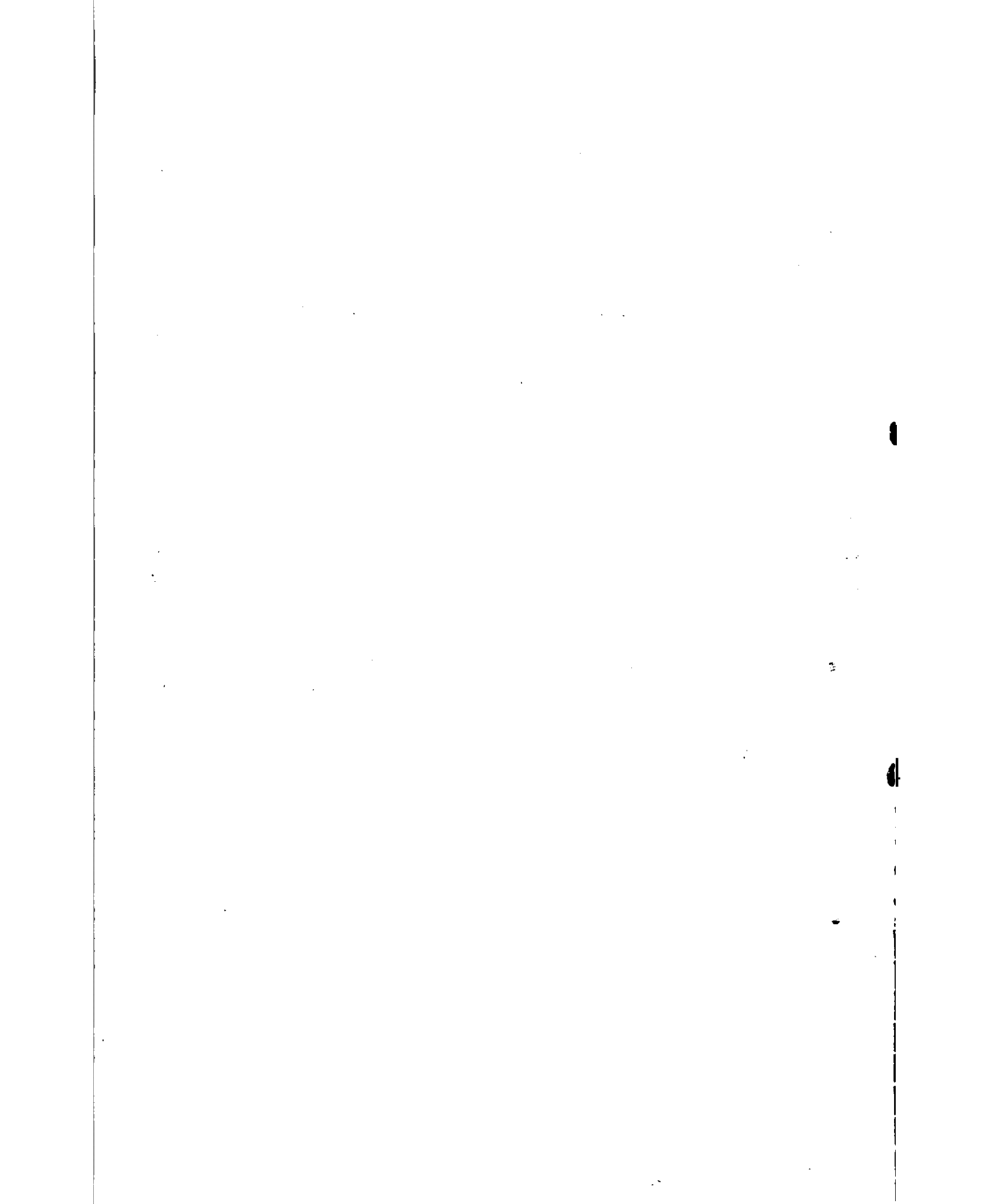
"Past orientation" refers to the preoccupation of the legal system with what has gone before. In other words, decision-making in a past oriented legal system is legitimately concerned only with the fact-situation which existed prior to the decision<sup>28</sup>. Past oriented rules require decision makers to ignore potential future change and prohibit, a fortiori, speculation by the decision maker as to the effects which his decision may have in the future. It is clear, therefore, that such a limitation of perspective constitutes both an obstacle to decisional freedom and an index of decisional rigidity. Of course, closedness and past orientation are interrelated indices of decisional rigidity. Before the precise standards of a closed legal system can be applied in an individual case, the decision maker must possess a factual record

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26. A brief but useful account of Weber's sociological analysis of law and legal decision-making can be found in David Trubek's, "Max Weber on Law and the Rise of Capitalism" 1972 Wisc LR 720.

27. "Decisions, Decisional Referents and Administrative Justice", 37 Law and Contemporary Problems (1972), 3, 13.

28. For a discussion of the necessary connection between 'adjudicative facts' and past events, see Barry Boyer's article, "Alternatives to Administrative Trial Type Hearings for Resolving Complex Scientific, Economic and Social Issues", [1972] 71 Mich LR 111, at pages 114-15.



which is sufficiently determinate to be categorised under those standards. Only that which is capable of being rendered certain in this way, i.e. the facts of a past event, is a fit subject for adjudication.

In view of its closed, past oriented perspective, decision by adjudication can deal only with, "claims of right or accusations of fault"<sup>29</sup> which present formal normative and narrow factual issues for resolution.

#### Openness and Future Orientation as an Index of Decisional Freedom

If the closedness of a legal system and its orientation to the past imply a formally rational method of decision-making, under which conditions is decisional freedom or discretion implicit within the legal order?

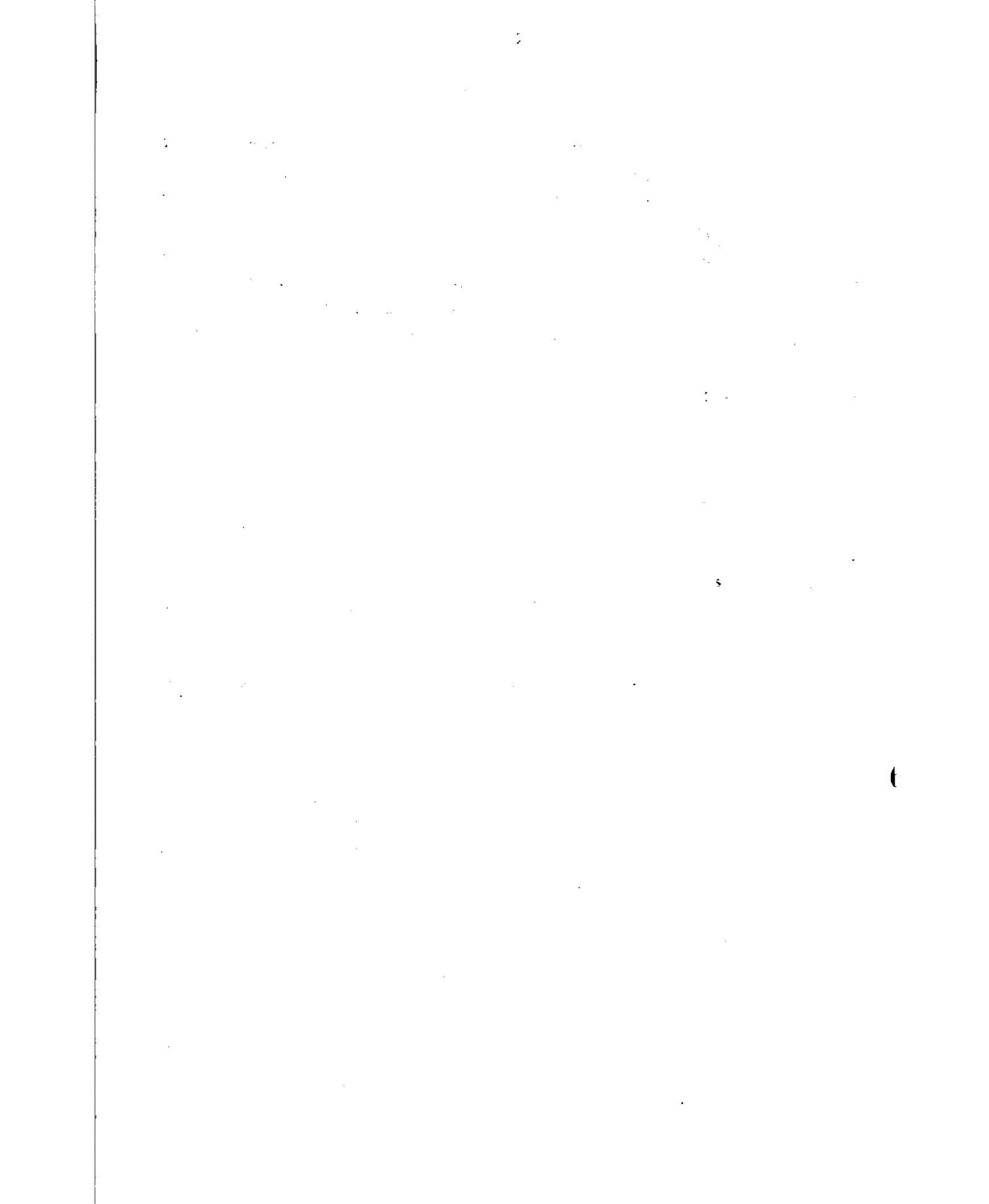
Schauer is clear on the point: such conditions exist in sufficiently open legal systems. According to him, open legal systems, which he defines as those that,

"employ norms sufficiently indeterminate to accommodate much that is important in the world at large, and in doing so sacrifice the occasional virtues of closedness. Such systems are more open even at the expense of being less predictable and less constraining of their decisionmakers"<sup>30</sup>.

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29. Lon L Fuller, "Forms and Limits of Adjudication", (1978) 92 Harvard Law Review, 353, 369.

30. op. cit., supra., fn. 23, 536.



Open systems, then, are characterised by the 'indeterminacy' or 'vagueness' or 'imprecision' of the norms which they employ. The type of reasoning which their application in concrete cases requires is different from that required by closed systems. The norms upon which a decision maker may legitimately draw are not limited to those of the legal system. The 'open texture' of the law which he applies enables him to utilize extra-legal norms in reaching his decision. To use, once again, the Weberian classification, we could say that the decision maker operating in an open legal system is expected to employ 'substantive rationality'.

Schauer suggests that another way of describing decisional freedom or discretion is in terms of the use which the decision maker may make of the non legal norms upon which the legal norms he applies are based ( i.e. their purposes or goals):

"[G]iving some decisionmaker jurisdiction to determine what the rule's purpose is (as well as jurisdiction to determine whether some item fits that purpose) injects a possibility of variance [in other words, a degree of discretion] substantially greater than that involved in giving a decisionmaker jurisdiction solely to determine whether some particular<sup>31</sup>", does or does not fall within a formal category of the rule<sup>31</sup>.

Furthermore, and in direct contrast to the conditions of decisional rigidity, the orientation of administrative decision making is emphatically towards the future. X

If an open textured legal system gives a decisionmaker jurisdiction with regard to the purposes or goals of the system,

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31. *ibid.*, 540-541.

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then his, "attention is ... [logically] directed toward reaching a future state of affairs"<sup>32</sup>. The decision maker is not required to categorise a set of facts in terms of a narrowly drawn legal category, but, instead, is encouraged to consider the factual material which will ensure his decision best serves the purpose of the system<sup>33</sup>. Assessing how best to further the purposes of the system inevitably involves speculating about future development and, of course, the future effects of the decision itself.

### Conclusion<sup>34</sup>

It was recently observed that, "[t]reatments of [governmental power] tend to err in at least two ways: by looking at particular powers without consideration of their essential nature or their broader context, or by being mere exhortations that are premised upon assumptions about the homogeneity of [that power]"<sup>35</sup>. Hopefully, this analysis has proceeded from the premiss that

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32. Gifford, op. cit., supra fn 27, 14.

33. These sort of facts belong to the category of 'legislative facts', or "general facts which help the ... [decision maker] decide questions of ... policy and discretion", Kenneth Culp Davis, "Administrative Law Treatise" 1958, USA, West Publishing Co, Vol 1, 7.02.

34. See also, the Gifford text cited at fn 27 above, especially pages 13-15 comprising a useful summary section entitled, "Judicial and Administrative Referents Compared", which covers most of the same points.

35. Robert Baldwin and Keith Hawkins, "Discretionary Justice: Davis Reconsidered" [1984] Public Law, 570, 599 (emphasis added).

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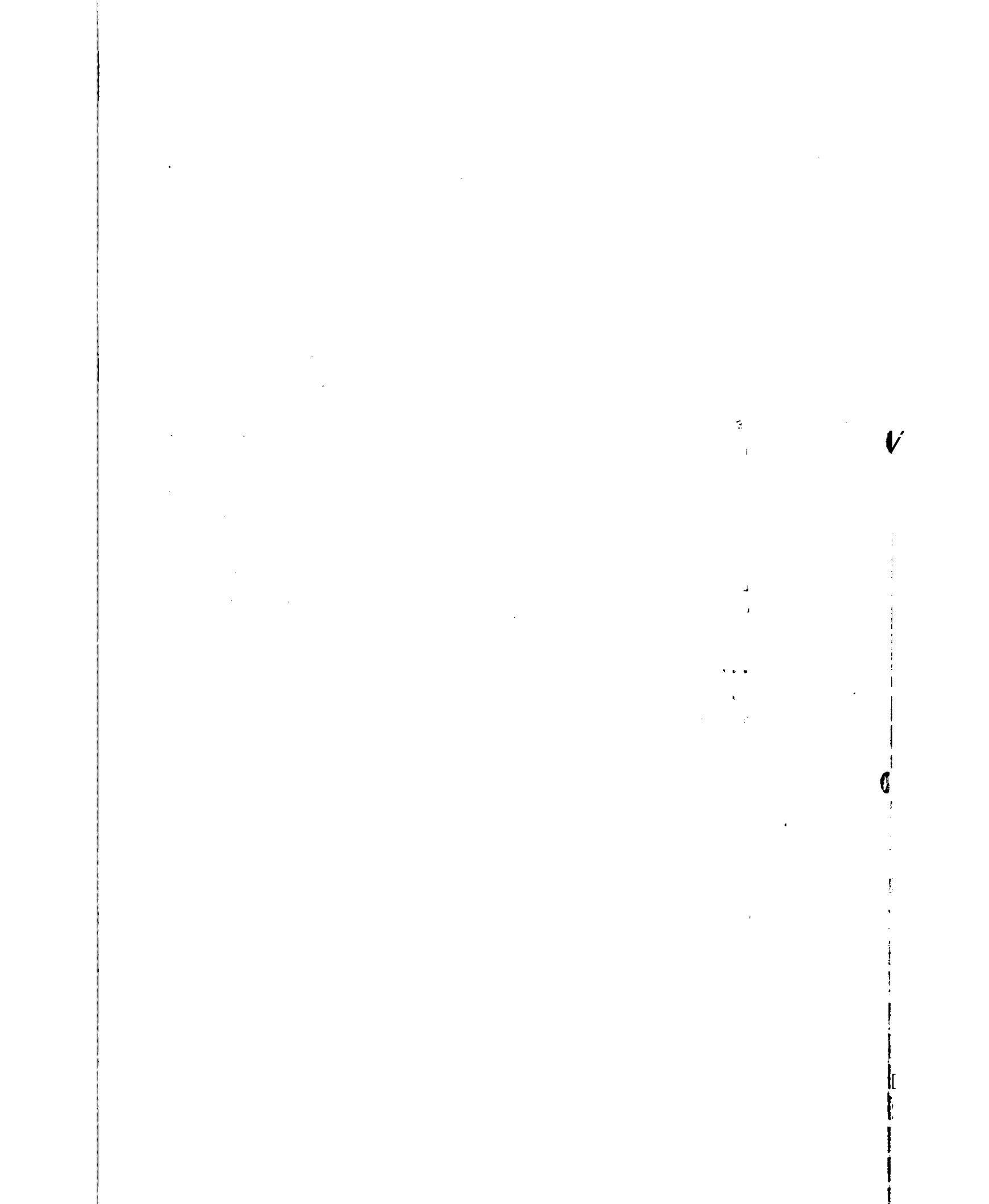
discretion is basically heterogeneous and that, consequently, we have seen that it is possible to distinguish meaningfully between two kinds of legal decision-making.

First, adjudication or rule-applying. This is the type of decision-making implied by the application of the rules of a closed legal system to concrete cases and it is characterised by decisional rigidity. It is a formally rational procedure, in which the only legitimate bases for decision are the rules of the system themselves. Adjudication is capable of recognizing only those facts which are sufficiently determinate to enable application of the clear and precise standards of the system, i.e. those which have occurred.

Second, administration or policy-applying. This is the type of decision-making implied by the concretisation of the rules of an open legal system whose norms encourage future orientation. Together, "[t]hese two factors - the orientation toward the future and the vagueness of the terms themselves - suggest that the role which the ... [decision maker] is expected to play is an active one"<sup>36</sup>; or, in other words, there is an implication of decisional freedom. It is a substantively rational procedure, in which norms outside the system, e.g. the goals of the system itself, are legitimate justification for decision. Administration is capable of utilizing all factual information which will ensure that it efficiently serves these goals.

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36. Gifford, *op. cit.*, supra fn 27, 14.



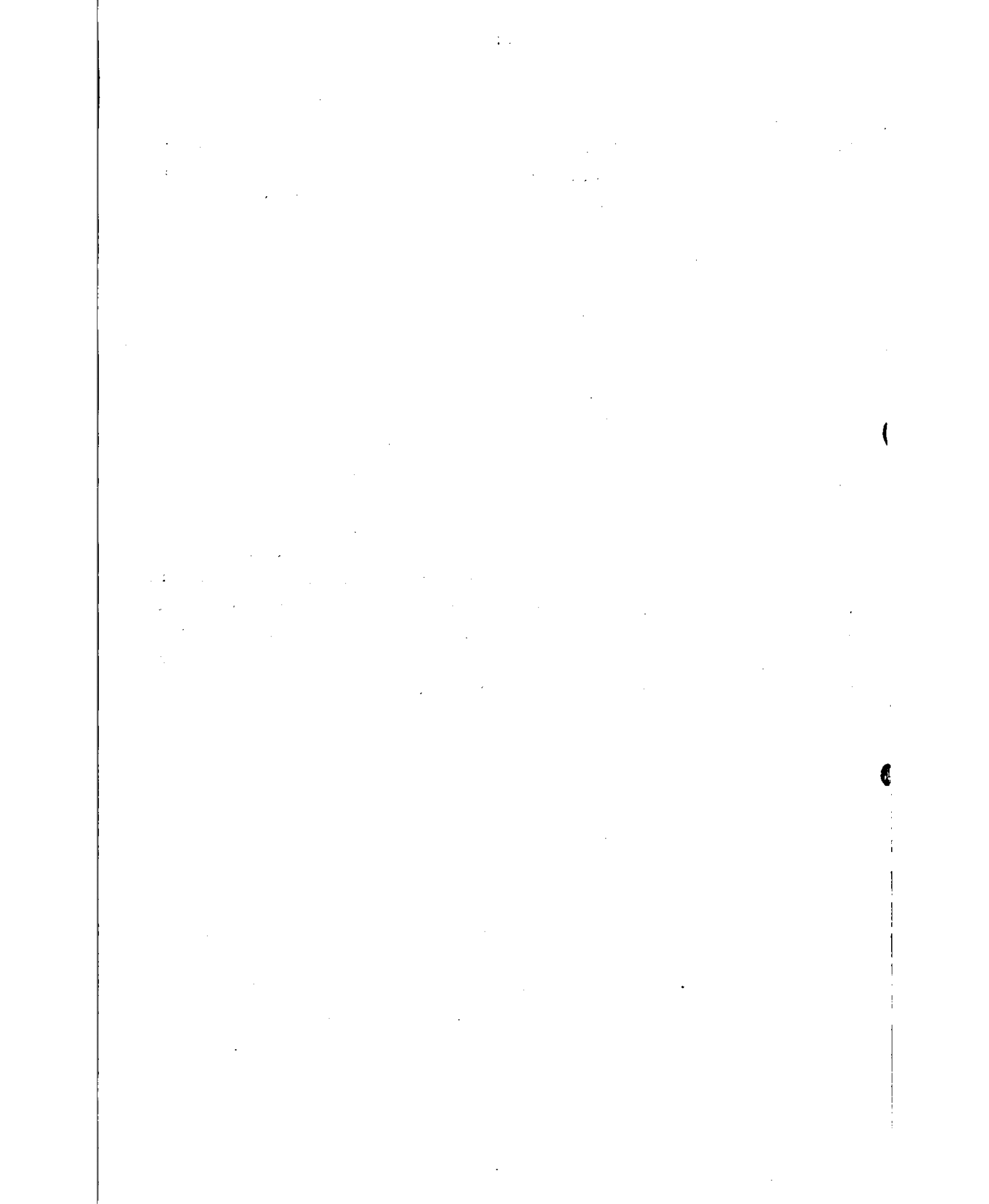
We shall now proceed to examine how this functional analysis of legal decision-making applies to the powers of the Commission under Regulation 17/62 EEC.

The Application of Article 85(3) EEC  
as Administration / Policy Application

We have seen above that under Article 9(1) of Regulation 17/62 EEC, the Commission has the power to disapply the provisions of Article 85(1) EEC from individual agreements or practices pursuant to Article 85(3) EEC. It may do so provided it finds certain conditions enumerated in the Treaty satisfied. Broadly stated, the conditions listed by Article 85(3) EEC relate to the political objective of maintaining the conditions under which competition is maximized without preventing the conclusion of agreements which, although they restrict competition, do so only in so far as it is necessary to produce economic or technical advance of benefit to all. Article 85(3) EEC provides no other explicit criteria, beyond those broad ones mentioned, upon which to base exemption decisions.

Into which decision-making category, then, does the application of the general rule of Article 85(3) EEC to individual cases fall?

It is obvious that the criteria for granting an exemption are both open textured and future oriented. First, the assessment of such factors as 'necessary' restraints of competition, 'economic progress' and 'fair share' to consumers all call for the use of norms other than those of the Treaty Article. They all leave the Commission, the decision maker, with decisional freedom or discretion as to the suitability of an agreement for exemption.



Second, in its fact finding before decision the Commission is tacitly directed by the language of Article 85(3) EEC to engage in speculation about future economic conditions and about the future effects of its decision in the light of changing circumstances<sup>37</sup>.

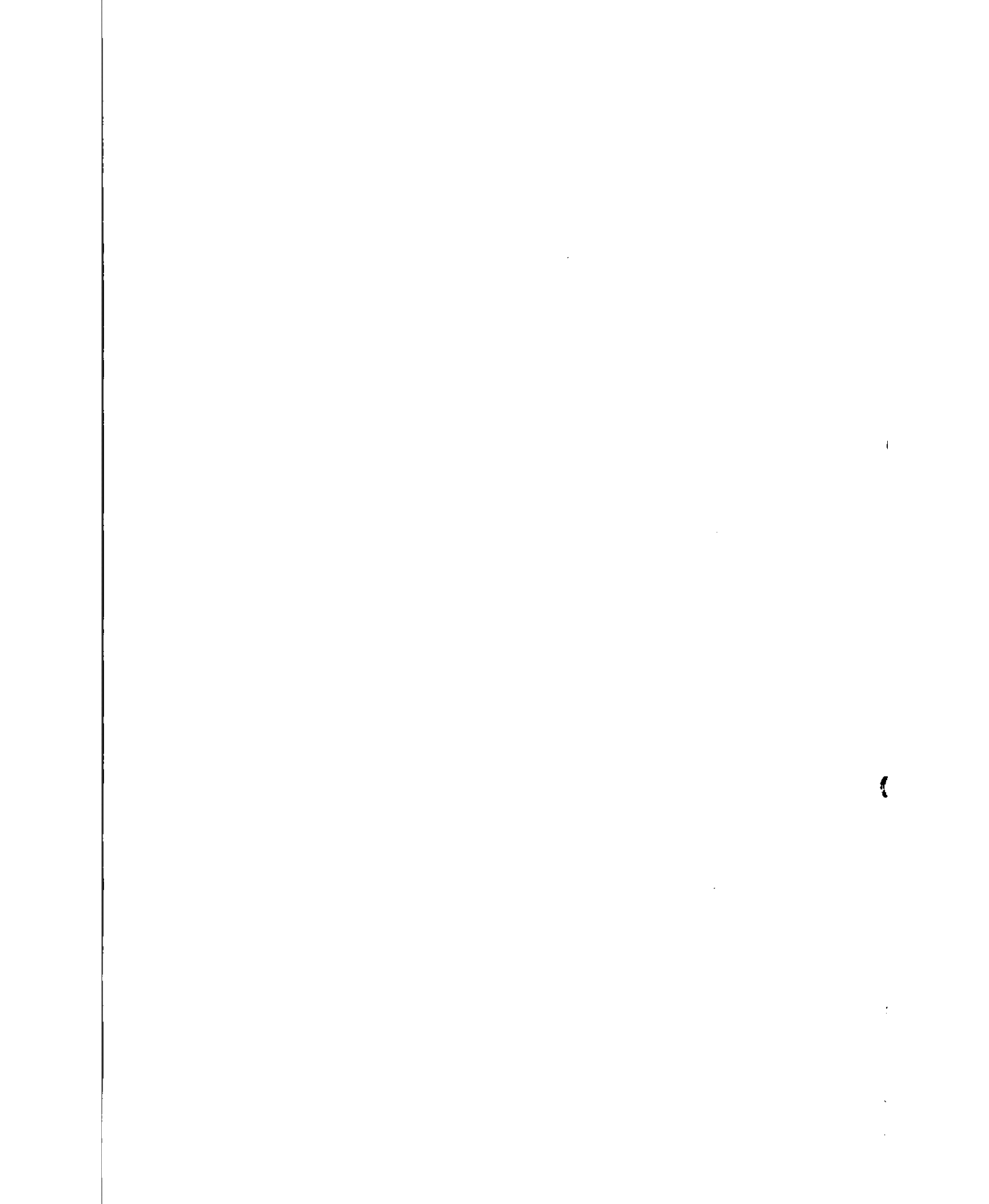
From this it seems reasonable to conclude that, in pursuing the policy objectives broadly stated by Article 85(3) EEC, the power of the Commission to grant exemptions from Article 85(1) EEC is an example of an administrative or policy applying function.

The Application of Article 85(1)/86 EEC  
as Adjudication / Rule Application

Article 9(2) of Regulation 17/62 provides that the Commission has power to apply the prohibitions of Articles 85(1) and 86 EEC to individual agreements or practices. Into which category of legal decision-making fall decisions finding, for instance, that several undertakings have secretly formed and operated a cartel whose object is the fixing of Aluminium prices in the Community, or finding that IBM has abused its dominant position in the EC micro-computer market by changing the specifications of its products without notifying its competitors?

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37. This future orientation is underlined by the fact that decisions applying Article 85(3) EEC are made for a specific duration, after which they may be renewed with or without amendment or discontinued by the Commission, Article 8 of Regulation 17/62 EEC. In addition, Article 8 provides that the grant of exemption may involve the imposition of conditions or obligations of continuing future effect.





First, one can point out that the application of both Articles necessitates the collection of a fact dossier relating to the past and to the past alone. Articles 85(1)/86 EEC are prohibitions whose violation, from the point of view of their application, is a matter of historical fact. In the cartel example, the future competitive situation of the aluminium market and the likely positions in that market of the cartel members are not relevant decisional criteria.

Second, the language of both Article 85(1) and Article 86 EEC is sufficiently precise, or has been rendered sufficiently precise by the authoritative rulings of the Court of Justice<sup>38</sup>, to enable the Commission to rely exclusively upon the legal norms contained in those texts - as elaborated by the Court of Justice - in justifying its decisions to apply them.

It can be concluded, then, that the Commission's power to apply Articles 85(1)/86 EEC to individual undertakings is an adjudicative or rule applying function.

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38. Note that the function of the Court of Justice in elaborating and interpreting these prohibitions is not a decision-making power within the meaning of this section. Rather it is an example of a distinct norm creating function which Vile calls "authoritative rule-interpretation", see text accompanying fn 22 supra.

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COMMISSION PRACTICE IN TAKING DECISIONS  
APPLYING ARTICLES 85(1) AND 86 EEC

Introduction<sup>39</sup>

From what we have seen of the legislative rules governing decision making procedure under Regulation 17/62 it would be logically possible to conclude that the Commission of the European Communities 'en séance plénière' could deal with most of the stages of action itself, perhaps delegating one or two of its 17 members to perform surprise investigations on the premises of unsuspecting undertakings. This is, of course, an absurd proposition and in reality the Commission rarely, if ever, sits together to take decisions under Regulation 17/62, even those which find infringement of Article 85(1)/86 EEC and impose substantial fines on undertakings. Indeed, such is the degree of specialisation found among the Members of the Commission that only one of their number, the Commissioner with special responsibility for Competition Policy, takes a significant role in decisionmaking in this area - exercising power on behalf of his colleagues.

Not only are the powers of the Commission in relation to the application of Articles 85(1)/86 EEC exercised more or less exclusively by a single Commissioner, but one must also be aware that this person represents only the tip of the bureaucracy which

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39. The administrative structure of the Commission is set out, at base, in the Rules of Procedure of the Commission (Commission Decision 63/41 EEC, JO 1963, 181/63, as amended), Chapter II, "The Administration".

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performs most of the work preparatory to publication of the 'finished product', the decision. Directly responsible to the 'Competition Commissioner' is the 'Directorate General for Competition' (usually referred to as DG IV) headed by a 'Director General' and consisting of some 140 Grade 'A' officials<sup>40</sup> (most trained lawyers or, to a lesser extent, economists), 20 or so of whom will be directly involved in each decision. In addition, the involvement of the Commission's Legal Service - directly responsible to the President of the Commission - brings at least one other Grade 'A' official into the picture for each decision taken.

The Typical Practice in Taking a Decision  
applying Article 85(1)/86 EEC

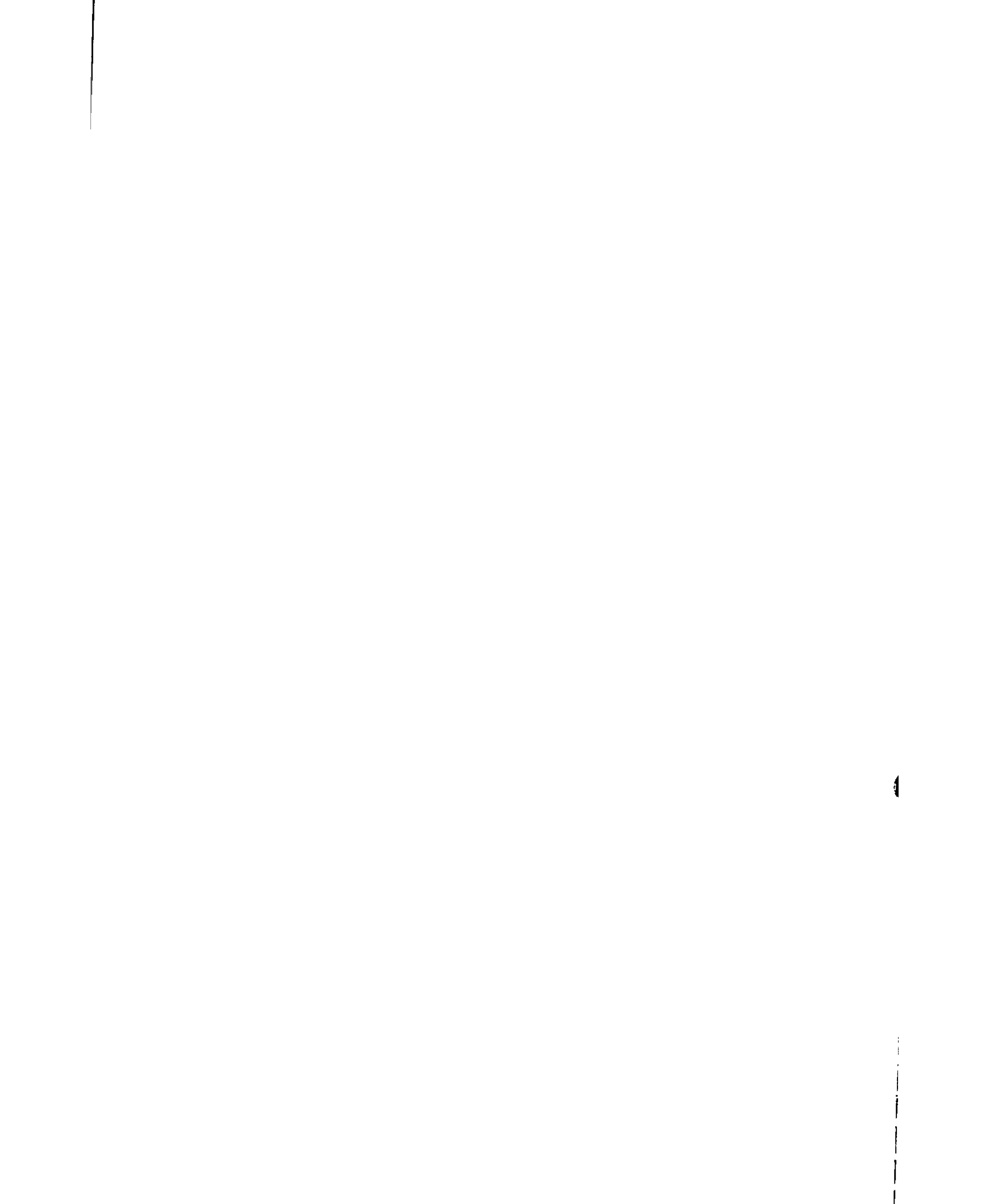
The Commission's practice in making 'infringement decisions' is characterised by internal consultation and a series of internal checks involving much of the relevant bureaucracy<sup>41</sup>.

Allocation of the Case

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40. These represent the officials who actually take part in making decisions, as opposed to the 140 or so who perform an administrative support role. Figures obtained from, Van Bael & Bellis, "Competition Law of the EEC" (1987), CCH Editions, para. 104.

41. The author obtained much of the information used in this section from contacts with DG IV in September of 1987. He also obtained much help from, Van Bael & Bellis, op. cit. supra, paras. 104 and 1005 to 1018.



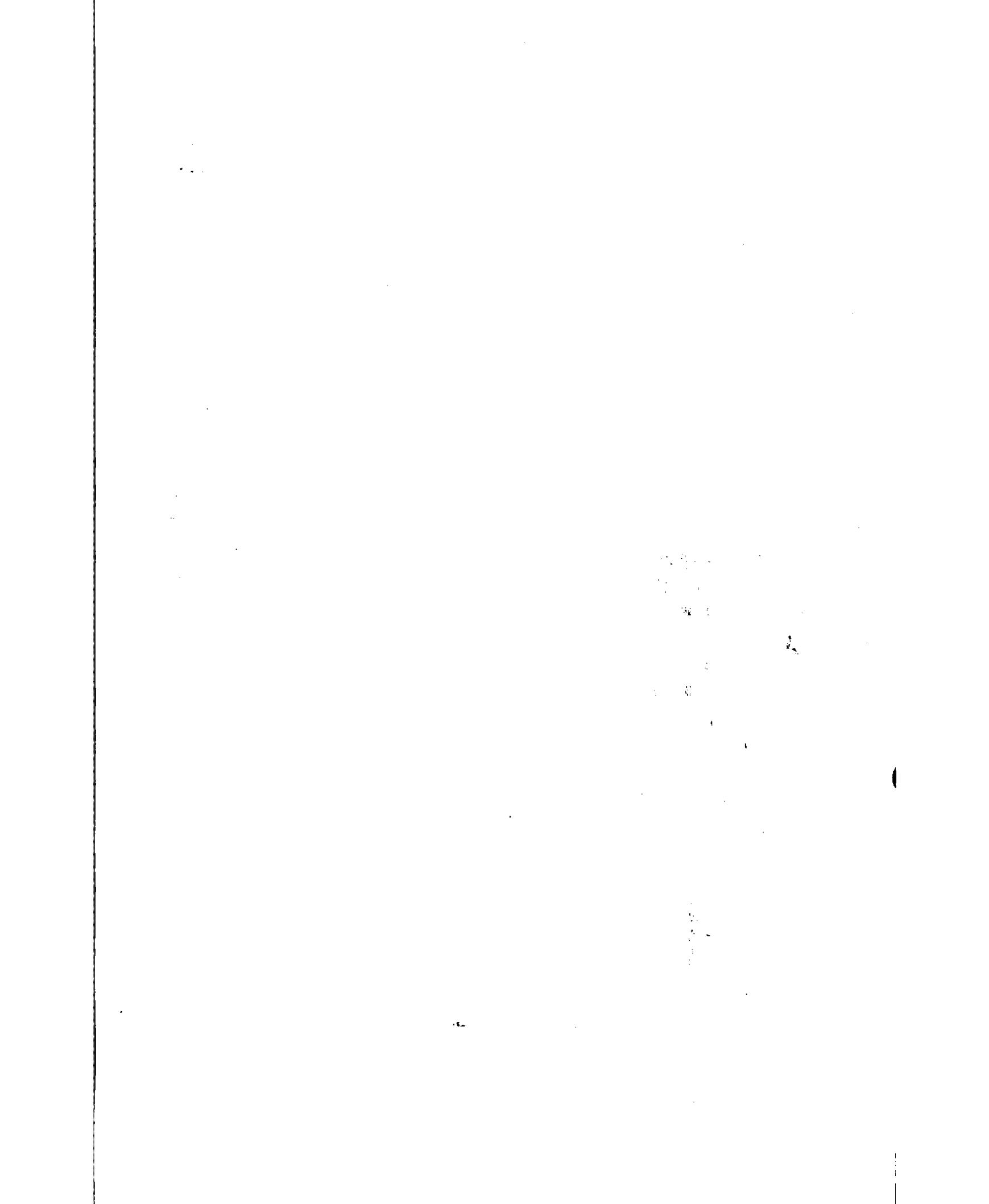
Investigatory activities begin either with the receipt and registration by DG IV of a complaint of anti-competitive behaviour, or by upon the initiative of any part of the competition hierarchy, from Commissioner to DG IV official. The next stage involves assignment of the case to a specialised unit, or 'Directorate', within DG IV for investigation. There are currently five Directorates within DG IV: Directorate A (headed by an Assistant Director General), which is responsible for "General Competition Policy and Coordination", and Directorates B, C, D (each headed by a Director), which are each responsible for investigation and decision preparation and which are organised on a market sector basis<sup>42</sup>. In fact, each case is assigned for investigation not simply to one of the three sectoral Directorates, but to a 'Division' within the Directorate (there are nine spread among the three) consisting of maybe five to ten people.

#### Information Gathering

The next stage, involving the gathering of evidence of alleged or suspected anti-competitive behaviour, may take the form of letters sent to the undertakings involved prepared by the relevant Division and signed by the Director General of DG IV requesting information under Article 11 of Regulation 17/62 (his signature is endorsed internally by the 'Competition Commissioner'). Alternatively, evidence gathering may be accomplished by means of

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42. Information obtained from "Directory of the European Commission 1988".





inspections undertaken by officials of the relevant Division authorised for that purpose and, if necessary, carrying a decision issued by the 'Competition Commissioner' under Article 14(3), acting on the advice of the Director General.

#### The "Statement of Objections"

Once the Division investigating a case believes it has sufficient evidence to proceed, it will seek a 'Go/No Go' from the Director General (acting in consultation with the Competition Commissioner). If the case is given the go-ahead, then the Director General will, after consulting Directorate A and obtaining the authorisation of the Commissioner, sign the "statement of objections", prepared by the Division in collaboration with the Legal Service, and notify it to the undertakings. At this point most of the file of information held by DG IV on the case is opened to the undertakings<sup>43</sup> and their views awaited for the time limit specified in the statement of objections<sup>44</sup>.

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43. The practice of giving "access to the file" was announced in the Twelfth Report on Competition Policy, point 34. Only documents containing the business secrets of other undertakings, internal Commission documents and information disclosed to the Commission subject to an obligation of confidentiality are not made available.

44. If there has been a complaint, then the complainant will be given access to the replies and observations submitted by the undertakings, although these might be issued in summary form. Thirteenth Report on Competition Policy, point 74(b).

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## Oral Hearings

If the undertakings replying to a statement of objections request to be heard orally, then DG IV will organise such a hearing and cite them to attend at a specified date. Oral hearings are presently held in the Borschette building, in Brussels and usually last from a day with a single defendant, to a week for one with several defendants. They are presided over by the "Hearing Officer", an advisory official within DG IV, whose post was established in 1982<sup>45</sup>.

The Hearing Officer, administratively part of DG IV, is not involved in the work of investigation or of formulating decisions; his sole task is to, "ensure that the hearing is properly conducted" by balancing the "rights of the defence" with "the need for effective application of the competition rules"<sup>46</sup>. He is fully responsible for the date, duration, location and conduct of the hearing and for the admission of new evidence. He also has authority to decide whether persons should be heard pursuant to Articles 3(3) and 7(2) of Regulation 99/63 EEC<sup>47</sup>.

His ultimate concern is to, "ensure that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or

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45. See "Terms of Reference of the Hearing Officer", Thirteenth Report on Competition Policy, Annex.

46. *ibid*, Article 2(2).

47. *ibid.*, Article 4.

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unfavourable to the parties concerned"<sup>48</sup>. He does this in three ways: first, by being responsible for preparing minutes containing the essential content of statements made by persons heard and which they approve<sup>49</sup>; second, by reporting to the Director General for Competition on the hearing and on the conclusions he draws from it; and third, by making observations to the Director General on the further progress of proceedings, which may relate to, "the need for further information, the withdrawal of certain objections, or the formulation of further objections"<sup>50</sup>.

The Hearing Officer's terms of reference provide that, "[t]o ensure his independence in the performance of his duties", the Hearing Officer has the right of direct access to the competition Commissioner<sup>51</sup>, a right which consists in the discretion to bypass the Director General and refer his observations directly to the Commissioner at the time that the preliminary draft decision (see below) is submitted to the latter for reference to the Advisory Committee<sup>52</sup>. If the competition Commissioner considers it appropriate, he may, at the request of the Hearing Officer, attach the final report of the latter to the draft decision submitted to the full Commission, "in order to ensure that when it

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48. *ibid.*, Article 2(1).

49. *ibid.*, Article 4(4), mandated by Article 9(4) of Regulation 99/63. Apparently, the Commission's practice is to release only a typed summary of statements, but not the tape recording of proceedings from which the summary was constructed.

50. *ibid.*, Article 5.

51. *ibid.*, Article 1(2).

52. *ibid.*, Article 6.

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reaches a decision on an individual case it is fully apprised of all relevant information"<sup>53</sup>. The Hearing Officer's report, even if attach to the draft decision, is not made public. The Court of Justice has ruled that the report of the Hearing Officer "does not constitute a decisive factor"<sup>54</sup> in the application of Article 85(1)/86 and, therefore, we can conclude that the participation of this officer in the decision-making process is, at best, indirect.

#### The "Preliminary Draft Decision"

The next stage of Commission procedure is the preparation of a "preliminary draft decision" by the relevant Division supervised by Directorate A. Directorate A's "special administrative unit for the co-ordination of competition decisions" is, "called upon to give a separate assessment of all individual cases" prepared by the other Directorates<sup>55</sup>. However, it is important to note that this assessment is not made in isolation from those responsible for the preliminary draft. In reality, one can assume that,

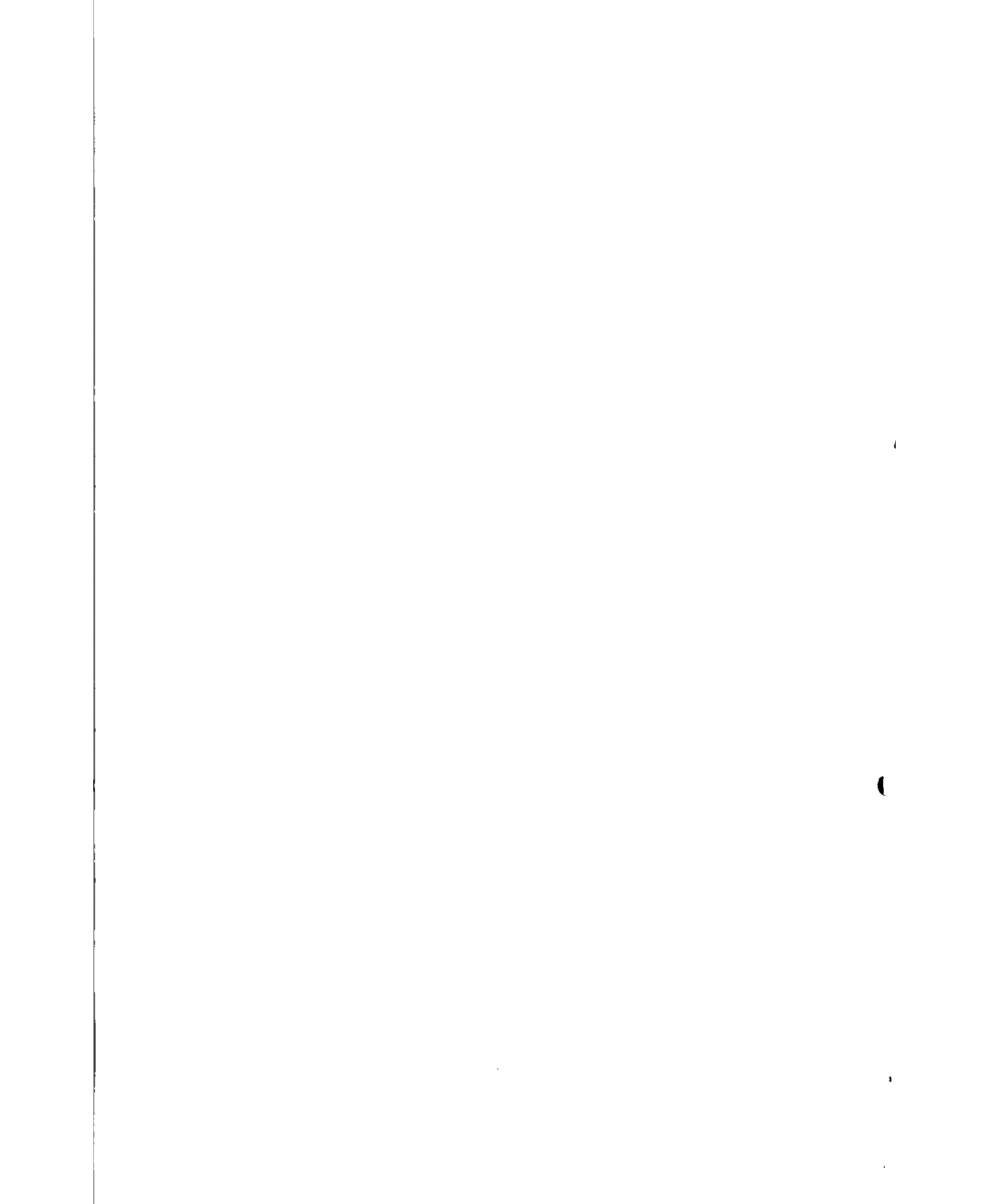
"there is a continuing dialogue between the person who carries out the investigation [and prepares the preliminary draft] and the person who makes that [assessment] ... and that the latter will go back to the investigator and perhaps

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53. *ibid.*, Article 7.

54. Case 212/86, 'ICI v. Commission' [1987] 2 CMLR 500, paragraph 7 of the order of the Court.

55. Statement of Re-organisation in 14th Report on Competition Policy (1985), para. 45.





ask for further details and further clarification"<sup>56</sup>.

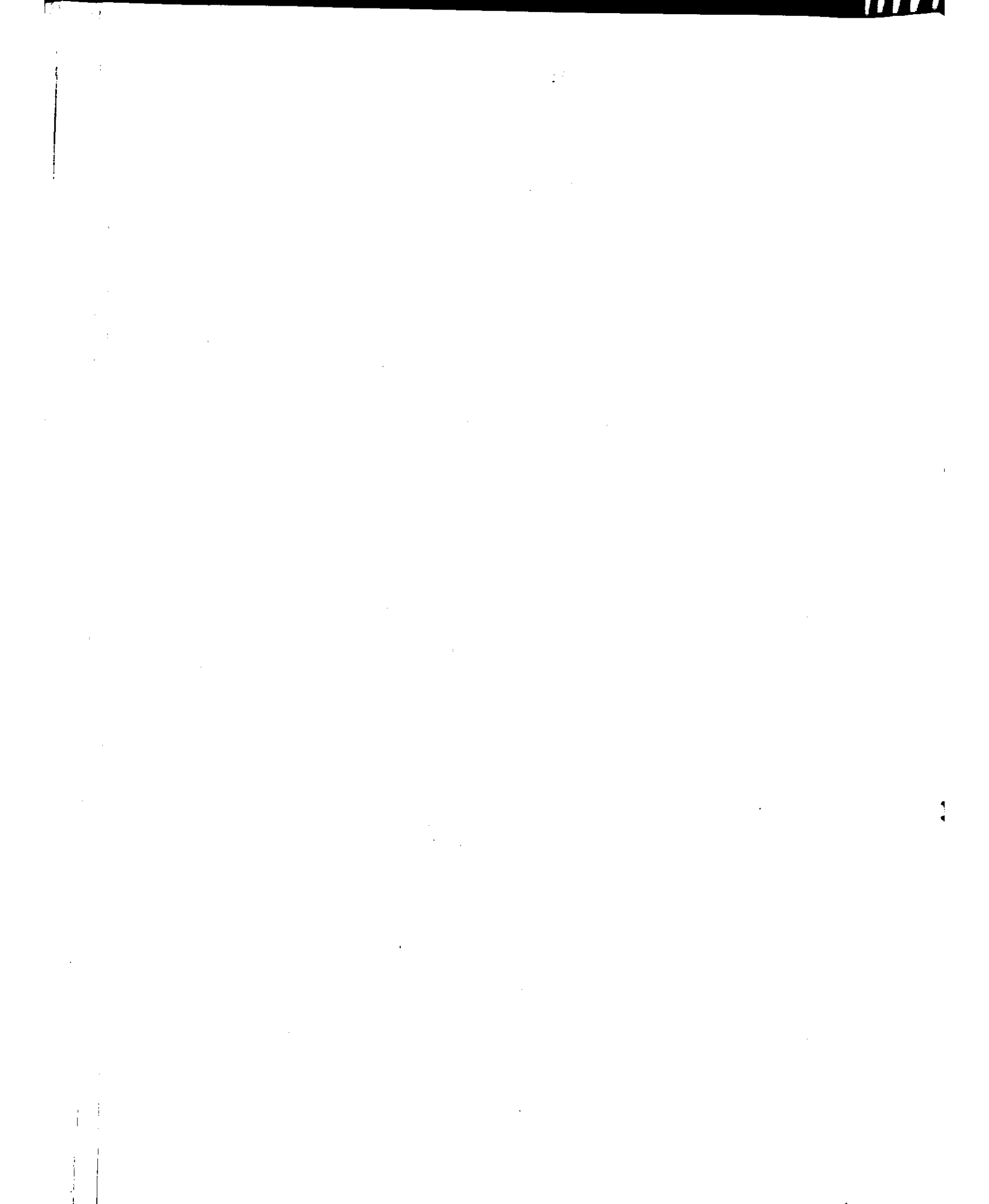
The preliminary draft is, then, submitted to the Director General for approval and, if he approves, it will continue to the "Cabinet"<sup>57</sup> of the competition Commissioner and to the Commission's own team of professional lawyers - the Legal Service. In the Legal Service, the preliminary draft will become the 'possession' of a "conseiller juridique", who becomes exclusively responsible for its treatment by the Legal Service. There then follows a series of exchanges between Legal Service, principally, and DG IV. When both are in agreement and the Commissioner has given the go-ahead the preliminary draft can be submitted to the Advisory Committee. The Advisory Committee, in consultation with DG IV, issues an opinion on the preliminary draft which is not made public. The opinion of the Advisory Committee is restricted to the merits of the preliminary draft as presented to it; its role is not to provide new facts or arguments for its adoption<sup>58</sup>.

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56. House of Lords, Session 1983-84, Select Committee on the European Communities, 18th Report, "Commission's Powers of Investigation and Inspection", Minutes of Evidence, pp 98-99 (per Mr P. Egerton-Vernon of the Joint Working Party of the Law Society and the Bar).

57. His/her own team of support staff, sometimes experts in his field of responsibility, usually from his/her own Member State.

58. In the 'Pioneer' case, the Court of Justice ruled implicitly that it would be improper for the Commission to base any part of its decision upon facts or arguments presented to it, in secret, by the Advisory Committee, Joined Cases 100-103/80, 'Musique Diffusion Française et al v. Commission' [1983] ECR 1825, para. 36 of judgment.



### The "Draft Decision" and the "Written Procedure"

The penultimate stage involves the formulation of a "draft decision" (to which the opinion of the Advisory Committee is attached) in the light of these exchanges, which is passed to the competition Commissioner. If he approves the draft, he will circulate copies of it to his colleagues using the so-called "written procedure"<sup>59</sup> of decision making and will make the file of the case available for their inspection. If none of the other Commissioners raise any objections within a specified time limit, usually a few days, the draft is taken to be adopted<sup>60</sup>. If an objection is made, the draft may only be approved at a plenary meeting of the college of Commissioners<sup>61</sup>.

### Publication

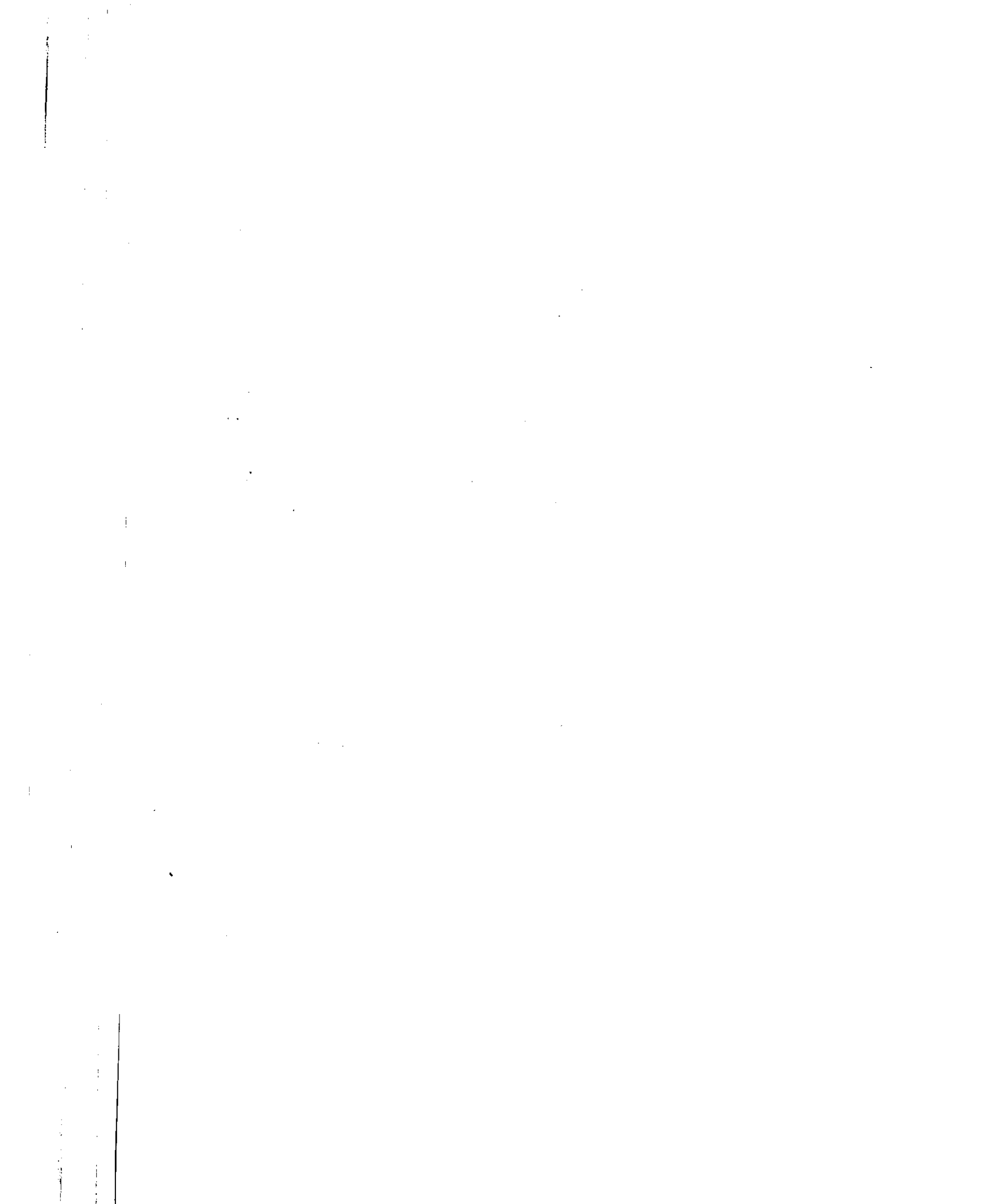
The decision is finally notified by telex to the relevant undertakings and the Member States; it is announced by press release from the Cabinet; any complainant is duly notified; and the decision is published in the Official Journal of the Communities.

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59. Established by the Commission's Rules of Procedure (Commission Decision 63/41 EEC, JO 1963, 181/63 as amended), Article 11.

60. *ibid.*, Article 11(4).

61. *ibid.*, Article 11(3).



THE STRUCTURAL IMPLICATIONS OF  
ADJUDICATION AND ADMINISTRATION

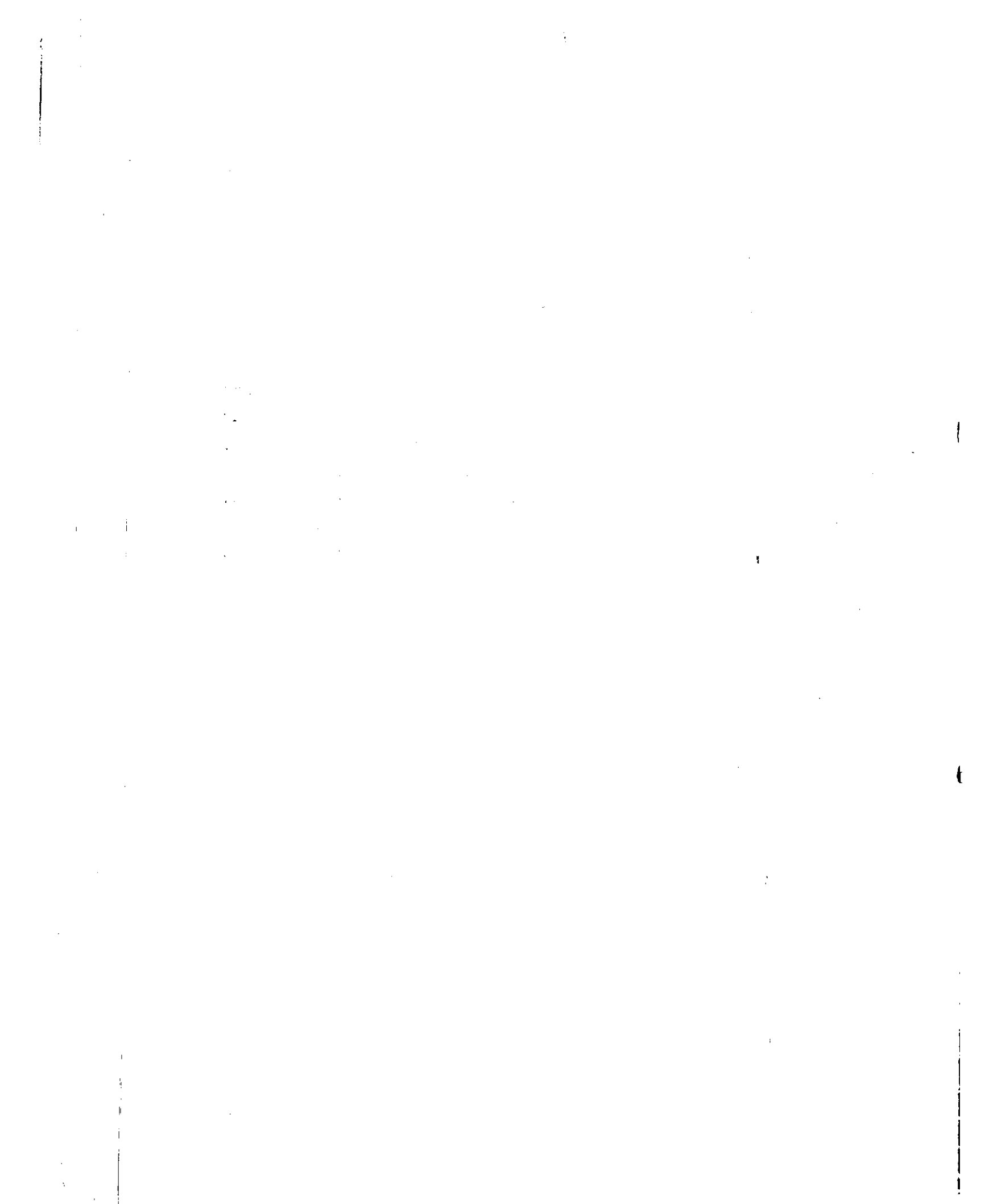
Introduction

This section takes the functional analysis of decision-making developed above, which distinguishes adjudication and administration, and examines what structural consequences, if any, are implied by those functions. It concludes that the two functions of adjudication and administration, in so far as they imply the pursuit of two different groups of political values, themselves imply the use of distinct decisional structures.

The Values Pursued by Adjudication  
and Administration

The Value/Function Relationship

How does one respond to the person who asks, quite legitimately, which mode the State ought logically to choose in applying a general legal norm in individual cases. According to Schauer, "to answer this question we must ask what the legal system, in whole or in part, is supposed to do, for only when we answer that question can we determine what kinds of tools it needs to



accomplish that task"<sup>62</sup>. In other words, the choice of decision-making function depends upon the value or values which government attaches to that decisional mode in the circumstances. Powers of adjudication or powers of administration are selected by the legislator as modes of legal decision-making according to their perceived political appropriateness. Moreover, it is submitted that this choice is determined by the language and terms of the legislative text itself.

In the granting of legal decision-making powers, the values whose relative political appropriateness is in issue are split basically into two groups: on one hand, are the values of stability and predictability; on the other, are the values of efficiency and flexibility. Of course, we should not allow ourselves to forget that, while creating decision-making jurisdiction is, at one level, about stability v efficiency and predictability v flexibility, "[m]ore fundamentally, it is about power and its allocation"<sup>63</sup>. Without doubt, the creation of different decision-making jurisdictions, "implicates profound questions of just who in any given domain may legitimately make certain decisions"<sup>64</sup>. A decision maker 'required' to act efficiently and permitted to take a flexible approach, wields significantly more power than one whose role is to stabilize and whose decisions are meant to be predictable.

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62. op. cit., supra fn 23, 547.

63. ibid., 543.

64. ibid., 541.

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We shall now proceed to consider the extent to which the priority which a legislative scheme places on one group of these values necessarily implies choice of either the administrative or adjudicative functions?

#### Efficiency, Flexibility and Administration

We have seen already that open-textured legal provisions which exhibit future orientation are the sort of rule systems whose application implies 'decisional freedom', 'discretion', or, in other words, administrative decision making. Administrative decision making is characterised by the ability of the decision maker to make use of and reason from non-legal norms which bear relevance to the policies or goals of the legal rules he is applying. We must now ask, (a), which values are open legal systems pursuing in instituting this sort of decision-making and, (b), whose values are they?

It is plain that a first value furthered by giving a decision maker jurisdiction with regard to the purposes of the legal system is the public value of or public interest in efficiency. In other words, the interest of society in ensuring that decisions make the best possible use of the resources available in the circumstances. To take a good administrative decision is to deliver a result which, given the constraints of time and resources, most accurately serves the policy of the relevant legal system. In the words of one English judge, "[g]ood ... administration requires proper consideration of the public interest" (or, in other words, the goals of the legal scheme)

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while being, "concerned with speed of decision"<sup>65</sup>. The ability of the administrative decision maker to make use of any social, scientific or political considerations which he considers relevant is a means of making the result of his decision more accurate and, therefore, to make him a more efficient actor.

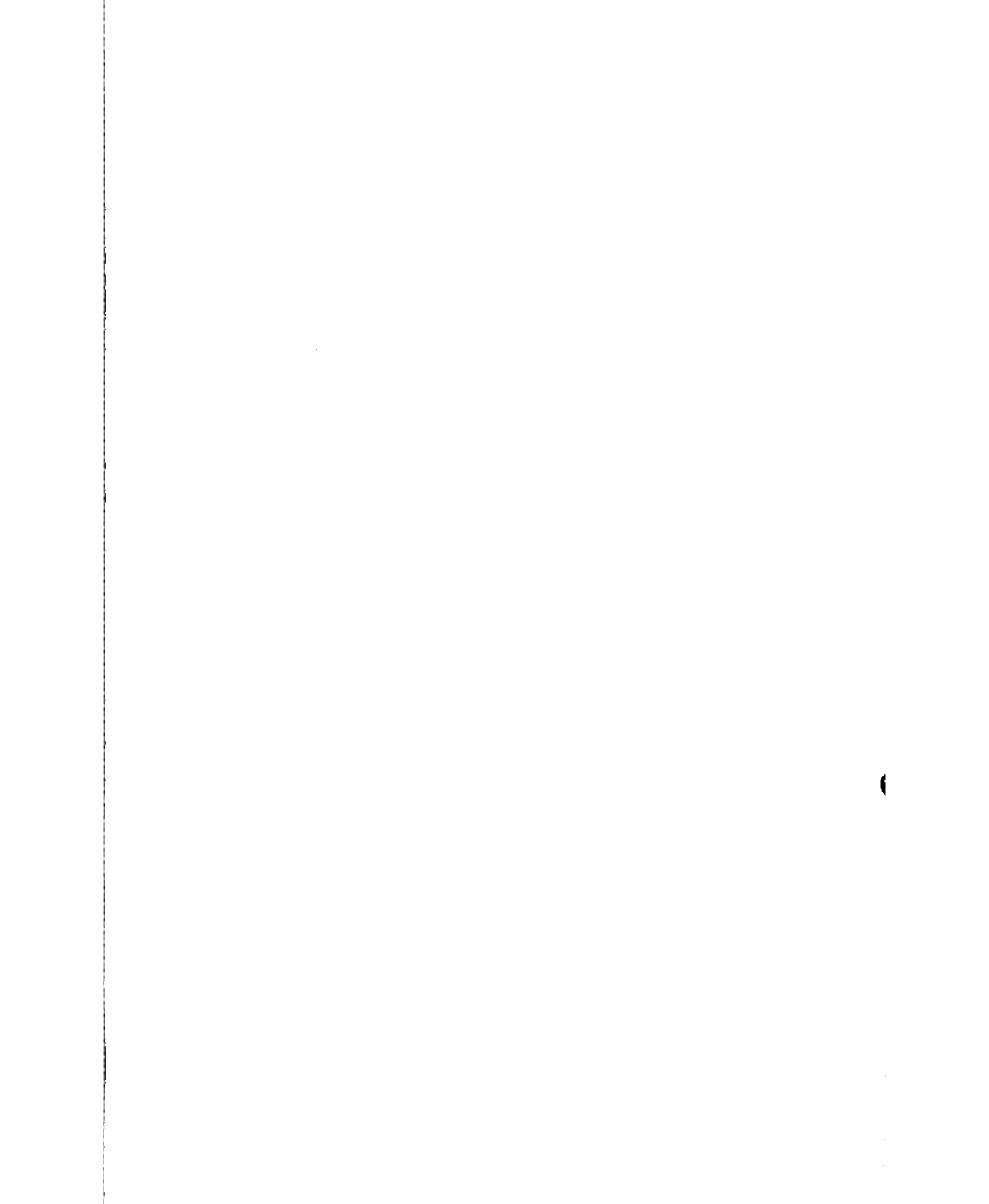
A second value served by discretionary decision-making is the principally private value of or private interest in flexibility, or variability. In other words, the interest of the individual in obtaining a decision which takes into account his special needs or circumstances. If it is adequately to respond to the manifold needs and conditions of individuals, administration must operate flexibly. A decision maker must, therefore, be able continually to adapt his activities in the light of changing social, scientific or political circumstances present in the cases before him: in other words, "[g]ood ... administration is concerned with substance rather than form"<sup>66</sup>. Using other terms, one can also define a system which enables a decision maker to be flexible as one which, to repeat a phrase used earlier, "injects a [substantial] possibility of variance"<sup>67</sup>, into decisional outcome.

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65. R v Monopolies and Mergers Commission, ex parte Distillers, [1986] 2 All ER, 257, 266 (per Sir John Donaldson MR).

66. *ibid.*

67. Schauer, *op. cit.*, supra fn 23, 540-41.



## Stability, Predictability and Adjudication<sup>68</sup>

Previously we have explored the proposition that the application of the rules of closed legal systems which are oriented to the past necessarily implies 'decisional restraint', or adjudicative decision-making. Adjudication is characterised by the impermissibility of the use of decisional referents other than those of the legal system itself in applying its rules. Which, then, are the particular values pursued by the establishment of adjudicative systems and, again, whose interests are they?

Stability is the principal public value to be, "fostered by truncating the decisionmaking authority"<sup>69</sup>. Or, in other words, limiting the decisional jurisdiction furthers society's interest in continuous adherence to standards, in conservatism in governmental action. Stability is, if anything, the opposite of that of efficiency which we examined above. Indeed, described in negative terms, the pursuit of stability could legitimately be described as the pursuit of "sub-optimization" or inefficiency. The adjudicator is deprived of access to non legal norms by the system's clearly and precisely worded rules, in order that the decisions which he reaches are not based upon constantly varying factors. Instead, the ultimate bases of his decisions are formally limited and essentially immutable. In denying the decision maker jurisdiction with regard to the goals of the

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68. On the way in which systems implying decisional restraint foster the values of stability and predictability, see generally, Schauer, *op. cit.*, supra fn 23., 539-42.

69. *ibid.*, 542.



system, the closed legal system seeks to restrict substantially the range of possible decisional outcomes in the cases which come before him and, "give up some of the possibility of improvement [optimum outcome] in exchange for guarding against some of the possibility of disaster"<sup>70</sup> inherent in the pursuit of efficiency. Possessing fewer normative 'tools' than the administrator to distinguish between individual cases, in the long run the adjudicator is institutionally inclined to stability.

While stability is the principal public value pursued by creating adjudicative jurisdiction, there is a second, private, value which it serves - predictability. The function of adjudicative decision making serves the interest of individuals subject to government regulation in being able to plan their future activities with certainty. In order to plan ahead with certainty, affected individuals need to be able to predict the outcome of potential legal decisions. Decision-making which utilizes extra-legal norms cannot deliver this predictability; only decision-making which utilizes exclusively legal norms (in the context of a closed legal system consisting of clear and precise standards) can guarantee a large degree of predictability or consistency of outcome to affected individuals.

Justice and its Functional Implications

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70. *ibid.*, 542.



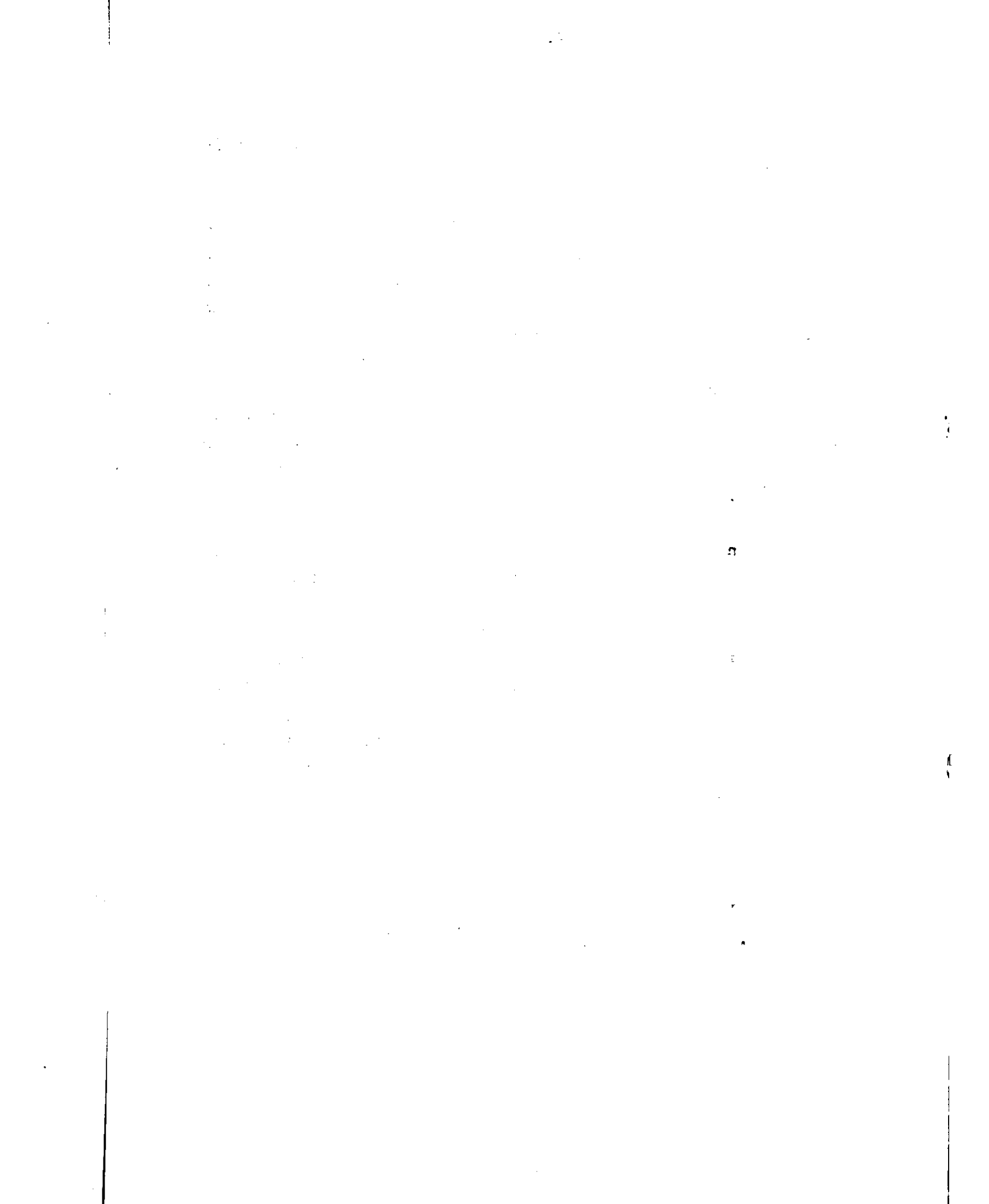


We have examined, on one level, the values pursued by legal systems which imply one or other functional type of decision-making. It is important at this point, however, to discuss a public value whose pursuit may be involved in either closed or open legal systems - that of justice. Justice, however, has two 'faces', in the sense that the concept of "justice" can only be conceived of in terms of two separate and mutually opposed interests: that, on one hand, in social or 'activist' justice and that, on the other, in formal or 'reactive' justice<sup>71</sup>.

