

## **THREE POSSIBILITIES FOR REFORM OF THE PROCEDURE OF THE EUROPEAN COMMISSION IN COMPETITION CASES UNDER REGULATION 1/2003**

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*«It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.»*

*Lord Chief Justice Hewart, R. v. Sussex Justices [1924] 1 K.B. 259*

## I. PART I

### A. The two main criticisms of the present procedures

From time to time two fundamental criticisms have been made of the present procedures of the European Commission in competition cases under Reg. 1/2003, and previously under Reg. 17 of 1962:

- The Decisions are finally taken by Commissioners none of whom has any special knowledge or experience of competition law or competition economics, and none of whom has read all the arguments, reviewed the evidence, or attended the hearings, and who may have been extensively lobbied by one side of the case or the other.
- The Decisions are drafted by the same officials who wrote the Statements of Objections, so that the authors of the Decisions can not be relied on to have made an objective, impartial reconsideration and assessment of the evidence.

The standing and reputation of the Commission and of European competition law would be greatly improved if Commission procedures were modified to take account of these criticisms.

This paper suggests that the only way in which these criticisms could be satisfied without an amendment of the EU Treaties would be to give the General Court (formerly the Court of First Instance), instead of the Commission, the power to adopt prohibition decisions and to impose fines in competition cases. Article 103 TFEU authorises the Council «to define the respective functions of the Commission and the Court of Justice» in applying competition law. That is also the only reform which would lead to a situation clearly compatible with the European Convention on Human Rights.

This paper is laid out as follows:

Part I describes the present procedure of the Commission.

Part II considers the existing safeguards for due process, and suggests that they are not sufficient.

Part III explains why reform is now more urgently needed

Part IV discusses three possible radical solutions:

- setting up a decision-making body within the Commission;
- setting up a separate European competition authority; or
- making the Commission a «prosecutor» bringing competition cases before the General Court, which would adopt the first legally binding decisions.

Part V sets out some conclusions.

## B. The Commission's Procedure

At present, the essential elements of the Commission's formal procedure in cases under Reg. 1/2003 begin with the Statement of Objections, which sets out the facts and legal arguments against the agreement or practice in question.<sup>1</sup> This is drafted by members of the Unit in DG Competition responsible for the industry involved, and is reviewed by the Legal Service, an economist within DG Competition, the responsible Director and Director General, and the Cabinet of the Commissioner for Competition. It may also have been the subject of consultation or discussion with other Directorates General in the Commission.

The companies to which the Statement of Objections is addressed make written replies. Companies have a right to ask for a hearing and there is usually one, at which the officials who wrote the Objections are present, and some or all of the other officials already involved. In practice recently the Director attends part or all of a hearing, but not the Director General, or the Commissioner for Competition.

After the hearing, if there is one (companies have a right to ask for one), essentially the same officials who wrote the Statement of Objections also draft the Decision. At this stage other officials in the Competition DG may be involved, either informally or as members of an internal «panel» intended to look more objectively at the draft Decision. Since the draft Decision must ultimately be adopted by the Commissioners collectively, it is circulated to all their Cabinets, and in practice is reviewed by officials in other Directorates General. It is commented on by the Advisory Committee of representatives of national competition authorities.

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<sup>1</sup> Under the Merger Regulation the procedure begins with the notification of the proposed merger, but in contentious cases the procedure follows lines broadly similar to those under Reg. 1/2003, but with more negotiation, and with strict time limits. Merger Regulation cases are therefore not separately discussed here, except towards the end of this paper in connection with the implementation of the possible third reform.

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Finally, with or without oral discussion, the Decision is proposed by the Competition Commissioner to the other Commissioners. One does not know whether even the Competition Commissioner has read the entire Decision, but it seems unlikely that the other Commissioners (as distinct from, perhaps, their Cabinets) have done so. The Hearing Officer certifies that the procedural rules (known as the rights of the defence), designed to safeguard the interests of the companies, have been respected.

That is the formal Commission procedure. As will be explained below, the reality today can be rather different.

### C. The terms of reference of Hearing Officers

The responsibilities of the Hearing Officer are still those laid down in a Commission decision of 2001.<sup>2</sup> The Hearing Officer is to be «*an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency*» of administrative proceedings in competition cases. The aim is «*to safeguard the right to be heard throughout the whole procedure*». The Hearing Officer «*may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission*» (Article 3).

The principal responsibility of the Hearing Officer is stated in Article 5 of the decision as follows:

*«The Hearing Officer shall ensure that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently. The Hearing Officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement.»*

Under Article 13 the Hearing Officer must make an interim report on the hearing «*and the conclusions he draws from it, with regard to the respect for the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing.*» Article 15 provides that the Hearing Officer shall «*on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only*

<sup>2</sup> Commission Decision on the terms of reference of Hearing Officers in certain competition proceedings, OJ No. L-162/21, June 19, 2001.

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*with objections in respect of which the parties have been afforded the opportunity of making known their views, and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.»*

It is only the final report, and not the interim report, that is disclosed to the parties, and published.

In spite of the apparently broad language of Article 3, the limitations on the formal role and responsibilities of the Hearing Officer are clear from Article 5 and the provisions on the interim and final reports. The Hearing Officer is to look after the procedure, and it is not part of his or her responsibilities to comment, in the final report, on the substantive conclusions drawn from the evidence, or on the legal arguments. In other words, formally the Hearing Officer must say whether the parties have been given an adequate opportunity to comment on evidence or arguments made against them, but may not say whether their comments should have been accepted. What the Hearing Officer may have said under Article 5 or in the interim report is not publicly known, and since the parties have no right to see it, no additional safeguard is provided by the fact that Hearing Officers may go further than their formal powers require. What they may say on substantive issues therefore is, at most, advice to the Commission.

In a document circulated in January 2010 headed «Hearing Officers – Guidance on procedure of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU», and described as the Commission's «best practices», the Commission said:

*«Whilst the Hearing Officers oversee procedural matters, have decision-making powers and adjudicate disputes in this respect, they may also make observations on substantive issues to the Commissioner. They usually submit such observations, if any, when reporting to the Commissioner on the oral hearing» (para. 7).*

Later the Commission said:

*«In addition to the report on the procedural aspects of the case, the Hearing Officer usually also makes observations on the substance of the case to the Commissioner. Such observations focus on the Commission's findings contested by the parties, which are liable to have decisive importance for the outcome of the proceedings and may relate to the withdrawal of certain objections, the formulation of further objections or, in any other way, make suggestions as to the further progress of the proceedings.*

*The Interim Report and any additional observations are internal to the Commission's decision-making process and are therefore not accessible to the parties to the proceedings» (paras. 62–63).*

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Even since 2001, Hearing Officers have only had the grade of Head of Unit, not Director. This indicates that the Commission does not consider their positions to be particularly important.

## II. PART II

### A. Some comments on due process and the safeguards for the rights of the defence in the Commission's procedure under Regulation 1/2003

The procedure under Regulation 1/2003 calls for a number of comments.<sup>3</sup>

1. As already mentioned, the Decision is taken by the Commissioners, none of whom may have any specialised knowledge or experience of competition law or competition economics, none of whom may have any training or experience as a judge, and none of whom is likely to have read all the evidence and arguments or attended the hearing.
2. However, Commissioners, or their Cabinets, or the officials in their Directorates General, may have received written or oral submissions either from the defendant companies or from complainants. Such submissions may or may not influence the ultimate Decision. But they do not necessarily become part of the DG Competition file on the case, and the submissions made by one side may never be seen by the other side.
3. As already mentioned, essentially the same officials draft the Statement of Objections and the ultimate Decision. There may be a number of officials involved, in addition to those in the Unit formally responsible, even if the offi-

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3 See House of Lords, *Enforcement of Community Competition Rules*, 1<sup>st</sup> Report 1993–94, HL 7–1; House of Lords, *Strengthening the Role of the Hearing Officer in EC Competition Cases* (1999, Nineteenth Report of the Select Committee on the EU); Vesterdorf, *Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement*, Vol. 1, No. 2, *Competition Policy International* (2005) 3–27; Lowe, *The design of competition policy institutions for the 21<sup>st</sup> century – The experience of the European Commission and DG Competition*, 2008 *Competition Policy Newsletter* No. 3, 1–11; Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures?*, 34 *European Law Review* (2009) 817; Schwarze, *Europäische Kartellbussgelder im Lichte übergeordneter Vertrags- und Verfassungsgrundsätze*, *Europarecht* 2009, p. 171 *et seq.*; Schwarze, *Rechtsstaatliche Defizite des europäischen Kartellbussgeldverfahrens*, *WuW* 2009, p. 6 *et seq.*; Wernicke, «In Defence of the Rights of the Defence»: *Competition Law procedure and the changing role of the Hearing Officer*, *Concurrences* 3–2009, 1–14.

cials in that Unit do not change during the procedure. The companies involved have no formal right to know what officials, other than the members of the Unit, the Director, the Director General, and the Commissioner, have been involved.

