

# Due Process in EU Competition Cases Following the Introduction of the New Best Practices Guidelines on Antitrust Proceedings

Anne MacGregor and Bogdan Gecic\*

On October 17, 2011, the European Commission (Commission) issued the final version of its best practices in antitrust proceedings,<sup>1</sup> best practices on submission of economic evidence<sup>2</sup> and a revised mandate of the Hearing Officer (Best Practices Package).<sup>3</sup> The new measures are aimed at '[enhancing] transparency and procedural guarantees, while maintaining the need for efficient processes'.<sup>4</sup>

The Best Practices Package provides stakeholders 'for the first time a guide on how proceedings take place before the Commission'.<sup>5</sup> The new guidelines set out the main phases of an antitrust investigation and its possible outcomes. The Best Practices Package further enhances the role of the Hearing Officer and provides guidance on the collection and submission of economic evidence.

An EU antitrust case commences when the Commission begins an investigation and ends with the exhaustion of all legal remedies. The quality of 'due process' before the Commission at the present time can only be assessed against the broader legal system in which the Commission's antitrust decisions are created and take effect.

Before proceeding with an in-depth assessment of the changes that the guidelines introduce, it is useful to consider the broader context. What is the nature of the Commission's procedure? What is the character and impact of resulting decisions? What judicial review is available and how does it work in practice?

## Key Points

- Commission decisions have unprecedented legal and practical effects that require stringent procedural safeguards in order to satisfy due process.
- The current state of EU judicial review is as yet insufficient to counterbalance the far-reaching impact of Commission decisions.
- The Commission's recently adopted antitrust best practices package does not cure the inadequacies of the broader enforcement model and to some extent exacerbates the due process problem.
- The Commission's procedure could be reformed into a full two-tier system, modelled on robust Continental civil administrative systems, which would add to its actual and perceived fairness.

## I. An administrative procedure

At the EU level, the enforcement of competition rules enshrined in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) is primarily entrusted to the Commission.<sup>6</sup> Commission antitrust procedure declares itself to be 'administrative' in nature, seemingly alleging itself to have the full due process

\* Anne MacGregor is Special Counsel and Bogdan Gecic is a law clerk in the Brussels office of Cadwalader, Wickersham & Taft LLP.

1 Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C308/06 (Best Practices Notice).

2 DG Competition, 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, Staff Working Paper <[http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_submission\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf)> accessed 27 February 2012.

3 Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in

certain competition proceedings [2011] OJ L 275/29 (Hearing Officer Mandate).

4 Alexander Italianer, Director General of the Directorate General for Competition (DG Competition), European Commission, *Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of the Hearing Officer*, OECD Competition Meeting, 18 October 2011, Paris, 2, para. 5.

5 *ibid.* 5, para. 2.

6 Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47.

safeguards of other administrative procedures known in civil law.<sup>7</sup> The Commission investigates and decides on a case by administrative decision, subject to subsequent judicial review by the European courts in Luxembourg. If the Commission determines the existence of a competition infringement, it may issue a prohibition decision, impose fines or periodic penalty payments or take other measures against companies. Such decisions have far-reaching consequences, which, clearly separate them from general administrative decisions.

## II. Effects of a Commission decision

A Commission decision has a binding effect on its addressees. Companies can, however, resort to judicial review, first before the EU General Court (GC) and, subsequently, on appeal, before the Court of Justice of the EU (ECJ). Irrespective of potential actions for annulment, and even before any appeals are initiated, a Commission decision produces legal effects that are unusual when viewed against administrative acts taken in the civil law traditions of most EU Member States.

### A. Mechanics of Review and Suspensory Effect

Rules on administrative law and procedure have been developed and codified amongst continental European countries for over a hundred years.<sup>8</sup> Similar to the Commission, national administrative authorities that enforce traffic, tax, communal, antitrust or other rules, can issue decisions imposing fines and other sanctions.

For example, in Germany, there is generally a prior review procedure of administrative acts, provided by the administration itself. This is called ‘administrative self-regulation’ and is different to judicial control. It is

usually a mandatory review step which has to be taken before an aggrieved party can file a court action.<sup>9</sup> The party may submit an objection (*Widerspruch*) to the issuing authority that then has the option of either adopting the objection (*Abhilfe*) or rejecting it. In the latter case, the objection will be transferred to the supervising administrative authority for its deliberation (*Widerspruchsbescheid*). Only upon the final decision of the supervisory authority can the party apply for judicial review. During this entire procedure, the legal effects of the contested administrative act are suspended.<sup>10</sup> There are only limited exceptions to this rule.

Upon exhausting self-regulation avenues, a party can file an action for annulment before the administrative courts. As a general rule, this action will also result in suspensory effect for the contested administrative act.<sup>11</sup> If not satisfied with the court’s ruling, the party has at its disposal a number of legal remedies to challenge the judgment of lower and higher administrative courts. The filing of a court action or appeal has, again, a suspensory effect and delays the lower court’s judgment from coming into effect.<sup>12</sup>

The German competition authority (*Bundeskartellamt*) is also conceived as an administrative body. However, unlike other administrative bodies in Germany, competition proceedings do not include administrative self-regulation. The competition authority’s decisions against antitrust infringers can only be directly appealed before a specialised court.<sup>13</sup> In some less important cases an appeal will trigger an automatic suspension of the German competition authority’s decision.<sup>14</sup> In most cases of any note, the competition authority generally issues an order of immediate enforcement of its antitrust decision,<sup>15</sup> although that

7 In justifying the advantages of an administrative enforcement system, Alexander Italianer, DG Competition, has stated that: ‘[t]he administrative model is not specific to antitrust enforcement. In many civil law jurisdictions, it is used in a wide range of areas such as consumer protection, environmental protection, financial services, etc. In such civil law cases, the administrative authorities have powers to carry out investigations, impose fines if necessary or withdraw licenses to operate’, Italianer, *Safeguarding due process in antitrust proceedings*, Fordham Competition Law Institute, Annual Conference on International Antitrust Law and Policy, Session on ‘Enforcers’ perspectives on international antitrust’, 23 September 2010. Nevertheless, when compared to administrative procedures in other European civil law jurisdictions, Commission proceedings are quite different and should be classified as a *sui generis* system.

8 The development of rules on administrative procedures and the establishment of specialised administrative courts goes back to the French revolution. The Conseil d’État (Council of State) was founded in 1799. The so-called ‘French model’ of specialised administrative courts has been adopted in a number of continental European states including Austria, Germany, Italy, Switzerland, Greece, Portugal, Spain, Croatia, Bulgaria, Ukraine, Serbia, and Hungary. The case law of these courts has led to the development and, in some cases, codification of rules on administrative procedure (e.g. Germany, Austria, Poland, Hungary).

9 Meinhard Schroder, ‘Administrative Law in Germany’ in Ren JGH Seerden (ed.), *Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis* (2nd edn Intersentia, Cambridge 2007), 138.

10 *ibid.* 139.

11 Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*, VwGO) version of 19 March 1991 (Federal Law Gazette I, p. 686), most recently amended by Article 9 of the Act of 22 December 2010 (Federal Law Gazette I, p. 2248), section 80.

12 Schroder (n 9) 145.

13 Article 63 of the Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition) version of 15 July 2005 (Bundesgesetzblatt (Federal Law Gazette) I 2005), p. 2114 (BGBl), as amended by Art. 1 of the Act of 20 April 2009 (BGBl. I 20, pp. 790–8). The Düsseldorf Court of Appeals has four separate divisions exclusively for antitrust cases—the so-called ‘cartel divisions’ (Article 91 *et al.* of the Act against Restraints of Competition). Therefore, in Germany, there is a substantive specialisation by the review court.