) The public interest in social justice can be defined as that of securing some degree of equality or equal treatment for the members of the community in a substantive as opposed to a procedural sense. This interest has historically involved the spontaneous legislative intervention of the State in social or economic life in order to undertake the (re)distribution or (re)allocation of resources required to achieve the substantive equality sought. One can contrast the public interest in social justice with the public interest in formal justice. This interest reflects society's opposite desire to ignore the material inequalities of economic or social actors and treat them - in the official procedures to which they are subjected - as equal, or indistinguishable. The public interest in formal justice has ) historically required the State to intervene on a case by case

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71. For a full discussion of the two forms of the 'justice' value see, Mirjan R Damaska "The Faces of Justice and State Authority: A Comparative Approach to the Legal Process", 1986 Yale, especially pages 71 to 94, which discuss the relationship between the type of State ('reactive' or 'activist') and the ends of the legal process ('conflict solving' or 'policy implementing').



basis, only in so far as it is called upon to do so by parties in dispute.

It will be noted that governments attempting legally to achieve social justice in a certain field will be best served by an open textured legal system whose implicit administrative method of application allows material inequality and resource disparity to be readily ascertained and rectified by decision makers. In contrast, it will be obvious that a government uninterested in resolving material inequality or resource disparity is likely to be best served by a closed legal system whose implicit adjudicative method of application closes the decision maker's eyes to anything but the formally defined position of affected individuals.

Perhaps the most important reason for introducing the dual concepts of social and formal justice at this stage of the discussion is to point out that while, sometimes, one of these interests alone can be served by a legal scheme, they are more often present together in the same legislative programme. Implementing a governmental policy of maintaining a healthy working environment, or preserving undistorted economic competition in the market certainly requires the creation of a legislative scheme using open textured legal norms which can be applied administratively, but, in certain respects where there is a desire to serve the public interest in formal justice, it can also include the insertion into that scheme of closed legal norms, whose application implies adjudication.

Summary



*Don't let the structure  
be the structure*

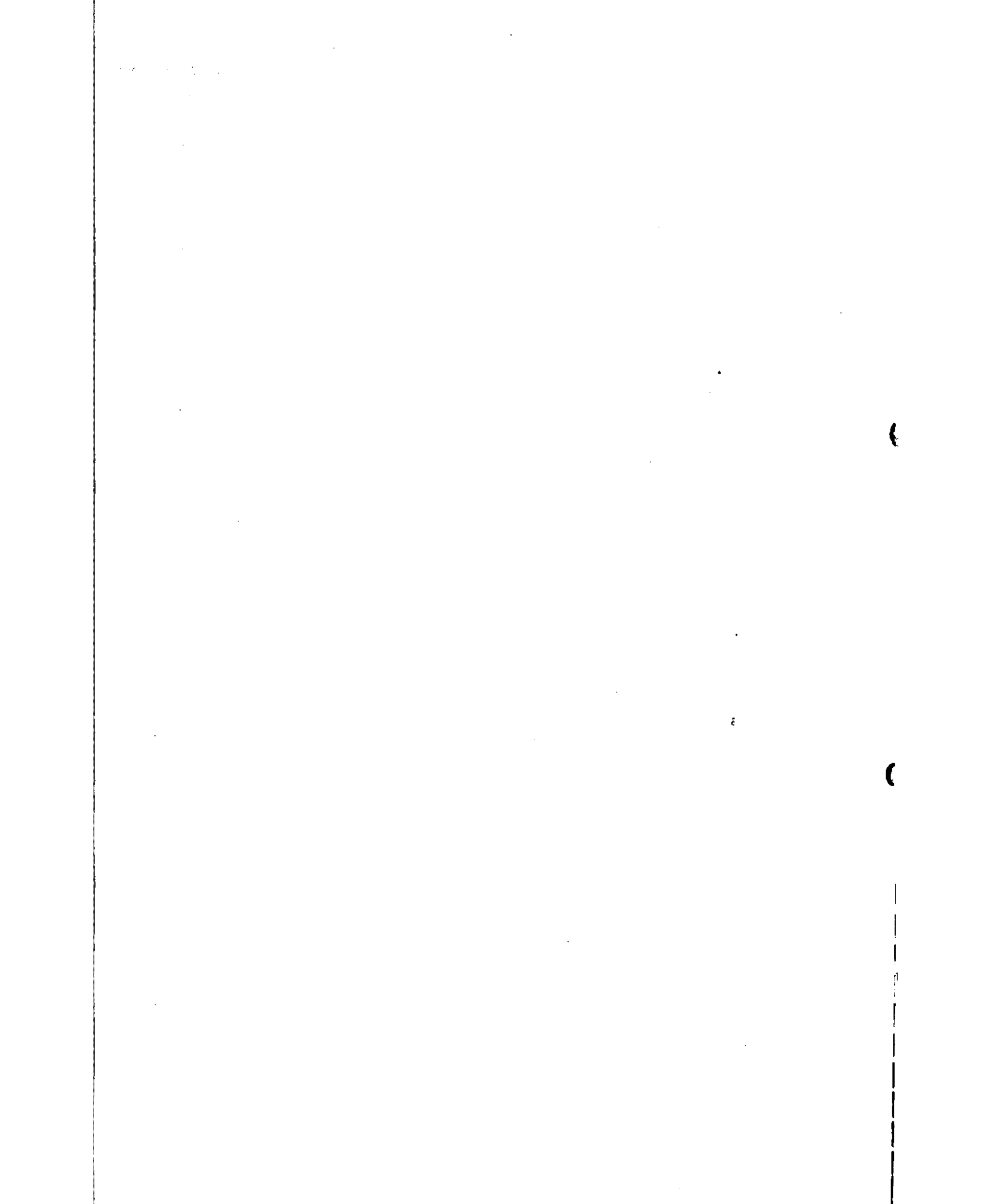
We have seen in this part how the creation of either adjudicative or administrative jurisdiction reflects, at the most fundamental level, a concern with the legitimate exercise of political power. On a second level, the choice between the two relates to the priority placed by the legislator on decisional stability or efficiency and on decisional predictability or flexibility. On a third level, the choosing one or other involves a choice between achieving results which are either substantively or merely formally just.

### The Structural Implications of Adjudicative and Administrative Functions

#### The Value-Function/Structure Relationship

Decisional 'structure' is used here in to describe the legally constituted organ - the personnel, their procedures - which actually exercises a certain decision-making function. Structural implications refer to the sort of decisional structure (in terms of its composition, organisation, procedure) logically suggested by a particular value-function combination. In this part we shall see that the structural implications of adjudication can be summed up in the term, 'policy insulation' or impartiality, while those implied by administration can be characterised as, 'policy orientation'.

#### Adjudication and Policy Insulation



To recall what we have previously established, adjudicative decision-making pursues the values of limited power, formal justice, stability and predictability. Its use is implied by closed legal orders containing clear and precisely worded norms with past orientation whose application necessitates formulation of, "claims of [legal] right or accusations of [legal] fault"<sup>72</sup>. What structural guarantees logically underpin these sorts of institutional commitments?

Adjudication is institutionally committed to decision by formally rational deduction: as Fuller put it, "a formal definition of rights and wrongs is a nearly inevitable product of the adjudicative process"<sup>73</sup>, or to use his classic formulation,

"the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and [formally] reasoned arguments in his favour"<sup>74</sup>

Behind this proposition there logically stands the assumption that the decision reached is rationally related, in a formal sense, to the proofs and arguments presented by the affected parties. Second, and implicit in the assumption of formal rationality, is the assumption that the decision-maker is himself receptive only to formally rational argument - that he decides without regard to non legal / policy norms: in short, that he acts with impartiality.

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72. Fuller, op. cit., fn 29 supra, 369.

73. ibid., 370.

74. ibid., 364.

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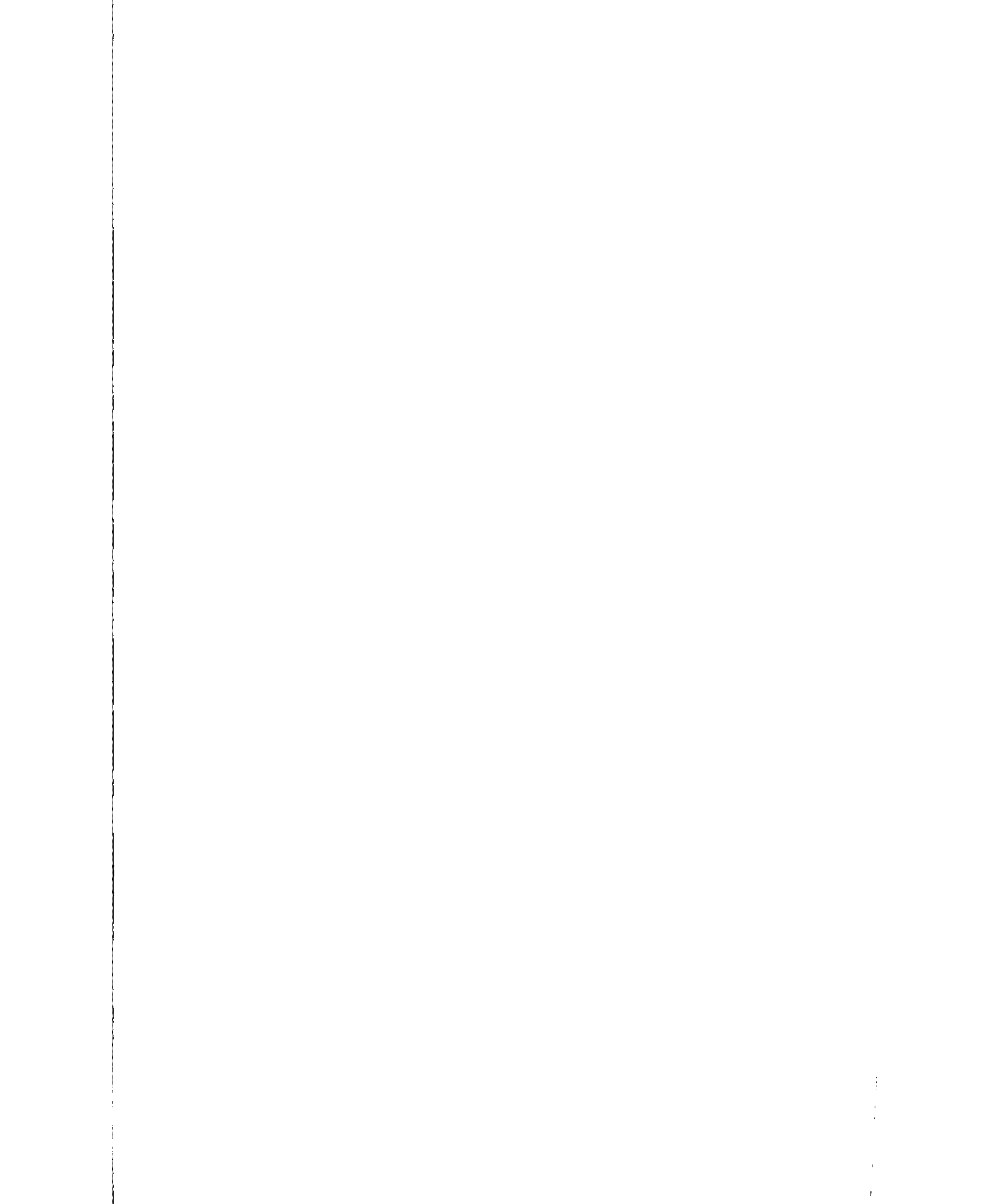
Impartiality, as a logical pre-requisite of adjudication, implies the possession of certain structural and procedural characteristics by the adjudicator. In the context of the adjudication of an accusation of fault, for instance, impartiality implies that the adjudicator ought to be a person, or group of persons, independent of both accuser and accused, firstly, in a physical sense (being a person distinct from either the accuser or accused) and, secondly, in an organisational sense (being free from the control or undue influence of either side). In other words, the decisional structure implied by the adjudicative function is a triadic one. The adjudication of an accusation of legal fault logically implies, first, a legal rule, an accuser (A), an accused (B), whom A accuses of violating the rule and an adjudicator (C) to decide whether, given legal rule and the facts of the case, B has violated the rule. C must obviously be independent of B, the accused, who has a clear interest in the outcome of the case. Equally, C must be independent of A, the accuser, whose policy interest in the outcome of the case, though opposite to B's, is also clear.

The primary interest of this paper is the A-C, accuser-adjudicator, combination. In Fuller's opinion, the damage caused to adjudicative integrity by this combination is inevitable, since

"it is generally impossible to keep even the bare initiation of proceedings untainted by preconceptions about what happened and what its consequences should be... [which, in compromising the impartiality of the adjudicator] impair... the integrity of adjudication by reducing the effectiveness of the [affected party's] participation through proofs and arguments"<sup>75</sup>.

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75. *ibid.*, page 387.



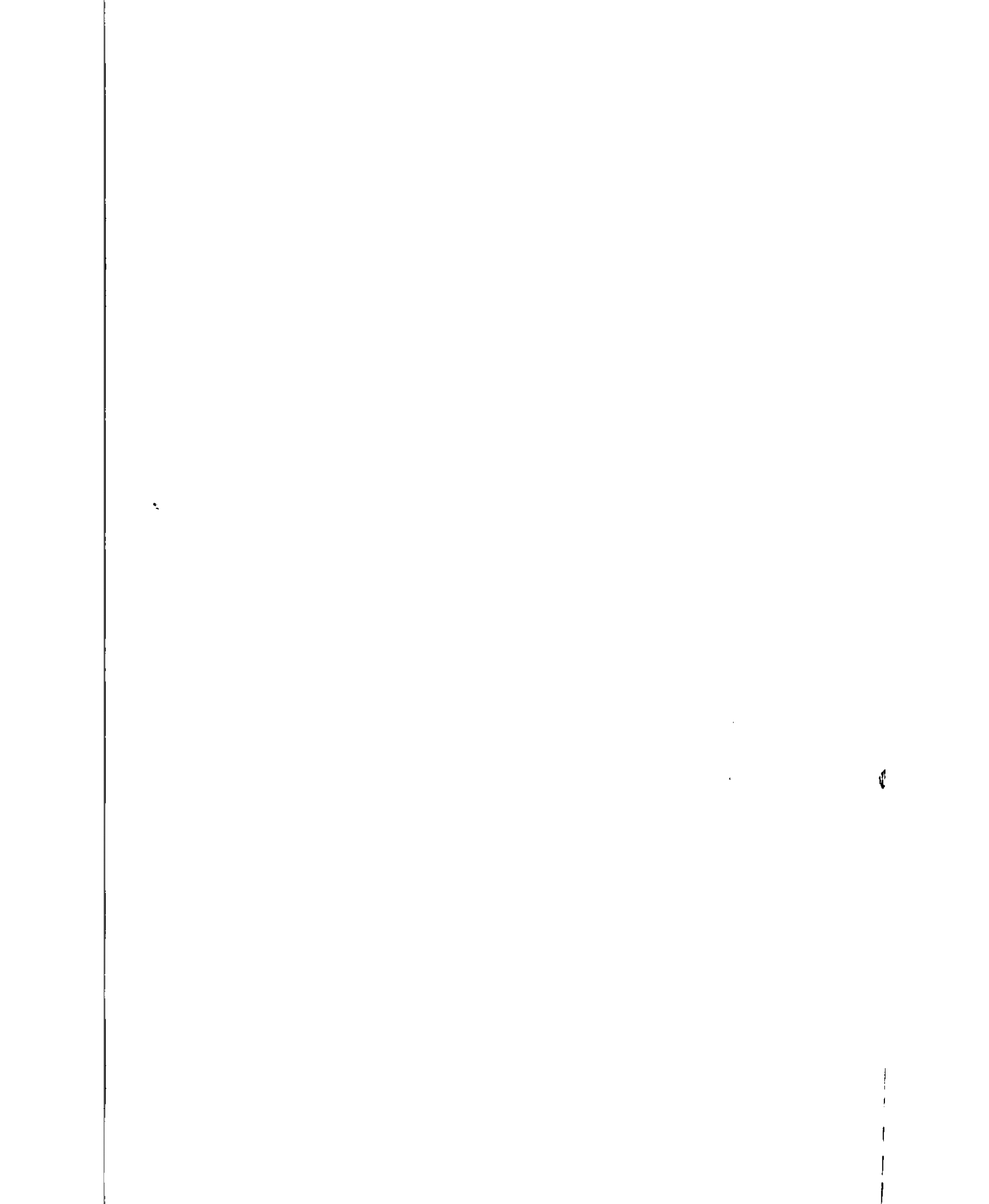
What do we really mean, however, when we talk of a triadic adjudicative structure? Do we mean, among other things, that the agency or organisation to which the adjudicator belongs is, in no way, structurally connected with the agency or organisation to which the accuser belongs? Not necessarily. The creation of structural guarantees to ensure that the adjudicator is independent of the accuser or prosecutor can logically operate within one and the same agency or organisation - provided that the two sets of role players are insulated sufficiently well from each other. We shall examine some of the methods available to achieve this insulation later in the paper<sup>76</sup>.

#### Administration and Policy-Orientation

We have previously established that administrative decision-making pursues the values of governmental activism, social justice, efficiency and flexibility. Its use is implicit in open textured legal systems made up of generally and vaguely worded norms of future orientation whose application requires the making of value judgments based on non legal norms which inform their purposes or goals. What can we say about the sort of decisional structures implied, or, rather, not implied, by this type of decision-making? Given that administrative decision-making is not bound to a formally rational process of reasoning, given that the administrator is required to be responsive to non legal arguments - those specifically not framed as formal claims of right or accusations of fault - ought his impartiality be implied?

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76. See Chapter 9 *supra*.



In one sense, impartiality on his part is an implicit prerequisite of his function: he must be receptive only to rational arguments based on norms relevant to the purposes or goals of the legal system with which he is working. In other words, he must not misuse his decisional jurisdiction by exercising it for policy purposes other than those for which it was granted. In this sense, the administrative decision maker is required to be impartial by ignoring factors, such as his personal relationship to the affected parties, which are not rational criteria for decision. However, we can clearly contrast this type of impartiality with that required of the adjudicative decision maker. Whereas the adjudicator is required to be receptive only to formally rational argument, the administrator is required to be open also to that which is substantively rational. In the former case, impartiality suggests insulation from policy argumentation 'per se', while, in the latter case, it suggests insulation only from irrelevant policy argument. To put it another way, the administrative decision maker must orient himself towards the policy of the legal rule he applies instead of being obliged to insulate himself from it. The administrative implementation of legislative goals by a policy oriented decision maker clearly does not suggest the same sort of impartiality that is implied by adjudication. In that case, is there any logical need for a triadic decisional structure in administration?

The administrative application of legal policy implies, first, a policy rule, an agency (A) which seeks to apply that rule, an individual (B) in whose case the rule is to be applied and a decision maker (C) to decide whether, given the policy and the facts, it is appropriate to apply the rule in B's case. Obviously, as with adjudication, the B-C combination of decision maker and affected individual is illicit. However, the A-C combination which, in the adjudication example, is illegitimate,

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is not logically excluded here as a feature of decisional structure. The necessary sharing of interests by both A and C removes the logic of the decisional triad and suggests the use of a completely different set of structural options.

### Summary

In this part we have looked at the structural implications of the two decision-making functions. We have discovered, on one hand, that in the case of adjudication, institutional commitment to formal rationality and, thereby, to policy insulation logically imply a fundamentally triadic decisional structure, which separates the roles of accusing and judging. On the other hand, we have come to the conclusion that with administration, the commitment to substantive rationality and, thereby, to policy orientation imply a decisional structure other than the triad.

## Regulatory Mis-match: Allocating Decision-Making Functions to Inappropriate Structures

### Introduction

In the parts of the section above we have examined how the two different decision-making functions logically imply the pursuit of two separate groups of public or private interests or values and how their exercise either does or does not imply the use of a triadic decisional structure. Of course, this is a normative proposition - it does not and cannot describe the allocation of

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functions which takes place in the 'real world'. Society's, "conscious and deliberate attempt[s] to articulate structure and function in a way which would reflect certain values in the operation of powers demanded"<sup>77</sup> need not correspond to the scheme we have established. However, the arguments we have constructed about the inter-relationship of value, function and structure were never meant for that purpose, instead they serve as a powerful tool for criticising 'real world' allocations from a sound theoretical perspective.

Theoretical criticism is valid as an end in itself, of course, <sup>Assume</sup> but it will ultimately be used in this paper as a means of explaining the malfunction of a real decision-making system (adjudication of cases under Articles 85(1)/86 EEC), of evaluating the prospects of success of current reforms of the system (creation of the new Court of First Instance) and of suggesting the direction in which reform of that system perhaps ought to be heading (division of powers within the Commission).

Meanwhile, we shall end this section by demonstrating the practical value of our arguments by examining another real life example of regulatory mismatch.

#### Administration and Use of the Triad

The inappropriate combination of administrative function and triadic structure is probably the most frequent example of

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77. Vile, op. cit., supra fn 17, 329.

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regulatory mis-match. In these cases, the triadic structure in question normally takes the form of a court or court-like body, which either exists already, or which is established specially. Damaska discusses this issue when he talks of the possibility of implementing 'activist' State policies via the court-like structures of 'reactive' justice and of the dissonance or tension which such mismatch cause<sup>78</sup>. The attempt of legislators to pursue the goal of social justice via triadic structures like courts is symptomatic of a desire to administer policy efficiently, whilst constrained by a belief that somehow 'justice' will not be seen to be done to affected individuals unless the structure entrusted with administration is policy-insulated or impartial - or, in other words, takes the form of a court. These allocations ignore the fact that, as Delfino observes:

for  
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 Damaska

"[c]ourts are ill equipped to carry out - or even foster - regulation ... The judicial process is by its very nature <<static oriented>>. The court needs to look at factual situations as facts that are well fixed in time and place. The need to solve an actual dispute, that is, one set of facts and no others, makes the court recoil from considering an evolving reality. The judicial system needs <<facts>>, not <<processes>>"<sup>79</sup>.

The risk incurred in constructing a legal system which attempts to combine a function serving the values of efficiency and flexibility with a structure which serves the opposing values of stability and predictability, is that, in the end, the system succeeds in serving neither.

78. op. cit., supra fn 71, 92-93.

79. Maurizio M. Delfino, "Enforcement Discretion and American Antitrust: Regulation through Prosecution" 1984, Edizioni La Piramide, Roma, 133-34.

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## The Restrictive Practices Court - Overview

An excellent example of the administration/triad mismatch and the problems which it causes can be found in the United Kingdom's, "Restrictive Trade Practices Court" (RPC), which was established in 1956<sup>80</sup>. This is a formally constituted court of law<sup>81</sup>, staffed by judges of the regular court system<sup>82</sup> and assisted in its decision-making by lay members<sup>83</sup>. Its function, under the Restrictive Trade Practices Act 1976<sup>84</sup>, is, broadly speaking, to decide whether restrictive trade agreements referred to it by the

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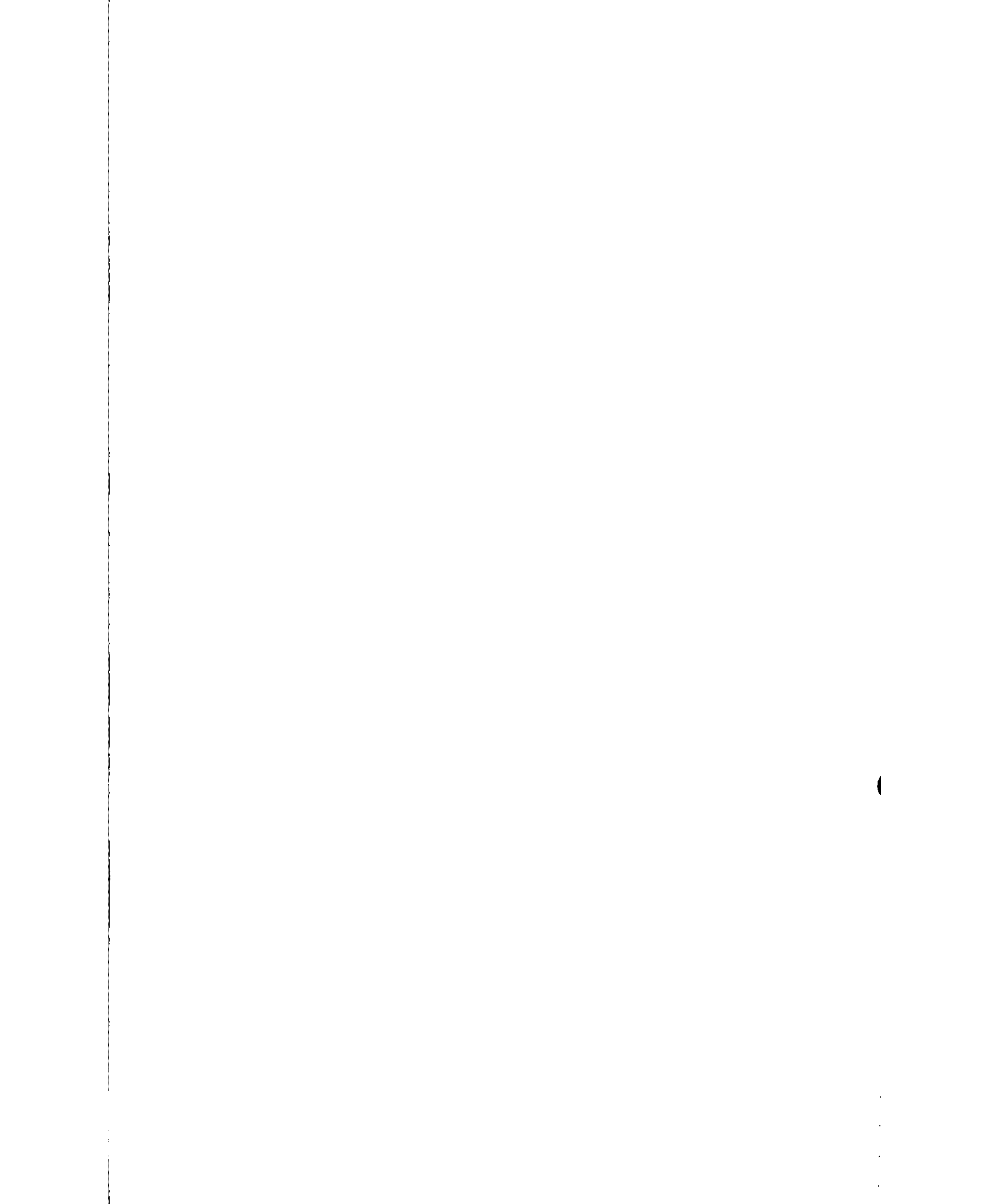
80. Restrictive Trade Practices Act 1956, c. 68, section 2.

81. Restrictive Practices Court Act 1976, c. 33 (hereafter, RPCA), section 1(1).

82. The RPC consists of five "nominated judges" (RPCA, s1(2)(a)) of which three are High Court judges nominated to the Court by the Lord Chancellor; one is a judge of the Court of Session nominated by the Lord President of that Court; and one is a judge of the Supreme Court of Northern Ireland nominated by the Lord Chief Justice of Northern Ireland (RPCA, s. 2).

83. The Court consists of, "not more than ten appointed members" (RPCA, s. 1(2)(b)) appointed by the sovereign from those whom the Lord Chancellor recommends as appearing to him to be qualified by virtue of their, "knowledge of or experience in industry, commerce or public affairs" (RPCA, s. 3(1)). For the hearing of proceedings, a minimum of three Court members, of whom one must be a judge, are required to sit (RPCA, s. 7(1)). The opinion of the judge or judges sitting in any case on points of law prevails over that of their lay colleagues (RPCA, s. 7(2)).

84. c. 34, consolidating the provisions of the Act of 1956, cited at fn 18 supra, and the Restrictive Trade Practices Act 1968, c. 66.



Director General of Fair Trading<sup>85</sup> are in the public interest, or are against the public interest<sup>86</sup>. The Director General is obliged to compile and maintain a register of agreements subject to registration under the RPA and then to refer to the Court all agreements contained on that register<sup>87</sup>. The RPC performs its public interest evaluation by utilizing a number of so-called 'gateways' listed in the legislation containing a number of socio-economic justifications any one of which the Court must find satisfied before it will sanction an agreement<sup>88</sup>. In addition,

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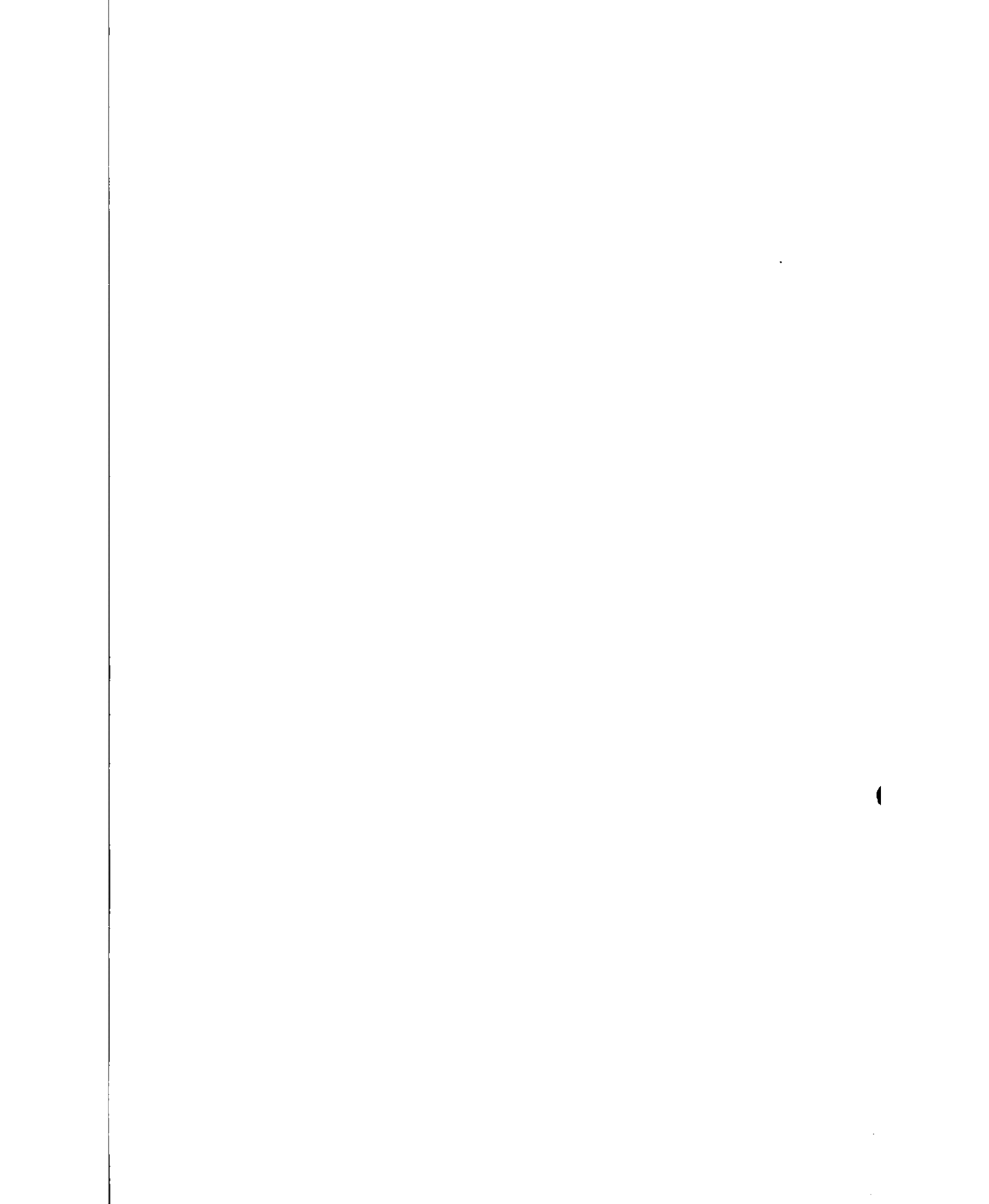
85. The Office of Fair Trading is a government agency responsible for the investigation and suppression of unfair trade practices and the protection of consumer welfare in the United Kingdom which was established under the Fair Trading Act 1973, c. 41. The Director General of Fair Trading is head of this agency.

86. The Court's jurisdiction is set out in s. 1(3) of the RPA. Restrictions which are found by the Court to be contrary to the public interest are void (RPA, s. 2(1)).

87. RPA, s. 1(2)(a),(b). Agreements subject to registration are defined by section 6 of the RPA according to an exhaustive list of criteria relating to the form which they take.

88. RPA, s. 10(1). Under this provision, restrictions with respect to goods agreements are justified if the Court is satisfied, inter alia, that their removal would, "deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits enjoyed or likely to be enjoyed by them" (s. 10(1)(b)); or that their removal would, "have a serious and persistent adverse effect on the general level of unemployment in an area" (s. 10(1)(e)); or that it would, "be likely to cause a reduction in the volume or earnings of the export business ... of the [relevant] trade or industry" (s. 10(1)(f)). In addition, the Court must also be satisfied under the so-called "tailpiece" of s.

(Footnote continues on next page)





the Court may, at any time, discharge a previous public interest declaration it has made and substitute it with another<sup>89</sup> if requested to do so by the Director General or by an affected party<sup>90</sup>. Application for such variation may only be made with the Court's leave and, then, may only be granted, "upon prima facie evidence of a material change in the relevant circumstances"<sup>91</sup>. The RPC's power is not only declaratory, however; it may also issue "injunctions" or restraining orders which forbid parties from illegally attempting to enforce agreements that it has declared contrary to the public interest<sup>92</sup>.

We can see from this overview that the RPA empowers a triadic structure of a classic sort, the RPC, to perform a clearly administrative function with regard to the regulation of restrictive trade agreements. On the one hand, the RPC's formal court status, its judicial personnel and its adversarial

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(Footnote continued from previous page)

10(1) that the restriction, "is not unreasonable having regard to the balance between [the justifications made out] and any detriment to the public or to [purchasers, consumers, users or competitors] ... resulting or likely to result from the operation of the restriction".

89. RPA, s. 4(1).

90. RPA, s. 4(3).

91. RPA, s. 4(4).

92. RPA, s. 2(2). Breach of an injunction issued by the RPC constitutes contempt of court and as such exposes those responsible to the risk of the imposition, at the RPC's discretion, of fines and/or prison sentences (RPCA, s. 9(3),(4)).



procedures clearly demonstrate its triadic decision-making structure. The open textured nature of the 'gateways' and 'tailpiece'<sup>93</sup> of the RPA and the wide power of variation/substitution of judgments it grants to the Court point out, in contrast, the administrative nature of its function.

#### The RPC - Predicted Difficulties

In their seminal work on the RPC, published only nine years after its establishment, Yamey and Stevens expressed serious doubts about the choice of a judicial body to perform the function of economic prediction<sup>94</sup>. In their opinion, "the insufficiently precise criteria provided by the gateways and the invitation in the tailpiece to balance conflicting policy objectives meant that the judicial process was being invoked to deal with issues which it was institutionally ill-equipped to handle"<sup>95</sup>; or which, in other words, were not, "peculiarly suited to the judicial process or causally related to the peculiarities of legal logic or legal relevance"<sup>96</sup>. "The adversary procedure as embodied in the traditional judicial process", they contend, "could scarcely be a

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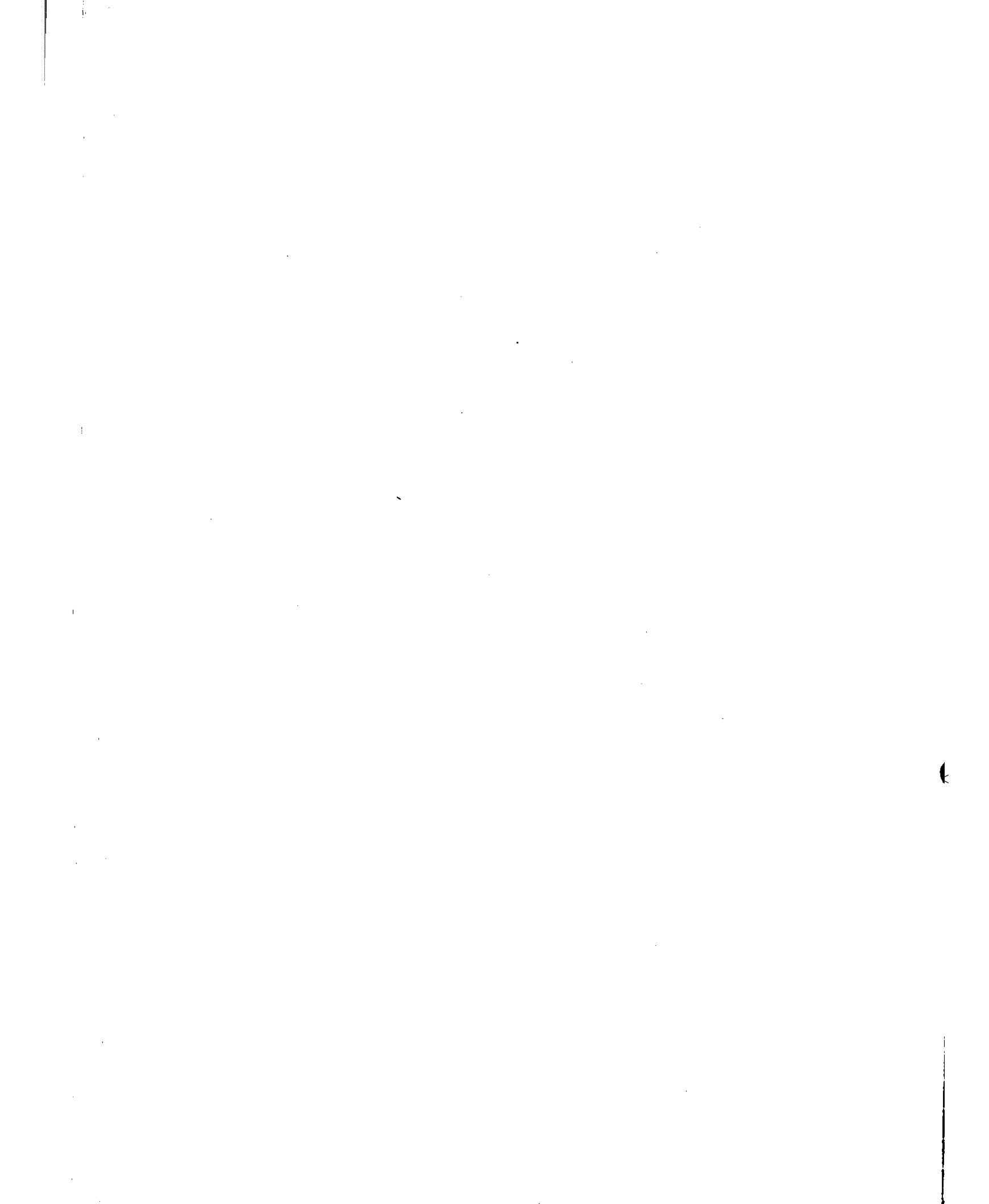
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93. See fn 88 supra.

94. B. Yamey and R. Stevens, "The Restrictive Practices Court" 1965, Weiden & Nicholson, London.

95. *ibid.*, 48.

96. *ibid.*, 140-41.



less convenient method of handling naked issues of policy"<sup>97</sup>.

The most serious error which they accuse Parliament of committing in 1956 was the confusion of the flexibility of a case by case approach with the judicial 'modus operandi'. They point out that, while courts do investigate situations on a case by case basis, "they are investigated in the context of legal standards which, in the spectrum of decisionmaking, are relatively inflexible"<sup>98</sup>. "[I]t is not normally assumed", they continue, "that in the course of such individual investigations the judges will have to choose between conflicting economic predictions and make value judgments involving ... competing policy objectives"<sup>99</sup>. Yamey and Stevens conclude on an ominous note by observing that, "[t]he disguising of economic policy issues as judicial ones, when they have customarily been settled as political issues, may well prove to have be<sup>e</sup>n an unfortunate constitutional development"<sup>100</sup>.

#### The RPC - System Breakdown

In the first years of its operation the attempts of the RPC to reconcile function to its procedure resulted in a series of

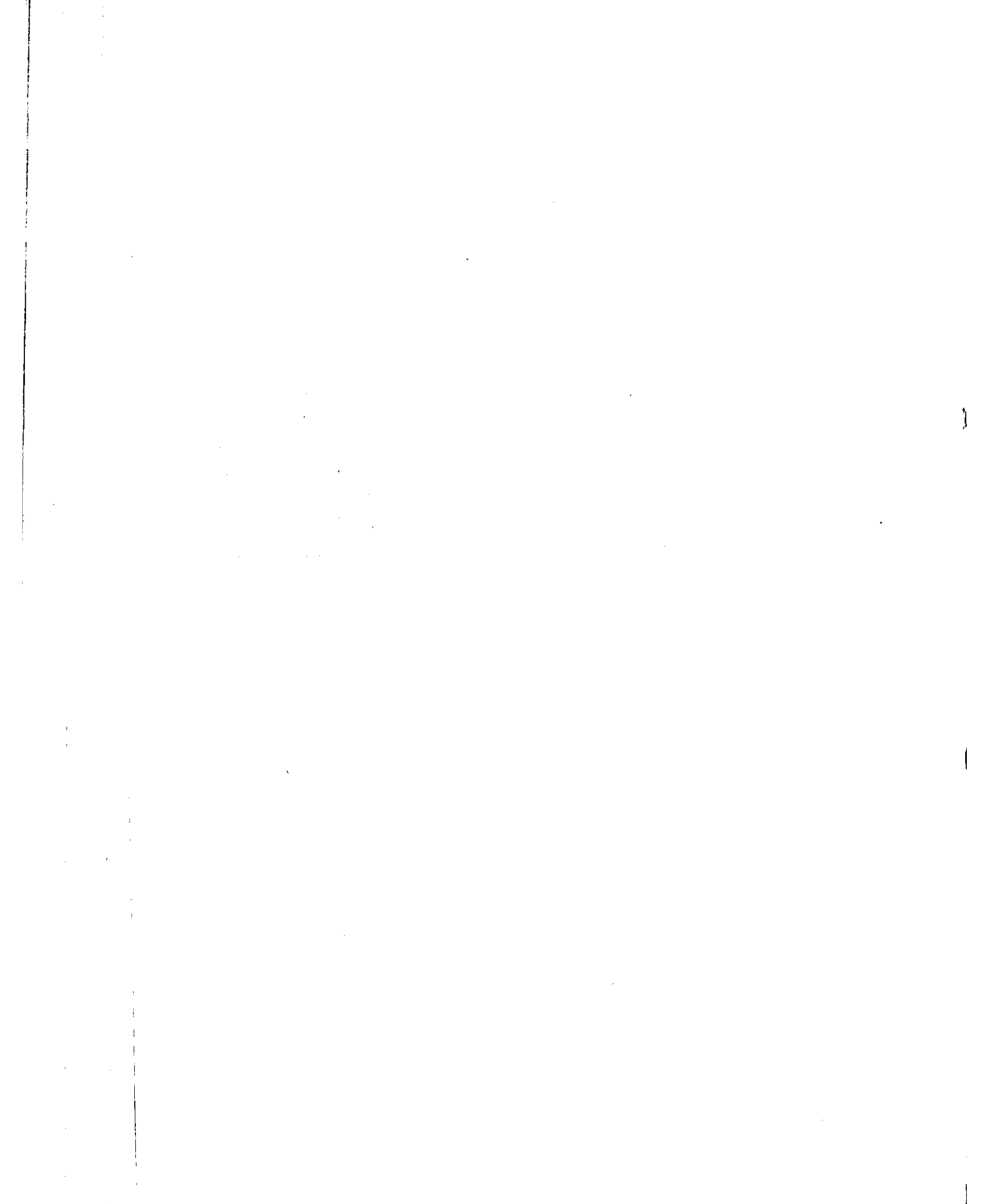
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97. *ibid.*, 144.

98. *ibid.*, 140 (emphasis added).

99. *ibid.*

100. *ibid.*, 153.



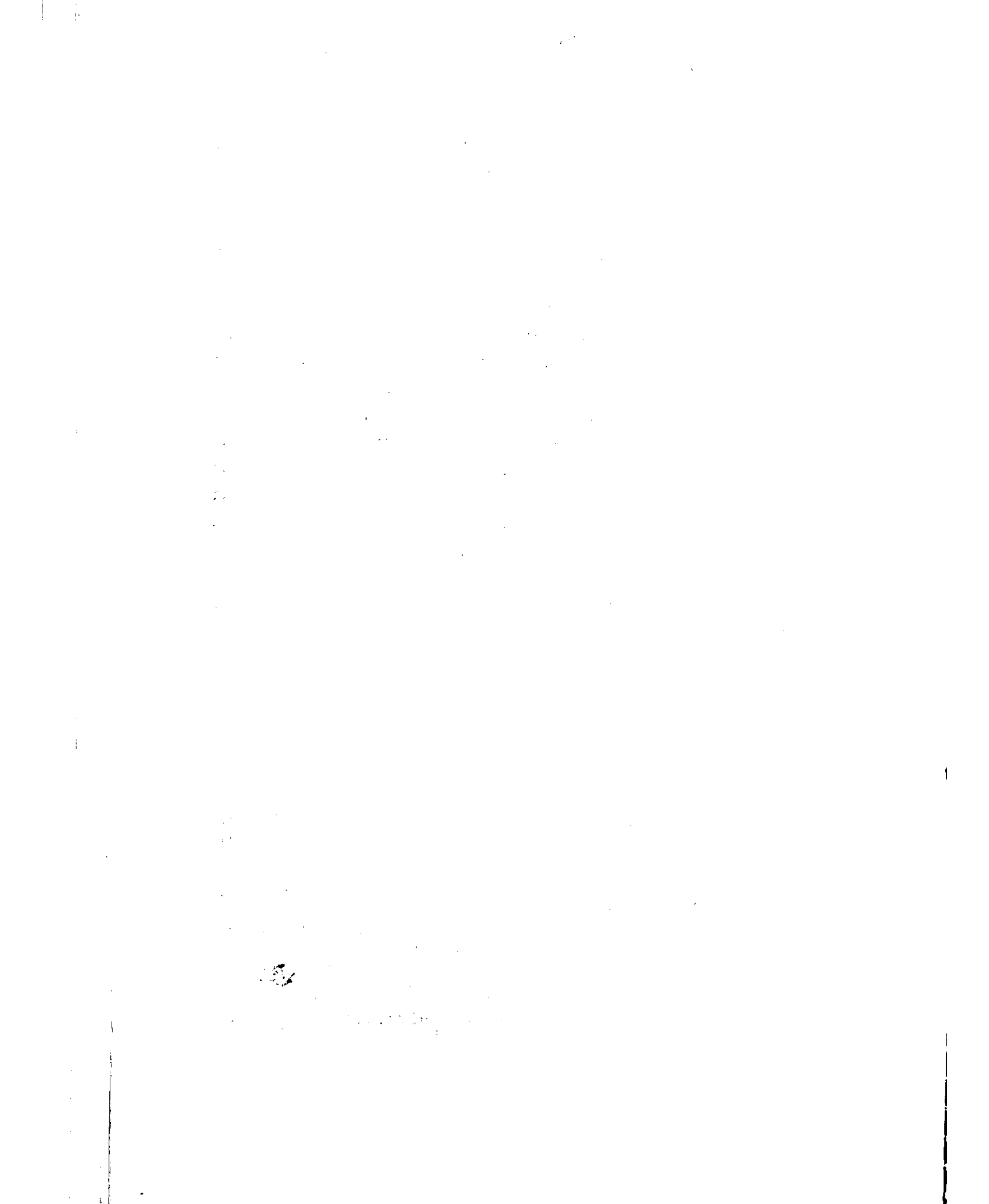
judgments strictly construing the 'gateways' and making justification of agreements restricting competition virtually impossible<sup>101</sup>. The Court was deliberately eschewing the discretion it had been required to exercise by a process of auto-limitation; by fixing the content of the legislation in order that it could be applied by formal deduction. The effects of this strict approach on industry were dramatic - large numbers of agreements in affected industries were abandoned before they could be referred to the RPC<sup>102</sup>. It was feared for a time that the flexibility sought by the legislator would be smothered by judicial concern to construct 'justiciable' rules. Eventually, though, later cases began to reflect a more pragmatic or lenient approach to justification and suggested that the Court was trying actually to interpret and apply the 'gateways' and 'tailpiece' as they were intended to be used<sup>103</sup>. This revised attitude of the Court was generally welcomed by business and government. However, this new approach brought problems of its own. To begin with, despite the RPC's willingness to enter the policy arena, its trial-type procedures rendered applications for evaluation both

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101. See, e.g., "Re Chemists Federation Agreement", 1958 LR 1 RP 75, "Re Blanket Manufacturers Agreement", 1959 LR 1 RP 271 and "Re Yarn-Spinners Agreement", 1959 LR 1 RP, 118, especially 188-89.

102. See Stevens and Yamey, *op. cit. supra* fn 89, chapter 6. Indeed, the threat to employment posed by abandonment of agreements following the 'Yarn Spinning' decision (cited above) prompted the swift enactment of the Cotton Industry Act of 1959, which effectively reversed the judgment.

103. See, e.g., "Re Black Bolt and Nut Association's Agreement", 1960 LR 2 RP 50, "Re Net Book Agreement 1957", 1962 LR 3 RP 246.





burdensome and costly<sup>104</sup>. In addition, the RPC's abandonment of a formalistic approach meant that, "the predictability [and political consistency] of decisions had been reduced"<sup>105</sup> in two related ways: firstly, the RPC's policy-insulated status prevented it from undertaking, "systematic investigation designed to test the value of existing theories and to provoke the formulation of new theories and policies"<sup>106</sup>; secondly, the structural insulation of the RPC's members meant that the exerting of political 'pressure' or 'influence' upon them had to be an indirect and, therefore, highly uncertain process. In the eyes of the business community, therefore, the credibility of the RPC as an efficient administrative agency has been fatally undermined. In consequence, the number of agreements which parties have sought to defend before the Court on public interest grounds has gradually fallen to zero since the 1960's - as the recent Green Paper announcing the RPA's imminent repeal observes:

"the Court is now little used except for undefended cases. Its primary function is to hear arguments and make public interest judgments on agreements, yet it is hardly ever called into action for this purpose"<sup>107</sup>.

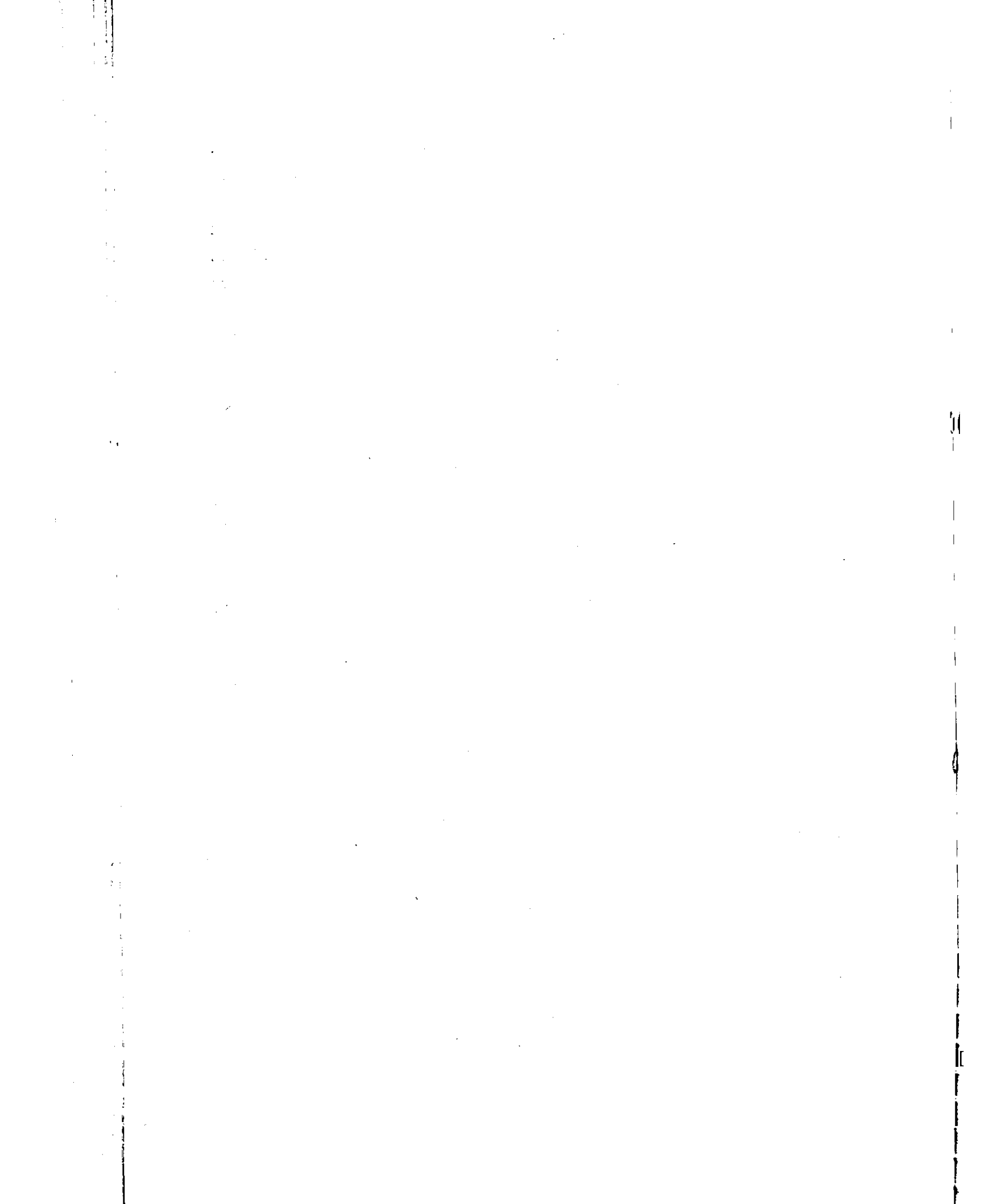
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104. Department of Trade and Industry, "Review of Restrictive Trade Practices Policy: A Consultative Document", March 1988, Cm. 331, Annex C, para. 26.

105. B. Yamey, "The Judicial Control of Cartels: The Restrictive Practices Court", in A. Jacquemin and G. Schrans (eds), "Actes du Colloque sur la Magistrature Economique" 1976, Leuven Oyez, IV.1-14.

106. Stevens and Yamey, op. cit. fn 94 supra, 147.

107. Cm. 331, "Review of Restrictive Trade Practices Policy", Department of Trade and Industry, March 1988.



Instead, evaluations concerning the beneficial nature of restrictive agreements are now largely conducted in the context of negotiations between the parties and the Office of Fair Trading<sup>108</sup>. The object of these negotiations is the removal of all restrictions which the OFT considers objectionable. If the OFT is dissatisfied with the outcome of negotiations, they conclude with an undefended reference to the RPC resulting in the prohibition of the relevant agreement. If, alternatively, the Director General considers all significant restrictions have been removed, then the proceedings will be suspended<sup>109</sup>.

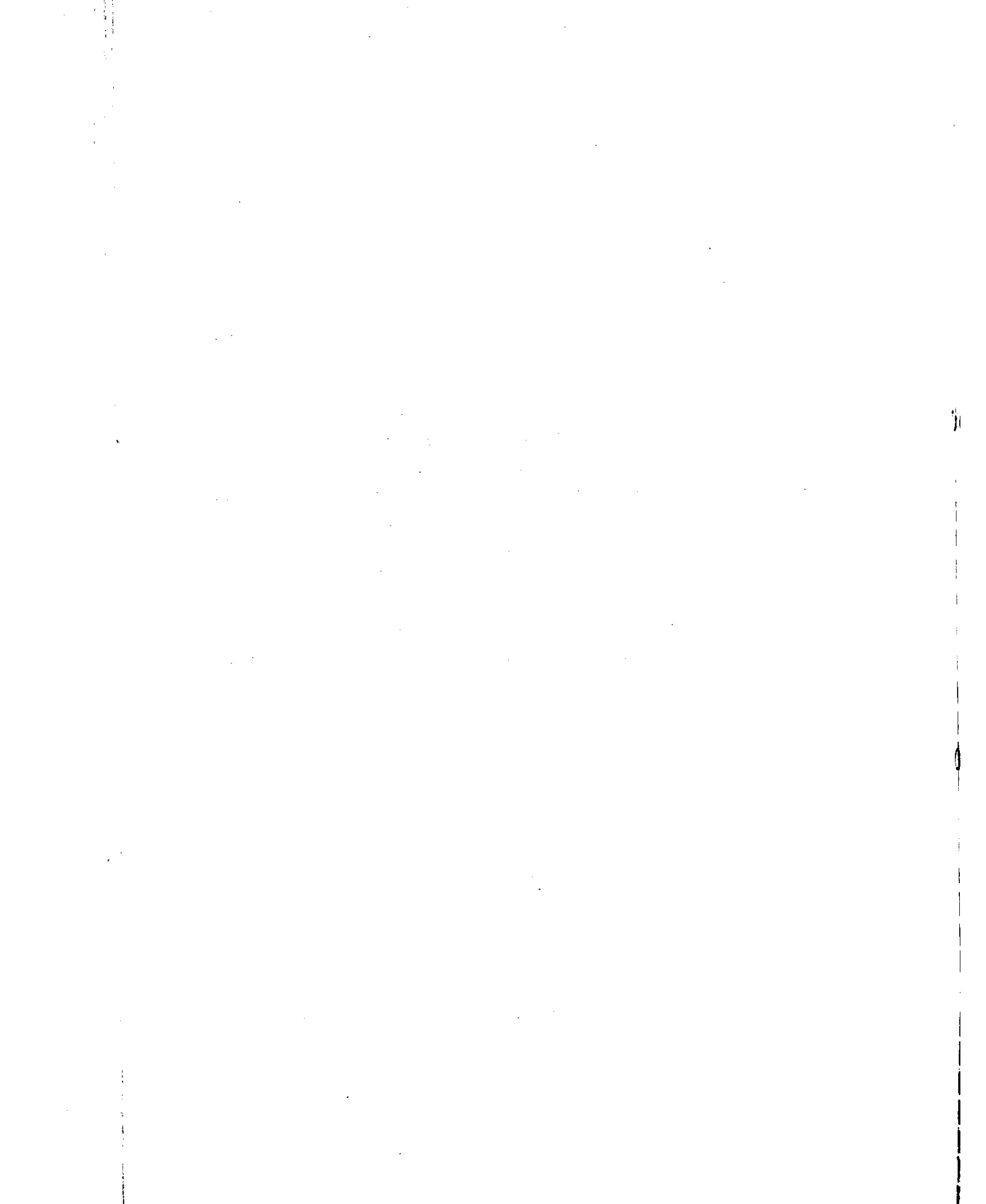
The legislative transfer of the RPC's economic prediction function to a non triadic, administrative agency - specifically, to the Director General of Fair Trading - was suggested as long ago as 1979 by the so called 'Liesner Report', "with a view both to greater flexibility and, in particular, to allowing beneficial agreements"<sup>110</sup>. It is submitted, however, that the increased use of negotiation by the OFT has already circumvented much of the need for transfer, although the imminent repeal of the 1976 Act, abolition of the RPC and formal establishment of an appropriately non-judicial system for the supervision of restrictive trade

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108. According to the 1988 Green Paper, this procedure, "now dominates the whole process", op. cit. supra, para. 22.

109. RPA, s21(2), which provides that the Director General may, with the consent of the Secretary of State, refrain from referring an agreement which he believes to contain no significant restrictions.

110. Green Paper on Restrictive Trade Practices Policy, March 1979, Cmnd. 7512, para. 1.9.(ii). N.B. the proposal made clear that the Director General's jurisdiction would be concurrent with that of the RPC.



agreements<sup>111</sup> is surely welcome from the point of view of legal certainty.

#### The RPC - Conclusion

The example of the Restrictive Practices Court was chosen in order to demonstrate the critical use to which our theory can be put. It has shown how the inappropriate matching of triadic structure with administrative function can result in a loss of credibility or confidence leading to system breakdown. We predicted that the 'policy insulation' of an agency required to take administrative decisions would mean, as Pops says, that "the agency becomes less responsive to the political demands of interest groups"; that "[p]olicy is more disjointed"; that, because of insulation, "political pressures are exerted more often in an indirect [and therefore, unaccountable] manner"; and ultimately, that "the agency's ability to build the [direct, political] constituency it needs to survive and prosper will be impaired"<sup>112</sup>. The downfall of the RPC has, it is submitted, vindicated us in our belief.

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111. 1988 Green Paper, op. cit. supra fn 107, paras. 6.14 to 6.17.

112. Gerald M. Pops, "The Judicialisation of Federal Administrative Law Judges: Implications for Policymaking" 1979, 81 West Virginia Law Review, 169, 204.

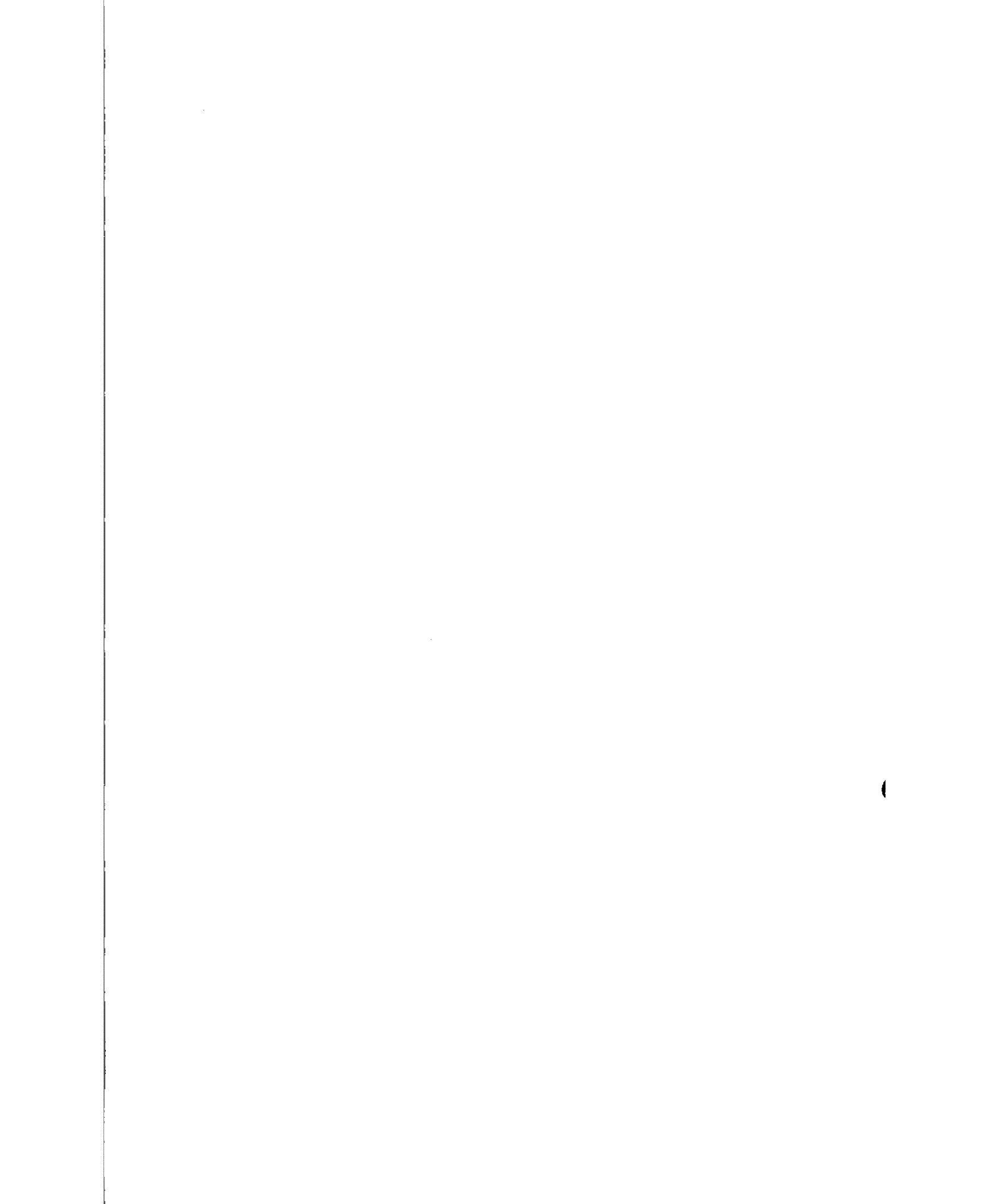


THE INAPPROPRIATE ALLOCATION OF AN ADJUDICATIVE  
FUNCTION TO THE EC COMMISSION

Introduction

Just as regulatory mismatch is possible by combining an administrative function with a triadic structure, so it is possible by combining an adjudicative function and a structure which does not possess triadic characteristics.

It will be apparent that, in terms of the values they pursue, there is a necessary tension between the function of adjudication and a non triadic decision-making structure. In creating tightly defined or definable text, the legislator seeks to provide a stable datum of legal norms which will render case by case outcomes relatively stable and able to be predicted accurately by affected individuals. By contrast, in selecting a non triadic agency to perform adjudications under the statutory text, the legislator seeks simultaneously to ensure that the powers created will be used energetically and with the goals standing behind the text in mind. However, if an agency is required by statutory language, on one hand, to perform a formally rational decision-making task but is encouraged, by its composition and internal structure on the other, to adopt a policy oriented approach to applying the law, then it is inevitable that the legislator has created a system with an in-built value conflict. More important, it is submitted that, as with the case of the administration-triad mismatch, the presence of this value conflict will be inevitably reflected in the unsatisfactory operation of the system. It is submitted that a value conflict of this order is present within





the present system for the adjudication of cases by the EC Commission under Articles 85(1)/86 EEC.

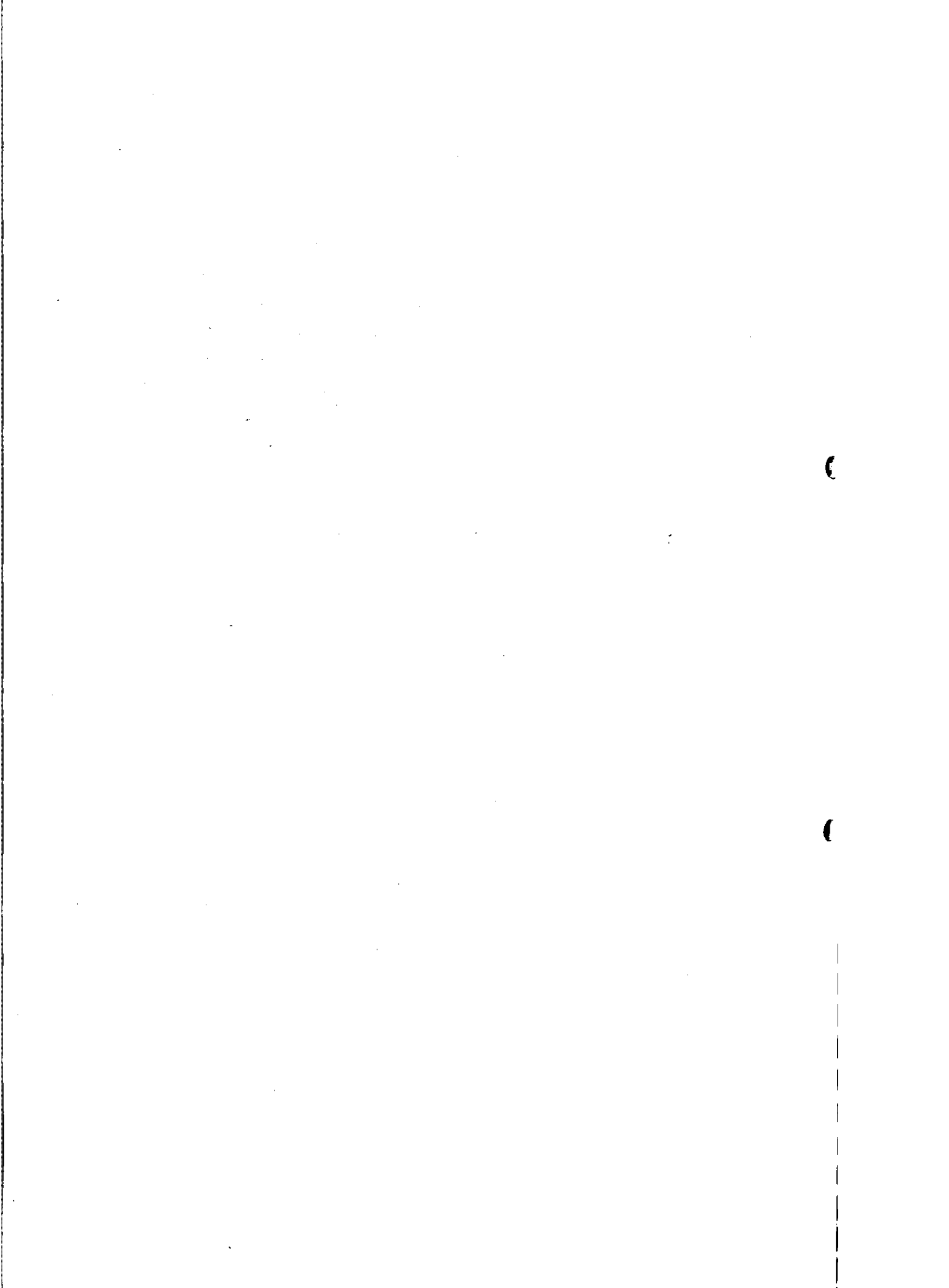
This section is designed to discuss the appropriateness of the Commission's decision-making structure, given its adjudicatory function vis à vis infringement of Articles 85(1)/86 EEC. In it, we shall enquire, first, in what ways the independent status of the Commission makes it structurally committed to performing adjudications triadically; second, to what degree the Commission's internal decision-making structure contributes to triadic adjudication of such cases; and, finally, to what extent the Court of Justice has sought to impose upon the Commission the sort of constitutional restrictions on structure that would oblige it to adjudicate these cases in a triadic manner.

Policy Insulation and the Independent Status  
of the College of Commissioners

The European Commission consists, at base, of 17 individuals appointed by common accord of the Governments of the Member States for renewable terms of four years<sup>113</sup>. The Commission is encharged by Article 155 EEC, "to ensure the proper functioning and development of the common market" and it is clear from other provisions relating to the duties of the Members of the Commission that in performing this task they are not to be subject to outside influence or pressures. Indeed the standard of impartiality and

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113. Treaty Establishing a Single Council and a Single Commission of the European Communities of 8th April 1965 (hereafter "Merger Treaty"), Articles 10 and 11.



independence required of and secured to Members of the Commission is comparable, if not similar, to that relating to the Members of that other collegiate body of the Community, the Court of Justice.

Specifically, Members of both institutions are selected from those "whose independence is beyond doubt"<sup>114</sup>; they are both obliged to act with complete independence<sup>115</sup>; and both may only be removed from office on grounds of misbehaviour and then only by impeachment by the Court of Justice, rather than at the whim of the Member States<sup>116</sup>.

The security of tenure granted to the Members of the Commission and Judges of the European Court by the Treaty and their

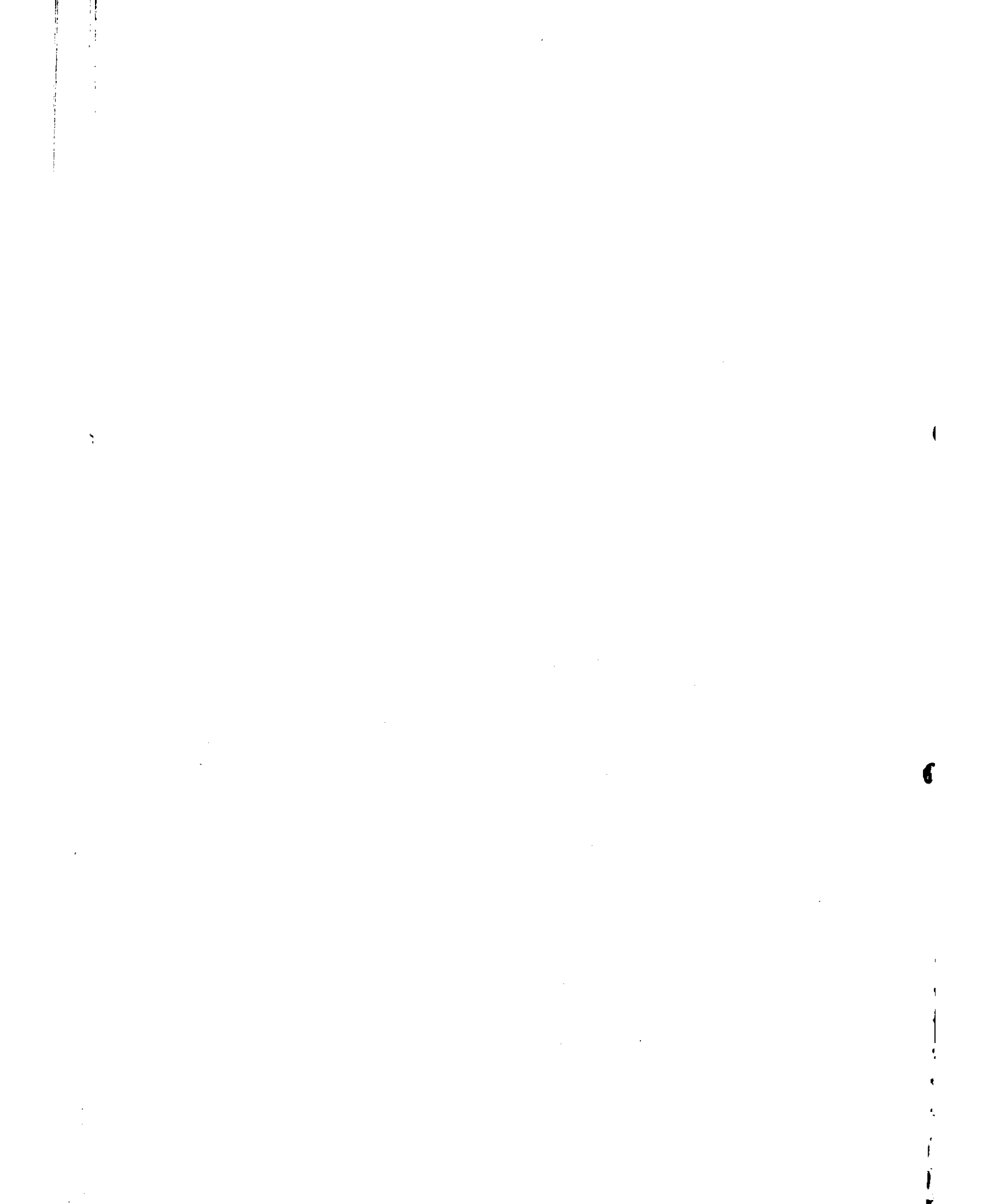
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109. Commission, Merger Treaty, Article 10(1); Court, Art 167 EEC.

115. Commission, Merger Treaty, Article 10(2); Court, Court Statute, Article 4.

116. Commission, Merger Treaty, Article 13 (compulsory retirement by decision of the Court, on a reference by either Council or Commission, on grounds that he, "no longer fulfills the conditions required for the performance of his duties or if he has been guilty of serious misconduct"); Court, Article 6 of Court Statute (deprivation of office if, in unanimous opinion of Court, "he no longer fulfills the requisite conditions or meets the obligations arising from his office").

Cf. Art 144 EEC, which requires the resignation of Commission as a body if censured by vote of the European Parliament. It is submitted that this limit to the lifespan of the Commission is neither intended nor capable of being exercised as a judgment on the personal performance of a Member of the Commission or a means of exerting pressure on him. In this respect, therefore, Article 144 EEC does not materially diminish the security of tenure of Commissioners as compared with Judges of the Court of Justice.



corresponding duty to act independently of governmental and non-governmental pressure are designed to ensure that the criteria which they employ in taking decisions are entirely professional, or, rather, entirely "relevant" ones. Relevant decisional criteria can be defined as all those referents for decision making which can be objectively justified as bearing a rational relation to the subject matter of the decision<sup>117</sup>. Irrelevant decisional criteria can be defined as the residuum, or, perhaps as the indices of arbitrary action<sup>118</sup>. The structural measures used to ensure that these bodies' decisions are rationally related to the subject matter in question can also be described, of course, as guarantees of their impartiality.