4. Most but not all of the officials in DG Competition are either lawyers or economists, but the other officials in other parts of the Commission are less likely to be either. Few if any of the officials involved have been trained as judges, and there is no requirement that an official who has been trained as a judge must always be a member of the case team. Judges are not infallible, but they have been trained to be objective.
5. To answer the criticism that the officials who drafted the Statement of Objections cannot be objective when they draft the decision, the objectivity of the Decision is said to be ensured by five safeguards. First, in some cases, not clearly defined, a «peer review panel» of officials who have not been directly involved in the case read the draft Decision and discuss it if necessary. The identity of the members of the panel is normally not known to the companies. They have not normally attended the hearing. They are not required to have read all the evidence, or all the arguments of the parties, although of course they may have done so. Their comments and conclusions are not part of the file that is shown to the companies. The companies therefore do not know what the panel said, or whether it was acted on. The views of the panel are not binding on the case team or anyone else.
6. Second, the Advisory Committee is composed of representatives of the national competition authorities. They have received the most important documents from the Commission. The Committee appoints one Rapporteur, who drafts the questions for the Committee to answer: the answers constitute its Opinion. It is clear that most members of the Committee have not studied the case in depth. Unlike the views of the panels, this Opinion is disclosed to the companies. The Opinion is not binding on the Commission, and is short and formal. It is not very useful to the companies to know that some delegations did not consider that e.g., there was no effect on trade between Member States, if no further explanation is given.
7. The third and probably the most important of the safeguards for due process and the interests of the companies is the Hearing Officer.<sup>4</sup> This position was created as a gesture to respond to the criticism, mentioned at the beginning of this paper, that the same team of Commission officials acts as «prosecutor and judge». However, as explained above, the value of the Hearing Officer is limited by the fact that his or her final report is limited to procedural issues, and does not deal with substantive legal or factual issues. This means, in effect,

4 See House of Lords Select Committee on the European Union, Strengthening the Role of the Hearing Officer in EC Competition Cases, Session 1999–2000, 19<sup>th</sup> Report (2000).



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that the Hearing Officer must say whether the companies have been given an opportunity to reply to a particular argument, but is not formally entitled to say that too little attention has been paid to what the company said. Like the Opinion of the Advisory Committee, the final Report of the Hearing Officer is made available to the companies, but because it is strictly limited to procedural issues, it is not an effective safeguard or an assurance of the substantive objectivity of the Decision. Recently the Hearing Officers have begun to express opinions on substantive issues, but these are not disclosed to the companies, and are not available to the General Court if there is an appeal.

It seems that the Hearing Officer's final report is based on the draft decision as submitted to the Advisory Committee or to the Commissioners, and that it does not take into account any changes that may be made by the Commissioners themselves. This might be important if, for example, the Commissioners decided to increase the amount of the fine suggested in the last draft seen by the Hearing Officer.

8. The fourth supposed safeguard is provided because in recent years the DG Competition has included a Chief Economist and a group of economists who are consulted on each Decision. Their opinion is not made available to the companies formally, and even if it is written, it does not form part of the file disclosed to the companies, and therefore is not available to the General Court if there is an appeal.
9. The fifth possible safeguard is provided by the European Ombudsman. However, the Ombudsman has no special responsibility for competition matters, and no special expertise in connection with them.<sup>5</sup> The Ombudsman's responsibilities concern administrative and procedural matters, and the Ombudsman does not investigate cases that have been put before the General Court. He is involved only if there is a complaint, and not routinely.

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5 The relevant limits on the Ombudsman's powers are clearly stated in the Ombudsman's Decision in Complaint 1935/2008/FOR brought by Intel. The company complained that DG Competition had failed to keep a record of an important meeting, and had argued that it had no obligation to do so. Intel argued that it was contrary to Article 24 European Code of Good Administrative Behaviour. The Ombudsman concluded in a long, detailed and thorough decision, that is clearly intended to provide guidance for future cases, that the complaint was justified, and that an infringement of the principles of good administration had been committed. The Ombudsman's Decision noted that he could not have conducted an enquiry if the facts had been the subject of legal proceedings. «*The Ombudsman emphasizes the importance he attaches to ensuring that his enquiries do not, in any way, impinge upon the role of the courts. If facts have been established or interpreted in a ruling by a court, the Ombudsman will not reevaluate the existence of, or the interpretation of, such facts*» (para. 25). See now Article 228 Treaty on the Functioning of the European Union. It is not to the credit of an institution that imposes fines of hundreds of millions of Euros to argue that it does not need to keep notes of meetings.

10. The result of all this is that the Statement of Objections and the Decision are still written by essentially the same individuals, but the number of officials who may be involved directly or indirectly has risen greatly, and as a consequence influence and real responsibility are diffused. It is often unclear to the companies which officials will in fact take or influence the crucial decisions. Companies which lobby other Commissioners and a large number of officials, in DG Competition, in the Legal Service, in the Cabinet, and elsewhere in the Commission, often do not know who is the most important or influential official to talk to, since it is not necessarily the official who is formally responsible. The procedure in practice has become less structured, less formal, and more diffuse.
11. It will be seen that these five supposed safeguards do not deal with the criticism that the decision is ultimately adopted by Commissioners whose knowledge of the case is limited and second-hand. All these safeguards concern only the second criticism.
12. If the draft Decision is discussed by the Commissioners or their Cabinets, they are likely to have read or heard submissions made by one side or the other that have not necessarily been disclosed to the Competition officials, and which have probably not been disclosed to the opposing side.
13. Draft Decisions submitted to the Cabinet of the Commissioner for Competition have sometimes been altered without notice having been given to the companies involved at any stage, and without giving them an opportunity to comment on the alteration proposed. This has happened even when the change was contrary to an assurance given to the companies involved by a DG Competition official dealing with the case.
14. DG Competition is now a large Directorate General which is obliged to deal quickly with a large number of State aid cases and Merger Regulation cases, as well as cases under Articles 101–102 TFEU. It would therefore not be surprising if there was not always enough time to consider all aspects of draft Decisions under Articles 101–102. It would certainly be hard for the highest officials in the DG and in the Cabinet to be fully informed about every case. Lawyers who meet senior officials sometimes have the impression that their knowledge of individual cases is limited, and that the main responsibility for the decisions has been left to more junior officials.
15. It may be said that it is legitimate for the policies and views of other Directorates General to influence the result of a competition case, and indeed that this is why the Commissioners are formally responsible for adopting the decision. However, that argument should be accepted only if there were a procedure or mechanism that ensured that the parties were given an opportunity to comment on the policies or views in question, and on documents received by anyone in the Commission after the Statement of Objections was sent, the time at which «access to the file» is given. There is no such procedure or mechanism. The parties may never see documents received by anyone in the Commission after the Statement of Objections was sent, unless the Commission wishes to

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rely on them.<sup>6</sup> It is inappropriate for the Hearing Officer to report to the Commission that the parties' rights to be heard have been respected up to the time when the draft decision is submitted to the Commissioners, if the draft can be altered after that for reasons or on the basis of submissions on which the parties have had no chance to comment.

This criticism is made even stronger because the changes made by the Commissioners may result either from lobbying or from policy considerations. Companies might be able to guess what policy considerations might be thought relevant, but have no way of knowing what lobbyists may have written to other Commissioners.

16. The right to be heard in defence of one's interests, and to know the arguments against those interests, is a general principle of EU law which applies even where the specific rules of competition procedure do not apply. Therefore a company could object if the Commission took into account evidence or arguments received by the Commission after the Statement of Objections had been sent to it. But there would be no certainty that the company would know that this had happened, unless it was apparent on the face of the Commission's decision.
17. The Commission system is not one which those responsible for setting up a new competition authority would be wise to copy. Justice is certainly not seen to be done.

To conclude Part II, this final thought in particular is surprising and reinforces these criticisms. Considering the principle of decentralised enforcement at the heart of Regulation 1/2003, and the influence that the Commission has to ensure that accession states who wish to join the European Union comply with the *acquis communautaire*, it would follow that Commission enforcement procedures should be a model that Member States both established and new would seek to follow.

### III. PART III

#### A. Reasons why this reform is now more urgent than before

A reform of the Commission's procedure in competition cases is now more urgent and important than before, for a number of reasons. Broadly, there are ten reasons, all of which can be shortly stated.

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<sup>6</sup> In some circumstances, if litigation in a national court commences between the defendant in the Commission's procedure and a complainant, each litigant may be able to obtain disclosure of documents filed by the other after access to the Commission's file was given to the defendant, and documents which were never put on the DG Competition file. This is unusual, however, and clearly does not compensate for the defects in the Commission's procedure.

### 1. *Greatly increased fines*

The first and most important single reason is the very large fines recently imposed by the Commission in Article 102 cases and in price-fixing cases under Article 101. The fine of € 1.06 billion on Intel was only the largest of a series of very large fines. Large fines now make it much more difficult to defend the fact that they are imposed on the basis of a procedure that is open to criticism. The question raised here is not whether a large fine was justified in any particular case, or whether large fines are justified in European competition cases in general: no opinion is expressed here on either of those issues. The question is whether the existing procedures are adequate and satisfactory now that such large fines are imposed, or whether the procedures should be improved.<sup>7</sup> High fines greatly increase the cost of errors. (It is apparently now accepted that the existing Hearing Officers should be consulted about the amount of fines to be proposed to the Commissioners, but their views are not included in their published final reports, and since they are not, this change is of little importance).

The question whether these fines, or the procedures leading to them, should be regarded as «criminal» procedures within the meaning of Article 6 of the European Convention on Human Rights (and if so whether the procedure is permitted by the Convention), is not considered here.<sup>8</sup> It is difficult to imagine that fines of up to and exceeding one billion Euros could be somehow less important than expressly «criminal» penalties. Fines imposed by the Commission now greatly exceed the fines imposed in Member States for undoubted criminal conduct. Whether «criminal» or not, the Commission fines are enormous and the issues raised are extremely serious, and the question considered here is whether the procedures should be improved or replaced, and if so, how.<sup>9</sup>

The new EU Treaties envisage that the EU will become a party to the European Convention on Human Rights. That would make it easier to raise before the

<sup>7</sup> See generally Simonsson, *Legitimacy in EC Cartel Control* (2009, Stockholm University) ch. 7.