14 Act against Restraints of Competition, art. 64.

15 *ibid.* art. 65(1).

order can be overturned by the review court and the suspensory effect restored.<sup>16</sup> To ensure expediency, the law goes further and allows a party to submit an application for the restoration of the suspensory effect even prior to formally lodging its appeal.<sup>17</sup>

If fined, a party has the right to file an objection (*Einspruch*) with the German competition authority.<sup>18</sup> The remainder of the procedure is generally governed by criminal procedure rules.<sup>19</sup> If the authority rejects the objection on the merits, the case transfers to the public prosecutor and potentially to the court.<sup>20</sup> During this period, the decision to impose a fine has no effect. The objection invokes the decision's *de facto* suspension.

In general administrative proceedings in Germany, suspensory effect is available at both the administrative and judicial levels. Additionally, in special cases, such as antitrust proceedings, suspensory effect is either automatic or may be almost immediately requested by the administrative decision. Finally, when fines are imposed criminal procedure safeguards also come into play.

In contrast, administrative procedure in competition matters at the EU level is significantly different. There is no official procedure equivalent to administrative self-regulation. So, the question of suspensory effect does not arise at that stage.

When the Commission adopts its final decision, there is never automatic suspensory effect.<sup>21</sup> An aggrieved party can only request the suspension of the application of the Commission's decision along with the filing of its action for annulment, and not before.<sup>22</sup> In order for a suspension request to be granted, the conditions for its

adoption have to be *prima facie* satisfied on both factual and legal grounds, its adoption needs to be necessary to avoid serious and irreparable damage and the balance of interests should favour such an order.<sup>23</sup> In contrast to national administrative practices in European countries, at the EU level, suspensory effect is not a general rule but only an exception rarely granted.<sup>24</sup>

Commission decisions are applicable upon adoption after they have been notified to the addressees. This also means that before an action for annulment is lodged, fines will be payable,<sup>25</sup> and a Commission press release will be published summarising the key elements of the decision. This press release will usually list the amount of the fine imposed on each infringer. It is followed by other publications including, eventually, a non-confidential version of the full decision.<sup>26</sup> In a recent case, the Hearing Officer declined to withhold the publication of certain parts of the decision when an addressee argued their publication would violate the presumption of innocence, since an appeal was still pending.<sup>27</sup> The Hearing Officer applied the principle established in *Bank Austria*,<sup>28</sup> and concluded that the interests of an infringing company not to have the decision publicly disclosed are not, 'objectively, worthy of protection.'<sup>29</sup>

## B. Binding effect on national courts and competition authorities

Based on the case law of the EU Courts, subsequently codified in Regulation 1/2003,<sup>30</sup> Commission decisions have binding effect on national courts and national

16 *ibid.* art. 65(3).

17 *ibid.* art. 65(4).

18 Administrative Offences Act in the version published on 19 February 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I, p. 602), as most recently amended by Article 2 of the Act of 29 July 2009 (Federal Law Gazette [Bundesgesetzblatt] part I, p. 2353) (OWiG), art. 67.

19 *ibid.* art. 67 and Code of Criminal Procedure in the version published on 7 April 1987 (Federal Law Gazette [Bundesgesetzblatt] Part I, pp. 1074, 1319), as most recently amended by Article 2 of the Act of 22 December 2010 (Federal Law Gazette [Bundesgesetzblatt] Part I, p. 2300) (StPO), arts 297–300 and 302.

20 Act against Restraints of Competition, art 83, OWiG, art 79 and StPO, art 341.

21 TFEU, art. 278.

22 TFEU, art. 279.

23 See Wouter PL Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33(1) *World Competition* 7–8; and Michael Albers and Jérémie Jourdan, 'The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective' (2011) 2(3) *Journal of European Competition Law & Practice* 185, 198.

24 The ECJ will suspend a Commission decision only under exceptional circumstances. See for example Case 45–71 R, *GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) v Commission*, Order of the President of the Court, [1971] ECR 00791 and Case T-384/06 R, *IBP Ltd and International Building Products France SA v Commission*, Order of the President of the Court of First Instance,

[2007] ECR II-00030. See also Giacomo Gattinara, 'Judicial Protection at European Level' in Gian Luigi Tosato and Leonardo Bellodi (eds), *EU Competition Law, Volume 1, Procedure: Antitrust—Merger—State Aid* (Claeys & Casteels 2006), 474–477.

25 A company can provide a bank guarantee instead of paying the fine immediately. However, if the party then succeeds on appeal and the fine is annulled or reduced, it will not receive a reimbursement of the bank guarantee charges. See also CS Kerse and N Khan, *EC Antitrust Procedure* (5th edn, Sweet & Maxwell London 2005) 330–1.

26 Best Practices Notice, paras 147–149.

27 *Aluminum Fluoride* (Case COMP/39.180) (not yet officially published). See also Albers and Jourdan (n 23) 198.

28 Case T-198/03 *Bank Austria Creditanstalt AG v Commission* [2006] ECR II-1429, para. 71.

29 Albers and Jourdan, (n 23) 198.

30 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2004] OJ L1/1, as amended by Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries [2004] OJ L 68/1 and Council Regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services [2006] OJ L 269/1 (Regulation 1/2003).

competition authorities (NCAs) when they apply EU antitrust law.

Regulation 1/2003 is the end product of the Commission's efforts to modernise EU antitrust enforcement. Unlike the previous centralised system of notifications and authorisations,<sup>31</sup> Regulation 1/2003 decentralised the enforcement of EU antitrust rules, which is now shared between the Commission and NCAs in EU Member States. Further, Regulation 1/2003 mandates that when national courts and NCAs apply their national antitrust rules, they must also apply EU competition law.<sup>32</sup>

A Commission decision is binding in its entirety.<sup>33</sup> In the *Masterfoods* case,<sup>34</sup> the ECJ stated that national courts must avoid giving decisions on Articles 101 and 102 which would conflict with a decision contemplated by the Commission.<sup>35</sup> National courts were also prohibited from issuing decisions running counter to those of the Commission, even if the latter's decision conflicts with a decision given by a national court.<sup>36</sup> Finally, if a judicial outcome would depend on the validity of the Commission decision, national courts are instructed to stay their proceedings pending final judgment in the action for annulment by the EU Courts.<sup>37</sup> Article 16 of Regulation 1/2003 codifies the law resulting from *Masterfoods* and, in accordance with Regulation 1/2003's parallel enforcement nature, expands *Masterfoods'* application so as to encompass NCAs.

Rules on jurisdiction and other procedural safeguards were put in place in Regulation 1/2003,<sup>38</sup> and

have been further developed in recent EU case law,<sup>39</sup> all with the aim of ensuring the Commission's legal primacy in the enforcement of EU antitrust rules. Thanks to this guaranteed primacy, the EU antitrust model is being disseminated down to Member State level.<sup>40</sup>

Commission decisions are also binding on national courts in both civil and criminal proceedings. Drawing inspiration from the US antitrust model, there has been a visible increase in the private enforcement of EU competition law in recent years.<sup>41</sup> National courts adjudicating on damages claims in follow-on litigation are bound by the Commission's infringement decision. The Commission's determination on the existence of an infringement is not open for debate and cannot be rebutted before a national court. Not only do companies face ever greater fines imposed by the Commission but they are also at risk from subsequent private litigation at EU Member State level, following on from the same Commission decision.

Finally, Regulation 1/2003 states that Commission decisions are not criminal in nature.<sup>42</sup> Irrespective of whether this is in fact so,<sup>43</sup> they have binding legal effect in subsequent criminal proceedings. Regulation 1/2003 clearly allows Member States to impose criminal sanctions (including gaol sentences) for a breach of EU antitrust rules.<sup>44</sup> In a notice, the Commission explicitly acknowledges that Articles 101 and 102 TFEU may be applied by national courts in criminal proceedings.<sup>45</sup> Member States are allowed to criminalise their national antitrust rules only as long as they provide the same

31 Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ L3/204.

32 Regulation 1/2003, art. 3(1).

33 TFEU, art. 288(3).

34 Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd.*, [2000] ECR I-11369 (*Masterfoods*), paras 51, 52 and 57.

35 *ibid.* para. 51.