However, are the decisional referents which are 'relevant' for Commission decision making identical to those of the Court of Justice? In what ways are they similar, or different? In both cases, it is clear that decisional referents of the same order, for example, as the family relationship of an interested party to the decision maker, cannot constitute relevant criteria. Both Commissioners and Judges are required to treat like cases alike in the sense that they may not make distinctions between individuals in respect of differences are not recognised as material by the law.

However, it is equally obvious that while Members of the Commission are often required to base their decisions on criteria of political expediency, such criteria will always represent

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117. See D.J. Gifford, *op. cit. supra* fn 27.

118. *ibid.*, section IV. A., "'Arbitrary' Administrative Action as the Use of Impermissible Referents".

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irrelevant bases for judgments of the Court of Justice. The constitutional balance of powers in the Community requires that the Court of Justice (the judicial body required by Article 164 EEC to ensure that "the law is observed" in the Community order) should be functionally bound to decide issues of law brought before it in a formally rational manner. In other words, the Court of Justice is constitutionally bound to perform an exclusively adjudicatory role. In performing this function, the Court may only legitimately have regard to relevant formal legal and evidential criteria: it must behave with formally rational impartiality, or, in to use our own phrase, it must exhibit 'policy insulation'. On the other hand, the Commission is often required to act in a substantively rational way. To put it differently, the Commission may be required to use substantive legislative policy in a predictive fashion and regulate future behaviour. In performing this function, the Commission may quite legitimately base its decision on relevant informal policy and factual criteria: it must behave with substantively rational impartiality, or, as we would put it, be 'policy oriented'.

However, in applying the prohibitions of Articles 85(1) and 86 EEC to undertakings, we have seen that the Commission is performing not a policy applying (administrative) function, but a legal rule applying function; in other words, it adjudicates. Therefore, it is appropriate for it, like the Court of Justice or any other court, to employ only formally rational decisional referents. Whilst the College's independence from external political pressure will guarantee its substantively rational impartiality, or policy orientation, it cannot guarantee that it will exhibit the formally rational impartiality or policy-insulation appropriate to adjudication. Only a triadic decision-making structure can do that. Does such a structure exist with regard to the making of infringement decisions?

*When does  
the above  
apply?*





Policy-Insulation and the Division of  
Labour within the Commission

Article 155 of the Treaty of Rome provides that, "[i]n order to ensure the proper functioning and development of the common market, the Commission shall [inter alia] ... exercise the powers conferred upon it by the Council for the implementation of the rules laid down by the latter". The measures adopted by the Council under Article 87 EEC (notably Regulations 17/62 and 19/65 EEC) confer just such powers, of course. In exercising these powers the Commission is required by Article 17 of the Merger Treaty of 1965 to the principle of collegiality. Article 17 provides that,

"[t]he Commission shall act by majority of the number of members provided for in Article 10<sup>119</sup>.

A meeting of the Commission shall be valid only if the number of members laid down in its rules of procedure is present"

Furthermore, the Commission's Rules of Procedure adopted pursuant to Article 16 of that Treaty emphasise the paramouncy of collegiate responsibility<sup>120</sup>. However, in qualification of this principle, these Rules also provide that "Subject to the principle of collegiate responsibility being respected in full", Members of the Commission (and its officials, if "indispensable" for the

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119. Article 10 of the Merger Treaty, which currently provides that, "[t]he Commission shall consist of seventeen members".

120. Commission's Provisional Rules of Procedure (Commission Decision 67/426 Euratom, ECSC, EEC, OJ 1967, L 147/1, Article 1: referring to Commission Decision 63/41 EEC, OJ 1963, 181/63).

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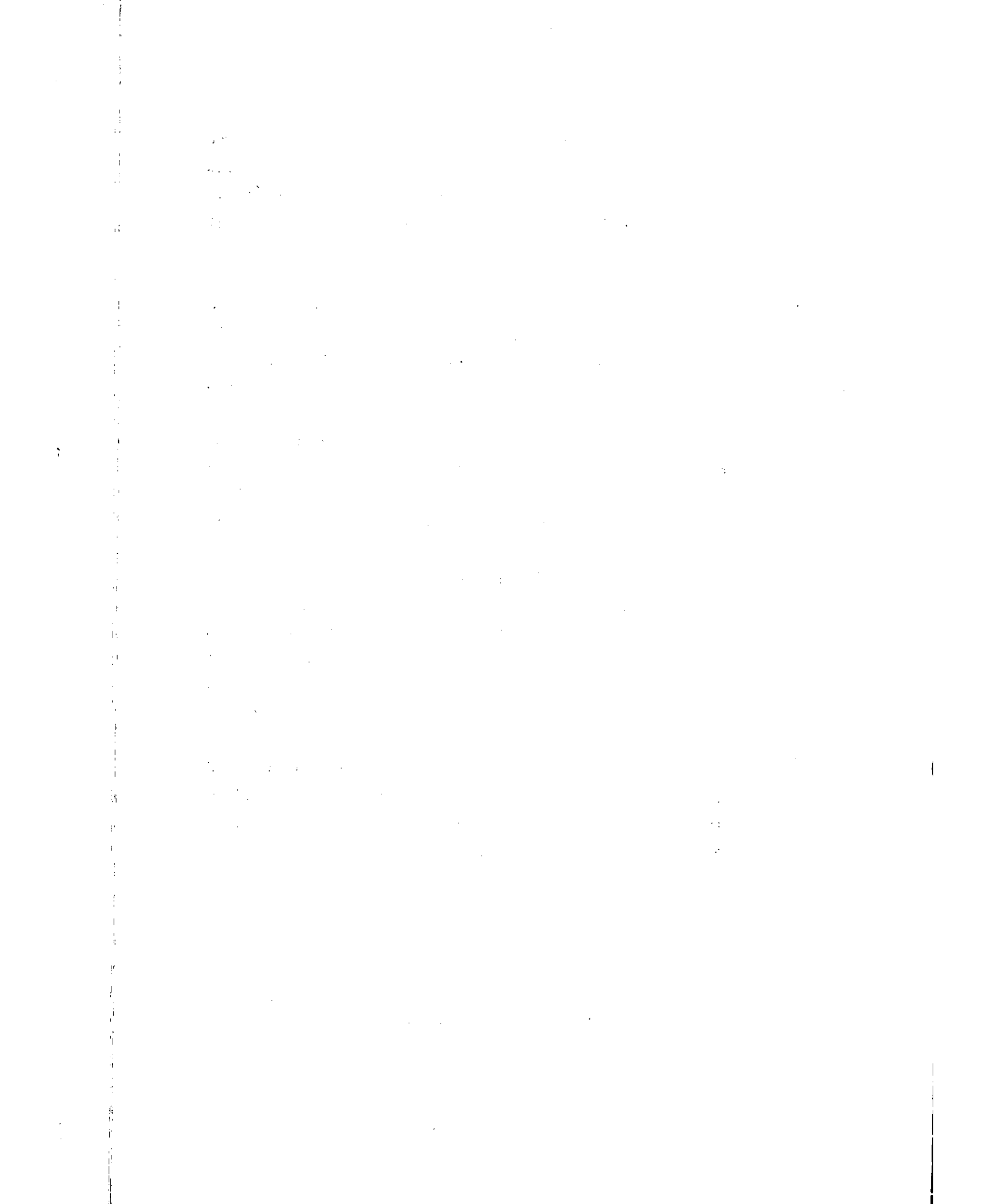
proper fulfillment of the Commission's duties) may be granted the power to take "clearly defined measures of management and administration"<sup>121</sup>. Several powers relating to the taking of decisions applying Articles 85(1)/86 EEC have been the subject of such delegations.

Although it is true that these delegations were carried out in order to relieve the Members of the Commission of an impossibly heavy work burden, it is submitted that, from the point of view of the decisional triad, these delegations have contributed to the construction of an appropriate adjudicatory structure. Triadic decision-making requires, if we recall, that the adjudicator ought to be a person, or group of persons, independent of both accuser and accused, firstly, in a physical sense (being a person distinct from either the accuser or accused) and, secondly, in an organisational sense (being free from the control or undue influence of either side). By delegating the accusatory elements of the adjudicatory process to people distinct from the college and retaining the decision-making element within the college, the Commission begins to resemble a triadic decision maker. In what ways has it achieved this?

Both of the specific powers of the Commission under Council Regulation 17/62 of ordering investigation into and initiating proceedings against the infringement of Articles 85(1)/86 EEC have been the subject of delegation. In addition the duty of the Commission to hear addressees of Article 85(1)/86 EEC decisions

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121. Commission Decision 75/461 Euratom, ECSC, EEC, OJ 1975, L 199/43, replacing Art 27 of Rules of Procedure of 1967 cited above.



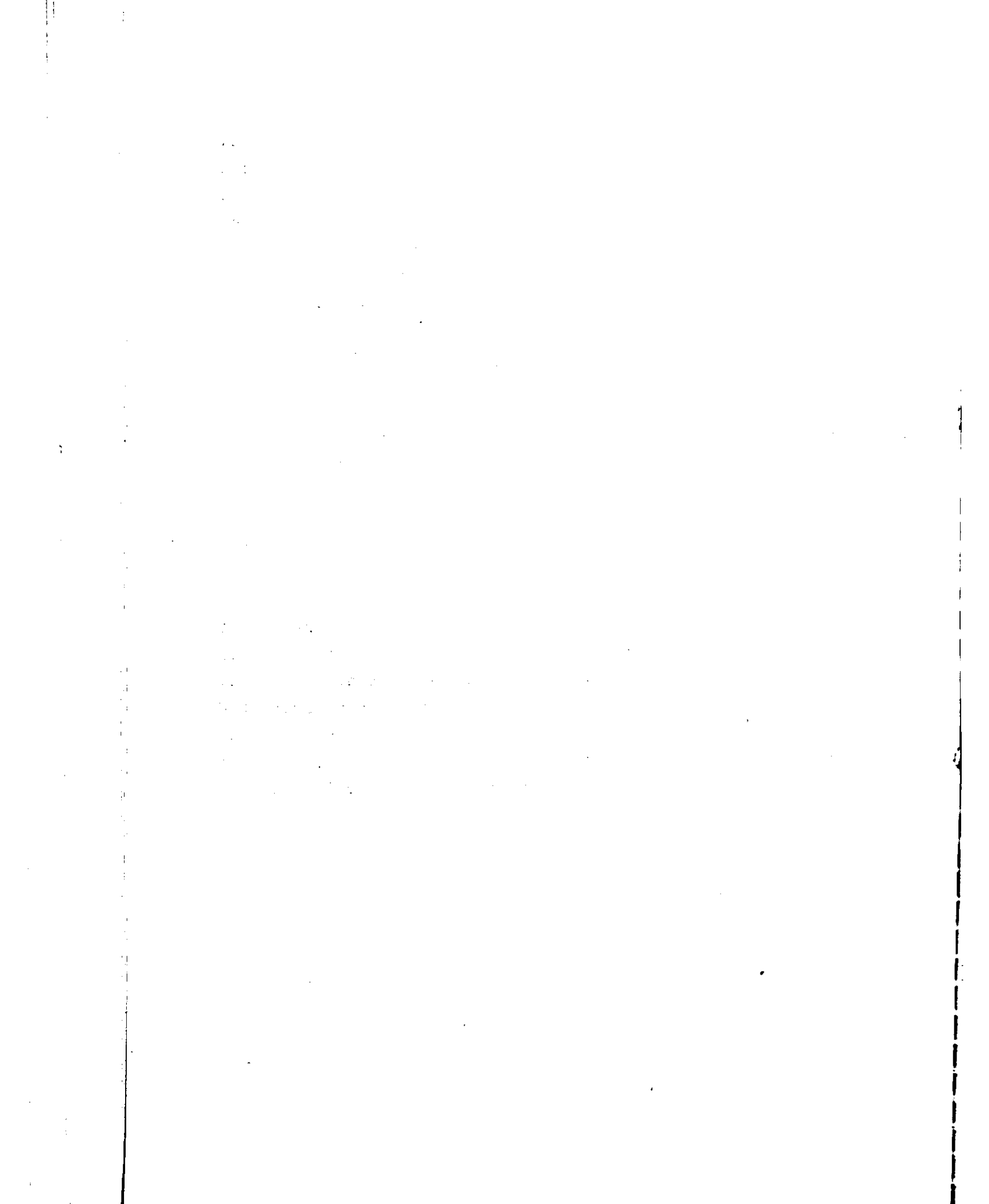
imposed by Regulation 17/62 has also been the subject of delegation. First, the powers of requesting/obtaining information from undertakings provided in Articles 11 and 14 of Regulation 17 are exercised by the Member of the Commission responsible for Competition Policy on behalf of the college of Commissioners. Second, the power to initiate proceedings (on complaint, notification, or 'ex officio') by service of a statement of objections is also exercised by the 'Competition Commissioner' on his brethren's behalf<sup>122</sup>. Third, as we have seen already that the Commission has, by Article 9 of Regulation 99/63, delegated the duty to hear those who are the subjects of infringement proceedings to, "the persons appointed by the Commission for that purpose". We have seen that none of the Members of the Commission as a college or individually preside at hearings and that instead the person appointed to undertake this responsibility is a member of DG IV reporting directly to the Competition Commissioner: the "Hearing Officer"<sup>123</sup>.

It is submitted that all of these delegated powers represent measures taken in the 'accusatory' phase of the making of an infringement decision. The power to initiate proceedings against undertakings, the power to investigate the activities of suspected undertakings and the power to collect and synthesise the fact dossier of the case each correspond to powers of inquiry or, to use the french legal term, "instruction" which logically precede

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122. However, we have seen that whilst the authority to exercise these powers is that of the Commissioner, his immediate subordinate, the Director General of the Directorate General for Competition Policy (DGIV), may, with his prior approval, sign relevant documents on his behalf.

123. see text accompanying fn 45 to 54 supra.



and, in a triad, ought to be functionally and structurally distinct from those of decision. In ensuring that the Competition hierarchy exercises a prosecutorial role while the college of Commissioners performs a decisional role, these delegations have produced an organisational separation of powers which could make triadic decision-making possible.

The Effect of the "Written Procedure" on the  
Commission's Triadic Decision-Making Structure

Introduction

In this part we shall examine the role played by active collegiate debate and criticism in sustaining the triadic structure which is made possible by the division of labour within the Commission. By delegating prosecutorial power to the Competition hierarchy the college becomes capable of acting as an adjudicator. However, it will be seen that, unless the members of the college play a sufficiently active role in taking definitive decisions, this adjudicatory role is in danger of becoming illusory.

The Role of Active Collegiate Debate in  
Sustaining Triadic Behaviour

If we approach the principle of collegiate decision-making as a principle encouraging interactive action then it becomes possible





to see how it could help guarantee rationality in Commission decision-making. Daniel Gifford, in his ground breaking analysis of administrative decision making<sup>124</sup>, observed how "human interaction" could have significant effects on agency action. He identifies both dynamic and stabilizing aspects of interactive decision-making. Interaction has a dynamic effect, "when a ... participant in a decisional process ... alters his approach as a result of his contact with another person". This may occur, "when a decision-maker's contact with another person brings him new information or acquaints him with new ways of perceiving the matter before him or makes him aware of criticism of his own position to which he had previously not been exposed"<sup>125</sup>. Interaction has a stabilizing effect in so far as the decision maker, "is exposed to pressure to justify departures from his own prior practice not only to himself but, since his earlier decisions have been seen by other officials who will observe his present decisions, to other officials as well". In particular, he, "must explain his justification in the light of the decisional referents used by him in his earlier decisions"<sup>126</sup>.

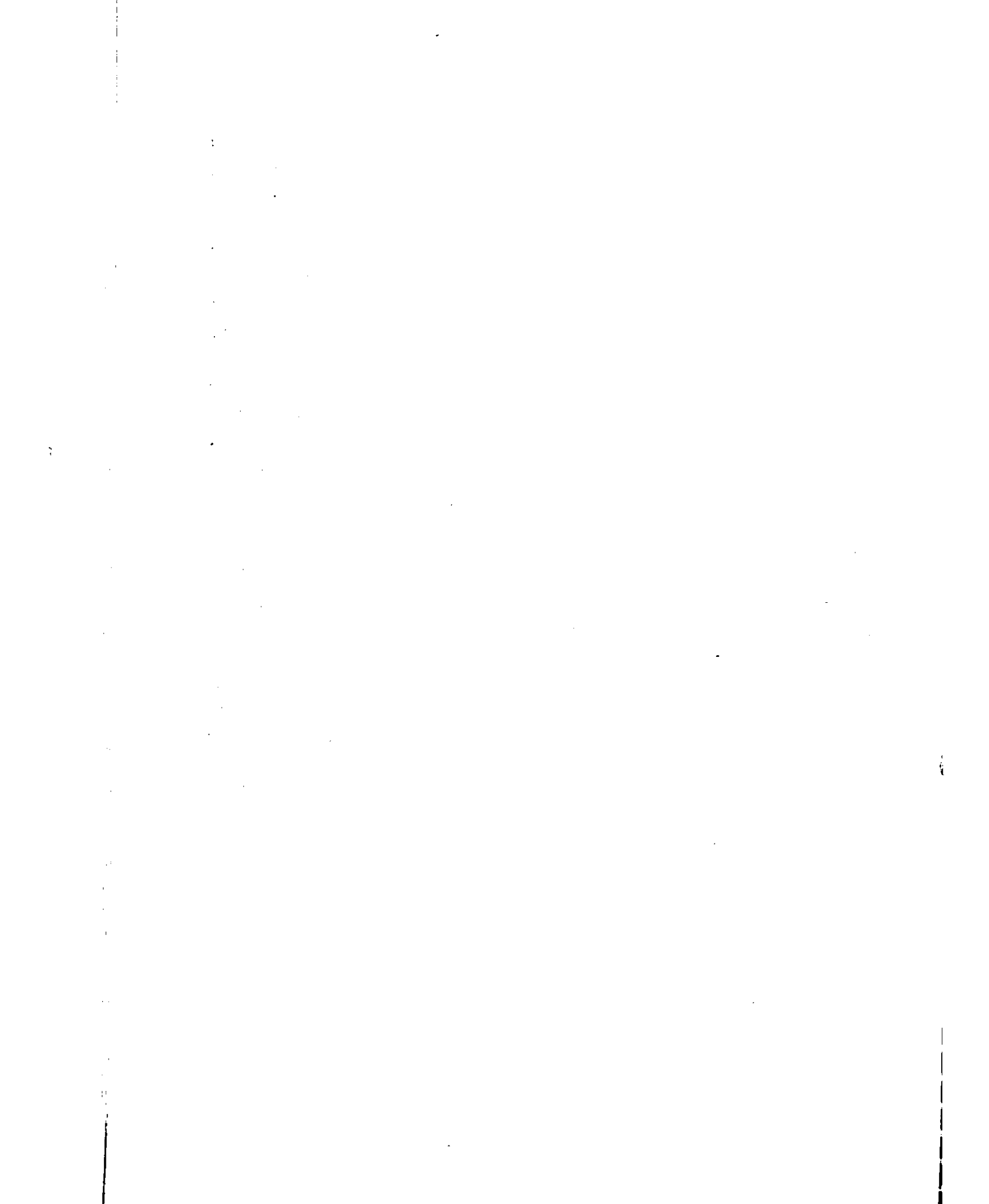
What, then, can we say of the effects upon Commission decision making of the interaction which is encouraged by the principle of collegiality? Given that the responsibilities of each of the sixteen members of the Commission not involved in competition policy are highly specialised and diverse, the extent to which they could subject proposed applications of Article 85(3) EEC to

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124. op. cit. supra fn 27.

125. ibid., 22.

126. ibid., page 25.

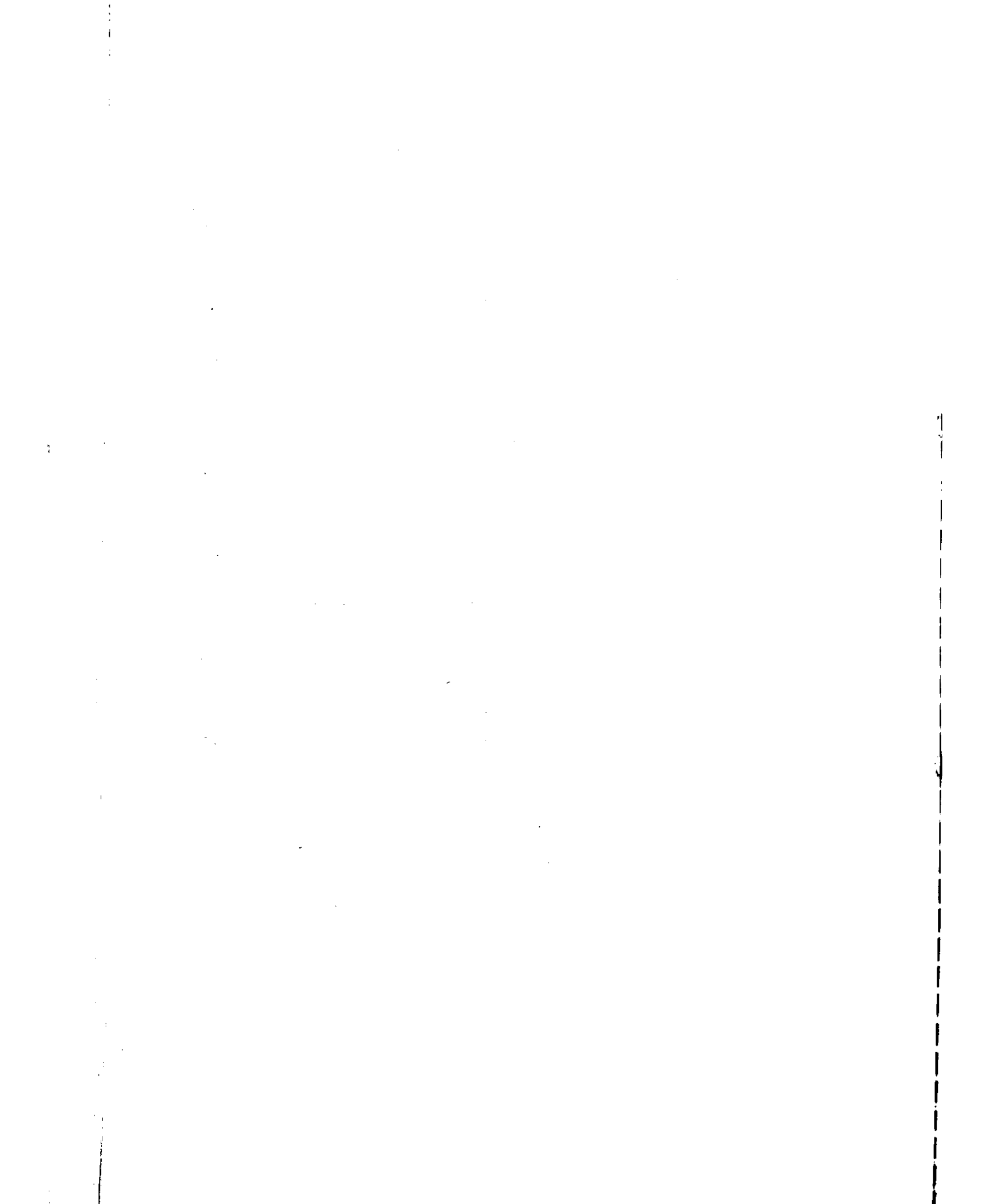


critical scrutiny in terms of the policy referents upon which they were based is doubtful<sup>127</sup>. However, this same degree of specialisation renders them singularly qualified to scrutinize critically the fact evaluation upon which decisions applying Articles 85(1)/86 EEC are based. In this regard, the other members of the college represent disinterested parties who, not having participated in any prior proceedings relating to the investigation of the undertakings involved, are free from possible pre-conceptions concerning the case at hand and can concern themselves only with the historic facts presented to them and the legal arguments made. Since it makes decision more open, the collegiate evaluation of infringement cases could, it is submitted, make the participation of affected undertakings via presentation of proofs more meaningful than otherwise.

In summary, then, we can say that the meaningful participation of the college of Commissioners in the taking of a definitive infringement decision is a means of guaranteeing the policy insulated nature of the fact evaluations upon which it is based. Of course, it cannot be denied that the presence, in collegiate debate, of the Competition Commissioner is a threat to the integrity of its disinterested status; however, assuming that his sixteen colleagues demonstrate some independence of spirit, this threat need only be minimal.

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127. The sort of critical scrutiny required to improve what Gifford calls the "objective rationality" (efficiency) of such decisions is more likely to come from the experts within the competition policy hierarchy itself, or from specialist external bodies or interest groups. See Gifford on this point, *ibid.*, 29 to 33.



### The "Written Procedure" as a Threat to Collegiality

The delegation of prosecutorial powers by the college to the Competition hierarchy and the reservation to the college of adjudicatory jurisdiction make triadic decision-making possible, provided the role of the college is a sufficiently active one. Unfortunately, although the active participation of each Member of the Commission in the final act of adjudication is possible, it is not realistically feasible.

We have seen in a previous section that the power of the Commission under Articles 3 and 15 of Regulation 17 to order undertakings to terminate infringements of Articles 85(1)/86 EEC is formally exercised by the Commission as a whole. However, due to the impracticality of requiring the college to meet in full session to reach a decision in every case, this power is exercised using the so called 'written procedure'. To recall what we have said earlier, in the 'written procedure' in this instance, the Competition Commissioner prepares a draft decision which he forwards, with the principal details of the case, to his colleagues. If, in the space of a certain time limit (usually a few days), none of them have communicated any objection to the adoption of the decision to him in writing, then the decision is adopted. If objections are timeously made, then adoption of the decision is referred to the college.

Clearly, the use of the written procedure does not constitute a 'de jure' or formal delegation of decision making power to a single Commissioner. However, it will be equally apparent that, given the highly specialised nature of the tasks allotted to individual Members of the Commission and the burdensome nature of those responsibilities, the scant scrutiny to which they can

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subject a draft decision circulated by the Competition Commissioner permits him to exercise 'de facto' delegated power in this regard. Whereas alternatively, the active participation or interaction of the Members of the Commission in final adjudication was merely difficult, the use of the "written procedure" ensures that is impossible and that, "the decision is normally in practice solely that of DG IV and the Commissioner responsible for competition"<sup>128</sup>.

Opportunities for Triadic Behaviour by Dividing  
Roles within the Competition Hierarchy

Introduction

It has been shown that it might have been possible to achieve triadic decision-making in infringement cases by dividing roles between the college of Commissioners and the competition hierarchy headed by the Competition Commissioner. However, as we have seen, this division of labour has gone beyond what is needed to separate prosecutorial roles from adjudicatory roles. The "written procedure" has taken the Commission full circle, so to speak, with the effective arrogation of both sorts of powers to the competition hierarchy. There may still be opportunities, however, for triadic behaviour within that hierarchy itself.

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128. Written Submission of the 'Unione des Industries de la Communauté Européenne', House of Lords Select Committee on the European Communities, Session 1981-82, 8th Report, "Competition Practice", page 67.





Writing in 1983, Maurizio Delfino, quoting Commission sources, described how the internal procedure for the preparation of infringement decisions provided guarantees of separated power. He observed that:

"the present internal organisation of the Commission, with the inspectorate and the directorate who prepare the decision separate from each other, with a separate policy department of DG IV and the Legal Service each giving a separate opinion on the case and with the decision, finally, having to be reviewed with a critical eye by the politically responsible Commissioner ..., contains enough checks and balances to prevent a misguided rapporteur ... sentencing<sup>129</sup> innocent undertaking as prosecutor, judge and executioner"<sup>129</sup>.

This part shall examine the accuracy of Delfino's observations and assess whether the 'checks and balances' he ascribes to internal procedure actually does exist<sup>130</sup>.

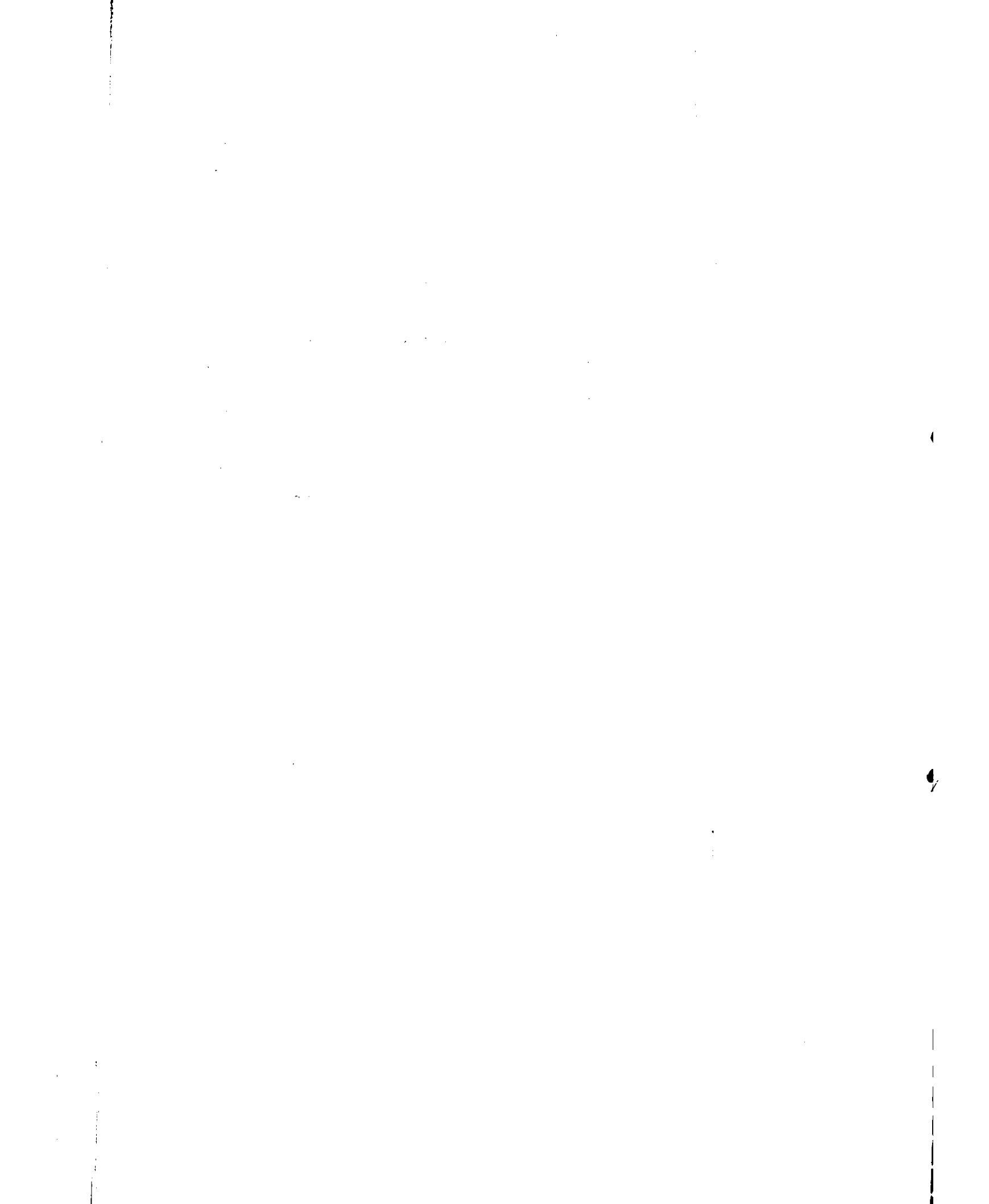
#### Separation of Roles in the Relationship between the Competition Commissioner and his Subordinates

The Commissioner with responsibility for Competition Policy heads a bureaucracy whose operations were described earlier in this paper. He acts in close liason with his immediate subordinate, the Director General for Competition Policy. Are their aspects

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129. "Enforcement Discretion in Anti-trust - A Comparative Analysis of the EEC and US Systems", PhD. Thesis, Stanford, USA, 1983, Vol. 2, 206.

130. Part of the Delfino passage quoted above, which mentioned the procedural guarantee which scrutiny, "by the Commission as a whole" provided, has been deleted since we have already discussed the role of the college of Commissioners and how it has been undermined through use of the "written procedure".



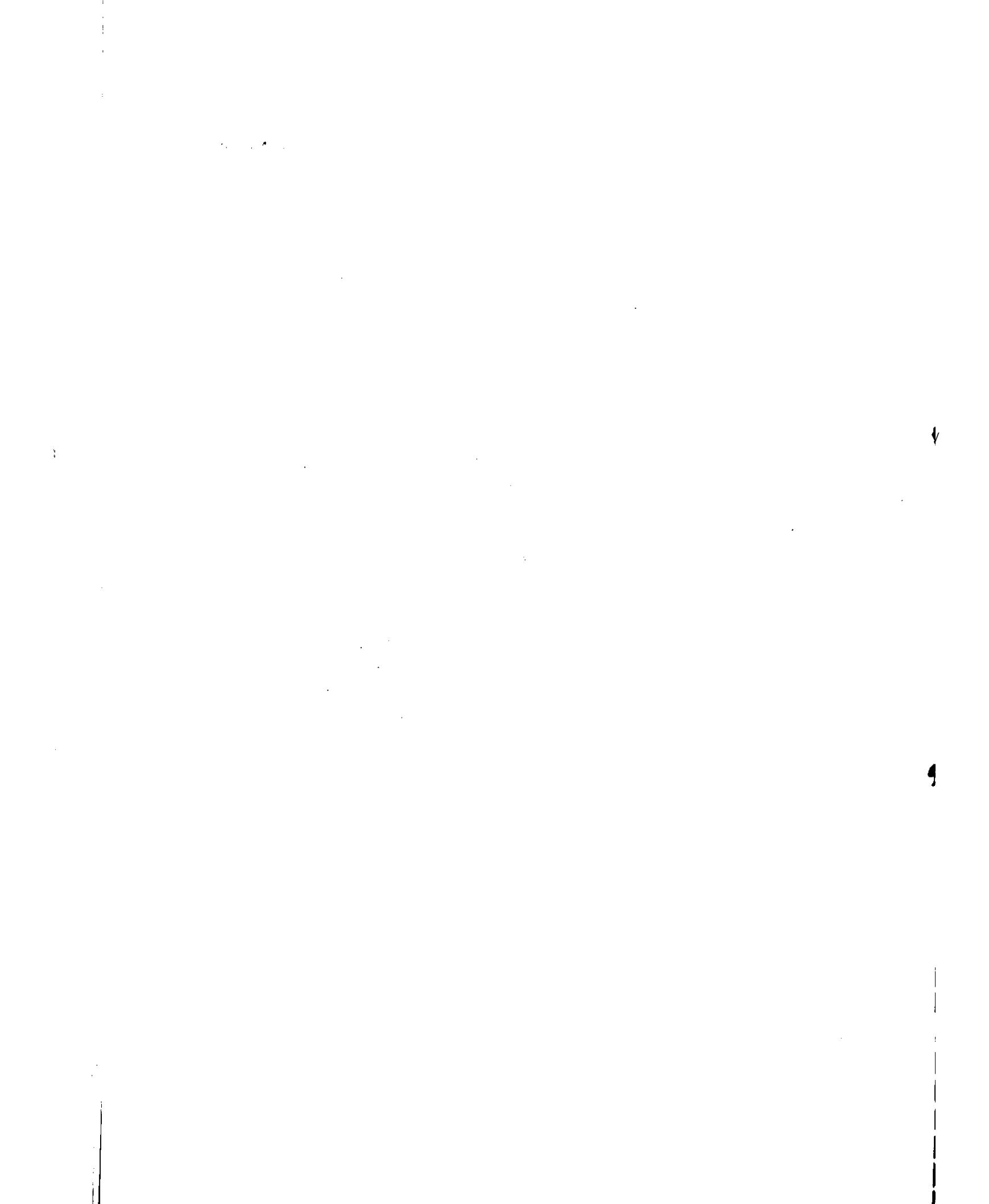
of the relationship which the Commissioner enjoys with his bureaucracy which indicate a division of prosecutorial and adjudicatory roles?

It seems clear from the start that the Commissioner is directly and actively involved in the prosecutorial side of infringement proceedings as well as the adjudicatory aspect. We have seen that, in a legal sense, he is directly responsible both for the investigation of undertakings under suspicion and for the commencement of action against them. In terms of practice, he plays an active role in the performance of these duties - although the Director General's has "power to sign" inspection decisions and statements of objections, this authority is continually renewed by personal approval of the Commissioner<sup>131</sup>. From this we could certainly deduce that there was a mixing of prosecutorial and adjudicatory roles and that, by engaging in prosecutorial decision-making, the Commissioner's position as an impartial adjudicator was compromised.

One could, of course, object to this deduction on the ground that it is only formally correct to say that the Commissioner is actively and directly involved in prosecution and that, in truth, he merely "rubber stamps" the prosecutorial initiatives which originate in DG IV. However, if one accepts that the Commissioner's formal role in taking prosecutorial measures is, in substance, transformed into a role of 'ex post facto' approval must one not also accept that his role of making draft infringement decisions is probably also exercised in terms of approval and that adjudication or drafting actually occurs within

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131. See text accompanying fn 185 to 187 post.



DG IV subject only to his supervision? In these circumstances, which probably correspond to the reality of the matter, the Commissioner does not really prosecute or adjudicate: major responsibility for the exercise of both roles really lies at the level of the Directorate General itself. In this case, can we detect any meaningful separation of roles within DG IV?

Separation of Roles in the Relationship among  
the Commission Officials of DG IV

In our earlier look at the internal practice of DG IV we established several things. First, that individual cases, from investigation through prosecution to decision-drafting, are the fundamental responsibility of the 'divisions' to which they are assigned. Delfino was correct at the time when he noted that investigative and decision-making roles were separated within DG IV, but this is no longer the case<sup>132</sup>. Second, that, although Directorate A's "special administrative unit for the co-ordination of competition decisions" is used to give a separate assessment on each case prepared by the divisions, it benefits from no guarantees of organisational independence or impartiality, vis à vis those divisions<sup>133</sup>. Third, that although a hearing officer benefitting from such guarantees does exist, his role is confined to chairing the oral hearings of undertakings and does not extend to supervising the drafting of decisions.

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132. See text accompanying fn 42 supra.

133. See text accompanying fns 55 to 56 supra.



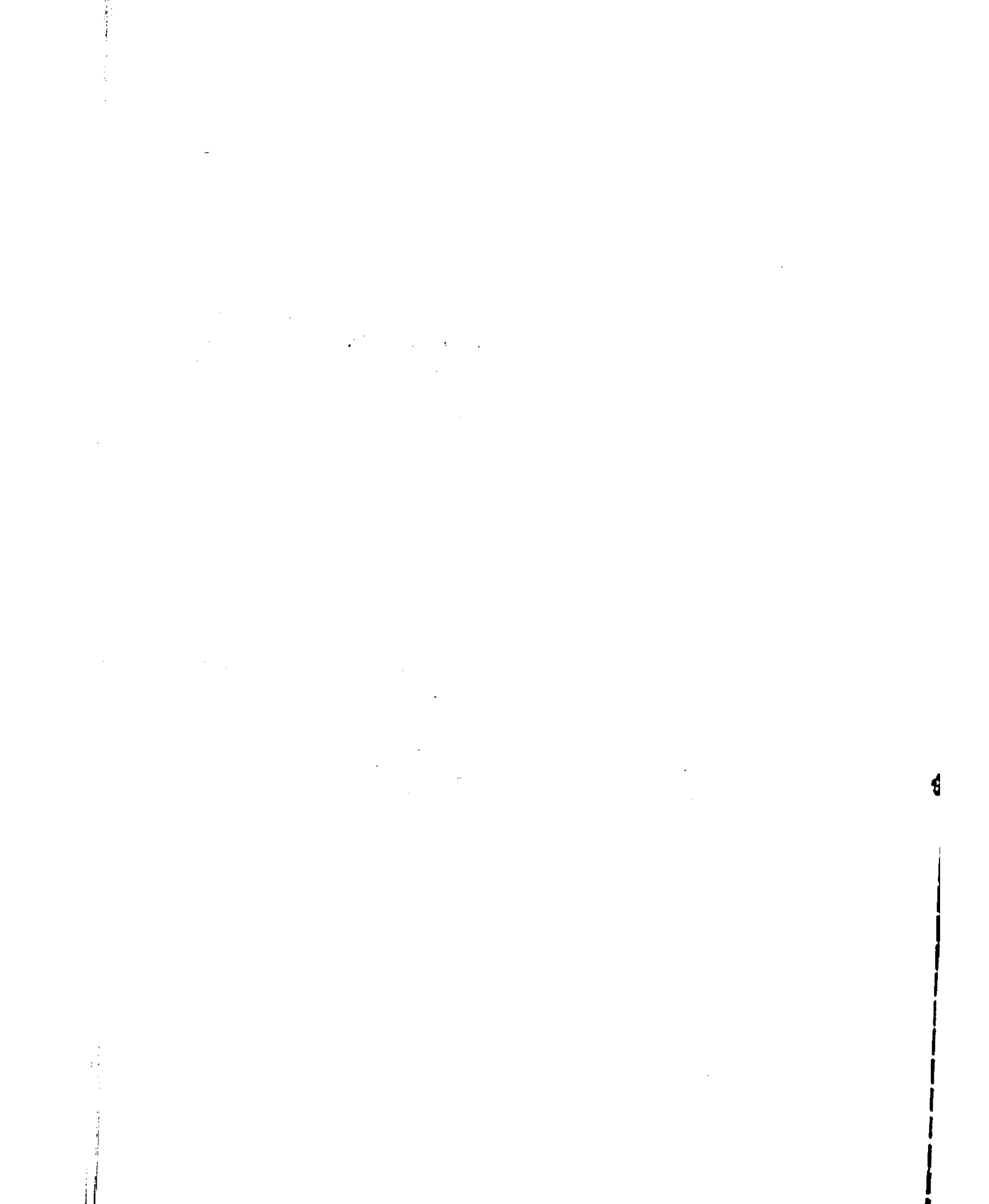
All of these factors lead us to the inevitable conclusion that DG IV does not employ a division of labour in infringement proceedings that would ensure that those involved in prosecutorial activities were structurally distinct from those involved in adjudicatory activities.

#### Separation of Roles created in the Advisory Role of the Commission's Legal Service

At first glance, the role of the Commission's Legal Service in the preparation of infringement decisions might suggest that a meaningful separation of roles existed. The Legal Service is entirely independent of the Competition hierarchy, being responsible directly to the President of the Commission. Further, the decision of the member of the Legal Service to whom a case is assigned for advice is decisive in the outcome of the infringement proceedings; the Commissioner cannot proceed to approve the draft decision submitted to him by DG IV unless it has obtained the agreement of the Legal Service as to its content<sup>134</sup>. In other words, the submission of a preliminary draft decision to

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134. See practice cited in Case 5/85, 'AKZO v Commission' [1986] ECR 2585, para. 33 of judgment. Compare, however, the following comment: "[I]n theory, in the event of a disagreement on the terms of a draft decision between the Legal Service and DG.IV, the matter is referred to the next oral session of the Commission, which, sitting as a collegiate body, hears both points of view and rules on the question. In fact, such disagreements are almost always eliminated by discussion and compromise between the two departments and formal referral to the Commission is rare", F. Graupner, "Commission Decision-making on Competition Matters", (1973) 10 CMLRev, 291, 292 (emphasis added).





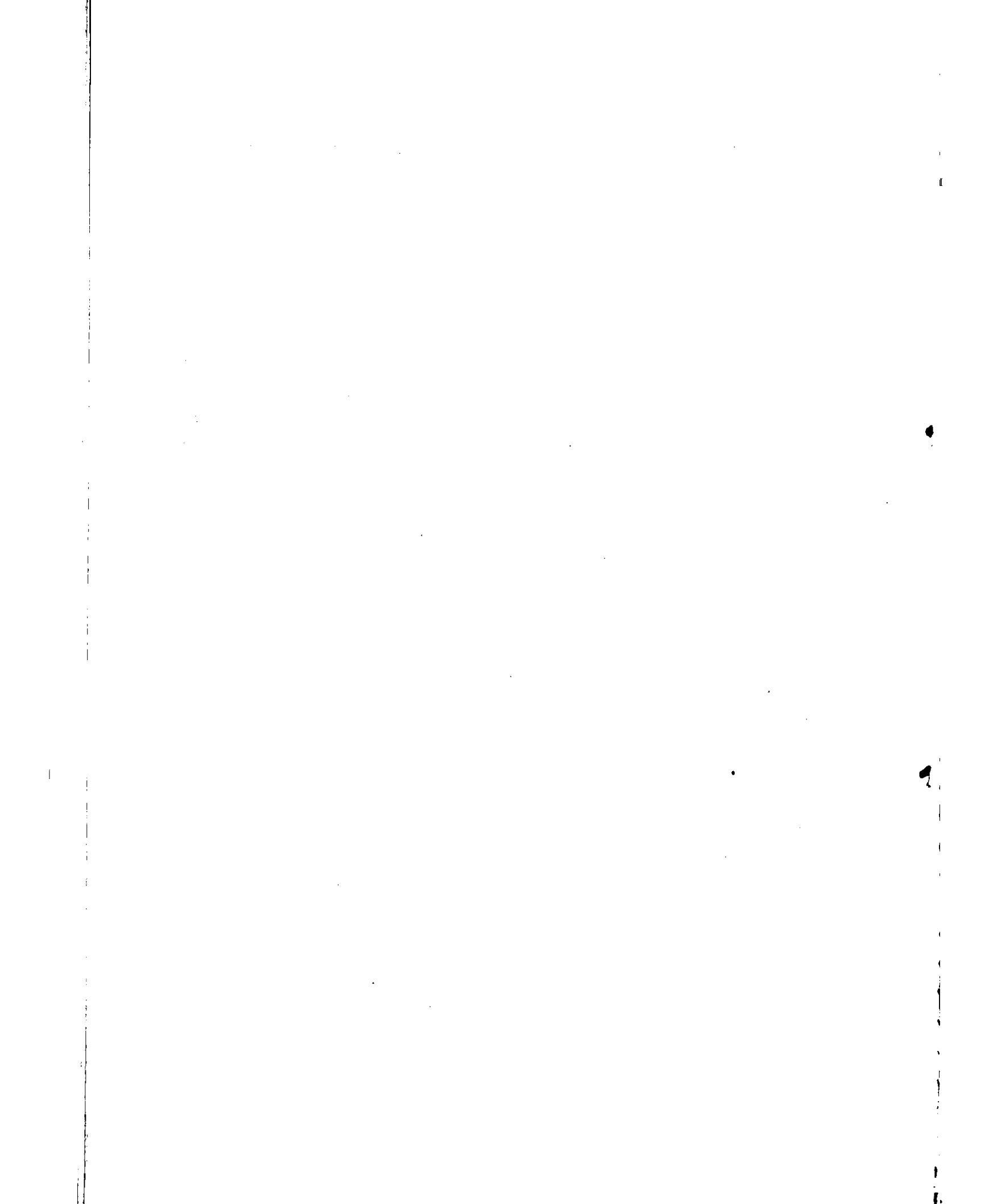
the Legal Service seems to provide an independent and impartial means of assessing the merits of any case.

Such an impression would be misleading, it is suggested. In the first place, the Legal Service (like Directorate A's special unit) does not deliberate on the merits of a proposed decision in isolation from DG IV; on the contrary, the 'conseiller juridique' involved is in constant contact with the competition hierarchy regarding all aspects of the case, which serves as a convenient opportunity for discussion and negotiation on the content of the draft<sup>135</sup>. The organisational impartiality of the 'conseiller' as a putative adjudicator can only be compromised if he adopts a negotiating posture<sup>136</sup>. Finally, it must be pointed out that the role of the Legal Service, like any other legal adviser, is to ensure that its client is acting in a way which can be defended against legal attack. In giving its opinion, the Legal Service (again like Directorate A's special unit) is ensuring that the Commission decision in question will not be annuled in subsequent proceedings and not endeavouring to judge it impartially on its merits. It would never, for instance, be prepared to block unconditionally the adoption of a decision submitted to it; inadequate arguments of fact and/or law are seen as faults to be rectified rather than as arguments in which DG IV has been 'unsuccessful'. The Legal Service is certainly interested in examining the submissions of fact and law made by the affected undertakings, but only to the extent that they assist it to make

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135. See fn immediately above.

136. If we recall Gifford's theory of interactive decision-making as an aid to impartiality [see text accompanying fns 124 to 127 supra] we will see that it would be difficult to accept a negotiator as a truly critical onlooker.



the eventual decision which will inevitably be addressed to them secure against their subsequent challenges.

### Conclusion

This part has shown that the "checks and balances" which Delfino deduced from the internal procedure for the adoption of infringement decisions were, in general, rather optimistic and that, with specific regard to internal DG IV operation, the facts upon which they are deduced have changed. At present, neither the relationship between the Commissioner and DG IV, nor that between the officials of DG IV, nor that between DG IV and the Legal Service, it is submitted, guarantees that such measures will be the subject of truly triadic decision-making.

### The Non-Triadic Nature of Commission Adjudication and the Reaction of Undertakings - Loss of Credibility

#### The Article 85(1)/86 EEC Adjudication Structure as a Threat to Industry Confidence

A lack of confidence in the non-triadic nature of the system of adjudication under Articles 85(1)/86 EEC has been voiced by industry for years. In 1973, an english barrister noted that, "firms liable to be fined millions of dollars may well feel aggrieved at not being guaranteed the chance to" have their case

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established by a structurally impartial body<sup>137</sup>. Evidence submitted to the House of Lords Select Committee in 1982, quoting an earlier United States Report on Anti-Trust enforcement, expressed the concern that, "Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself"<sup>138</sup>. In other evidence to the Committee, it was submitted by the 'Union des Industries de la Communauté Européenne' that, while, "[i]n theory checks by other Directorates General and by the Commissioners may appear to be adequate ... they are not so regarded by those outside the Commission"<sup>139</sup>. This evidence continued to point out the necessity, "of the parties to the proceedings having sufficient confidence in the objectivity of the procedure"<sup>140</sup>, thereby implying a current lack of such confidence. K.P.E Lasok wrote in 1983 of the need to, "provide a fact-finding procedure in competition investigations in which undertakings have some confidence. At present this is not so ... partly because, understandably, the Commission is seen as both prosecutor and judge"<sup>141</sup>. We need not overstate our case by citing more recent

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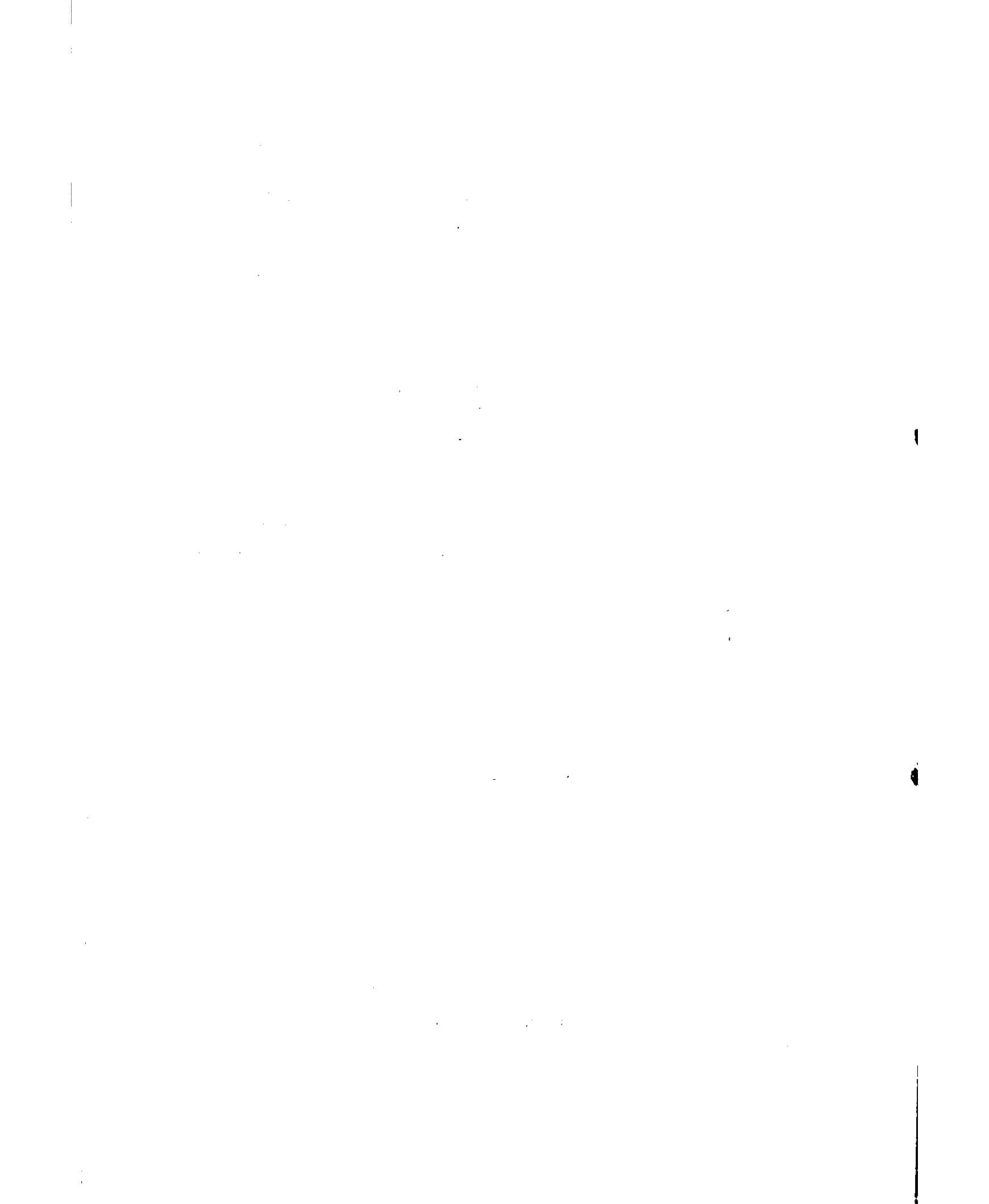
137. Francis Graupner, "Commission Decisionmaking on Competition Matters" (1973) CMLRev 291, 304.

138. Eighth Report of the House of Lords Select Committee on the European Communities (Session 1981-82), "Competition Practice", 34, per Joint Working Party on Competition Law of the Bar and Law Society.

139. *ibid.*, page 73 at para. 8.

140. *ibid.*, p 73, para. 10.

141. "Judicial Review of Issues of Fact in Competition Cases" [1983] ECLR 85, 95.



examples of industry grievance - suffice to say that lack of confidence in and lack of credibility of the system of adjudication under Articles 85(1)/86 EEC is a phenomenon which persists<sup>142</sup>.

A respected American commentator in the field once observed:

"Lack of confidence may sometimes be nearly as serious as lack of fairness. Some portions of the community undeniably seem unwilling to place faith in a system in which the same men both accuse and judge, especially within the biases of the adjudicators are opposed to the biases of the objectors"<sup>143</sup>

The unwillingness - however cynical it may be - of the European business community to place faith in the Commission system for adjudicating infringement decisions, is reflected most vividly, perhaps, in the many attempts by applicant undertakings to challenge the constitutionality of that system before the Court of Justice.

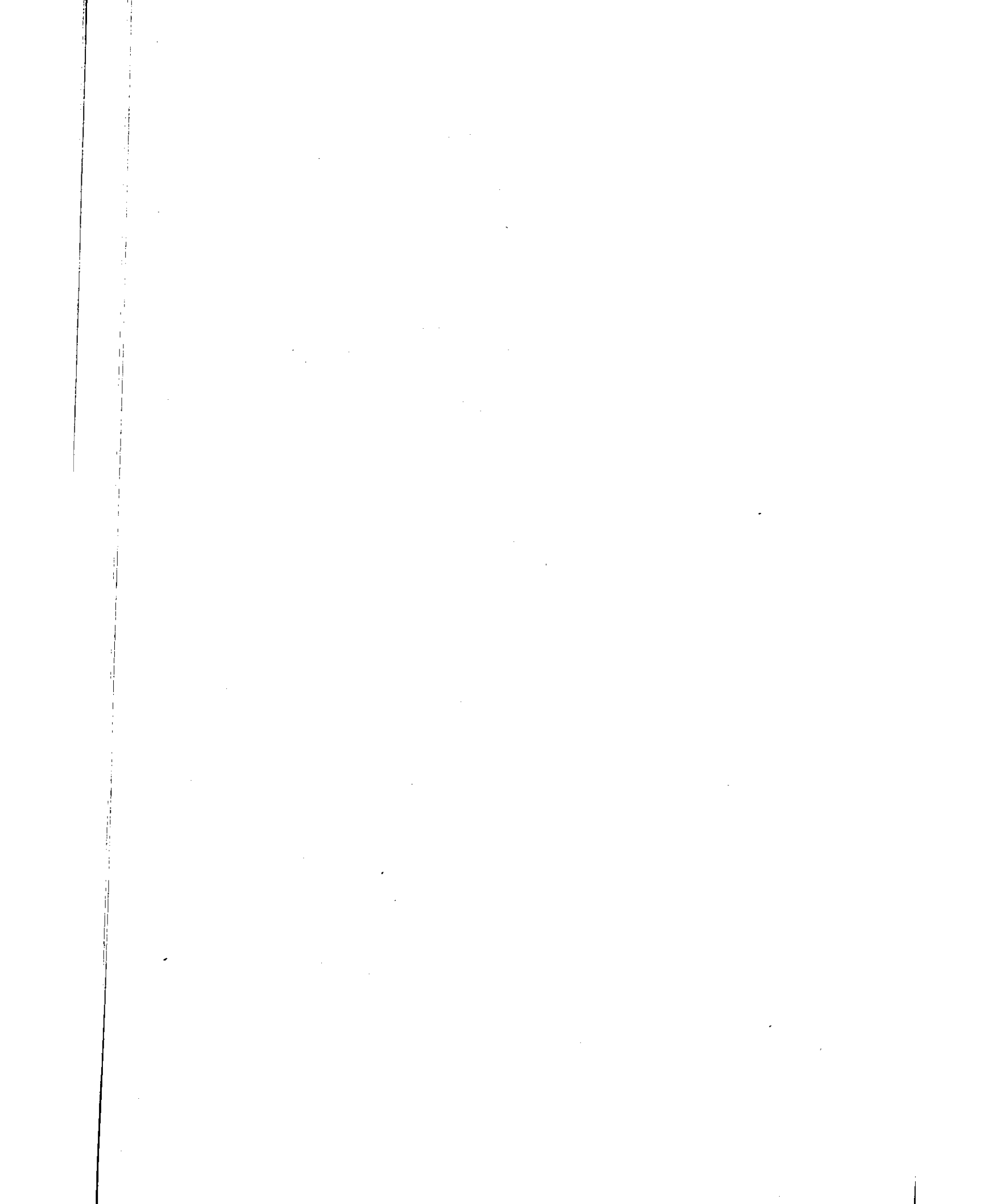
The Reaction of the Court of Justice to Structural  
Inappropriateness in Commission Adjudication

"The Commission has no judicial function; however inconsistent it must be, the procedure provided for by Regulation No. 17 is at all

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142. For a more recent statement of discontent see Van Bael & Bellis, "Competition Law of the EEC" (1987) CCH Editions, page 18.

143. K.C. Davis, "Separation of Powers in Administrative Agencies" 61 Harvard Law Review (1948) 612, 646.





times administrative"<sup>144</sup>.

### The Court's Reaction (I) - Fundamental Rights

The Court of Justice is a highly politicised body, which, as one of the, "chief architects of the constitutional order of the European Community"<sup>145</sup>, is more conscious than most courts of the political consequences of its decisions. The Court has issued major judgments which are clearly intrusions into the political sphere, sometimes rivalling or even surpassing the efforts of the other explicitly political institutions of the Community in promoting the achievement of the common market<sup>146</sup>. These should be seen as examples of the lengths to which, "the pro-Community policymaking"<sup>147</sup>, of the Court can take it. In short, the Court of Justice, from early on, deliberately set itself up as an activist tribunal acting as some sort of motor of integration whose, "case law puts into effect bold conceptions which the architects of the Community have made the foundation of their

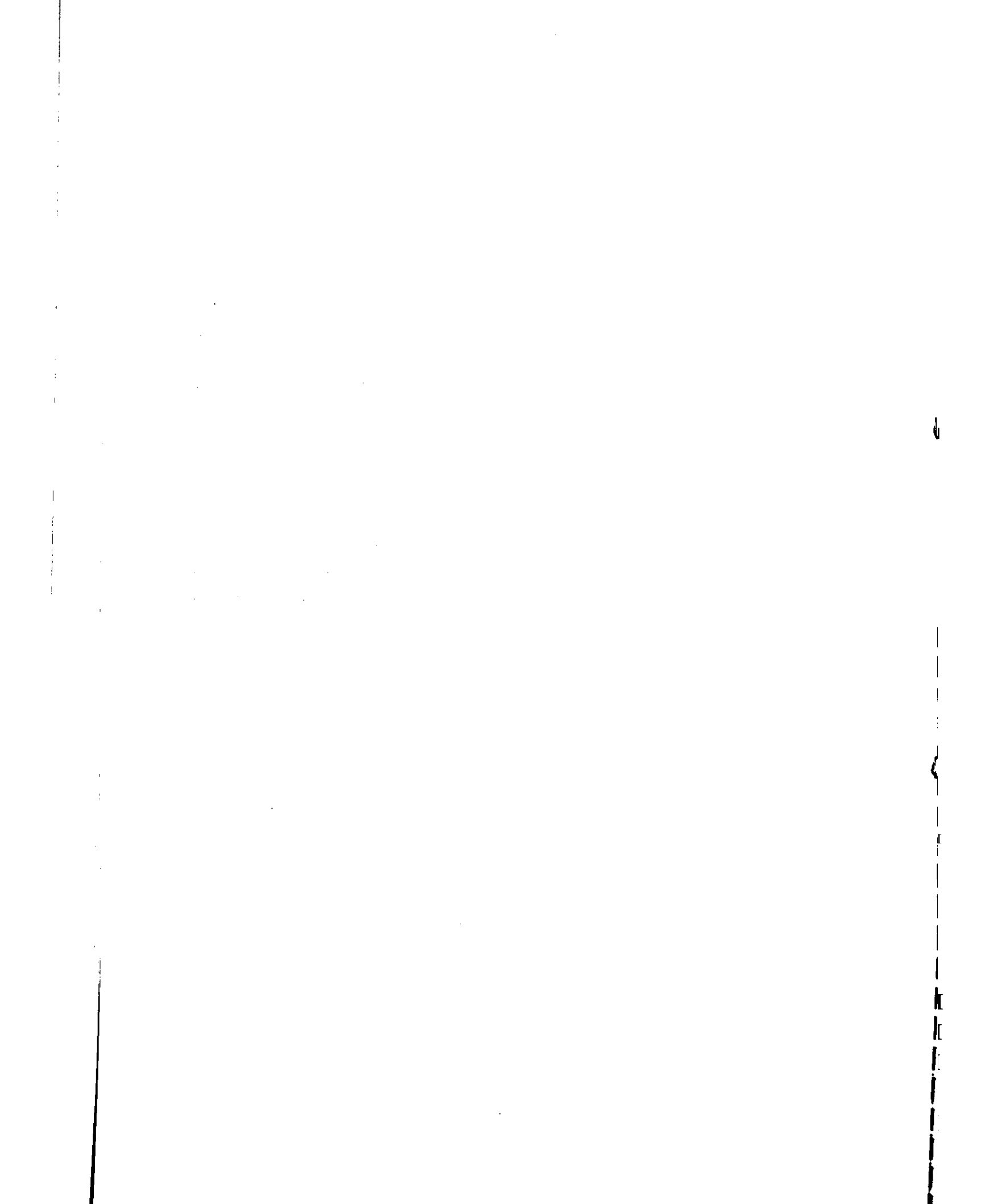
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144. Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, 'Suiker Unie v Commission', [1975] ECR 1663, 2067, per Mayras AG (emphasis added).

145. "On Law and Policy in the European Court of Justice", Hjalte Rasmussen, 1986 Martinus Nijhoff, p3.

146. Cf. e.g., Case 26/62, 'Van Gend en Loos', [1963] ECR 1; Case 22/70, 'AERT', [1971] ECR 263; Case 43/75, 'Defrenne', [1976] ECR 455; Case 120/78, Cassis de Dijon, [1979] ECR 649.

147. op. cit., loc. cit., fn 145 supra.



edifice"<sup>148</sup>.

A major element in this highly instrumentalist jurisprudence is the so-called fundamental rights doctrine, whereby certain, basic, individual freedoms vis a vis the Community Institutions have been accorded constitutional status. Most important has been the express incorporation, via the jurisprudence of the Court, of the freedoms enounced in the European Convention on Human Rights of 1950 into the Community legal order<sup>149</sup>. However, this fundamental rights doctrine must be read in the context of the overall political stance of the Court of Justice.

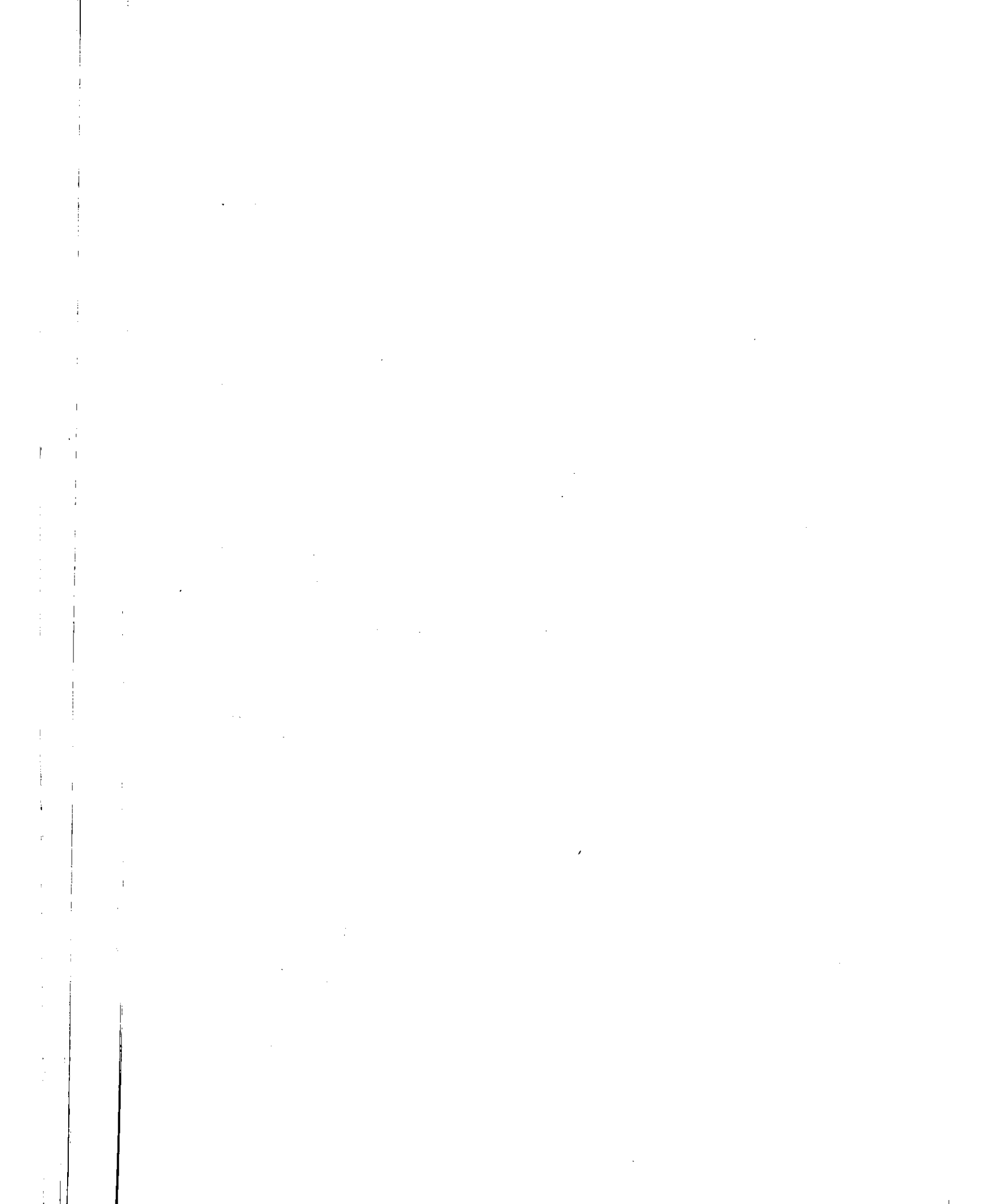
The Community legal order was confronted, in the early 1970's, with a refusal among some Member States - via their constitutional courts - to accept the principle of primacy of Community law insofar as it implied the primacy of Community legislation over national constitutional guarantees of basic human rights. This reluctance was, it is submitted, a justifiable response to the absence, in the Treaties, of a code of human rights circumscribing the freedom of action of Community Institutions.

Faced with such a clearly principled stance which, nevertheless, threatened the autonomy of the supra-national legal order, the Community was in a position analogous to that of the nascent United States of America at the end of the Eighteenth Century.

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148. Pierre Pescatore, "The Law of Integration" (1974), page 90. See also Pescatore's candid reference to the Court's, "certaine idéé de l'Europe", in "The Doctrine of Direct Effect: An Infant Disease of Community Law", 8 ELRev (1984), page 157.

149. Case 4/73, Nold v Commission, [1974] ECR 491.



However, unlike the latter case, the Constitutional text of the EC's was not formally amended to include a 'Bill of Rights'; instead the Court of Justice, taking up the challenge of inertia among the 'political' organs (national and supra-national) of the Community, read the presence of just such guarantees into the existing text. To quote Rasmussen,

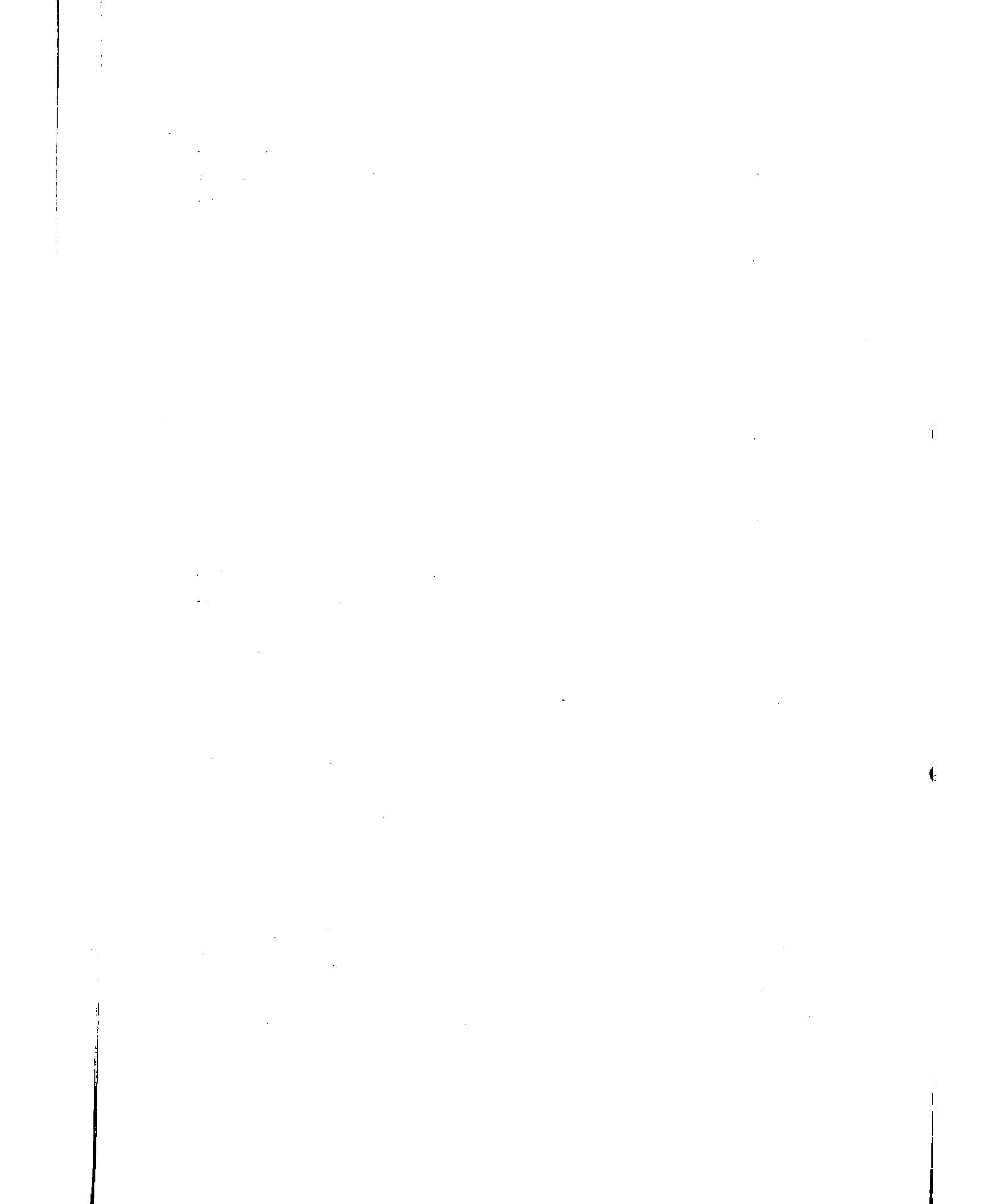
"it [the Court] aimed at undermining (if possible) the justifications for the mounting criticism of the unavailability of an adequate Community protection [of human rights] without forcing the Community's political processes into a constitutional straightjacket"<sup>150</sup>.

In this way, responsibility for the effective, constitutional protection of individual interests vis à vis the Community's legislative and executive institutions has been shouldered by the Court in order that constitutional clashes regarding such interests between national and supra-national legal orders be eliminated and the wheels of integration be lubricated: and this effort has been most successful. The judicial creation of a code of basic rights vis a vis the Community Institutions, roughly analogous to those enjoyed under national constitutions vis a vis national institutions, has eventually encouraged the unequivocal acceptance by national constitutional courts of the primacy of the Community legislation over their own constitutional guarantees<sup>151</sup>.

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150. op. cit. supra at fn 145, page 405.

151. In the case of the Federal Republic, the jurisprudence of the federal constitutional court, the Bundesverfassungsgericht, traces this inter-tribunal process of 'winning over' in the most exceptionally candid terms: see especially, Case 2 BvL 52/71, "Internationale Handelsgesellschaft mbH", [1974] 2 CMLR 540, para. 35 of judgment; Case 2 BvL 6/77, "FA Steinike und Weinlig", [1980] 2 CMLR 531, para. 12 of judgment; Case 2 BvR 197/83, "Wüunsche Handelsgesellschaft", [1986] 3 CMLR 225, paras. 35, 44, 45 and 48 of judgment.



An important corollary of the Court's deliberate development of an "integration-friendly" fundamental rights doctrine is, it is submitted, the Court's evident refusal to go beyond what is broadly necessary to ensure the 'effet utile' of Community law at national level and, thereby, to interpret those fundamental rights so to speak "gratuitously" against the Community Institutions. In this context 'gratuitous' interpretation means interpreting human rights in a way which would hinder Community organs in their integrative work, or force them into a "constitutional straightjacket" in the absence of national constitutional pressure so to do. The practical import of this corollary is particularly significant with regard to the Court's decisions on the constitutionality of the allocation of adjudicative power to the Commission under Articles 85(1)/86 EEC.

