

# UK COMPETITION LAW ASSOCIATION

## Consultation Response

### European Commission, DG Competition, Best Practices on Antitrust Proceedings and Guidance on Hearing Officer Procedures

March 2010

#### 1. Introduction and overview

- 1.1 This document is submitted on behalf of the UK Competition Law Association (“CLA”) in response to the consultation launched by the European Commission on January 6, 2010 in connection with the Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU (“Best Practices on Antitrust Proceedings” or “Best Practices”) and the Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (“Guidance on Hearing Officer Procedures” or “Guidance”).<sup>1</sup>
- 1.2 The CLA is affiliated to the Ligue International du Droit de la Concurrence. The members of the CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of the CLA is to promote the freedom of competition and to combat unfair competition.<sup>2</sup>
- 1.3 The CLA welcomes the opportunity to comment on the Commission’s Best Practices on Antitrust Proceedings and Guidance on Hearing Officer Procedures. We applaud the European Commission for the action it has taken to date towards creating an effective and efficient system of competition enforcement and the efforts to improve the current system through adoption of the Best Practices and Guidance. The CLA in particular supports the

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<sup>1</sup> The European Commission also published Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases (the “Best Practices on Submission of Economic Evidence”). In the time available, the CLA has not sought to provide comments on these Best Practices.

<sup>2</sup> Further details on the CLA can be found on our website at <http://www.competitionlawassociation.org.uk/>.

Commission's attempts to introduce more transparency and predictability into its antitrust procedures, while at the same time seeking to ensure the efficiency of the Commission's investigations. This includes the earlier opening of formal proceedings, offering state of play meetings at key points of the proceedings, disclosing key submissions (including earlier access to complaints), and providing guidance on the new commitment procedures. As one of the leading competition enforcement agencies in the world, the procedures adopted by the Commission have an important influence on the procedures adopted by other antitrust agencies around the world.

1.4 In light of the limited time available for submitting comments, we have focused our attention on what we regard as the “big picture” procedural issues and provided general comments as to how we believe the existing procedural framework could be made more effective. Indeed, the CLA has fundamental concerns regarding the current procedural framework for antitrust cases before the European Commission as outlined in the Best Practices and Guidance. Our concerns relate primarily to the lack of separation of powers in relation to Commission decisions and the limited opportunity for cross-examination of the evidence. These concerns are all the more serious in light of the staggering increase in fines for antitrust infringements in recent years and the wide margin of appreciation afforded to the Commission by the European Courts on appeal. Moreover, given the likelihood that the EU will ratify the Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention on Human Rights” or “ECHR”) in the near term, we believe that this provides a perfect opportunity to rethink the structure of European antitrust enforcement to ensure compliance with the ECHR.

1.5 In the first part of this response (Section 2 below), we address our general concerns with the current procedure that strike at the heart of its legitimacy and propose broad measures for reform (Section 3). The second part of our response addresses more specific issues raised by the Best Practices on Antitrust Procedures (Section 4) and the Guidance on Hearing Officer Procedures (Section 5). In the second part, we do not aim to address every aspect of the Best Practices on Antitrust Proceedings or the Guidance on Hearing

Officer Procedures, but confine our comments to particular matters that we wish to highlight.

## 2. Fundamental weaknesses in the current procedure

### *Increasing severity of penalties*

2.1 Before discussing the current weaknesses of the existing system in more detail, it is worth placing this debate in context by highlighting the increasing severity of penalties for antitrust infringements. It is well known that under the leadership of former Competition Commissioner Neelie Kroes there has been a substantial increase both in the total amount of fines imposed by the Commission and the amount imposed on individual undertakings. In the period covering 1995-1999, cartel fines totalled only €271 million. This grew to a total of over €1 billion for the two years of 2004 and 2005, and to around an astounding €5.5 billion for the two years of 2007 and 2008.<sup>3</sup> In 2008, Saint Gobain was fined a record €96 million for its role in the car glass cartel.<sup>4</sup> Such large fines have not been restricted to cartel infringements: in two separate abuse of dominance cases, the Commission imposed a fine of €99 million on Microsoft in February 2008<sup>5</sup> and then for the first time imposed a fine exceeding €1 billion (€1.06 billion) on Intel in May 2009.<sup>6</sup> Moreover, there are already indications that the new Competition Commissioner Joaquín Almunia looks set to continue the trend pioneered by Neelie Kroes, stating in his hearing before the European Parliament that “*the fines are commensurate with this deterrent element, which is what we want to introduce in a fines policy.*”<sup>7</sup>

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<sup>3</sup> See, e.g., N. Kroes speech “Tackling cartels – a never ending task”, Anti-Cartel Enforcement Criminal and Administrative Policy – Panel session Brasilia, 8 October 2009. <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/454&format=HTML&aged=0&language=EN&guiLanguage=en>.

<sup>4</sup> European Commission Cartel Statistics as of 25 January 2010 <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

<sup>5</sup> See EUROPA Press Release, 22 February 2008 at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/318>.