36 *ibid.* para. 52.

37 *ibid.* para. 57.

38 Regulation 1/2003, art. 11.

39 See for example Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o.* (not yet officially published) (*Tele2 Polska*) <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-375/09#>> accessed 27 February 2012. See also Anne MacGregor and Bogdan Gecic, 'EU Antitrust Proceedings and National Competition Authorities: A Leap in the Wrong Direction' (2012) 1 *International Trade Law and Regulation* 10.

40 *ibid.* See also Case C-439/08 *VEBIC VZW* (not yet officially published) <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-439/08>> accessed 27 February 2012.

41 Commission of the European Communities, *White Paper on Damages actions for breach of the EC antitrust rules*, Brussels, 2.4.2008 COM(2008) 165 final <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF>> accessed 27 February 2012 and Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, *Study on the Condition on Claim for Damages in Case of Infringement of EC*

*Competition Rules*, Comparative Report, undertaken by the law firm Ashurst, for the European Commission, <[http://ec.europa.eu/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf)> accessed 27 February 2012.

42 Regulation 1/2003, art. 23(5).

43 There is an on-going debate on the criminal law nature of Commission decisions. Amongst the many authors that contest the alleged non-criminal nature of Commission decisions see, for example, Ian S Forrester, 'Due Process in EC Competition cases: A distinguished institution with flawed procedures' (2009) *ELR* 817 and André Klip, *European Criminal Law, An Integrative Approach* (Intersentia, Cambridge 2009) 2, 160, 197, 405–10. For a contrary view see Wouter PJ Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28(2) *World Competition*. See also an editorial of articles on this topic—Katalin J Cseres, Maarten Pieter Schinkel and Floris OW Vogelelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Edward Elgar, Cheltenham 2006).

44 Article 5 of Regulation 1/2003 states, when applying Articles 101 and 102 TFEU NCAs may issue decisions '... imposing fines, periodic penalty payments or any other penalty provided for in their national law' (emphasis added). See also Wils (n 43).

45 Para 4 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC [2004] OJ C101/54, para. 4 (Court Cooperation Notice).

protection against EU competition infringements.<sup>46</sup> This framework provides an additional impetus for the criminalisation of EU competition law at Member State level.<sup>47</sup> Indeed, a number of EU Member States have already provided for criminal sanctions against natural persons for competition infringements. For example, in the United Kingdom, an individual may be found criminally liable under the cartel offence.<sup>48</sup> A Commission cartel infringement decision should, therefore, have binding legal effect in criminal proceedings in the United Kingdom.<sup>49</sup>

In summary, Commission decisions are binding on NCAs when they apply EU competition rules. Furthermore, the legal primacy of the Commission's procedure and resulting decisions is meticulously safeguarded by both statute and case law. The Brussels-based antitrust model is being permeated down to Member State level. Finally, Commission decisions are legally binding on national courts of law in both civil and criminal proceedings. There is, probably, no other administrative authority in the world with similar powers and whose decisions have comparable legal effect.

### C. Level of fines

In addition to their legal consequences, Commission decisions have a substantial material impact on the companies to whom they are addressed. In Article 101 and 102 infringement cases, Regulation 1/2003 empowers the Commission to issue fines that are capped at 10 per cent of the total global turnover of the company concerned.<sup>50</sup> Consequently, in absolute numbers, fines can be virtually unlimited.

The level of fines that the Commission has been imposing in recent years has significantly increased. Arguably, this may be attributed to the modernisation

process and the adoption of Regulation 1/2003. The drastic increase in fines coincides with the coming into force of Regulation 1/2003 and the publication of the Fining Guidelines.<sup>51</sup>

If one looks at the Commission's statistics, the numbers are significant. For Article 101 violations, relative to the 1990s, the total fines imposed for illegal cartels in the 2000s have increased almost twenty-fold; from €615 million in the period 1990–1999 to €12.78 billion in the period 2000–2009.<sup>52</sup> The latest figures show no indication of any meaningful decrease in this trend.<sup>53</sup> The highest total fine of €1.383 billion was imposed on the *car glass* cartel in 2008.<sup>54</sup> The situation is no different when it comes to abuse of dominance cases under Article 102 TFEU. The Commission presently holds the record for imposing the highest individual monetary sanction ever in the amount of €1.06 billion against Intel for abuse of dominance in 2009.<sup>55</sup> Regardless of issues of legality and increases in fines,<sup>56</sup> their sheer amount in absolute terms is without precedent.<sup>57</sup>

### III. Scope and intensity of judicial review

With its hybrid legal character, the Commission wields powers unlike any other national, international or supranational administrative or judicial body. The only recourse that an aggrieved party has in order to counterbalance the sweeping effects of a Commission decision is to lodge an appeal before the EU Courts. The question then becomes what kind of review is engaged in by the EU judicature.

This has long been a controversial issue and the debate has intensified in recent years.<sup>58</sup> There are two key reasons for this. The first is the abovementioned

46 Wils (n 43) 19–20.

47 For example, criminal sanctions have been introduced in *inter alia* Ireland, Estonia and the United Kingdom.

48 Section 188 of the UK Enterprise Act 2002 imposes criminal liability on individuals who dishonestly engage in cartel agreements.

49 See also Forrester (n 43) and Wils (n 43) paras 57–62.

50 Regulation 1/2003, art 23(2). Although the cap is set at 10 per cent, the Commission issues fines which are substantially below this threshold.

51 Regulation 1/2003 came into force on 1 May 2004, while the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2 (Fining Guidelines) have been in effect since 2 September 2006. Total cartel fines for the period 2005–2009 have increased threefold relative to the previous 2000–2004 period. Commission's official statistics <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 27 February 2012. See also Damien MB Gerard, 'Breaking the EU Antitrust Enforcement Deadlock: Re-empowering the Courts?' (2011) 36 ERL 457, 459–62.

52 The Commission's cartel statistics, point 1.4 <<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>> accessed 27 February 2012.

53 *ibid.* In the period 1 January 2010 to the end of 2011 the Commission imposed some €3.48 billion in fines against cartels.

54 *Car glass* (Case COMP/39.125) (not yet officially published).

55 *Intel* (Case COMP/37.990) (not yet officially published), provisional non-confidential version, Commission decision of 13 May 2009, para. 1789 <[http://ec.europa.eu/competition/sectors/ICT/intel\\_provisional\\_decision.pdf](http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf)> accessed 27 February 2012.

56 There is an on-going debate on the legality of the level of the imposed fines and their compatibility with the European Convention on Human Rights. See, for example, Ian S Forrester (n 43) 4–12; and Alan Riley, 'The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?' [2010] CEPS Special Report. For a contrary view see Wils (n 23).

57 An exception (probably unique) is the Yukos case in Russia, in which the Moscow commercial court ordered Yukos to pay some €2.85 billion in taxes, interest and penalties which led the company to declare bankruptcy. The European Court of Human Rights in Strasbourg (ECtHR) recently found that the Russian authorities had violated Yukos' human rights. See *Yukos v Russia* (2011) ECHR 1342.