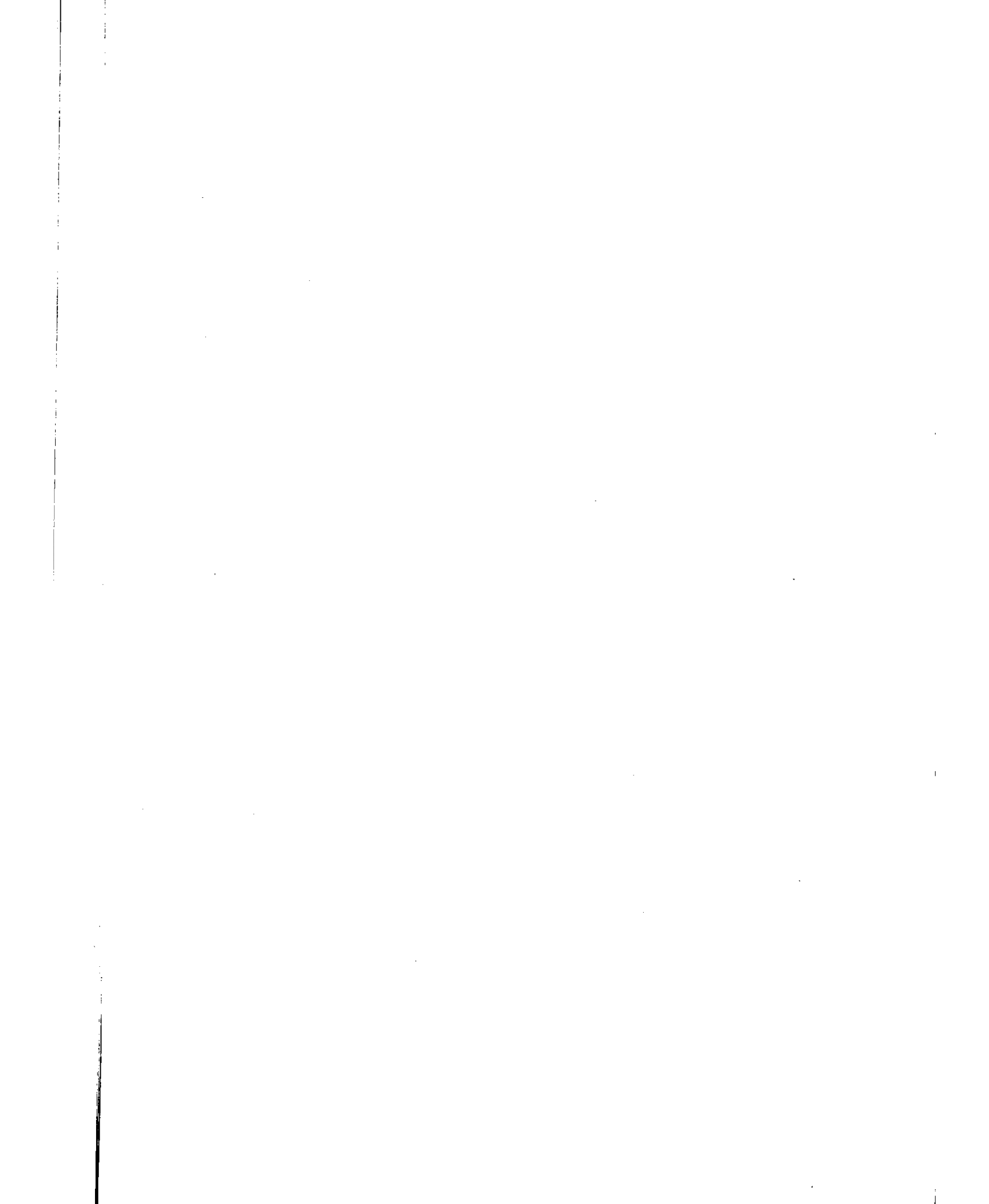
The Court's Reaction (II) - Article 6(1) ECHR and its Interpretation by the Court of Human Rights

Article 6(1) of the European Convention on Human Rights provides that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

The European Court of Human Rights has developed a substantial jurisprudence on Article 6(1) of the Convention. We shall deal here with some of the most important dicta.

The Court of Human Rights has developed a two-stage substantive notion of the term 'tribunal' in Article 6(1). Firstly, the Court enquires whether it is possible to describe the legal





situation in issue as one implying a 'right to a tribunal'. This enquiry involves looking at the function performed by the governmental agency with respect to the specific individual interests at stake<sup>152</sup>. With regard to this functional element of the first stage, the Court has ruled that,

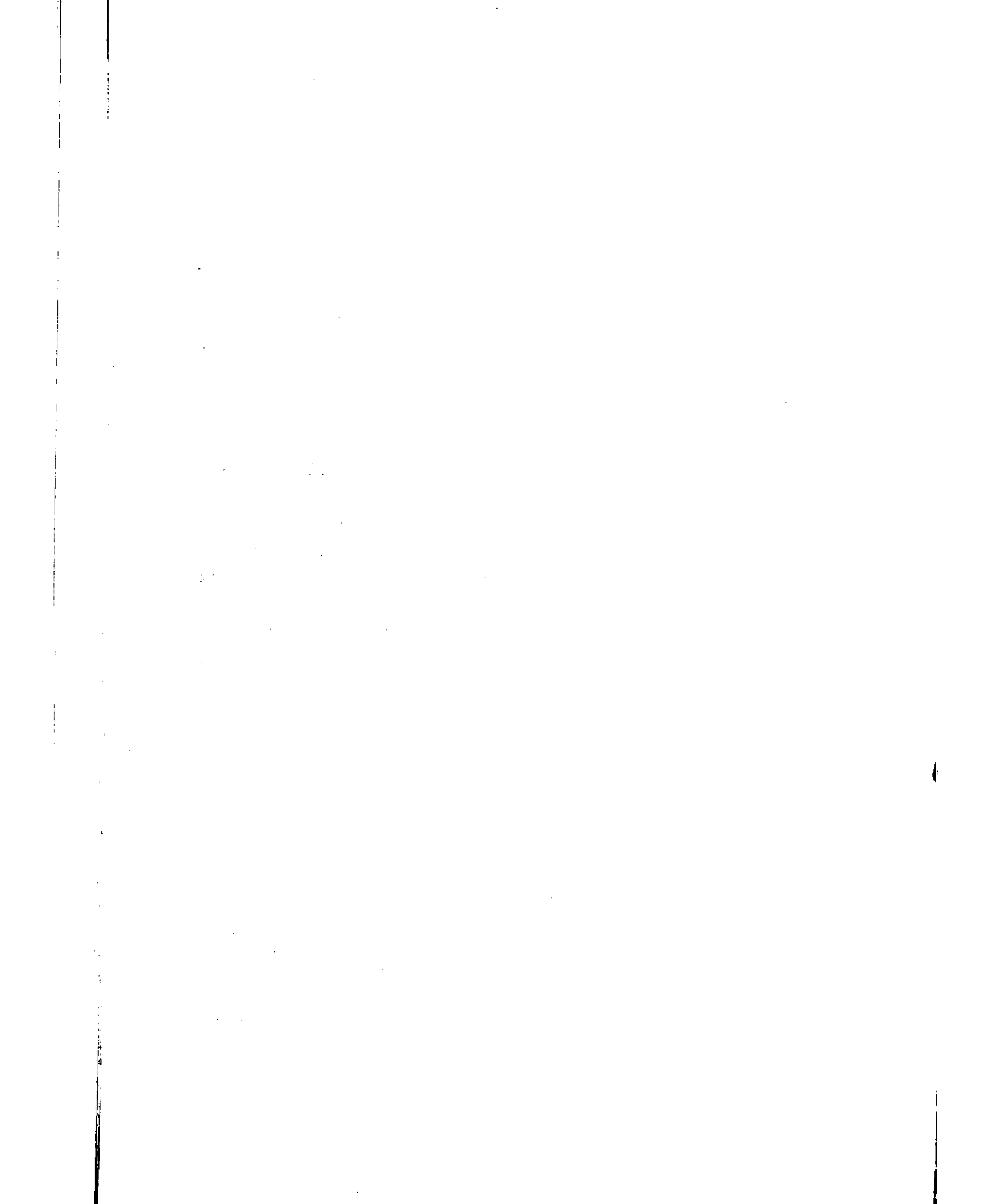
"[f]or the purposes of Article 6 ... [an agency] comes within the concept of a 'tribunal' within the substantive sense of this expression ... [if] its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner"<sup>153</sup>.

In other words, the protections supplied by Article 6 of the Convention can be invoked not only against the procedures and personnel of a court of law ('tribunal' in the formal sense), but also against those of any body, such as the EC Commission, which purports to exercise an adjudicatory function ('tribunal' in the substantive sense) whether formally independent of the executive or not. Furthermore the Court has emphasised that a body can be a tribunal within the substantive sense of the term in respect of any one of a variety of functions which it performs. In a recent case the Court ruled:

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152. It will be understood that the sort of function performed and the type of individual interests at stake are interdependent concepts. It is only when the application of rules of law can, as we have seen before, be articulated in terms of claims of right or accusations of fault (by being drafted in sufficiently 'closed' terms) that adjudication is implied. The Court of Human Rights deduced adjudicative function from type of interest at issue in this way in its judgment of 10 February 1983, 'Albert and Le Compte v Belgium', Series A, Vol. 58, para. 29.

153. 'Sramek v Austria', judgment of 22 October 1984, Series A, Vol. 48, para. 36.



"The [agency in question] performs many functions - administrative, regulatory, adjudicative, advisory and disciplinary... This kind of plurality of powers cannot in itself preclude an institution from being a 'tribunal' in respect of some of them"<sup>154</sup>.

Once the 'right to a tribunal' has been found using this "descriptive" functional analysis, the second "prescriptive" stage of enquiry can begin. This stage involves assessing whether agency in question satisfies the other substantive elements of the term "tribunal" under Article 6(1). The Court of Human Rights has held that this second level definition of "tribunal",

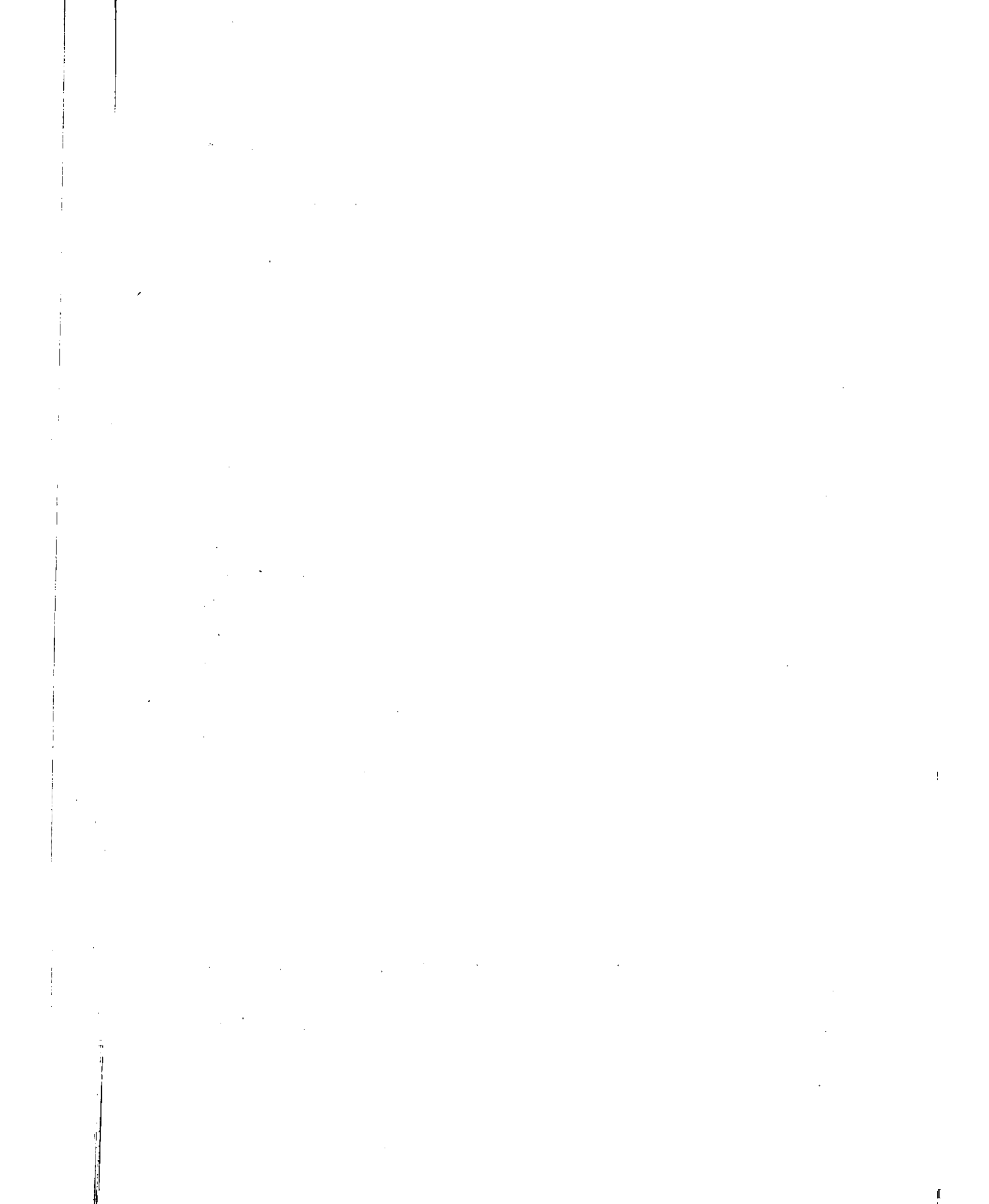
"denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case..., but also the guarantees of judicial procedure"<sup>155</sup>.

This second level definition of "tribunal" relates, therefore, to the independence, impartiality and procedural propriety of the agency to which the first level definition of "tribunal" applies. It is important to note that the Court of Human Rights approaches this second level definition from the same substantive perspective as before. It has ruled, for example, that enquiry into independence/impartiality means that the Court will have regard to the manner of appointment of the agency's members, the duration of their term of office and the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence. In this respect, "questions of

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154. 'H v Belgium', Judgment of 30 November 1987, Series A, Vol. 127, para. 50.

155. 'De Wilde, Ooms and Versyp', Judgment of 18 June 1971, Series A, Vol. 12, para. 78.



internal organisation"<sup>156</sup> (in the sense of intra-agency division of adjudicatory powers from other powers), or of, "organisational impartiality"<sup>157</sup> are always highly relevant.

The final aspect of the Court of Human Rights' Article 6(1) jurisprudence we shall mention here relates to the hierarchical location of the "tribunal" identified according to the two-stage definition discussed. The Court has held that if an agency dealing with issues at first instance falls within the first level definition of Article 6(1), then, provided that the hierarchy of which it is a part provides a superior agency satisfying both levels of that definition, no violation of the Convention will occur. As the Court says: "[d]emands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of ... bodies which do not satisfy the ... requirements [of Article 6(1)] in every respect"<sup>158</sup>. "Even where Article 6(1) is applicable", the Court stated on another occasion, then the system established must conform to one of two models, in which:

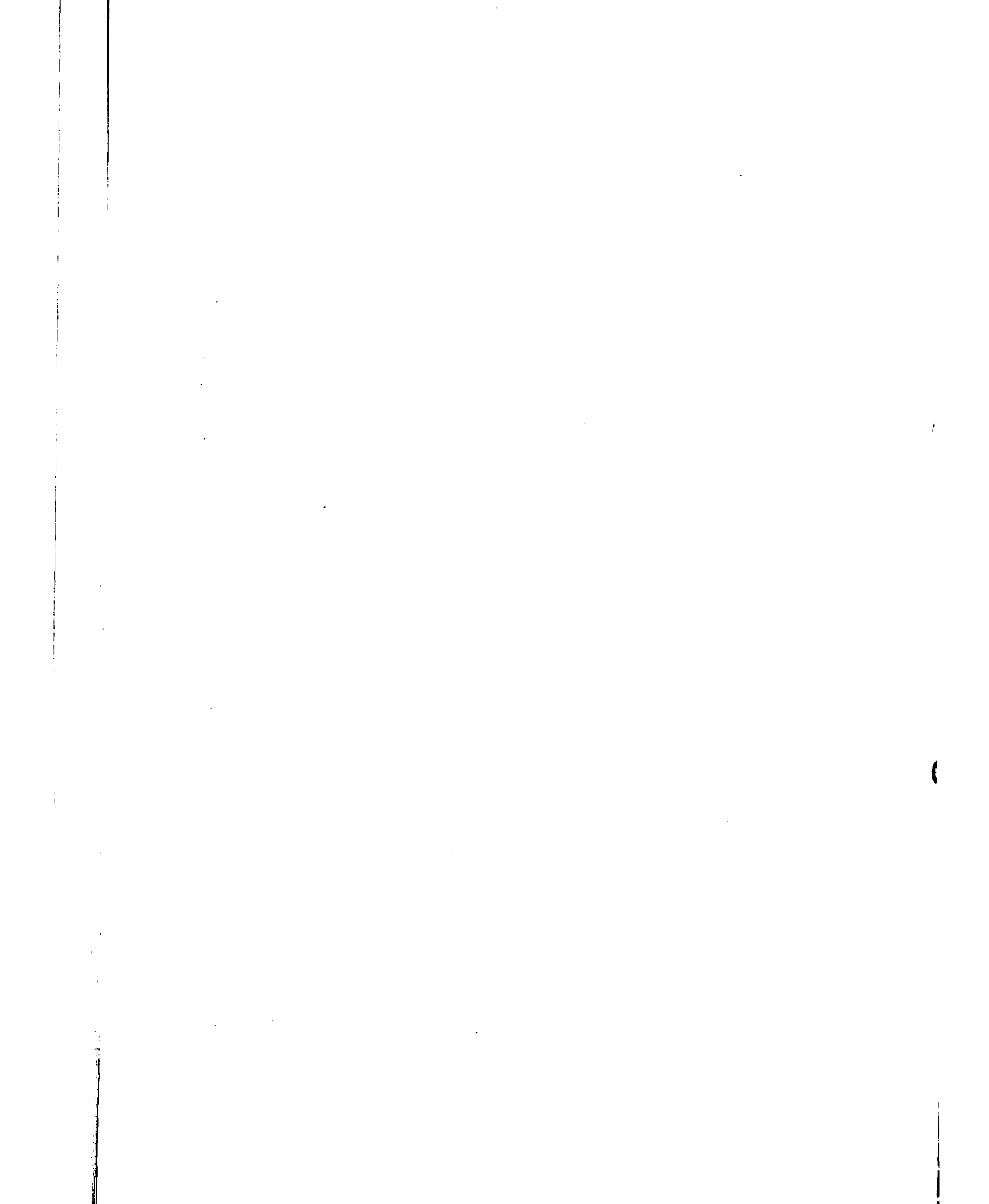
"either the jurisdictional organs themselves ['tribunals' according to the 'level one' definition] comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction [i.e., jurisdiction which is co-extensive with that of the dealing with the case at first instance] and does

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156. 'Piersack', Judgment of 1 October 1982, Series A, Vol. 53, para. 30 (emphasis added).

157. 'Belios v Switzerland', Judgment of 29 April 1988, Series A, Vol. 132, para. 67.

158. 'Le Compte, Van Leuven and De Meyere v Belgium', Judgment of 23 June 1981, Series A, Vol. 43, para. 51.



provide the guarantees of Article 6(1)"<sup>159</sup>.

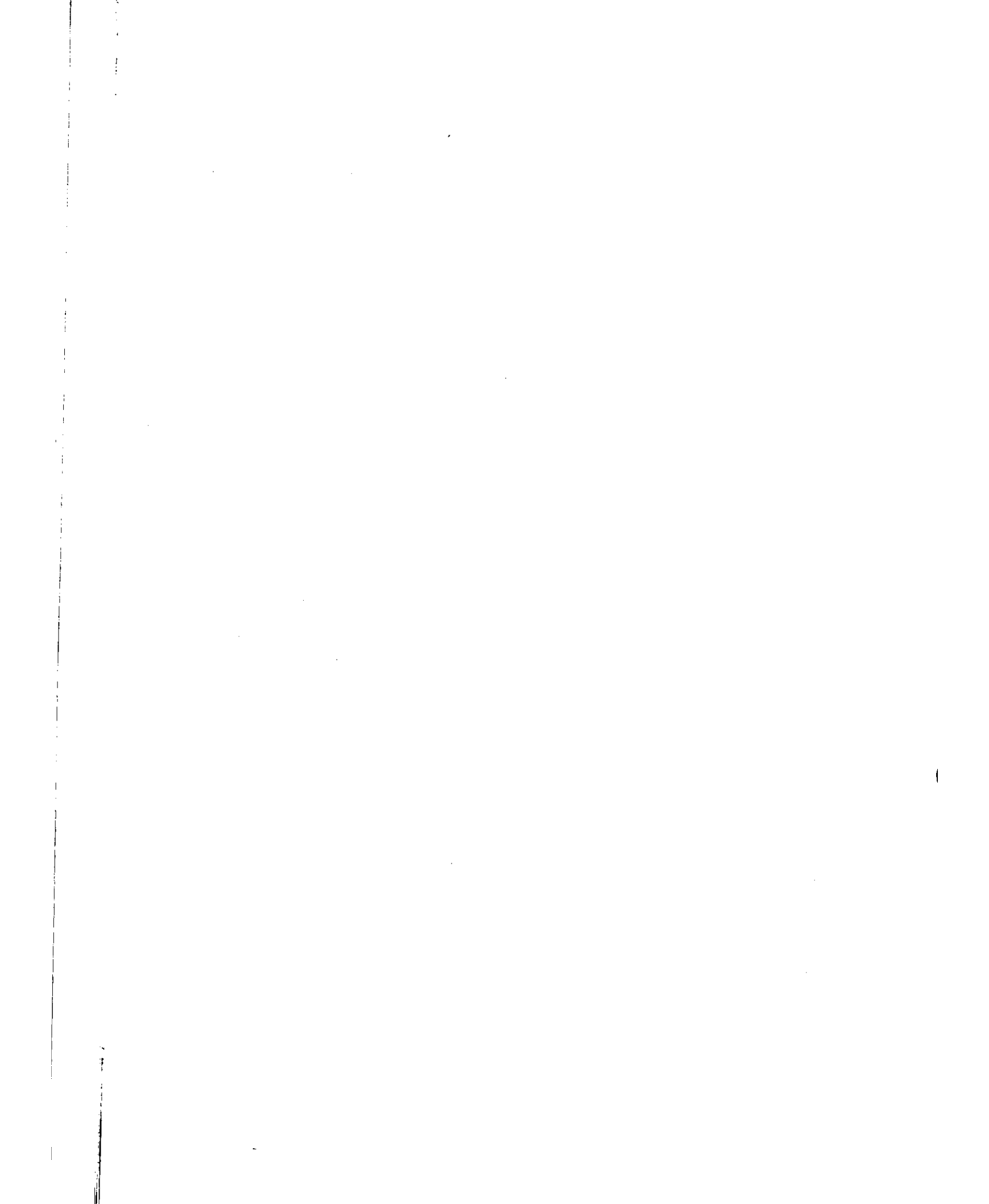
In conclusion, therefore, we can say that the Court of Human Rights applies a two-level substantive definition with regard to the term "tribunal" under Article 6(1) of the Convention. The first "descriptive" level renders Article 6(1) applicable in view of the function performed by a governmental agency with respect to individual interests. The second "prescriptive" level applies the normative structural and procedural guarantees of Article 6(1) to the performance of such a function. We have also seen that the Court is prepared to allow agencies which decide at first instance and which fall within the first level of definition to escape the demands of the second level definition provided that the issues upon which they adjudicate are subject to full re-adjudication by an superior agency satisfying that second level.

#### The Court's Reaction (III) - Interpretation of Article 6(1) by the Court of Justice

On two occasions the Court of Justice has been asked to rule that, by not exhibiting a triadic decision-making structure in

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159. 'Albert and Le Compte v Belgium', cit. fn 147 supra, loc. cit. (emphasis added). Review tribunals with jurisdiction over points of law alone provide an inadequate solution in the Court's opinion, since, "Article 6(1) draws no distinction between questions of fact and questions of law. Both categories of questions are equally crucial for the outcome of [adjudication]". In other words, the 'right to a tribunal' guaranteed by Article 6(1), "covers questions of fact just as much as questions of law", 'Le Compte, Van Leuven etc.', cit. immediately above, loc. cit. (emphasis added).





adjudicating cases under Articles 85(1)/86 EEC, the Commission violates the fundamental right to a fair trial guaranteed by Article 6(1) and, accordingly, by Community Law. On both occasions the Court has flatly rejected such claims<sup>160</sup>. It is submitted that, in so far as it purports to rule on the applicability of Article 6(1) of the Convention, the reasoning in these cases is seriously flawed.

In the 'FEDETAB' case<sup>161</sup>, the applicant undertakings argued that Article 6(1) was applicable in Commission adjudication using the familiar functionalist stand-point employed by the Court of Human Rights (the first level 'descriptive' definition of "tribunal"), accurately citing that Court's 'König' decision<sup>162</sup> in support<sup>163</sup>. The Commission, on the other hand, argued that, since the "executive power of the Community is in fact vested in it, it is at least doubtful whether, not being independent of that power [in the sense of exhibiting internal separation of powers], it can constitute a tribunal within the [meaning of Article 6(1)]"<sup>164</sup>. In support of this proposition, the Commission claimed support

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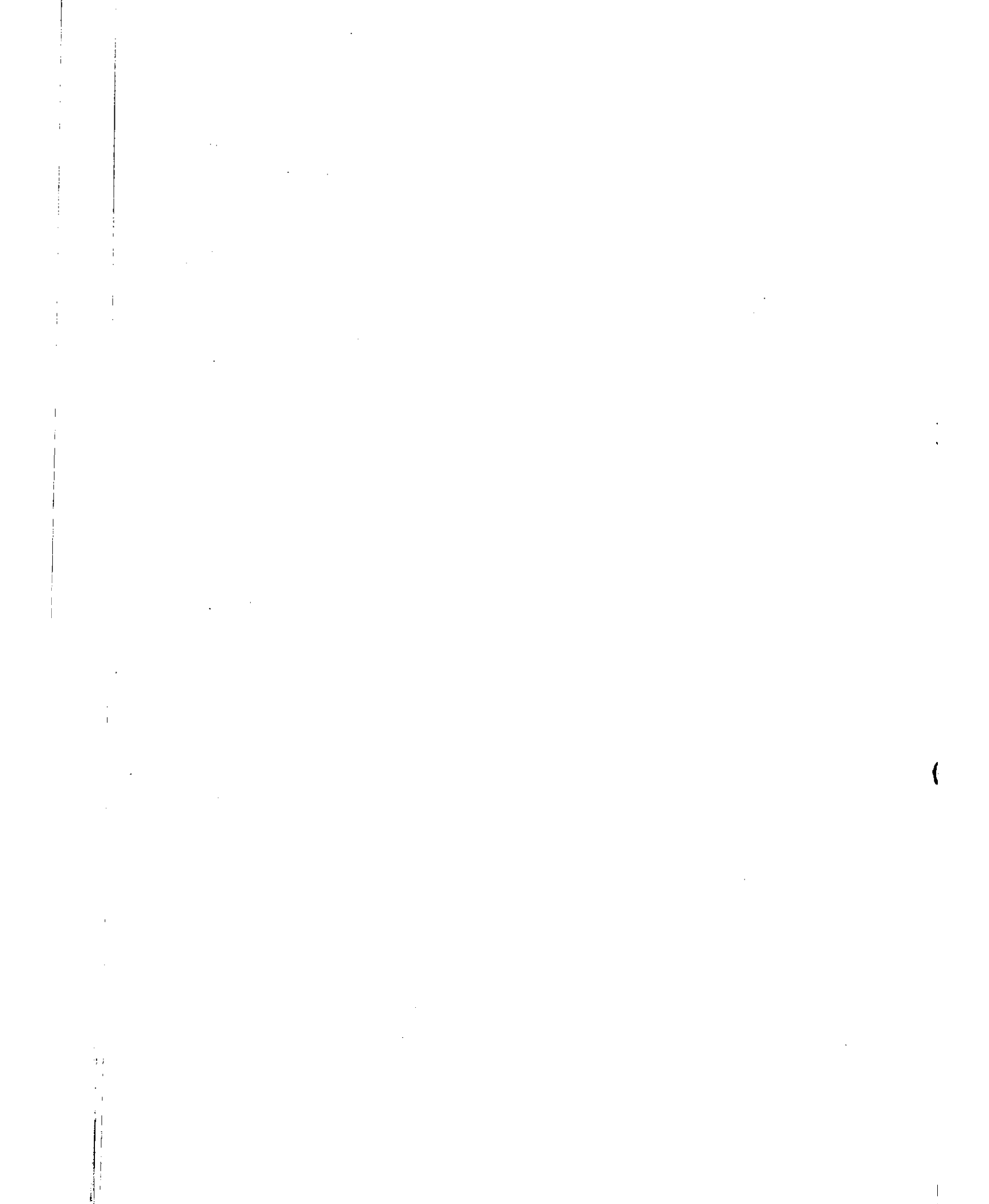
160. Joined Cases 209 to 215 and 218/78, Van Landewyck v Commission, [1980] ECR 3125, 3248, para. 81 of judgment; Joined Cases 100 to 103/80, Musique Diffusion Française v Commission [1983] ECR 1825, 1880, para. 7 of judgment.

161. Joined Cases 209 to 215 and 218/78, 'Van Landwyck v Commission', cited immediately above.

162. Judgment of 31 May 1978, Series A, Vol. 27, para. 90

163. Cited in 'FEDETAB' cit. fn 160 supra, para. 79 of judgment.

164. *ibid*, para. 80 of judgment.



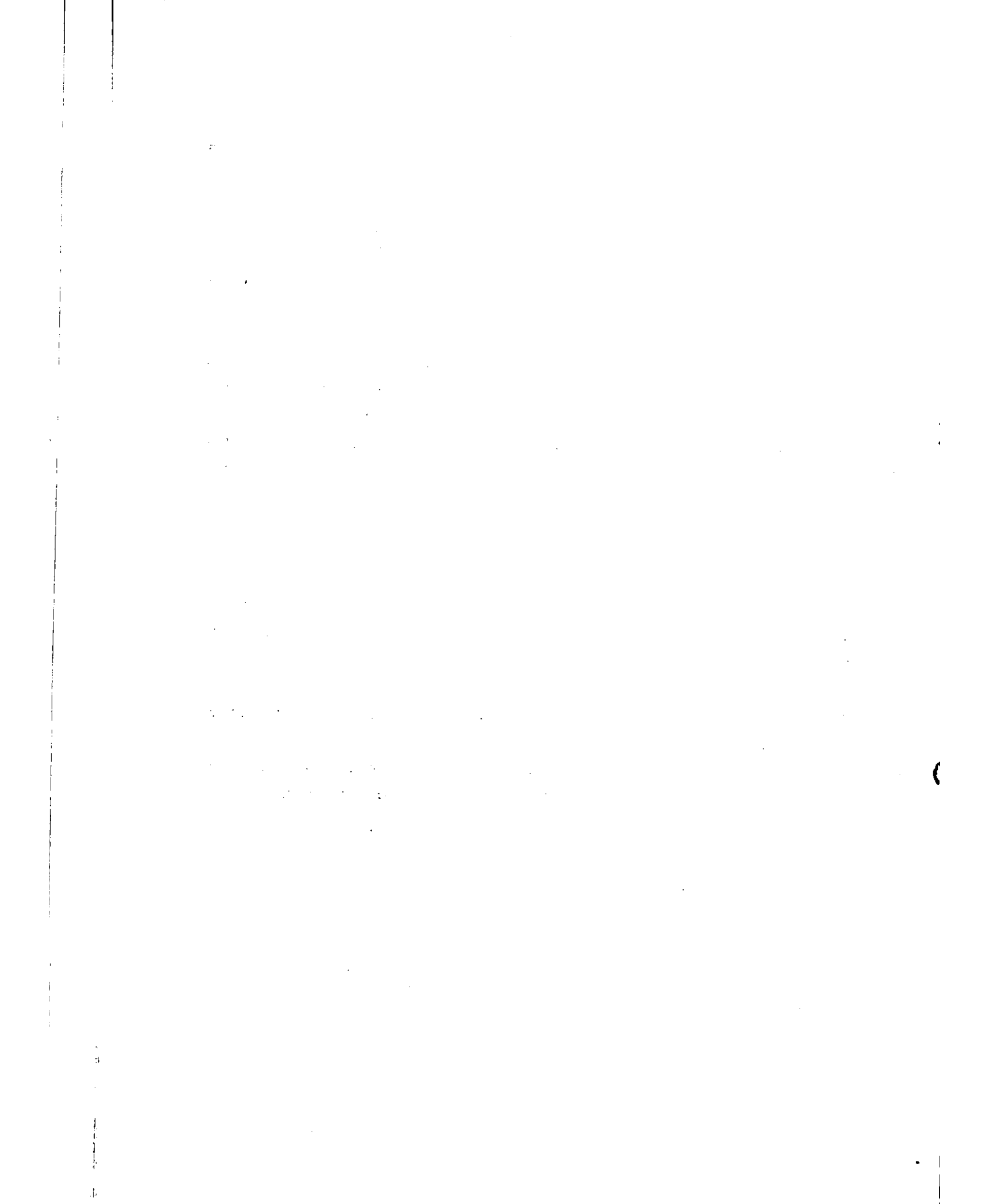
from the Court of Human Rights' 'Ringelsen' decision<sup>165</sup>. To the extent that the Commission's argument purports to derive from this decision, it is manifestly untenable. In the part of the decision cited, the Court of Human Rights stated inter alia, "that the [agency which was the subject of the case] is a 'tribunal' within the meaning of Article 6 paragraph 1 of the Convention as it is independent of the executive and also of the parties"<sup>166</sup>. The Commission interpreted this dictum to mean that only bodies which provide the guarantees of independence etc demanded by Article 6(1) can legitimately constitute tribunals within the meaning of that Article. The corollary of this proposition; i.e., that, regardless of its function, an agency's lack of independence means that it is not required to be independent; effectively abrogates Article 6(1). Its scope would be limited merely to ensuring that bodies which are formally independent of the executive power, e.g. Courts, maintain their independence.

The 'Ringelsen' decision does not, of course, support such a proposition. The dictum cited by the Commission was delivered in the context of the second level "prescriptive" analysis we discussed above; in the paragraph which immediately preceded it, the Court of Human Rights had already undertaken the first level "descriptive" analysis of the agency in issue and had held that, due to its adjudicative function, it was a 'tribunal' within the meaning of Article 6(1), which was required to provide the

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165. Judgment of 16 July 1971, Series A, Vol. 13, para. 95 (wrongly cited in the 'FEDETAB' judgment, cit. immediately above, loc. cit., as para. 94).

166. *ibid.*



guarantees listed by that Article<sup>167</sup>. In 'Ringeisen', if the agency in question had been found not to be independent, then Article 6(1) would have been violated - it would not have been held inapplicable. Nevertheless, the Court of Justice in 'FEDETAB' proceeded to accept the Commission's argument and ruled that the Commission could not be considered a tribunal within the meaning of Article 6(1)<sup>168</sup>.

We have, in 'FEDETAB', therefore, a decision which prevents the enforcement of a constitutional right by simply confusing form and substance. It is submitted that this confusion, far from deriving from the Court's limited understanding, was created precisely because its understanding of the political consequences of separating description and prescription was too full.

The Court of Justice has always been aware of the difference between the substantive and the formal concept of a 'tribunal'. Indeed, in its decisions relating to Article 177 EEC it has developed a functionalist jurisprudence very similar to that of the Court of Human Rights quoted above.

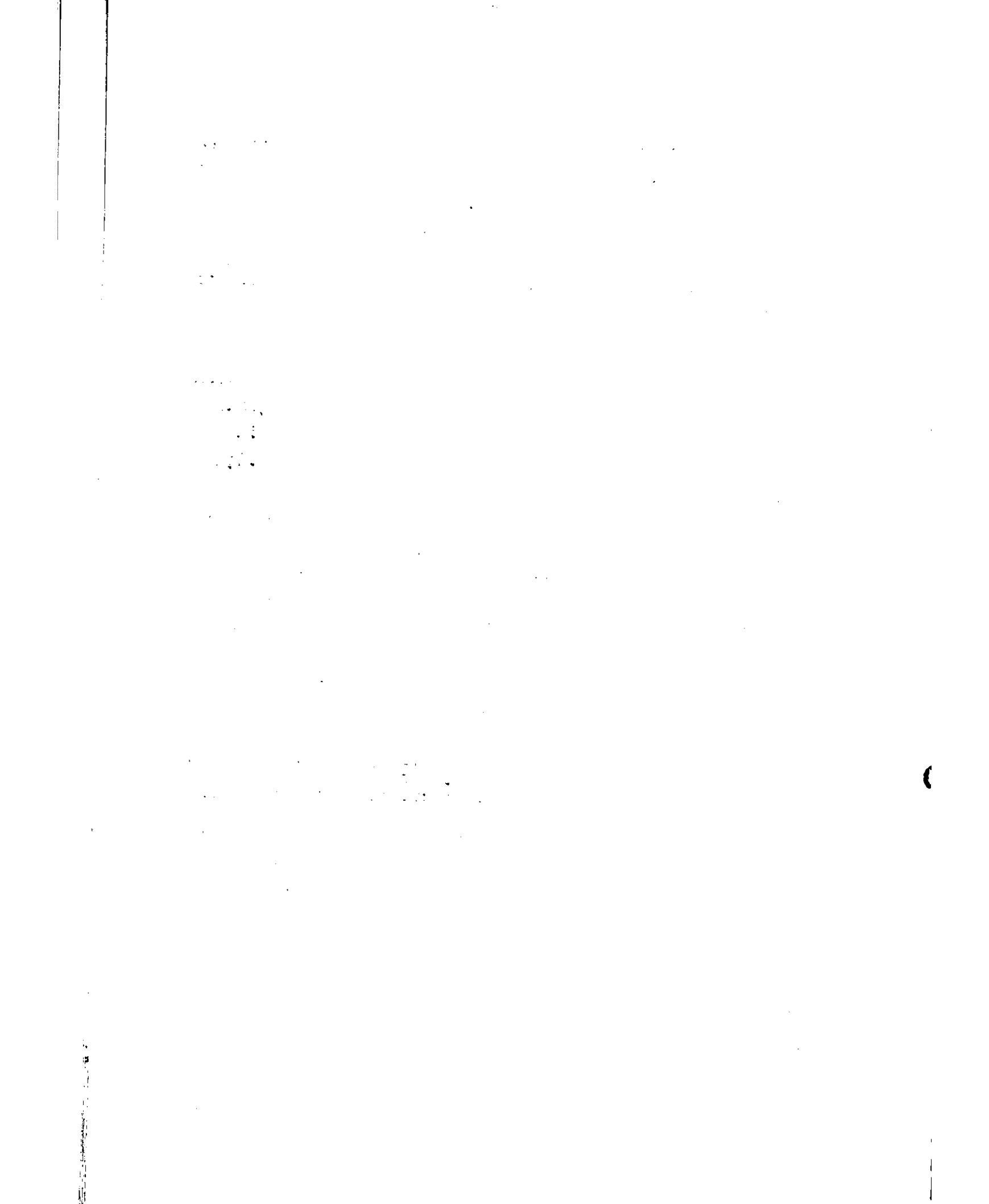
In defining the term "tribunal" for the purposes of determining from which national bodies preliminary rulings on the interpretation of Community Law are admissible under Article 177 EEC, the Court has stated that any body which, for example:

"operates with the consent of the public authorities and with their cooperation and which, after an adversarial procedure, delivers decisions which are in fact recognized as final,

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167. *ibid.*

168. *case cit.* at fn 160 *supra*, para. 81 of judgment.



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must, in a matter involving the application of Community law, be considered as a court or tribunal of a Member State within the meaning of Article 177"<sup>169</sup>;

or, as the Advocate General in the case said:

"[any permanent body] endowed with powers of a public nature which adjudicates upon disputes according to legal rules after a proper procedure in which the parties are given a hearing [constitutes such a tribunal]"<sup>170</sup>.

This functionalist or substantive interpretation of the term 'tribunal' in Article 177 is justified by the Court on the grounds that if the activities of a national body which operates in the way the Court described, "may affect the exercise of rights granted by Community law, it is imperative that the Court should have an opportunity of ruling on issues of interpretation and validity arising out of such proceedings"<sup>171</sup>. In other words, the purpose of Article 177 in promoting uniform interpretation and application of rules of Community law would be frustrated if 'tribunal' were interpreted formalistically.

Advocate General Reischl put things even more candidly than the Court in the same case where he pointed out:

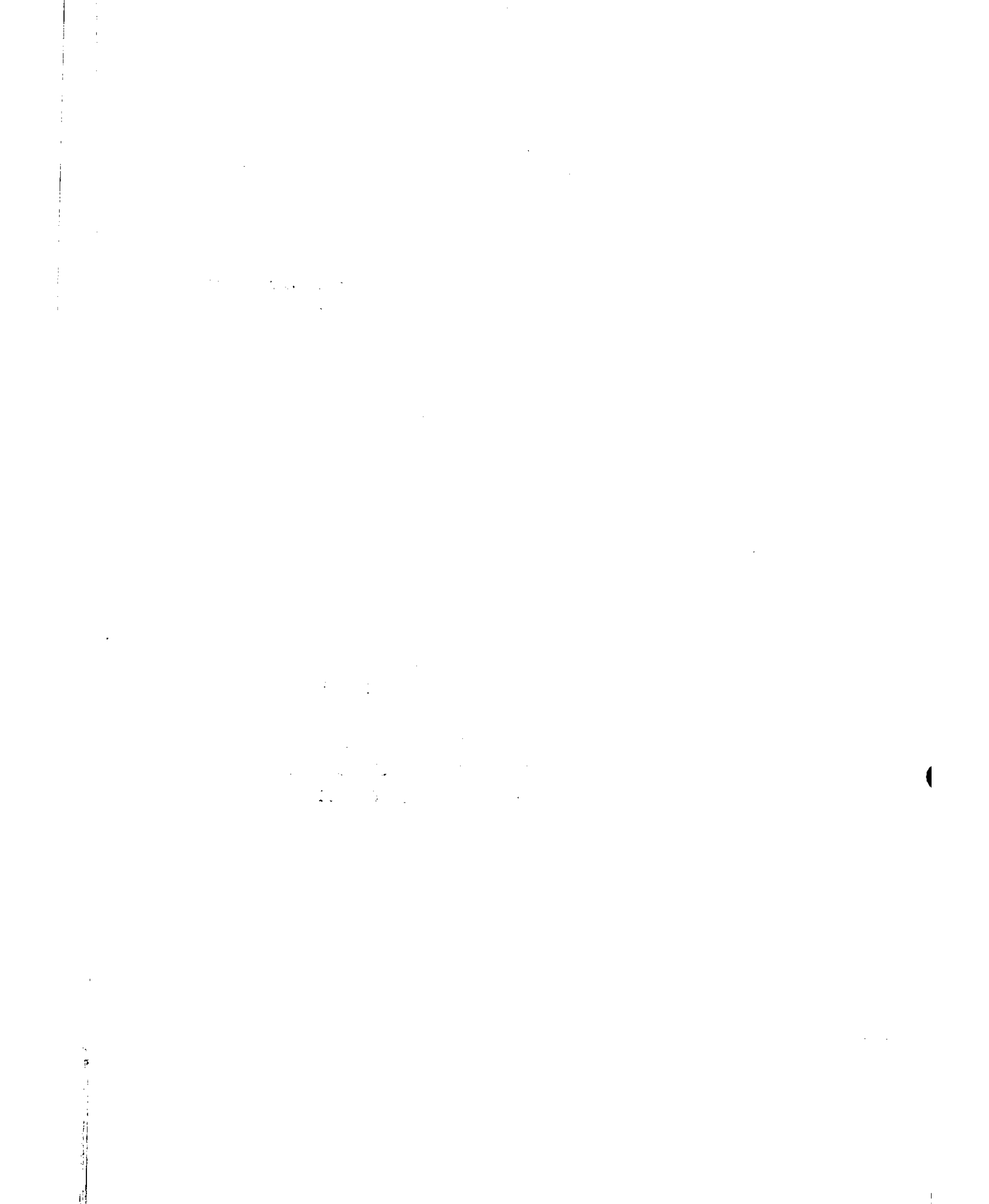
"If ... the term in question were to be construed as a reference to [formal] national law, Member States would have it in their power to take away from certain decision making bodies which have to apply Community law the right, and in some cases, the obligation to request a preliminary ruling ...

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169. Case 246/80, Broeckmeulen v Huisarts Registratie Commissie, [1981] ECR 2311, 2328, para. 17.

170. *ibid*, per Advocate General Reischl at p 2388.

171. *ibid.*, p. 2328, para. 16.





This would lead to the fragmentation of Community law, which is precisely what the procedure under Article 177 is designed to avoid"<sup>172</sup>.

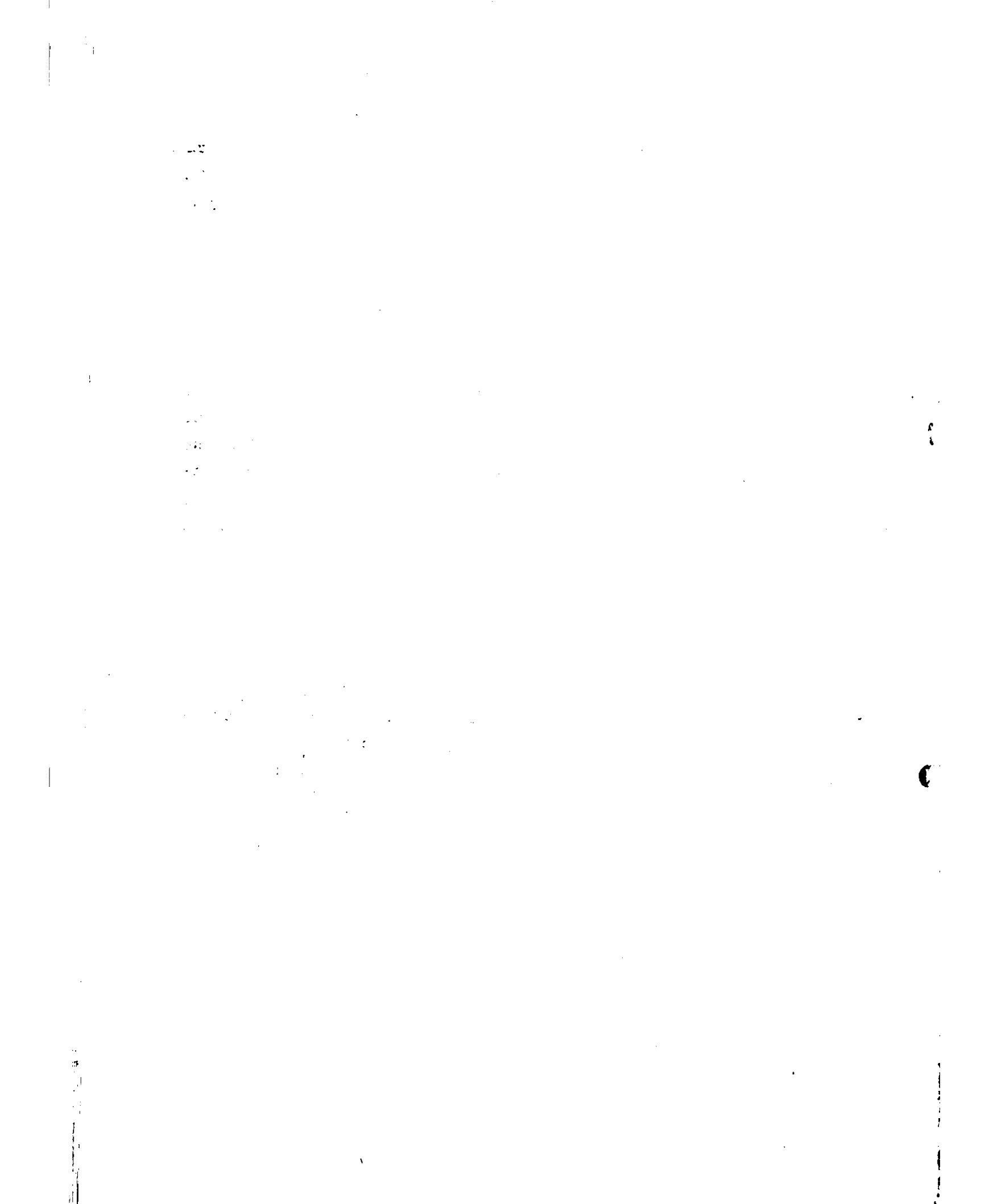
By the same token the construction by the Court of Human Rights of the term 'tribunal' in Article 6(1) of the Convention on Human Rights as a reference only to formally constituted courts would lead to precisely the same result with regard to the uniform and effective application of that Article in the Contracting States. A result contrary to the purpose of the Convention.

Why, then, does the Court of Justice adopt such different interpretatory techniques with regard to the same term? The answer is clear and relates again to the politically 'pro-integrative' stance of the Court. To the extent that the Court of Justice proceeded to accept the Commission's argument in 'FEDETAB', while purporting to apply the jurisprudence of the Court of Human Rights on Article 6(1), its decision was intellectually unsound. However, if we recall what we have said about the Court of Justice's fundamental rights doctrine and, specifically, about its corollary<sup>173</sup>, then at least the motive for its decision becomes clear. If the Court had held that the Commission's lack of internal separation of powers, or lack of a triadic decision-making structure in relation to the adjudication of infringement cases violated Article 6(1) of the Convention, the whole competition hierarchy would have been disabled until the

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172. *ibid.* p. 2366.

173. See text accompanying fn 145 to 151 *supra*.



fault could be rectified<sup>174</sup>. Therefore, in view of the Court of Justice's whole-hearted commitment to facilitating the Commission's integrative work, its 'FEDETAB' decision, although intellectually unsound, is politically consistent.

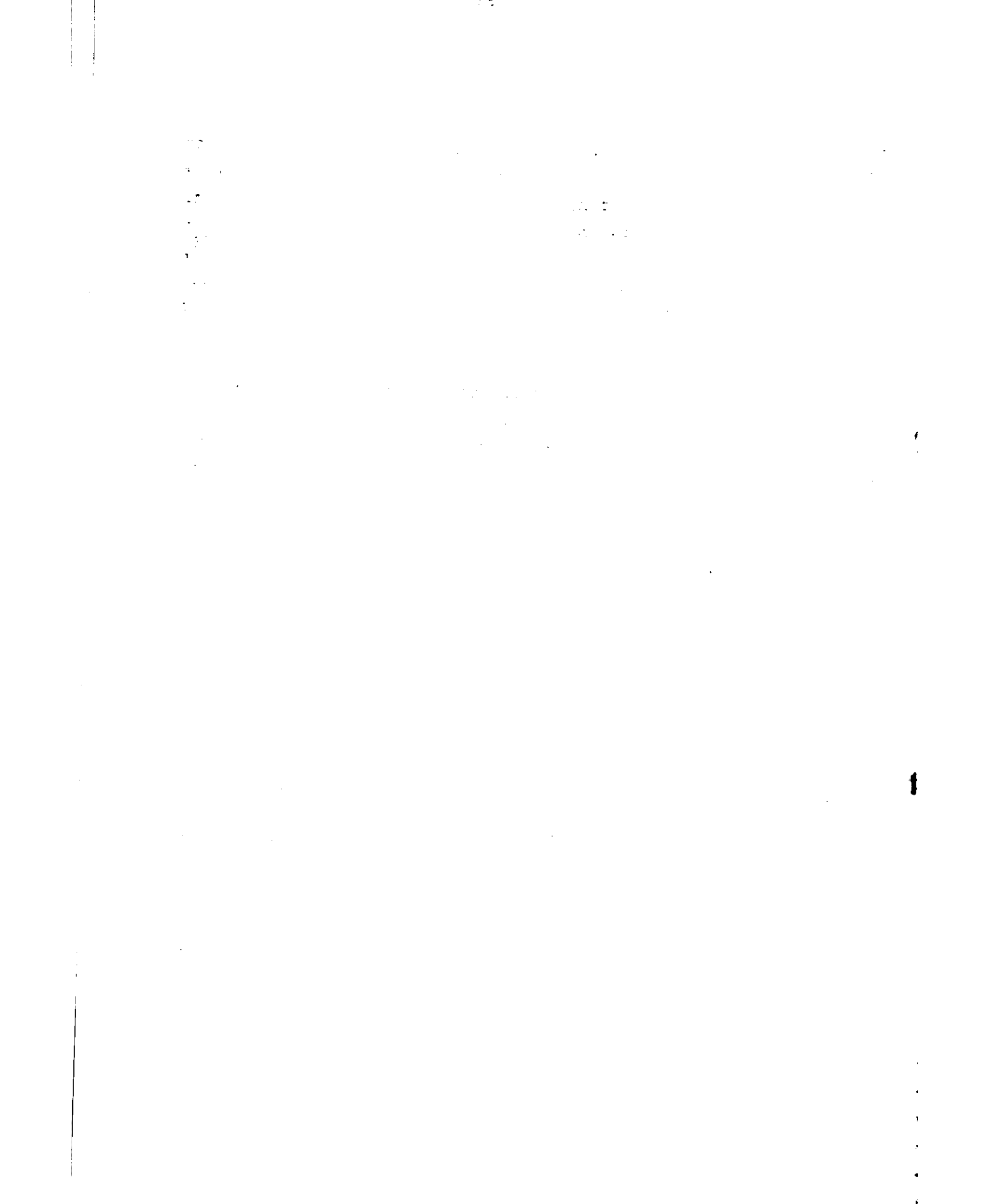
#### Reaction of the Court (IV) - Delegation of Powers

The Court of Justice has never recognised that the application of Articles 85(1)/86 EEC is an adjudicatory function<sup>175</sup>, nor, consequently, that its discharge requires a triadic decisional organisation; however, in its reaction to delegation of prosecutorial Commission powers under the competition regime it has certainly not prevented the Commission from creating such a structure.

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174. To have ruled that, although the Commission constituted a tribunal within the meaning of Article 6(1) without satisfying its requirements, it, as a appellate tribunal, could legitimately compensate for this failing at the review stage, was not an option open to the Court of Justice. We have seen above [See fn 159 supra and accompanying text] that the Court of Human Rights demands re-adjudication on the facts as an essential factor in fulfilling the requirements of Article 6(1) at the review stage; however, as we shall see in the following section, the Court of Justice is not in a position to offer full re-adjudication of infringement cases on the facts as well as the law.

175. "As the purpose of the procedure before the Commission is to apply Article 85 of the Treaty, even where it may lead to the imposition of fines, it is an administrative procedure", Case 44/69, 'Buchler v Commission', [1970] ECR 733, para 20 of judgment. See also, Joined Cases 56 & 58/64, 'Consten & Grundig v Commission', [1966] ECR 299, 338.



In 1986, the Court of Justice delivered its most recent ruling on the constitutional limits of delegation within the Commission in a case concerning the propriety of the delegation, to the Competition Commissioner, of the power to issue decisions under Article 14(3) of Regulation 17/62. In the 'AKZO' decision<sup>176</sup>, the Court delivered a clear statement on the extent to which the principle of collegiality contained in Article 17 of the Merger Treaty had to bow to a principle of efficacy which it inferred from Article 16 of the Merger Treaty<sup>177</sup>. The Court interpreted Article 16 as articulating the, "need to ensure that the decision-making body is able to function [which] corresponds to a principle inherent in all institutional systems"<sup>178</sup>. Thus the principle contained in Article 16 was held to sanction, "measures adopted by the Commission in order to prevent the rule requiring collective deliberation from having a paralysing effect on the full Commission"<sup>179</sup>. In conceding that, given the Commission's

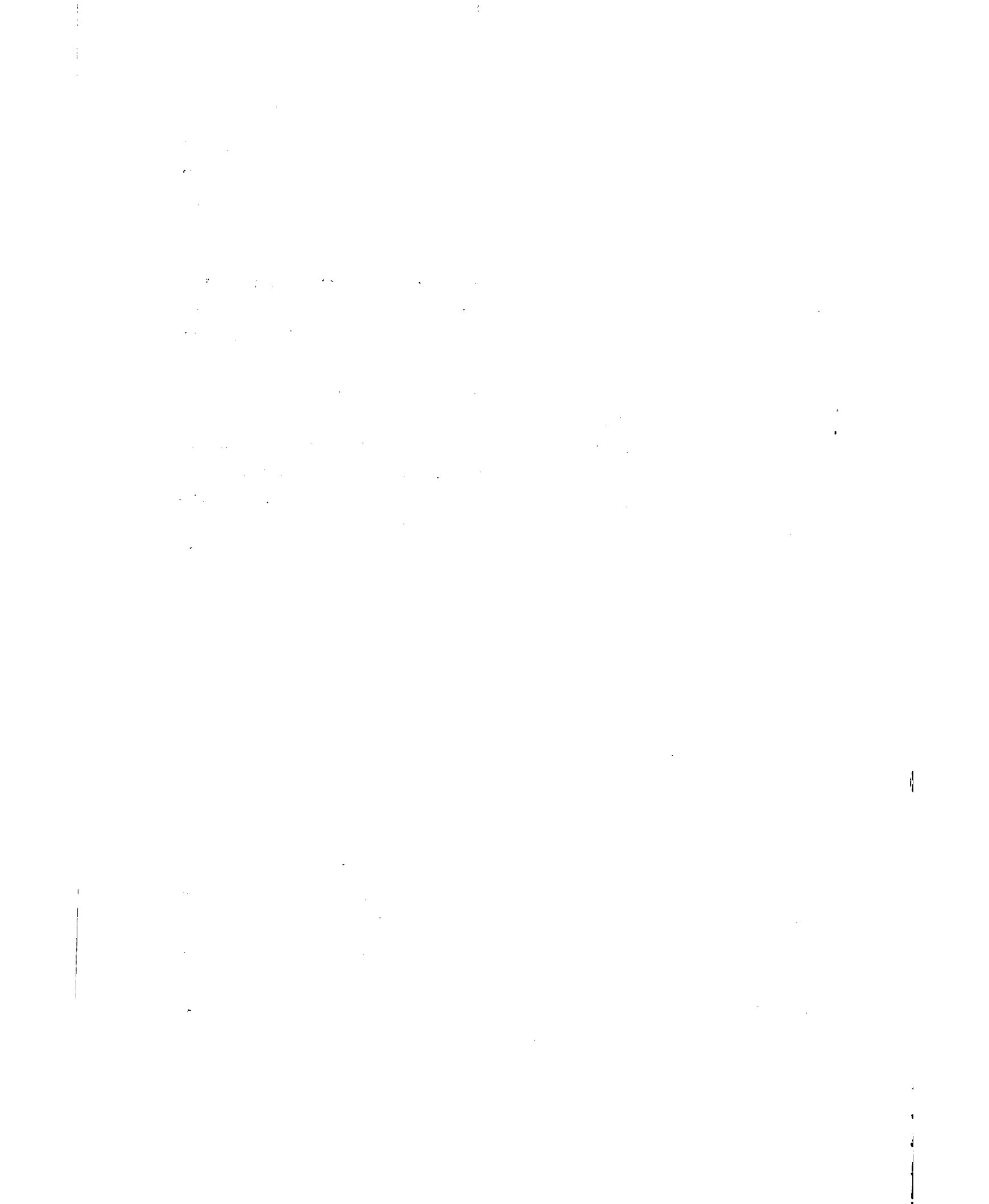
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176. Case cit. supra at fn 129, applying case law laid down in, e.g., Joined Cases 43 & 63/82, 'VBVB & VBBB v Commission', [1984] ECR 19.

177. Article 16 of the Merger Treaty requires the Commission to adopt its rules of procedure, "so that both it and its departments operate in accordance with the provisions of the Treaties establishing the [Communities] ... and of this [i.e., the Merger] Treaty". The extent to which Article 16 required these rules of procedure to conform to Article 17 of the Merger Treaty was, therefore, the point in issue in 'AKZO'.

178. *ibid.*, para. 37 of judgment.

179. *ibid.*, para. 31 of judgment.



enormous work-load<sup>180</sup>, a "division of labour is unavoidable"<sup>181</sup> how did the Court proceed in 'AKZO' to formulate a principle by which the constitutionality of such a division of labour could be gauged?

The Court ruled impliedly that delegations within the Commission hierarchy would be constitutional provided they, "were limited to specific categories of measures of management or administration ... thus excluding by definition decisions of principle"<sup>182</sup>. The Court made clear that the distinction between "measures of management or administration" and "decisions of principle" is not the same as that between rule-applying and policy applying power. Instead the decision establishes that, in the competition sphere, for instance, a Commission decision requesting information, initiating infringement proceedings or ordering the submission of undertakings to an inspection qualifies as, "a form of preliminary inquiry [in the French text, "en tant que mesure d'instruction"] and, as such, must be regarded as a straightforward measure of management"<sup>183</sup>. It would appear, therefore, that under the 'AKZO' rule only decisions representing the conclusion of proceedings, e.g, finding infringements of Article 85(1) EEC, or applying Article 85(3) EEC would qualify as non-delegable "decisions of principle". The taking of definitive decisions

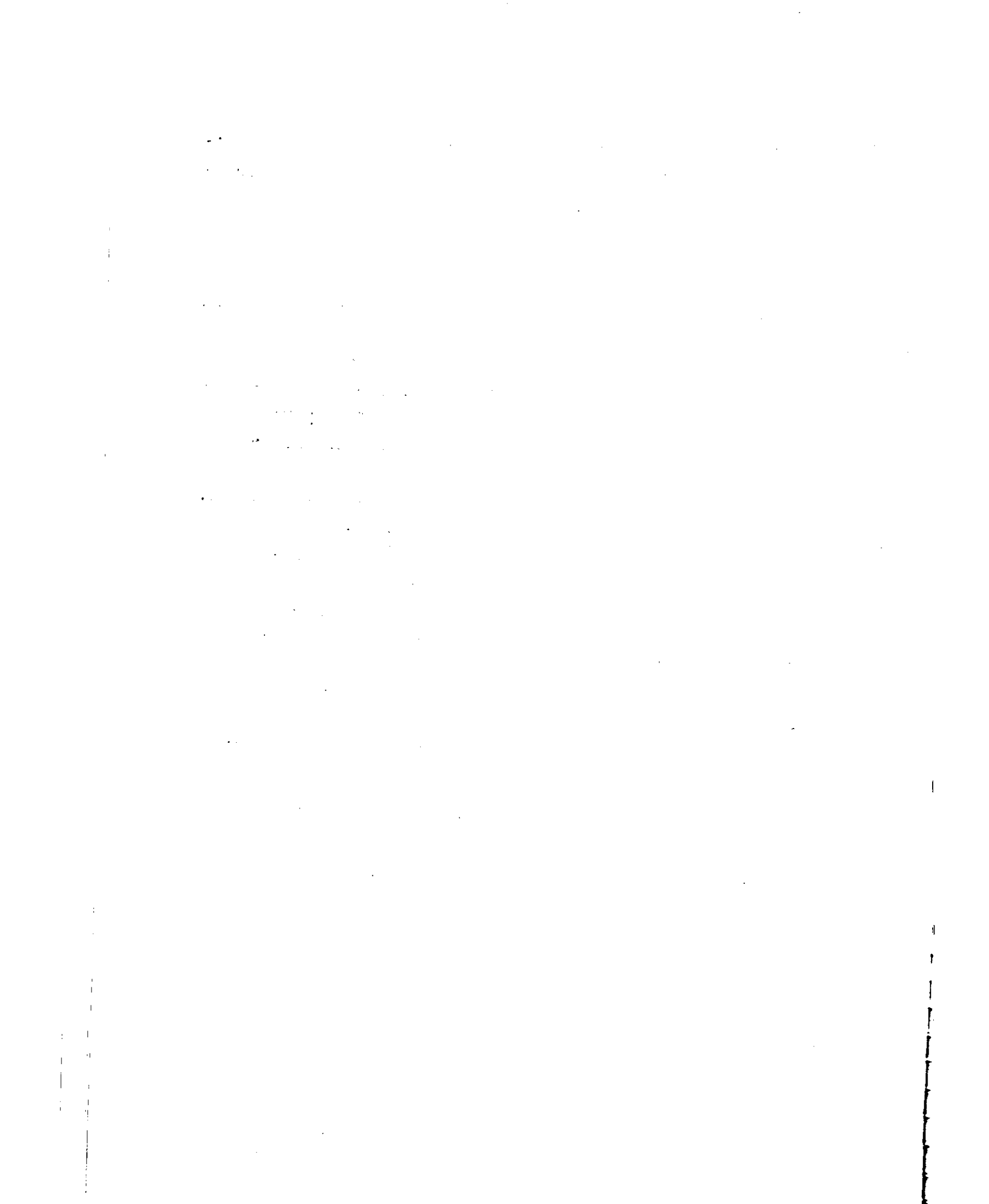
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180. An indication of the work burden of the Commission in terms of individual decisions can be obtained from the figures cited by Lenz AG in his opinion, *ibid.*, 723.

181. Opinion of Gand AG in Case 41/69, 'ACF Chemiefarma', [1970] ECR 661, 711.

182. 'AKZO', *op. cit.* supra fn 134, para. 37 of judgment.

183. *ibid.*, para. 38 of judgment (emphasis added).





which dispose of substantive issues, therefore, is constitutionally bound to remain within the exclusive jurisdiction of the college of Commissioners.

The other delegated power exercised on the Commission's behalf under Regulation 17/62, the conduct of oral hearings, was expressly approved by the Court of Justice in the 'Buchler' case of 1970. In its judgment, the Court stated:

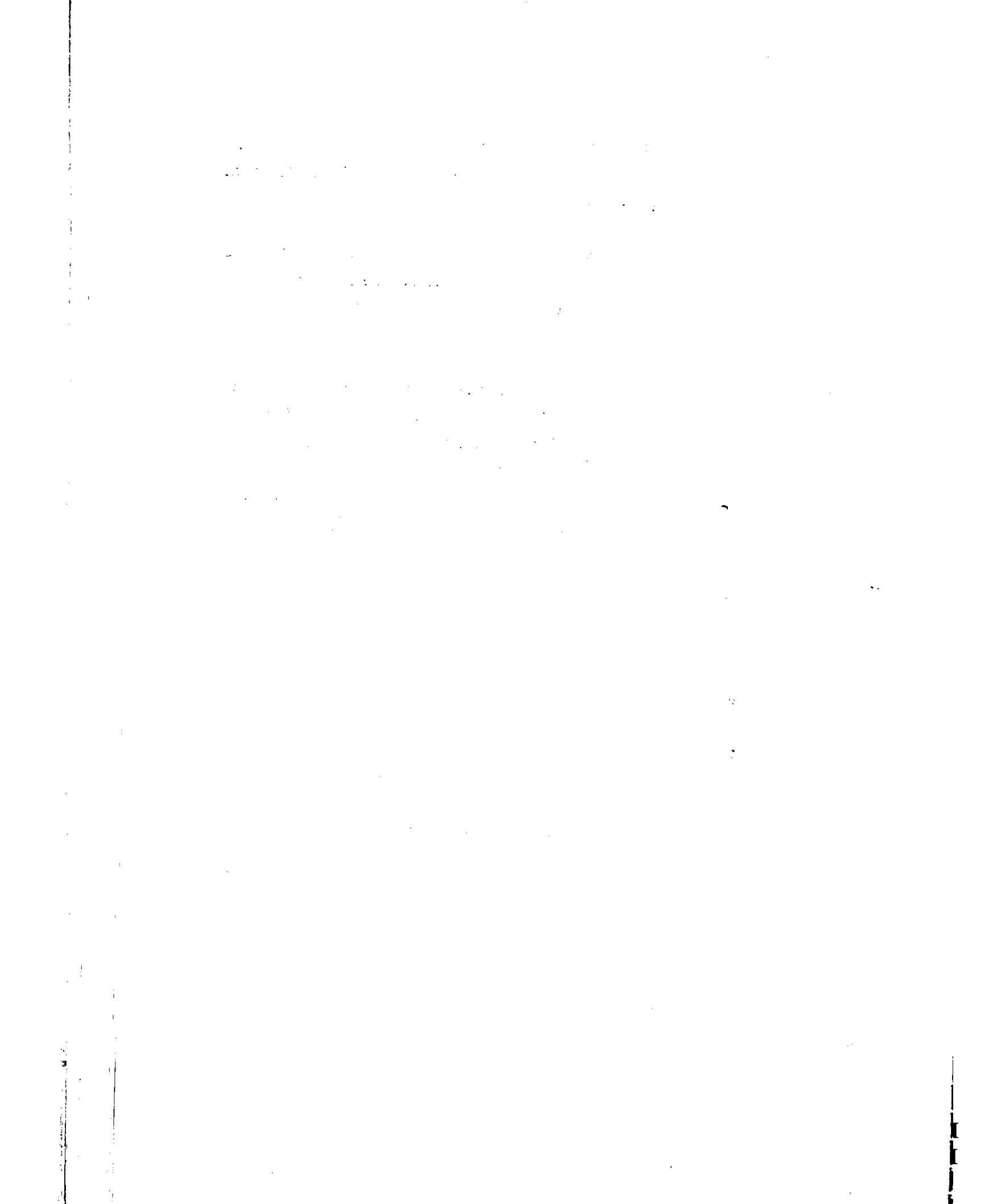
"there is nothing to prevent the Members of the Commission who are responsible for taking a decision imposing fines from being informed of the outcome of the hearing by such persons as the Commission has appointed to conduct it in accordance with Article 9(1) of Regulation 99/63"<sup>184</sup>.

This decision is, of course, entirely in line with the 'AKZO' formula, in that the conduct of oral hearings are simply one more, "mesure d'instruction", or form of preliminary inquiry which may be constitutionally delegated outside the college.

With regard to the practice of allowing the Director General of DG IV to sign certain documents on behalf of the Competition Commissioner, the Court has taken the view that this is permissible provided it does not constitute an attempt, by that Commissioner, to sub-delegate. The Court has said that provided the Director General's signature has, in each case, been personally approved by the Competition Commissioner in advance then it constitutes a permissible, "delegation of signature" as

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184. Case 44/69, 'Buchler v Commission', [1970] ECR , para 20 of judgment.



opposed to an impermissible sub-delegation of power<sup>185</sup>. The Commission, for its part, maintains that such a proviso is part of settled practice<sup>186</sup> and, on occasions where the existence of such personal approval has been questioned by an undertaking before the Court, the Commission will offer (and has, in at least one instance<sup>187</sup>, provided) documentary proof that this consent was obtained.

We can see, therefore, that, to the extent that the Court sanctions a division of labour between the college of Commissioners on one hand and the highly integrated competition hierarchy headed by the Competition Commissioner on the other, it permits the creation of a triadic decisional structure. However, we shall now see that, since the Commission is not really interested in creating this sort of structure, such 'permission' is of no importance.

#### Reaction of the Court (V) - the "Written Procedure"

In the 'Buchler' case<sup>188</sup>, the Court of Justice approved the use of

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185. Case 48/69, 'ICI v Commission', [1972] ECR 619, para 12 of judgment (regarding signing of the statement of objections); Case 5/85, 'AKZO', op. cit. supra fn 129 (regarding signing of an order under Article 14(3) of Regulation 17/62).

186. Opinion of VerLoren van Themaat AG, in Joined Cases 43 & 63/82, 'Dutch Books', [1984] 1 CMLR 27, 78.

187. Case 48/69, 'ICI v Commission', cited at fn 185 supra.

188. op. cit., supra fn 184.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that every entry should be supported by a valid receipt or invoice.

2. The second part outlines the procedures for handling discrepancies between the recorded amounts and the actual cash received. It states that any such variance must be investigated immediately and reported to the appropriate authority.

3. The third part details the requirements for the physical handling of cash. It specifies that all cash must be stored in a secure, fireproof safe and that access to the safe is restricted to authorized personnel only.

4. The fourth part describes the process for depositing cash into the company's bank account. It requires that all deposits be made on a regular basis and that the deposit slips be properly filed and reconciled with the bank statements.

5. The fifth part discusses the importance of regular audits to ensure the integrity of the financial records. It notes that audits should be conducted by an independent party to provide an objective assessment of the company's financial health.

6. The sixth part provides information regarding the penalties for non-compliance with these financial regulations. It states that any employee found to be in violation of these rules may face disciplinary action, up to and including termination.

7. The seventh part concludes with a statement of the company's commitment to transparency and ethical financial practices. It expresses the company's confidence in the accuracy and reliability of its financial reporting.

8. The eighth part provides contact information for the finance department and the internal audit team for any questions or concerns.

9. The ninth part includes a section for the employee's acknowledgment of the policy. It requires the employee to sign and date the document to confirm that they have read and understood the financial regulations.

10. The tenth part contains the date of the policy's implementation and the name of the authorized signatory.

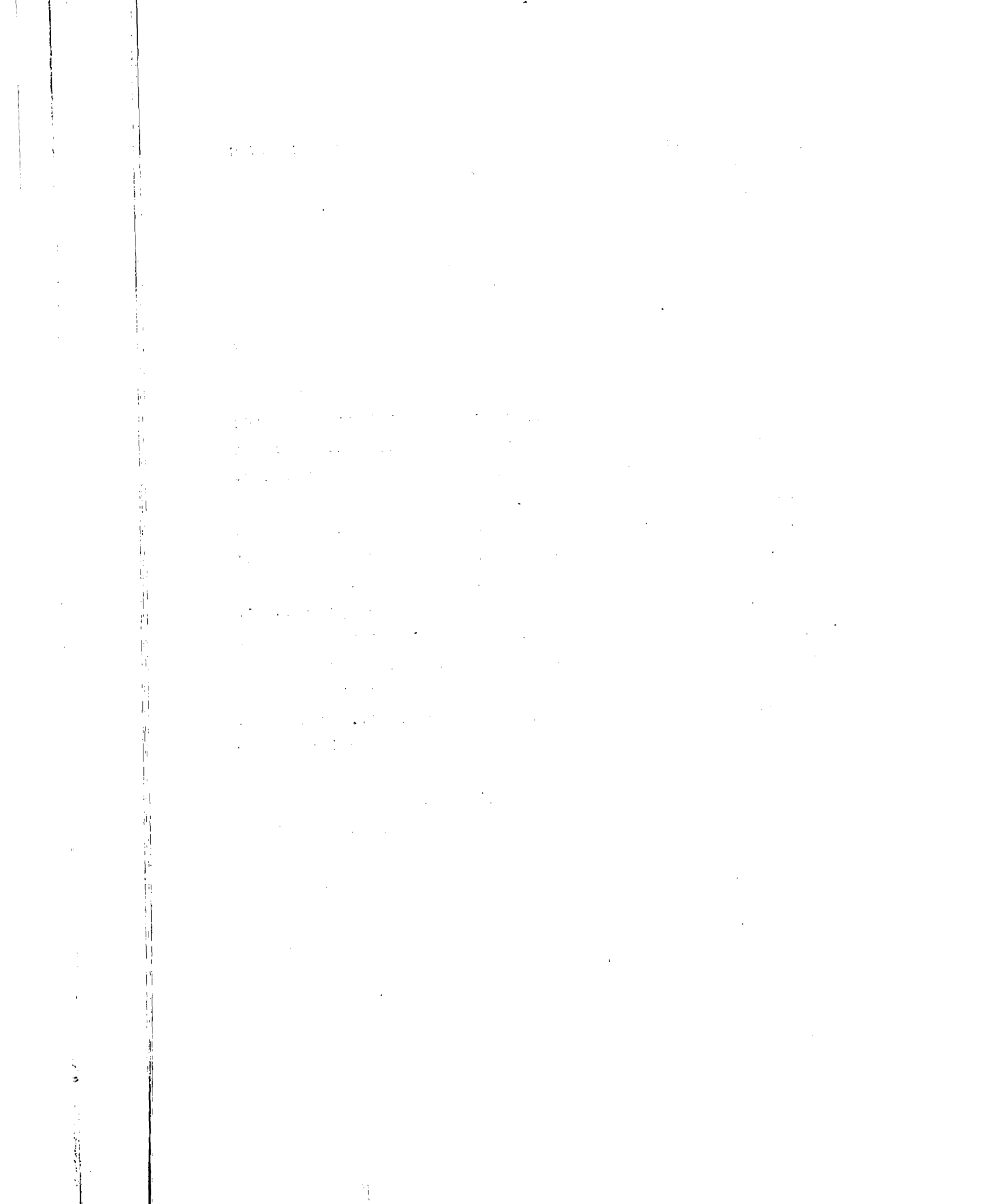
the written procedure for the final adoption of decisions applying Articles 85(1)/86 EEC . In a tersely worded decision, the Court held that the fact that all Members of the Commission had received, " complete and detailed information regarding the essential points of the case and had access to the entire file"<sup>189</sup>, was sufficient guarantee that the principle of collegiate decision-making was fully respected by use of the written procedure.