<sup>8</sup> Ortiz Blanco (ed.), *EC Competition Procedure* (2<sup>nd</sup> ed., 2006) 175–185; Wils, *The increased level of EU antitrust fines, judicial review, and the European Convention on Human Rights*, [2010] *World Competition*; Castillo de la Torre, *Evidence, proof and judicial review in cartel cases*, [2009] *World Competition* 505; GCLC, *Report of Group III, Fifth Annual Conference on the Commission's Review of Regulation 1/2003*, Brussels, 11–12 June 2009 (available at [http://www.coleurope.eu/template.asp?pagename=gclcfifthannual\\_docs](http://www.coleurope.eu/template.asp?pagename=gclcfifthannual_docs)); Schwarze, Bechtold and Bosch, *Deficiencies in European Community Competition Law*, Stuttgart 2008 (available at [http://ec.europa.eu/competition/consultations/2008\\_regulation\\_1\\_2003/gleiss\\_lutz\\_en.pdf](http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf)).

<sup>9</sup> There is also the serious and related question whether the Fining Guidelines, which were adopted without any democratic discussion, and which greatly increased the general level of fines, are within the powers of the Commission.

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Court of Human Rights in Strasbourg the question whether the existing Commission procedures are compatible with the Convention.

## 2. *The consequences of lobbying – dispersed involvement and responsibility*

The second reason why reform of the Commission's procedure is now necessary is the increased amount of lobbying of Commissioners and officials, at least in important cases.

Originally, in theory competition cases were dealt with by only a small and identifiable hierarchy of competition officials, and the draft decision passed upwards from them to the Competition Commissioner and was approved by the Commissioners as a body. However, the practice today is different. At least in important cases, lawyers and lobbyists talk to and give written submissions to the Cabinets of other Commissioners, and to officials of other parts of the Commission, as well as to the Competition Cabinet. (They may also lobby the national competition authorities which are represented on the Advisory Committee). The result may or may not influence the ultimate decision, but certainly it is generally believed that it can do so, and therefore that it is worth doing. Lobbyists, of course, claim that it is useful. It may be that lobbying is like advertising: «*only half of it is effective, but you never know which half*».

All this has several ill-effects. The submissions do not necessarily become part of the Competition DG file, and cannot be relied on to do so.<sup>10</sup> The parties there-

10 The Notice on the rules for access to the Commission's file (OJ No. C-325/7, December 22, 2005 provides that the file «*consists of all documents which have been obtained, produced and/or assembled by the Commission Directorate General for Competition during the investigation*». This does not include documents received by any other Directorate General or any Commissioner other than the Competition Commissioner. Indeed, it is not clear whether the Competition Commissioner or the Cabinet of the Competition Commissioner always put documents received by them on to the file. In addition «*internal documents*», which should be on the file, will not be disclosed to the companies, but the companies will know that they exist, since they should be listed on the index of the file, if it has been correctly kept. There does not seem to be any reason for the failure of the Commission to require all documents received from outside the Commission (except perhaps documents received from public authorities, which are treated as «*internal*») to be put on the file and disclosed. As this is not now required, the companies have no way of knowing what documents have been submitted to other Commissioners or to officials in other Directorates General, in spite of the fact that those documents may influence both the Commissioners and the officials in question, and may result in «*internal*» documents sent to DG Competition. Another omission is also serious. As explained in the text, documents received after the file has been given to the companies (which is done when the Statement of Objections is sent) are disclosed to the companies only if the Commission plans to rely on them, which will only occur if they are unhelpful to the defendant. But it is primarily after the Objections have been sent that lobbying is likely to be most intense. As a result, lobbyists' documents are not normally seen by the companies, except of course documents produced by the companies' own lobbyists.

fore do not necessarily see them, or even know that they have been made. Much time is spent trying to find out who has been approached, and by whom, what was said, and whether it was thought convincing. A large and unmeasurable proportion of the overall consideration of a case by the Commission as a whole is informal, unstructured, unregulated, and substantially unrecorded. Submissions are duplicated, revised, and adapted to what is thought are the interests or the prejudices of the Commissioners or officials addressed. Those addressed are, by definition, mostly those thought likely to be sympathetic to the company lobbying them, and thought to be influential, or likely to influence the Commission's decision favourably. The other Commissioners and the officials in the rest of the Commission are subject to no relevant disciplines governing who they listen to, how much weight they give to what is said, whether they make any effort to verify its accuracy, whether they disclose that they have been lobbied, or how they use what they have been told. Nothing prevents them from believing what is likely to be, and almost always is, a one-sided story – sometimes so one-sided that it is surprising to find it written on both sides of the paper.

Another consequence is that companies that are in a position to do so get lawyers, economists, lobbyists, and others to write articles in newspapers, law and economics journals and websites, sometimes without disclosing that they have been paid to do so, criticising the Commission's actions and making whatever arguments are thought favourable to the company concerned. The case is argued, in a one-sided way, in the media. Other Commissioners, presumably, read the newspapers, and may be influenced by them. Some professional advisors seem to make available writers who are ready to provide this service.<sup>11</sup> Publications brought to the attention of other Commissioners do not necessarily appear on the DG Competition file.

The result of all this is that as well as the formal submissions on both sides (if there is a complaint, as there often is), there may be an amorphous body of popular or less technical propaganda directed at Commissioners and officials thought to be open to being persuaded. The discussion becomes diffuse, and the key issues may become blurred, deliberately or accidentally. This is most likely to happen in complicated cases with large sums of money at stake, but in general lobbying does not clarify the issues. Arguments that would be firmly rejected in a formal procedure continue to circulate.

The result is that the formal process within the Competition Directorate General, whatever its merits, may become only a proportion of the total consideration, for-

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<sup>11</sup> Temple Lang, *Keeping Quiet*, 6 *Competition Law Insight in Brief*, (June 2007). What is described here seems unethical, but there is no doubt that it occurs, and it would be difficult to prevent.

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mal and informal, by the entire Commission of an important case.<sup>12</sup> Like an iceberg, the proportion that is concealed may be larger or more important than the part that is visible. Unnecessary and undesirable duplication of work occurs. The result may also be inconvenient for the Competition officials, who may need to answer questions and criticisms from individuals elsewhere in the Commission who may know little about the case, and who have no enforceable obligation to be impartial or objective.

If the Hearing Officer became aware that submissions had been made to Commissioners or other Directorates General that were not on the DG Competition file, the Hearing Officer might insist on the submission being placed on the file and disclosed when the file is disclosed, to ensure that the right to be heard had been respected. However, it seems that internal communications within the Commission are not necessarily or always put on the DG Competition file on the case, and when they are, they are not disclosed to the company (on the grounds that they are «internal»). There seems to be no duty on officials elsewhere, or on other Commissioners, to send submissions to the DG Competition file.

In any case, even documents that are placed on the DG Competition file after the Statement of Objections is sent are not necessarily disclosed to the companies at any stage.

Lobbying of Commissioners other than the Competition Commissioner is an inevitable result of the fact that Commission decisions are adopted by all the Commissioners. This is a structural fault, not a personal criticism. It is unavoidable. Such lobbying could not be effectively controlled or regulated, or even made transparent. Nor can it be made compatible with the rights of the defence to know what has been said or written to those who are ultimately responsible for the decisions.

Another consequence of widespread lobbying is that much of what happens is outside the sphere of the DG Competition Manual of Procedure for Regulation 1/2003 cases (which has never been published and which the Commission has tried hard to avoid publishing), and even outside the sphere of the special rules on conflicts of interests that were found necessary for DG Competition, in particular as a result of DG Competition recruiting from outside the Commission.<sup>13</sup> These two documents are so important that it is necessary to call attention to them, but they do not apply to officials in any other part of the Commission, or to Commissioners themselves, who are apparently not subject, even on paper, to any special ethical obligations when they deal with competition cases. This may be connected, among other things, with the premature disclosures that have

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<sup>12</sup> One recent case went on for four years without ever reaching the stage of a formal procedure, *i.e.*, a Statement of Objections, under Reg. 1/2003. In the *Intel* case the Complaint was made in October 2000, and the Statement of Objections was sent only in July 2007. During those periods many submissions were no doubt made.

<sup>13</sup> Code on Ethics and Integrity of DG Competition Staff, Edition February 22, 2008.

occurred of the amounts to be proposed as fines in specific competition cases. In any case, it would be impossible in practice to enforce a code of conduct on such a large number of individuals. Indeed, it would be very difficult even to identify all of those who might be in a position directly or indirectly to influence the Commission's decision.<sup>14</sup>

There are some policies that, once adopted, weaken the institutional arrangements from which they came. The policy of very large fines has made widespread lobbying of Commissioners and Commission officials inevitable, and has increased the defects in the existing procedures. This is so in particular now for other reasons explained below.

### 3. *The law is not clear in important respects*

European competition law in important respects (primarily, under Article 102) is not clear, and the Commission has so far failed to clarify it, although it has tried twice to do so, most recently in its Guidance Notice on exclusionary abuses,<sup>15</sup> without conspicuous success. It is therefore important that everything possible should be done to ensure that in future all initial decisions are sound and well-considered, to try to clarify and correct the defects in the law as it is now understood. Some of this uncertainty is due to the Commission, in particular in its Guidance Notice, envisaging measures that would be regulatory in nature rather than based on competition law. If it adopted measures of this kind, it would create a situation in which Article 102 was applied in a significantly different way by the Commission and by national courts. To avoid this, it would be better if decisions were no longer adopted by Commissioners and Commission officials, but by judges. Also, there seems to be an increasing number of cases in which the Commission as an institution is simply unable to make up its mind. One would expect a Court to be better able to clarify and correct the law, and to be quicker and more decisive.

<sup>14</sup> The difficulty of dealing with responsibility that is diffused over so many Commissioners and officials may be illustrated by asking a question; if one official or Commissioner was shown to have had a conflict of interest that should have led him to avoid all involvement in a decision of the Commission, and it became clear that he had in fact been actively involved, how could the company concerned show that his involvement, even assuming that it was improper, had influenced the decision? Responsibility in practice is so diffused over such an imprecise group that this would probably be impossible.

<sup>15</sup> Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ No. C-45/7, February 24, 2009. For an assessment of this Guidance Paper, see Centre for European Policy Studies, Report of a CEPS Task Force, Treatment of Exclusionary Abuses under Article 82 of the EC Treaty: Comments on the Commission's Guidance Paper (2009, Brussels).