58 For criticism of the level of judicial review, see, for example, Donald Slater, Sebastien Thomas and Denis Waelbroeck, 'Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?', *The Global Competition Law Center Working*

increase in the level of fines over the past decade. The second is the entry into force of the Lisbon Treaty in 2009.<sup>59</sup> The Lisbon Treaty elevates the Charter on Fundamental Rights of the EU (Charter) to the status of primary law.<sup>60</sup> It also provides for the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>61</sup> A key line of criticism is that Commission proceedings and subsequent judicial review do not satisfy the principles of due process enshrined in Article 6(1) of the ECHR and Article 47 of the Charter.<sup>62</sup>

For judicial review, the issue is whether the EU Courts have limited or full jurisdiction when adjudicating an appeal against a Commission decision. Only full jurisdiction would be compatible with the Charter and the ECHR.<sup>63</sup> For the purposes of the ECHR and the Charter, a court has full jurisdiction in competition matters if it has the power to quash the challenged decision in all respects, on questions of fact and law.<sup>64</sup>

A distinction should be made between the scope and intensity of judicial review by the EU Courts: on scope, Article 263 TFEU limits the EU Courts' jurisdiction to reviewing only the legality of Commission decisions in competition matters (also called annulment jurisdiction—*contrôle de légalité*).<sup>65</sup> The jurisdiction does not encompass substantive assessments of the measures the Commission chooses to implement or policies it pursues in a given case.<sup>66</sup> In other words, the EU Courts must respect the Commission's discretion, and, thus, cannot review the decision's 'utility' (*opportunité*).<sup>67</sup> The EU judicature cannot substitute its own

judgment for a Commission decision. It can only annul a decision, while the Commission remains free in its choice of measures for adhering to the judgment. The only condition is that the Commission reaches a result that complies with the judgment.<sup>68</sup>

In contrast, Article 261 TFEU and Article 31 of Regulation 1/2003 authorise the EU Courts to perform an 'unlimited review' of the appropriateness of the amounts of fines imposed by the Commission (*compétence de pleine juridiction* or *contrôle d'opportunité*). In this regard, the law does not limit the scope of the EU Courts' review, since they can, at least in theory, check both the legality and the 'utility' (*opportunité*) of the amount of fines levied.<sup>69</sup> Unlimited review, therefore, allows the EU Courts, or more precisely, the GC, not only to annul but also to adjust the amount of fines. This means that the GC has the power to substitute its own decision on fines for that of the Commission.

Closely intertwined with the scope of judicial review is the question of the intensity of the EU Courts' scrutiny when appraising Commission decisions. In EU Court parlance, the intensity of judicial review is referred to as the 'standard of review'.<sup>70</sup> For annulment jurisdiction under Article 263 TFEU, the EU Courts perform a legality check only and cannot assess whether the Commission has correctly applied its discretion. The standard of review is relevant here since it is indicative of the dividing line between what the EU Courts consider to be legal issues as opposed to matters that remain within the Commission's discretion. The EU Courts will only examine the incorrect

*Paper Series, GCLC Working Paper 04/08* 40–44; Forrester (n 43) and Gerard (n 51). For an opposite view, see Wils (n 23); Marc Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2(4) *Journal of European Competition Law & Practice* 295.

59 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon [2007] OJ C306/01 (Lisbon Treaty), which came into force on 1 December 2009.

60 Article 6(1) of the Treaty on European Union (TEU), as amended by the Lisbon Treaty gives the same Charter the same legal value as the Treaties.

61 Article 6(3) of the TEU, as amended by the Lisbon Treaty and Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

62 The specifics of this debate are outside the scope of this paper. For further on the issue, see note 65.

63 See for example, the ECtHR's judgment in *A. Menarini Diagnostics S.R.L. v Italy*, handed down on 27 September 2011. There the ECtHR held that the powers of the Italian competition authority to issue fines against competition infringers was compatible with Article 6(1) ECHR since the alleged infringer was granted access to a court of 'full jurisdiction'.

64 *ibid.*

65 Most of the concepts of judicial review in the original Treaties trace their origins back to French administrative law and the wider

Continental European legal tradition. At the time the original treaties were drafted in the 1950s, none of the Member States were common law jurisdictions. See further, Hubert Legal, 'Standards of Proof and Standards of Judicial Review in EU Competition Law', in Barry Hawk (ed.), *International Antitrust Law and Policy: Fordham Corporate Law 2005* (Juris Publishing, Huntington, NY 2006) ch. 5.

66 See, for example, Gattinara (n 24) 454–7.

67 'Légalité' is opposed to 'opportunité'. It is for the judge to decide whether the measure concerned is permitted by existing law, *not whether it is timely, effective, politically sound or socially commendable*' (emphasis added), Legal (n 65) 3.

68 Gattinara (n 24) 461.

69 See, for example, John Ratliff, 'Judicial Review in EC Competition Cases Before the European Courts: Avoiding double renvoi', in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing, 2011) 453.

70 While the original concepts of EU judicial review stem from French administrative law, the notion of 'standards for review' does not exist in French or other Continental European jurisdictions and comes from common law. Consequently, while the platform for review belongs to one legal tradition, its apparatus originates from another, thereby amalgamating legal notions, logic and vocabulary. This adds to the confusion and difficulties in finding a 'common language' when carrying out judicial review and makes the task for EU judges and lawyers, of different legal backgrounds, even more difficult. See further, Legal (n 65) 1–2.

application of procedural rules, materially incorrect appreciations of facts, error of law, misuse of powers, and manifest errors of assessment.<sup>71</sup> When it comes to ‘complex economic and technical assessments’, the EU Courts generally recognise the Commission’s ‘substantial margin of discretion or appreciation’. In such cases, the EU Courts will refrain from substituting their own assessment for that of the Commission and will only assess the coherence of the Commission’s evidence, reasoning and application of law.<sup>72</sup> By adopting this marginal review standard with its narrower scope, the EU Courts have further constrained their original limited control.<sup>73</sup> For fines, although they have unlimited jurisdiction, the EU Courts have for the most part expressed a deferential approach, limiting their review to the Commission’s methodology in setting the fines.<sup>74</sup> Statistics show that the EU Courts have generally declined to alter the amount of fines set by the Commission, with only a few exceptions.<sup>75</sup>

The last issue concerns the exact scope of the EU Courts’ unlimited jurisdiction and its relationship with the notion of ‘full jurisdiction’. This has been the subject of a longstanding debate.<sup>76</sup> Article 261 TFEU states that EU Courts have ‘unlimited jurisdiction with regard to the penalties’. On the other hand, under Article 31 of Regulation 1/2003, the EU Courts ‘shall have *unlimited jurisdiction to review decisions* whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed’ (emphasis added). The issue is whether unlimited jurisdiction refers only to the amount of penalties, or decisions imposing the

penalties as well. If the latter is true, this would in effect mean the broadening of the original limited review of legality so as to include a substantive assessment of the whole Commission decision (*contrôle d’opportunité*).<sup>77</sup> In the past, the EU Courts have rejected this approach.<sup>78</sup> There has been, however, a sea change of sorts in recent cases, albeit with many inconsistencies along the way.<sup>79</sup> A recent addition to this new line of cases is the ECJ’s judgment in *Chalkor v Commission*.<sup>80</sup> By affirmatively answering that EU Courts do satisfy the requirements of effective judicial protection, the ECJ, at least nominally, has established its full jurisdiction to review decisions in which the Commission imposes fines.<sup>81</sup> The ECJ went on to state that ‘...the Courts cannot use the Commission’s margin of discretion... as a basis for dispensing with the conduct of an *in-depth review* of the law and of the facts.’<sup>82</sup>

This ruling may imply a shift in the scope of review by the EU judiciary so as to include a substantive assessment of not only the level of fines but also the contested decision. From the ambiguous wording used in *Chalkor*, though, it is difficult to know with any certainty. Even less guidance is provided on the EU Courts’ power to amend a contested Commission decision. It seems that the EU Courts (ie the GC) are still not authorised to substitute their own judgment for the contested decision.<sup>83</sup> This impacts the effectiveness of the antitrust enforcement system as a whole, since a successful appellant may well have to wait for a considerable time until its legal situation is finally resolved.<sup>84</sup> This has the potential to impinge upon another due

71 See, for example, Gattinara (n 24) 454–7 and Slater, Thomas and Waelbroeck (n 58) 43.

72 One of the potential reasons behind this limited standard of review is the lack of resources at the EU Courts’ disposal. Although the GC was created, amongst others, with the purpose to hear competition cases at first instance, EU Courts are not specialised antitrust or administrative tribunals. There is no substantive court specialisation in competition matters as, for example, in Germany. The EU Courts also lack the significant numbers of competition economists, as well as the manpower and competition expertise, of the Commission.