In discussing the Court's reaction to delegation of prosecutorial powers by the college, we have already mentioned that it was not consciously fostering the creation of a triadic structure for the adjudication of cases under Articles 85(1)/86 EEC, but, instead, was simply interested in assisting the Commission to rationalize its resources. We should not be surprised, then, if it was to permit the further rationalization that could be achieved by 'de facto' delegation of definitive adjudicatory power from the college to the Competition hierarchy via the "written procedure". The Court's AKZO principle may prohibit the delegation of such power, but is pointedly silent as to its informal abdication.

The hidden agenda of the AKZO principle is the facilitation of Commission decision-making 'per se' without differentiating the roles in which decision-making consists. The constitutional limits it places upon dispersal of decisional power within the Commission are superficial. The Court is simply not prepared to hinder the Community's executive organ by imposing meaningful structural limits on its internal organisation. Trying to

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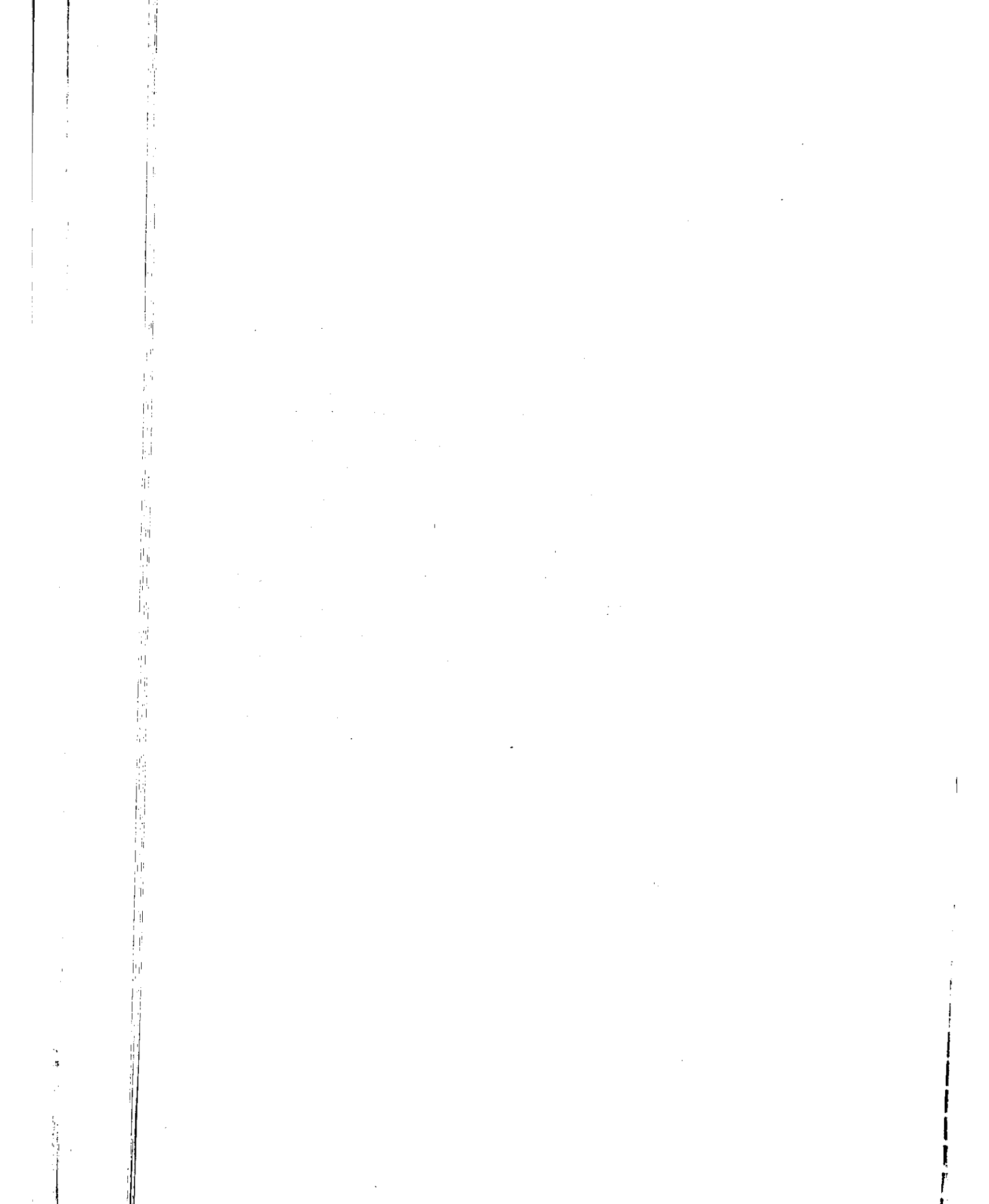
189. *ibid.*, para. 22 of judgment.



reconcile the AKZO principle with the 'Buchler' judgment makes that painfully clear.

#### Reaction of the Court (VI) - Conclusion

There are two trends to which we should draw attention in examining the reaction of the Court to the inappropriate allocation of adjudicatory power to the Commission. First, we have seen that the Court is unwilling constitutionally to force the Commission to adopt a triadic decision-making structure vis à vis the application of Articles 85(1)/86 EEC. It was for that reason that Article 6(1) of the Convention on Human Rights was held inapplicable. Second, if it is true to say that the Court has not prevented division of labour within the Commission from rendering infringement decision-making more triadic, it is equally accurate to observe that it has not prevented the process of dividing labour from going so far that it actually undermines triadic decision-making - witness, in this regard, the Court's simultaneous approval of delegation of prosecutorial powers outside of the college and use of the "written procedure" in definitive decision-making in college.





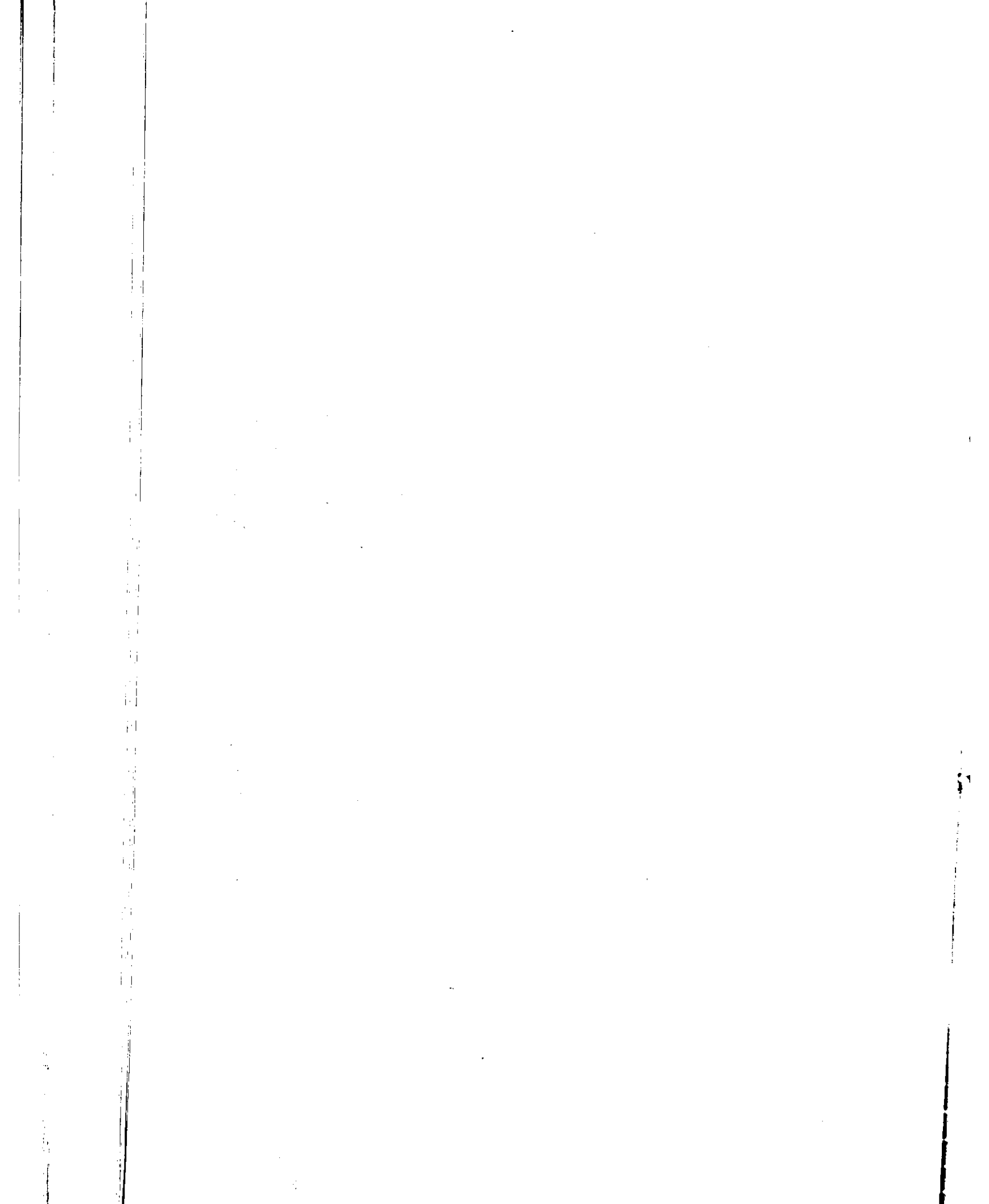
THE COURT'S APPLICATION OF ADMINISTRATIVE LAW  
PRINCIPLES, RATHER THAN CONSTITUTIONAL LAW  
RESTRAINTS, TO COMMISSION ADJUDICATION

Introduction

The last section of the paper dealt with the inappropriateness inherent in allocating to the power to adjudicate under Articles 85(1)/86 EEC to the Commission - given its non-triadic decision-making structure. The last part of the previous section examined the reluctance of the Court of Justice to rectify this inappropriate allocation by forcing the Commission to adopt a triadic decision-making procedure in such cases. However, in the same breath with which it denied the applicability of Article 6(1) of the Convention of Human Rights to the 'adjudication of infringement decisions, the Court of Justice reaffirmed that, despite that fact, "[t]he Commission is bound to respect the procedural guarantees provided for by Community law"<sup>190</sup>. In this section, we shall see that in spite of its understandable refusal to obstruct the Commission's integrative work, the Court has endeavoured, through the case by case application of the procedural principles of judicial review, to curb the adverse effects which this 'structural inappropriateness' has on the undertakings to whom particular infringement decisions are addressed.

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190. 'FEDETAB', cit. supra at fn 160, para. 81 of judgment.



Treaty Grounds for the Review of Competition Decisions

## Article 173: Recours pour Excès de Pouvoir

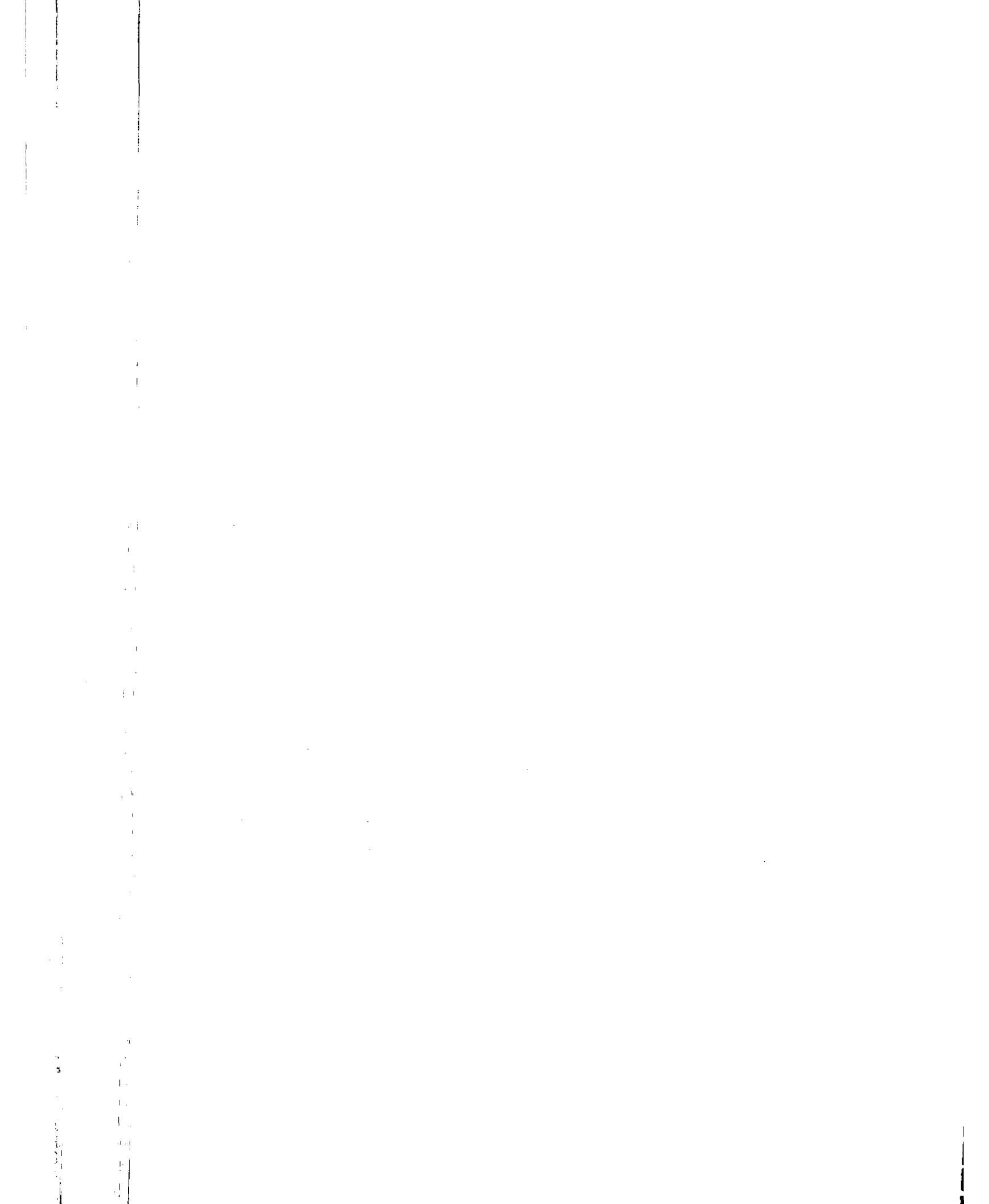
As we have already seen<sup>191</sup>, an undertaking, which is the subject of a Commission decision applying Articles 85(1), 85(3) or 86 of the EEC Treaty, may apply to the Court of Justice under Article 173(2)EEC for the annulment of the decision in an action closely modelled on the "recours pour excès de pouvoir" known in french administrative law. Decisions may be alleged to be 'ultra vires' the Commission on four grounds, again analogous to those available in the french system: these are, "incompétence, violation des formes substantielles, violation du present traité ou de toute règle de droit relative à son application, ou détournement de pouvoir".

## Article 172: Recours de Pleine Jurisdiction

Further more, Article 172 EEC empowers the Council to give the Court of Justice unlimited jurisdiction in regard to the penalties which the Commission can impose under Article 15 of Council Regulation 17/62 EEC. Article 17 of that Regulation authorises the Court accordingly, and provides that, in the exercise of its unlimited jurisdiction, the Court, "may cancel, reduce or increase the ...[pecuniary sanction] imposed".

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191. See text accompanying fn 18 to 20 supra.



This form of review, once again, borrows heavily from the french administrative law model, this time from the "recours de pleine juridiction" against administrative decisions. A court exercising unlimited jurisdiction in this sense has the power of re-adjudicating the subject matter of the initial decision. French administrative courts traditionally exercise this 're-adjudicatory' function in several fields, notably with regard to the decisions of electoral officials.

#### Articles 173 and 172 EEC Compared

A basic difference between Article 173 and Article 172 review; the same difference that exists between the 'recours pour excès de pouvoir' and the 'recours de pleine juridiction' in the french system; lies in this jurisdiction over the factual basis or merits of the decision, as opposed to its legality. In other words, the duty of the judge exercising unlimited jurisdiction is actually to "second-guess" the administrator. The procedural consequences of this difference mean that, on the one hand, the 'recours de pleine juridiction' takes the form of an administrative review: a re-trial of facts and issues before a second, but independent, administrative decision-maker and that, on the other hand, the 'recours pour l'excès de pouvoir' takes the form of a specifically judicial review: an investigation of the formal propriety of the initial administrative decision by a judicial decision-maker. To put it another way, the question asked by a court in judicial review is, "Are we satisfied that the administrator was legally entitled to apply rule X to situation Y?". In administrative review on the other hand, the question is, "What do we consider rule X to be applicable to the facts as we find them?".

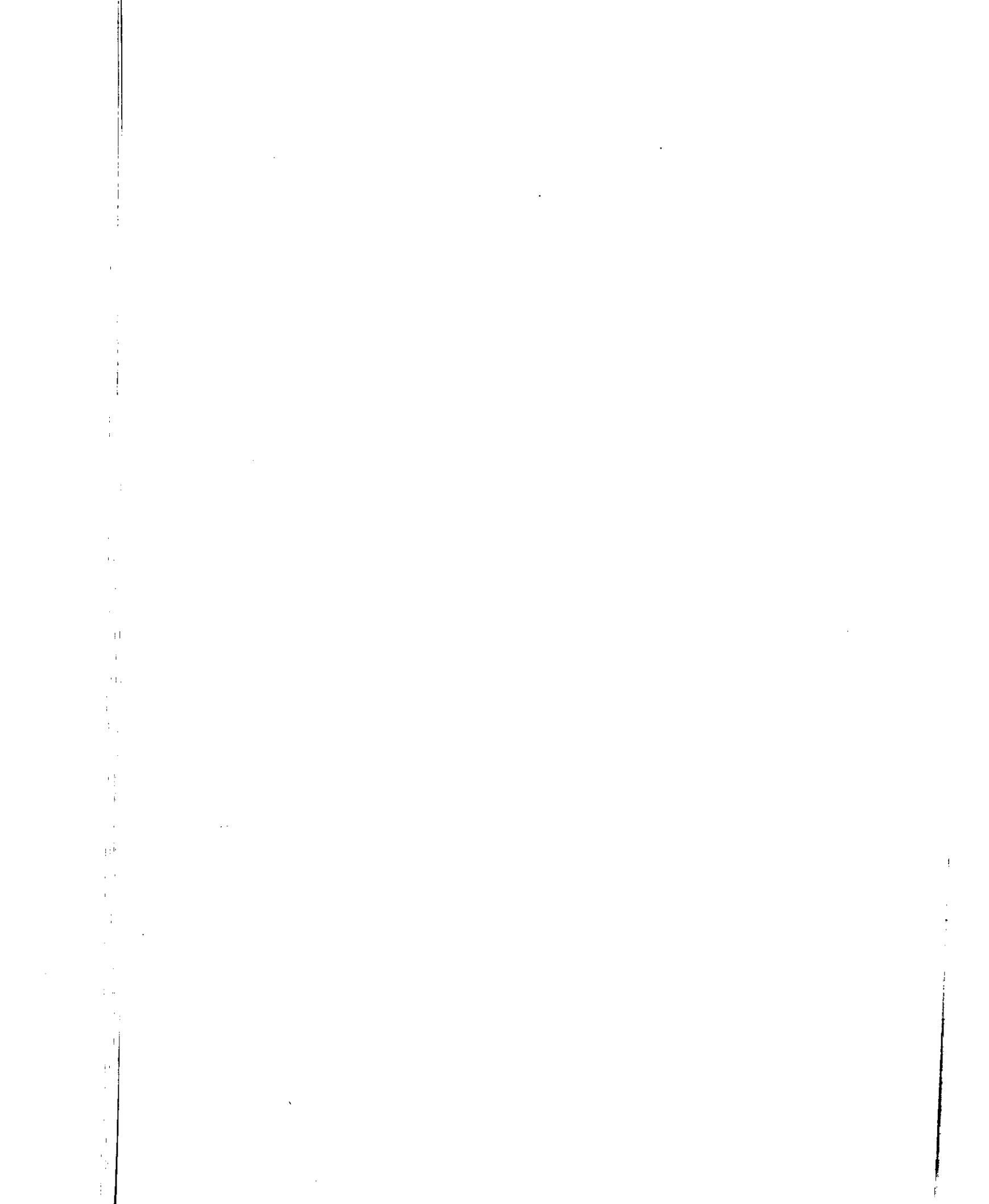


The European Court is explicitly required to control the legality of certain elements of a decision via the 'recours en annulation' and to exercise "unlimited jurisdiction" (i.e. jurisdiction over the merits) in respect of other elements under the 'recours en r{formation'. On one hand, the Court is functionally obliged by Article 172 to consider all facts and issues involved 'de novo'. On the other hand, Article 173(2) EEC imposes no obligation on the Court to reassess findings of fact made at first instance. It is crucial to note that while the Court is not obliged to review facts under Article 173 EEC, this Article certainly grants it the power to do so.

Article 173 EEC Authority for Judicial Review of  
Issues of Fact arising in Commission Decisions

Error of Fact as Error of Law

One can look at the head of illegality on the ground of "violation of the Treaty or of any rule of law relative to its application" available to undertakings under Article 173 EEC in two ways. On one hand, the Treaty or some subordinate legislative measure can be regarded as violated by a competition decision which is objectively or 'ex facie' incompatible with the legal provisions in question: here the decision's external legality is called into question. On the other hand, violation of the Treaty etc. can be seen to occur here the decision is subjectively incompatibility





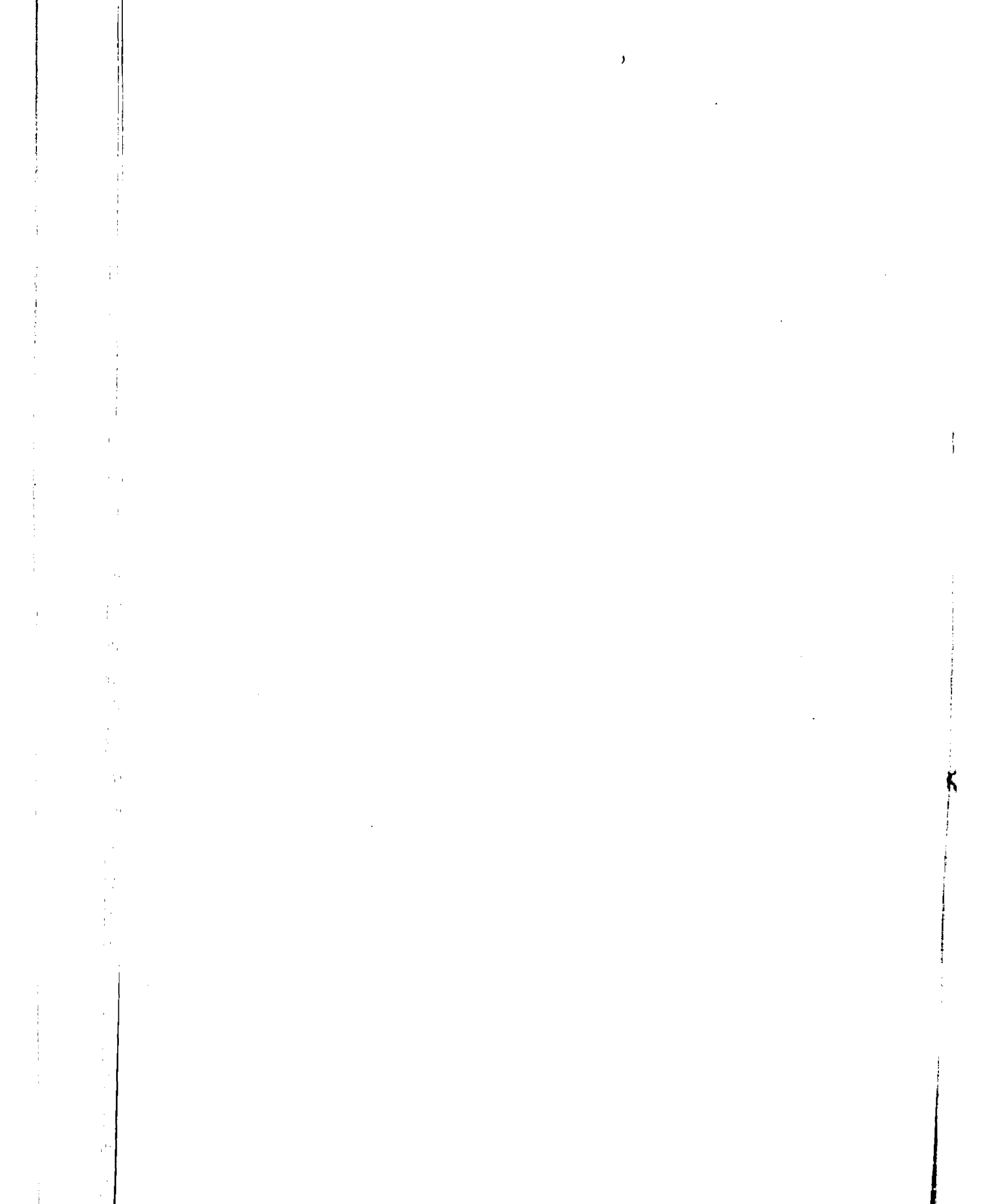
with the relevant rules of law, here it is internal legality which is called into question<sup>192</sup>.

This last idea of subjective incompatibility with the law or internal illegality can be more precisely defined as erroneous application of a rule of law. Crucially, judicial review of such an error of law can logically include the review of issues of fact when that error is alleged to have followed inexorably from erroneous findings of fact. In administrative decision making, an error of law may logically flow from an error of fact in two ways: first, the particular fact situation to which a legal rule is stated to have been applied by the decision, ("exactitude matérielle des faits"), may have been misperceived by the administrator; second, while re-creation of the relevant fact-situation may have been accurately carried out by the decision-maker in his decision, his subsumption of these facts within the relevant legal categories, ("qualification juridique des faits"), may not.

While the difference between the "exactitude matérielle" and "qualification juridique" of fact situations is difficult to articulate in the abstract, it becomes clearer when one takes an example. In the case of a Commission decision applying Article 85(1) EEC to an alleged, secret, market sharing agreement, for instance, Commission findings regarding the existence of the agreement in question which were based on documents recovered from surprise inspections could be challenged on the grounds, either, (a), that the elements of evidence upon which the finding that an

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192. This dual classification is used, e.g., in Charles Debbasch's "Contentieux Administratif" (3rd Ed), Dalloz, Chapter III, sections 1(1) and (2).



agreement existed was based were forged or incomplete, or otherwise unreliable, (exactitude matérielle); or, (b), that the elements of evidence founded upon by the Commission decision were, even if unchallengeable under (a), insufficient, in point of law, to support the inference that an agreement existed, (qualification juridique).

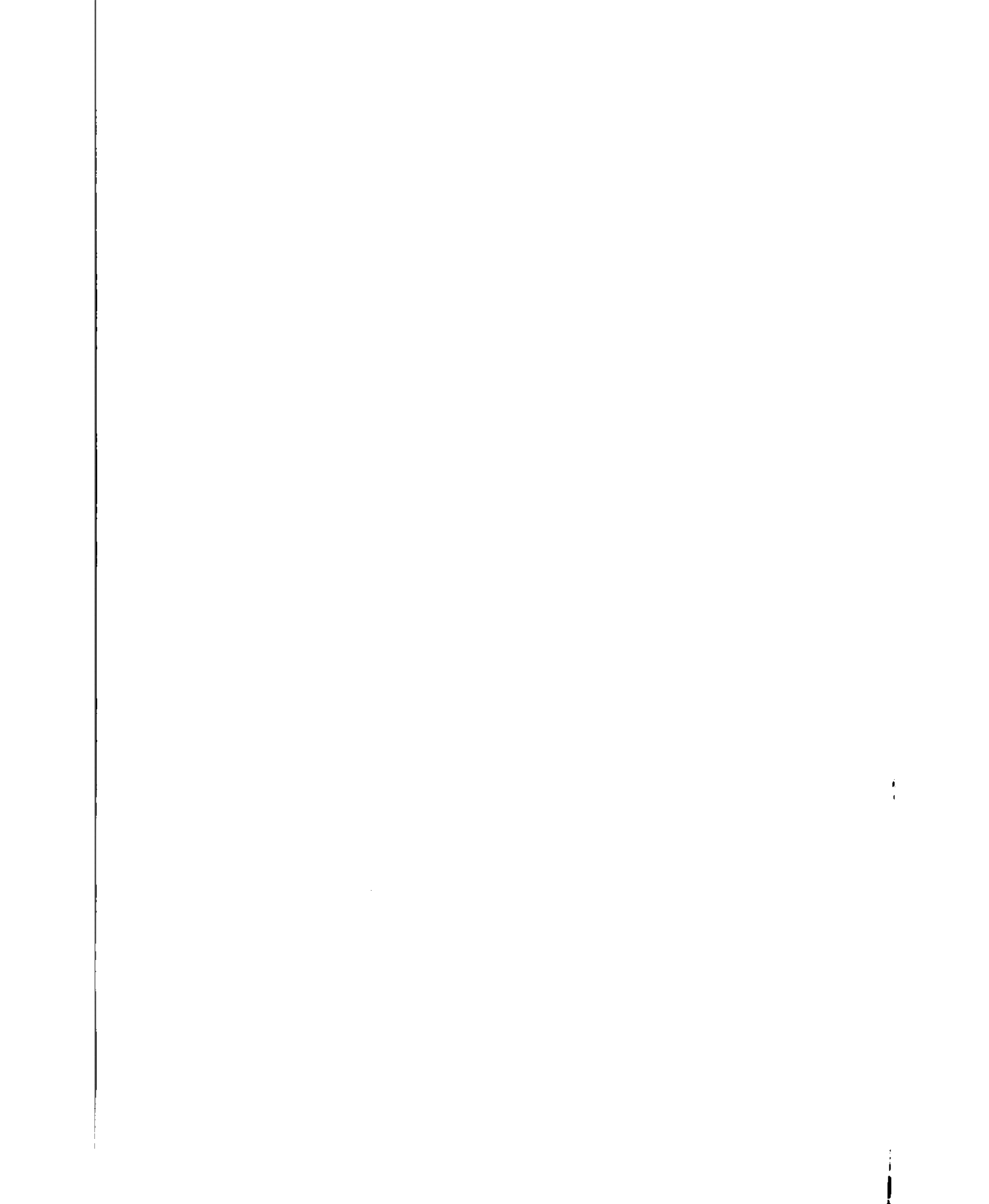
#### Comparison with the Article 33 ECSC

The Court of Justice is granted, under Article 33 of the Treaty establishing the Coal and Steel Community, jurisdiction similar to that which it exercises under Article 173 EEC. The Court is empowered to review the legality of and to annul acts of the High Authority under the same four heads available under Article 173 EEC. The second paragraph entitles individual undertakings to seek the annulment 'inter alia' of decisions, "concerning them which are individual in character".

However, the second sentence of the first paragraph of Article 33 ECSC provides that the Court:

"may not ... examine the evaluation of the situation resulting from economic facts or circumstances in the light of which the High Authority took its decision ... save where the High Authority is alleged to have misused its powers or to have manifestly failed to observe the provisions of this Treaty"

In order to establish misuse of power, the Court has held that an applicant must establish a strong and convincing case that, "the High Authority, through want of foresight or serious lack of care amounting to disregard for the purpose of the law, has pursued objectives other than those for which the powers [in question] ...



were conferred upon it"<sup>193</sup>. On the other hand, "manifest" disregard of the Treaty etc. has been held to presuppose, "that a certain degree is reached in the failure to observe legal provisions so that the failure to observe the Treaty appears to derive from an obvious error in the evaluation, having regard to the provisions of the Treaty, of the situation in respect of which the decision was taken"<sup>194</sup>.

In contrast to Article 173 EEC, therefore, Article 33 ECSC denies the Court of Justice power to review administrative decisions on the basis of errors of law which derive from errors of fact, save when the facts as stated by a decision are clearly bizzare or can be shown to be pretextual.

The reasons for the insertion of this limitation into Article 33 ECSC are discussed by Advocate General Roemer in the 'Netherlands v High Authority' case. In his opinion he refers to the report of the French delegation to the negotiations regarding the drafting of the Treaty, which states that since, "it was considered that most decisions of the High Authority were by the very provisions of the Treaty made subject to the realization of factual conditions or the existence of situations of an economic nature ... [,] examination by the Court of the 'legality' of decisions taken by the High Authority would have had the effect in reality of letting the Court judge whether those decisions were

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193. Joined Cases 3 and 4/64, 'Sidérurgie Français v High Authority', [1965] ECR 441, 454.

194. Case 6/54, 'Netherlands v High Authority', [1954-56] ECR, 103, 115. This decision makes it clear that "obvious error" refers to one, "evident from the decision" in an 'ex facie' sense (ibid., 116).

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well founded"<sup>195</sup>. This report concludes in the belief that Article 33 ECSC represents the,

"indispensible reconciliation of the concern to maintain within legal limits the action of the High Authority and the necessity which is no less great of not obstructing that action in a field where economic, political or social considerations require a continuous appraisal of the factual circumstances which normally fall outside the jurisdiction of the judge"<sup>196</sup>.

It is submitted that the Framers' inclusion of Article 33(2) ECSC reflects a misconception of the danger posed by the judicial review of fact evaluation. In the first place, it presumes, wrongly, that all High Authority/Commission decisions subject to judicial review are based upon, "continuous appraisal of ... factual circumstances", or, in other words, that they are the sort of policy-applying, administrative decisions oriented towards evolving fact situations, as opposed to the kind of rule-applying, adjudicative decisions which are based upon a discretely focussed assessment of narrow, historic facts. In the second place (and linked to the first misconception) it presumes that the Court would attempt to scrutinize errors of fact in the cases before it, without differentiating between the two distinct types of fact evaluation just mentioned.

Article 173 EEC includes no such express exclusion of jurisdiction over factual error. It seems reasonable to assume that the decision not to include such a provision in this Article reflects

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195. *ibid.*, 126.

196. *ibid.* (emphasis added).





a rejection of the fear that the Court would use Article 173 EEC to set itself up as, "the supreme body representing the will of the Community in economic questions in place of the [Commission]"<sup>197</sup>, and the acceptance of the belief in the Court's own sense of self-restraint with regard to its constitutional role vis a vis the other Community institutions. How has the Court responded to this act of faith? Has it subjected fact evaluation in Commission decision-making to a differentiated standard of scrutiny? Let us examine this point with regard to review of the fact evaluations underpinning decisions applying Article 85(3) EEC, on one hand, and decisions applying Articles 85(1)/86 EEC, on the other.

The Distinction between Adjudicative Facts  
and Administrative Facts employed by the Court

The 'Meroni' Case - The Balance of Power

The Court of Justice has always distinguished between the adjudicative/rule-applying nature and the administrative/policy-applying nature of Commission decisions. This distinction, it is submitted, derives directly from the Court's perception of its role within the institutional system of the Community. In the celebrated 'Meroni' case of 1957<sup>198</sup>, the Court ruled that, "there can be seen in the balance of powers which is characteristic of

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197. *ibid.*

198. Case 9/56, 'Meroni v High Authority', [1957-58] ECR 133.

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the institutional structure of the Community a fundamental guarantee granted by the Treaty in particular to [individual undertakings]"<sup>199</sup>. For the Commission (in 'Meroni', the High Authority), "[t]o delegate a discretionary power by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of power each within the limits of its own authority, would render that guarantee ineffective"<sup>200</sup>.

The Court distinguishes "discretionary power", which it defines as a power "mak[ing] possible the execution of actual economic policy", from "executive power", which it sees as one "clearly defined ... [according to] objective criteria determined by the delegating authority"<sup>201</sup>. It will be obvious that, in drawing a distinction between executive and discretionary power, the Court's classification corresponds closely to the differentiation of adjudicative or rule-applying and administrative or policy-applying powers of decision which we developed earlier in the paper.

The Court, in 'Meroni' emphasises that, while the Commission may constitutionally delegate a rule-applying power to a body not established by the relevant Treaty, to do so in respect of a policy-applying power is emphatically unconstitutional. The logic behind this dichotomy lies in the Court's interpretation of

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199. *ibid.*, 152 (emphasis added). The "Treaty" referred to here is, of course, the ECSC Treaty. It seems clear, however, that the "balance of powers" established by the EEC Treaty grants, by analogy, the same "fundamental guarantee".

200. *ibid.* (emphasis added).

201. *ibid.*



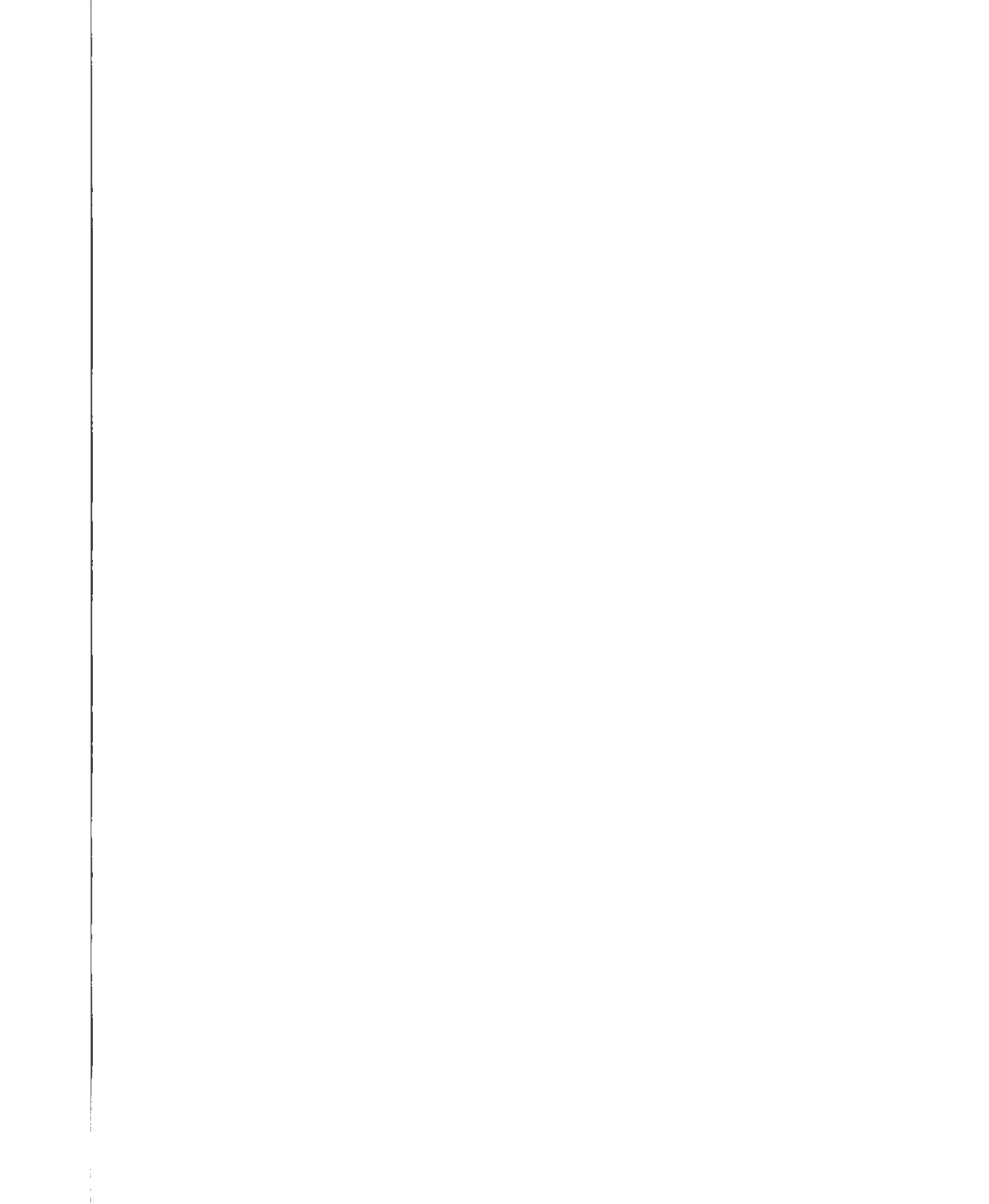
the institutional "balance of power" established by the Treaties. In the eyes of the Court, the exercise of "executive" or rule-applying power by the Commission is subjected by the Treaty principally to judicial control<sup>202</sup>. The exercise of such power, even by a body other than the Commission, "can", in the words of the Court, "be subject to strict [judicial] review"<sup>203</sup>, thereby leaving the balance of power between Commission and the judicial hierarchy of the Community undisturbed. However, in contrast, while the Court possesses Article 33 ECSC (and Article 173 EEC) jurisdiction over the formal legality of the exercise of discretionary power, it impliedly regards the Treaties as subjecting the substantive control of that power largely to the political organs of the Community, in particular, the European Parliament<sup>204</sup>. The delegation of policy-applying type of power to a body which is not accountable to the Parliament in the same way

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202. Usually in the context of an action for annulment on the grounds of illegality provided by Article 173 EEC, see text accompanying fn 18 to 20 supra.

203. *ibid.* (emphasis added). The exercise by a 'delegatus' of any clearly defined "executive" or rule-applying power granted by a Commission Regulation or Decision would normally be subject to review by national courts: the criteria for exercise of such a tightly defined grant would probably be directly effective and would, therefore, give rise to individual rights which national courts would be bound to defend (Case 26/62, 'Van Gend en Loos', [1963] ECR 1, 12). The involvement of a national court in this way can, of course, ultimately allow the intervention of the Court of Justice via Article 177 EEC (and its equivalents in the other Treaties).

204. One thinks essentially of Article 144 EEC (and its equivalents in the other Treaties), for details see fn 116 supra.



as the Commission would, therefore, upset the pre-existing balance of power.

If the Court of Justice finds it necessary - in view of its institutional role in the Community - to distinguish between adjudicative and administrative decision-making in assessing the constitutionality of delegation of power, then perhaps it will make the same distinction - in view of that role - in reviewing the substance of Commission decisions applying Article 85(1)/86 EEC and those applying Article 85(3) EEC.

#### The 'Consten & Grundig' and 'Remia' Cases

In its 'Consten & Grundig' decision of 1966<sup>205</sup>, the Court of Justice held, in a dictum frequently repeated, that exercise of the Commission's power to grant exemptions under Article 85(3) EEC:

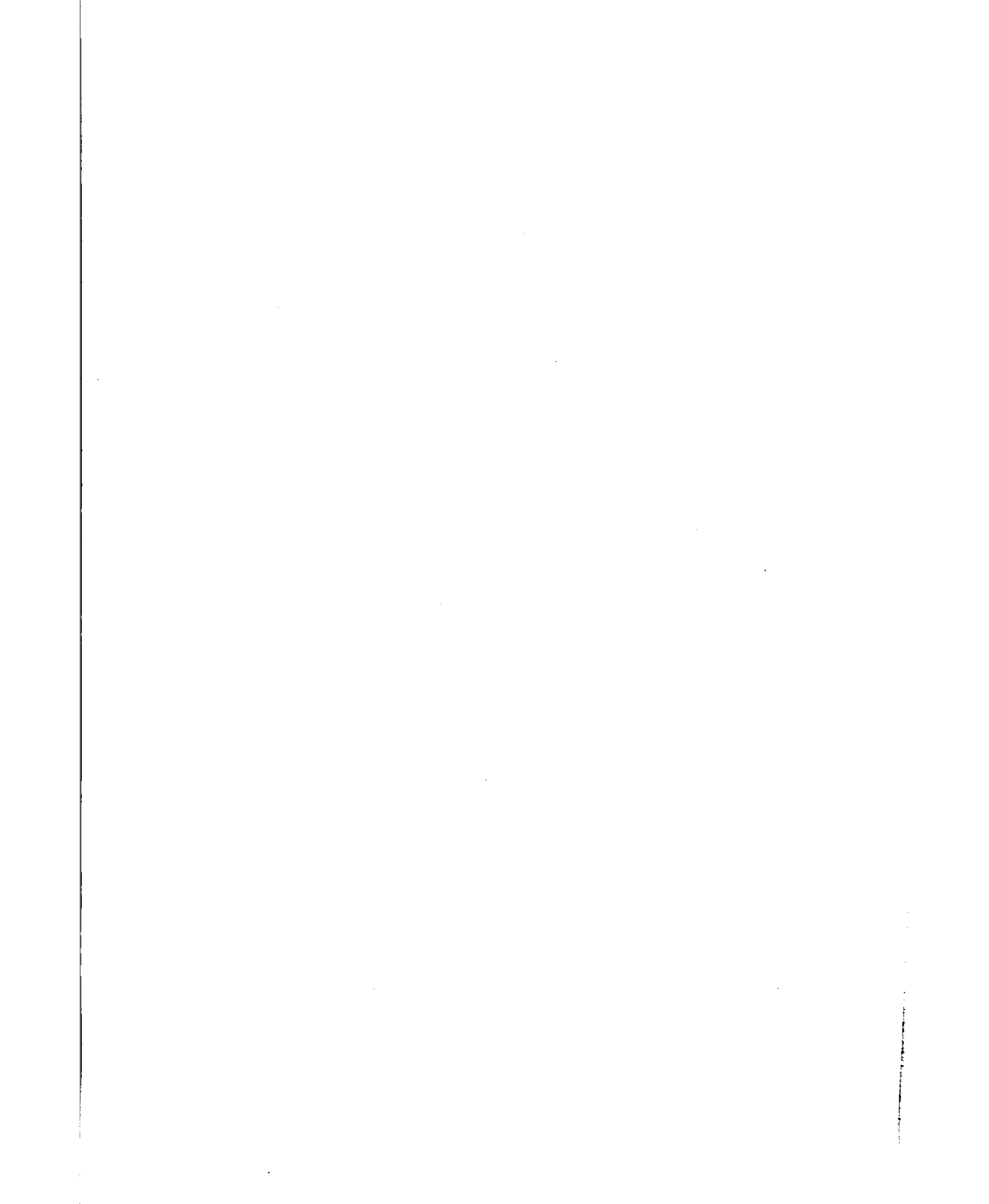
"necessarily implies complex evaluations on economic matters. A judicial review of these evaluations must take account of their nature by confining itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduced therefrom"<sup>206</sup>.

Here, the Court is clearly stating that the discretionary or policy-applying nature of the power to apply Article 85(3) EEC means that its exercise can be only be subjected to an attenuated

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205. Joined Cases 56 and 58/64, 'Consten & Grundig v Commission', [1966] ECR 299.

206. *ibid.*, 347 (emphasis added).





degree of judicial review. With regard to review of facts, this low level review will be restricted to examining the reasoning in the decision for manifest factual errors, or to assessing whether, "the circumstances surrounding the decision in question gave rise to serious doubts as to the real reasons and, in particular, to suspicions that those [real] reasons were extraneous to the objectives of Community law and hence amounted to a misuse of powers"<sup>207</sup>. In other words, the Court does not wish to become involved in reviewing the economic predictions or policy evaluations made by the Commission in applying Article 85(3) EEC. A Court which has not forgotten the logic of 'Meroni' tacitly instructs litigants to make such arguments in the political, as opposed to the judicial, arena.

In 1985 the Court delivered a judgment which is clear proof that the 'Consten & Grundig' logic does not apply to decisions applying Articles 85(1)/86 EEC. In the 'Remia' case<sup>208</sup>, the applicant undertaking was the subject of a Commission decision which found that a "non-competition" clause in an agreement to which it was party violated Article 85(1) EEC. However, Article 85(1) was not applied in respect of the effects the clause had produced during the first four years of its existence. Remia sought to have the decision annulled on the ground that the factual need for the 'non-application' of Article 85(1) to these first four years had not been sufficiently proved by the Commission. The Court, rejecting Remia's arguments, held:

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207. Joined Cases 142 and 156/84, 'BAT and RJ Reynolds v Commission', [1987] 2 CMLR 551, para. 11 of judgment.

208. Case 42/84, 'Remia v Commission', [1985] ECR 2545.



"Although as a general rule the Court undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85(1) are met, it is clear that in determining the permissible duration of a non-competition clause<sup>209</sup>. the Commission has to appraise complex economic matters"

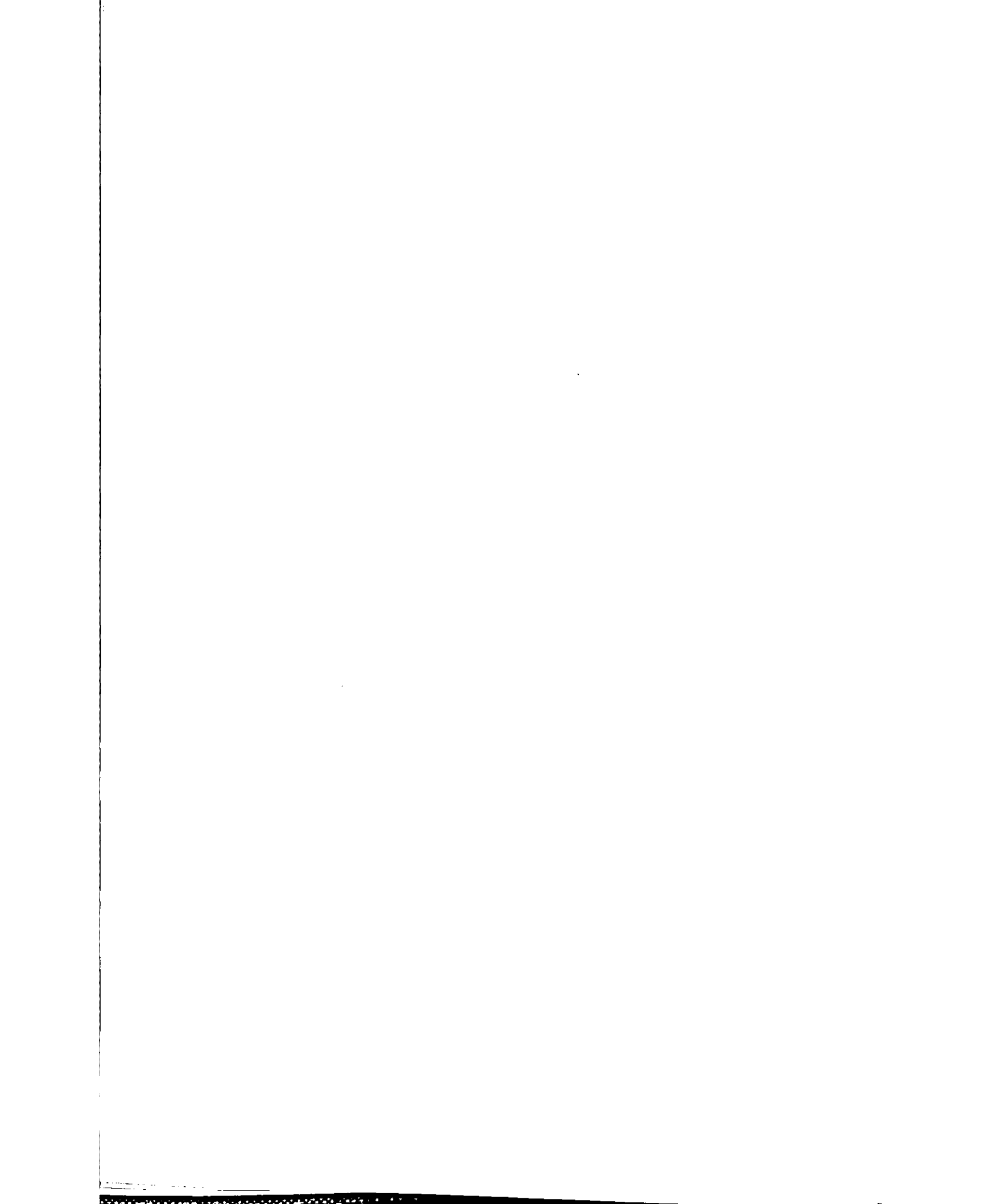
The Court then proceeded to repeat the 'Consten & Grundig' formula as regards the legitimate extent of judicial review of such a decision. In addition, Advocate General Lenz's opinion in the case explicitly states that, in his opinion, the selective non-application of Article 85(1) is governed by, "criteria similar to those contained in Article 85(3) EEC"<sup>210</sup>. What 'Remia' indicates, although in a negative way, is that the facts and issues which underpin infringement decisions are subjected to a qualitatively different standard of scrutiny by the Court than those upon which exemption decisions are based<sup>211</sup>. This, it is

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209. *ibid.*, para. 34 of judgment (emphasis added).

210. *ibid.*, 2559.

211. Ivo Van Bael has stated recently that, "in its 'Remia' judgment in a case which the Commission had decided under Article 85(1), the Court came to the same conclusion [it had reached in 'Consten & Grundig' regarding the scope of judicial review]", "Discretionary Powers of the Commission and their Legal Control in Trade and Anti-Dumping Matters", in, Jürgen Schwarze (Ed.), "Discretionary Powers of the Member States in the Field of Economic Policies and their Limits under the EEC Treaty" 1988, Nomos, Baden-Baden, 173 at page 187. It is submitted that, in making this comment, Van Bael badly misrepresents 'Remia' on two counts: first, the part of the decision under review was not an application, but a non-application of Article 85(1) EEC which was held to be functionally analogous to an application of Article 85(3) EEC; second, as we have seen, the Court did not decide that review of infringement decisions was limited to the grounds specified in 'Consten & Grundig', in fact the dictum quoted shows that it decided precisely the opposite.



submitted, is because of their nature as adjudicative decisions - a nature identified in 'Meroni' as warranting strict judicial oversight. In an opinion from 1972, Advocate General Mayras provides some guidance as to the Court's perception of the 'special' nature of infringement decisions:

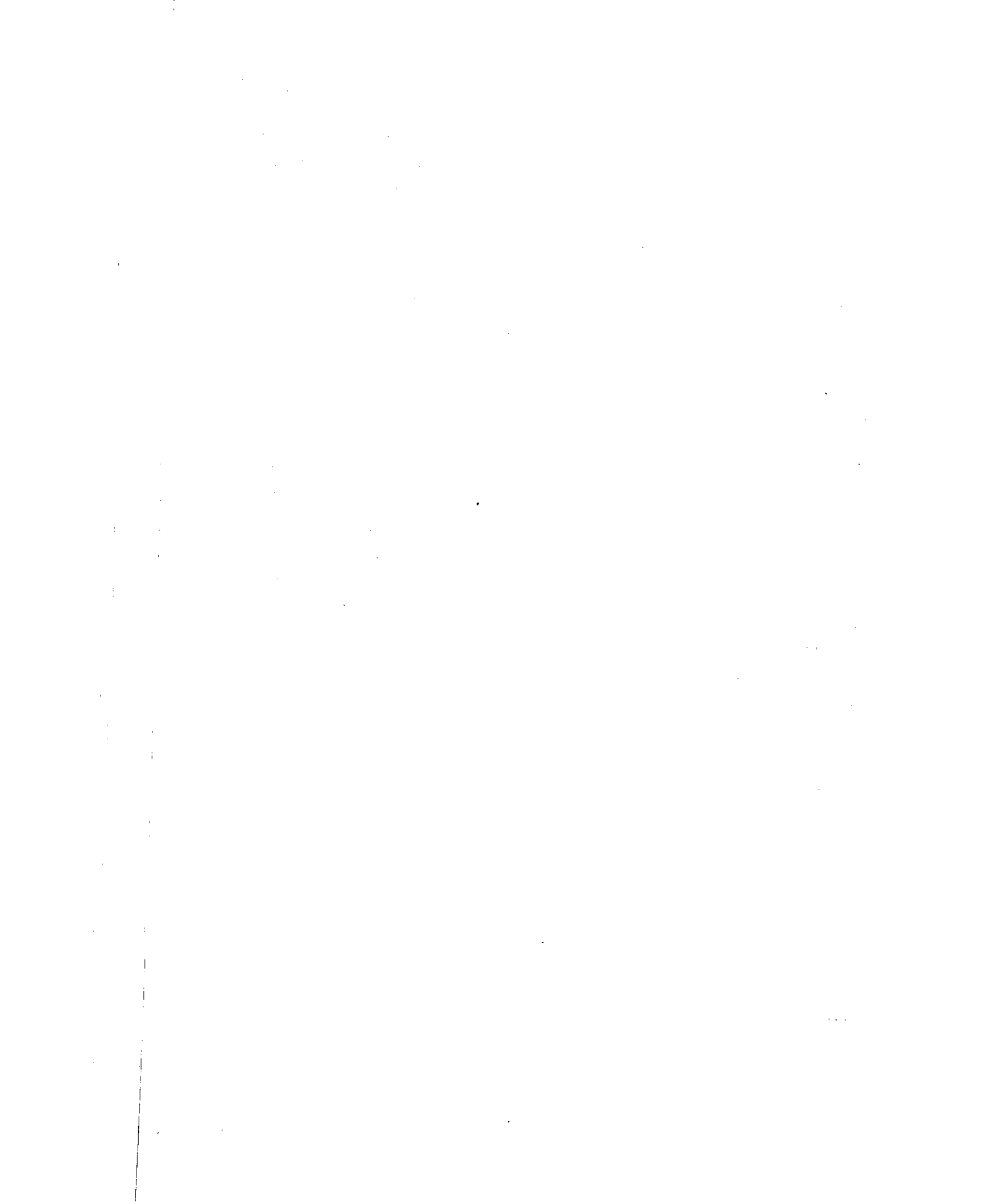
"Although infringements of the competition rules are defined in very general terms in Article 85 and relate to a predominantly technical area which leaves the Commission and this Court a particularly large degree of discretion, they are the subject matter of a legal decision ... and ... the prohibitions provided in Article 85 are applicable to agreements, decisions or practices evidence of which must be brought before the Court"<sup>212</sup>.

In this passage, Mayras identifies the two fundamental differences between an exemption and an infringement decision. First, the latter is a, "legal decision", in the sense of a decision applying pre-existing legal rules, while the former involves the implementation of non legal policy. Second, the latter is based on "evidence", in the sense of narrowly defined historic facts, while the former rests upon predicted or assumed situations. These fundamental differences, the same fundamental differences we identified in our earlier theoretical discussion, are the foundation upon which the Court has built up a jurisprudence which permits it to undertake the "comprehensive" as opposed to attenuated judicial review of infringement decisions.

#### Conclusion

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212. Case 7/72, 'Boehringer v Commission', [1972] ECR 1281, 1300.



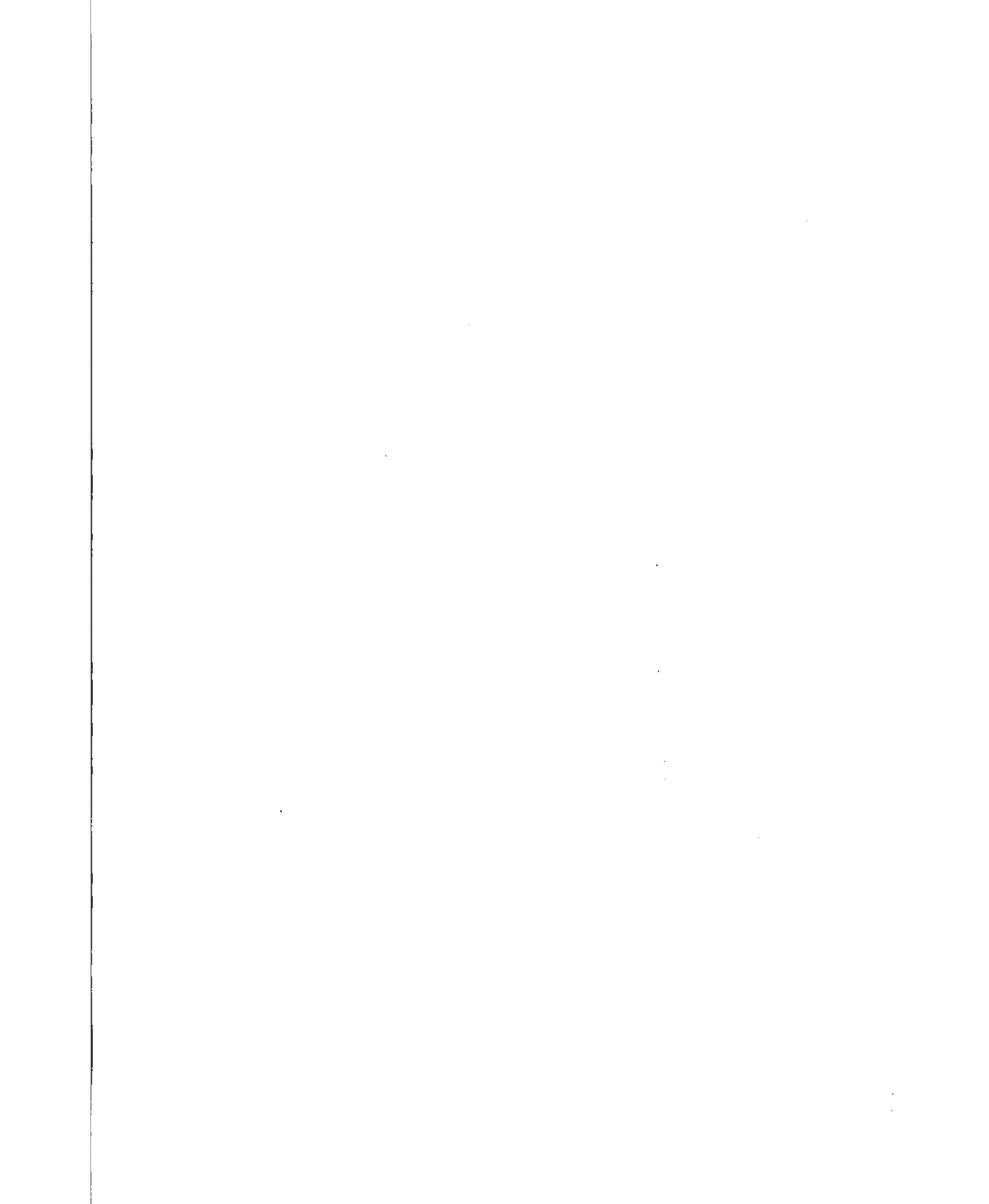
The Court of Justice has a clear idea of its role in the inter-institutional balance of power in the system established by the Treaties. Its view of its role vis à vis the Commission is a dichotomous one. With regard to the exercise of discretionary power, the Court perceives its role as somewhat peripheral, ensuring that the 'rules of play' are observed and no more. With respect to the exercise of adjudicatory power, in contrast, the Court considers itself constitutionally bound to play a central role, examining legal and factual justifications for action. This dichotomy has, we have noted, been extended into the review of competition decisions. While exemption decisions, amounting to exercises of discretionary power, are subject to low-level review, infringement decisions, as exercises of adjudicatory power, are subject to high-level review. We shall now examine the ways in which high-level review is carried out.

The "High Level" Standard of Judicial Review to which  
the Court of Justice subjects Infringement Decisions

Introduction

In this part we shall examine the manner in which the Court of Justice exercises 'high-level' review of infringement decisions. We shall see that the subject matter of such review can be divided under three heads: reasoning, the standard of proof, and the onus of proof.

Reasoning in Infringement Proceedings





The Court's approach to the reasoning employed by the Commission in infringement proceedings may be divided into two parts: first the reasoning used in the proceedings leading up to decision and, second, the reasoning contained in the infringement decision itself.

We have already seen that, before taking a decision in application of Art 85(1), 85(3), or 86 EEC, the Commission is required by Council Regulation 17/62 EEC, Article 19(1), to hear the undertaking/s concerned. We have also seen that detailed rules for the conduct of such hearings are laid down in Commission Regulation 99/63 EEC, which declares that such rules are necessitated by, "Article 19(1) of Regulation No. 17 and with the rights of the defence"<sup>213</sup>, the latter justification being based on some principle supposedly underpinning the said Article 19(1).

The "rights of the defence" or "the right to be heard", has been accorded the status of an unwritten, hierarchically superior rule of Community law by the Court of Justice. In its famous "Transocean Marine Paint" Decision<sup>214</sup>, the Court referred to,

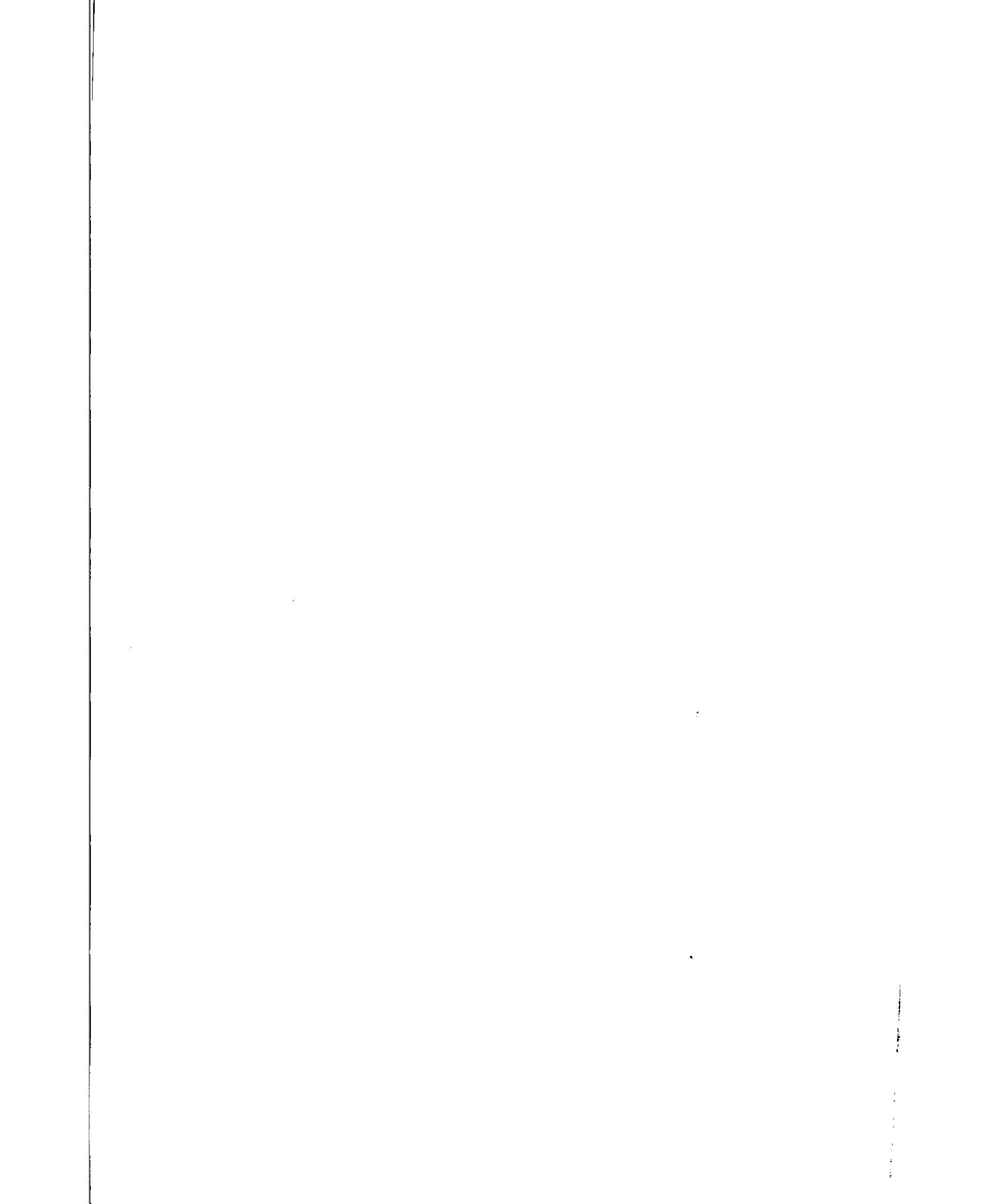
"the general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known [before the decision is taken]"<sup>215</sup>.

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213. Preamble, fifth recital. Emphasis Added.

214. Case 17/74, "Transocean Marine Paint Association v Commission", [1974] ECR, 1063.

215. *ibid.*, paragraph 15 of judgment. Cf. Case 41/69, 'ACF Chemiefarmie v Commission', [1970] ECR 661, para. 27 of judgment, and Case 45/69, 'Boehringer Mannheim v Commission', [1970] ECR 769, para. 9 of judgment.



In the proceedings leading up to the decision to apply or not to apply Article 85(3) EEC, the substantive content of the right to be heard is limited to the right to comment on the policy judgment of the Commission and, therefore, the right to be informed of the economic and policy considerations upon which the Commission intends to rely. The precision with which such considerations are required to be communicated to potential addressees is necessarily limited by their naturally imprecise or indefinite nature. However, in infringement proceedings, the considerations upon which decisions are to be based are capable of being communicated in very precise form to potential addressees during the administrative stage; as the Court ruled in the 'Hoffman La Roche' case:

"in order to respect the right to be heard the undertakings must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement"<sup>216</sup>.

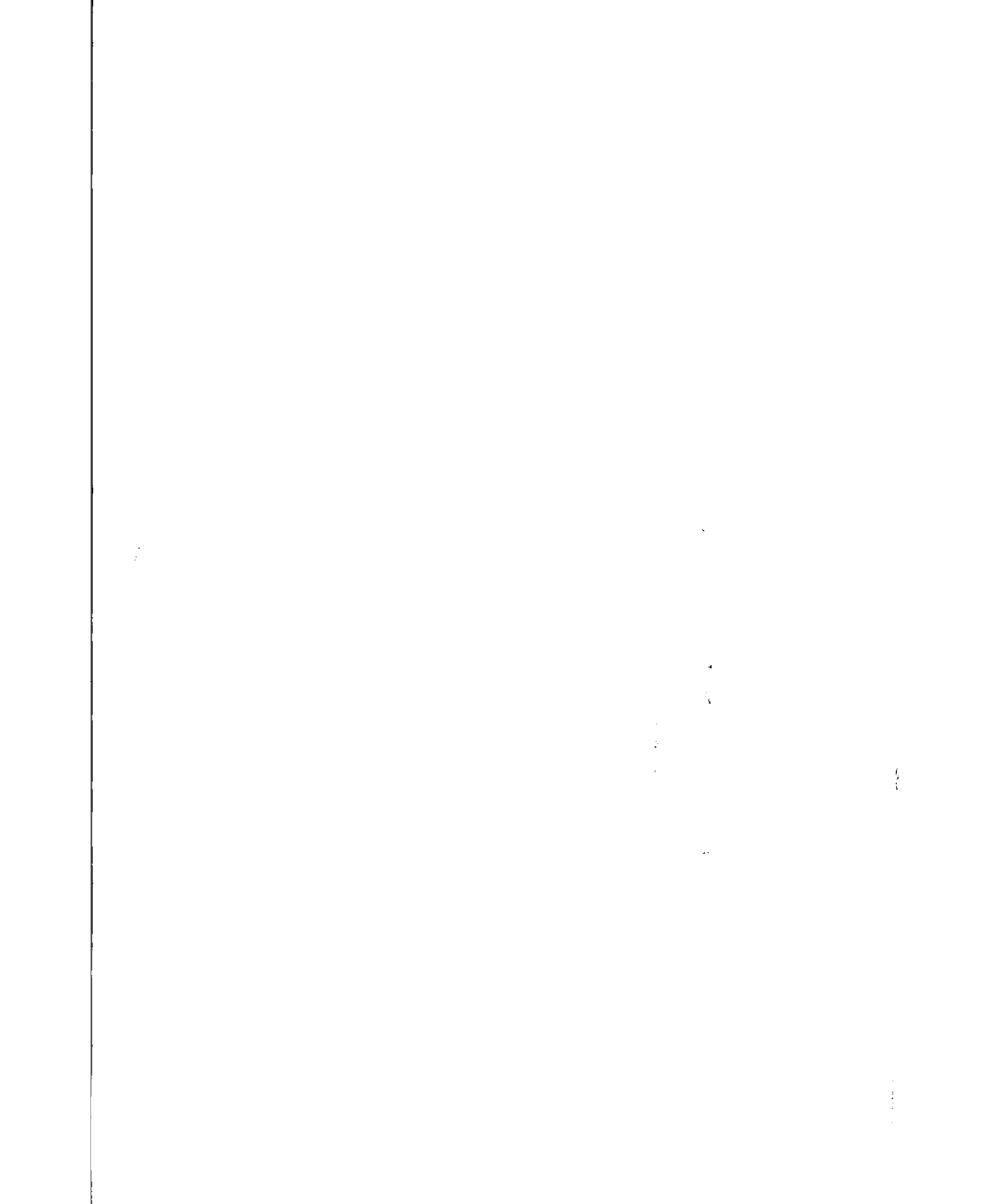
Accordingly, the Commission is required by the Court to disclose all documentary evidence upon which it relies<sup>217</sup>.

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216. Case 85/76, 'Hoffman La Roche v Commission', [1979] ECR 461, para. 11 of judgment (emphasis added).

217. Non-disclosure of such documents constitutes a violation of the right to be heard, *ibid.*, para. 14 of judgment. In paragraph 15 of the same judgment the Court suggested that such a violation could be cured by disclosure in subsequent annulment proceedings, but in the 'Distillers' case [Case 30/78, 'Distillers v Commission', [1980] ECR 2229], Advocate General Warner severely criticised this dictum as being out

(Footnote continues on next page)



The exemption or infringement decision eventually adopted by the Commission at the conclusion of proceedings is required, pursuant to Article 190 EEC, to state the reasons upon which it is based. The value of this obligation is that it,

"allow[s] the Court to exercise its power of review as to the legality of the decision and ... provide[s] the person concerned with the information necessary to enable him to decide whether or not the decision is well founded"<sup>218</sup>.

