



International Chamber of Commerce

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## Policy Statement



Prepared by the ICC Commission on  
**Competition**

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# Due process in EU antitrust proceedings

Comments on the European Commission's draft Best Practices in Antitrust Proceedings and the Hearing Officers' Guidance Paper

### Highlights

- Analysis of current EU antitrust proceedings
- Comments on EC Best Practices in Antitrust Proceedings and Guidelines on the Hearing Officer

# Due process in EU antitrust proceedings

## 1. Introduction

- 1.1 ICC welcomes DG COMP's consultation in relation to Best Practices in Antitrust Proceedings, the Hearing Officers' Guidance Paper and Best Practices on the submission of economic evidence. This paper addresses the first two of these documents. We do not specifically address the paper on the use of economic evidence.
- 1.2 Before we comment specifically on these two Best Practices consultation papers, we believe that it is essential that a more fundamental review is carried out of due process and procedural fairness in EU antitrust cases. This is not to impugn the professionalism, dedication and commitment of the talented staff in DG COMP, the Commission's Legal Service or the European Courts, but ICC believes that the European Commission's procedures for enforcing antitrust law and the General Court's practices in reviewing antitrust decisions are currently inadequate to guarantee procedural fairness, and possibly may reduce the prestige of the institutions as antitrust enforcers. The exceptional success of the European Commission in enforcing antitrust law means that its own practices need to be the best in the world, such that all stakeholders are convinced that those procedures are robust and are incapable of being politically influenced. This is why due process and scrupulous attention to procedural fairness are imperative if justice is not only to be done, but also seen to be done.<sup>1</sup>
- 1.3 The key features of a competition regime that business wants are certainty, predictability, consistency and confidence in the process. Companies doing business in Europe want competition rules which are strong, but which are also fair. The business community wants the Commission to have the best possible procedures – and for the Commission to adopt procedures which are the benchmark and which stand up well in comparison with global best practices. The perception of unfairness of the Commission's competition procedures is something that the business community therefore regrets.
- 1.4 The European Commission is made up of 27 experienced political figures, one from each Member State. In most areas of EU law, it acts as the EU executive and as the proposer of new EU legislation. Yet in the antitrust field, it also acts as investigator, prosecutor and adjudicator, and imposes considerable sanctions for antitrust infringements. We have no doubt that if the EU were put in place antitrust rules today, starting with a clean slate, it would design the decision making process differently. So while DG COMP's commitment to improving the current system by way of best practices is certainly welcome, now is also the time to consider broader and more fundamental reform. The best practices papers are no substitute for a broader and more fundamental reform of Regulation 1/2003, which remains necessary.
- 1.5 We therefore believe DG COMP should not merely look at Best Practices in existing procedures, but that they (and indeed the EU institutions as a whole) should address a wider question: is more fundamental reform of EU antitrust procedures desirable? We believe it is not only desirable, but necessary.

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<sup>1</sup> "[J]ustice should not only be done, but should manifestly and undoubtedly be seen to be done": *R v. Sussex Justices, ex p McCarthy* [1924] 1 KB 256, 259 per Hewart LJ.

## 2. Analysis of due process and procedural fairness in current EU antitrust proceedings

### 2.1 The relevance of the European Convention on Human Rights (ECHR)

- 2.1.1 The ECHR applies throughout the EU as all 27 Member States are signatories to this Treaty. Whilst the EU itself is not (yet) a signatory to the ECHR, the European Court of Justice (now the CJEU) has for a long time held that the shared traditions of the Member States in the human rights field, most notably inspired by the ECHR, constitute fundamental rights of EU law.<sup>2</sup> In addition, those rights which are recognised both under the ECHR and the Charter of Fundamental Rights of the EU must now be given the same meaning and scope under EU law as under the ECHR pursuant to Article 52(3) of the Charter of Fundamental Rights.<sup>3</sup> Since the entry into force of the Lisbon Treaty on 1<sup>st</sup> December 2009, the Charter of Fundamental Rights has the same legal value as the Treaties themselves.<sup>4</sup> In the near future the ECHR will become of even greater importance in the EU given that Article 6(2) TEU provides that the European Union will accede to the ECHR. So the due process rights enshrined in the ECHR are directly relevant to the antitrust field.
- 2.1.2 It is generally accepted<sup>5</sup> that when penalties are imposed for violations of the EC antitrust rules, these penalties are of a criminal nature, within the meaning of the ECHR. The ECHR sets certain due process requirements that must be met before criminal punishments can lawfully be imposed. These requirements in criminal proceedings include the right to a public hearing<sup>6</sup> before an independent and impartial tribunal<sup>7</sup> at first instance<sup>8</sup> with the opportunity *inter alia* to give evidence in one's own defence,<sup>9</sup> hear the evidence against one<sup>10</sup> and examine and cross-examine the witnesses.<sup>11</sup> Proceedings must not exceed a reasonable time.<sup>12</sup>
- 2.1.3 It is submitted (and indeed generally believed) that the procedures for antitrust cases within the Commission, up and until a Commission decision imposing a fine, do not meet these