<sup>6</sup> See EUROPA Press Release, 13 May 2009 at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745>.

<sup>7</sup> MLex, L. Crofts, “Level of antitrust fines is appropriate and deterrent, says Almunia”, 12 January 2010.

- 2.2 The severity of penalties is not limited to large fines. Since modernisation of the EU competition rules in 2004, the Commission has had the explicit power to order divestitures for violations of EU competition law. In 2008, E.ON agreed to divest significant assets to settle an ongoing Commission investigation into suspected infringements of EU competition law involving the German electricity markets.
- 2.3 Given the draconian consequences flowing from a violation of EU competition rules, it is essential that the procedure before the Commission is just and fair. The requirement for a just and fair procedure exists regardless of the fact that parties subject to a Commission infringement decision are able to seek judicial review. In any event, the margin of appreciation afforded to the Commission particularly by the General Court means that the appeal procedure cannot counterbalance inadequacies in the procedure before the Commission.

#### *Separation of powers*

- 2.4 The CLA takes issue with the fact that the Commission acts as legislator, investigator, prosecutor, and judge for purposes of EU antitrust enforcement. Despite internal Commission processes aimed at improving the robustness of decisions, such as the use of devil's advocate panels, we do not feel that there are sufficient checks and balances within the system overseeing the power held by the Commission. The lack of separation of powers clearly increases the risk of bias, unchecked mistakes, and decisions based on opinions rather than facts. For example, case teams that work on cases for potentially several years can easily become entrenched in their views and find changing direction late in the process difficult, even when presented with exculpatory evidence. Equally, when the Commission staff who are responsible for a lengthy investigation are also responsible for preparing the infringement decision, mistakes or biases can be overlooked. These issues were recognised by the OECD in its 2005 peer-review report which considered that some explicit separation between the investigative and decision-

making functions within the Commission may be inevitable to secure judicial confidence in the quality of the Commission's decisions.<sup>8</sup>

- 2.5 A spate of recent complaints to the European Ombudsman highlight problems with the current system. In November 2009, the European Ombudsman, P. Nikiforos Diamandouros, found maladministration by the Commission on the grounds that it failed to make a proper note of a meeting when investigating Intel for abusive conduct.

#### *Role of the Commissioners*

- 2.6 Within the current procedure, it is the college of 27 Commissioners who formally issue decisions. We believe that their role as ultimate decision makers is an anomaly and inappropriate notwithstanding the unique nature of the EU as a collection of 27 Member States. First, 26 of the individuals have little or no experience of the case; indeed the Commissioners do not even attend the Oral Hearing. Second, as politicians their decision will be largely guided by policy concerns, which are typically inappropriate for most antitrust investigations. Third, a group of 27 people is too large effectively to deliberate a case. In an influential report, the OECD has criticised the EU system in which the Commissioners decide cases, commenting that “[n]o other jurisdiction in the OECD assigns decision-making responsibility in competition enforcement to a body like the Commission.”<sup>9</sup>

#### *Lack of adversarial hearing*

- 2.7 The current procedure as outlined in the Best Practices on Antitrust Procedures and the Guidance on Hearing Officer Procedures does not contain an adversarial hearing in which the parties can present their evidence and cross-examine the evidence presented by other parties, including the evidence that forms the basis of the Commission's case. The procedure does not, therefore, allow for sufficient verification and testing of the relevant facts.

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<sup>8</sup> Country Studies, European Commission – Peer Review of Competition Law and Policy, 2005, page 63.

<sup>9</sup> Country Studies, European Commission – Peer Review of Competition Law and Policy, 2005, page 63.

### *Judicial review*

- 2.8 The current system of judicial review is insufficient and in particular does not provide an adequate check on the findings of the Commission – as mentioned above, even if the system of judicial review was more effective, this would not sufficiently outweigh inadequacies during the Commission’s administrative procedure. Effective judicial control has at least two dimensions. The first is whether judicial review is sufficiently timely so as to be a credible check on the Commission’s decisions. The second is whether the scope of judicial review is sufficiently broad to provide adequate quality control. The current system of judicial review raises questions on both these points.
- 2.9 The appellate process has long been criticised as slow, particularly when added to the lengthy procedures before the Commission. In the *Gas Insulated Switchgear* cartel, for example, an appeal brought by two of the parties was heard by the General Court in February 2010, following a decision taken by the Commission more than three years previously in January 2007. Moreover, the Commission’s initial inspections of the parties’ premises had been conducted as far back as May 2004.
- 2.10 As regards the scope of review, the General Court, which provides the first layer of appeal against Commission decisions, was established in 1989 for purposes of dealing with actions requiring close examination of complex facts. However, appeals before the General Court are by no means a full re-hearing of the merits of the case, while any subsequent appeal to the European Court of Justice is strictly limited to points of law. Indeed, the European Courts have adopted what might be described as a non-interventionist policy, giving broad discretion to the Commission particularly in complex economic matters and, worryingly in more recent cases, in matters of a technical nature. In *Microsoft*, the General Court described the standard for judicial review with respect to an infringement of law as follows:

*“[A]lthough as a general rule the Community Courts undertake a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met, their review of complex economic appraisals made by the Commission are necessarily limited to checking whether the relevant rules on procedure and on stating*

*reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited review by the Court, which means that the Community Courts cannot substitute their own assessment of matters of fact for the Commission's."*<sup>10</sup> (Emphasis added.)