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#### 4. *National Authorities and Courts treat Commission decisions as precedents*

Under Reg. 1/2003 national competition authorities are now obliged to apply Articles 101–102, and they may not adopt decisions conflicting with the Commission's decisions. This makes it much more important than previously to ensure that Commission decisions are correct, because national authorities and courts are bound by them in the cases in question,<sup>16</sup> and will treat them as precedents and tend to follow them in other cases, at least until the General Court ultimately corrects them.

#### 5. *The Commission's internal safeguards are not effective*

It is now clear, in the light of experience, that neither the Chief Economist, the Hearing Officer, the «panels», the Ombudsman or the Advisory Committee can effectively guarantee objective assessment of evidence and legal and economic analysis in competition cases, in particular under Article 102. Delays are caused and responsibility is diffused by multiplying safeguards and the number of officials involved, without any noticeable increase in efficiency. It is easier for the General Court, when necessary, to correct procedural errors (which the Hearing Officer should normally be able to prevent) than substantive errors (which the Hearing Officer is not responsible for preventing, but which the Court does not necessarily consider that the present limits of judicial review allow it to review and correct). Neither the views of the Chief Economist or those of the «panels» are disclosed to the companies. The Ombudsman can be concerned only with correct administration, can intervene only after the event, and would be unwilling to be made into an appellate tribunal of any kind.

#### 6. *Commission officials are less specialised*

As a result of the «Kinnock» staff reforms, the Commission's internal personnel policies now require the transfer of top officials at regular intervals, and this involves moving officials both into and out of the Competition DG. This has the unfortunate consequence that some officials with genuine competition experience move out, and officials are transferred in, even at high levels, who have no special economic knowledge and experience, and who would not be recruited directly into the Competition DG. This lack of specialised knowledge is sometimes clear to lawyers dealing with the Competition DG. Some senior officials in recent years have been noticeably less expert than their opposite numbers in other competition authorities. These effects are in addition to the overall effect of the reforms, and of Member States' efforts to weaken the Commission (in particular by reducing effective salary levels), which has been to lower both the morale and the average quality of Commission officials. The Commission under-

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<sup>16</sup> Regulation 1/2003, Article 16.

estimates the need to bring in experienced lawyers, and undervalues the experience of those brought in, depriving itself of the advantages of a «revolving door». Too many officials have no experience of industry or of private practice. These circumstances accentuate the effect of the informality and lack of structure of the procedures as actually practised by the Commission as a whole, which is to disperse and diffuse the real effective responsibility for decisions, to involve individuals who are not specialists in competition economics or law, and to cause delays without providing effective safeguards.

### 7. *Cases are more complex*

The Commission is more and more often obliged to deal with complex and sophisticated cases, for which the Commission's Guidance Notice on exclusionary abuse and the Commission's other Notices are insufficient, because they deal with only a limited number of well-recognised kinds of conduct. It has become noticeable that the Commission is not always able to respect its own internal timetables for deciding how to deal with cases. These delays are not now due to the Commission being unable to control its own priorities (although as already mentioned DG Competition is obliged to give priority to State aids and Merger Regulation cases).

### 8. *Regulation 1/2003 did nothing to improve procedures*

Reg. 1/2003 gave the Commission additional powers, but did little to improve its procedures, and the additional powers, to adopt interim measures and to intervene in national court cases, have hardly been used.<sup>17</sup> If they were used, that would speed up the handling of cases, but would of course necessitate prompt decisive action by the Commission.

Since Regulation 17 was adopted in 1962 the only significant changes made in the Commission's internal procedure have concerned the Hearing Officers, the Chief Economist, and the «panels». The fundamental characteristics of the procedure are entirely unchanged.

A substantial proportion of the comments on the operation of Reg. 1/2003 that have been given to the Commission argued for a strengthening of the role of the Hearing Officer in various ways,<sup>18</sup> because this is a modest reform that could clearly be carried out without a Treaty amendment. However, in the «best prac-

<sup>17</sup> One of the first times that the Commission used its right to make submissions to a national court was in *Garage Gremeau v. Daimler Chrysler* (Cour d'Appel de Paris, 2009). See also Case C-429/07, *X BV*, [2009] ECR I \_\_\_ June 11<sup>th</sup>.

<sup>18</sup> Wernicke, «In Defence of the Rights of the Defence»: Competition law procedure and the changing role of the Hearing Officer, *Concurrences* 3-2009, 1–14.

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tices» documents circulated in January 2010 the Commission gave no indication that any strengthening was being considered.

#### 9. *The General Court takes time to correct Commission errors*

The General Court (formerly the Court of First Instance) now sometimes takes several years to decide cases in which competition decisions of the Commission are challenged. This is important if the Commission's decision obliges the companies to alter their conduct, or prohibits them from adopting other conduct having the same or similar object or effect, or even if it merely discourages them from behaving in certain ways. Unless such obligations are suspended by the Court (which happens often but not always), the companies are obliged or led to alter or to limit their behaviour for several years, and this would be unjustified if the Commission's decision is finally annulled. It is therefore more important than ever to do everything possible to ensure that the initial Commission decision is correct. The thoroughness and quality of the judicial review by the General Court are not enough to make the whole system satisfactory.

#### 10. *Claims for compensation*

The Commission is encouraging claims for compensation by companies injured by infringements of competition rules. This means that in a gradually increasing number of cases claims are initiated soon after the Commission's decisions are adopted. Even if the claims are not actively pursued because the validity of the Commission's decision is challenged before the Court, such claims create additional expense and difficulties for the companies involved, which would prove to be unnecessary and unjustified if the decisions are ultimately annulled. It is therefore important for this reason also that as far as possible each Commission decision should be correct, even though it should ultimately be corrected, if necessary, by the Court.

### B. The Charter of Fundamental Rights and the proposal that the European Union should become a party to the European Convention on Human Rights

The Charter of Fundamental Rights is now fully part of EU law. Article 6 of the Treaty in European Union says that the Charter shall have the same legal value as the treaties. Article 52 of the Charter says that insofar as the Charter contains rights corresponding to rights guaranteed by the European Convention on Human Rights, the meaning and scope of the rights shall be the same as those laid down by the Convention. This means that the Charter guarantees as a minimum the rights given by the Convention. So, in effect, the Court of Justice is now bound by the Charter to protect at least the rights given by the Convention,

including the right to trial by a court in «criminal» cases, understood broadly. The Court of Justice for institutional reasons will be careful not to interpret the Charter and the Convention much less strictly than the Court in Strasbourg.

When the Union becomes a party to the Convention, as is visualised by Article 6 TEU, the Union will be bound directly by the Convention. So it would no longer be necessary for a company claiming that the Commission's procedure did not give it the right to trial by a court under Article 6 ECHR to bring proceedings against all the EU Member States, and to argue that they were infringing the Convention because they had set up a Commission procedure which infringed it. In other words, the argument that a company would make would be greatly simplified, even though, in theory, the same substantive argument could be made today.

### C. What can be done to combat these problems?

#### 1. *The first suggestion: delegating additional powers to the Competition Commissioner*

At one time it was suggested that it would be useful for the Commission to delegate additional powers to the Commissioner for Competition, not merely to adopt interim measures decisions, but to adopt final decisions. That is mentioned here only for completeness, as the delegation would not be permissible as the law now stands.<sup>19</sup> In any case, in the context of this paper, the suggestion seems clearly undesirable, for several reasons. First, it would do nothing to separate the officials writing the Statements of Objections from the officials writing the decisions. Second, it would do nothing to avoid the present situation, in which Commission decisions are adopted by individuals who have not read all the arguments or attended the hearing. Third, it would increase the already considerable influence on Commission decisions of the Competition Commissioner's personal views. Even if it could be combined with effective measures to ensure that the Competition Commissioner was always experienced in competition law or competition economics (which would be impossible to achieve unless the Competition Commissioner was separately chosen), that would not be enough to outweigh the institutional disadvantages. It would be undesirable for a single individual, particularly a politician who was not a trained and experienced judge, and who might want to demonstrate determination and toughness, to have too much power, in particular the power to overrule the advice of officials and e.g., to increase the amount of fines for price-fixing. Fourth, it would remove

<sup>19</sup> Case 9/56, *Meroni v. High Authority*, [1958] ECR 133; Case 5/85, *AKZO* [1986] ECR 2585; Case C-137/92 P, *Commission v. BASF* [1994] ECR I-2555; Case T-275/94, *Groupement des Cartes Bancaires* [1995] ECR II-2169.

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a useful limitation on the influence of officials within the Competition DG, that may be needed if they make errors of judgment or pursue policies that conflict with other EU policies. Fifth, even delegating powers to adopt interim measures decisions would be undesirable, since at least one of the few recent interim decisions has been seriously flawed, and would have had serious consequences if it had not been suspended by the Court of First Instance<sup>20</sup> and ultimately withdrawn by the Commission itself.<sup>21</sup>

2. *The second suggestion: stricter judicial review of Commission's fines, economic assessments, and findings of fact*

Another much more desirable change that might be made would be for the General Court to review fully all the findings and economic assessments made by the Commission.

This could be done, if the EU Courts decided that it was necessary and appropriate to do it, because Commission fines are now so high. It would not involve any change in the Treaties, or even in the Statute or Rules of Procedure of the Court. It seems, from the Commission's attitude in the *Alrosa* case,<sup>22</sup> that the Commission would resist such a change, and on the basis of the existing case law it would seem to be entitled to do so. This change might be brought about slowly and gradually, if the General Court considered particular economic assessments to be doubtful or inconsistent with the weight of the evidence. Indeed, it seems inevitable that this change will happen to some extent, because the Commission is trying to base its decisions more on the economic effects of the conduct. This obliges the General Court to review the economic assessments made by the Commission,<sup>23</sup> in at least some cases, since the alternative would be effectively to abandon judicial review.