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<sup>2</sup> Case T-112/98, *Mannesmannröhren-Werke*, [2001] ECR II-729, para 77; *Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij a.o. v Commission (PVC II)*, [2002] ECR I-8357, para 273; *Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rorindustri a.o. v Commission*, [2005] ECR I-5425, para 202.

<sup>3</sup> Article 52(3) of the Charter of Fundamental Rights provides: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

<sup>4</sup> Article 6(1) of the TEU provides that: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." (Emphasis added.)

<sup>5</sup> W. Wils, "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights", [2010] *World Competition* (forthcoming); F. Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases", [2009] *World Competition* 505; I. Forrester, "Due Process in EC competition cases: a distinguished institution with flawed procedures", [2009] *European Law Review* 817; 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)); Jürgen Schwarze, Rainer Bechtold and Wolfgang 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)); Opinion of Mr Vesterdorf, acting as Advocate General, of 10 July 1991 in *Joined Cases T-1/89 to T-4/89 and T-6/89 to T-15/89, Rhône-Poulenc and Others v Commission*, [1991] ECR II-869 at 885; Opinion of Advocate General Léger of 3 February 1998 in *Case C-185/95 P, Baustahlgewebe v Commission*, [1998] ECR I-8422, para. 31; Judgment of 8 July 1999 in *Case C-199/92 P, Hüls v Commission*, [1999] ECR 4287, para. 150.

<sup>6</sup> *Fredin v Sweden*, [1991] EHRR 784, para. 21.

<sup>7</sup> *Campbell and Fell v United Kingdom*, [1984] EHRR 165, para. 78.

<sup>8</sup> *Findlay v. the United Kingdom*, [1997] EHRR 221, para. 79.

<sup>9</sup> *Hulki Gunes v Turkey*, App. 28490/95, Judgment of 19 June 2003.

<sup>10</sup> *Ekbatani v Sweden*, [1988] EHRR 504, para. 25.

<sup>11</sup> *Isgro v Italy*, Judgment of 19 February 1991, Series A, No 104.

<sup>12</sup> *Eckle v Germany*, [1982] EHRR 1, para. 76.

rigorous standards. The hearing is not public. The decision makers (formally speaking, the Commissioners) are not judges in the normal sense, nor could the Commission be called a tribunal. Moreover, the 27 Commissioners never attend hearings. While there is the right to present one's defence at the hearing, there is no right to cross-examine witnesses – which can be an important lacuna if amnesty or leniency applicants have made incriminating statements which are being contested. Furthermore there is no compulsion on witnesses even to attend the hearing. Nor is there any opportunity to be heard on the amount of the fine. Finally, and most fundamentally, the roles of investigator, prosecutor, judge and jury are all ascribed to the same body.