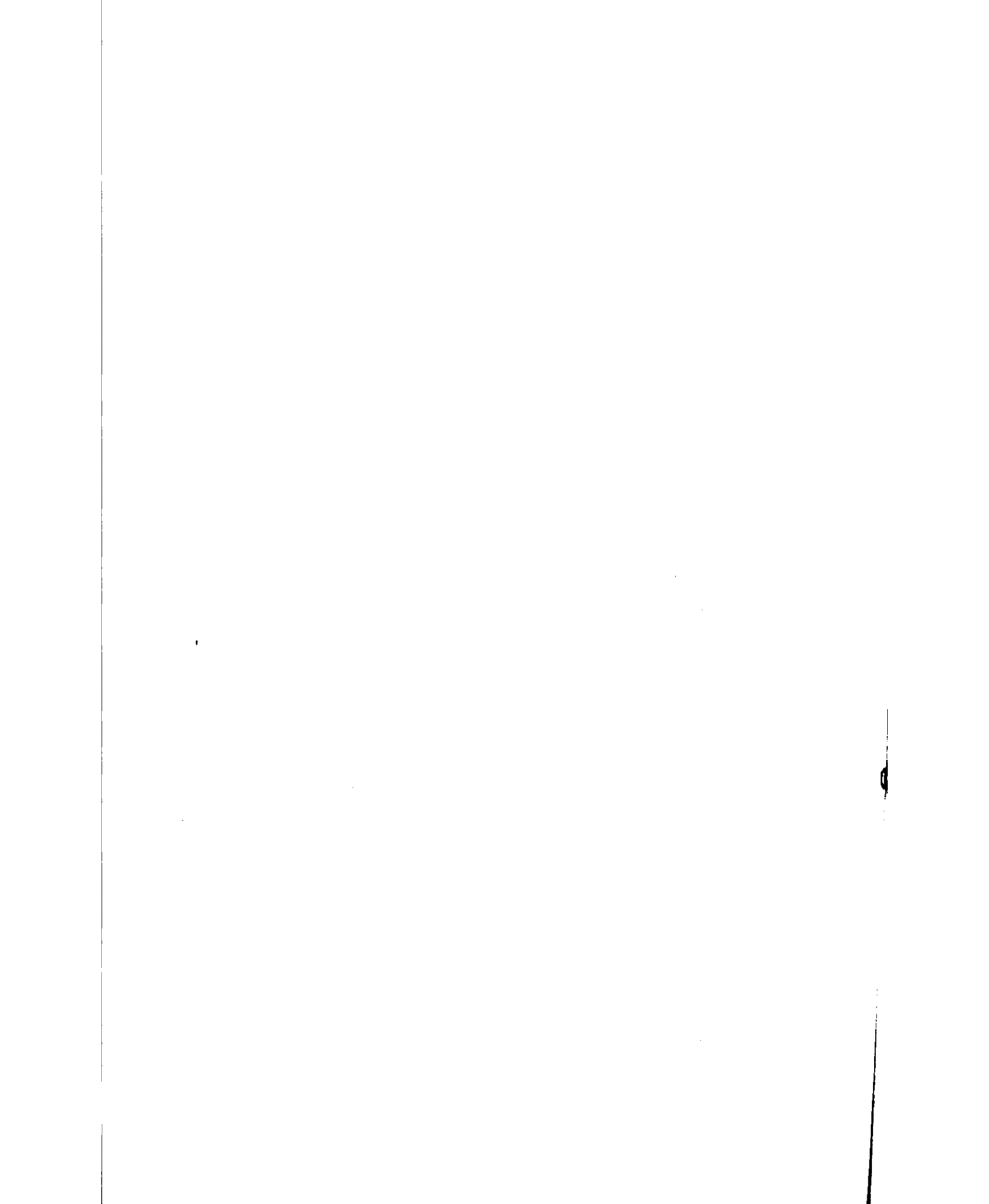
With regard to exemption decisions, we have seen that the review of 'legality' which their statement of reasons enables is simply a review of the 'ex facie' relevance and 'bona fides' of the considerations upon which they are based. However, as we shall

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of line with previous dicta of the Court and as inimical of the right to be heard, *ibid.*, 2297-8. In addition, Advocate General Slynn stated in the 'Pioneer' case that, "evidence coming to light during the procedure before the Court should not be taken into account, in support of the Commission's case, save to the extent that such evidence is directly related to allegations made by the Commission at the administrative stage" [Joined Cases 100-103/80, 'Musique Diffusion Française v Commission', [1983] ECR 1825, 1931]. Documents not relied upon by the Commission's case against an undertaking, e.g., documents exonerating him, are not subject to the obligation of disclosure: see 'VBVB & VBBB v Commission' *cit. supra* at fn 176, paras. 23 to 25 of judgment. However, the Commission, in response to pressure from undertakings has adopted the practice of giving undertakings access to the entire file of evidence it holds on their case during the administrative proceedings, see announcement to this effect in the Twelfth Report on Competition Policy, para. 34.

218. 'VBVB and VBBB v Commission', *cit. supra* fn 176, para. 22 of judgment.



see, the review of the 'legality' of infringement decisions made possible by the statement of reasons involves detailed examination of the elements of proof which underly them.

#### Standard of Proof in Infringement Proceedings

The Court is always open to argument that the factual evidence upon which an infringement decision is based is insufficient, in point of law, to support the conclusions that it reaches; as it stated in the 'Sugar' case:

"[t]he examination of the question whether the Commission has or has not produced sufficient evidence of the <sup>219</sup>alleged infringement forms part of the substance of the case".

We saw earlier in this section that an error of law can derive from an error of fact which results either from the mis-perception of the facts of a case, or the mistaken subsumption of those facts within the relevant legal rules. Arguments that either or both of these mistakes have occurred in Commission fact assessments will be given serious consideration by the Court during annulment proceedings. The test which the Court will apply in reviewing the sufficiency of Commission evidence is that enounced in 1984 of whether, "the Commission has ... produced sufficiently precise and coherent proof to justify [its legal conclusions]"<sup>220</sup>. Evidence

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219. Joined Cases 40-48, 50, 54-56, 111, 113 & 114/73, 'Suiker Unie v Commission', [1975] ECR 1663, para. 440 of judgment.

220. Joined Cases 29 & 30/83, 'CRAM & Rheinzink v Commission', [1984] ECR 1679, para. 20 of judgment (emphasis added).

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is sufficiently "precise and coherent" when, as Advocate General Slynn has said, it constitutes, "material upon which the Commission can be satisfied reasonably that there was [an infringement]"<sup>221</sup>. Advocate General Mayras, in the 'Sugar' case, described the precision and coherence test in the context of judicial review when he stated that it is the role of, "the Community judge to determine whether the material produced as evidence by the Commission is conclusive", or, in other words, "strong, precise and relevant"<sup>222</sup>. Whatever the formula used to describe sufficiency, it is clear that Commission evidence must be of a very high standard to withstand the scrutiny of the Court<sup>223</sup>, particularly since it is the Commission which carries the onus of proof.

#### Burden of Proof in Infringement Proceedings

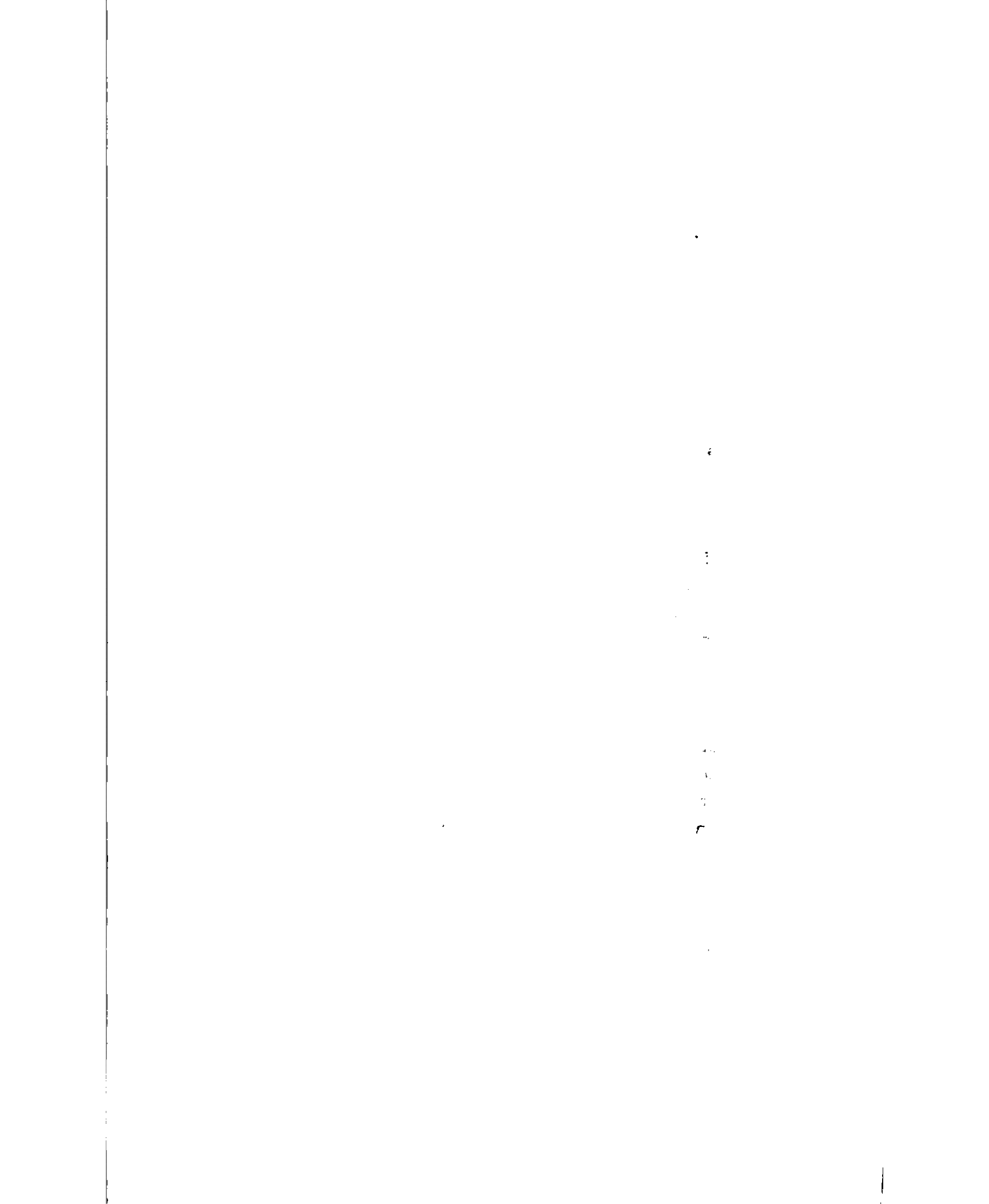
Inasmuch as infringement decisions represent the culmination of 'accusatory' proceedings (the undertaking in question being accused of infringing Treaty provisions) their adoption implies that the Commission has established the truth of its accusations. In annulment proceedings before the Court of Justice, therefore, it is the Commission and the Commission alone which must prove that the infringement it found actually occurred. In this sense, the Commission carries the legal burden or onus of proof before

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221. 'Pioneer' case, cit. supra fn 217, loc. cit.

222. Cit. supra fn 144, 2067.

223. J. M. Joshua, "Proof in Contested EEC Competition Cases", 1987 ELRev 315, 320.



the Court, while, in contrast, the applicant undertaking does not. In the 'United Brands' case, the Court stated that, "it is for the Commission to prove that the applicant [infringed the Treaty]"<sup>224</sup>, while, in the 'Sugar' case, Advocate General Mayras stated even more candidly that, "[t]here is no doubt in my view that the burden of proof lies on the Commission"<sup>225</sup>.

As Brearly says, "[t]he legal burden of proof is the obligation of a party to meet the requirement of a rule of law that a fact in issue be provided to the satisfaction of the Court. It is a burden of persuasion and carries with it the risk of non-persuasion"<sup>226</sup>. In other words, failure to discharge the burden of proof means losing the case and, in infringement cases, having the infringement decision annulled. The only burden carried by undertakings vis à vis the Commission is that of adducing evidence, one which simply requires them, "to adduce sufficient evidence to raise an issue as to the existence of [the specific facts they allege]"<sup>227</sup>. Applicant undertakings, free from the legal burden of proof when contesting infringement decisions:

"do ... not have to go so far as to show that the Commission's decision was wrong. It may suffice to show that it was unsafe or insufficiently proven"<sup>228</sup>, or

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224. Case 27/76, 'United Brands v Commission', [1978] ECR 207, para. 264 of judgment.

225. Cit. supra fn 144, loc. cit.

226. M. Brealy, "The Burden of Proof before the European Court", 1985 ELRev 250, 255.

227. *ibid.*, 250.

228. Advocate General Slynn, 'Pioneer', cit. supra fn 212, loc. cit.



"to prove circumstances which casts the facts established by the Commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested decision"<sup>229</sup>.

In a concerted action case, for example, the Commission must prove that the, "conduct which ... [it] alleges and regards as [evidence] ... of the concerted practice can only reasonably be explained by the existence of a concerted action"<sup>230</sup>. If an applicant undertaking is able to prove that the conduct was conceivably explainable otherwise, then there will exist a doubt fatal to the Commission's case<sup>231</sup>.

#### Conclusion

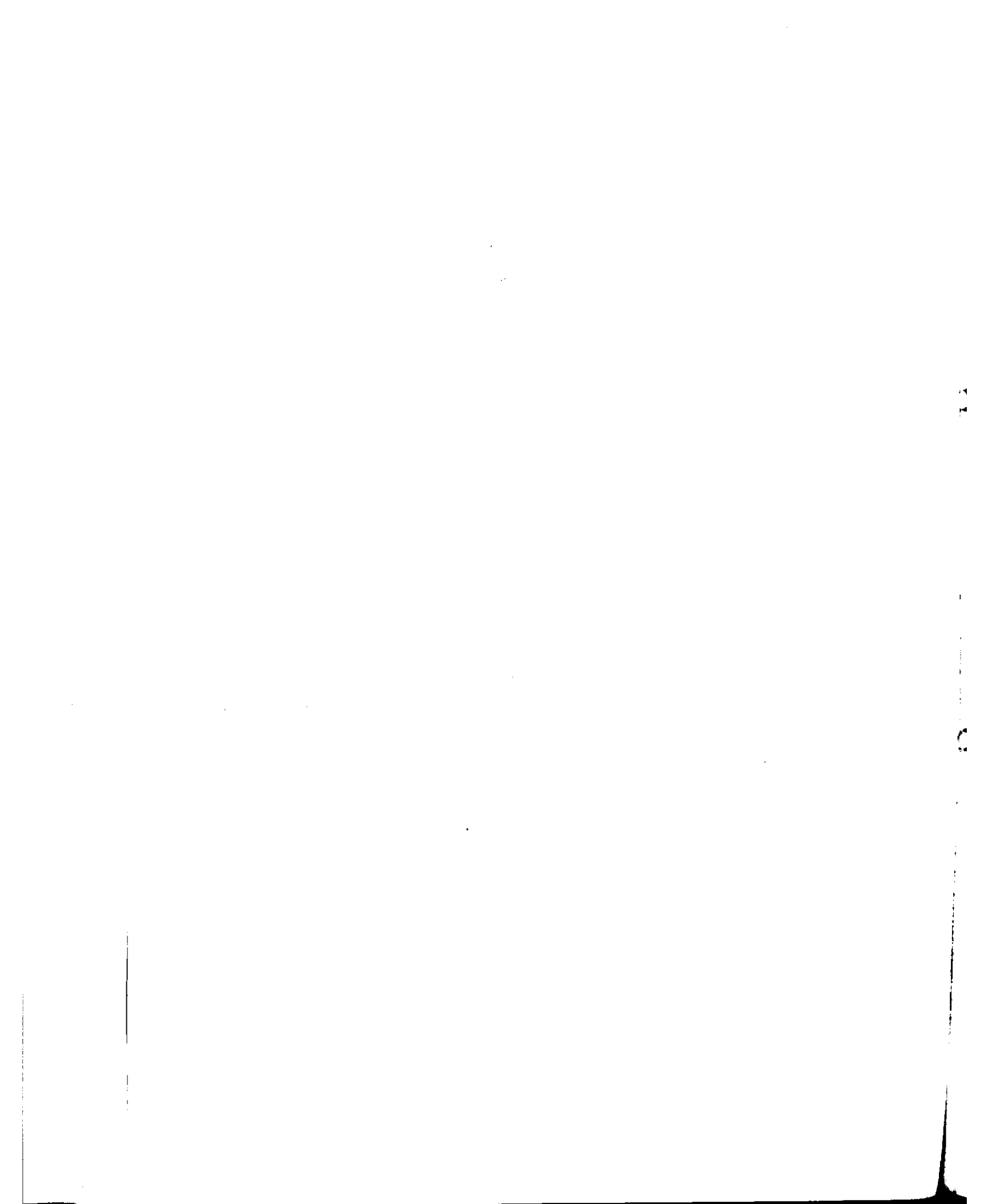
We have seen that the 'high-level' review to which the Court of Justice subjects infringement decisions is qualitatively different than the 'low-level' review to which it subjects exemption decisions. 'High-level' review is concerned with issues of law and of proof, while 'low-level' review is concerned solely with formal aspects of decisional legality. 'High-level' review extends into the substance of the matter, demanding that infringement decisions demonstrate not only rational legal deduction, but also a high degree of evidential conclusiveness.

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229. 'CRAM & Rheinzink', cit. supra fn MMMM, para. 16 of judgment.

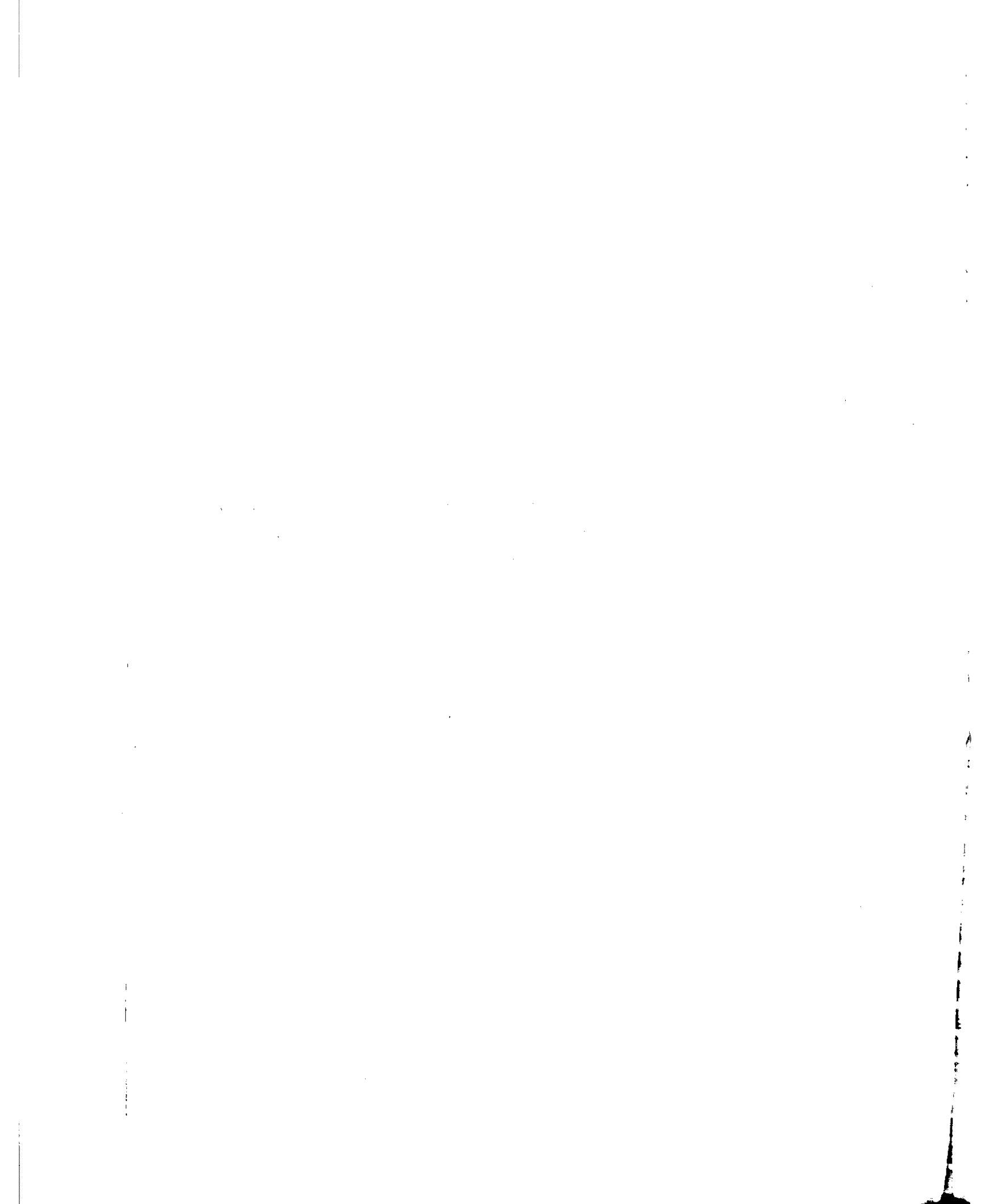
230. 'Sugar' case, cit. supra fn 139, para. 301 of judgment (emphasis added).

231. Case 26/75, 'General Motors v Commission', [1975] ECR 1367, para. 21 of judgment.



Subjecting infringement decisions to 'high level' review is most certainly a means of alleviating the adverse effects experienced by undertakings. By requiring that such decisions demonstrate that a legal burden of proof has been duly discharged and that they deal comprehensively and convincingly with the relevant evidence, the Court offers undertakings an opportunity to challenge their factual basis in annulment proceedings, and, thereby, to eliminate or minimise injustices suffered at the hands of a non-triadic decision maker.

However, offering an opportunity is one thing; allowing effective use to be made of that opportunity is entirely another. In the next section shall see that, while the Court of Justice has, on the one hand, created a formal opportunity for undertakings to challenge the fact assessments upon which infringement decisions are based, it is unable and/or unwilling, on the other, to permit them to exploit that opportunity effectively.





THE PROBLEMS ENCOUNTERED BY THE COURT OF JUSTICE  
IN UNDERTAKING THE 'HIGH-LEVEL' REVIEW OF  
COMMISSION DECISIONS APPLYING ARTICLES 85(1)/86 EEC

Introduction

It was seen in the last section that the Court of Justice has interpreted its jurisdiction to review the legality of infringement decisions as also permitting the comprehensive investigation of the fact assessments upon which they are based.

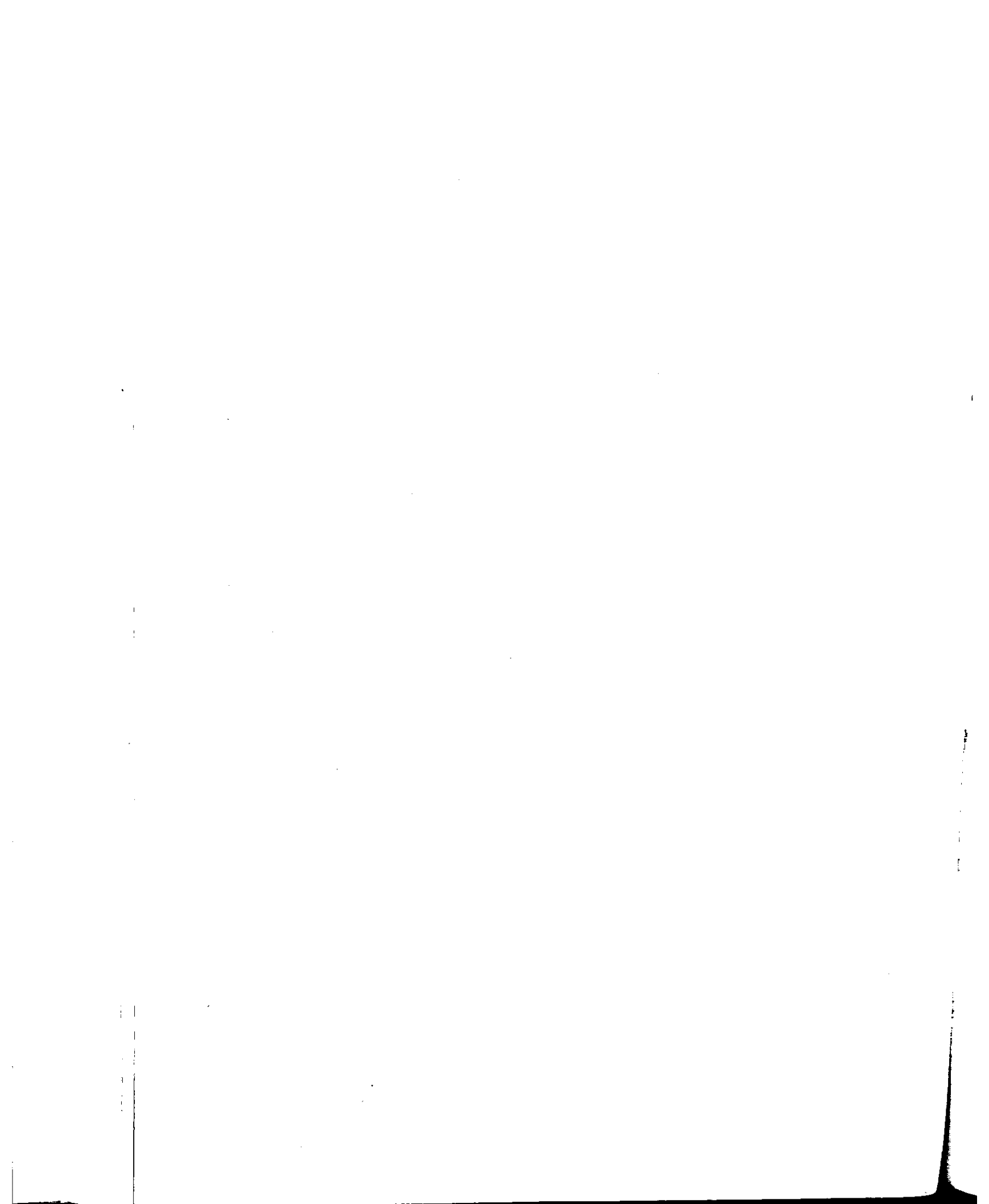
In this section we shall see that two factors; first, the limited dispositive powers available to the Court under Article 173 EEC, and, second, the inadequacy of the judicial resources which are committed to carrying out review of infringement decisions; have created an, "allergy of the Court of Justice to reviewing the facts established by the Community authorities"<sup>232</sup>, thereby handicapping the efforts of undertakings to obtain effective 'high-level' review of infringement decisions.

The Court of Justice's Limited Power of Disposal under  
Article 173 EEC compared with that under Article 172 EEC

Power to Annul v. Power to Reform

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232. Van Bael, op. cit., supra fn 211, 189.



We know that the jurisdiction exercised by the Court of Justice under Article 173 EEC differs from that exercised under Article 172 EEC to the extent that whilst the former enables review of fact-finding and fact assessment, the latter obliges such review.

However, a difference of much greater importance between the two jurisdictions exists in respect of the nature of the powers of disposal they create. The powers of disposal attached to a jurisdiction consist of the orders which a court is entitled to issue at the conclusion of proceedings before it. Indeed, the traditional french classification of the 'recours du droit administratif', "repose sur la constatation selon laquelle les pouvoirs du juge varient en fonction de la matière contentieuse"<sup>233</sup>. Under this system, the jurisdiction which the Court of Justice exercises under Article 172 EEC, can be classified as a 'recours de pleine juridiction', in which, "le juge peut ... réformer totalement ou partiellement la décision administrative attaquée"<sup>234</sup>. This means that in disposing of an action against a fine or periodic penalty payment imposed in an infringement decision, the Court of Justice may 'reform' the sanctioning element of the decision by cancelling, reducing or increasing the fine or penalty. On the other hand, the 'recours pour excès de pouvoir' available under Article 173 EEC can, according to this system, be defined as a 'recours en annulation', in which le, "juge ne peut que procéder à une annulation, il ne peut réformer la décision"<sup>235</sup>. In other words, in disposing of an

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233. Charles Debbasch, "Contentieux Administratif" 3rd Ed. 1981, Dalloz, Paris, para. 700.

234. *ibid.*, para. 701.

235. *ibid.*, para. 702.



action against the provisions of a Commission decision, the Court of Justice must either uphold or annul them - it may not 'reform' or 're-make' them.

The consequences of this limited power or jurisdiction with respect to infringement decisions are important. In the words of the Court in its 1979 decision, 'France v Commission',

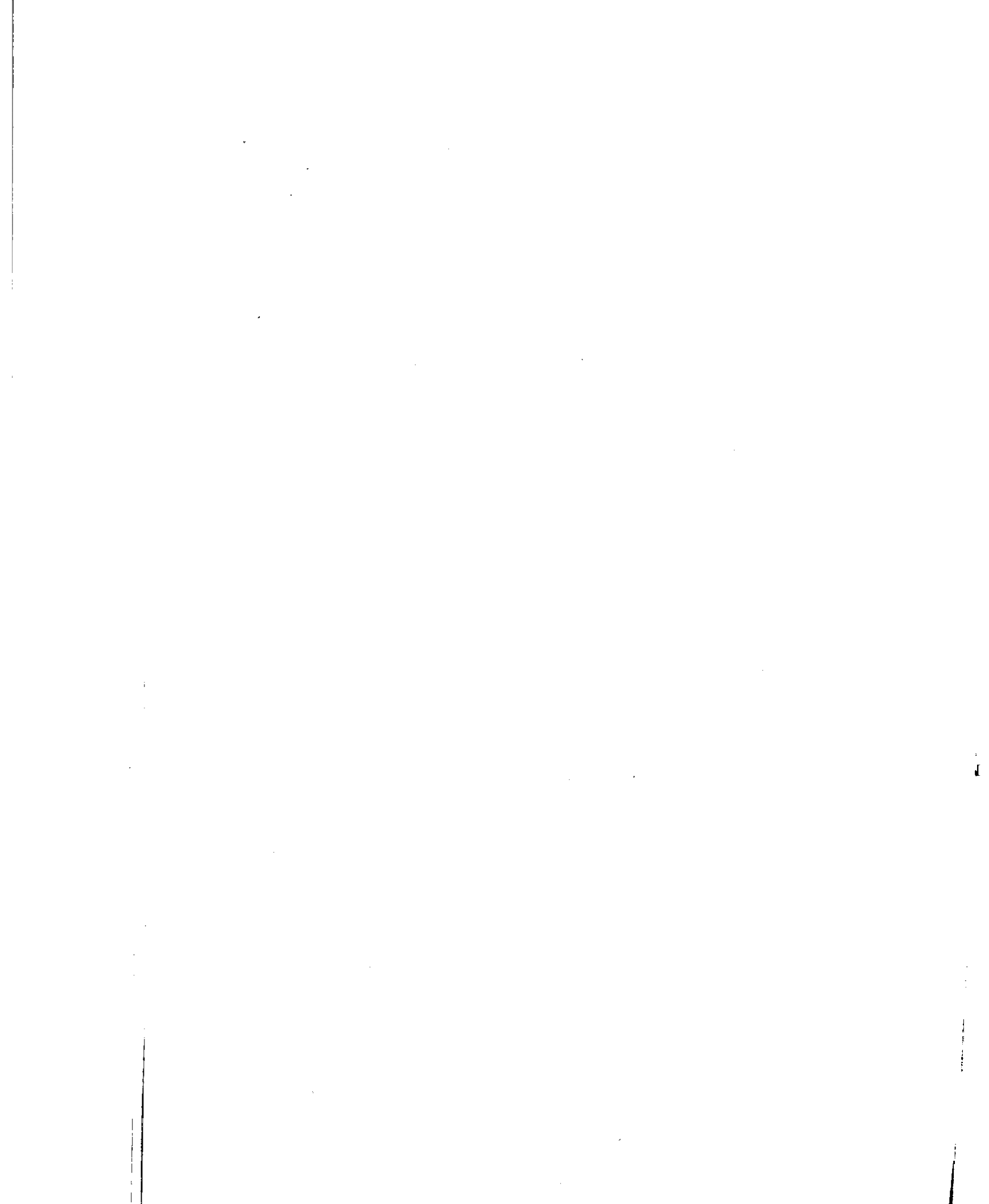
"[I]n the context of an application for annulment under Article 173 of the Treaty the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted.

Rectifications subsequent to that date cannot therefore be taken into account for the purposes of such an assessment"<sup>236</sup>.

This principle derives directly from the role of the Court in exercising its Article 173 EEC jurisdiction as opposed to its Article 172 EEC jurisdiction. The power to annul or uphold an infringement decision on grounds of (il)legality is premised upon the existence of an historically distinct legal 'event' which is the object of review by the Court. The legal and factual elements of that event are fixed in time and are not subject to

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236. Joined Cases 15 & 16/76, judgment of 7 February 1979, [1979] ECR 321, paras. 7 and 8 of decision. In its decision in Case 85/76, 'Hoffman La Roche v Commission' delivered six days later, the Court caused confusion by indicating that rectifications undertaken by the Commission after the date of adoption of an infringement decision could cure otherwise fatal defects ([1979] ECR 461, para. 15 of decision). However, this dictum was severely criticised by Advocate General Warner in Case 30/78, 'Distillers Co. v Commission', as permitting the Commission to ignore due process requirements at the administrative stage in the knowledge that, "irregularit[ies] can be put right in the course of the appeal", [1980] ECR 2229, 2298.



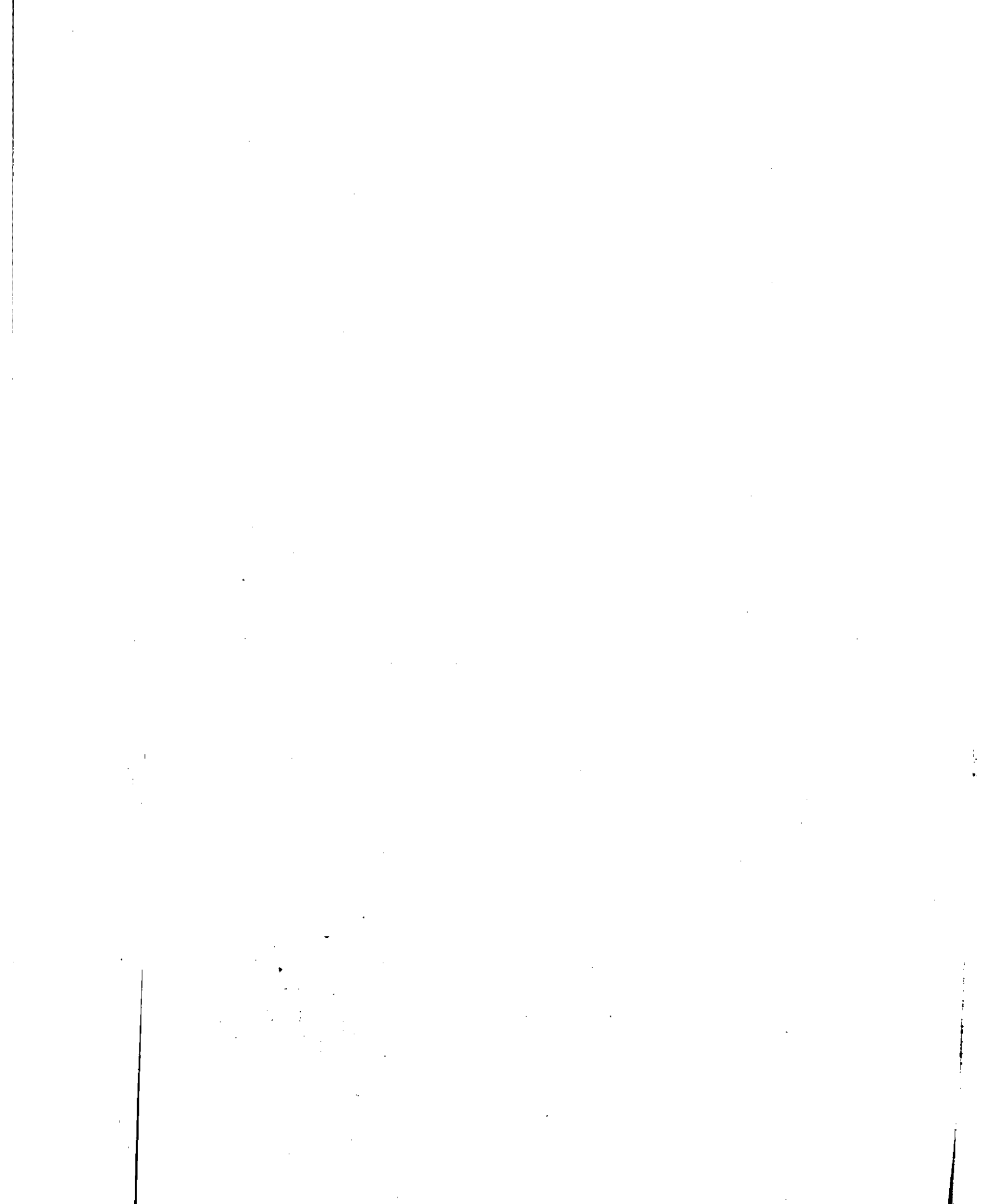
change after the date on which it took place. The power to re-adjudicate or reform a decision is premised upon the notion that the legal 'event' (i.e. the decision) has yet to occur and that, therefore, the elements of fact and law of which it consists have still to be determined in Court.

Given the premise for Article 173 EEC review, then, can we say that the limited powers of disposal available to the Court in reviewing the legality of infringement decisions act as a disincentive to judicial fact-finding in this field?

) Limited Power of Disposal as a Factor Influencing  
The Court vis à vis Infringement Decisions

) Each provision of an infringement decision, other than that imposing a pecuniary sanction, is subject to Article 173 EEC review, as opposed to Article 172 EEC review. Consequently, if an attack against any such provision is sustained by the Court then that provision must be annulled in its entirety. Assuming that a provision of an infringement decision consisting of a Commission fact evaluation is annulled due to insufficiency or unpersuasiveness of evidence, then the findings of law which are logically derived from it must fall as well. Moreover, the undertaking who is the subject of an infringement decision obviously benefits from the right against double jeopardy, or 'non bis in idem', and, therefore, should that decision be annulled on 'evidential' grounds, the Commission is subsequently barred from taking a new one dealing with the same substantive circumstances but based on other evidence or argumentation.

In sustaining an attack against a mistaken fact evaluation of the Commission, therefore, the Court must assume the responsibility of allowing an undertaking to escape all punishment in circumstances





where, given a second chance, the Commission might well have been able to present a more convincing or differently argued case capable of withstanding such an attack. Were the Court empowered to re-adjudicate the fact evaluations upon which the findings in an infringement decision were based, then the Commission would in turn be entitled to reargue its case and present evidence in amplification or supplementation of, or as an alternative to that already presented in its decision. In such circumstances the Court would be able to avoid nullifying the Commission's work by recasting the latter's decision on the basis of re-evaluated evidence.

In view of the Court's clear commitment towards facilitating the Commission's integrative work, it would not be surprising to find it refusing to act in the politically 'negative' way that annulment under Article 173 EEC demands. It is submitted, therefore, that the lack of a power of 'réformation' might well be a factor which subtly influences the Court's decision whether or not to take the opportunity (a) to investigate or (b) to accept the arguments of applicant undertakings that the Commission's fact evaluations are incorrect.

The Inadequate Resources of the European Court  
vis à vis High-Level Review of Infringement Decisions

The Crisis of Resources caused by the  
 Width of the Court's Jurisdiction

The Court of Justice occupies an unique position in the maintenance of the constitutional balance of the Community legal order. By virtue of Article 177 EEC, thousands of courts and



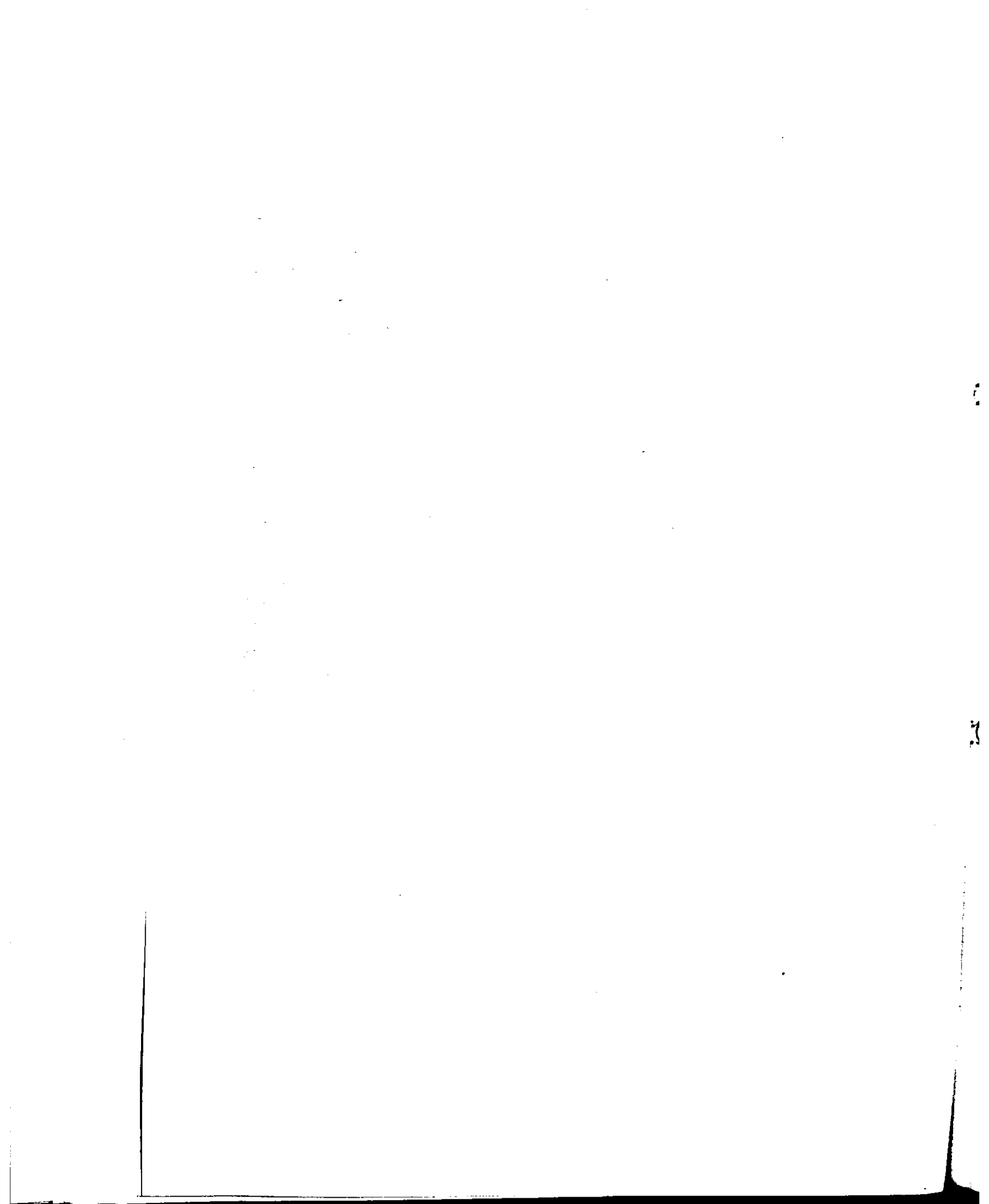
other quasi-judicial bodies all over the Community have the ability and, for some, the duty, to refer questions on points of Community law to the Court of Justice for 'preliminary rulings' before they attempt to apply it. Under Article 169 EEC, the Court has exclusive jurisdiction to adjudicate in disputes between the Commission and the Member States and between the Member States themselves as to the compatibility of national actions with the Treaty. In addition, the Court's jurisdiction under Articles 173 and 175 EEC is frequently invoked against the Community institutions themselves by the Member States (and by other institutions) as to the legality of their behaviour.

However, and in striking contrast to its role in respect of these weighty constitutional, inter-institutional and inter-governmental issues, the 13 judges are obliged by Article 179 EEC to adjudicate in all disputes arising between the Community institutions and their many thousands of servants. According to the President of the Court himself, "[t]he Court is at the same time a constitutional Court and an employment tribunal"<sup>237</sup>. Last, but by no means least, the Court is required to hear all direct actions brought by natural or legal persons against acts of the Community institutions under Articles 173(2) and 175 EEC<sup>238</sup>.

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237. Ole Due, "The Court of First Instance" (unpublished manuscript of 1989 in possession of author) page 10.

238. This paragraph is, of course, subject to the observations to be made in the next section concerning the transfer of jurisdiction to the Court of First Instance in 'staff cases' and direct actions challenging individual applications of Articles 85 and 86 EEC.



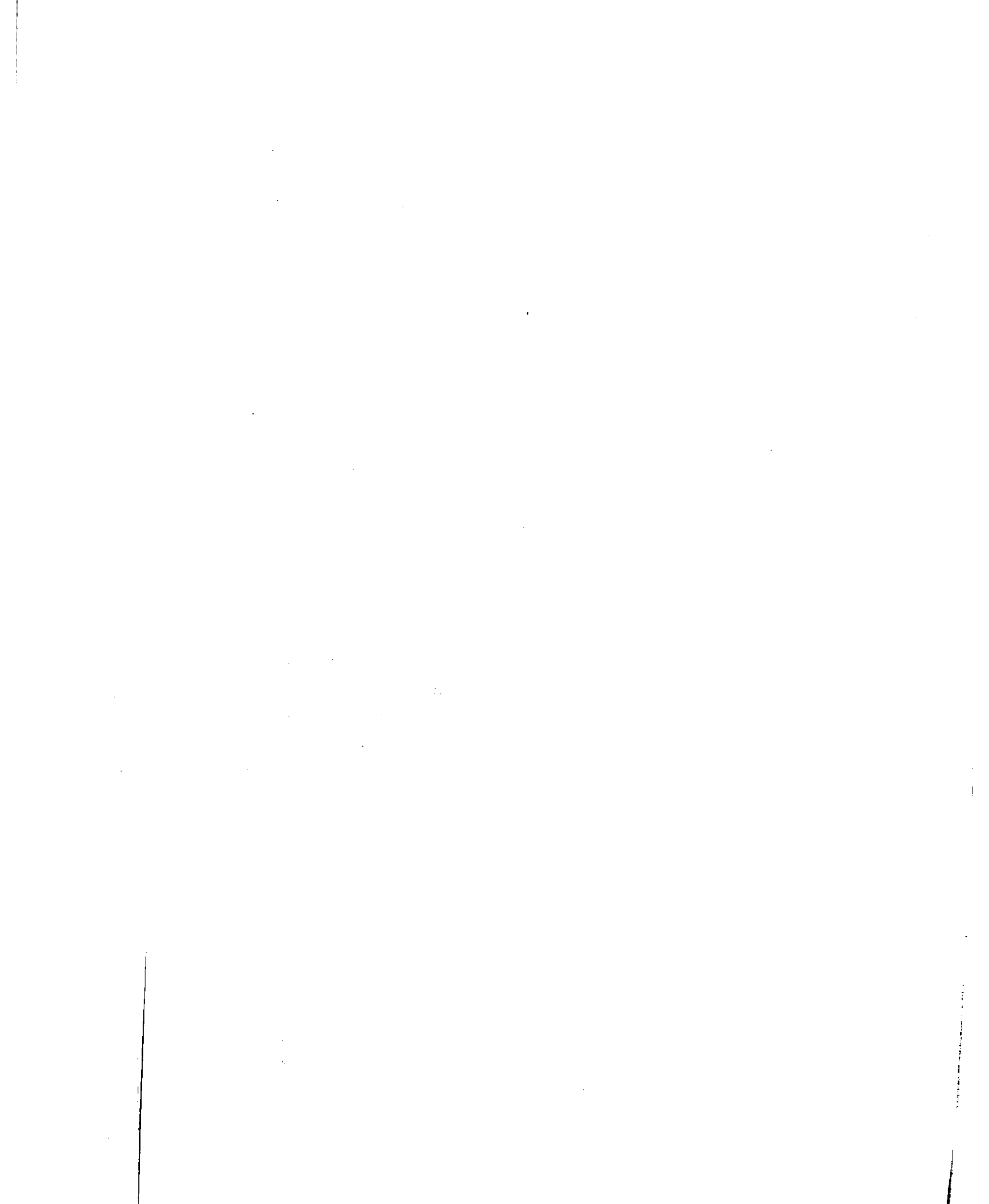
The case load created by these jurisdictions is enormous. The latest figures available from the Court disclose that in 1988 some 334 new cases were brought and 231 judgments were delivered, leaving a backlog of 542 cases pending<sup>239</sup>. The average time taken by the Court to deal with cases amounted, in 1987, to 18 months for preliminary rulings and 22 months for direct actions<sup>240</sup>. Given such a caseload and the delays which it produces, the Court has, in the words of its President, been, "forced to choose certain priorities. Constitutional problems and preliminary questions which keep in suspense the work of the other institutions or the cases pending before the national courts must necessarily be given top priority. This, of course, makes other cases suffer. Among these cases we find a number of actions where individual applicants contest the facts on which the defending Community institution has based its decision"<sup>241</sup>. In view of the Court's desire to concentrate its energies on its constitutional role, therefore, it is the competition case entitled to 'high level' review of mixed questions of fact and law, which has had to bear the brunt of the 'resource rationalization' which the Court has undertaken in order that it can continue to function. In which ways has the Court attempted to rationalize its resources vis à vis the hearing of competition cases? There are principally two: firstly, minimization of the use of fact-finding procedures and, secondly, division of labour. We shall now proceed to assess the adverse effects which these two

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239. These figures reflect the situation as of 18th November 1988 and reported in, "The Essential Minimum: The Establishment of the Court of First Instance" by Tom Kennedy, 1989 ELRev 7, 8.

240. *ibid.*

241. *Due, op. cit., supra fn 237, loc. cit.*



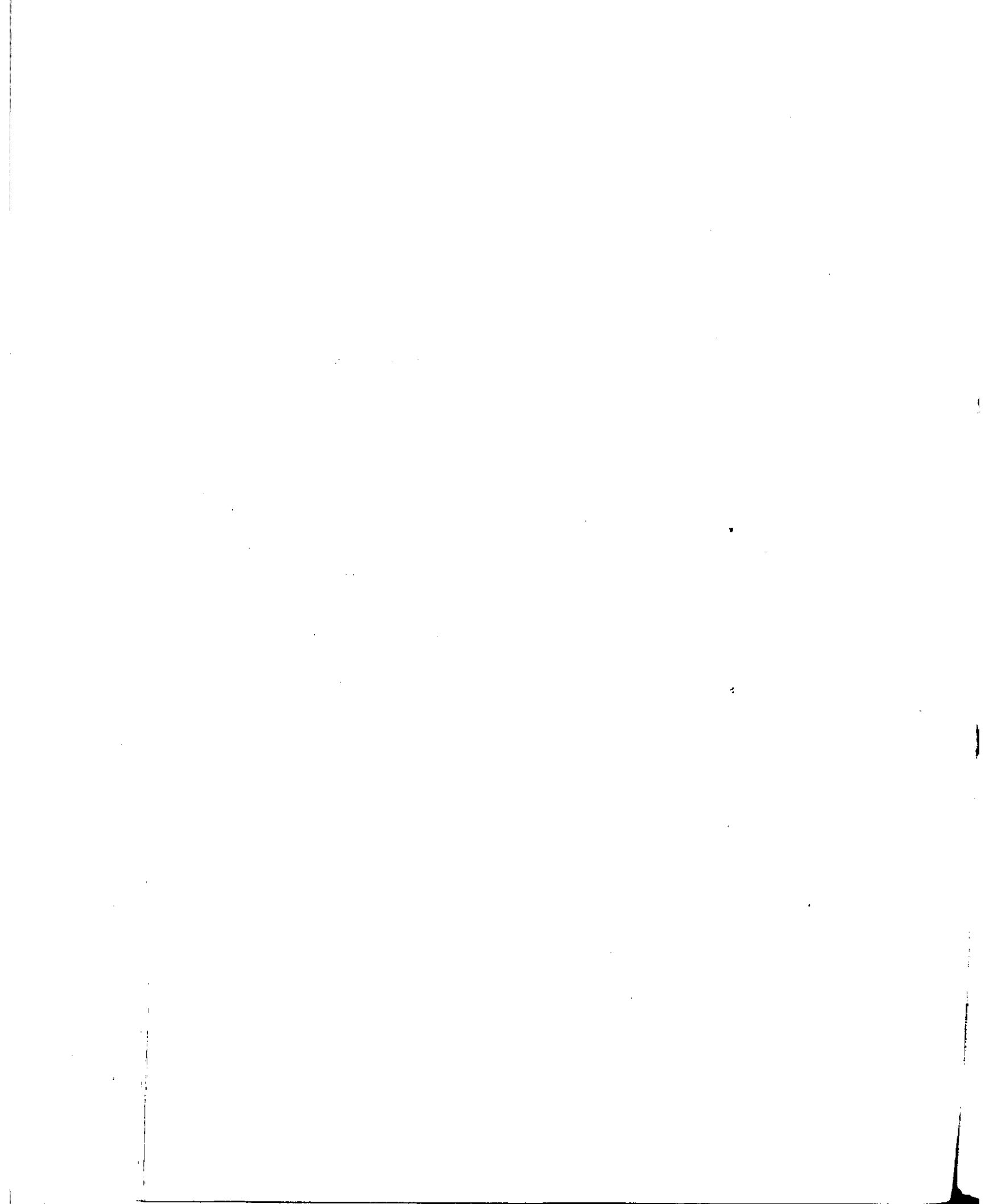
measures may have upon the quality of the 'high level' review which undertakings expect from the Court when they contest the factual/economic/legal evaluations made by the Commission under Articles 85(1)/86 EEC.

#### The Court's Fact-Finding Procedure<sup>242</sup>

Direct actions before the European Court, including competition cases brought under Articles 173(2) EEC, involve three distinct stages. First, and most important, is a "written procedure": the exchange of pleadings in which the parties set out the form of court order sought, the points of fact and law they rely on and the nature of any evidence used to found their claims. With regard to the latter, the Court of Justice allows undertakings a wide degree of freedom, during the written procedure, to submit a wide range of documentary evidence upon which they base their attack on the "exactitude matérielle" of Commission findings of fact. In addition to the documents submitted in the pleadings, the Court, as its inquisitory role requires, can and does request, via a letter from its Registrar, the submission of information or the production of documents which it considers necessary to enable

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242. See, with regard to the EEC Treaty, Arts. 165 and 188 EEC, The Protocol on the Statute of the Court of Justice of the EEC and The Rules of Procedure of the Court of Justice, (particularly Titles 2 and 3 of the Rules). An excellent commentary on the Court's procedure can be found in "The European Court of Justice: Practice and Procedure" (1984) by K.P. Lasok.





it to reach a decision<sup>243</sup>.

On the basis of these written submissions, the "juge rapporteur" compiles a 'rapport d'audience' or preliminary report, summarising the arguments and recommending whether or not to move immediately to the final stage or, instead, to the second stage - "preparatory inquiries".

Preparatory inquiries may, as will be discussed presently, be carried out by the Court or a Chamber of the Court. After considering the recommendations of the "juge rapporteur" and after hearing the Advocate General, the Court or Chamber may formally order the carrying out of certain measures of inquiry in order to determine specific issues of fact. In either case, the measures of inquiry ordered can be carried out by the "juge rapporteur" acting alone. Measures of inquiry can involve the personal appearance of the parties themselves; the summoning, in consultation with the parties and the Advocate General, and judicially mediated questioning of oral witnesses; the presentation of experts' reports; the production, at the request of the Court or Chamber, of documentary evidence or other information<sup>244</sup> and, lastly, the inspection of the place or thing

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243. These requests are made directly under the authority of Article 21 of the Court Statute and not, of course, as a measure of inquiry in accordance with the Rules of Procedure.

244. We have seen, however, that this provision is more or less a dead letter since the Court normally obtains such documentary material informally during the written procedure.



in question<sup>245</sup> .

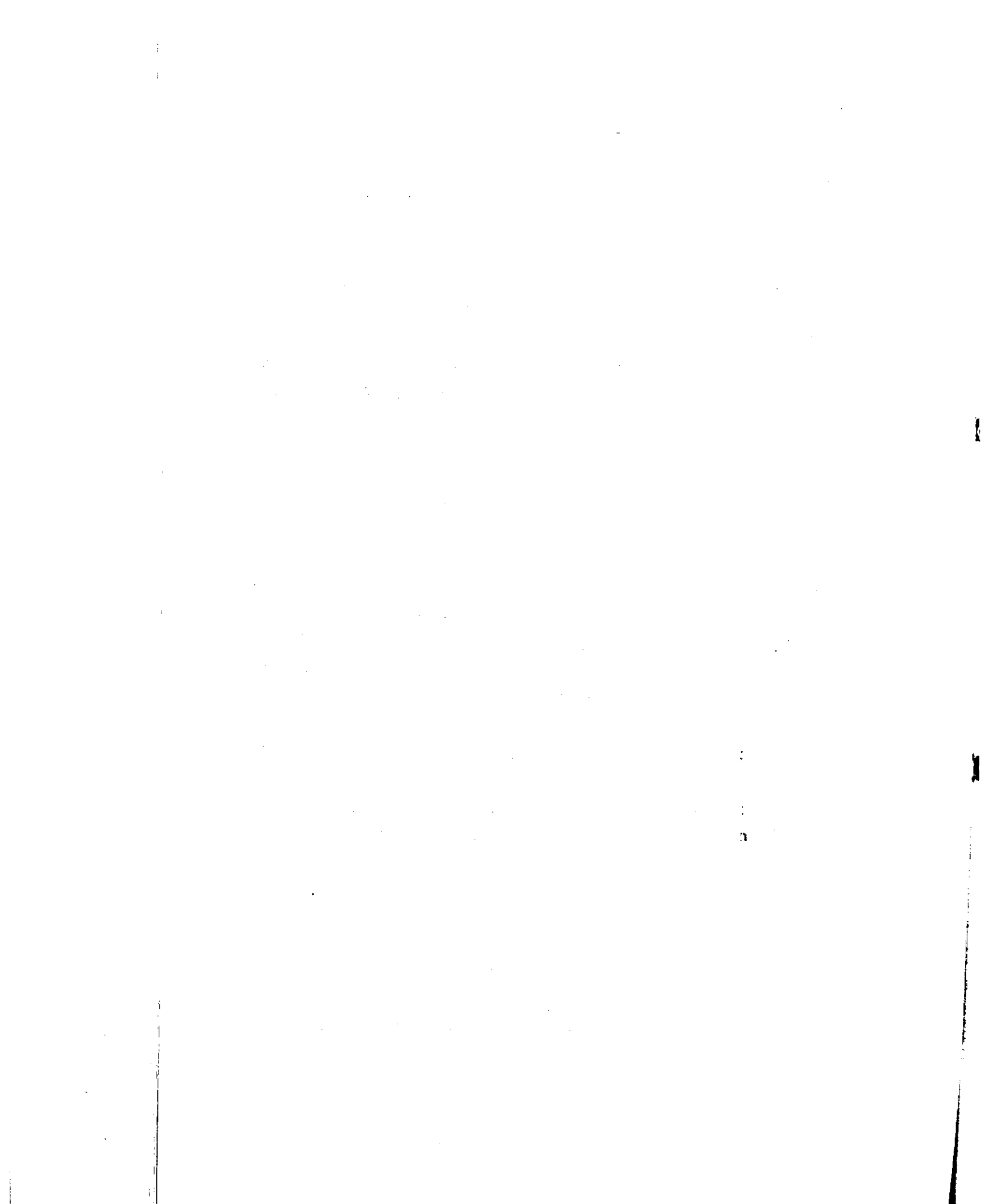
At a date after the preparatory inquiries have been completed, the Court or Chamber holds an "oral hearing". This is an opportunity for the representatives of the parties to make fairly short, legal submissions before the judges who will ultimately decide the case and for the judges and advocate general to put their questions to the representatives. At the end of the oral hearing and before the judges leave to consider their decision, the Advocate General delivers an oral opinion containing a relatively objective assessment of the issues raised in the case.

#### Minimisation of Fact-Finding as an Impediment to Effective 'High Level' Review of Infringement Decisions

An inquisitorial procedure such as that operated by the Court of Justice places a great deal of responsibility on the judge as opposed to the litigant with respect to fact-finding. Parties to a competition case have no right to 'lead' evidence before the Court and the Court has no duty to hear such evidence, instead it is the task of the Court as inquisitor to seek out those elements of fact which it considers necessary to enable resolution of the issues at hand. Of course, the parties in dispute are not excluded from participating in the evidence gathering process (indeed, most, if not all, of the evidence which the Court

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245. This is the official translation of the french, "la descente sur les lieux", which conveys a narrower idea, along the lines of Mohamed coming to the mountain instead of the mountain coming to Mohamed. No doubt, the latter would not, in appropriate cases be ruled out as a competent measure of inquiry.



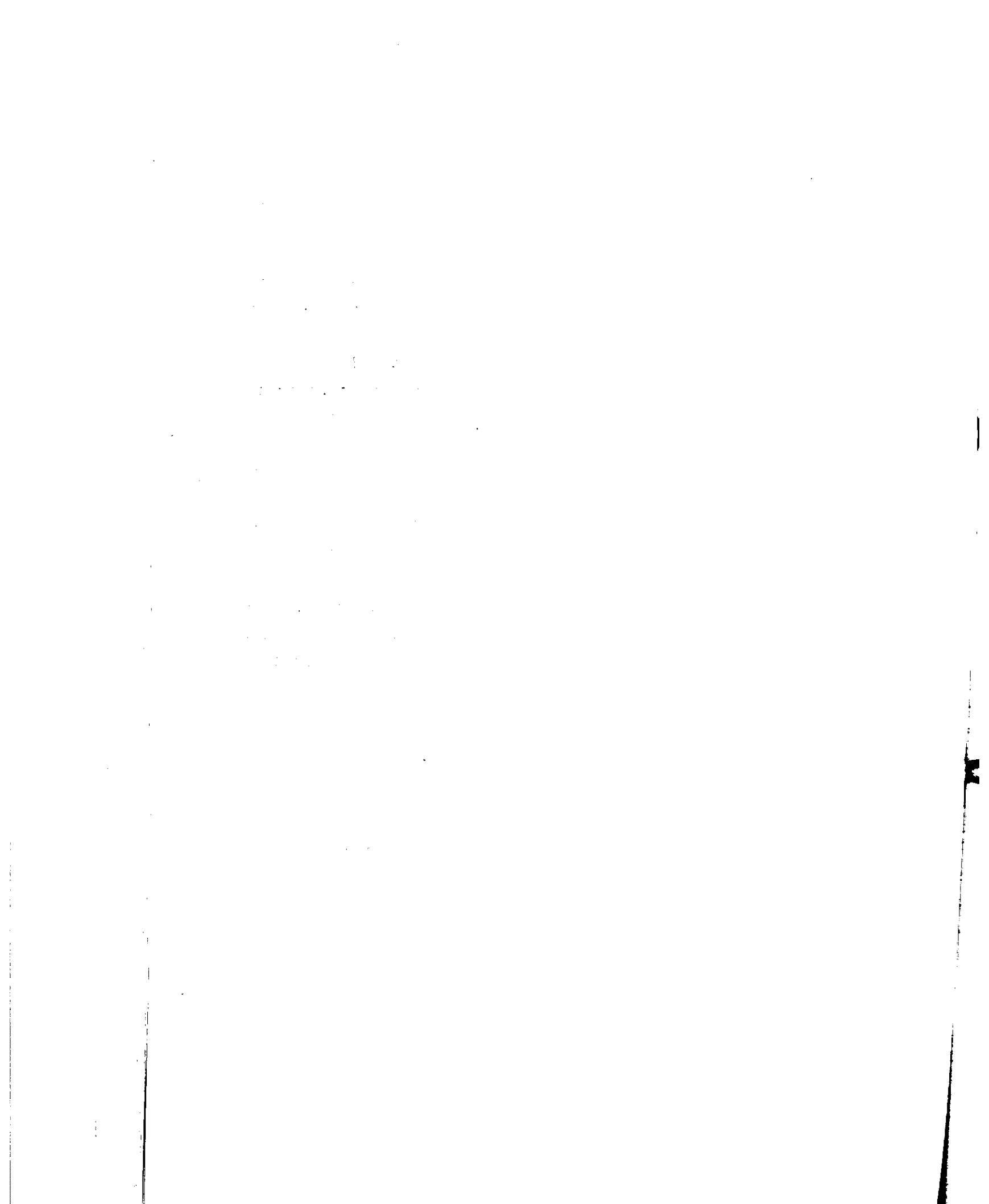
examines will have been brought to its attention by them), however, in terms of the allocation of judicial time, their role is to a greater or lesser degree subordinated to that of the Court itself.

The principal benefit of such a judicially controlled fact-finding procedure is that of speed. It is effectively impossible for an undertaking to delay or burden proceedings by leading superfluous or unduly repetitive evidence before the Court of Justice. However, by empowering the judge to supervise fact-finding in order to prevent unnecessary delays, the inquisitorial system introduces the possibility that this power will be used in a way which goes beyond preventing unnecessary delay (in the sense of delay created by the leading of superfluous evidence) and which becomes a means of preventing delay 'per se'. In other words, when it is the judge's priorities and not the parties' priorities which determine the length of the fact-finding process, then the burden of pending cases - a burden only in the eyes of the judge - is a factor which could (illegitimately) influence the the Court's decision whether or not to undertake a particular measure of inquiry.

It cannot be doubted that the huge case-load of the European Court has been a powerful factor in discouraging the Court from undertaking extensive fact-finding inquiries. In dealing with competition cases the Court has heard oral witnesses on only three occasions<sup>246</sup> and has appointed an expert to compile a report on

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246. "Suiker Unie", cit. supra fn 144, "Pioneer" cit. supra fn 217 and "AKZO" cit. supra fn 134.



only one<sup>247</sup>. Requests for documentary evidence and other information by the Court during the written procedure are, in practice, more frequent occurrences, however, even this is restricted by the pressure of resources felt by the judges conducting proceedings. Indeed, it would seem that the most popular means of collecting evidence at present is the so called "question time" which occurs at the end of the oral procedure and in which the judges and advocate general question the representatives of the parties before retiring to consider their decision. In the words of President Due, in fact, "the rules on the traditional measures of inquiry are becoming more and more dead letters and ... the 'question time' has to a great extent replaced the taking of evidence in due procedural form"<sup>248</sup>. Now, the 'quick fire' oral examination of counsel is to be welcomed as useful in itself, but this means of collecting evidence is meant to supplement and not to substitute other fact-finding measures.

In competition cases in which complex economic evaluations are in issue, the minimal use which the Court of Justice makes of its extensive fact-finding powers can only impede the professed ability of the Court to conduct 'high level' review.

#### ) Division of Labour in the Court of Justice

The European Court is a collegiate court, in the sense that its 13 judges are of equal rank and may sit as a college, "en séance

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247. Case 48/69, "ICI v Commission", 1972§ ECR 619.

248. op. cit., supra fn 237, 11.





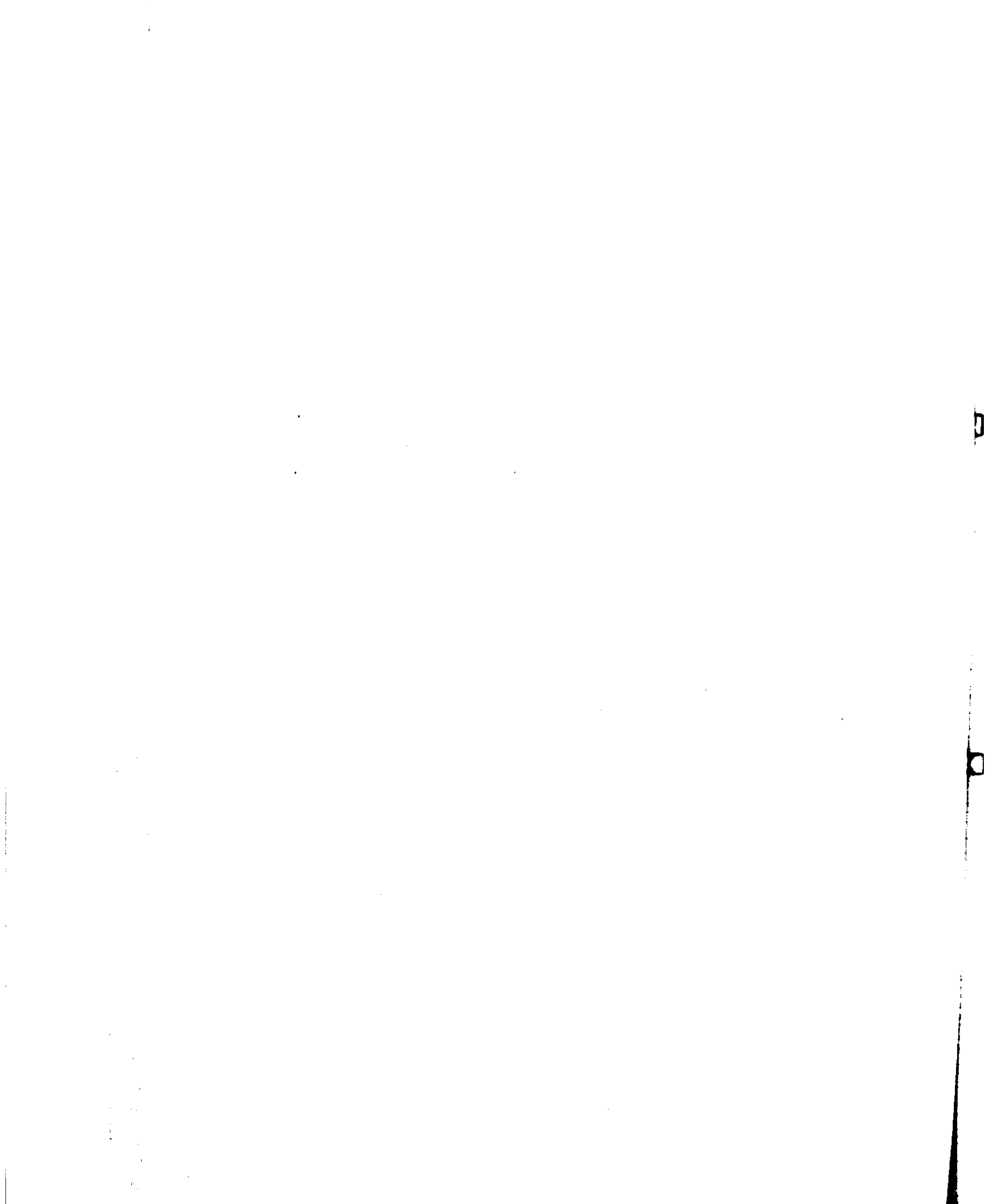
plénière" (the quorum being seven), to hear any one case or decide any issue, however trivial. In practice, of course, the whole Court is rarely, if ever, convened. Efficient use of manpower dictates that in most cases, the Court will operate via chambers of three or five of its Members.

The Chambers of the Court may be used to adjudicate in the name of the Court in a direct action, such as one brought under Arts 172 and 173(2) EEC, "in so far as the difficulty or importance of the case or particular circumstances are not such as to require the the Court decide it in plenary session"<sup>249</sup> or may be used simply as judicial fact-finders to conduct "preparatory inquiries" in cases which the full Court adjudicates itself.

When an application initiating an Article 173(2) action is registered with the Court, the President selects one of the Chambers. He appoints one judge from this Chamber to be "juge rapporteur" to the Court during the "written procedure" and provisionally assigns to the Chamber the conduct of any preparatory inquiries which it might order. When the written procedure is concluded, the Court, after considering the preliminary report of the "juge-rapporteur" and after hearing the Advocate-General assigned to the case it may assign the conduct of any measures of inquiry it considers necessary to the Chamber or

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249. Rules of Procedure of ECJ, Art 95(1). However, Art 95(3) of the Rules allows the Court no such discretion in respect of so called "Staff Cases", [i.e. actions brought against Community Institutions by their servants under Article 179 EEC], where adjudication automatically devolves on the Chambers to which that class of actions are assigned, in rotation, on an annual basis, [Cf. decision of Court of 30.9.81, OJ (1981) C 265/3; setting up system whereby staff cases are heard in rotation by the Chambers containing three judges].



may, if appropriate decide to refer all of the remaining stages of the case to the Chamber.

Division of Labour as an Impediment to the  
Effective 'High Level' Review of Infringement Decisions

The 'dossier' of factual and legal issues presented to the Court in a competition case can be enormous and, unless all of the judges who are to decide the case are given a reasonable opportunity to absorb the intricacies of such information, they cannot be expected to be willing or able to discharge their responsibilities fully. Given the pressure of resources faced by the Court, it is submitted that the use of investigating chambers and, to a lesser extent, 'rapports d'audience' in hearing competition cases impedes the ability of the members of the Court to acquaint themselves properly with the facts and arguments of applicant undertakings.

The House of Lords Select Committee Report on the proposal for a Court of First Instance<sup>250</sup> pointed out two grounds of concern arising from the division of labour employed by the Court in hearing competition cases. Firstly, the Lords criticised the Court's practice of delegating to chambers both the conduct of any preparatory inquiries and examination of written evidence. Concern was expressed specifically that the practice of taking oral evidence in any preliminary inquiry before a minority of the

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250. "A New Court of First Instance", 5th Report of the House of Lords Select Committee on the European Communities, Session 1987-88, (HL Paper 20).



judges deciding the case<sup>251</sup> deprived the majority of the important opportunity of observing the demeanour of witnesses questioned. In this criticism the Lords are joined by Sir Gordon Slynn, formerly Advocate General to and now judge of the Court of Justice, who has said:

"I do not find satisfactory the half-way house which sometimes has to be adopted under which a chamber hears the evidence and reports to the full Court which then proceeds on the basis of that report without actually seeing the witnesses. If credibility is in issue that is not satisfactory"<sup>252</sup>.

) Second, the Lords stated that, since the 'preliminary report' compiled by the "juge rapporteur" alone at the end of the written procedure represents only a somewhat refined or sifted account of the evidence submitted, the judges who finally decide the case on the basis of this report and without having examined the dossier compiled by the parties are acting without having truly acquainted themselves with all of the written evidence submitted. In cases where detailed factual submissions are of such importance, the Committee observed that it is crucial that judges examine as much evidence at first hand as possible.<sup>253</sup> It is submitted that this second criticism is at least partially valid. The 'rapport

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251. When the case is to be decided by a Chamber or by the Court, this occurs if it is the "juge rapporteur" alone who examines the witness. When the case is to be decided by the Court itself, this can theoretically occur even when examination of the witness is undertaken by every member of the Chamber to which the holding of preparatory inquiries has been assigned.

252. 1985 Fordham Corporate Law Institute, p 393. See also, Due, op. cit. supra fn 237, 11, "the taking of evidence before a bench which may not comprise all the judges that are going to decide the case is a totally unsatisfactory procedure".