However, it is clear that this change, even if it was fully and thoroughly carried out with the approval of the Court of Justice, would not solve the basic problems discussed in this paper. Those problems concern the Commission's procedure, and not the practice of the Court. More thorough judicial review might presumably lead to more Commission decisions being modified or annulled, but would do nothing directly to make it more likely that the Commission decisions would be correct in the first place. (The Commission might be more careful in making its

20 Case T-184/01 R, *IMS Health* [2001] ECR II-3193; Temple Lang, *European Competition Law and Compulsory Licensing of Intellectual Property Rights – A Comprehensive Principle*, 4 *Europarättslig Tidskrift* (2004) 558–588.

21 OJ No. L-268/69, 2003.

22 Case C-441/07 P.

23 See Wahl, in Baudenbacher (ed.), *Current Developments in European and International Competition Law*, 16<sup>th</sup> St.Gallen International Competition Law Forum (2010).

economic assessments if judicial review was more thorough, and if the Commission was no longer able to rely so much on its «discretion» to avoid review by the Courts). The effect of more thorough review would presumably be to increase the expense and duration of cases in the Court (though this would also be one effect of arranging for the Commission to bring cases before the Court as «prosecutor», a possible reform considered below).

In short, this change may be necessary, and may occur as the Court adjusts judicial review to deal with «effects-based» decisions, but is not an answer to the criticisms of the Commission's procedure.

#### D. The main criticisms

In short, this analysis suggests that the present system is open to several specific criticisms:

- (i) The Commission's decision is formally adopted by Commissioners most of whom have no direct knowledge of the case.
- (ii) A large but unmeasurable number of oral and written submissions may have been made to other Commissioners and officials, which may influence what they say or do, and of which the companies are not aware.
- (iii) The same individuals in the Competition DG draft both the Statement of Objections and the decision.
- (iv) The Hearing Officer does not formally express any views on the substance of the case or the strength of the evidence or legal arguments, although the Hearing Officer is the only official in a position to give such views objectively on the basis of a study of the entire Competition DG file (although not necessarily on the basis of submissions made to other Commissioners or officials in other parts of the Commission).
- (v) The views of the anonymous «panels» and of the Chief Economist are not officially known outside the Commission, and the Commission is not bound by the opinion of the Advisory Committee, which is known.

### IV. PART IV

#### A. The three possible solutions

In essence, there are three possible solutions, all of which are radical:

1. Reorganisation within the Commission, and appointment of decision-makers who would in practice determine the content of decisions, instead of the Commissioners.

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2. Setting up a separate European Competition Authority with decision-making powers, with appeals to the General Court.
3. Requiring the Commission to bring cases before the General Court, which would take the first legally binding act.

It will be seen that there are two separate questions: which institution or authority should adopt the initial competition decisions, and what procedures that body should follow.

It is assumed here for convenience that whatever reform is adopted would apply to merger decisions under the Merger Regulation, but not to State aid cases or to procedures against Member States under Article 106 EC, which are not discussed here. In other words, it would apply to cases involving only enterprises, not States. The procedures in cases involving Member States are different, and raise different issues.<sup>24</sup>

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<sup>24</sup> The Commission's procedure in State aid cases also involves decisions adopted by Commissioners and drafted by the same officials who wrote the objections to the aid, and there do not seem to be safeguards corresponding to the Advisory Committee, the Hearing Officer, or «panels». However, it is usually assumed that in State aid cases there is usually more scope for negotiation and compromise between the Commission and the State in question. It is also assumed that it is less likely than in cases under Reg. 1/2003 that the Commission would be influenced by evidence not disclosed to the State. The procedure in normal State aid cases does not lead to fines on the State. State aid decisions are probably not treated as precedents by national courts and national competition authorities in the same way as decisions under Reg. 1/2003, and State aid cases are generally regarded as being subject to less clear legal and economic rules. A procedural Regulation for State aid cases was not adopted until Reg. 659/1999, presumably because Member States did not consider that such a Regulation was essential.

The procedure under Art. 106(3) TFEU (ex-86), which like the State aid procedure can involve legally binding decisions adopted by the Commission and addressed to Member States, would presumably be treated in the same way as State aid cases. There is no procedural Regulation dealing with individual cases under Art. 106(3). There is an arrangement between the Commission and the Parliament that directives under Art. 106(3), which would have broader application than decisions, will be discussed with the Parliament.

In both State aid and Art. 106 cases, all the relevant facts are usually known to both the Commission and the Member State concerned. Procedural issues concern the rights of the enterprise that is a beneficiary of the aid or measure, or of its competitors. The liability to repay may be imposed on the supposed beneficiary, which is far less protected legally than defendants in Articles 101–102 cases. Rules of procedure are certainly needed to clarify those rights, but they would be quite separate from those under Reg. 1/2003. See Ortiz Blanco (ed.), *EC Competition Procedure* (2nd ed., 2006) ch. 21; Quigley, *EC State Aid Law and Policy* (2nd ed., \_\_\_\_).

## B. First possibility – Reorganisation within the Commission

If it is accepted that the reform needs to separate those who write the Statement of Objections from those who write the decision, and that the decision should be written and adopted by appropriately qualified individuals who have read the evidence and attended the hearing, the essential elements of a possible reorganisation within the Commission become clear.

It would be necessary to establish one or more individuals who would in effect be decision-makers (they are referred to here for convenience as «judges», although whether that word is appropriate or not would depend on their status). They would be given the power to write and decide the content of decisions, rather than the Commissioners. Their status, independence and powers would need to be set out fully and clearly, and they should be prohibited from taking into consideration any arguments or evidence not submitted to them in the context of the procedure. They would need to be given power to order the Commission officials responsible for writing the Statement of Objections to disclose information, and presumably also the power when appropriate to order interim measures. When their decisions were adopted, the decisions would be subject to appeal to the General Court, in the same way as Commission decisions are at present. It would be necessary to set out the rules concerning these judges to avoid misunderstanding, to establish their independence beyond question, and to make it clear that they would not merely be Hearing Officers with enlarged powers.<sup>25</sup>

<sup>25</sup> See Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures?* 34 *European Law Review* (2009) 817. Wernicke, «In Defence of the Rights of Defence»: *Competition law procedure and the changing role of the Hearing Officer*, *Concurrences* 3-2009, 1–14 says that «*One such possible institutional change would be to assimilate some powers of the Hearing Officer to the powers exercised by Administrative Law Judges (ALJ) in the United States ... To turn the Hearing Officer into the nucleus of an independent administrative law judge would be the logical next step in modernizing European competition law with a view to guaranteeing all rights of defence in the competition procedure.*»

However, to give Hearing Officers the power to write and adopt substantive decisions under Reg. 1/2003 instead of the Commissioners, if that were legally permitted delegation, would involve a huge and improbable raising of the status of the Hearing Officers. Even since 2001, when the Hearing Officer role was strengthened, Hearing Officers have only been heads of Units, not Directors. It is difficult to imagine that the Commission would consider that they should have power to replace the Commissioners and to adopt decisions and to impose fines. Even the judges in the General Court sit and decide cases in chambers of at least three judges. Decision-makers within the Commission, if that were legally permitted, would need to have a status similar to that of judges in the General Court.



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It will be seen that a reform on these lines would probably necessitate an amendment of the Treaty. Article 103 does not contemplate the application of Community competition law, at Community level, by any body except the Commission and the Court of Justice. Article 103(2)(d) merely envisages regulations or directives «to define the respective functions of the Commission and the Court of Justice in applying the provisions laid down in this paragraph». The powers that would need to be given to the decision-makers would clearly not be within any permissible delegation of the powers of the Commission.<sup>26</sup> For this solution to achieve its aim, it would be necessary for decisions to be taken in practice by the decision-makers, rather than the Commissioners. The responsibility would be transferred. Unless the decisions were taken in practice by the decision-makers, with appropriate safeguards to make them into a court, this solution would be no more likely to be compatible with the European Convention on Human Rights than the present procedure.

It would be possible to provide for a power for the college of Commissioners to override the judges' decision, provided that the Commissioners gave reasons for their decision, which itself would then be open to challenge in the General Court. However, such a power should be exercisable only in exceptional and strictly limited circumstances, and only on grounds of policy, and not merely because the Commissioners disagreed with the judges about the facts of the case or the law applicable to it. Such a power would be analogous to the power of the German Minister for Economic Affairs to override certain decisions of the Bundeskartellamt. Such a power, if given, would not be enough to validate delegation of the decision-making powers on the lines visualised here. Nor would it be enough to oblige the Commissioners either to accept the draft decision as it stood, or to reject it entirely.

To ensure that any such system worked satisfactorily, the judges appointed would need to have a status similar to that of judges in the General Court. Since they would be required to consider questions of substance as well as procedure, and would be required to take responsibility for adopting legally binding decisions, they would have to be given a status substantially superior to that of the existing Hearing Officers, probably at A.I, Director General, level. Otherwise, lawyers with the necessary knowledge and experience would not be willing to be appointed. This would be crucial, since one of the aims of the reform must be to guarantee the quality of the decision-makers. Their complete independence would have to be ensured, as otherwise there would continue to be questions about the compatibility of the system with Article 6 of the European Convention on Human Rights. They would need to be prohibited from discussing cases informally and from taking into account any arguments or evidence not available to both parties.

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<sup>26</sup> See e.g., Case 9/56 *Meroni v. High Authority*, [1958] ECR 133; Craig, EU Administrative Law (2006) 160–162, 276–277; Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health* [2005] ECR I-6451, para. 90.