- 2.11 The non-interventionist stance of the European Courts causes particular concern given that complex economic analysis increasingly forms a routine part of Commission investigations and more weight is being placed on economic analysis in the Commission's determination of cases. Indeed, in a speech in November last year, Neelie Kroes stated that "*[i]n terms of our processes, I am very pleased with the progress we have made on two fronts: a stronger focus on the cases tha[t] affect consumers the most and greater use of economic analysis in our decisions*".<sup>11</sup> The growing importance of economic analysis is of course reflected in the publication of the Commission's Best Practices on Submission of Economic Evidence. It is also likely that there will in future be an increasing number of cases involving complex technical matters, including cases in the information technology space. To the extent that the General Court continues to treat the Commission with deference in relation to technical as well as economic matters, it may be doubted whether Commission decisions will be subject to sufficient checks.
- 2.12 The deference the General Court has shown to the Commission with respect to complex economic and, more recently, technical matters extends to the Commission's fining policy. Pursuant to Article 261 TFEU (ex Article 229 EC), the European Courts in fact have unlimited jurisdiction with regard to the penalties imposed by the Commission. However, only in a handful of cases to date has the General Court in fact departed from the methodology used by the Commission.

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<sup>10</sup> Case T-201/04, *Microsoft v Commission*, General Court judgment of 17 September 2007, paras. 87-88.

<sup>11</sup> Neelie Kroes Speech, Conference on "Competition, Public Policy and Common Man", Delhi, 16 November 2009.

- 2.13 Another reason for concern regarding the non-interventionist stance of the European Courts is that decisions by the European Commission are binding on EU Member State courts. Article 16 of Regulation 1/2003 sets out the general rule that “[w]hen national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.”<sup>12</sup> Defendants in follow-on damages actions before national courts may be condemned to pay damages to alleged victims of antitrust violations (in addition to substantial fines imposed by the Commission) on the basis of a Commission decision adopted as a result of a proceeding where the defendant had neither an effective possibility to exercise his right of defence nor a right to adequate judicial review of the Commission’s decision.<sup>13</sup>
- 2.14 The appeal process before the General Court may be contrasted with the situation in the UK. Parties subject to an infringement decision by the Office of Fair Trading have a full right of appeal available to them, not simply judicial review, before a tribunal with specific expertise in the area of competition law (the Competition Appeals Tribunal).
- 2.15 In sum, the limited power of the courts to reassess facts in judicial review, and their reluctance to exercise their powers in relation to fines, means that the present review process does not sufficiently get to the heart of factual controversies but relies too heavily on the findings of the Commission. Accordingly, it cannot be considered an adequate check on the Commission’s procedure. In order for the procedure to be compliant with Article 6(1) of the ECHR, a full merits review would be required.

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<sup>12</sup> Moreover, this provision has inspired some national legislators to adopt similar rules according to which the finding of an infringement of national or Community antitrust laws by the relevant national competition authority is binding on the national civil courts.

<sup>13</sup> Interestingly, in its staff working paper accompanying the White Paper on damages actions for breach of the EC antitrust rules specified, the Commission referred to the exception of Article 34(1) of Regulation 44/2001 that allows the courts of a Member State to avoid the recognition of a judgement from another Member State “*on the ground of public policy, primarily if the right to fair legal process was not guaranteed during the proceedings leading to the judgment*” (para. 171).

## *ECHR*

- 2.16 The prospect of accession to the ECHR provides an opportunity and impetus for the EC to overhaul its current antitrust procedure, as there are good arguments for considering that the existing antitrust procedures would not withstand scrutiny in Strasbourg due to the weaknesses described above. The EU has the power to ratify the ECHR under Article 6(2) TEU and it is thought likely that it may accede to the ECHR in the near term. Once the ECHR has been ratified by the EU, parties to Commission investigations will have the ability to challenge infringements of the ECHR before the European Court of Human Rights in Strasbourg (“ECtHR”). The Commission would be advised to amend its procedure on a voluntary basis rather than waiting for a potentially embarrassing decision by the ECtHR.
- 2.17 Article 6(1) of the ECHR states 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...by an independent and impartial tribunal...*”. In considering whether or not the current EU antitrust procedures breach Article 6(1), discussions have largely centred on whether antitrust enforcement meets the definition of “criminal” under that Article, and therefore whether Article 6(1) indeed applies to EU antitrust procedures.
- 2.18 Article 23(5) of Regulation 1/2003 states that the Commission’s decision to impose fines “*shall not be of a criminal law nature*”. In the 1976 case of *Engel and Others v Netherlands*,<sup>14</sup> however, the ECtHR established criteria for identifying “criminal” charges for purposes of Article 6(1) ECHR, which focus not only on whether the provisions defining the offence belong to criminal law, but also on the nature of the offence and severity of the fine. It has long been recognised that application of these criteria to decisions to impose penalties for cartel infringements results in their definition as criminal under Article 6(1).<sup>15</sup> In the *Polypropylene* cartel case, Judge Vesterdorf, as Advocate General opined that fines imposed pursuant to Article 15 of Regulation 17/62