- 2.1.4 It has been argued that the existence of “internal debate and intellectual critique” inside the Commission at staff level, including from the Legal Service and peer review from inside DG COMP (including the possibility of a Devil’s Advocate panel), ensure that the process is fair and open minded, and the findings are reliable.<sup>13</sup> Indeed, it is said that the “*alleged lack of transparency of the decision making process is what makes this free exchange of point of views amongst officials possible.*”<sup>14</sup>
- 2.1.5 While this level of internal debate is of course to be welcomed, the evident problem is that no outsider (and most notably the entity that is being punished) can tell whether such an impressive level of debate has in fact happened in any one case. Hence it does not pass muster under Lord Chief Justice Hewart’s famous maxim that “*justice should not only be done, but should manifestly and undoubtedly be seen to be done*”. Finally, and most fundamentally, this type of argument is not one that would satisfy the requirements of the European Court of Human Rights (ECtHR).
- 2.1.6 Some authors, notably from inside the European Commission,<sup>15</sup> have argued that the full ECHR requirements do not apply to the Commission’s investigations of cartel cases because penalties for infringing antitrust law are not “hard core criminal” law sanctions. However, when one reads the passage often cited in support of this proposition and bears in mind its context, namely as part of a judgment dealing with the right to an oral and public hearing, which constitutes a fundamental principle enshrined in Article 6 § 1 ECHR,<sup>16</sup> it does not really offer much support for their argument:

*"This principle is particularly important in the criminal context, where generally there must be at first instance a tribunal which fully meets the requirements of Article 6 [ECHR]... and where an applicant has an entitlement to have his case 'heard', with the opportunity inter alia to give evidence in his own defence, hear the evidence against him and examine and cross-examine the witnesses."*<sup>17</sup>

*"That said, the obligation to hold a hearing is not absolute (...). There may be proceedings in which an oral hearing may not be required: for example where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials (...)." <sup>18</sup>*

*"While it may be noted that the above-mentioned cases in which an oral hearing was not considered necessary concerned proceedings falling under the civil head of Article 6 § 1 and that the requirements of a fair hearing are the most strict in the sphere of criminal law, the Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing. Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight. What is more, the autonomous interpretation adopted by the Convention institutions of the notion of a "criminal charge" by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not*

<sup>13</sup> Castillo de la Torre, *op cit*, p. 568-569.

<sup>14</sup> *Id.*

<sup>15</sup> Wils, *op. cit.*; pp. 12-19 and Castillo de la Torre, *op. cit.*, pp. 570-572.

<sup>16</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*.

<sup>17</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para. 40.

<sup>18</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para. 41.

*strictly belonging to the traditional categories of the criminal law, for example administrative penalties (Öztürk v. Germany), prison disciplinary proceedings (Campbell and Fell v. the United Kingdom, judgment of 28 June 1984, Series A, no. 80), customs law (Salabiaku v. France, judgment of 7 October 1988, Series A no 141-A), competition law (Société Stenuit v. France, judgment of 27 February 1992, Series A no. 232-A) and penalties imposed by a court with jurisdiction in financial matters (Guisset v. France, no. 33933/96, ECHR 2000-IX). Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency (see Bendenoun and Janosevic, § 46 and § 81 respectively, where it was found compatible with Article 6 § 1 for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body: a contrario, Findlay v. the United Kingdom, cited above)."*<sup>19</sup> (emphasis added)

- 2.1.7 The *Jussila* case from which the quotes are drawn concerned a tax surcharge (the cases *Bendenoun* and *Janosevic* cited in support of the finding were tax cases as well) and cannot be construed in such a way as to extend to all other cases not strictly belonging to the traditional categories of the criminal law. In this judgment, the ECtHR makes it clear that there are "criminal charges" of differing weight and that the stigma involved in the offence is one of the key elements. So while it is true that the Commission does not have the possibility to imprison individuals, its punishments are now regularly so severe and receive such wide publicity that they inevitably lead to considerable stigma for the company concerned.<sup>20</sup>
- 2.1.8 No particular stigma is attached to a tax surcharge. It was this tax surcharge which was said to differ from hard core criminal law – such that it was not necessary to have a hearing before imposing the mathematically calculated surcharge. Antitrust penalties, by contrast, do not involve a mere mathematical calculation, but involve a lengthy process of adjudication and assessment of evidence. In imposing fines, the Commission has a considerable margin of discretion in assessing a complex set of economic and technical facts that are often highly disputed. This can hardly be compared to setting a tax surcharge.<sup>21</sup>
- 2.1.9 Tax surcharges can be compared to traffic offences which have been acknowledged in the *Öztürk* case<sup>22</sup> as an exception to the general rule, i.e. that the ECHR requirements fully apply to criminal charges. The rationale of these exceptions, however, is that these are cases of widespread petty offences. Demands of flexibility and efficiency (e.g., the duration of the proceedings) may justify a derogation from the general principle. In the *Jussila* case, the ECtHR states as follows:

*"The Court has further acknowledged that the national authorities may have regard to the demands of efficiency and economy and found, for example, that the systematic holding of hearings could be an obstacle to the particular diligence required in social security cases..."*<sup>23</sup>

Similarly, in *Bendenoun*, the ECtHR held:

*"As regards the general aspects of the French system of tax surcharges where the taxpayer has not acted in good faith, the Court considers that, having regard to the large number of offences of the kind referred to in Article 1729 para. 1 of the General Tax Code (...), Contracting States must be free*

<sup>19</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para. 43.