Since a reform on these lines, whatever the details might be, would deprive the Commissioners of their decision-making powers (subject only to any power to overrule in exceptional and limited circumstances), Commissioners would be unlikely to support such a reform. But it should perhaps be no more unattractive to them than the other two possibilities considered below. The reform would be unorthodox, because it would involve setting up a kind of court within an administrative body. It would be difficult to carry out satisfactorily, because the Commission would be likely to try to retain powers in various ways, just as the Commission and DG Competition officials have persistently avoided giving any substantive powers to Hearing Officers. Many questions would arise that could be resolved more easily and clearly, or would not arise, in the context of either of the other possible reforms, considered below.

In other words, the only reasons why this first possibility might seem more attractive to Commissioners would be because it would give the Commission some possibilities for retaining power. That is however precisely one of the reasons why this possibility would be less attractive to everyone else. Even if a change in the Treaty allowed delegation of powers on these lines, it would clearly be troublesome to work out the details, because it would be unorthodox and «untidy», and would have to make clear what was changed and what was to remain unchanged.

It may be said that this proposal has the advantage that State aids cases and competition cases under Reg. 1/2003 would remain in the hands of the same Directorate General. This is true but unimportant. There is little need for coordination between officials dealing with the two types of cases, and coordination has not always been ensured.<sup>27</sup> The procedures in State aid cases, which are against Member States, are quite different in nature from the procedures against companies under Reg. 1/2003. This the Commission itself acknowledges by the way it evaluates State aid cases (the «scoreboard» introduced in July 2001), which has no parallel in competition matters.<sup>28</sup> In any case, it would be improper for the judges dealing with competition cases to consult the officials dealing with State aid cases (unless it became appropriate for them to do so formally, which would be unusual unless the State aid case involved the same facts or the same companies as the case under Regulation 1/2003).

### C. A limited reorganisation within the Commission?

A limited reorganisation within the Commission could separate the team that writes the Statement of Objections from the team that writes the decision, but

<sup>27</sup> Case T-156/98, *RJB Mining*, [2001] ECR II-337.

<sup>28</sup> [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/studies\\_reports.html](http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html)

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would leave the adoption of the decision in the hands of Commissioners, and would leave the rest of the present system unchanged. (Allegations that there is already such a separation are incorrect). Such a reorganisation would deal with only one of the two criticisms of the present procedure, and would do nothing to reduce lobbying. In addition, it would increase some difficulties, because the two teams might disagree. If the team responsible for the decision considered that no infringement had occurred, either their view would automatically prevail, or some third group, presumably the Commissioner's Cabinet with the advice of the Legal Service and the Chief Economist, would have to choose between the two views. But the Cabinet, the Legal Service and the Chief Economist's unit would already have approved the Statement of Objections. So such a limited reform would either lead to the decision team having the final say, or to incomplete separation of the decision team and the Statement of Objections team. If the decision team would have the final say, they would in effect become internal «judges», and they would need to be carefully chosen and given special status. In other words, a limited reorganisation would either fail to achieve even its supposed objective, or would amount to creating internal «judges» whose decision would be final. A limited reorganisation would also have the undesirable result of separating the final or nearly final rulings on procedural issues (taken by the Hearing Officer) and the rulings on substantive issues (which would be taken by the decision team). Such a reorganisation would presumably make panels unnecessary. The Chief Economist's unit would have to be part of either the decision team or the other team, but could not be part of both teams, since that would make the separation incomplete.

Such a limited reform would not need an amendment of the Treaty, since it would involve no delegation of the Commissioners' decision-making powers.

#### D. Expanding the role of the Hearing Officer

Another reform, which would be useful but even more modest, would be to require the Hearing Officer in the published final report to make a substantive assessment, to say whether he or she considered that the draft decision was legally sound and supported by all the evidence. That change would of course do nothing to alter the two basic features of the Commission's procedure that are criticised here. But knowing that the draft decision would be objectively assessed and commented on, before it was adopted by the Commissioners, would do something to ensure that the officials drafting the decision looked more objectively at the evidence and the legal arguments. It would also do something to ensure that the Commissioners would not simply do what the Competition Commissioner or the last lobbyist proposed, but were given an independent substantive assessment. This would not be a sufficient reform, but it would be a step in the right direction. Its effectiveness, of course, would necessitate increasing the

independence and the standing of the Hearing Officers. However, if the final report included a substantive assessment that was duly published, it should be possible to get lawyers of standing from outside the Commission to take positions as Hearing Officers, which would be difficult or impossible today.

If the basic elements of the Commission's procedure are not compatible with Article 6 of the European Convention on Human Rights, giving the Hearing Officer the duty to make non-binding comments on issues of substance would not be enough to make the procedure lawful.

### 1. *The second possibility – a separate European Competition Authority*<sup>29</sup>

This possibility is simpler to visualise than the first, because it would involve setting up a new specialised competition authority, with decision-making powers, subject to appeals to the General Court. Within this authority, the officials writing the Statements of Objections and the individuals drafting and adopting the decisions would presumably be separated. Those responsible for the decisions would be required to have specialised knowledge of competition law or competition economics, and they would be required to read all the evidence and arguments and to attend the hearings. All the powers and procedures of the new authority would need to be set out in a new, comprehensive, self-sufficient Regulation. These powers would, presumably, be similar to those now exercised by the Commission under Regulation 1/2003. The procedures would, of course, be radically altered by the separation of the «prosecution» and decision-making responsibilities, but no more radically than in the case of a similar reorganisation within the Commission.

Presumably a number of the officials now in the Competition Directorate in the Commission would move to the new authority. This would provide the opportunity to rationalise decision-making procedures, by ensuring that the most senior and experienced officials had control over the direction of each case.

This reform would also necessitate an amendment of the Treaty, for essentially the same reason as in the case of a reorganisation within the Commission, due to the wording of Article 103(2)(d).

Because this possibility would involve setting up a new authority, most governments of Member States would object to it, as they would not be convinced that the cost would be offset by corresponding reductions in the staff and the budget

<sup>29</sup> See Ehlermann, Reflections on a European Cartel Office, 32 Common Market Law Review (1995) 471–486; DG IV Working Party on Inter-Governmental Conference 1996, 1 Discussion Paper on the new European Competition Agency; Baudenbacher, Institutionelles Setting Vertikale Abreden Sanktionierung von Einzelpersonen Zivilrechtliche Verfahren, Strukturberichterstattung Nr. 44/3 (2009) 1–55.

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of the European Commission. Some Member States might also try to use the opportunity to make the powers of the new authority less than those of the Commission, or to influence its policies.

Like the proposal to set up judges within the Commission, this proposal would enable (and ought to require) the decision-makers to refuse to listen to lobbyists, and would make the decision-making more judicial and more efficient. It would also have the broader advantage that the competition decision-making responsibility, which ought to be «quasi-judicial» and based on evidence, argument, and legal procedure, would be clearly separated from the European Commission's normal policy-proposing role in other areas, in which lobbying is legitimate. The members of the separate authority could refuse to discuss individual cases with Commissioners, politicians, and industrialists, more easily than «judges» within the Commission would be able to do.

A wholly new competition authority would take a little time to establish its reputation, but as it would be more specialised and more professional than the Commission, that should not take very long. It would probably be easier to find economists and lawyers willing to be members of a separate new authority than to find lawyers willing to act as judges of an unusual kind within the Commission.

In the 1990s, a body of opinion, in particular in Germany, was in favour of setting up, or at least modifying the EU Treaties to allow the setting up, of a separate European competition authority, in lines broadly similar to the Bundeskartellamt. When it was suggested, primarily by German officials, that the Convention for a European Constitution should propose an amendment to the Treaty to allow a separate European competition authority to be set up, there was little interest in the idea. In the subsequent Inter-Governmental Conference it appeared that there was little support for this proposal, and the EU Treaty was not amended to provide for it. It is only recently that the proposal has been discussed unofficially again, as a result of increasing dissatisfaction with the Commission's procedures.

In short, the proposal to set up a separate authority would be simpler in principle, easier to understand, and preferable to any reorganisation within the Commission, and would not be open to any of the same objections. However, it would have three disadvantages. First, it would involve a change in the Treaty, and no Member State now wants Treaty changes. Second, it would mean that all the Member States would have an opportunity to discuss every aspect of the organisation of the new authority. This would not only take time, but it might lead to lengthy disagreements between the States in which the investigation and the decision-making functions are clearly separated and other States in which they are less clearly separated. The latter States might consider that the separation of the two functions at Community level implied a criticism of their practices. However, this possible disagreement between Member States might be as likely to

arise from the first proposal, above, as in connection with a proposal for a separate authority. Third, this might not be any more compatible with the European Convention on Human Rights than the present procedure.

Merely setting up a separate authority would not, of course, necessarily imply how it should be constituted, or what its procedure should be. Many questions would have to be resolved. The whole process would be long, complicated, and controversial. The issues that would arise are not all discussed here.

### E. The third possibility – the Commission would bring cases before the General Court

The third possibility is that the Commission, when it had investigated the facts and the legal issues, instead of adopting a decision, would bring the case before the General Court, the judgment of which would be the first legally binding act.<sup>30</sup>

The Commission would make the case against the companies (essentially what is now the Statement of Objections) in the form of an application to the Court. However, the Commission would probably investigate the case more thoroughly and pursue the implications further than at present, since the Court would probably not allow the Commission to submit additional evidence or arguments later.

This would not require a Treaty amendment, since the new Regulation that would be needed could be based on Article 103 as it stands at present. It would redefine «*the respective functions of the Commission and the Court*» in applying Article 103. It would involve some changes in the Statute and Rules of Procedure of the Court. Article 256(1) TFEU says that: «*The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.*» Article 271 already allows proceedings against national central banks by the European Central Bank.