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<sup>14</sup> *Engel and others v. Netherlands* [1976] 1 EHRR 647.

<sup>15</sup> Riley, A. “The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity”, *CEPS Special Report*, January 2010.

*“have a criminal law character, it is vitally important that the Court should seek to bring about a state of affairs not susceptible of any justified criticism with reference to the European Convention for the Protection of Human Rights”.*<sup>16</sup>

2.19 In defending the current EU antitrust procedures as being compatible with the ECHR, some commentators point to the recent case of *Jussila v Finland*.<sup>17</sup> In *Jussila*, the applicant alleged that he did not receive a fair hearing in proceedings in which a tax surcharge was imposed because he was not given an oral hearing. The ECtHR examined the complaint under Article 6(1) ECHR. While the court concluded that Article 6 did apply to this case, it found that no violation had occurred as tax surcharges differ from the hard core of criminal law and consequently the criminal guarantees need not apply in full. The ECtHR explained that, although the requirement of a fair hearing is most strict in the sphere of criminal law, the nature of the issues in the case under consideration did not necessarily require an oral hearing as they could be adequately addressed in a written submission. Some commentators have interpreted this to mean that there are two categories of criminal cases, *i.e.*, hard-core traditional criminal charges and administrative penalties, with the latter not subject to a stringent application of the ECHR. However, although *Jussila* appears to allow for less stringent application of the ECHR to certain types of “criminal” cases adjudicated by administrative bodies, it is by no means decisive that EU cartel enforcement fits into this category. Indeed, the judgement in *Jussila* concerned a tax case, not cartel enforcement which involves the most serious breaches of EU competition law and for which there are severe financial and reputational consequences. The hard core criminal nature of such conduct is confirmed by the fact that a number of EU Member States, including the UK, have criminalised cartel activity and allow for custodial sentences.

2.20 In this context, it bears emphasis that in June 2009 the ECtHR ruled that disciplinary proceedings brought by the French Banking Commission violated Article 6(1), criticising

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<sup>16</sup> Opinion of Advocate General, Case T-1/89 *Rhône Poulenc SA v. Commission* [1991] ECR II 867.

<sup>17</sup> Judgment of the European Court of Human Rights (Grand Chamber) of 23 November 2006 in Case of *Jussila v. Finland*, Application no. 73053/01.

the lack of impartiality and independence in the proceedings and highlighting the absence of a distinction between the Banking Commission's functions of prosecution, investigation, and adjudication.<sup>18</sup> There are good grounds for considering that the ECtHR would adopt a similar position in relation to the EU antitrust procedures. This should therefore provide additional impetus for the Commission to revise the current system before fundamental reform is forced upon the Commission through a successful appeal before the ECtHR. Pursuant to ECtHR case law, the ECHR requires criminal cases to be heard by a tribunal that fully complies with the independent and impartial tribunal criteria of Article 6(1).

### **3. Suggestions for reform to combat fundamental weaknesses in the current procedure**

#### *Separate investigative and decision-making functions*

- 3.1 The CLA believes that reform within the antitrust procedure should seek to achieve two primary goals: (1) the explicit separation between investigative powers and decision-making functions currently held by the Commission; and (2) an opportunity for the parties to participate in a full independent hearing, where the investigative body is a party to the proceedings before an independent fact-finder and decision-maker. With this in mind, we would recommend certain measures to reform the EU antitrust enforcement procedural framework.
- 3.2 The separation of the roles of prosecutor and decision-maker in Commission cases could be achieved in a number of ways. First, the function of DG Competition in antitrust cases could be limited to prosecution, while transferring the decision-making powers to the General Court. As an alternative to the General Court, an independent Competition Court could be created to determine decisions. Such a measure would ensure that the procedure was compliant with Article 6 ECHR. In addition, the reduction in DG Competition's workload would likely lead to a more efficient and timely investigation. The Commission would expend less resources and time as it would no longer need to facilitate the defendant's right to a fair hearing or deliberate on and prepare a decision,

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<sup>18</sup> *Dubus SA v France*, Application no.5242/04.

with these functions transferred to the Court. Further, the prospect of a potentially lengthy, costly, and publicised full court hearing would no doubt encourage the Commission to ensure that it focused its resources on meritorious cases where there was sufficient evidence to persuade a fully independent tribunal of fact, while also potentially providing an incentive for defendants to settle early on in proceedings where it was apparent that the defence would not withstand judicial scrutiny.