73 See n 71. For an opposite view, see Marc Jaeger (n 58).

74 In practice the EU Courts have not used their unlimited jurisdiction to go beyond the Commission Fining Guidelines and its methodology in setting fines. See Wils (n 23) 28–9.

75 Gerard (n 51) 469–71.

76 See, for example, Ian S Forrester, ‘A Bush in Need of Pruning’, in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing Oxford, 2011) 407.

77 This interpretation is highly problematic because it contradicts the explicit wording of Article 263 TFEU. One possibility would be to use Article 103(2)(d) as the proper legal basis for granting the EU Courts unlimited jurisdiction in competition matters.

78 See further, Gerard (n 51) 472–473 and Gattinara (n 24) 457–60.

79 *ibid.*

80 Case C-386/10 P *Chalkor AE Epexergasias Metallon v European Commission*, judgment of the Court of 8 December 2011 (not yet officially published) (Chalkor) <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-386/10%20P>> accessed 27 February 2012; see also Case C-389/10 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, Judgment of the Court of 8 December 2011 (not yet officially published) <<http://curia.europa.eu/juris/documents.jsf?num=C-389/10>> accessed 27 February 2012, and Case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v European Commission*, Judgment of the Court of 8 December 2011 (not yet officially published) <<http://curia.europa.eu/juris/documents.jsf?num=C-272/09>> accessed 27 February 2012.

81 *Chalkor*, para. 67.

82 *ibid.* para. 62.

83 This is merely a practical point. According to ECHR case law, the court’s power to substitute a decision is not necessary to satisfy due process requirements. By contrast, for example, in the UK, the Competition Appeal Tribunal has the authority to fully substitute its own judgment for an OFT decision. See further, Wils (n 23) 19–22.

84 See Joint Cases C-109/10 P and C-110/10 P *Solvay SA v Commission*, 25 October 2011 (not yet officially published) (Solvay) <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-109/10%20P>> accessed 27 February 2012. There it took the company more than 20 years to conclude in its cases against the Commission for breaching Solvay’s due process rights.

process principle, that is, the right to a decision in a reasonable time.<sup>85</sup> It may therefore trigger new human rights criticism in the future.<sup>86</sup> Furthermore, as to the standards of review, it is still unclear how far the EU Courts will be prepared to go in encroaching on the Commission's discretion with regard to both fines and the contested decision as a whole.

Lastly, the *Chalkor* ruling does not consider the scope of the legality review under Article 263 TFEU for decisions imposing measures other than fixed fines or periodic penalty payments. The Commission is authorised to impose behavioural or structural remedies in order to bring an infringement to an end.<sup>87</sup> Such measures would be within the limits of the Commission's discretion and would be only subject to a marginal review. It is doubtful that this would satisfy the Charter's requirements for effective judicial protection and this point may give rise to future due process challenges.

If one steps back and peruses the current state of EU judicial review, although it may be developing in the right direction, it still seems inconsistent, fragmented and limited. In addition, a number of human rights concerns are yet to be dealt with. It is submitted that, presently, the quality of EU judicial review is not robust enough to effectively countervail the broad effects that Commission decisions have on alleged infringers.

#### IV. The overall EU antitrust model

As seen above, Commission decisions have unprecedented legal and practical effects. They are binding for NCAs and national courts in both civil and criminal proceedings in EU Member States. The EU antitrust model has been granted legal primacy and is being gradually expanded down to Member State level. Although nominally administrative in nature, unlike its European national counterparts, suspension of a Commission decision is not a general rule but an exception rarely applied. A decision is immediately applicable, along with its fine. Fines imposed by the Commission are the highest monetary sanctions for criminal and civil offences anywhere and they are generally increas-

ing. This is no ordinary administrative procedure, but rather a *sui generis* one that may have a fundamental impact on a party's legal and financial status and, thus, requires stringent standards of procedural safeguards in order to adhere to due process requirements. Such procedural guarantees may exist at an internal, administrative level, before the adoption of a decision or externally, through judicial review. As noted above, the current state of EU judicial recourse is as yet insufficient to counterbalance the far-reaching impact of Commission decisions.

It is against this background, then, that one must examine the quality of the Commission's internal processes and its new Best Practices Package. Are they robust enough to ensure due process and fairness in the EU antitrust enforcement system?

#### V. The Best Practices Package

After an initial two months of public consultation, and more than a year of further discussions with stakeholders and the provisional application of its preliminary draft following the arrival of Commissioner Almunia,<sup>88</sup> on 17 October 2011, the Commission adopted the final version of its Best Practices Package.

The package sets out a roadmap as to how the Commission enforces Articles 101 and 102 TFEU. The Commission's procedure is structured in two broad phases: the investigative phase (first phase) and procedures leading to a prohibition decision (second phase).<sup>89</sup> At the end of either phase, the Commission has the right to close the case.<sup>90</sup> In addition, the Best Practices Notice provides, for the first time, formal guidance on a special commitment procedure.<sup>91</sup> The main difference between a prohibition decision and a commitment decision is that in the latter the Commission ends its case without a formal conclusion on the existence of an infringement.<sup>92</sup> The Best Practices Notice also covers the procedure for the rejection of complaints.<sup>93</sup>

The investigative phase can be initiated either by means of complaints or *ex officio*.<sup>94</sup> It is divided into two stages: (i) an initial assessment and case allocation phase and (ii) the opening of proceedings.<sup>95</sup> In the initial assessment phase the Commission will decide

85 Article 47(3) of the Charter and Article 6(1) of the ECHR.

86 For suggestions on how to improve the situation see, for example, Wils (n 23) 22, n 65, 83.

87 Regulation 1/2003, art. 7(1).

88 Italianer (n 4) 2, para. 4. Public consultations were held in 2010 for two months. Probably due to the considerable number of contributions and interest, the Commission *de facto* extended the discussion for an additional year. During this period the Commission provisionally applied the consultation version of the Antitrust Best Practices

<[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/index.html](http://ec.europa.eu/competition/consultations/2010_best_practices/index.html)> accessed 27 February 2012.

89 Best Practices Notice, paras 9 and 77.

90 *ibid.* paras 75, 76 and 114.

91 *ibid.* para. 155 *et al.*

92 *ibid.* para. 117.

93 *ibid.* para. 134.

94 *ibid.* paras 10–11.

95 *ibid.* paras 12 and 17.

whether to pursue the case or allocate it to an NCA in an EU Member State, if it is better suited to conduct the investigation. If the Commission opts to continue pursuing the case it will conduct a preliminary investigation including its first investigative measures (requests for information or inspections) and inform the addressees that they are subject to a preliminary investigation, and of its scope and purpose.<sup>96</sup>

If the Commission concludes that further investigation is necessary it will adopt a decision to formally open proceedings.<sup>97</sup> This decision will be notified to the parties ‘sufficiently in advance’ before it is made public.<sup>98</sup> The Commission may send out information requests,<sup>99</sup> conduct interviews,<sup>100</sup> perform dawn raids,<sup>101</sup> and hold different types of meetings with the parties subject to the proceedings, complainants and third parties.<sup>102</sup> At this stage, the parties may be granted access to some of the ‘key submissions’ in the Commission’s file, while wider access is only available in procedures leading to a prohibition decision (second phase).<sup>103</sup>

At the end of the investigative phase the Commission has three options: either to drop the case, commence a commitment procedure or move forward with the second phase and a potential prohibition decision.<sup>104</sup>

A procedure leading to a prohibition decision (second phase) is officially triggered by the issuance of the Commission’s Statement of Objections (SO).<sup>105</sup> However, in cartel cases, the adoption of an SO usually coincides with the opening of proceedings.<sup>106</sup> In other words, in cartel cases, the first phase of proceedings ends with the initial assessment while the second phase consists of a fusion of the formal opening of proceedings stage and the procedure leading to a prohibition decision (otherwise, the second phase).