This proposal would be simple, clear, and easily understood. Although formally apparently radical, in functional terms it would involve changes that would be less substantial than they might seem. It would involve no reorganisation within the Commission, except that the decision-making functions would, of course, disappear. It would increase slightly, but in practice perhaps not very much, the

<sup>30</sup> This is the solution advocated by Schwarze, in a speech on September 25 2009 at the conference «Celebration of 20 years of the Court of First Instance of the European Communities», in Luxembourg; see J. Schwarze, *Europäische Kartellbussgelder im Lichte übergeordneter Vertrags- und Verfassungsgrundsätze*, *Europarecht* 2009, p. 171 *et seq.*; J. Schwarze, *Rechtsstaatliche Defizite des europäischen Kartellbussgeldverfahrens*, *WuW* 2009, p. 6 *et seq.*

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workload of the General Court, since every case would be in effect a case of «full jurisdiction», as all appeals involving fines are now. In fact, the procedure would be essentially similar to the procedure under Article 258 (ex 226), under which the Commission's case against a Member State is brought before the Court by an Application, and would be similar to appeals from Commission competition decisions, as at present.<sup>31</sup> Much controversy about confidentiality and access to the Commission's file would be avoided: the Court would see only evidence that the defendant company was being given an opportunity to comment on. The Advisory Committee would presumably continue to be consulted, but on the draft Application to the Court, as the Commission would not adopt a decision. The proposal would strengthen the arguments for having a specialised competition chamber of the General Court, or even a separate competition court, but would not necessarily involve either.<sup>32</sup> Since the Commission would no longer adopt decisions, there would no longer be an important role for a Hearing Officer. The roles of the Chief Economist and the «panels» would concern the writing of the application to the Court, and not a Commission decision, but otherwise would be substantially unchanged. Lobbying of Commissioners should be reduced, because it would relate primarily to whether the Commission should bring the case before the Court.

Presumably the length of time taken by the Commission to investigate the case would be similar to the time taken at present (although the Commission might consider it necessary to investigate more thoroughly). There is no obvious reason why the time between the sending of the Commission's Application to the Court and the Court's judgment (essentially, the time needed for written arguments, a hearing and one judgment) should be longer (and some reason to think that it should be shorter), than the time taken at present by the Commission's procedure, hearing and decision plus the entire case in the Court. The Court's consideration of the case would be slightly more thorough than the existing judicial review under Article 263, (though not much more thorough than it already is in cases of «full jurisdiction»), which would be desirable.<sup>33</sup> The Court, unlike the Commission, could

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31 Of course, since the Commission would be the party making the Application, the order of the arguments would be the opposite of what it is in competition cases now, when the Commission is usually the defendant, and the application to the Court is made by a private party. In practice that would probably not make much difference. See on the significance of the order of speaking in a primarily oral procedure, Paterson, *The Law Lords* (1982) pp. 52–56.

32 See Temple Lang, *Do we need a European Union Competition Court?* in Baudenbacher, Gulmann, Lenaerts, Coulon & Barbier de la Serre (eds.), *Liber Amicorum* in honour of Bo Vesterdorf (2007) 343–361; House of Lords European Union Committee, *An EU Competition Court*, HL Paper 75, 15<sup>th</sup> Report of Session 2006–07.

33 See Siragusa, speech at the Conference to Celebrate 20 Years of the Court of First Instance, Sept. 25<sup>th</sup>, 2009.

**Focus**

## The Setting of Fines – Efficiency v. Due Process

order witnesses to attend and hear witnesses on oath, if necessary, and allow cross-examination. Since the Court now sometimes suspends Commission decisions when their validity is challenged, this proposal would delay the coming into force of the first binding obligations only in relatively few cases, by comparison with the present situation. Since the Commission uses its powers to order interim measures so rarely, and is so reluctant to use them, the transfer of the relevant powers to the Court would not make much difference. Successive Presidents of the General Court have more experience, and have demonstrated much greater judgment, in dealing with interim measures than the Commission.

An important legal advantage of this proposal is that, unlike the first two possibilities, there would be no doubt that it is permitted under the European Convention on Human Rights. Another advantage is that it would free many Commission officials from being lobbied. Another is that if it were accepted in principle, it would be difficult for anyone opposed to it to distort or obstruct it by insisting on detailed provisions. Both the proposal for «judges» within the Commission and the proposal for a separate competition authority would be vulnerable to controversy and obstructions that might seriously reduce their efficacy.

If it was thought appropriate, the power to send cases to the Court could be delegated to the Competition Commissioner.

In short, this proposal could be carried out more simply and much more quickly and with less discussion of details than either of the others. The principal disadvantage, which is a serious one, would be the increased workload for the Court. The Court would be obliged to reach conclusions on economic issues that at present the Court expects the Commission to decide, subject only to limited judicial review of «*economic assessments*». The Court therefore might find that it needed the advice of its own economic experts, or that judges with specialised economic knowledge might be needed. These changes might be desirable anyway, and the need for them is hardly an argument against the reform considered here, but the disadvantage of increasing the Court's workload should be clearly recognised. However, if the General Court will need to exercise stricter judicial review anyway, as suggested above, the additional workload that would result from the reform would not be as great as might be supposed at first sight. If the Court would do more case management than it does at present, as seems desirable, that would reduce its workload.

If contested merger cases were decided by the Court, and not by the Commission as at present, the Commission would raise no objections in most cases, as at present, and would give approval subject to commitments when appropriate, as at present. If the Commission objected to a merger, the Commission would bring the case before the Court, instead of adopting a decision prohibiting the merger. The application to the Court would continue the suspension of the merger. There is no obvious reason why the Court's judgment would be later than it would be at present when a prohibition is challenged.



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This third solution would have another consequence that may be regarded as an advantage. Some companies complain that in cases under the Merger Regulation, and in cases in which the Commission is seeking a commitment,<sup>34</sup> companies are in a weak negotiating position and may be compelled to agree to the Commission's wishes, even when they do not consider that they are justified. If the first legally binding decision would be taken by the Court and not by the Commission, companies might still agree reluctantly to compromises they regard as unsatisfactory, to obtain quick solutions, but they would not regard themselves as being in such a weak negotiating position. In the USA it has been publicly said that the Department of Justice has to consider a case carefully before bringing it before a court, and the same thing would presumably be true in Europe.

If the only legally binding decisions were taken by the Court and not by the Commission, the problems of conflict of interests of officials in the Commission, though still serious, would be less than they are at present.

The most serious difficulty presented by this third proposal must be pointed out. Under the ordinary legislative procedure in accordance with the Treaties on the European Union, the Commission has the exclusive right to initiate all legislation. There are strong institutional and political reasons for this rule.<sup>35</sup> But it creates the difficulty that the Commission can block formal consideration of any measure that it considers would be contrary to its interests as an institution. However, the Commission should make appropriate proposals if it becomes concerned that its procedure will be found to be contrary to the European Convention on Human Rights, or if it becomes convinced that the procedure is no longer appropriate for the other reasons explained here.

## F. Implementing the third possible reform: Reg. 1/2003

To give effect to this third reform, it would be necessary to alter Regulation 1/2003 and the Merger Regulation, because the Commission would no longer adopt prohibition decisions. New parts of the Statute and Rules of Procedure of the Court of Justice and the General Court would have to be adopted, to provide for cases in which the Commission would be the applicant and a private company the defendant. If the decision in principle to adopt this third possibility had been taken, there seems to be no serious difficulty in drafting and adopting the measures needed to implement it.

<sup>34</sup> See Case C-441/07 P, *Commission v. Alrosa*, judgment dated \_\_\_\_\_; Temple Lang, *Commitment Decisions and Settlements with Antitrust Authorities and Private Parties under European Antitrust Law*, in Hawk (ed.), 2005 Fordham Corporate Law Institute (2006) 265–324, 316–321.

<sup>35</sup> Temple Lang and Gallagher, *The Role of the Commission and Qualified Majority Voting* (Institute of European Affairs, Dublin, Occasional Paper No. 7, 1995).

However, at least the following issues would need to be dealt with:

1. At present under Article 16 of Reg. 1/2003 national courts must avoid giving decisions that would conflict with a decision «*contemplated by the Commission in proceedings that it has initiated*». Presumably that Article could be amended to require national courts to avoid giving final decisions conflicting with applications made by the Commission to the General Court in competition cases.
2. Article 10 of Reg. 1/2003 allows the Commission «*where the Community public interest ... so requires*» to adopt decisions finding that Article 102 is not applicable, either because Art. 101(1) is not applicable or because Art. 101(3) is satisfied. The Commission has made very little use of this power. If it was decided to retain the power, the Article could be kept as it is.
3. Fines would be imposed by the General Court, and not by the Commission. Presumably it would ultimately be appropriate for the Court to develop fining practices or guidelines broadly similar to those of the Commission. In individual cases the Commission could propose the amount of the fine it considered appropriate to the Court. The Commission would be obliged to give more detailed reasons than it gives at present in its decisions.
4. The Commission would presumably retain the power to withdraw the benefit of an exemption Regulation in individual cases.
5. Since 2008 the Commission has a «*settlement procedure*»<sup>36</sup> under which companies may acknowledge their part in an infringement, waive certain rights of defence, and agree to pay a fine of an agreed amount in exchange for a reduction of 10% in the amount of the fine. This procedure could be retained, but it would be effective only if the Commission and the companies had a relatively clear idea of the fine that would be imposed by the Court on the companies in question (and if the companies considered that a 10% reduction is enough).
6. Leniency applications, as at present, would continue to be made to the Commission. The Commission would presumably propose to the Court an appropriate reduction of the fine, unless it was agreed under a settlement.
7. The Commission could perhaps keep the power to adopt decisions making commitments legally binding,<sup>37</sup> since in theory these are voluntary. In practice however the commitment procedure at present enables the Commission to put companies under pressure to accept obligations more onerous than those that could probably be imposed by the Commission in a prohibition

36 Reg. 622/2008 OJ No. L-171/3, July 1 2008; Notice on the conduct of settlement procedures, OJ No. C-167/1, July 2 2008.