- 3.3 The same objectives could to some degree be achieved by separating the roles of investigator, prosecutor, and decision maker within DG Competition, allocating different work teams to each function. The retention of the multiple functions within DG Competition as a whole would necessitate that the General Court adopt a more interventionist stance in appeals to ensure that there is a sufficient check on the decisions of DG Competition. To ensure adherence to the right to a fair hearing, we believe that it would be appropriate to extend the scope of the current Oral Hearing procedure to a full hearing in which the parties subject to the investigation have the opportunity to cross-examine each other and the Commission's evidence. The hearing would continue to be adjudicated by the Hearing Officer, although it would be necessary to reinforce the independence and authority of Hearing Officers, as well as extending the role so as clearly to cover substantive and procedural issues. This would enhance the objectivity and quality of the Commission's proceedings and decisions. Senior officials at DG Competition should be required to attend the hearing and be available to discuss the case.

*Re-examination of fining policy*

- 3.4 As discussed earlier in this response, there has been a significant increase in the level of antitrust fines in recent years. The CLA has serious concerns about this trend in EU antitrust enforcement and questions whether such huge fines in fact lead to greater deterrence as opposed to unfairly penalising undertakings and their shareholders for the acts of certain rogue individuals within the undertakings.
- 3.5 Following revision of the Commission's fining guidelines in 2006, the Commission now bases fines on the infringing undertaking's turnover in the most recent year. The application of the turnover criteria has led to even higher fines as compared with the

previous fining guidelines. In the view of the CLA, the Commission should adopt a less formulaic approach to determining the level of fines and have more regard to the effects of particular cartels.

#### *Sanctions against individuals*

- 3.6 Given the seriousness of cartel infringement, we believe that careful consideration should be given to the introduction of individual liability as an alternative to the ever increasing fines. Indeed, the current system of penalties, with an absence of personal sanctions, does not necessarily dissuade individuals from breaching EU competition rules, even where the company itself has a strong compliance culture. It is widely believed that employees who stand to gain from the profits and success of a cartel would have a greater incentive to steer clear of anti-competitive arrangements if the potential consequences of detection were personal in nature such as a personal fine or director disqualification. Indeed, the system of imposing less significant fines on undertakings while at the same time fining or imposing custodial sentences on rogue directors is generally accepted to have been a successful deterrent of cartel activity in the United States. Furthermore, the threat of investigation and punishment of individuals would likely lead to an increase in leniency applications, thereby facilitating antitrust enforcement in the EU.
- 3.7 Accordingly, the CLA advocates extension of the Commission's antitrust enforcement to individuals in the form of personal fines and director disqualification. Personal sanctions for cartel infringement already exist in a number of the member states including Austria, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, the Slovak Republic, and the UK. In view of the nature of the sanctions, we would envisage that the adoption of this change would place further pressure on the Commission to transfer principal decision-making powers from the Commission to the Courts. Further, the CLA believes that where infringement is caused by rogue individuals acting unilaterally, but the undertaking itself has a programme and culture of compliance, the existence of such a programme should be taken into account by the Commission as a mitigating factor.

*More extensive judicial review*

- 3.8 In order for the courts adequately to safeguard the antitrust enforcement process, we strongly believe that they should extend the scope of judicial review. Effective judicial review is especially important in situations where an administrative body issues the decisions as is the case with the current antitrust procedural framework in the EU. The role of the courts should be both to ensure that the Commission's proceedings have been conducted fairly and to conduct a review of the substance of the Commission's findings. Defendants should therefore be entitled to a full appeal, as opposed to the current system where the courts largely defer to the Commission. The General Court should at least exercise its current powers to their full extent and depart from its non-interventionist stance to ensure a full review of the facts of the case and the fines imposed by the Commission. Such a change is necessary not only to ensure a fair procedure, but also to maintain the credibility of the Commission as a decision-making institution.

**4. Specific Points on Best Practices in Antitrust Proceedings**

- 4.1 This part of the response provides specific comments on the Best Practices in Antitrust Proceedings and is aimed at the situation prior to more fundamental reform of the Commission's antitrust procedures as endorsed by the CLA above. The numbering below follows the paragraph and footnote references in the Best Practices.

*Paragraph 5 – adaptation of Best Practices in specific cases*

Paragraph 5 states that the specificity of an individual case may require an adaptation of the Best Practices. This gives the Commission a broad discretion not to apply the Best Practices. We would therefore recommend that the Commission be required to notify the parties in writing where the Commission intends to depart from the Best Practices, explaining the reason for this. This would ensure transparency in the process.