253. Op. cit., supra. fn 250, para.64.



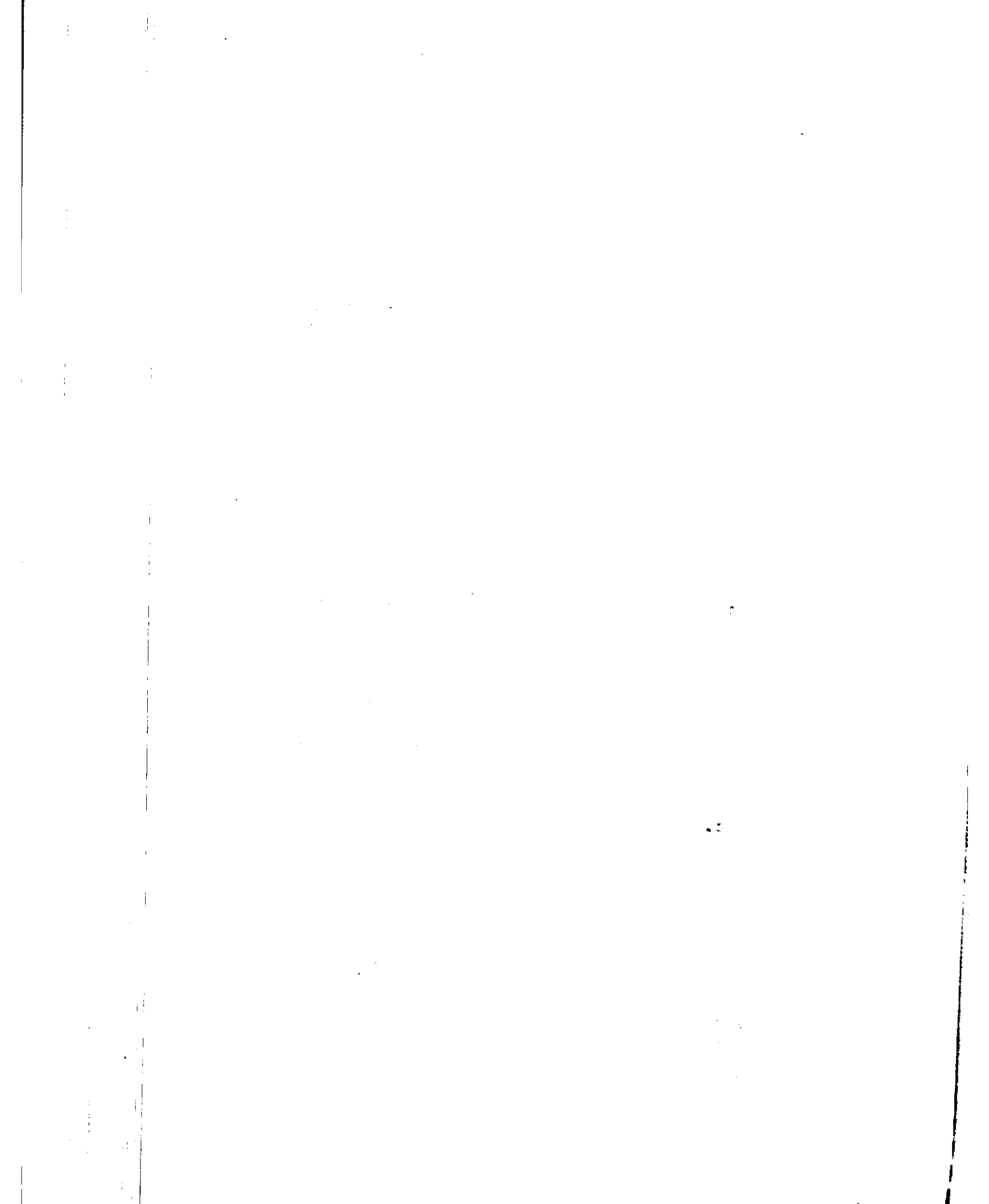
d'audience' prepared by the "juge rapporteur" is always supplemented by primary evidential materials (transcripts of testimony, documentation, reports, written pleadings etc.) which are available for consultation by the deciding judges. However, given the resource shortage in the Court of Justice, it is unlikely that those judges will find the time or the energy to examine these primary materials (especially when they are as complex as those presented in a competition case).

Proposals for Reform of the System of Judicial  
Review of Infringement Decisions

Introduction

We have seen above how the Court of Justice has been hindered in two ways in performing its self-professed task of subjecting infringement decisions to 'high level' judicial review. Firstly, there is the inability of the Court to perform full re-adjudication of an infringement case which derives from its limited powers of disposal under Article 173 EEC. Second, there is the crisis of resources inhibiting judicial fact-finding which derives from a multiplicity of jurisdictions and the shortage of manpower in the Court. Over the years, proposals to eliminate both of these obstacles to effective 'high level' review have been put forward.

Proposals for a 'Recours en Pleine Jurisdiction'  
from the Substantive Findings in Infringement Decisions





Before Regulation 17/62 was even enacted there were proposals to establish a 'recours en pleine juridiction' against infringement decisions. The so-called "Deringer Report" of 1961, which embodied the EEC Assembly's opinion on the proposal for Regulation 17/62, stated in this regard that:

"Il est un problème qui ne peut pas être résolu dans le règlement, mais que la Commission de la CEE ne devrait pas perdre de vue: c'est l'ampleur de contrôle de la Cour de Justice ... En ce qui concerne les décisions relative aux ententes ... les faits et leur appréciation économique et politique jouent un rôle important. C'est pourquoi il faudra décider si la Cour de Justice disposera d'un pouvoir de contrôle au fond ou s'il est possible d'instituer une instance spéciale, <sup>254</sup>intermédiaire entre la Commission et la Cour de Justice".

The suggestion here was clearly that the Court ought to be given, "un pouvoir de contrôle au fond", i.e., not the review jurisdiction or 'juridiction de l'anulation', of the Court (i.e. under Article 173(2) EEC), but a jurisdiction on the merits or 'juridiction de réformation' similar to that exercised under Article 172 EEC, or, alternatively, that a new subordinate tribunal ought to be given such power. This position has been followed consistently by the European Parliament during the 1962-88 period in its criticisms of the 'pure administrative approach' to adjudication set up in Regulation 17/62<sup>255</sup>. In 1985, for instance, Parliament stated that from the point of view of undertakings,

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254. Opinion of Parliamentary Assembly on proposal for Regulation No. 17, Doc. 104/1960-61, para. 118 (emphasis added).

255. See, e.g., Resolution of EP on 10th Report on Competition Policy, OJ 1981 C 144/19, para. 41 and Resolution of EP on 11th Report, OJ 1982 C 11/72, para. 47.



"the administrative approach lacked an essential ingredient without which any purely administrative approach is fundamentally defective; that is, a right of appeal to a higher tribunal on findings of fact"<sup>256</sup>.

The Commission itself joined with Parliament in 1982 to state that it found the absence of such a system of "une double instance de contrôle judiciaire" anomalous and expressed its support for:

"l'introduction d'une double instance: un tribunal de première instance qui se prononcerait tant sur les questions de fait que de droit, l'intervention de la deuxième instance étant alors limitée à un réexamen des questions de droit"<sup>257</sup>.

The belief in the merits of such a reform can be seen to be shared by K.P. Lasok in his evidence to the House of Lords Select Committee on the European Communities where, assessing the prospects of success of the proposed Court of First Instance which is to exercise part of the Court's existing jurisdiction vis à vis competition decisions<sup>258</sup>, he stated:

"The true solution lies in the creation of a court with the power to carry out what could be described as an "administrative" as opposed to "judicial review" of acts of the Community institutions; in other words, a court (or tribunal) which has the unlimited jurisdiction that the Court possesses only in exceptional cases"<sup>259</sup>.

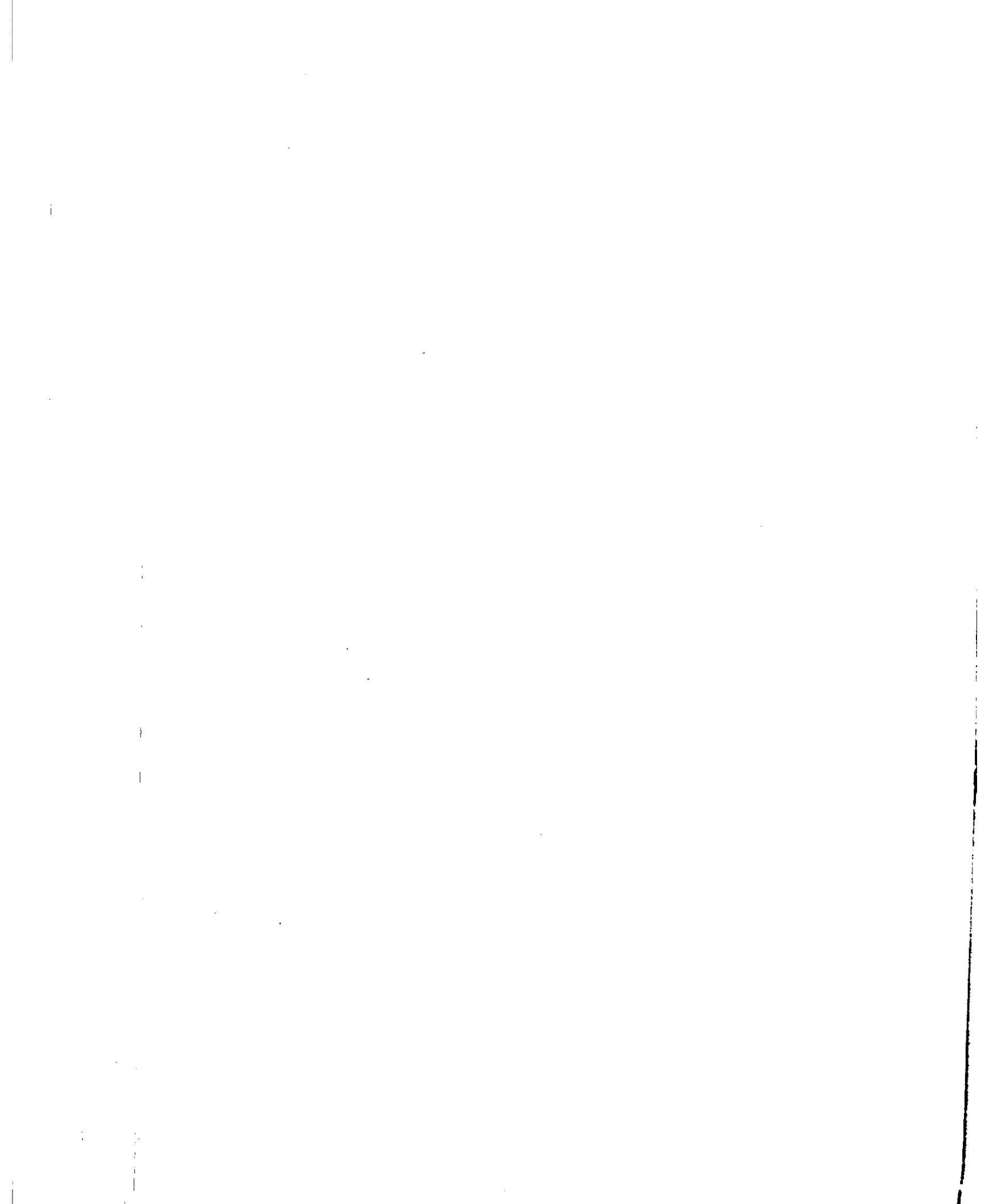
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256. Opinion of the Committee on Legal Affairs and Citizens' Rights on the Resolution of the European Parliament on the 14th Annual Report on Competition Policy, PE Doc. A2-128/85/Annex, 12.

257. Onzième Rapport sur La Politique Communautaire de la Concurrence, paragraph 16 (emphasis added).

258. For details of the Court of First Instance see next chapter.

259. HL Report, op. cit. supra at fn. 250, Evidence, page 83.



Widespread, therefore, is the conviction that 'high level' review of infringement decisions will be efficient only if that review is carried out in the context of a re-adjudication on the merits, by a tribunal with the power of 'réformation'

Proposals to Alleviate the Pressure of Resources  
vis à vis the Hearing of Competition Cases

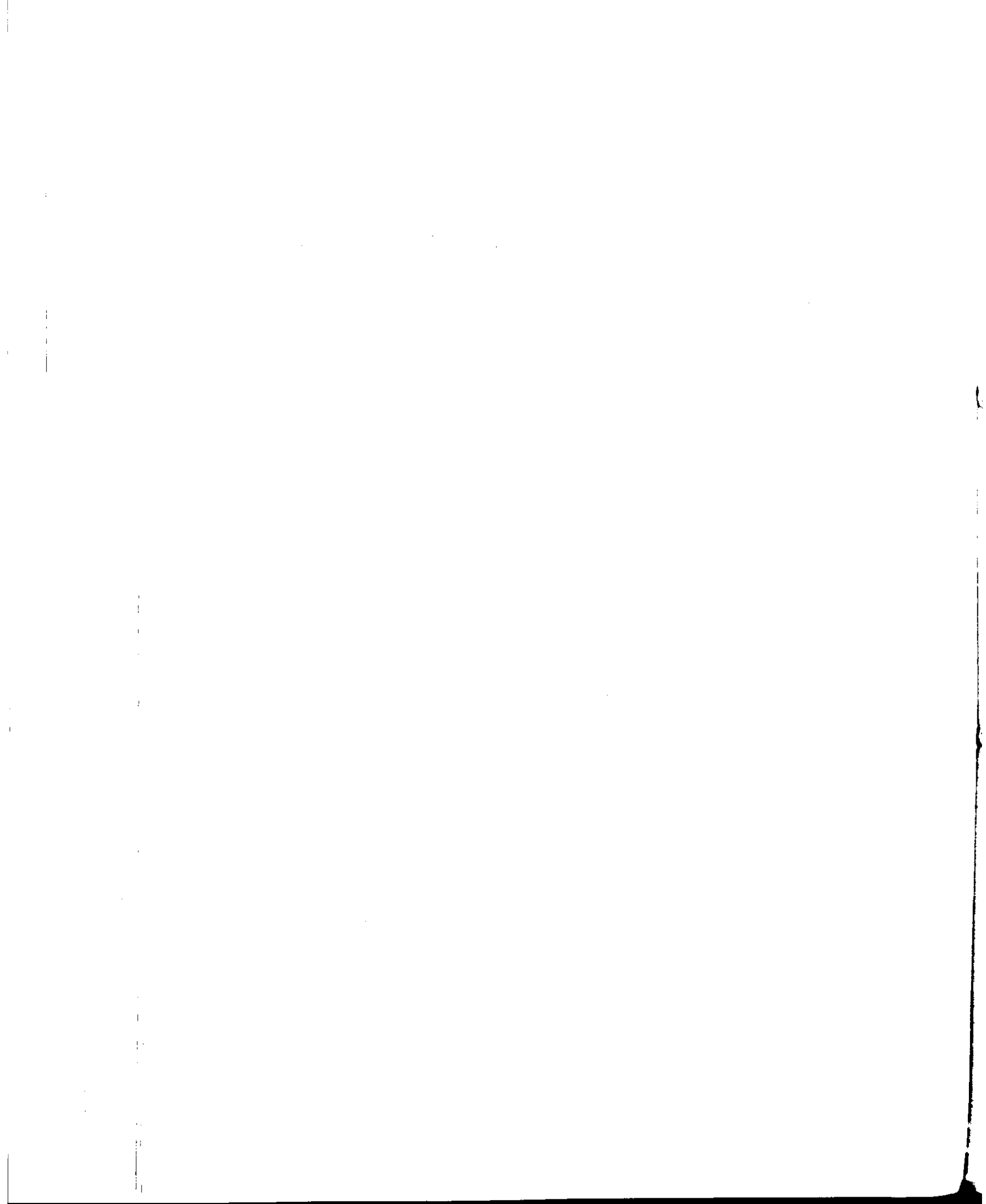
The problems caused by the over-burdening of the European Court have been the subject of proposals for reform since 1974 when the Court sought to be relieved of its jurisdiction in the so called 'staff cases',<sup>260</sup>. While that proposal was not adopted by the Council, it was decided in the same year to permit the Court to assign, within the context of its Rules of Procedure, the hearing of certain classes of preliminary rulings to chambers<sup>261</sup>.

In 1978 the Court produced a memorandum in which it proposed an increase in the number of judges and advocates general, certain changes in the Rules of Procedure and, most important for this study, the establishment of a Court of first instance to deal with actions brought by private persons in competition matters or for damages subject to a right of appeal to the Court of Justice on

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260. Kennedy, op. cit. supra fn 239, 9.

261. Council Decision 74/584 EEC Euratom ECSC of November 26, 1974, OJ 1974 L 318/22.



points of law<sup>262</sup>. The proposal to establish a first instance tribunal to deal with the competition case-load was not acted upon, however, and the Court had to wait until the inter-governmental conference of 1985 before the Member States provided the Treaty basis for such reform. Article 11 of the Single European Act, introducing Article 168A EEC, provides that the Council acting unanimously on a request from the Court of Justice may,

"attach to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of a appeal to the Court of Justice on points of law only and in accordance with the conditions laid down in the Statute [of the Court of Justice], certain classes of action or proceeding brought by natural or legal persons ".

The Council Decision establishing the Court of First Instance of the European Communities was adopted on the 24th of October 1988 and we shall consider its content in detail in the following part.

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262. Memorandum of 21 July, 1978 (published in 'EUROPE' of 20 December 1978) and proposals regarding measures to ensure the efficient operation of the Court (unpublished). Discussed in the 23rd Report of the House of Lords Select Committee on the European Communities, Session 1979-80, "European Court of Justice: R/2075/78, 4679/79, Proposals of the Court for its Reorganisation", 12 to 18. See also Kennedy, *op. cit. supra* fn 239, 10 to 12.





THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIESIntroduction

On the 24th of October 1988, the Council, according to the provisions of Article 168A of the EEC Treaty as introduced by Article 11 of the Single European Act, decided<sup>263</sup> to establish the Court of First Instance of the European Communities. The second recital of the preamble to that Decision states:

"Whereas, in respect of actions requiring close examination of complex facts, the establishment of a second court will improve the judicial protection of individual interests;

The reforms, therefore, are explicitly directed towards improving the quality of judicial scrutiny of complex factual issues at first instance. How well is this aspiration served by the substance of the legislation? In this part, we shall examine first the institutional framework of the new system for the judicial review of competition decisions and then, second, we shall assess what sort of impact this new system will have on the "judicial protection of individual interests" vis à vis infringement decisions.

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263. Council Decision 88/591 EEC Euratom ECSC of 24 October 1988, OJ L 319/1 of 25 November 1988.



The mechanics of the New System<sup>264</sup>

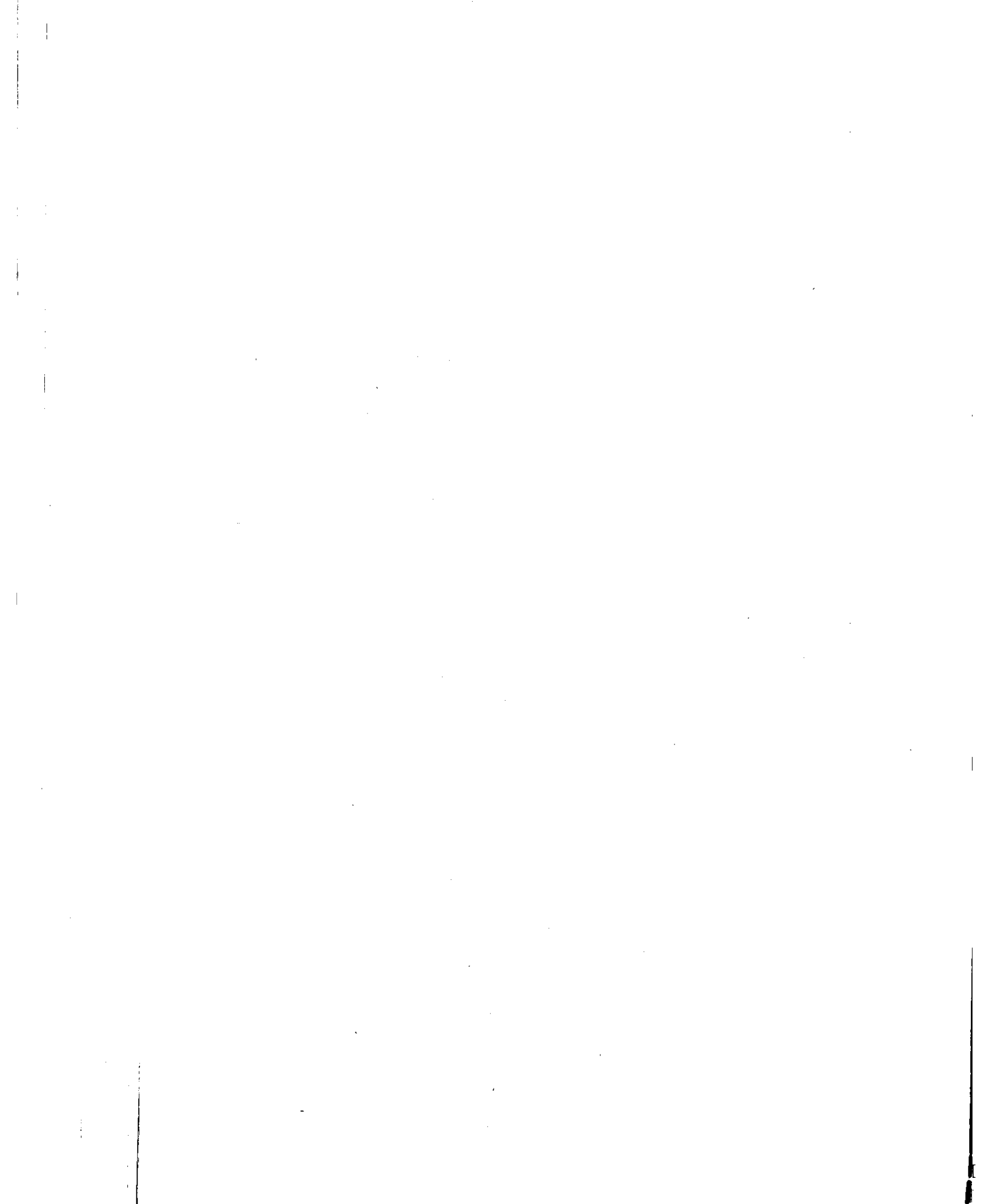
The CFI - Composition and Procedure

The Decision establishing The Court of First Instance, (CFI), provides that it will consist of 12 judges, appointed for renewable terms of six years, electing the President of the CFI from among their number for a renewable term of three years. Generally speaking, the CFI will sit in Chambers of three or five judges, but in certain cases - designated by the CFI's Rules of Procedure - it may sit in plenary session<sup>265</sup>. Further, the CFI will not as a rule be assisted by Advocates General, though again, in certain cases - designated by the CFI's Rules of Procedure -

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264. Governed by Article 168A EEC, Council Decision 88/591 EEC Euratom ECSC and Articles 44 to 54 of the Protocol on the Statute of the Court of Justice of the EEC, as inserted by Article 7 of that Decision. See generally, Kennedy, *op. cit.* supra fn 239, 21 to 27.

265. The need for the CFI to sit in plenary session was not accepted by the Court in its formal proposal since, in its opinion, it, "it is for the Court of Justice to ensure consistency in judicial decisions, avoid possible divergences between the chambers of the Court of First Instance and develop Community law", [Cou 8770/87, explanatory note accompanying proposed Article 2, para. 2], (although, without elaborating, it indicated that its proposal would not prevent the holding of plenary sessions "to discuss questions of law", [ibid.]). The alternative view, expressed in the evidence submitted to the Lords Committee (*op. cit.*, supra fn 245, Evidence, p36, Q. 159), was that the ability to sit in plenary session to resolve divergences between chambers on points of law, which could foreseeably be useful where there was no 'in point' ruling on the matter from the European Court, should not be eliminated. The Council has chosen in its decision to provide this 'safety valve'.



one of the judges themselves may be called upon to perform the task of an Advocate General<sup>266</sup>. The procedure before CFI will be governed by Title III of the Statute of Court of Justice<sup>267</sup> and by its Rules of Procedure which it will adopt in agreement with the Court of Justice, with the unanimous approval of the Council<sup>268</sup>. Until these Rules are adopted, the Rules of Procedure of the Court of Justice will apply to it 'mutatis mutandis'<sup>269</sup>.

The CFI is to take over the jurisdiction in competition cases presently exercised by the Court of Justice under Articles 172 and 173(2) of the EEC Treaty<sup>270</sup>. The exclusivity of the CFI's jurisdiction is underlined by Article 49 of the Statute of the Court of Justice, as inserted by Article 7 of the Decision, which provides, *inter alia*, that in the event of the Court of Justice receiving an application to adjudicate in such proceedings, it is required to refer the action to the CFI.

Appeals from the CFI to the Court of Justice

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266. Council Decision 88/591/ECSC/EEC/Euratom, Article 2. The new Article 46(3) of the Court Statute permits the submissions of an Advocate General to the CFI to be made in writing.

267. Article 168A(2) EEC; with the exception, (made by Article 46(1) of the Court Statute), of Article 20, which relates to preliminary rulings.

268. Article 168A(4) EEC.

269. Article 46(2) of the Court Statute.

270. Council Decision, Article 3(1)(c).



The Court of Justice is unequivocal in its desire to avoid becoming bogged down in appellate hearings after the CFI comes into operation. Rather, it would prefer, as the third recital of the preamble to the Council Decision puts it, "to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law": a task which the President of the Court, in 1978, called, "its true and main role within the framework of the Community"<sup>271</sup>. The limited grounds and the expedited procedure to be employed during appeal from decisions of the CFI underline this distaste for fact examination.

#### Limited Grounds of Appeal

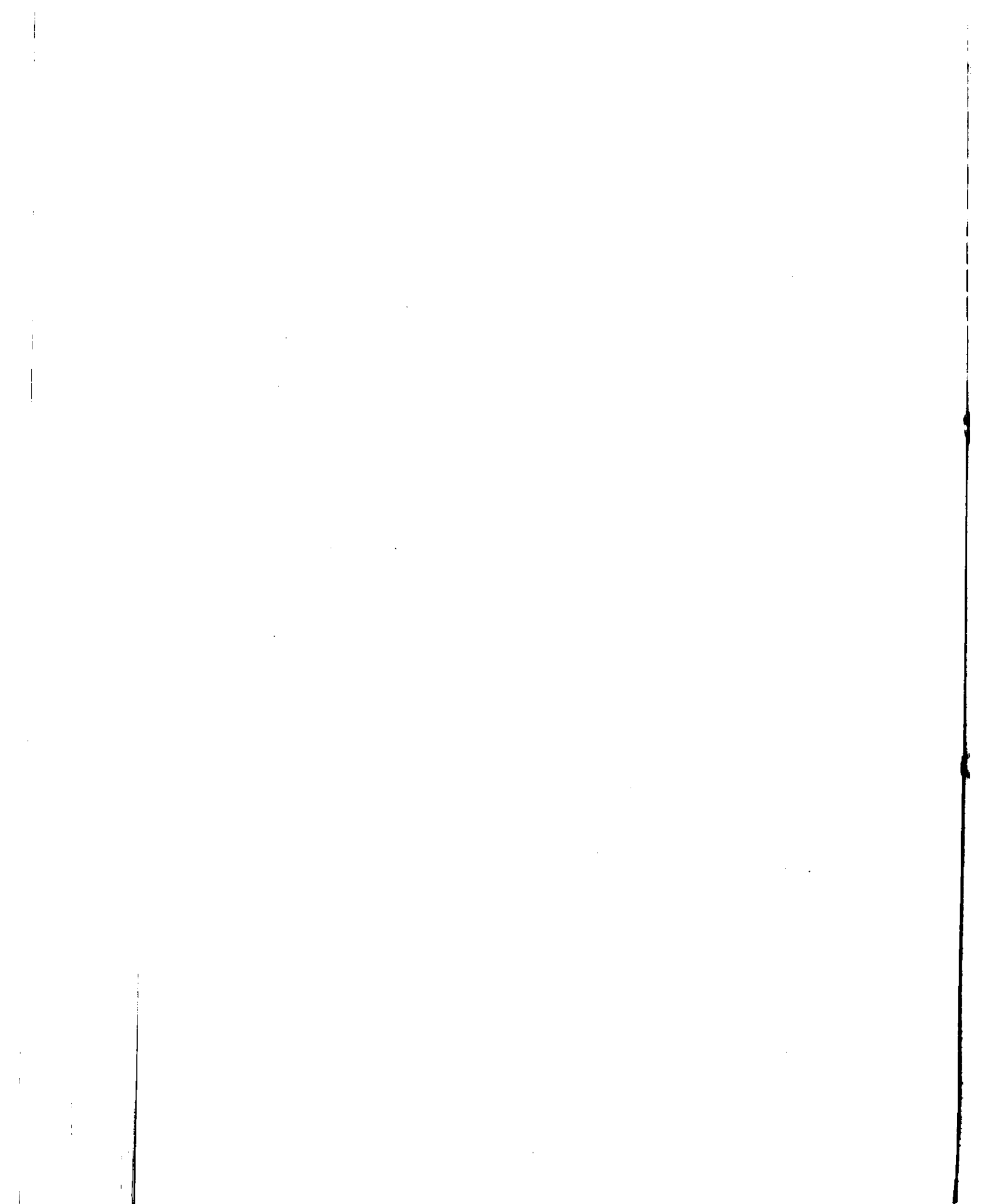
An appeal<sup>272</sup> will lie to the Court of Justice from the CFI<sup>273</sup> against final decisions and decisions disposing of the substance of a case in part or disposing of a procedural issue concerning a

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271. "EUROPE" No. 1034, of 20.12.78, p4.

272. The english version of the Council Decision refers to an "appeal" from the CFI to the Court of Justice. This should not be confused with the french legal term "appel" which represents a completely different concept. The french text, which uses the term "pourvoi", makes it clear that the appeal procedure is to be analogous to the "pourvoi en cassation" of the french system. This idea fits in nicely with the desire of the Council and Court to emphasise the latter's role as the Cour de Cassation or Supreme Court of the Community legal order.

273. The detailed rules of appeal procedure before the Court of Justice, which are to be laid down in its Rules of Procedure, are not yet available to the author. The proposed changes, set down in , and which are available to him, will be discussed in section B. below in relation to the impact of the reforms.





plea of lack of competence or inadmissibility<sup>274</sup>. Appeals are limited to points of law on grounds of, "lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance"<sup>275</sup>. It will be noted that in so far as this last ground of appeal more or less reproduces the ground for annulment of acts under Article 173(2) EEC which reads, "violation of the Treaty or of any rule of law relative to its application", the review by the Court of Justice of the CFI's "qualification juridique des faits" is guaranteed<sup>276</sup>. However, in contradistinction to review of infringement decisions under Article 173(2) EEC, review of the, "exactitude matérielle", of facts found by the CFI is likely to be eschewed by a Court of Justice anxious to escape the burdens of fact-finding. With regard to appeals in competition cases, President Due has indicated that, in the Court's view, "the findings of the Court of First Instance concerning the economic and competitive situation on the market should be considered as final"<sup>277</sup>. Two procedural devices which the Court of Justice

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274. Article 49(1) of the Court Statute.

275. Art 51 of Court Statute. This last ground of appeal is a revised form replacing the proposed, "incorrect application of Community law" included in the Court's Draft Proposal of 1987 [Proposal for a Council Decision establishing a Court of First Instance, Cou 8770/87, proposed Art 50 of Court Statute].

276. President Due has indicated in this regard that, "the [legal] criteria used for defining the relevant market [in a competition case] constitute a point of law subject to appeal ... [as does t]he question which party has to bear the burden of proof", op. cit. supra fn 237, 5.

277. *ibid.*

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will probably employ in dealing with appeals underline its reluctance to re-examine facts determined at first instance. Firstly, the Court has proposed that in hearing appeals it should have no power to undertake fresh preparatory inquiries / "mesures d'instruction"<sup>278</sup>, by which old items of evidence could be "re-heard" or new items of evidence introduced. Second, the Court has proposed that an appeal be made simply by lodging a note of appeal (stating the ground of appeal and the arguments of law relied upon) to which is attached the contested decision of the CFI<sup>279</sup>, which will contain 'in gremio' a statement of the facts that it has found proven and relevant<sup>280</sup>.

#### Oral Argument in Appeals

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278. Cou 8770/87, proposed Article 118(3) of Rules of Procedure and accompanying explanatory text. However, it should be remembered that the Court of Justice has a residual power under Article 21 of the Court Statute to obtain information which could be invoked in exceptional circumstances.

279. Cou 8770/87, proposed Article 112 of Rules of Procedure of the Court of Justice.

280. It is submitted that only if the Court were given good grounds for believing that the CFI had committed some truly gross factual error falling within the equitable scope of the "infringement of Community law" ground of appeal. The right to a fair hearing before an impartial tribunal; which is guaranteed by Article 6(1) of the European Convention on Human Rights (and is, therefore, according to the jurisprudence of the Court of Justice, a fundamental right of Community law which it is bound to defend) would, it is submitted, be violated in the event that the CFI did commit manifest or gross errors of fact. Alternatively, truly gross errors could also constitute an abuse of (judicial) power, again a ground implicitly contained in the "infringement of Community law" ground of appeal.



According to Article 52 of the Court Statute, appeals brought before the Court of Justice will consist of a written part and an oral part; provided that, in line with conditions to be laid down in its Rules of Procedure, the Court may, having consulted the parties and the Advocate General on the matter, dispense with the oral part. The new Article 120(1) of the Rules of Procedure of the Court of Justice enables the Court to dispense with the oral part unless one of the parties objects on the grounds that the written part did not permit him fully to defend his point of view. This provision differs from the formal proposal of the Court in which the Court could have proceeded to judgment without recourse to oral proceedings if - exercising unlimited discretion - it considered that they were not required<sup>281</sup>.

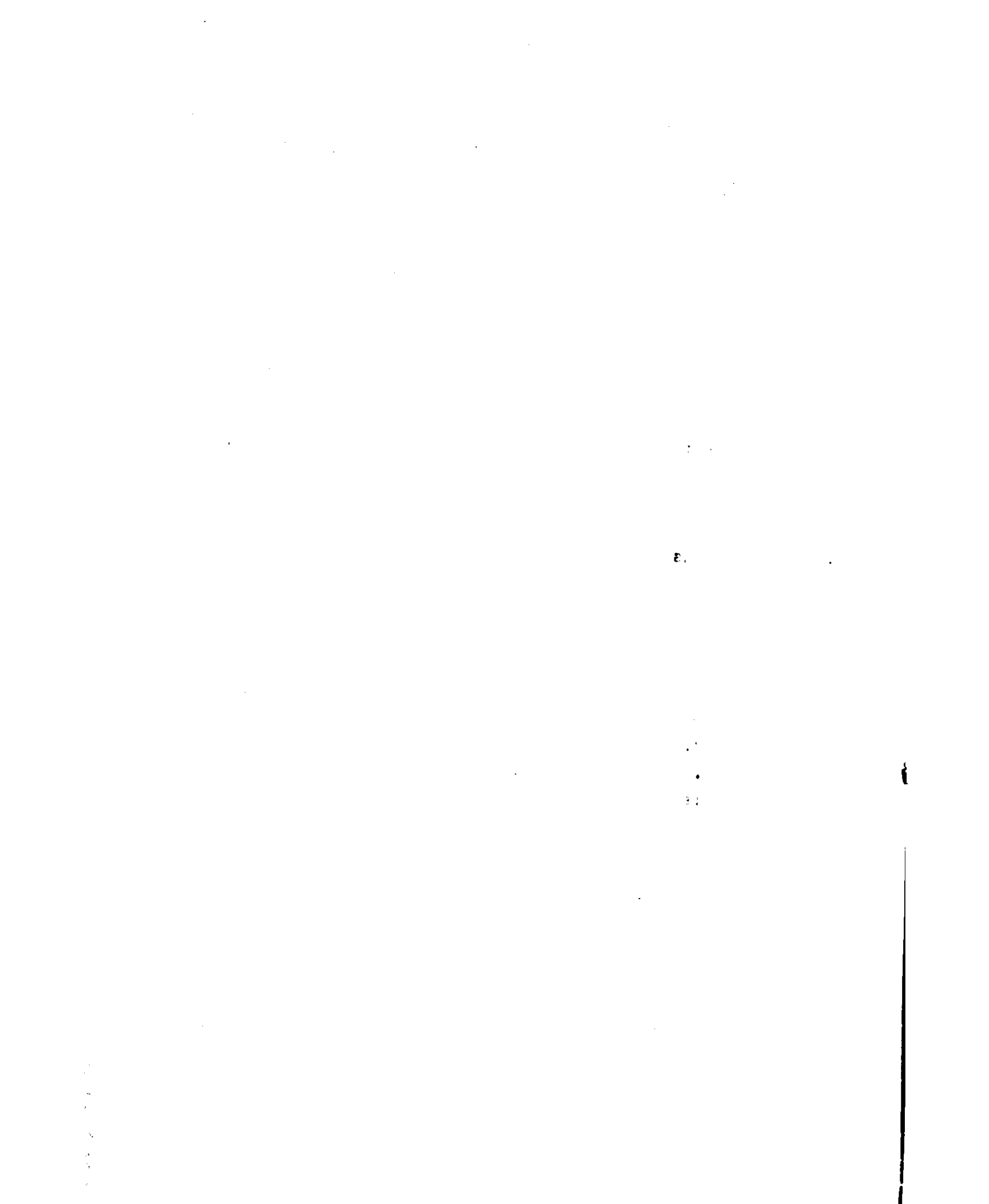
#### Disposal of Appeals

If an appeal is well founded, the Court of Justice will quash the decision of the CFI and, with regard to interlocutory decisions, refer the case back for disposal. If an appeal from a final decision of the CFI is well founded, the Court of Justice may, instead of referring the case back for disposal, issue final judgment itself. If a case is referred back to the CFI it is bound by the decision of the Court of Justice on points of law<sup>282</sup>.

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281. Cou 8770/87 (Final), cited by House of Lords Report, op. cit., fn. 14 supra, Addendum, para. 16.

282. Court Statute, Article 54, paragraphs (1) and (2) respectively.



The Court of First Instance and Improvement of  
Fact-Finding in the Review of Infringement Decisions

Introduction

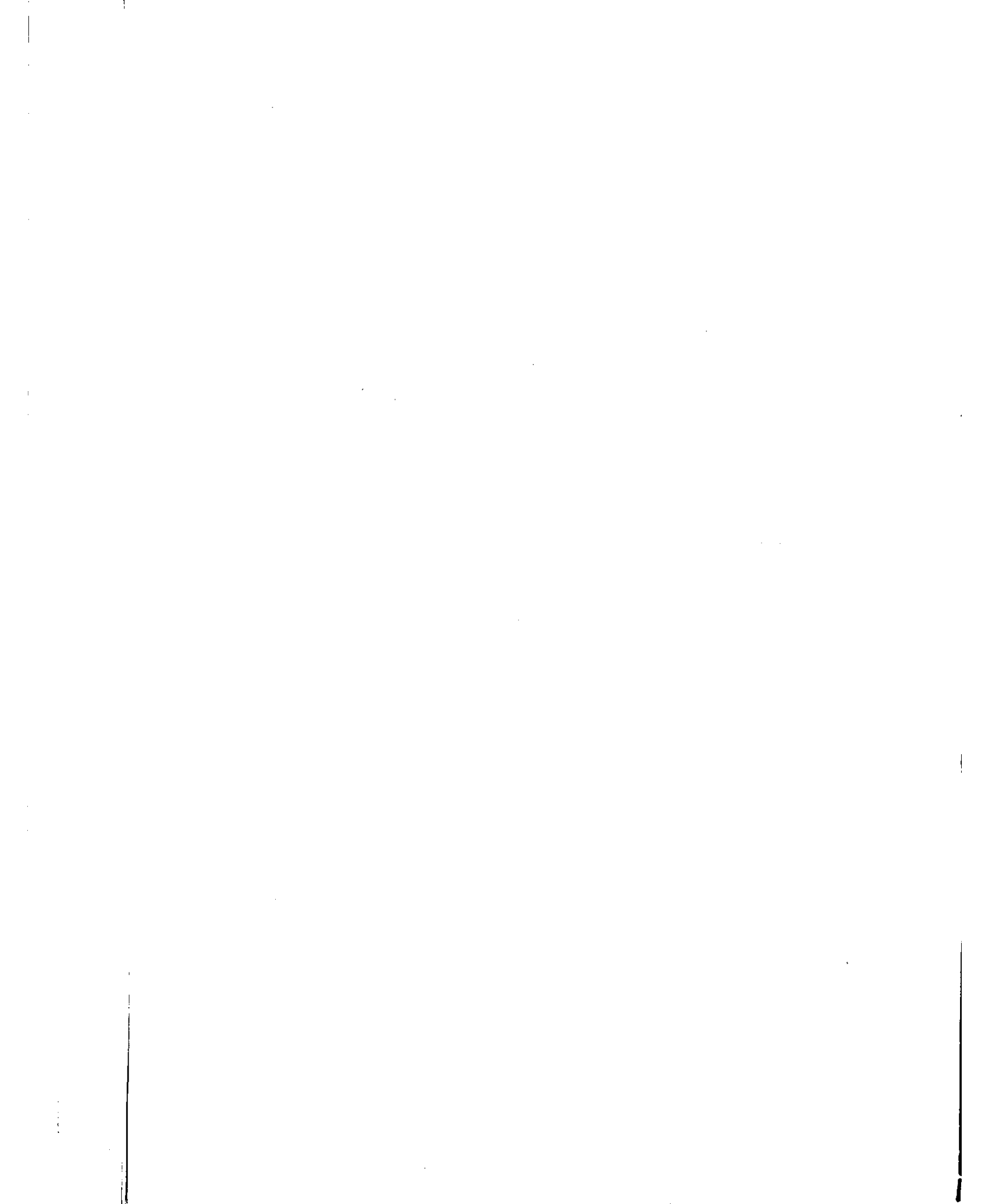
In this section we shall assess the creation of the Court of First Instance in terms of its likely impact on judicial fact-finding in the review of infringement decisions. We shall focus, first, on the resource implications of the new court and, second, on the nature of the CFI's jurisdiction.

Increased Resources as an Incentive to  
Undertake Fact-Finding

In so far as it creates, (in terms of numbers, composition and organisation), a second Court of Justice to exercise only 30% of the jurisdiction of its 'predecessor'<sup>283</sup>, the Decision to establish the CFI must be seen as a useful reform. This is particularly so since we have seen that the very heavy case load of the European Court has been at least partly responsible for its minimal use of its fact-finding powers. One would expect, therefore, that such generous provision would be likely to

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283. Figure suggested by the Court itself, and quoted in the House of Lords Report, *op. cit. supra* fn 250, para., 79.





encourage these judges to use their fact-finding powers<sup>284</sup> more widely. Indeed, in the words of one of the witnesses to the House of Lords Select Committee stated,

"I think probably where the difference [in judicial practice] will come is the preparatory inquiries [which], particularly if they [the judges of the CFI] are given specialist back up and particularly given the nature of the economic subject they will often be discussing, will be very much more extensive and more developed than the Court of Justice at the moment"<sup>285</sup>

Fact-finding techniques and devices hitherto unused by the Court of Justice for resource reasons are more likely to be tested out by the CFI with its, "relatively easy case-load"<sup>286</sup>. In many ways, the criticisms levelled at the Court of Justice for the under-utilization of its powers by the House of Lords Select Committee in its Report on the Court of First Instance may be met by the approach taken by the CFI.

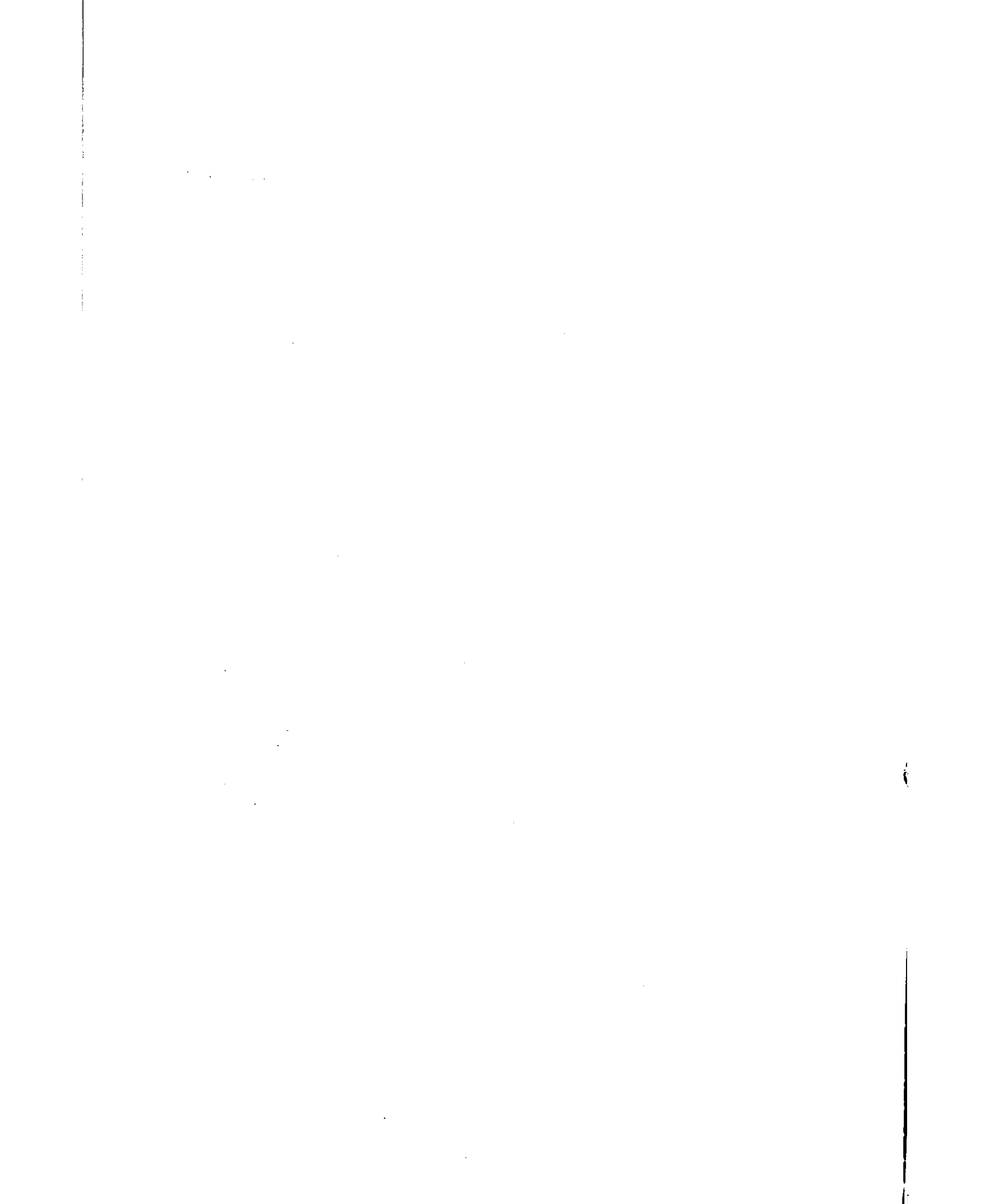
The Committee suggested that the procedure for oral examination of witnesses could be improved by allowing lawyers for the parties to take a more active part in the examination of witnesses. There

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284. Details of the fact-finding procedures of the CFI are as yet unavailable. The basic structure of proceedings before the CFI will certainly be similar to that of the Court of Justice, in the sense that Title III of the Court Statute will apply to them. However, the Rules of Procedure of the CFI (which, according to Art 168(4) EEC, have to be agreed between the two courts and then approved by the Council) are some way off - even in draft form.

285. House of Lords, *op. cit. supra* fn 250, Evidence, Q. 177, (per Joint Working Party on Competition Law of the Bar and Law Society, David Vaughan QC, Chairman).

286. Due, *op. cit. supra* fn 237, 13.



was room, the Committee suggested, for such adversarial techniques to supplement the inquisitorial function of the Court and help clarify facts<sup>287</sup>. This is, of course, an area in which the CFI will be free to experiment. The Committee also noted that the Court did not, as a matter of routine, require a list of all documents relevant to the case held by each party to be disclosed to the other party<sup>288</sup>. Again the CFI may explore this possibility, given its increased resources. Finally, the Committee felt that the lack of any procedure for "discovery of documents" as exists in Common Law systems impeded the fact-finding process. This procedure, whereby a court, on the application of one of the parties, orders the other to produce some class or specific item of documentary evidence sought by that party, would be, from the point of view of those contesting an annulment action, an improvement on the existing procedure. The problem is not one of coercive power<sup>289</sup>, but is, once again, one

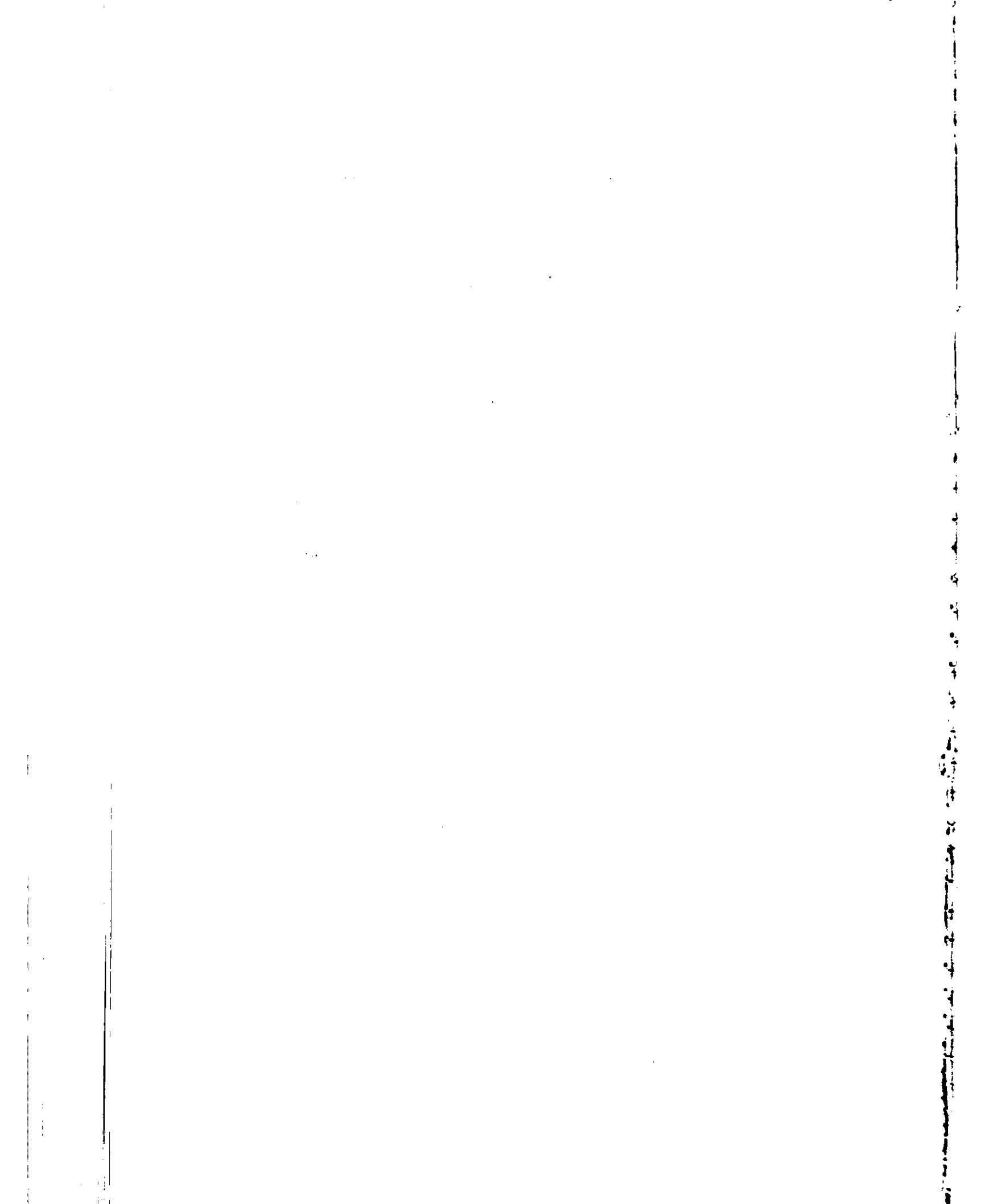
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287. House of Lords Report, op. cit supra fn 250, Addendum, para. 10.

288. Although this is a weakness in the fact finding process which could, in principle, damage the interests of either party, the practice of the Commission of giving more or less unrestricted access to the file of information relevant to an Article 85/86 EEC decision [12th Report on Competition Policy, point 32] more or less removes the practical import of this criticism as far as the interests of an undertaking seeking annulment of such a decision are concerned.

289. Formally speaking, the Court has no power to punish a refusal to produce evidence; indeed, all it is expressly empowered to do by the Treaties is to "take note" of the refusal [Court Statute, Article 21]. However, on the rare occasions where this has occurred, the Court has shown no hesitation in punishing what it views as behaviour

(Footnote continues on next page)



of lack of resources. The crucial defect highlighted by the Committee is that, as a result of time restraints, the Court will seek production only insofar as it considers it absolutely necessary for it to reach its decision. If the Court believes it has heard all it needs to in order to proceed to judgement it will refuse to admit more<sup>290</sup>. The CFI, which will operate using the same inquisitorial 'modus operandi' will, in contrast to the Court of Justice, have more time available to allow parties to seek production of documents. Although the traditional discovery procedure which exists in Common Law jurisdictions can become extremely burdensome, in that it allows the contestants great freedom in using the powers of the judge to search for relevant documents (a freedom which, of course implies the opportunity for abuse) a move towards enhanced control by the parties over production of documentary evidence, combined with greater availability of judicial time to allow such freedom, could do much

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(Footnote continued from previous page)

threatening the integrity of its review function by using other very effective coercive 'tools'. In the case of an appeal against a Commission decision sanctioning infringement Art 85(1) EEC, if refusal were to come from the applicant undertaking, the Court would simply infer the truth of the Commission findings which the undisclosed information is alleged to rebut, Case 19/77, "Miller Internationale Schallplatten GmbH v Commission", [1978] ECR 131 (in which truth of Commission findings was inferred), or, if it were the Commission which refused to disclose information, simply proceed to annul the decision appealed against, e.g., Case 155/78, "M v Commission", [1980] ECR 1797 (in which Commission decision was annulled).

290. See e.g. Joined Cases 19 and 65/63, "Prakesh v. Commission" [1965] ECR 533 at 561.

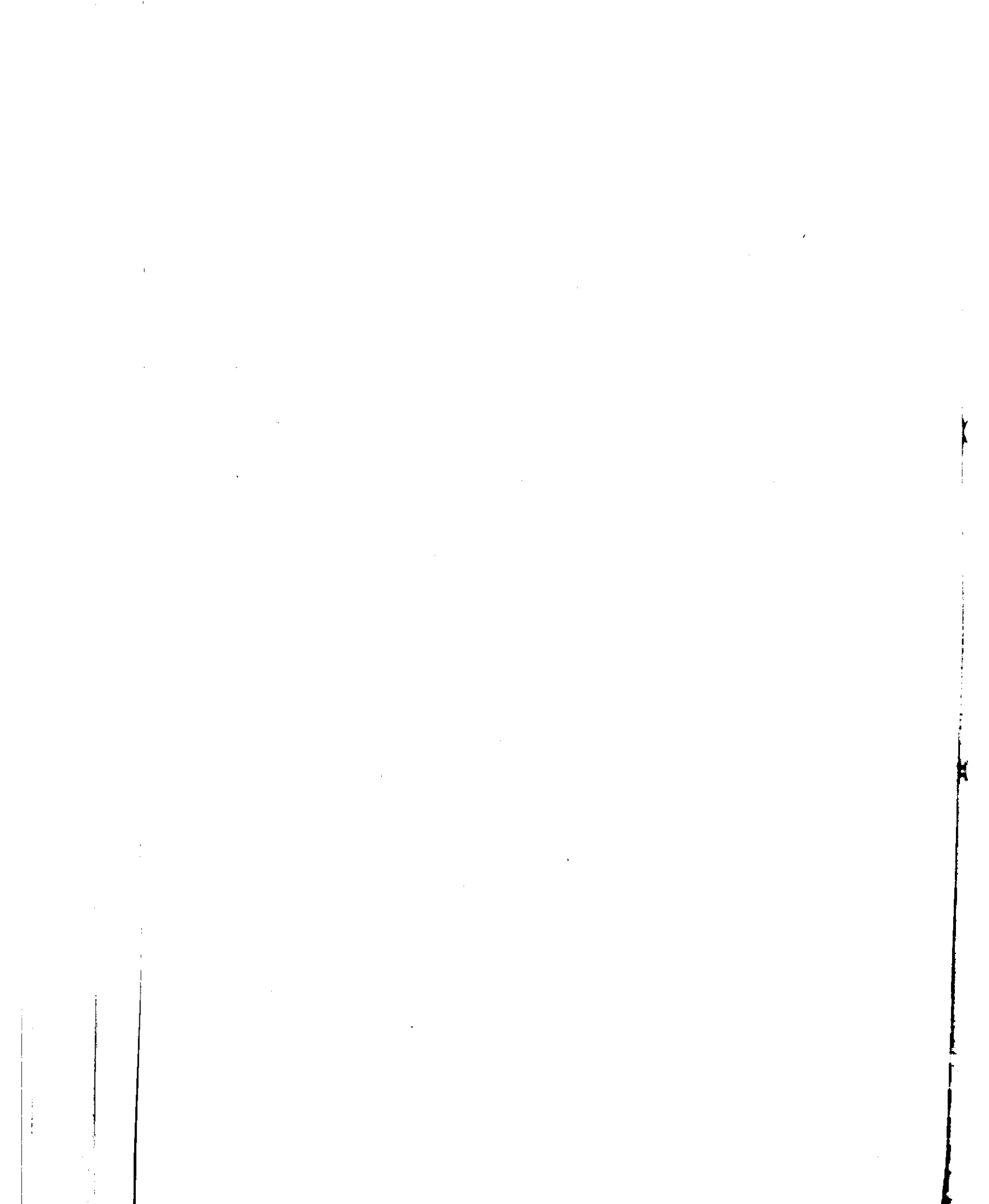


to enhance the quality of 'high level' judicial review of infringement decisions.

The Continuing Lack of a 'Jurisdiction de Réformation'  
as a Barrier to Improved Use of Fact-Finding Powers

Previously we have discussed how the European Court's lack of unlimited jurisdiction vis à vis infringement decisions could discourage it from subjecting them to 'high level' review. We saw that the limited powers of disposal available to the Court under Article 173 EEC make full re-adjudication of infringement decisions impossible. We concluded, therefore, that the Court of Justice would perhaps be reluctant to investigate the accuracy of Commission fact evaluation when such investigation could only be carried out in the context of reviewing the legality of the infringement decision and not for the purpose of re-adjudicating the substance of the case.

We also saw that, for this reason, the creation of 'pleine juridiction' with respect to infringement decisions has been suggested for many years as one solution to the problem of the Court of Justice's under-utilization of its powers of inquiry vis à vis those decisions. However, the Court of First Instance established in 1988 will exercise only the existing jurisdiction of the Court of Justice over infringement decisions, i.e. that under Article 173 EEC; it will not have the power to re-adjudicate analogous to that available under Article 172 EEC. Consequently, it is submitted that the Council Decision of 24 October, in failing to extend the substantive scope of judicial review of infringement decisions, has done less than it could have done to improve the judicial protection of individual interests vis à vis infringement decisions.





### Conclusion

The creation of the Court of First Instance is something of a mixed blessing, it brings improvements, but those improvements are brought at a price - perhaps a high one. The transfer of the competition case jurisdiction to the CFI is, to a large degree, to be welcomed by applicant undertakings, although the failure of the Council to extend the substantive scope of judicial review of infringement decisions by creating a 'recours en réformation' is perhaps unfortunate. In terms of the injection of resources it brings it will almost certainly improve the quality of 'high level' judicial review of infringement decisions. However, insofar as the creation of the CFI is the response to a very specific problem - the overloading of the Court of Justice - the improvements which it will bring are also necessarily limited.

The whole process of reforming the structure of judicial review of infringement decisions was aimed solely at relieving the adverse effects which the European Court's resource crisis has had on the 'high level' judicial review of infringement decisions. On the other hand, this paper has demonstrated that the resource crisis of the Court is primarily a 'symptom' of an underlying 'cause' in the system for the adjudication of cases under Articles 85(1)/86 EEC. In concentrating on alleviating this 'symptom', the creation of the CFI ignores the fundamental 'cause' of the resource crisis, i.e. the lack of confidence which undertakings have in the treatment they receive during infringement proceedings, which in turn derives from the inappropriate allocation of adjudicatory power to the Commission. To suggest an analogy, it is as though one had a factory producing sulphuric acid where employees were not issued with protective clothing. Clearly, a very large number of acid burns requiring hospital treatment would be likely to

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occur in these circumstances. However, imagine that the local hospital (a general hospital dealing with many different sorts of cases) was unable, due to lack of specialist resources, to give these unfortunates the care they needed. The creation of the Court of First Instance with respect to the review of infringement decisions is analogous, it is submitted, to establishing a special acid-burns hospital near our imaginary factory to relieve the 'case-load' of the general hospital. Just as there is a more direct solution in the analogy (i.e., ensuring that the factory workers were properly clothed) so, it is suggested, there are more direct ways of protecting undertakings against injustices arising in infringement decisions than the creation of a CFI.

In the following part we shall examine the alternatives to the CFI which were and are available as a means of addressing directly the lack of confidence in the administrative stage of infringement proceedings.



STRUCTURAL SEPARATION OF ROLES WITHIN THE COMMISSION  
AS THE BEST GUARANTEE OF ADJUDICATORY DUE PROCESS

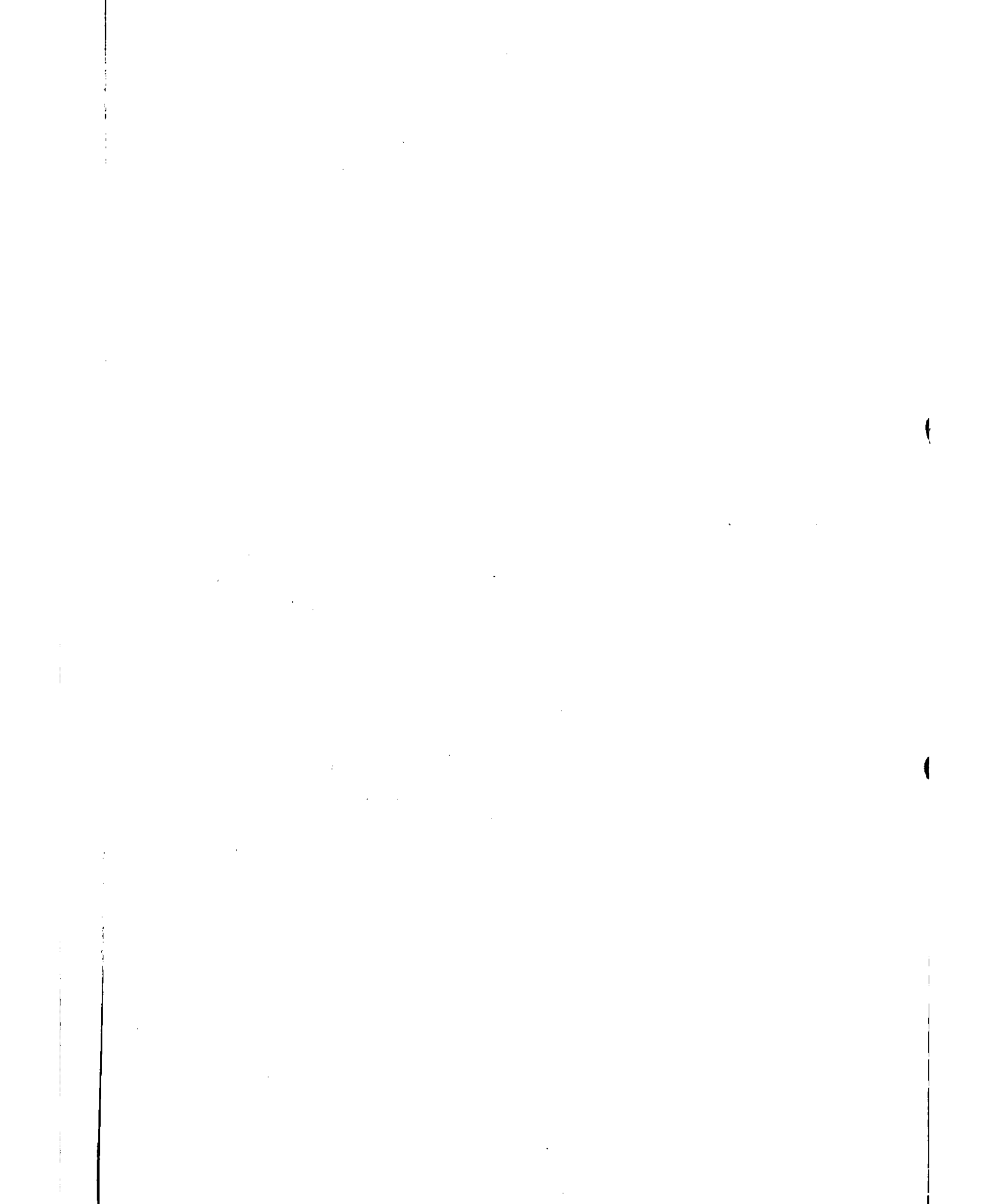
Introduction

In the last part we examined the reforms introduced in 1988 by the Council of Ministers in the shape of the Court of First Instance. More specifically we sought to assess the impact of this reform on the fact-finding procedures used in the 'high level' judicial review of infringement decisions. We concluded that part by noting that, while the Council's move would be likely to improve 'high level' review with the injection of much needed human resources into the system, it did not address the fundamental problem of regulatory mis-match which is responsible for placing so much emphasis upon this form of review vis à vis infringement decisions.

The failure to address the issue of regulatory mis-match directly is truly exasperating, since, the division of powers in anti-trust adjudication has been explicitly debated and guaranteed in all comparable systems<sup>291</sup>. In this part we shall look at the administrative systems for the adjudication of anti-trust cases established in the United States and France and examine how they have attempted to divide accusatory and adjudicative roles within those systems. Then we shall proceed to examine the criticisms of

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291. See, House of Lords Report, op. cit., supra fn 138, pp 69 and 78.



the European Parliament and of business circles arising from the Community's failure to address regulatory mis-match directly. Finally, we shall look at ways in which, with relatively little effort, the Council or Commission could tackle the problem themselves.

Division of Accusing and Judging Roles within the  
Federal Trade Commission under  
the Anti-Trust Laws of the United States

Introduction

The United States of America pioneered the area of anti-trust with its 'Sherman Act' of 1890<sup>292</sup>. This and other laws created specific criminal offences relating to anti-competitive cartels and to monopolies<sup>293</sup>. These offences are, naturally, prosecuted and punished via the judicial machinery of the US District Courts and the courts of the various states.

However, in addition to the criminal court system, there exists a parallel administrative system for the enforcement of the anti-trust prohibitions centred on the Federal Trade Commission (FTC). The FTC was established in 1914<sup>294</sup> with the mandate of

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292. USCA, Title 15, Chapter 1.

293. *ibid.*, ss 1 and 2.

294. Federal Trade Commission Act of 26 September 1914.

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investigating and suppressing the same sort of unfair trade practices prohibited under the Sherman Act. To this extent the FTC is explicitly empowered to act as both prosecutor (with discretion to decide whether proceedings are in the public interest or not) and judge (with power to issue orders prohibiting conduct which it finds violatory of the anti-trust laws)<sup>295</sup>.

#### Adjudication by the FTC

If the FTC, "has reason to believe", that a violation of the anti-trust laws is taking/has taken place and it considers that proceedings by it, "would be in the public interest", it may issue a written complaint stating its charges against the relevant undertakings. The latter then have a right to appear before the FTC to show cause why an order requiring them to cease and desist from specified conduct should not issue. If, upon hearing the undertakings, the FTC is, "of the opinion", that a violation exists, then it makes a written report stating its findings as to the facts and issues an order requiring the undertakings in question to cease and desist from certain specified conduct<sup>296</sup>. Undertakings who are subject to a cease and desist order may have their cases reviewed, within a specific time limit, by a United States Court of Appeals<sup>297</sup>.

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295. *ibid.*, s 5(b).

296. *ibid.*

297. *ibid.*, s 5(c).

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The Administrative Procedure Act: Hearings,  
Record and Initial Decisions

In 1946, the adjudicatory system described above - and those of all other federal administrative agencies which were also determined on the basis of a written record after an opportunity for an agency hearing - was fundamentally reformed by the Administrative Procedure Act<sup>298</sup> (APA). The (APA) provides, inter alia, that the officer who, "presides at the reception of evidence", in an adjudication (i.e. who 'hears' the parties) is the person who must take the relevant adjudicatory decision on behalf of the agency in question<sup>299</sup>. This 'adjudicator' may either be the panel of persons who comprise the agency itself (in the case of the FTC, the five commissioners appointed by the President), or one or more of this panel, or an officer appointed by the agency for this purpose<sup>300</sup>. The officer presiding at the hearing has total control over the summoning of witnesses, the receipt of evidence, the course of the hearing and the administration of oaths<sup>301</sup>. The transcripts of all evidence received etc. constitutes the "exclusive record"<sup>302</sup> from which the officer's decision (and any order issued) must be clearly and explicitly deduced<sup>303</sup>. Where hearings are presided over by an

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298. Act of 11 June 1946.

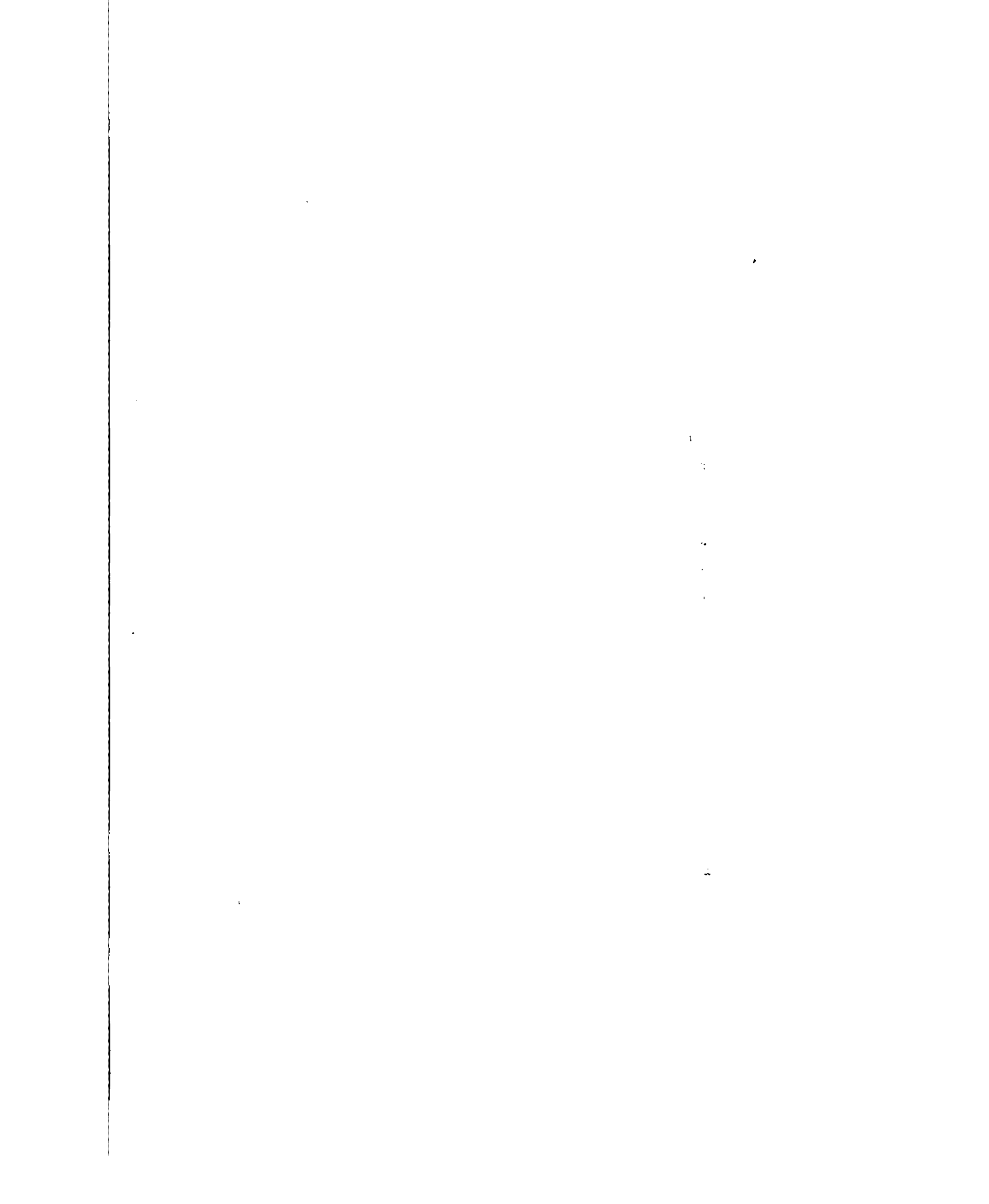
299. USC Title 5, Chapter 5, Subchapter II, s 554(d).

300. *ibid.*, s 556(b).

301. *ibid.*, s 556(c).

302. *ibid.*, s 556(e).

303. *ibid.*, s 557(c).



officer appointed by the agency, his "initial decision" becomes the definitive decision of the agency within a certain time period unless there is an appeal to or review by the agency<sup>304</sup>.

**The Administrative Procedure Act: Separation  
of Powers and Administrative Law Judges**

Officers appointed by an agency like the FTC to perform adjudications are required by the APA to be "administrative law judges"<sup>305</sup> (ALJ's). It is made clear by the APA that ALJ's are to form an independent corps within each agency who are not to, "perform duties inconsistent with" their adjudicatory ones<sup>306</sup>. ALJ's are appointed by the relevant agency and, as such, are employees of that agency; however, they may be removed from office only for "good cause" established and determined by the independent Merit Systems Protection Board (MSPB) on the record after the opportunity for a hearing<sup>307</sup>. Finally, the pay (and

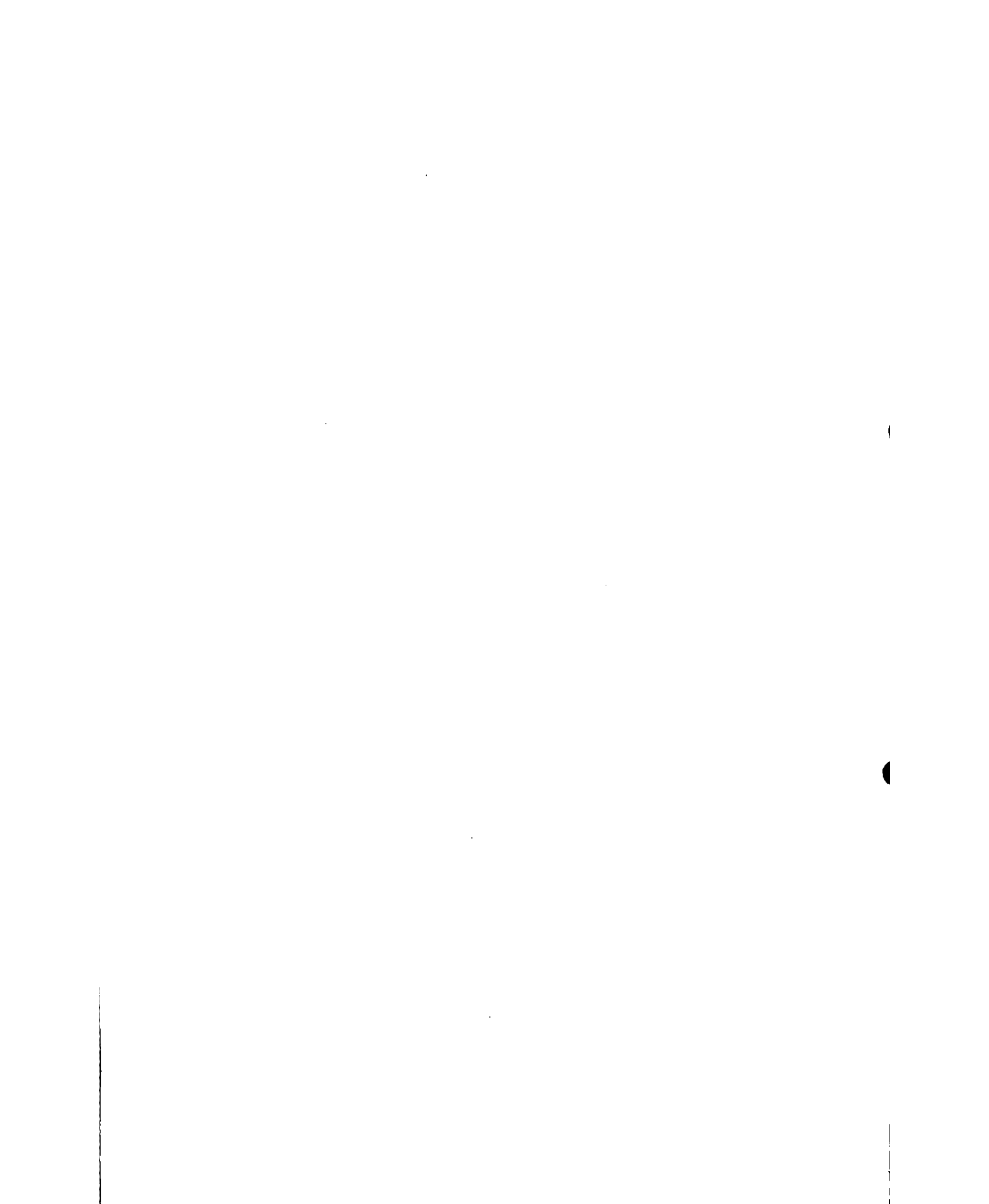
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304. *ibid.*, s 557(b). In addition, it is possible for an agency to require, as a general rule or in a specific case, that the record established during the hearing be certified to it for decision (*ibid.*).