37 Reg. 1/2003, Article 9; Temple Lang, Commitment Decisions and settlements with antitrust authorities and private parties under European antitrust law, in Hawk (ed.), 2005 Fordham Corporate Law Institute (2006) 265–324.

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decision. Since commitment decisions involve less work for the Commission than prohibition decisions or bringing a case before the Court, it is to be expected that the Commission would try to keep the power to adopt these decisions. It would be possible, but not necessary, to make commitment decisions subject to the approval of the General Court (as consent decrees are subject to the approval of courts in the USA).

### G. Implementing the third possible reform: Merger cases

As far as merger cases are concerned the following issues at least would need to be dealt with:

- (a) Whether the Commission would retain the power to transfer a merger case to a national competition authority, thereby depriving the General Court of jurisdiction over the case. This is already the result of transferring a merger case to a national authority, but the result would seem more surprising in a regime in which the decision at European Union level was taken by the Court and not the Commission.
- (b) The Commission would presumably need to retain its existing power under Article 7 of Reg. 139/2004 to grant derogations to allow a concentration to be implemented before authorisation is given.
- (c) The time limit for adopting a decision, under the existing Regulation, would become a time limit for the Commission to submit an application to the Court.
- (d) Since the first legally binding act would usually be the judgment of the Court and not the decision of the Commission, the influence of the national competition authorities would be reduced, since they would be involved only at the stage before the Commission sent its application to the Court.<sup>38</sup>
- (e) Presumably the Commission would retain its present power to allow a concentration subject to fulfilment of legally binding commitments.

Some comments on the treatment of merger cases by the Court are made below.

### H. Implementing the third possible reform: the Court

As far as the procedure of the Court is concerned, the following issues at least would need to be dealt with:

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<sup>38</sup> It is Member States, not national competition authorities, that have the right to intervene in the EU Courts. It would be possible to allow national competition authorities to intervene in competition cases, although that would be regarded as unorthodox, and as creating an undesirable precedent.

- (i) Presumably, if the Commission no longer had power to adopt final decisions, the Commission would no longer have power to adopt interim measures decisions. It would therefore need to be able to ask the President of the Court to make an interim measures order against the company in question. This would need to be provided for specifically in the Rules of Procedure of the Court.
- (ii) When the Commission brought proceedings against several companies for e.g., price fixing, the Commission might presumably need to bring a separate case against each one, to avoid disclosure of confidential information, and to keep the evidence against each company separate. The Court might need to decide, as under the present rules, whether the cases should be joined, or whether one company should be allowed to intervene in the case brought against another. Essentially the same issues already arise under the present procedure.
- (iii) The Court might find it necessary to exercise more active case management than it does at present in judicial review and «full jurisdiction» cases.<sup>39</sup> Much would depend on whether the Commission adopted arguments and evidence which it says are not strictly necessary to the conclusions that it draws (as it sometimes does at present),<sup>40</sup> since the effect of doing this is to complicate the case in a way which the Commission itself admits is unnecessary.
- (iv) The Court would have to make its own assessments of economic issues, although it would of course have the evidence produced by the Commission before it. The effect would be to make the assessment more objective and judicial, to reduce the element of discretion and negotiation in the whole process, and to increase the intensity and scope of judicial review of the Commission's conclusions.

## I. The Court and merger cases

- (v) Under the present system, the essential elements of the Commission's decision are known once it has been adopted, and in important cases are widely discussed. If the Commission was obliged to bring cases before the Court, the essential objections to the merger would not be as clearly and publicly stated until the Court gave judgment. This would tend to involve the Court more directly, and to attract more publicity. These are disadvantages.

Although none of these issues in itself is sufficient to make the reform inappropriate for merger cases, it seems likely that the Court would be less willing to

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39 Temple Lang, Do we need a European Union competition court? in Baudenbacher, Gulmann, Lenaerts, Coulon and Barbier de la Serre, *Liber Amicorum* in honour of Bo Vesterdorf (2007) 343–362.

40 For example in the Commission's *Intel* decision in 2009.

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decide merger cases in the first instance than what are now Reg. 1/2003 cases. The principal reason for this, however, is that merger cases are regarded as more urgent than other cases. Under both the existing system and the suggested reform, the initial action halting a merger would be an act of the Commission. But the pressure on the Court to decide quickly would be greater under the suggested reform than under the present system, since the Court would appear to be taking a greater responsibility.

## J. Judges for other Commission decisions too?

Another suggestion that has been made<sup>41</sup> is that there should be judges within the Commission for all decisions of the Commission, not only competition law decisions. This would again necessitate giving the individuals involved the independence and status of judges either within or outside the Commission. Since they would be dealing with e.g., trade law cases as well as competition cases, they would be clearly different from the existing Hearing Officers associated with DG Competition, and this would increase their independence and raise their standing. However, this would not be worth doing unless they were allowed to adopt decisions or at least to express opinions on substantive issues as well as procedural questions, and their decisions or opinions would have to be publicly available. Since at present definitive anti-dumping duties are imposed by the Council and not the Commission, it is not clear how judges linked to the Commission would be integrated into the existing institutional procedures for trade cases. On balance, this suggestion seems an undesirable complication in the context of competition procedures, although most of the criticisms discussed here apply equally to trade cases.

## V. PART V

### A. Conclusions

If any of these possibilities is considered, the most likely should be the third, simply because it does not need an amendment of the Treaty. The need to amend the Treaty will certainly be used as an argument against adopting either of the first two suggestions. If the Commission comes to accept that the present combination of high fines, widespread lobbying and unsatisfactory procedures is in need of improvement, it will probably propose some changes, although in this respect the Commission has never previously proposed a radical reform.

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41 Wernicke, *op. cit. supra*.

The third solution is also the only solution that is certainly compatible with the European Convention on Human Rights. If a radical reform is to be carried out, it must guarantee this result, or it would not be worth doing.

On reflection the Commission may understand that it would retain more influence as «prosecutor» before the Court than if its powers were delegated to administrative law «judges» or transferred to a new competition authority. It would certainly retain more influence as prosecutor than it would have if its decision-making processes came to be regarded as too much exposed to the views of officials and politicians – the government of men rather than the government of laws. The Commission wisely chose, in proposing what became Reg. 1/2003, to give up an ineffective monopoly power to apply Article 101(3) and to receive notifications of less restrictive agreements, and preferred instead to become the leading body in a network of effective enforcers. The result of Reg. 1/2003 was to allow the Commission to decide its enforcement priorities, for the first time. It was understandable that it chose to give priority to price-fixing and market-sharing, which are relatively easily proved as a result of leniency and immunity applications. The Commission might be wise to conclude that a group of politicians and technocrats without special expertise would be more highly regarded if they were prosecutors than if they acted as judges.

## B. Concluding remarks: Would these reforms be worthwhile?

Whether or not the existing procedures are considered to be unsatisfactory or contrary to the European Convention on Human Rights, clearly some improvements in the existing procedure would be desirable. They are widely considered as necessary.<sup>42</sup> The impression that the members of the case team are reluctant to change their minds after the Statement of Objections has been sent, and the impression that substantial elements in the amount of a fine or in the substance of a decision are decided at a political level, without giving the companies a chance to comment, are too widespread and too clear to ignore. The less far-reaching changes that could be made within the framework of the existing Regulation do not answer the criticism of decisions adopted by Commissioners. They might however go some way to deal with the criticism that the same officials are «prosecutor and judge». It is not clear how much support there would be for any of the three changes described here as radical. It is however clear that discussion and criticism of the existing procedure will continue unless and until it is significantly changed and improved.

<sup>42</sup> Forrester, Due process in EC competition cases: A distinguished institution with flawed procedures? 34 *European Law Review* (2009) 817.

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It may be said that any procedural improvements would be less necessary if DG Competition could recruit and retain more expert lawyers and economists, and that if the General Court were to carry out more detailed review of economic findings, a specialised competition chamber of some kind would be needed. Both comments are probably valid. However, it does not seem likely that the Commission will be able to retain more expert lawyers or economists, even if it were able to recruit them. Some strengthening of the Court may be desirable in competition cases, whether or not the Commission's procedures are altered. It should not be regarded as an argument against changes in the Commission's procedure that they might necessitate or make desirable a strengthening of the General Court. But it would certainly be unwise to consider any significant reform without considering carefully its implications for the workload and organisation of the Court.

No institution is infallible, and even in cases in which the Commission has clearly made mistakes, the mistakes cannot be shown to have been caused by the features of the procedure criticised here. It is true that without being able to trace the development of a draft decision to see who influenced it and why, it is difficult to prove that these features have been the cause of any specific error. However this amounts to little more than saying that because the internal working of the Commission is confidential, nothing can be proved about it by outsiders. It is not a reason for saying that the features criticised here are unimportant or satisfactory.

The real question is not how far the existing procedures can be conclusively proved to be unsatisfactory. The question should be whether they can be improved, and whether the Commission is now more willing to improve them than it has been in the past. Since the criticisms of the present procedure have been made more important by the Commission's own policies of imposing high fines and allowing widespread lobbying, the Commission ought to be willing to improve it. The real question is not whether but how to do so.

There are no obviously sound reasons why the Commission should be reluctant to change. Bureaucratic inertia and a wish to retain existing powers, if these were among the reasons, would not be good reasons. The Commission took a remarkable step with Regulation 1/2003 to share its powers with national authorities. It needs to take another equally wise and important step now.

A wise and statesmanlike Commission would not cling defensively to the *status quo*, but would look for the best available practices, without holding on to those adopted nearly fifty years ago, in 1962, in entirely different circumstances. The Commission aspires to be one of the leading competition authorities in the world. Its procedures should support that ambition, and not take away from it. The substantial achievements of the Commission are lessened by its procedures, and by the real possibility that its procedures may some day be found by the European Court of Human Rights to be contrary to the European Convention on Human Rights. The Commission cannot afford to take that risk.



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