In the SO, the Commission will inform the parties of the results of its in-depth investigation and its objections regarding the alleged infringements of Articles 101 and 102.<sup>107</sup> The Commission will also indicate in the SO whether it intends to impose remedies or fines and the factors relevant for the calculation of fines.<sup>108</sup>

The SO will be followed by a Commission press release setting out the key issues in the SO.<sup>109</sup> The issuance of the SO will trigger one of the most important rights of defence—access to the Commission’s file,<sup>110</sup> as well as two additional confidential information exchange procedures between the parties (the negotiated disclosure procedure and the data room procedure).<sup>111</sup> Access to information is intended to enable the parties to effectively use their right to be heard and prepare a written reply to the SO.<sup>112</sup> The parties to the proceedings have an additional right to have their arguments presented orally at a hearing.<sup>113</sup> If new evidence appears that can materially affect the case, the Commission will issue a Supplementary Statement of Objections (SSO) or, if the impact of the new evidence is of lesser significance, the Commission will issue a letter of facts instead.<sup>114</sup> Where there is an SSO, the parties will have the same procedural rights as in the case of the initial SO.<sup>115</sup>

Depending on the results of this phase, the Commission may proceed towards adopting an infringement decision imposing fines or remedies or it may close the case.<sup>116</sup>

Before assessing the disadvantages of the current procedural framework, it is perhaps important to note that prior to the publication of the provisional and final versions of the Best Practices Package, there was no formal guidance on Commission antitrust proceedings. In view of the inadequacies identified, the adoption of the Best Practices Package is no doubt a welcome step in its own right. It provides more transparency and certainty and creates a basis for future reforms. Furthermore, although the Best Practices Package does not revolutionise the structure of Commission antitrust proceedings, it does bring about some additional positive changes to its previous practice.

For the first time, the Commission procedure is structured into clear phases and stages. The formal opening of proceedings has been pushed to an earlier stage immediately upon conclusion of the initial assessment phase. This is a reaction to the longstanding criticism that proceedings were officially opened only after the case had reached a considerable level of maturity

96 *ibid.* para. 15.

97 *ibid.* para. 17.

98 *ibid.* para. 21.

99 *ibid.* para. 32.

100 *ibid.* para. 46.

101 *ibid.* para. 50.

102 *ibid.* para. 42.

103 *ibid.* paras 71–74 and 92–94.

104 *ibid.* para. 75.

105 *ibid.* para. 77.

106 *ibid.* para. 24.

107 *ibid.* para. 82.

108 *ibid.* paras 83–85.

109 *ibid.* para. 91.

110 *ibid.* paras 92–94.

111 *ibid.* paras 95–98.

112 *ibid.* para. 99.

113 *ibid.* paras 106–108.

114 *ibid.* paras 109–111.

115 *ibid.* para. 112.

116 *ibid.* para. 115.

while, in the meantime, the parties remained in the dark.

State of Play meetings are an ‘opportunity for frank and open discussions’ between DG Competition and the parties subject to the proceedings.<sup>117</sup> They are usually bilateral but can also be multilateral so as to include all of the parties to the proceedings. State of Play meetings are now offered at several key stages of the case including shortly after the opening of proceedings, at a sufficiently advanced stage in the investigation and, where an SO has been adopted, after the reply to the SO or after the oral hearing.<sup>118</sup> While State of Play meetings were previously exclusively available in dominance investigations, now they can be held in cartel cases after the oral hearing. In addition, two specific State of Play meetings will be offered in commitment procedures.<sup>119</sup>

The Best Practice Notice also provides for ‘triangular meetings’ among the parties subject to the proceedings, complainants and/or third parties and DG Competition.<sup>120</sup> They should be held as soon as possible after the opening of proceedings and before the adoption of the SO. In addition, the parties subject to the proceedings and the complainants have the possibility to schedule meetings with either the Commissioner with special responsibilities for competition matters (Competition Commissioner), the Director-General of DG Competition or the Deputy Director-General for Antitrust.<sup>121</sup>

In addition to their right of access to the file, the parties subject to the proceedings will be granted access to ‘key submissions’ as early as the investigative phase. This includes non-confidential versions of complaints and other key submissions by complainants or third parties such as economic studies. However, such rights will not be available in cartel proceedings.<sup>122</sup>

The Commission will publicise the major stages in a case by means of a press release and/or on the Commission’s website. This includes the opening of proceedings, the issuance of an SO, the adoption of a prohibition decision, the closure of proceedings and the rejection of complaints.<sup>123</sup>

Since the fines imposed by the Commission are not of fixed amounts but can vary depending on a number

of factors, there has been considerable criticism of the lack of transparency and legitimate expectations as to the final size of fines for some time. The changes aim to address this. The SO will now include a section on fines, including possible factors to be applied in their calculation.<sup>124</sup> The Best Practices Notice also provides further guidance for situations when the parties are unable to pay the fines.<sup>125</sup>

With regard to the new Hearing Officer Mandate (the so-called ‘fifth generation’),<sup>126</sup> his powers in procedural matters have also been expanded and further developed. On the other hand, in terms of substance, there are no significant changes and, therefore, the Hearing Officer’s influence remains limited. The same is true for the oral hearing.

The Hearing Officer is a guardian of procedural rights and he or she resolves disputes on any procedural issue between the case teams and the parties subject to the proceedings, complainants and/or third parties. Previously, the Hearing Officer could hear disputes only after the adoption of the SO (second phase), whereas now competence has been extended to cover the entirety of Commission proceedings including the investigative phase (first phase).<sup>127</sup>

The Hearing Officer has the right to provide recommendations as to whether a document is covered by legal professional privilege. In cases where a party declines to respond to a request for information by invoking the privilege against self-incrimination, the Hearing Officer may be called upon to resolve the issue. He or she may also intervene in disputes as to extensions of time limits for responding to the information requests. Another highly welcomed improvement is that the parties are now guaranteed the right to be informed of their procedural status, that is, whether they are subject to an investigation and, if so, the subject matter and purpose of that investigation. If this right is impinged upon by DG Competition, the parties may go to the Hearing Officer for relief.<sup>128</sup> He or she is now the parties’ point of reference for any complaints in antitrust commitment and settlement procedures.<sup>129</sup>

Finally, throughout the proceedings, the Hearing Officer has a duty to report on the respecting of procedural rights to the Competition Commissioner, the

117 *ibid.* para. 60.

118 *ibid.* paras 63–64.

119 *ibid.* para. 65.

120 *ibid.* paras 67–69.

121 *ibid.* para. 70.

122 *ibid.* paras 71–74.

123 *ibid.* paras 21, 76, 91, 114, 147–148 and 150.

124 *ibid.* para. 85.

125 *ibid.* para. 87–89.

126 The first terms of reference on the mandate of the Hearing Officer was adopted in 1982, then restated in 1990, followed by two additional revisions in 1994 and 2001.

127 Hearing Officer Mandate, art. 1(2).

128 Hearing Officer Mandate, art. 4(2).

129 Hearing Officer Mandate, art. 15.

Advisory Committee and the parties concerned. He or she also submits a final report together with the draft Commission decision to the College of Commissioners, 'in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as to the course of the procedure and that the effective exercise of procedural rights has been respected throughout the proceedings'.<sup>130</sup>

## VI. Major concerns with Commission antitrust procedures

A number of commentators have provided extensive and well-substantiated criticism as to the current state of play.<sup>131</sup> This article will not attempt to exhaustively reiterate all aspects of the debate, but will instead focus on some key issues.<sup>132</sup>

### A. The purpose of the oral hearing

There are a number of problems with the present formula for the oral hearing. The adoption of the Best Practices Package only serves to underscore these existing weaknesses.