305. *ibid.*, ss 556(b)(3) and s 3105. The term "administrative law judge" was introduced in 1972 by decision of the Civil Service Commission [(CSC Reg) 5 CFR s 930.203a] to replace the term of "hearing examiner" originally used by the APA.

306. *ibid.*, s 3105.

307. *ibid.* s 7521. Clearly, the MSPB's decision to remove an ALJ is itself subject to APA requirements and, therefore, must be carried out by another ALJ.



pay increases) to which an ALJ is entitled are determined not by the employing agency but by the Civil Service Commission<sup>308</sup>.

In performing their functions as adjudicators, ALJ's are required by the APA to be insulated both from the individuals against whom an order is proposed to be issued and from agency employees dealing with earlier stages of cases. The Act achieves this by placing obligations upon the ALJ himself and upon the other agency personnel involved in a case, it provides:

"[An ALJ may not] consult any person or party on any fact in issue unless upon notice and opportunity for all to participate, or be responsible to or subject to the supervision or direction of any officer or agent engaged in the performance of investigative or prosecuting functions for any agency.... [and no] employee or agent engaged in the performance of investigative or prosecuting functions for any agency in a case may not in that or any factually related case, participate or advise in the decision ... except as witness or counsel in public proceedings"<sup>309</sup>.

#### Conclusion

The APA provides that whoever proposes that an order be issued by an agency bears the burden of proof. Further, it requires that a decision to issue an order must be explicitly, "supported by and [be] in accordance with reliable, probative and substantial evidence"<sup>310</sup>. In requiring this, the APA also institutes a fully

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308. *ibid.*, s 5362.

309. *ibid.*, s 554(d).

310. *ibid.*, s 556(d).

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triadic structure for the performance of the adjudications which precede the issue of such orders. Discharge of the burden of proof is principally determined by an independent person within the agency and not 'ex post facto' in the context of judicial review. Similarly, as a rule, the reliability, probity and sufficiency of evidence is subject to independent evaluation at the stage of adjudication rather than on appeal<sup>311</sup>.

While the scope of the intra-agency separation of powers mandated by the APA is, by no means, free from criticism<sup>312</sup>, the appropriateness of such separation in the context of accusatory proceedings such as those before the FTC for violation of the anti-trust laws is taken, more or less, for granted by scholarly opinion in the US<sup>313</sup>.

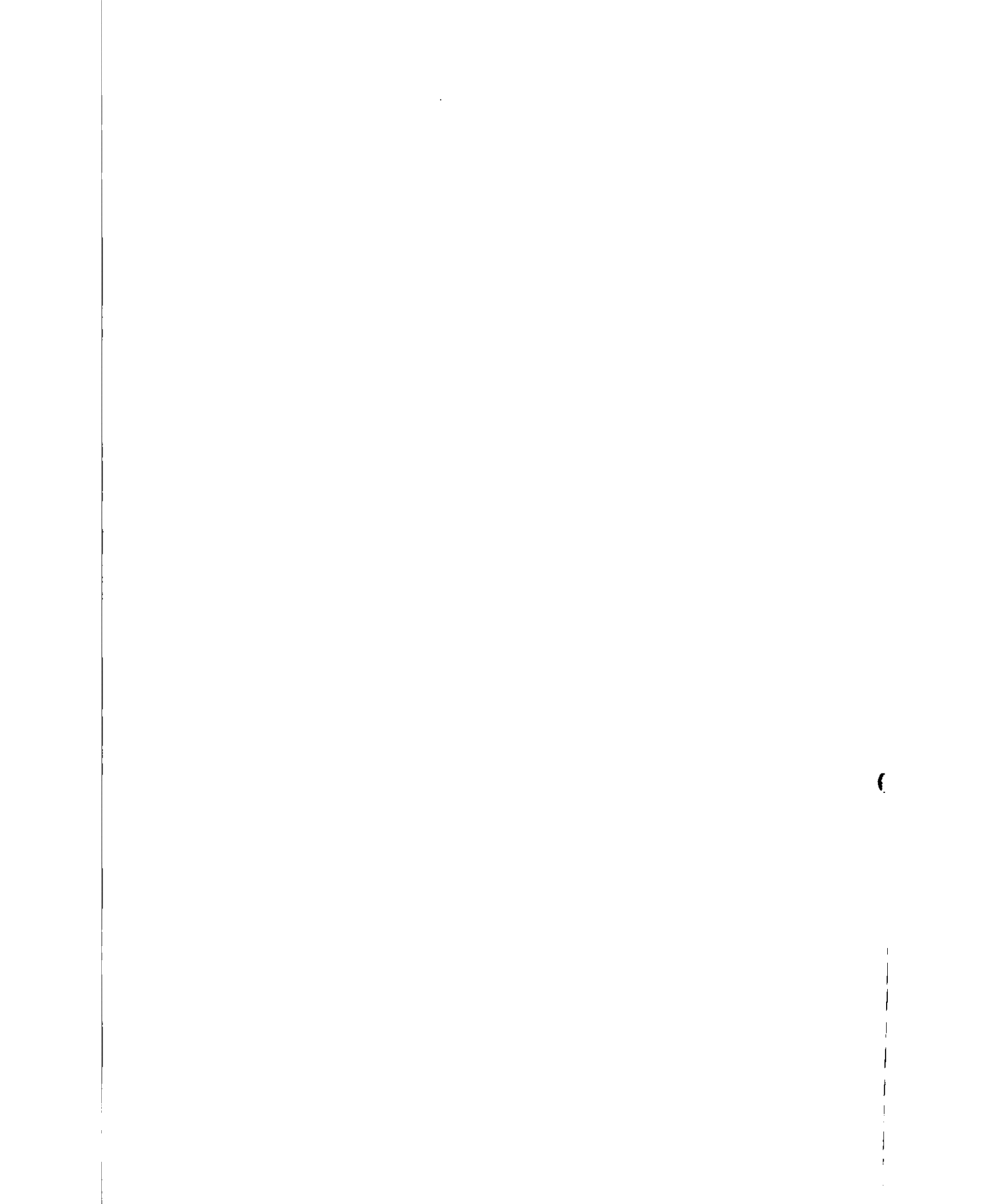
Division of Accusing and Judging Roles within the  
"Conseil de la Concurrence" under French Anti-trust Law

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311. In 'Universal Camera Corp. v. NLRB' 340 US 474 (1951), the US Supreme Court underlined the decisive weight which the evidential determinations of the ALJ have vis à vis those of the agency in the event of review of "initial decisions" by the latter.

312. The principal criticisms of the ALJ system arise in connection with its use in 'non-accusatory' (what we have previously termed 'administrative' or 'policy applying') decision-making: see Pops, op. cit. supra fn 112, also Boyer, op. cit. supra fn 28.

313. See, e.g., Gerald Harwood, "How Necessary is the Administrative Law Judge", 6 Western New England Law Review (1984), 793.



## Introduction

Like the United States, France has a dual system of anti-trust enforcement. On the one hand, anti-competitive behaviour in the form of cartels or abuses of dominant market position are subject to criminal sanctions applied by the courts<sup>314</sup>. On the other hand, there exists an administrative system for the enforcement of these prohibitions, which is centred upon the "Conseil de la Concurrence" (the Conseil). The Conseil is empowered to issue cease and desist orders like the FTC, but may also impose financial sanctions which may amount to 5% of turnover for corporate actors and 10 million francs for individuals<sup>315</sup>. The Conseil is capable of acting in co-operation with the "Ministre de l'Economie" or independently of it. In both cases, adjudications involving the Conseil are characterised by a clear separation of functions.

### Conseil de la Concurrence: Composition and Procedure

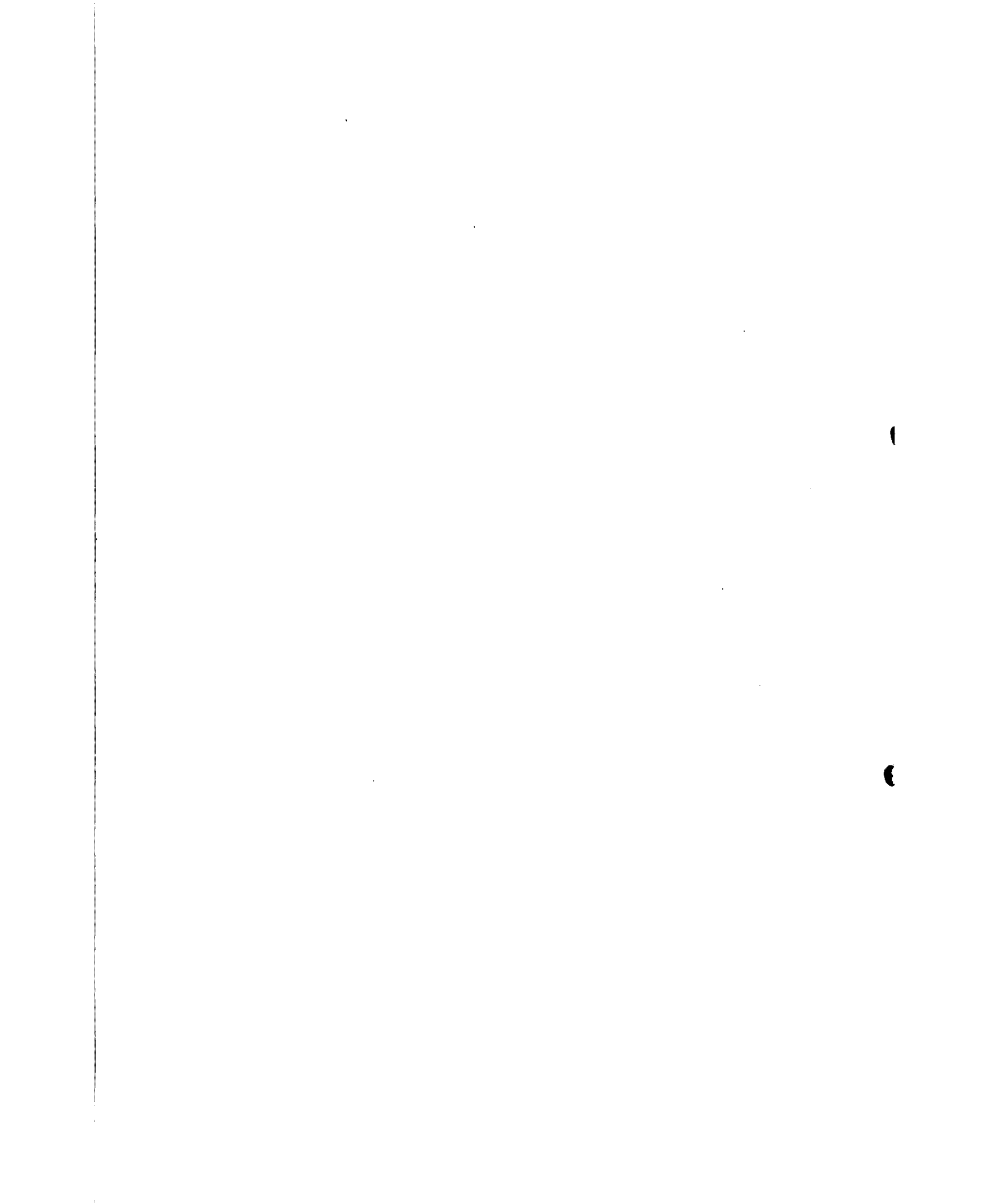
The Conseil consists of 16 members nominated by executive decree for renewable terms of six years<sup>316</sup>. Seven of these are

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314. Ordonnance No. 86-1243 of 1 December 1986, Article 17.

315. *ibid.*, Article 13.

316. *ibid.*, Article 2.



recruited from members of former members of the judiciary<sup>317</sup>, four are selected from a list, prepared by the Conseil's judicial members, of eight individuals experienced in the fields of economics, competition, or consumer concerns<sup>318</sup> and five are chosen from industry or the professions<sup>319</sup>. The full time posts<sup>320</sup> of president and two vice-presidents of the Conseil are appointed from its judicial members (excluding those appointed from 'juridictions judiciaires') and its lay members<sup>321</sup>. The Rapporteur General and other permanent rapporteurs to the Conseil are appointed by the executive on the proposal of the President of the Conseil<sup>322</sup> and the role of the commissaire du gouvernement<sup>323</sup> before the Conseil is performed by the designate of the "Ministre de l'Economie"<sup>324</sup>. The Conseil may sit, "en séance plénière" or in, "sections"<sup>325</sup> and may act within strict limits via its,

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317. *ibid.*, Art 2(1), which includes judges from both the 'juridictions administratives' and 'juridictions judiciaires'.

318. *ibid.*, Art 2(3).

319. *ibid.*, Art 2(3).

320. *ibid.*, Article 3.

321. *ibid.* Article 2(3), which further provides that the judicial members of the Conseil can provide no more than two of these posts and the lay members must provide no less than one of them.

322. *ibid.*, Art 4.

323. This position, which is a feature of French judicial procedure, is analogous to the role of the Advocate General before the Court of Justice.

324. *ibid.*, Art 3.

325. *ibid.*, Art 4.

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"commission permanente" composed of the President and two vice presidents<sup>326</sup>.

The Conseil may act either on its own initiative, or when "saisi" by one of a list of bodies including the "Ministre de l'Economie", local authorities, professional, industrial and consumer organisations and individual undertakings<sup>327</sup>. Once proceedings before the Conseil are initiated, its President appoints one or more of its rapporteurs to carry out all necessary "mesures d'instruction"<sup>328</sup> and, to this end, they are armed with wide investigatory powers<sup>329</sup>. Once the rapporteur has completed his inquiries he prepares, "griefs provisoires", which are communicated to the commissaire du gouvernement, the body initiating proceedings and the undertakings alleged to have violated the competition rules. They have two months in which to submit their observations before the rapporteur issues his "rapport definitif" (based on the information he has received from all sources) to which they may submit replies within a further two month period<sup>330</sup>. Finally, before the members of the Conseil or "section" proceed to take their decision, any of the recipients of

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326. *ibid.* The 'commission permanente' may only impose financial sanctions up to a maximum of 500 000 francs and, in any event, may only determine a case if all parties agree (*ibid.* Art 22).

327. *ibid.*, Article 11.

328. *ibid.*, Art 50.

329. *ibid.*, Art 45.

330. *ibid.*, Art 21.

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the "griefs provisoires" may demand a full oral hearing<sup>331</sup>.

Separation of Powers in the Context of  
a "Saisine Ministerielle" of the Conseil

The initiation of proceedings before the Conseil by the "Ministre de l'Economie" represent the culmination of extensive investigations and inquiries by the agents of the executive. These agents possess wide powers of inspection of business records and entry into business premises<sup>332</sup>. The "saisine" of the Conseil will normally take the form, then, of the submission of a detailed "dossier" of evidence by the Direction Générale de la Concurrence (an executive agency responsible for the investigation of anti-competitive practices) which presents an alleged case of infringement. The role of the Conseil, on receipt of such a dossier, is functionally restricted to that of allowing the undertakings accused of anti-competitive behaviour to defend themselves against the accusations of the Direction Générale, in proceedings which are "pleinement contradictoires"<sup>333</sup>, before proceeding to decide the case on its merits.

In the context of "saisine ministerielle", therefore, there exists a clear separation of powers between the Conseil, which is acting as independent adjudicator, "complètement déconnecté ... de la

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331. *ibid.*, Art 25, which also provides that the Conseil may hear anyone else it desires.

332. *ibid.* Art 45.

333. *ibid.*, Art 18.

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hierarchie administrative"<sup>334</sup>, within which the Direction Général, which is acting as prosecutor, is integrated.

Separation of Powers in the Context of  
either "Saisine d'Office" or by Others

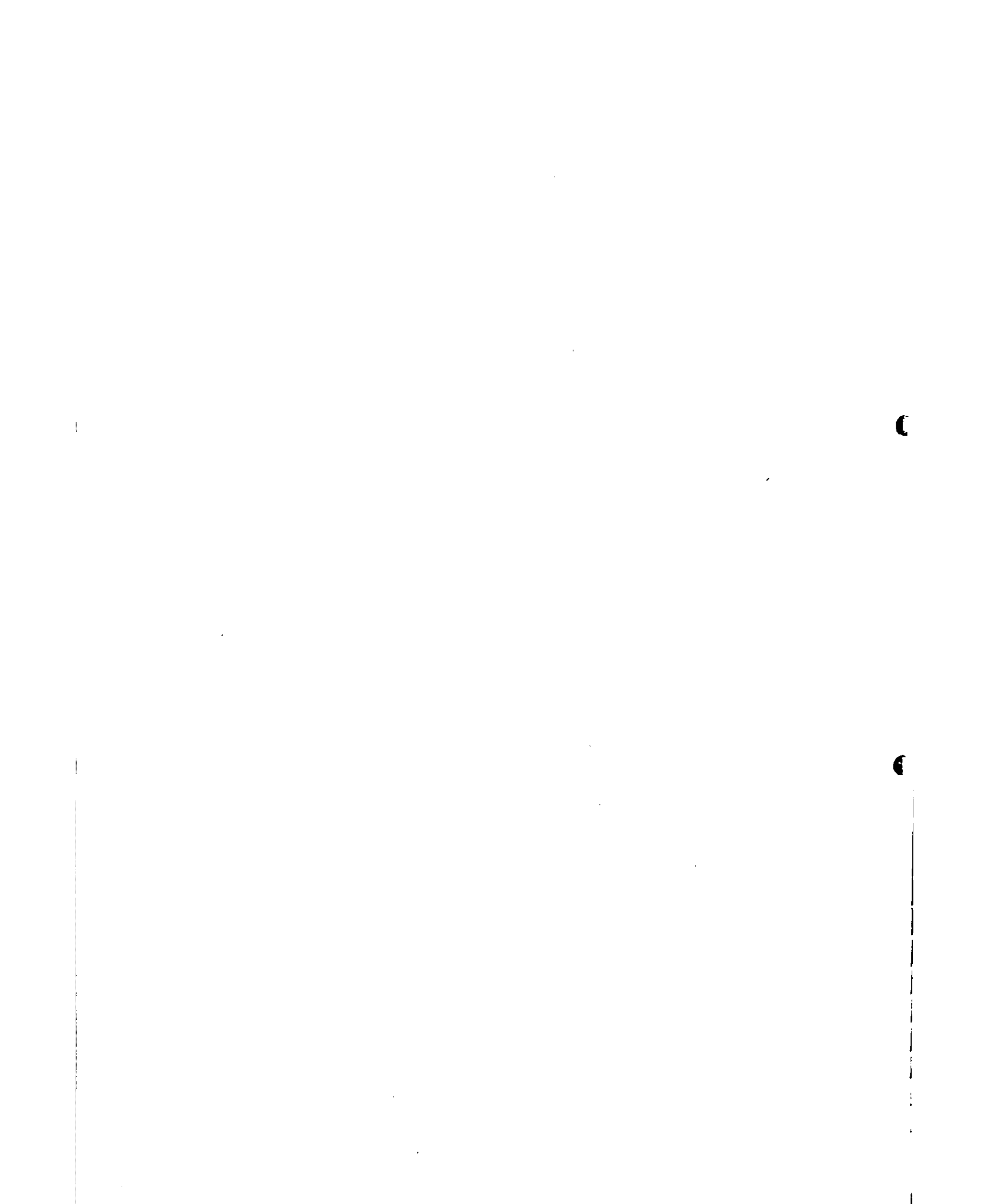
The Conseil is empowered to determine cases on its own initiative and on the complaint of, e.g., the aggrieved competitor of an undertaking. It is true that in these cases, without the Direction Générale performing a prosecuting role, the Conseil could be technically acting as both prosecutor and judge. Are there features of the procedure of the Conseil, however, which minimise or eliminate the dangers of undivided power in this context? It is submitted that there are.

In the first place, it is clear that the Conseil perceives its role principally as that of adjudicator and not as investigator of market practices or even as initiator of proceedings. In the first two years of its existence, proceedings aimed at obtaining a decision on the merits were initiated 148 times - only on four of these occasions was the Conseil itself the "auteur de la saisine"<sup>335</sup>. It is submitted that the membership of the Conseil, or more specifically its strong judicial component, would naturally incline it towards passivity. In addition, the Conseil has demonstrated an unwillingness to take a very active role in

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334. R. Drago, "Le Conseil de la Concurrence", La Semaine Juridique (Doctrine) 1987, 3300, para. 7.

335. "Revue de la Concurrence et de la Consommation", DG de la Concurrence &c., Paris, No. 46, Nov-Déc 1988, page 5.



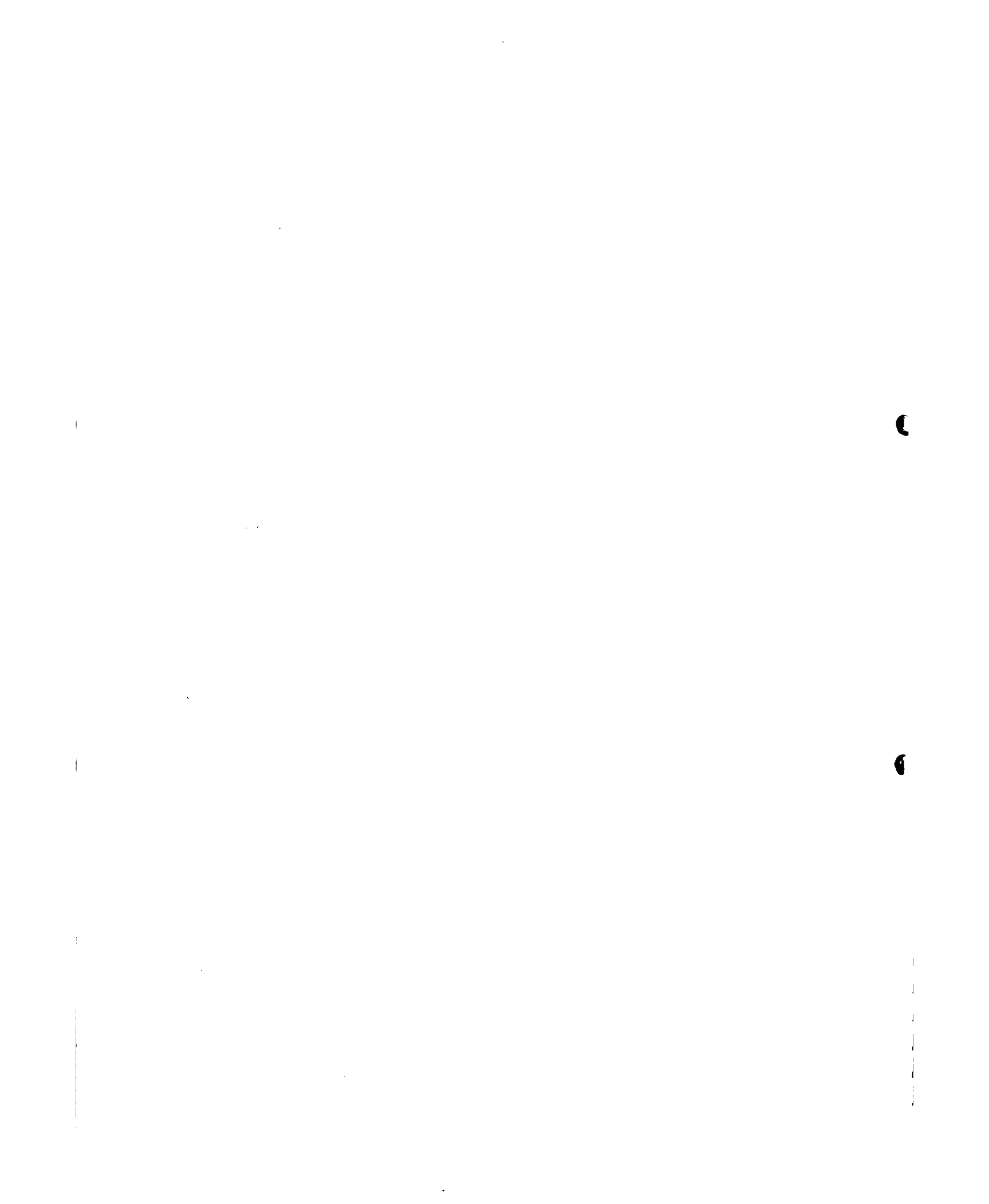
assisting third parties who initiate proceedings to establish the factual basis for their claims. Of the 56 decisions which the Conseil issued in the period mentioned above, the only ten to receive a judgment on the merits ("au fond") were those resulting from "saisines ministerielles". All of the decisions deriving from saisines by enterprises and others stopped short of a decision 'au fond' and either ruled proceedings to be "classé" or, as was generally the case, declared saisines to be "irrecevable"<sup>336</sup>. Many of the decisions of "irrecevabilité" focussed on the insufficiency of evidence of anti-competitive behaviour which was presented by the relevant "auteurs". The Cour d'Appel de Paris has, infact, found it necessary to widen the definition of evidence capable of creating a "saisine recevable" so as to include all facts capable, d', "établir la réalité ou, à tout le moins, la vraisemblance de pratiques anticoncurrentielles"<sup>337</sup>. It is obvious, therefore, that the Conseil is reluctant to act on a simple 'complaint' and undertake roving investigations of undertakings, but prefers aggrieved parties, like the government, to build a prima facie case which it can then adjudicate.

The second, and perhaps more important, feature of the Conseil which makes fusion of its prosecuting and judging roles unlikely is, of course, the internal functional division of labour between

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336. *ibid.*, page 10.

337. Arrêt of 17 December 1987, 'Société des Lubrifiants du Midi', *Revue de la Concurrence et de la Consommation &c.*, No. 41, Jan-Fév 1988, 28, commentaire A. Targa (emphasis added). The Cour d'Appel exercises jurisdiction "en annulation" and "en réformation" over decisions of the Conseil "Ordonnance 86-1243 of 1 December 1986, Art 15, as inserted by Loi 87-498 of 6 July 1987"].



the members of the Conseil (i.e., the 16 appointees) and its rapporteurs. The only member of the Conseil to have any regular contact with the rapporteurs who carry out its investigative work is the President, who allocates cases among them. In many cases, therefore, the only contact which the members of the Conseil deciding a case (e.g. a 'section') will have with the relevant rapporteur will be formally, on occasions open to the participation of the other parties. The only problematic feature of the rapporteur's role is his presence at the private deliberations of the Conseil<sup>338</sup>. Clearly, there is an opportunity for unfairness here and the need for his presence rather than that of the registrar (greffier) has been questioned<sup>339</sup>. The Cour d'Appel has ruled, in this regard, that provided that the presence of the rapporteur at the deliberations of the Conseil is directed, "exclusivement en vue de répondre, dans les limites du rapport écrit acquis aux débats, aux demandes de renseignements des membres du Conseil"<sup>340</sup>, then the "pleinement contradictoire" nature of proceedings is not impaired. Even with this pronouncement, however, the presence of the rapporteur can only detract from the image of impartiality presented by the Conseil<sup>341</sup>.

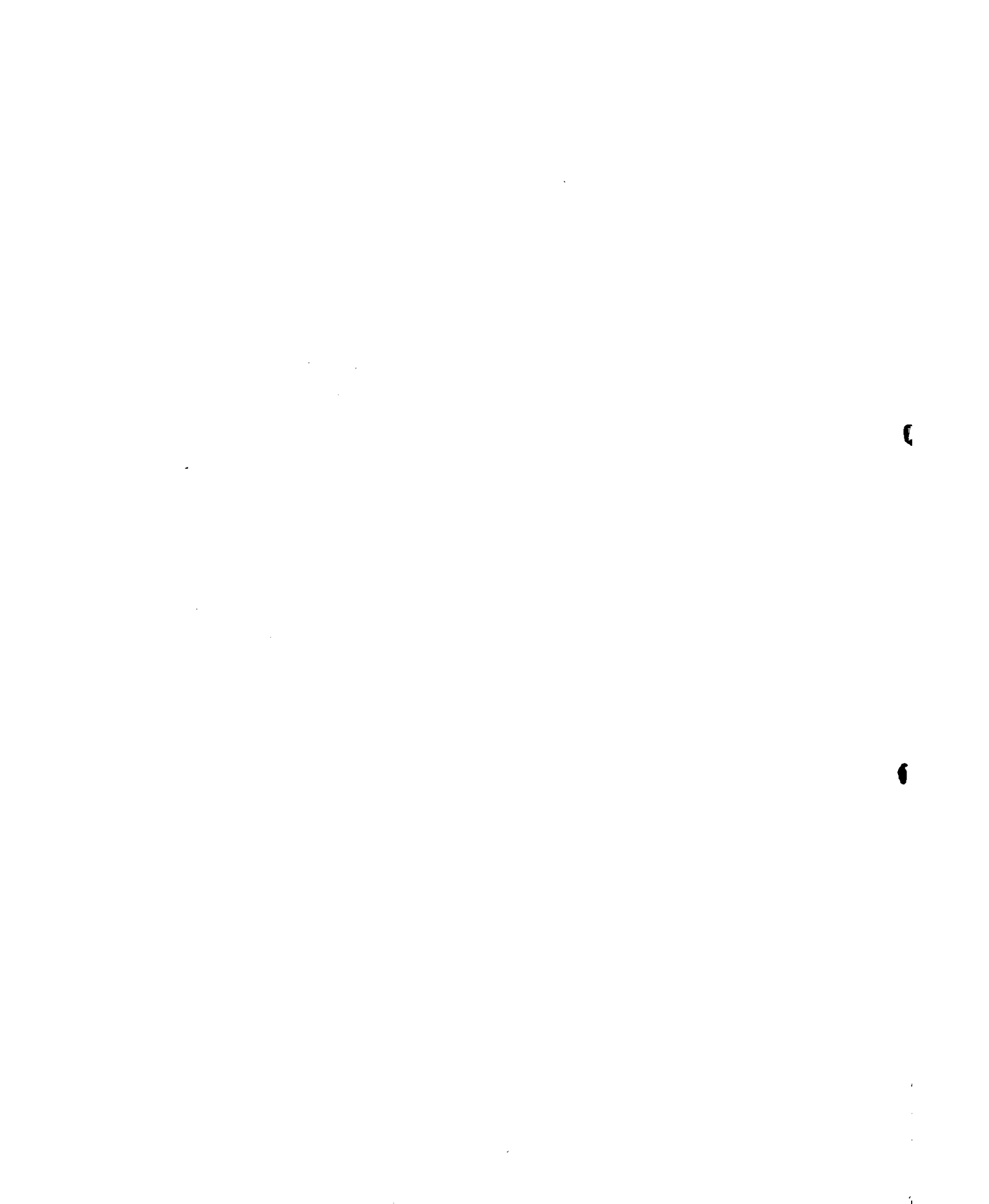
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338. Ordonnance 86-1243 of 1 December 1986, Art 25.

339. F.C. Jeantet, "L'Esprit du Nouveau Droit de la Concurrence", La Semaine Juridique (Doctrine) 1987, 3277, para. 31.

340. Arrêt of 26 May 1988, 'SNSO c. GADOBAT et autres', Gazette du Palais 1988. 2. 662, 663.

341. In Scots law, for example, the mere suspicion of unfairness raised by such 'proximity' of investigator and judge would be sufficient to vitiate any decision reached, cf. 'Barrs v. Scottish Wool Marketing Board', 1957 SLT, 153.





## Conclusion

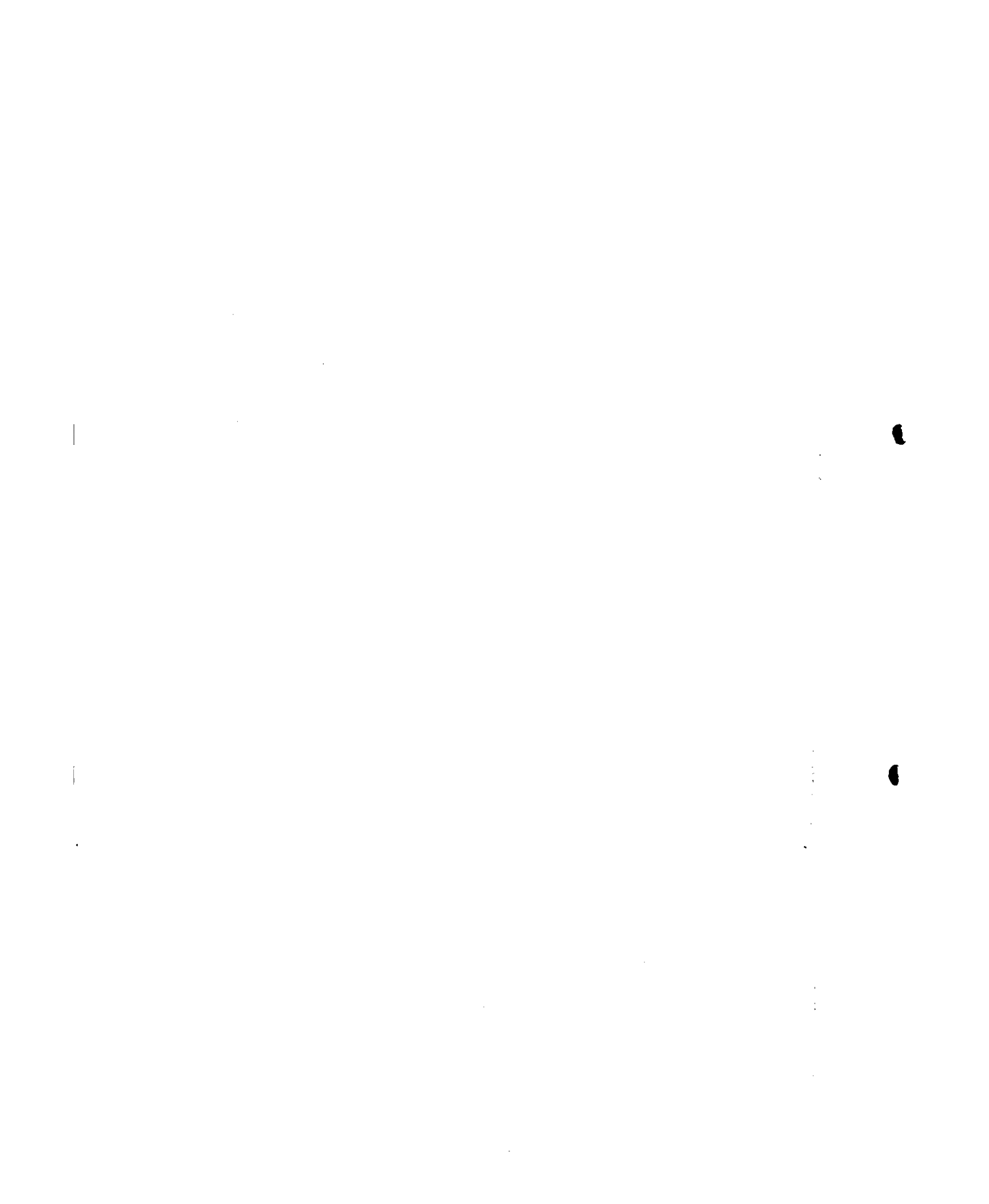
The administrative system established in France for the enforcement of the prohibitions against anti-competitive conduct has, since its introduction in 1977, featured a clear division of executive and adjudicatory functions. Indeed, from 1977 onwards, this system has been the subject of further reforms aimed at entrenching this division by 'judicialising' the administrative agency involved. The original "Commission de la Concurrence"<sup>342</sup>, whose independent adjudicative function was performed in order to enable a ministerial decision to sanction conduct<sup>343</sup>, has been replaced by the independent "Conseil de la Concurrence", whose adjudications, in contrast, represent the conclusion of proceedings. In addition, whereas previously the ministerial decisions following adjudication were the subject of a 'recours en pleine juridiction' before the Conseil d'Etat<sup>344</sup>, the adjudications of the "Conseil de la Concurrence", treated as truly judicial decisions, are now the subject of an appeal ("recours en annulation ou reformation") before the Cour d'Appel de Paris, a

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342. Established by Loi No. 77-806 of 19 July 1977. This body, in terms of composition and adjudicative procedure was very similar to the Conseil.

343. The law of 1977 cited above, enabled the "Ministre de l'Economie" to impose financial sanctions or injunctions against undertakings provided he had first seised the "Commission de la Concurrence" and it had delivered a favourable decision [Ordonnance No. 45-1483 of 30 June 1945, Arts 53 & 54, as inserted by the law of 1977].

344. Law of 1945, cited above, Art 56.



court of 'jurisdiction judiciaire'<sup>345</sup>. According to its authors, this reform represents,

"une étape importante ... dans la voie vers la <<judiciarisation>> complète du contrôle de la concurrence"<sup>346</sup>.

The French system, like the American system, is characterised by a desire to dissociate prosecuting and judging functions in the administrative system for enforcement of anti-trust. The French system, infact, has gone further than the American in realising this desire by entrusting the latter function to what amounts to a court of law, albeit a highly specialised one.

Criticism of the Lack of Division of Accusing  
and Judging Roles within DG IV with respect  
to Infringement Decision-making

The European Parliament

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345. Loi 87-498 of 6 July 1987, Art 1(II) amending Art 15 of the Ordonnance of 1986 [cited supra fn 333] which had provided for a 'recours en pleine juridiction' before the Conseil d'Etat.

346. Assemblée Nationale, 2e Séance du 18 Décembre 1986, Journal Officiel de la République Française 1986 (Débats, Ass. Nat.), 7813 (M. A Lamassoure).

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The Deringer Report of 1961 suggested that the legal protection of undertakings under the proposed Regulation 17/62 would, perhaps, be more effective,

"si on peut créer spécialement un <<office européen des ententes>> subordonné"<sup>347</sup>.

The inspiration for this suggestion was clearly the "Bundeskartellamt" (in French, "l'Office Federal des Ententes") of the Federal republic of Germany, whose operations, both then and now, are characterised by an internal division of investigative functions and adjudicative functions - the latter being exercised by a branch of officials which is genuinely independent<sup>348</sup>.

Regulation 17/62 did not, of course, institute such a system and Parliament had to adopt an approach of criticising the undivided powers possessed in that which had been established<sup>349</sup>. In 1981, Parliament urged,

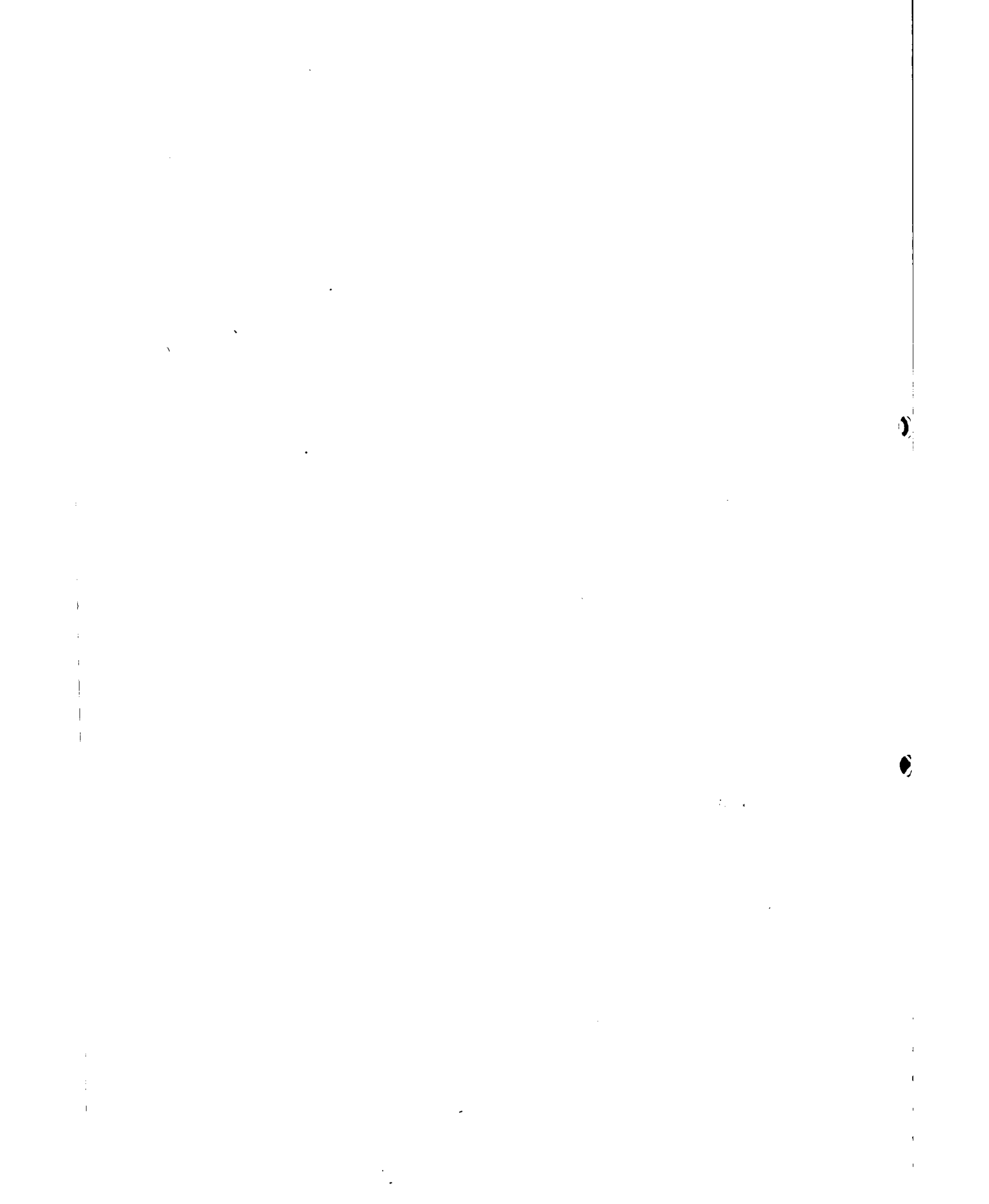
"that the Commission, following consultation with Parliament, adopt and publish formal Rules of Procedure relating to

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347. op. cit. supra fn 254, loc. cit.

348. A discussion of the decision making structure of the 'Bundeskarellamt' is outwith the scope of this paper. Suffice to say that much of what was said about the US system is applicable 'mutatis mutandis'. A brief discussion of the 'separated powers' aspect of the German system can be found in, "5eme Journées Juridiques Franco-Allemands", Bulletin de la Société de Legislation Comparée, contained in Revue Internationale de Droit Comparé 2-1988, page 469.

349. It should be remembered that until 1979 Parliament was not directly elected and that, therefore, most of its 'livelier' criticisms of Commission procedure date from then.



investigation, prosecution and decision-making procedures"<sup>350</sup>.

The intention here is obviously to obtain a commitment from the Commission to separate these three functions in a public and formal way. When it was announced in 1985 that the investigative and decision-making directorates of DG IV (previously enjoying a sort of mutual independence) were to be merged<sup>351</sup>, Parliament asked the Commission to reconsider and, "to distinguish clearly" between the two<sup>352</sup>.

With the announcement in 1983 of the creation of the post of Hearing Officer within DG IV<sup>353</sup>, Parliament began a campaign to raise the profile of this office and to increase the resources at its disposal in order that, "an effective guarantee of fair procedure can be given"<sup>354</sup>. It has always been the contention of Parliament that the Hearing Officer could satisfy the needs for a genuinely triadic adjudicative procedure, but that his ability to do so is contingent upon his obtaining (1) real powers of decision and (2) resources sufficient to make the exercise of such powers

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350. Resolution of EP on 9th Report on Competition Policy, 1981 OJ C 144/19, para. 7(c). In 1984, Parliament issued a sharp rebuke to the Commission for its failure to act on this proposal, 13th Report on Competition Policy, Annex, EP Resolution on 12th Report, para. 53.

351. 14th Report on Competition Policy, point 47(iv).

352. 15th Report on Competition Policy, Annex, Resolution of EP on the 14th Report, para. 46.

353. Details of the role and powers of the Hearing Officer can be found supra, text accompanying fns 40 to 49 supra.

354. 15th Report on Competition Policy, Annex, Resolution of EP on 14th Report, para. 47.

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effective<sup>355</sup>. While his powers remain advisory and largely ancillary the office of Hearing Officer will be seen by Parliament and others as an empty gesture.

#### Business and Lawyers

The dissatisfaction of undertakings, and their lawyers, with the undivided powers of the Commission is well summed up by the Consultative Committee of the Bars and Law Societies of the European Community as follows:

"In most cases, the point which gives rise to concern ... is not the belief that a miscarriage of justice has occurred, but the suspicion that such a miscarriage may have occurred in circumstances where it is impossible to find out whether it has or not"<sup>356</sup>.

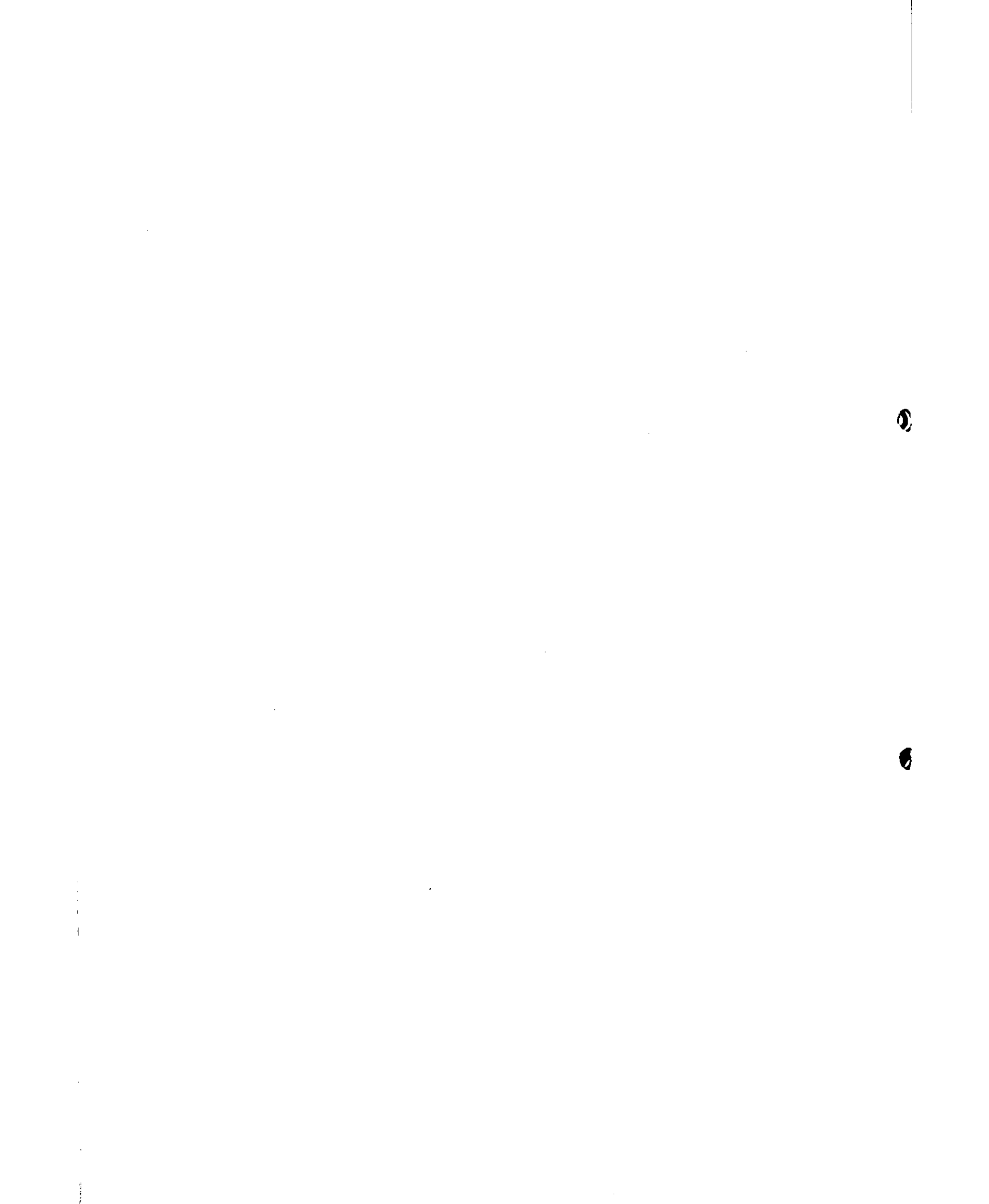
This notion of an irremediable miscarriage has two aspects. First, there is the risk of suppression or misstatement of evidence in the possession of the Commission. However, this risk has been more or less minimised by the introduction by the Commission of the practice of opening most of its file on a case to those concerned<sup>357</sup>. Second, and more important here, is the

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355. See, e.g., 14th Report on Competition Policy, Annex, Resolution of EP on 13th Report; 15th Report, Annex, Resolution of EP on 14th Report, para. 47; 17th Report, Annex, Resolution of EP on 16th Report, para. 49(i).

356. House of Lords Report, op. cit. supra fn 138, pages 78-79.

357. The so-called "Access to the File" was announced in the 12th Report on Competition Policy, point 34.



recognition that, "there is no formal or functional guarantee that the facts have been properly investigated and objectively assessed; ... or that the points made in defence have been fully and fairly weighed and taken into account"<sup>358</sup>. In other words, the concern is that there is no 'a priori' guarantee that the Commission is truly open to the arguments of undertakings that it ought not decide against them. The use of 'high level' judicial review by the Court of Justice to provide this objective assessment 'ex post facto' is regarded - with reason, it is submitted - as an ineffective remedy.

Business and their lawyers are united in their demands for the creation of functional guarantees within the Commission that will render adjudication truly objective by "ensur[ing] ... a formal separation (or at least a complete and overt de facto separation of the functions"<sup>359</sup> of prosecuting/investigating and judging.

Options available to the Council and Commission to  
bring about Structural Division of Roles in  
Infringement Decision-making

Amendment of Regulation No. 17

It was stated by Lord Scarman, chairman of the House of Lords Select Committee which issued the "Competition Practice"

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358. op. cit., supra fn 138, page 78.

359. ibid, page 79, para. 24.

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Report<sup>360</sup>, that, "[w]hereas one might like ... the Commission to be prosecutor and have an independent tribunal making up its mind ... , one cannot do it that way because the Treaty does not allow it and that would require tremendous modification of the Treaty"<sup>361</sup>.

This, it is submitted, is not correct. The Treaty does not provide that the application of Articles 85(1)/86 EEC is to be a matter for the Commission alone; in fact, the Treaty does not even mention that the Commission is to have any power to apply those Articles. The only relevant reference to the Commission as such is in Article 87(2)(d), which provides that Council provisions giving effect to the principles laid down in Articles 85/86 EEC shall be designed to, "define the respective functions of the Commission and the Court in applying [those] ... provisions". The participation of other bodies in the decision-making process is not excluded by this Article. That this is so is evidenced by the creation, in Article 10 of Regulation 17/62, of the Advisory Committee on Restrictive Practices and Monopolies. It is submitted that it is within the competence of the Council to amend Regulation 17/62 so as to insert an independent body with a role analogous to that of France's former "Commission de la Concurrence"<sup>362</sup> to perform adjudications on obligatory 'saisine' by the Commission and then to issue opinions determining the scope of the final Commission decision. This body's opinion, unlike that of the Hearing Officer, would constitute a decisive factor in

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360. op. cit., supra fn 138.

361. ibid., page 33 (emphasis added).

362. See fn 343 supra.

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decision-making, while, at the same time, respecting the balance of powers established by the Treaty as enounced in the 'Meroni' rule<sup>363</sup>.

Amendment of Regulation 17/62 is not altogether likely, however, since the Commission is reluctant to make the proposals needed to initiate the amending process. Its reluctance is explained by the fear that such proposals could be 'hijacked' by the Council and used to bring about a general limitation of its substantive powers.

#### Commission Action

The Commission is prohibited, by the so-called 'AKZO' rule, from depriving the college of any of its powers of final decision<sup>364</sup>. However, it may constitutionally delegate powers to take preliminary or preparatory decisions to subordinates<sup>365</sup>. In this case, it is open to the Commission to delegate the power to conduct hearings, admit evidence and issue an initial decision to one of its employees (with suitable guarantees of independence), in much the same way as the US system involves the taking of an initial decision by an independent agency employee. This decision would have to be published and would then have to be confirmed by decision of the Commission. The only risk with this

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363. See text accompanying fns 198 to 204 supra.

364. See text accompanying fns 182 to 184 supra.

365. *ibid.*





system would perhaps be that the final Commission decision, under the 'written procedure', would remain the responsibility of the Competition Commissioner. In these circumstances, it might be open to him (legally, if not politically), in collaboration with DG IV, to alter the initial decision by drawing different conclusions from, or by placing different emphasis upon, the evidence presented in the 'file'. This sort of risk would, however, be small compared to the increased objectivity of the decision-making process.



## SUMMARY OF CONCLUSIONS

We examined, in chapter two, that legal decision-making - the application of legal norms of general application to concrete cases - falls essentially into two functional categories. On the one hand, we have adjudication or rule applying, which is the formally rational application of the rules of a closed legal system in particular cases; it is oriented to the past and is characterised by decisional rigidity. On the other hand, we have administration or policy applying, which is the substantively rational application of the rules of an open textured legal system to individual circumstances; it is oriented to the future and is characterised by decisional freedom. Applying these definitions, we were also able to categorise the application of Article 85(1)/86 EEC as adjudication and that of Article 85(3) EEC as administration.

In chapter four we saw that the allocation of decision-making power reflects society's concern with the legitimate exercise of political power. Moreover, we decided that the creation of adjudicative power reflects a societal desire to achieve formally just results, whereas the creation of administrative power reflects an opposing desire to achieve results which are substantively just. The most important conclusion at which we arrived in chapter four was that the pursuit of formal justice implied that adjudication should be entrusted to a triadic decisional structure, but that in contrast no such structure was necessarily implicit in the pursuit of substantive justice by administration.

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Chapter five dealt with the Commission structure used to carry out adjudications under Regulation 17/62 EEC. We saw that it was difficult to identify anywhere in that structure the triadic elements which would be appropriate to the carrying out of adjudication. Chapter five then proceeded to examine the reaction of the Court of Justice to arguments that the absence of a triadic structure for adjudication of these cases was unconstitutional. We saw that, for cogent political reasons of its own, the Court refused to concede that the Commission was constitutionally obliged to behave triadically in deciding to apply Articles 85(1)/86 EEC.

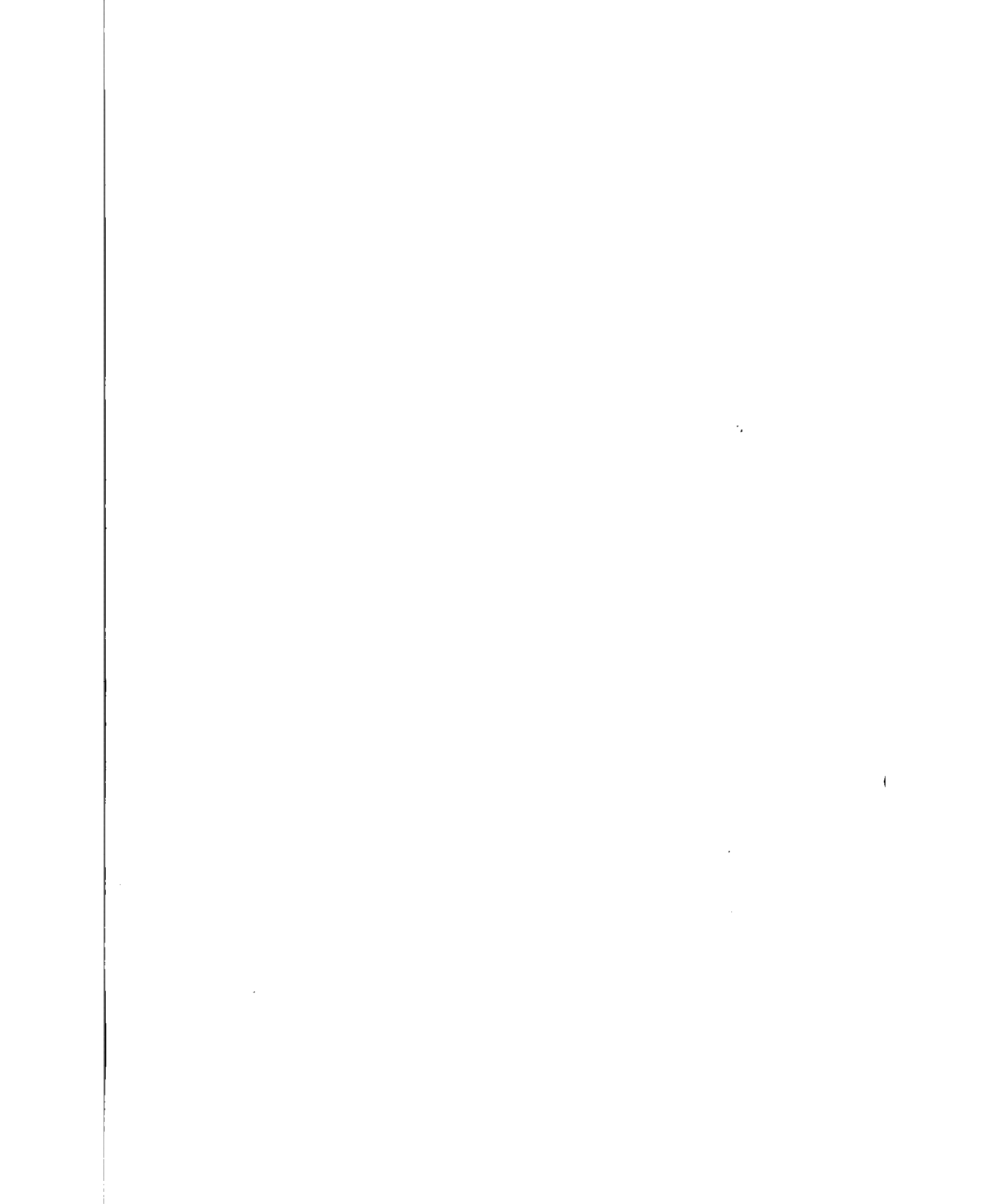
Notwithstanding its refusal to nullify the adjudicatory structure provided by the Commission, we saw in chapter six that, in the context of the recours pour excès de pouvoir under Article 173 EEC, the Court does differentiate between the administrative and adjudicative decisions which the Commission takes under Regulation 17/62. Moreover, it is clear that the distinction which the Court makes between, say, infringement decisions and exemption decisions of the Commission corresponds closely to the functional one which we developed ourselves in chapter two. In making this distinction, the Court attempts to subject infringement decisions to a substantively stricter or higher standard of review than exemption decisions; a standard which involves close examination of the factual/evidential basis of the former.

Chapters seven and eight dealt respectively with the difficulties encountered by the Court of Justice in undertaking 'high-level' review of infringement decisions and with the response of the Council of Ministers - in the shape of the Court of First Instance - to these problems. In chapter seven it was shown that two shortcomings: limited powers of disposal and lack of judicial resources were to blame for the ineffectiveness of 'high level'



review by the Court. In chapter eight we concluded that in so far as it provided new judicial resources (although no increased powers of disposal) the Court of First Instance represented a largely positive reform.

Finally, in chapter nine we investigated the possibilities of tackling the fundamental problem of regulatory mis-match in Commission adjudications at first instance, instead of at the stage of judicial review. We looked at the adjudicatory structures employed in France and the United States to deal with the same sort of cases and saw that they were able to provide undertakings with adequate structural guarantees of triadic decision-making. We then proceeded to argue that there was no convincing legal reason why the Commission system could not be amended (by the Council or by the Commission itself) so that such guarantees were provided in adjudications under Regulation 17/62.





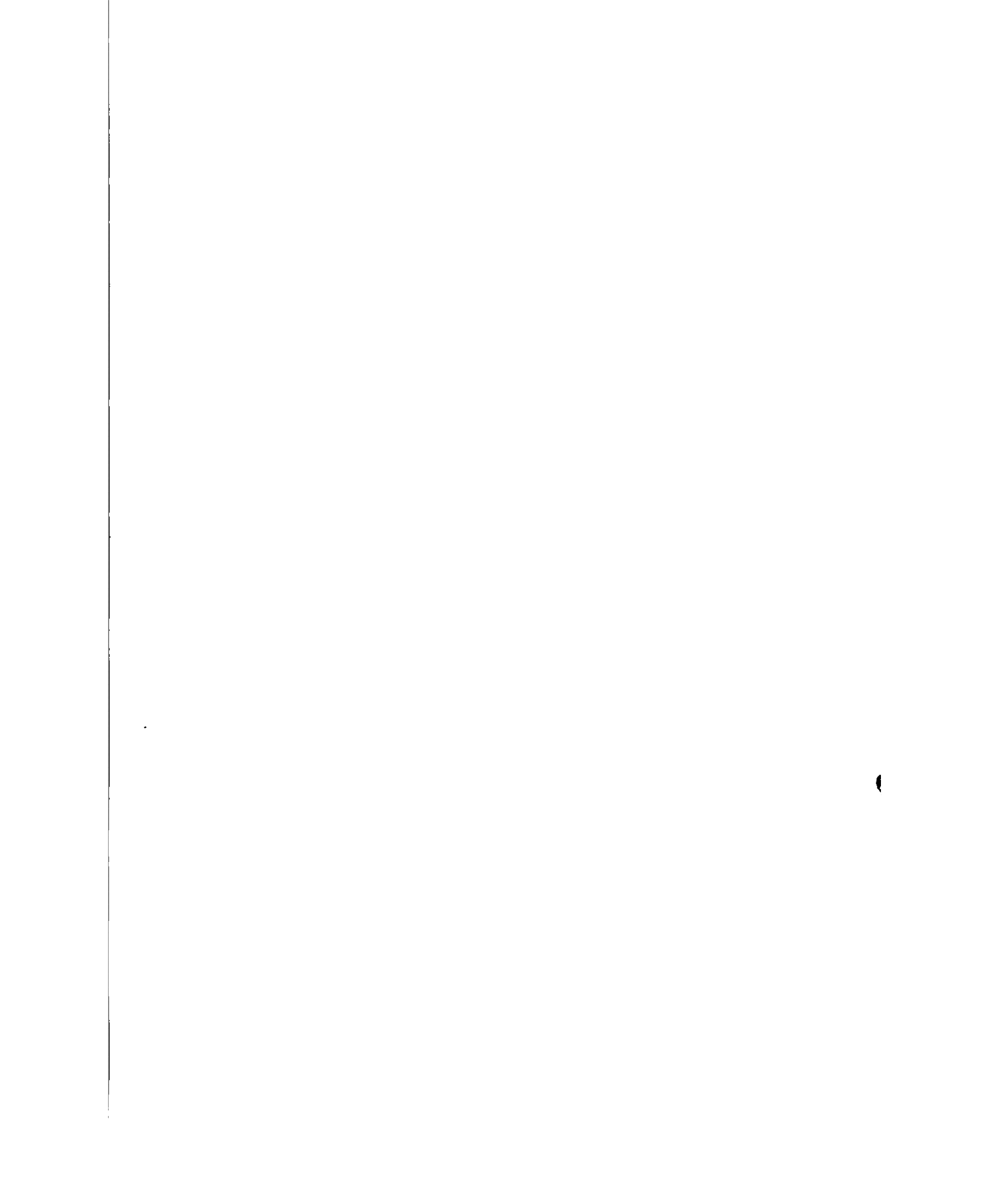
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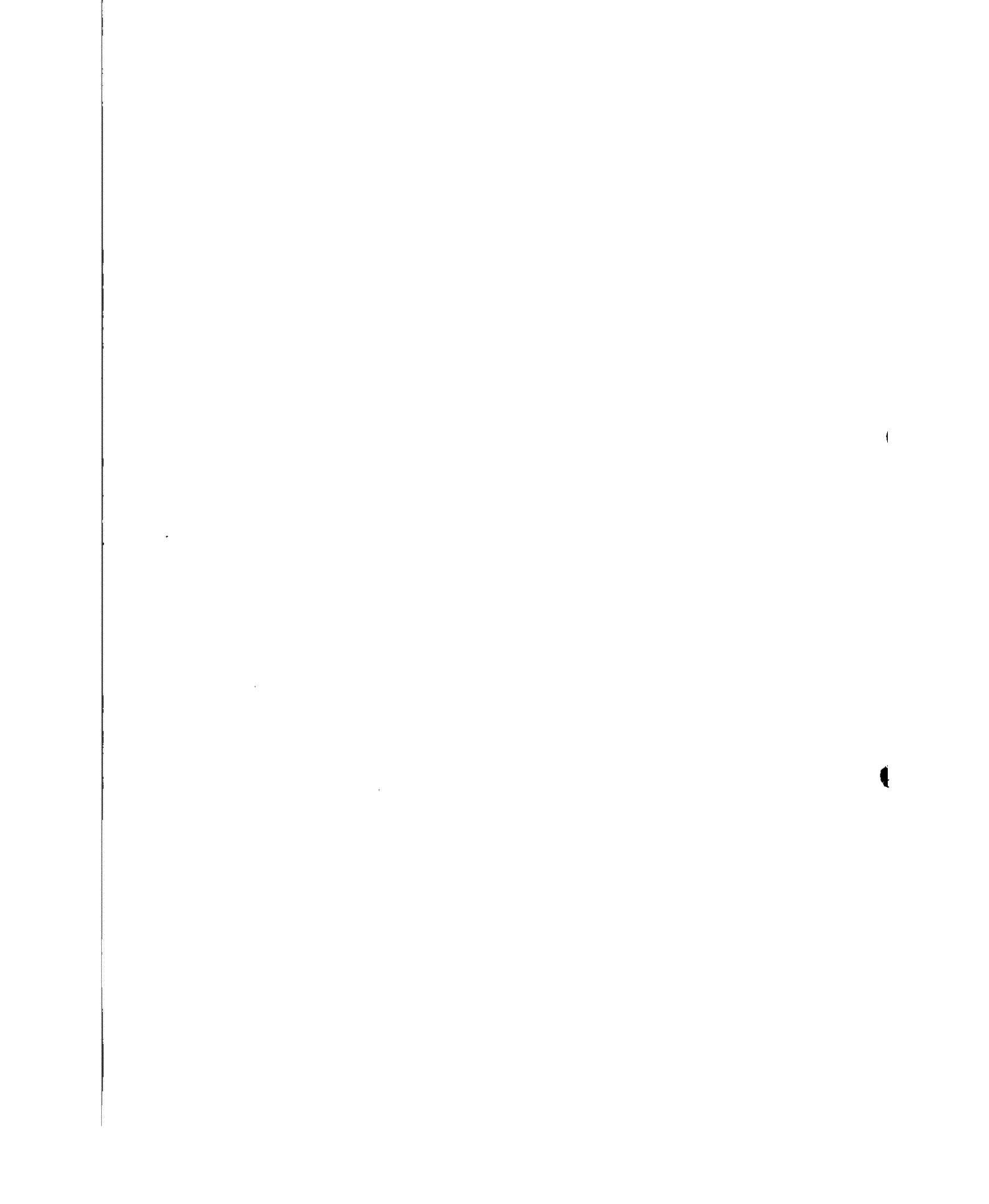
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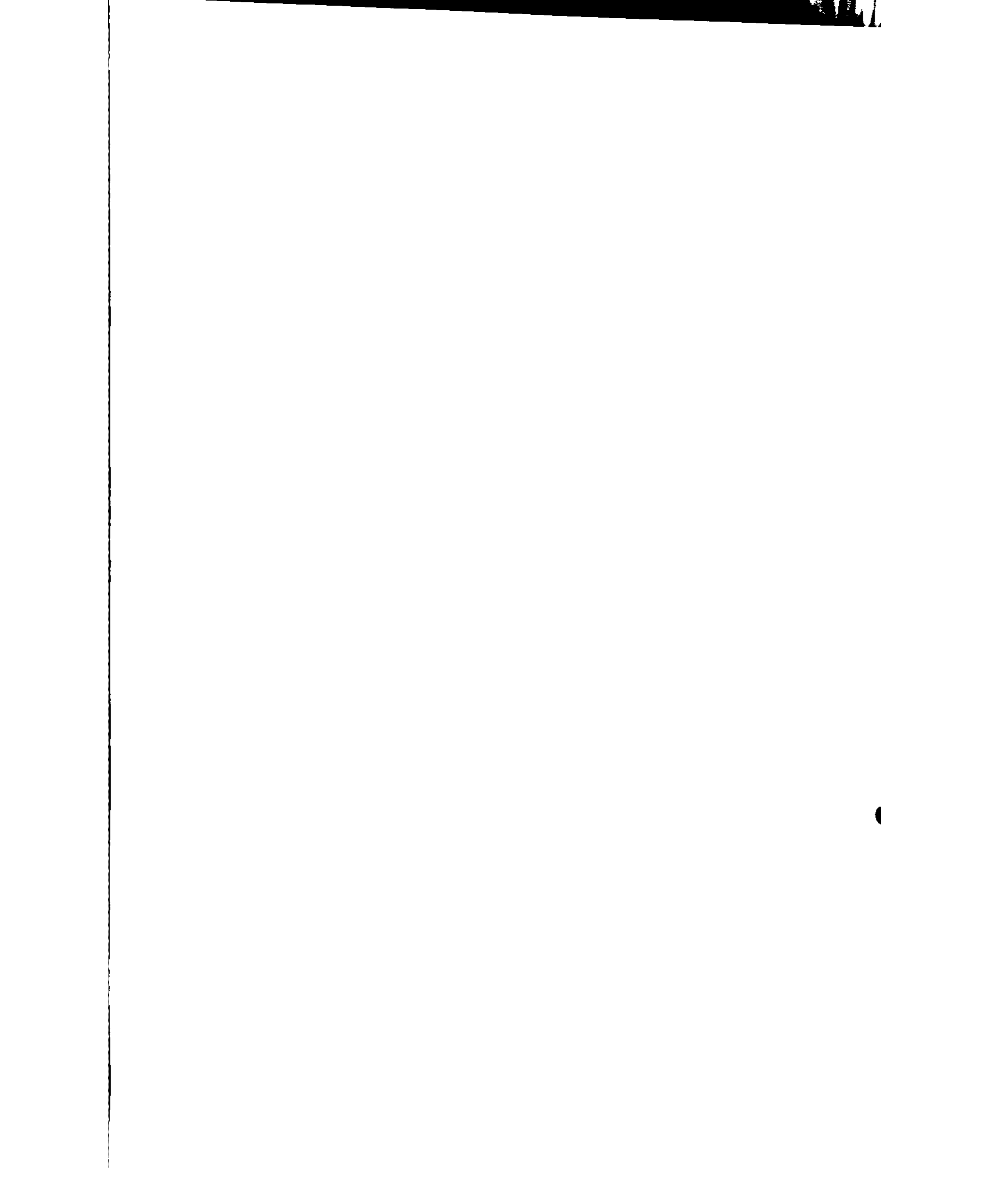
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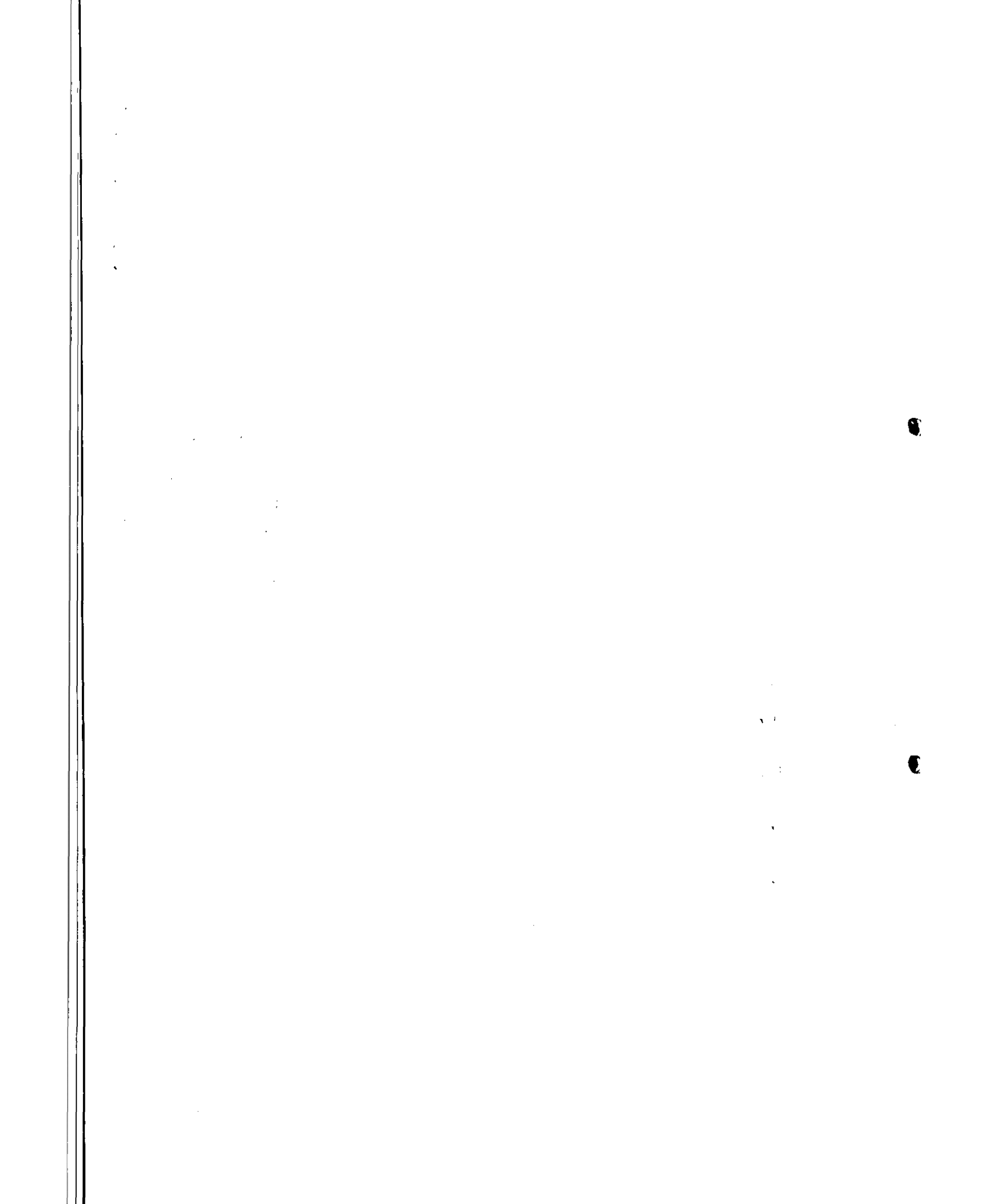
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- "CMLR" - Common Market Law Reports
- "ECR" - European Court Reports
- "LR RP" - The Law Reports, Restrictive Practices cases
- "SLT" - Scots Law Times
- "US" - United States Supreme Court Reports