<sup>20</sup> For instance, see specific web page on DG COMP website regarding the *Intel* case with quote from the Commissioner and video excerpt of her press conference, available at <http://ec.europa.eu/competition/sectors/ICT/intel.html> or the press release in the *Power Transformers* case, where the Commissioner stated "The Commission has now put an end to this rip-off by the self-appointed "Gentlemen"", available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1432&format=HTML&aged=0&language=EN&guiLanguage=en>. Another example is Neelie Kroes' early statement at the International Bar Association/European Commission Conference 'Anti-trust reform in Europe: a year in practice', Taking Competition Seriously – Anti-Trust Reform in Europe, Brussels, 10 March 2005: „I do believe that we need to begin changing general perception of the competition rules. [...] It is up to us to show that when we break up cartels, it is to stop money being stolen from customers' pockets.“

<sup>21</sup> In its judgment of 23 July 2002, *Janosevic v. Sweden*, para 100, the ECtHR states, e.g., as follows: "In respect of the applicant's first contention [i.e. breach of the presumption of innocence], the Court notes that Swedish tax surcharges are imposed on objective grounds, that is, without any requirement of intent or negligence on the part of the taxpayer."

<sup>22</sup> ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*

<sup>23</sup> ECtHR, Judgment of 23 November 2006, *Jussila v Finland*, para. 42.

to empower the Revenue to prosecute and punish them, even if the surcharges imposed as a penalty are large ones."<sup>24</sup>

- 2.1.10 In conclusion, the normal criminal standards on due process established by the ECHR should apply to Commission competition procedures. It is evident that current Commission procedures do not meet these standards. This problem will only be exacerbated when the EU accedes to the ECHR.

## **2.2 Does the existence of an application for annulment to the General Court (GC) cure this problem?**

- 2.2.1 It has been argued that the fact that Commission procedures do not meet the normal criminal due process standards set by the ECHR does not matter since the Commission's findings are subject to review by the General Court (formerly the Court of First Instance). This argument might have some merit if the General Court undertook an extensive review of all facts and evidence considered by the Commission, but unfortunately it does not, meaning that the level of review currently undertaken by the GC is insufficiently rigorous to compensate for the failings of the Commission process.
- 2.2.2 As noted above, the general rule is that no criminal penalties can be imposed except by a court or tribunal meeting ECHR standards. There is a limited exception that applies to minor offences,<sup>25</sup> such as relatively minor traffic fines, provided there is full review on appeal by a court that entirely complies with all Article 6 ECHR requirements.<sup>26</sup> This limited exception must be construed narrowly<sup>27</sup> and thus would not apply when the Commission engages in a full adjudicatory process, issuing lengthy statement of objections to which the accused party can respond in detail and argue its case on the merits. The ECtHR emphasized in its *De Cubber* decision that each level of jurisdiction must comply with the requirement of impartiality.<sup>28</sup>
- 2.2.3 Given that the Commission, by its very composition and internal organisation, is not an independent and impartial tribunal in the sense of Article 6 ECHR, and rather acts as investigator, prosecutor and judge, it is likely that the Commission cannot legally impose fines under the legal guarantees provided by the ECHR.
- 2.2.4 Thus, the existence of an appeal to the GC does not cure the deficiencies in the Commission's procedures.

<sup>24</sup> ECtHR, Judgement of 24 February 1994, *Bendenoun v. France*, para 46.

<sup>25</sup> ECtHR, Judgment of 21 February 1984, *Öztürk v Germany*, para. 56: "Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6".

<sup>26</sup> ECtHR, Judgment of 23 June 1981, *Le Compte v Belgium*, para. 51.