First, the oral hearing lacks rules of evidence of any nature and fact-finding procedures, unlike administrative procedures in various civil law jurisdictions.<sup>133</sup> This deficit is even more serious when compared to common law jurisdictions, since the hearing is not held

before a judge.<sup>134</sup> There is no procedure for hearing testimonies from witnesses and experts or for furnishing expert opinions. The Commission cannot force or compel a person to attend a hearing.<sup>135</sup> It is also impossible to examine and cross-examine witnesses or submit new arguments.<sup>136</sup> In addition, even if a natural person invited by the Hearing Officer were to voluntarily attend the hearing, the person would not be under any obligation, other than a moral one, to speak the truth because there are no sanctions for perjury. In both dominance and cartel cases, it is very common for competitors to commence proceedings either by filing complaints or leniency applications and, they will have directly conflicting interests. This means there is a natural tendency towards an adversarial procedure. However, since the oral hearing is not public and because there are no legal sanctions for perjury there is no guarantee that what is presented at a hearing is necessarily truthful.<sup>137</sup> In contrast, authorities in both general administrative proceedings and competition matters in national European civil law jurisdictions have a toolkit of formal fact-finding instruments at their disposal. This is another important way in which the Commission's procedure is unique.

Without strong procedural safeguards, the oral hearing is deprived of substance and amounts to little more than a well-organised meeting between various parties, Member State NCA representatives and Com-

130 Hearing Officer Mandate, arts 16 and 17.

131 See, for example, Forrester (n 43); Slater, Thomas and Waelbroeck (n 58); Gerard (n 51); Riley (n 56); and Hendrik Viaene, 'Administrative Proceedings in the Area of EU Competition Law' (2011) Directorate-General for Internal Policies, Policy Department C, Citizens' Rights and Constitutional Affairs.

132 There is an additional concern beyond the scope of this article regarding the Commission's internal manual on antitrust procedure (ManProc). The ManProc contains guidance for DG Competition officials on how to conduct antitrust proceedings. It may be a key missing part in interpreting the Best Practices Package on due process and fairness. On 26 September 2011, the European Ombudsman ordered the Commission to disclose partially the ManProc, that is, at least some 500 pages of the 2500-page long document. The Commission undertook to publish the ManProc simultaneously with the Best Practices Package in October 2011 or 'shortly after'. At the beginning of 2012, however, the ManProc had not been disclosed. See also John Temple Lang, 'Publishing the DG Competition Manual of Procedure' (2011) 10(11) *Competition Law Insight* 11–13.

133 In general administrative proceedings in Germany, the administrative authority may gather information of all kinds, hear witness testimonies, take statements from expert witnesses or furnish opinions, hear the parties, gather any of the previous statements in writing, obtain public and private documents and records and visit and inspect the locality at issue. All of the above statements may be requested under oath and, thus, may be subject to sanctions for perjury. See Section 26 of Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*) of 25 May 1976; in the wording last promulgated on 23 January 2003 (Federal Law Gazette I, p. 102), amended by Article 1, of the Fourth Administrative Law Amendment Act (*Viertes Gesetz zur Änderung verwaltungsverfahrenrechtlicher Vorschriften—4. VwVfÄndG*) of

December 11th 2008 (Federal Law Gazette I p. 2418). By analogy, the same legal instruments on the taking of evidence by inspection, testimony of witnesses, and experts are available in antitrust proceedings before the German competition authority. See Article 57 of the Act against Restraints of Competition. Almost identical evidentiary rules exist in administrative proceedings in other European civil law jurisdictions. For the Commission's comparison between its procedure and that of other civil law jurisdictions see n 7.

134 See, for example, White & Case, 'Comments on DG Competition's Best Practices in proceedings concerning Articles 101 and 102 TFEU' 5 <[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/white\\_case\\_a\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/white_case_a_en.pdf)> accessed 27 February 2012.

135 Albers and Jourdan (n 23) 194.

136 See also White and Case, 'Comments on DG Competition's Best Practices in proceedings concerning Articles 101 and 102 TFEU' 1 <[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/white\\_case\\_b\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/white_case_b_en.pdf)> accessed 11 December 2011; Baker and McKenzie, 'Response to DG Comp Consultation: Best Practices on the Conduct of Antitrust Proceedings and Guidance on Procedures of the Hearing Officers' 3, para. 2.10 <[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/baker\\_mckenzie\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/baker_mckenzie_en.pdf)> accessed 11 December 2011; and Skadden, Arps, Slate, Meagher and Flom, 'Response to DG Competition Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU' 4, para. 2.3 <[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/skadden\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/skadden_en.pdf)> accessed 11 December 2011.

137 Naturally, the provision of incorrect information might be regarded as an aggravating circumstance against a company in the setting of fines. See Albers and Jourdan (n 23) 195.

mission officials, with the Hearing Officer as the moderator. As correctly acknowledged by the UK House of Lords, the body that was primarily responsible for the creation of the Hearing Officer in 1982,<sup>138</sup> oral hearings resemble ‘much more a presentation by the parties to the Commission’,<sup>139</sup> than an adversarial process. The parties subject to the proceedings, other admitted parties and the case team present their arguments and engage in a question and answer session which is far from a cross-examination. It is therefore no surprise that many do not regard the oral hearing as a valuable part of the proceeding.<sup>140</sup>

The second problem concerns the timing of the oral hearing and its relationship to other meetings (eg State of Play, triangular meetings and meetings with senior officials). With the introduction of the two-phase procedure, the oral hearing has been placed late in the proceedings, after the issuance of the SO, in the second phase. On the other hand, the new Best Practices Notice provides for various other types of meetings in the investigative first phase, when the case team’s investigation is still in the early stages and its position is still preliminary.<sup>141</sup> Since both the oral hearing and the other available meetings lack rules of evidence and other structural formalities, apart from the fact that the first is moderated by the Hearing Officer,<sup>142</sup> there is little difference between them. Furthermore, from the parties’ perspective their right to be heard would arguably be more effectively employed in the first phase of proceedings rather than in the second, after the Commission has finished its in-depth review. In addition, ‘triangular meetings’ may include the parties subject to the proceedings, complainants and/or third parties and senior DG Competition officials (in effect, all of the materially important parties that are also present at the oral hearing). The meetings are held if DG Competition believes it to be in the ‘interests of the investigation to hear the views on, or to verify the accuracy of factual issues’, ‘where two or more opposing views or information have been put forward as to key data or evidence’.<sup>143</sup> More importantly, they are to be held ‘as

early as possible during the investigatory phase’.<sup>144</sup> Although the Commission makes an effort to state that these triangular meetings do not replace the oral hearing, the reality is that they can.

Finally, since the Hearing Officer is not a decision-maker and, therefore, does not adjudicate the case or draft the final Commission decision (this is done by the case team), his or her limited role of formally presiding over the oral hearing, means that the hearing itself can barely be distinguished from other meetings that are now available under the new Best Practices Package.

## B. The role of the Hearing Officer

Although not part of DG Competition, the Hearing Officer is attached to the Competition Commissioner.<sup>145</sup> He or she remains under the same ultimate umbrella as the case team that investigates, prosecutes and adjudicates the case, and the Hearing Officer is tasked with overseeing procedural legitimacy. For reasons of visible impartiality and independence, it would be preferable for the Hearing Officer to be part of the Secretariat General of the Commission or the Legal Service.

Apart from the role of mediator during the oral hearing, the Hearing Officer performs a substantial role in maintaining the procedural correctness of Commission proceedings. He or she can step in to resolve disputes on various procedural issues and files a final report with the Advisory Committee and the College of Commissioners on procedural matters.

On the other hand, the Hearing Officer has no power to decide on substantive issues and can rely only on the strength of his or her arguments.<sup>146</sup> The Hearing Officer’s substantive assessments are not binding on the case team and are not published. After the hearing, the Hearing Officer simply prepares an ‘interim report’, which may include observations on substantive issues.<sup>147</sup> A copy of the report is sent to the Competition Commissioner, the Director General of DG Competition and the Director in charge of the case. The interim report is never published or communicated to the parties.<sup>148</sup> Since there is no public pres-

138 Albers and Jourdan (n 23) 185–8.

139 *ibid.* 194. Original source of citation unavailable.

140 In cartel cases, it is only at the oral hearing stage that the parties become more familiar with the defence of other parties subject to the same proceedings. See Albers and Jourdan (n 23) 192.