*Footnote 9 – timing of leniency applications*

Footnote 9 states that it is possible for an undertaking to come forward with a leniency application up to the stage of the opening of proceedings, which in cartel proceedings

normally takes place simultaneously with the adoption of the Statement of Objections. Since there is nothing in the Commission Notice on Immunity from fines and reduction of fines in cartel cases<sup>19</sup> preventing a party from submitting a leniency application beyond the opening of proceedings or even after the Statement of Objections has been issued, we would recommend deleting this footnote. This would also be consistent with paragraph 3 of the Best Practices which states that the Best Practices do not seek to cover specific procedures relating to cartels such as leniency.<sup>20</sup>

#### *Paragraph 9 – information from citizens*

Paragraph 9 says that information from citizens and undertakings is essential in triggering investigations. We would propose changing “essential” to “important” not least as the Best Practices proceed to describe own-initiative cases in paragraph 10.

#### *Paragraph 13 - ECN*

Paragraph 13 touches on the allocation of cases within the European Competition Network (the “ECN”). Not least given the potential for divergence in approach between the various national competition authorities owing to differences in legal systems, national markets, and available resources, we believe that transparency in the allocation process is vital in order to maintain the legitimacy of the ECN. We would therefore recommend that the Commission start publishing details of cases referred within the ECN, together with a clear indication as to the basis on which such referral decisions

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<sup>19</sup> OJ [2006] C 298/17.

<sup>20</sup> While paragraph 3 of the Best Practices appears to indicate that the Commission intends generally to apply the Best Practices to cartel cases, there may be some ambiguity as regards the extent to which the Best Practices will actually apply to cartels and, in particular, the extent to which the improvements made to the Investigative Phase would carry over to cartel proceedings. For example, if cartel proceedings are opened at the same time as the Statement of Objections (footnote 9 and paragraph 23 of the Best Practices), then State of Play meetings will not generally be available and Triangular meetings (which are held after the opening of proceedings and before the issue of the Statement of Objections (paragraph 63 of the Best Practices) would also not be available in cartel cases. Nor are cartel defendants entitled to review key submissions (paragraph 68 of the Best Practices). Cartels may require a longer initial phase to ensure maximum input under leniency, but this should not in principle preclude the Commission from opening proceedings and allowing the defendant(s) time to confront initial concerns and have dialogue with the investigators before adopting the Statement of Objections.

were taken. This could form part of the recent commendable initiative to publish the European Competition Network Brief.

*Paragraph 14 – status updates*

Paragraph 14 explains that, at the moment of the first investigative measure addressed to them, undertakings are informed of the fact that they are subject to a preliminary investigation, as well as about the subject-matter and purpose of the investigation. With a view to ensuring consistency with Case T-99/04 *AC Treuhand v Commission*,<sup>21</sup> we would propose adding to the end of the first sentence: “— *this will include specifying the potential infringement and the fact that the undertaking may be faced with allegations relating to that infringement, thereby enabling the undertaking to take steps to exonerate itself and prepare its defence at the inter partes stage of the administrative procedure.*”<sup>22</sup> This paragraph also states that, at later stages of the initial assessment, DG Competition will upon request inform the parties of the status of the cases. We believe that the Best Practices should stipulate that this status update will include an indication of the likely length of the remainder of the initial assessment period, as well as an indication of the nature, extent, and strength of the evidence against the parties.

*Paragraph 15 – four months timeframe for initial assessment*

Paragraph 15 explains that DG Competition will endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the receipt of the complaint. The CLA considers that the Best Practices should specify that DG Competition would also inform the parties subject to the investigation of the action it intends to take at the same time as informing the complainant. Moreover, we believe that the indicative four-month period should apply to all cases (outside cartels), including those cases started at the Commission’s own initiative. In our view, the initial time frame should not be extended merely because the complainant has not been able to furnish sufficient information. Given that the

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<sup>21</sup> [2008] ECR II-1501.

<sup>22</sup> See para. 56.

Commission has its own extensive powers of investigation, it should not deviate from the specified time period for this or for any other reason. Moreover, the fact that the information furnished by the complainant has not been sufficient may of course be indicative of a weak and unsubstantiated case.

*Paragraph 17 – indicative timetable*

Paragraph 17 says that, following the opening of proceedings, the Commission will endeavour to deal with the case in a timely manner. The CLA believes that transparency would be increased if, at the time of opening the procedure or shortly afterwards, DG Competition were to set out an indicative timetable for the remainder of the investigation, including intended timings for key milestones within the procedure. Paragraph 57 later explains that during the State of Play meeting after opening of proceedings DG Competition may indicate a tentative timing for the case. However, we believe that the establishment of an indicative timetable should become part of all antitrust cases before the Commission.

*Paragraph 20 – informing parties of opening of proceedings*

Paragraph 20 states that the parties will be informed of the opening of the proceedings before it is made public. We would welcome clarification on precisely how far in advance of it being made public that the parties will be receive this information.