<sup>27</sup> It seems to be worth mentioning, since Wouter Wils (*cit. above*) refers to that case as an allegedly comparable precedent for justifying the Commission fines in antitrust cases, that in *Bendenoun v. France*, para 47, the "very substantial" surcharges were € 64,415 for Mr. Bendenoun personally and € 86,957 in respect of his company.

<sup>28</sup> "Article 6 para. 1 (art. 6-1) concerns primarily courts of first instance; it does not require the existence of courts of further instance. It is true that its fundamental guarantees, including impartiality, must also be provided by any courts of appeal or courts of cassation which a Contracting State may have chosen to set up (...). However, even when this is the case it does not follow that the lower courts do not have to provide the required guarantees. Such a result would be at variance with the intention underlying the creation of several levels of courts, namely to reinforce the protection afforded to litigants. At the hearings, the Commission's Delegate and the applicant's lawyer raised a further question, concerning not the applicability of Article 6 para. 1 but rather its application to the particular facts: had not 'the subsequent intervention' of the Ghent Court of Appeal 'made good the wrong' or 'purged' the first-instance proceedings of the 'defect' that vitiated them? The Court considers it appropriate to answer this point although the Government themselves did not raise the issue in such terms. The possibility certainly exists that a higher or the highest court might, in some circumstances, make reparation for an initial violation of one of the Convention's provisions: this is precisely the reason for the existence of the rule of exhaustion of domestic remedies (...). The circumstances of the present case, however, were different. The particular defect in question did not bear solely upon the conduct of the first-instance proceedings: its source being the very composition of the Oudenaarde criminal court, the defect involved matters of internal organisation and the Court of Appeal did not cure that defect since it did not quash on that ground the judgment of 29 June 1979 in its entirety." ECtHR, Judgment of 26 October 1984, *De Cubber v. Belgium*, paras 32 and 33.

## 2.3 In any event, the level of review in the GC would not meet ECHR standards

- 2.3.1 Even if one were (hypothetically) to admit that antitrust law falls within the exception set forth above such that a penalty can be imposed by a body other than an independent tribunal, for the system to be ECHR compatible<sup>29</sup>, its decisions would have to be “*subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 para. 1*”.<sup>30</sup> In order for a court to have “full jurisdiction” within the meaning of the ECHR, the ECtHR held that the judicial body must have “*the power to quash in all respects, on questions of fact and law, the decision of the body below*” – and actually exercise such jurisdiction.<sup>31</sup>
- 2.3.2 The review by the Community Courts and by the GC in particular does not meet the standard set out in *Schmautzer* and *Kyprianou*. Under Article 263 Treaty on the Functioning of the European Commission (TFEU), the Community Courts’ competence is limited to voiding decisions that are illegal, without the possibility to substitute their own decision to that of the Commission.<sup>32</sup> Their competence is limited to reviewing the Commission’s legal and manifest errors (review of legality, not de novo review). If a decision is annulled, it is then for the Commission to take the necessary measure to implement the judgment. Moreover, the GC and CJEU apply a purposive interpretation of EU competition law, even where criminal penalties are involved,<sup>33</sup> which clashes with the ECtHR’s view that the criminal law should not be extensively construed to an applicant’s detriment.<sup>34</sup>
- 2.3.3 Three additional problems with the review exercised by the GC can be identified (see 2.3.4 to 2.3.6 below), which reinforce our respectful conclusion that the existence of an appeal to the GC cannot cure the fundamental ECHR and due process issues inherent in the Commission procedure.

### The General Court’s use of manifest error test

- 2.3.4 The GC tends to exercise self-restraint when it comes to “complex factual or economic assessments”, allowing a significant margin of discretion to the Commission, and limiting their control to manifest errors of appreciation.<sup>35</sup> One reason for this self-restraint may be the limitations in the GC’s own procedures, which do not make it easy for the GC to adjudicate complex factual or economic matters where two experts disagree about the assessment. But this leads to an ECHR problem when the Commission imposes a punishment based on such assessments. In addition, a further limitation in the GC’s powers lies in the non-contractual liability of the Community for a breach of Community law by the Commission. The GC held in *Schneider Electric S.A.*<sup>36</sup> that a non-contractual liability of the Community according to Article 340 TFEU applies only in cases of a “sufficiently serious infringement of Community law by the Commission. The GC held in that decision that:

<sup>29</sup> Since the Commission does not constitute an independent and impartial tribunal within the meaning of Article 6 ECHR

<sup>30</sup> ECtHR, Judgment of 10 February 1983, *Albert and Le Compte v Belgium*, para. 29 (emphasis added).