141 Although the Best Practices Notice (para. 82) states that the SO contains a ‘preliminary position’ on the alleged infringement, it contradicts itself by continuing that this preliminary position is a result of ‘an in-depth investigation’. By contrast, State of Play meetings will be held shortly after the opening of proceedings in order to provide ‘the parties with an opportunity to react initially to the issues identified’, Best Practices Notice, para. 63(1).

142 Before the 1982 changes and the establishment of the Hearing Officer, oral hearings were, simply held before a senior DG Competition official.

143 Best Practices Notice, para. 67.

144 *ibid.* para. 69.

145 Hearing Officer Mandate, art. 2(2).

146 See Serge Durande and Karen Williams, former Hearing Officers attached to the Cabinet of the Commissioner, ‘The practical impact of the exercise of the right to be heard: A special focus on the effect of the Oral Hearings and the role of the Hearing Officers’ (2005) 2 Competition Policy Newsletter 27.

147 Hearing Officer Mandate, art. 14.

148 Albers and Jourdan (n 23) 197.

sure, or at least party awareness as to its content, the report does not have even the value of an Ombudsman's decision let alone that of an Advocate General's opinion.

According to previous Hearing Officers 'often... conclusions are very succinct and limit themselves to confirm the Commission's view, although it is not rare that, even in this case, they propose to investigate further some issues or include arguments or counterarguments expressed at the hearing'.<sup>149</sup> Not only are interim reports internal Commission documents, but they are brief and usually deferential to the case team's view.

All of the above begs the question as to whether the title 'Hearing Officer' is really appropriate for the role and powers attributed to the position. It is submitted that a more appropriate title for the post in its current form would be 'Procedural Officer'.<sup>150</sup>

### C. No separation of powers

As a final remark, it is useful to reiterate that the Commission combines the roles of investigator, prosecutor, judge and jury. The same case team conducts all phases of the Commission proceeding and drafts the final decision that is ultimately generally rubber-stamped by way of a formal adoption by the College of Commissioners. Although there are some internal checks and balances, apart from the very limited role of the Hearing Officer, they do not constitute formal proceedings followed by stringent procedural safeguards that would merit a decision that is fully compatible with due process requirements. When this is assessed through the lens of the overall EU antitrust enforcement system, not only do Commission internal procedures not cure the inadequacies of the broader enforcement model but in addition they exacerbate the due process problem.

## VII. Conclusion

Removing deficiencies in the EU antitrust system, such as the legal and material effects of Commission decisions or deficits in judicial review, would to some extent require difficult Treaty amendments and an overhaul of the entire EU antitrust framework. This is

unlikely to occur. But, the solution to the problem might be simpler than it initially appears.

In analysing the inherent evolution of the Commission's administrative procedure over the years and by drawing inspiration from more sophisticated administrative law traditions, it may be possible to remedy the due process problem. For various reasons, Commission procedure and the broader EU antitrust system were originally drafted in the image of Continental European administrative proceedings. Initially, the Commission's tasks and volume of work in competition matters were modest and did not require elaborate rules of administrative procedure. Over time, however, this has changed. European integration has increased as has the enforcement of EU competition law. In addition, common law lawyers trained in a different legal tradition and with a distinct perspective have joined the EU and thereby enriched the dynamic. In parallel, reforms in EU competition enforcement have resulted in an increase in fines and widespread changes to the European antitrust environment.

The introduction of the Hearing Officer in 1982, the gradual separation of the antitrust procedure into two distinct phases, and the various meetings that have been introduced at both phases in the new package all demonstrate the existence of an underlying rationale in the development of administrative proceedings. Following its Continental European predecessors, it seems that Commission procedure is inevitably moving towards an administrative system with two levels. As discussed, Germany and other Continental European jurisdictions have a system of administrative self-regulation. There are two potential tiers of administrative decision making. At first instance the administrative procedure is led by the authority that issues the decision. If the party objects it is sent to the supervisory authority for a full review. Oral hearings are held before both authorities, both of which have inquisitorial powers and combine the roles of investigator, prosecutor and adjudicator. Only after review by the supervisory authority will judicial review be available. It is worth noting that in Germany, for example, administrative self-regulation has a 90 per cent success rate.<sup>151</sup>

Since the Commission's procedure already has two phases, radical reforms would not be required to

149 Durande and Williams (n 146) 27 (emphasis added).

150 This was suggested to no avail during the public consultations. See WilmerHale, 'Consultation concerning DG Competition: Best Practices on Article 101 and 102 TFEU proceedings; Submission of Economic Evidence and Data Collection in Article 101 and 102 TFEU and merger cases; Guidance on Procedures of the Hearing Officers in relation to

Article 101 and 102 TFEU proceedings' 16–17, para. 76 <[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/wilmerhale\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/wilmerhale_en.pdf)> accessed 27 February 2012.

151 Schroder (n 9) 139. Note that under the existing system considerably more than 10 per cent of Commission decisions are challenged on appeal.

establish a full two tier system.<sup>152</sup> The DG Competition case team could take up the role of the issuing authority. At present, in the first phase the whole procedure is entirely led by the case team. The fact of its initiation is published as in any other administrative proceeding. DG Competition and the case team can hold various meetings with the parties at this stage. These meetings are not very different in substance from the oral hearing. After an in-depth analysis, the first phase ends with the adoption of the Statement of Objections. One could reform this so that the first phase became the first level of administrative procedure. The SO could be converted into a first instance administrative decision. As with the current SO, the fact that a first level decision has been issued could be made public by a Commission media release.

At the second level, similar to the present opportunity to reply to the SO, if the parties were to disagree with the first instance decision they could submit a formal objection (similar to *Widerspruch*). Analogous to an SO and a reply to the SO, this objection would have a suspensory effect, since the decision would not be immediately applicable. This solution would also solve the problem of lack of suspensory effect and mitigate other issues regarding EU judicial review. The case team could have the option to either adopt the objection (eg *Abhilfe*) or reject it. In the latter case, the objection could be passed onto the Hearing Officer for a final decision (analogous to *Widerspruchsbescheid*).

Further in-depth adjustments to the present system would then be necessary. The Hearing Officer could not only conduct the hearing, but also be given substantive powers to perform a full review of the case team's decision and amend it if necessary. This would significantly ameliorate the controversies surrounding

EU judicial review. For this to happen, it would be necessary to provide the Hearing Officer with an enlarged team and even consider increasing the number of decision-makers to establish a panel or tribunal. This person or panel would perform the function of the supervisory authority. Although separation would be preferable, the new architecture would be feasible even if the supervisory authority remained attached to the Competition Commissioner.

The entire procedure would remain administrative in nature. Instead of the present limited Hearing Officer's interim report, the supervisory authority would issue a 'final decision' on the merits, annulling, confirming or altering the case team's decision. As is the case now, the draft of this 'final decision' would be sent to the College of Commissioners for adoption. No Treaty changes would be necessary in order to implement these reforms.

The last modification required for the system to be fully compatible with due process would be to introduce formal rules of evidence and fact finding at both levels of the new administrative procedure. If such changes were to be made, similar to other national Continental European administrative procedures, the Commission's combined role of investigator, prosecutor and decision-maker would cease to be of such significance. The fact that the new procedure would be framed on the basis of robust European civil administrative systems would add to its actual and perceived fairness. It is submitted that an administrative procedure structured in this way could genuinely address most of the due process deficiencies present today in the broader EU antitrust enforcement system.

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152 Similar proposals were discussed academically and during the public consultations on the Best Practices Package. See, for example, White & Case, 'Comments on DG Competition's Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU' <[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/white\\_case\\_b\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/white_case_b_en.pdf)> accessed 27 February 2012. However, White and

Case does not compare its proposals to existing administrative systems whose due process legitimacy is well established in Continental European jurisdictions. If Commission procedures were structured clearly and enhanced in the image of these administrative systems, this would mute the due process criticism to a considerable extent.