*Paragraph 40 – written note of meetings*

Paragraph 40 states that DG Competition will prepare a brief note of meetings that take place at the request of parties, complainants, or third parties. The paragraph outlines that, subject to requests for anonymity, the note will mention the undertaking(s) attending the meeting, the date, and the topics covered at the meeting. The CLA is concerned that this does not adequately meet the criticism by the European Ombudsman in the recent Intel Decision, which concluded with the remark: *“It would be in the interests of good administration for the Commission to instruct its staff to ensure that a proper internal note, which should be placed in the file, is made of the content of the meetings or telephone calls with third parties concerning important procedural issues.”*

*Paragraph 50 – legal professional privilege*

Paragraph 50 explains, in the context of discussing legal professional privilege, that if DG Competition in the course of an inspection considers that the undertaking has provided no evidence or explanations for purposes of proving that the document concerned is covered by legal professional privilege but has only invoked reasons that are clearly unfounded to justify such protection or bases itself on factual circumstances that are manifestly inaccurate, this will not prevent DG Competition from immediately reading the contents of the document and taking a copy of it. The CLA believes that such an approach misunderstands the case law and ignores the fundamental principle behind legal privilege. Accordingly, in the opinion of the CLA, paragraph 50 should be deleted from the Best Practices. In light of the importance of legal professional privilege, we consider that the Commission should always use the procedure of the sealed envelope when an undertaking claims legal professional privilege, but subject to the possibility of the Commission imposing fines where undertakings make requests for legal professional privilege that ultimately turn out to have been clearly unfounded.

*Paragraph 57 – state of play meetings*

Paragraph 57 says that DG Competition will normally offer State of Play meetings at several key stages of the case. We believe that this first sentence should be modified to make clear that the parties subject to the Commission investigation may also request such meetings.

*Paragraph 64 – involvement of senior officials*

Paragraph 64 explains that it is normal practice to offer executive officers of the parties subject to the proceedings an opportunity to discuss the case either with the Director-General of DG Competition, the Deputy Director-General for antitrust, or when appropriate, the Competition Commissioner. In the CLA's view, at least one of these senior officials within DG Competition should be required to attend the Oral Hearing so as to bring greater transparency and legitimacy to the process. Indeed, it is an anomaly of

the current system that the ultimate decision maker is not required to attend the Oral Hearing.

*Paragraph 67 – opportunity to comment on key submissions*

Paragraph 67 states that, in addition to the complaint itself, DG Competition might request the parties to comment on other key submissions by the complainant or other parties during the early stage of the procedure – we assume that the Best Practices here refer to the initial assessment period described in paragraphs 11 ff. We believe that, in the interests of transparency and efficiency of proceedings, DG Competition should as a matter of course afford the parties subject to the investigation an opportunity to comment on such key submissions during the initial assessment period. Greater transparency during this early stage will assist the parties subject to the investigation to prepare their defence and would assist in ensuring that unmeritorious complaints do not proceed beyond the early stage.

*Paragraph 75 – Statement of Objections and fines*

Paragraph 75 outlines that, before adopting a decision, the Commission will adopt a Statement of Objections and notify each of the parties subject to the proceedings. The CLA believes that the Statement of Objections itself (or a separate Statement of Objections) should set out the fine the Commission intends to impose, together with its detailed reasoning as to the quantum of the fine. At present, there is a complete lack of transparency regarding fines imposed on the parties until the fine has actually been imposed on the parties (and even then transparency can be lacking). Due process would be considerably improved if parties subject to the investigation have an opportunity of commenting on the Commission's proposal regarding the fine prior to its imposition. Further, the lack of information regarding the likely level of the fine at the time of the Statement of Objections is problematic where a company is potentially unable to pay a

fine since, under the current procedure, a party is expected to prove inability to pay before it knows the level of the fine.<sup>23</sup>

*Paragraph 87 – time-limit to reply to Statement of Objections*

Paragraph 87 says that the time-limit for the reply to the Statement of Objections will take into account both the time required for the preparation of the submission and the urgency of the case. In view of the General Court’s judgment in Case T-4/00 *Mannesmanröhren-Werken AG v Commission*,<sup>24</sup> we consider that this first sentence of paragraph 87 should be redrafted to state that the time-limit for the reply will take into account “*the time required for the preparation of the submission, as well as the difficulty and urgency of the case.*”

*Paragraph 89 – access to non-confidential written replies*

Paragraph 89 says that the Commission may give one or more of the parties a copy of the non-confidential version of the other parties’ written reply to the statement of objections. We would welcome clarification from the Commission as to the situations in which it might exercise this discretion.

*Paragraph 96 – supplementary Statement of Objections*

Paragraph 96 outlines that, if new evidence justifies the issuance of additional objections or the intrinsic nature of the infringement with which an undertaking is charged is modified, the Commission will notify this to the parties in a supplementary Statement of Objections. We would welcome clarification of the precise meaning of “additional objections” in this context.

*Paragraph 113 - self-executing commitments*

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<sup>23</sup> According to paragraph 35 of the 2006 Guidelines on the method of setting fines “[i]n exceptional cases, the Commission may, upon request, take account of the undertaking’s inability to pay in a specific social and economic context”. We suggest that the Commission should set out a specific procedure to ensure transparency in the treatment of such requests, which in the current economic climate are increasingly common.

<sup>24</sup> [2004] ECR II-223, paras. 62-65.

Paragraph 113 states that commitments must be unambiguous and self-executing. The CLA believes that, in the interests of transparency, the Commission should explain in more detail what is meant by self-executing.

## **5. Specific points on Guidance on Hearing Officer Procedures**

- 5.1 This part of the response provides specific comments on the Guidance on Hearing Officer Procedures and is aimed at the situation prior to more fundamental reform of the Commission's antitrust procedures as endorsed above. The numbering below follows the paragraph and footnote references in the Guidance.

### *Paragraph 7 – The Oral Hearing*

Paragraph 7 explains that, while the Hearing Officers oversee procedural matters, have decision-making powers, and adjudicate disputes, they may also make observations on substantive issues to the Competition Commissioner. As explained above, absent a formal separation of the investigative and decision-making powers currently held by the Commission, the CLA believes that it would be appropriate to extend the scope of the current Oral Hearing procedure to a full hearing in which the parties to the investigation have the opportunity to cross-examine each other and the Commission's evidence. The independence and authority of Hearing Officers would also need to be reinforced, as well as extending the role so as clearly to cover substantive as well as procedural issues. We would further envisage the need to appoint more than the current two Hearing Officers and to make them fully independent of the Commission.

### *Paragraph 8 – failure to bring a dispute*

Paragraph 8 says that failure to bring a dispute with DG Competition before the Hearing Officers for which they are conferred decision-making powers can be taken as an acceptance of the position expressed by DG Competition. However, this appears to go beyond the case-law cited by the Commission in the Guidance at footnote 11. In Case T-4/00 *Mannesmannröhren-Werke AG v Commission*,<sup>25</sup> the General Court proceeded to

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<sup>25</sup> [2004] ECR II-223, para. 51 ff.

assess the applicability of internal Commission documents to see if the applicant's rights of defence had been affected notwithstanding that the applicant had not submitted a request to the Hearing Officer to verify whether the Commission had been correct during the administrative procedure to refuse access to the relevant internal Commission documents. The same point also applies to paragraph 14 of the Guidance on Hearing Officer Procedures.

*Paragraph 27 – deadlines for responding to Statement of Objections*

Paragraph 27 explains that the “deadlines” for responding to the Statement of Objections will not normally start running until access to the main documents in the Commission's file has been granted. We would suggest replacing “deadlines” with “time-limits” and changing “main documents” to “all the most important documents” – the latter change is to bring the Guidance in line with European Court precedent.<sup>26</sup>

*Paragraph 35 – admission of third parties to the procedure*

Paragraph 35 states that the Hearing Officer will decide on a request for admission of a third party into the procedure after having requested comments from DG Competition. We believe that allowing DG Competition to comment on the requests but not the parties to the proceedings is unfair. All parties should be able to comment on requests from third parties to be admitted to the procedure.

*Paragraph 38 – procedures for the Oral Hearing*

Paragraph 38 deals with the procedures for the Oral Hearing itself. We believe that the timing and schedule of the Oral Hearing should be decided through a consultation with all of the parties to the proceedings. In addition, the CLA would welcome ways to increase the participation of Member State representatives in the Oral Hearings. Member State representatives often do not engage in the Oral Hearing and infrequently ask questions notwithstanding that they ultimately need to express an opinion on the Commission decision.

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<sup>26</sup> Case T-4/00, *Mannesmannröhren-Werke AG v Commission*, [2004] ECR II-223, para. 65.

*Paragraph 40 – attendees at Oral Hearing*

Paragraph 40 states that it is the Hearing Officer who will decide on who will be invited to attend the Oral Hearing. The CLA considers that attendance at the Hearing should not be at the sole discretion of the Hearing Officer without any guidelines as to how the Hearing Officer will exercise his or her discretion. We would therefore recommend that guidelines be drawn up dealing with who can attend the Hearing. The attendance of third parties should be limited to those who have previously made a formal submission, so as to ensure that their presence does not disrupt the efficiency of the hearing.

*Paragraph 63 – Interim Report*

Paragraph 63 explains that the Interim Report prepared by the Hearing Officer is an internal Commission document that is not accessible to the parties to the proceedings. However, with a view to increasing the transparency of the process and particularly given the fact that Hearing Officers are supposed to be “independent guardians of the rights of defence” as noted in paragraph 1 of the Guidance, we would recommend that the Interim Report as well as the Final Report be made available to the parties to the proceeding. Release of the Interim Report to the parties would no doubt give DG Competition more impetus to ensure the fairness of its proceedings and a correct assessment of the facts and law.

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The CLA would be happy to discuss any of the comments provided above in more detail if it would be of assistance to DG Competition.