<sup>31</sup> ECtHR, Judgment of 23 October 1995, *Schmautzer v Austria*, para. 36. See also the later *Kyprianou* case where the ECtHR ruled on whether the review by the Cypriot Supreme Court of a condemnation for criminal contempt could cure the flaws that affected the trial before the lower court. Noting the absence of retrial of the case because the Supreme Court was lacking the competence to deal de novo with the case, the ECtHR concluded that the defects were not cured on appeal. (ECtHR, Judgment of 27 January 2004, *Kyprianou v Cyprus*, paras 43-46. Subsequently, the Grand Chamber upheld the judgment of the Chamber and did not overrule the conclusions or the reasoning reproduced above - ECtHR, Judgment of 15 December 2005 (Grand Chamber), *Kyprianou v Cyprus*, para. 134.)

<sup>32</sup> See Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, (2009) 34 ELR 817.

<sup>33</sup> In Case T-13/99, *AC Treuband v Commission*, [2008] ECR II-1501, the GC read the concept of agreement “in the light of the objectives pursued by Article 81(1) EC and by Article 3(1)(g) EC” to uphold the imposition of a fine on a consultancy firm which provided logistical and administrative tasks associated with the organisation of cartel meetings. The Court rejected the applicant’s argument that such an interpretation constituted a breach of the principle of *nullum crimen, nulla poena sine lege*.

<sup>34</sup> ECtHR, *SW v UK*, Judgment of 22 November 1995, Series A, No 335, para. 36; ECtHR, *CR v UK*, Judgment of 22 November 1995, Series A, No 335, para. 34.

<sup>35</sup> Case T-13/99, *Pfizer Animal Health v Council*, [2002] ECR II-3305, paras 168-169; case T-201/04, *Microsoft v Commission*, [2007] ECR II-3601, paras 87-89.

<sup>36</sup> Case T-351/03, *Schneider Electric SA v. Commission*, [2008] 4 CMLR 22.

*“It must be conceded that [the possible inhibiting effect that the risk of having to bear damages alleged by the undertakings concerned might have on the control of concentrations], contrary to the general Community interest, might arise if the concept of a serious breach of Community law were construed as comprising all errors or mistakes which, even if of some gravity, are not by their nature or extent alien to the normal conduct of an institution entrusted with the task of overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion. Therefore, a sufficiently serious breach of Community law, for the purposes of establishing the non-contractual liability of the Community, cannot be constituted by failure to fulfil a legal obligation, which, regrettable though it may be, can be explained by the objective constraints to which the institution and its officials are subject as a result of the provisions governing the control of concentrations.”<sup>37</sup>*

- 2.3.5 This means that the Commission has considerable degree of discretion especially in cases with complex economic assessments and that even in cases where the Community Courts held that a Commission decision was illegal the Commission is not liable which means that the undertakings in question have to bear the damage caused by a mistake of the Commission.
- 2.3.6 It has been argued that the GC review in cases involving complex economic assessment is in fact very detailed.<sup>38</sup> But even if that were to be the case, the fact remains that the party being fined has to prove that the Commission was manifestly wrong – which is the opposite of the standard normally applied in criminal cases (i.e. the prosecutor must prove the case to a high level of proof). Faced with complex economic appraisals, the GC held that it would limit itself to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.<sup>39</sup>

### **GC does not use its unlimited jurisdiction on fines**

- 2.3.7 Bo Vesterdorf, the former President of the Court of First Instance has noted in an article published after his retirement<sup>40</sup> that the GC (then still the CFI) only exercised its power of unlimited jurisdiction under Article 262 to review fines imposed by the Commission on three occasions.<sup>41</sup> Vesterdorf notes that in almost all cases the GC merely looks to see if the Commission has applied its fining guidelines correctly.<sup>42</sup> In doing so, it will often apply a manifest error test, which only focuses on whether the Commission has exceeded its margin of discretion.<sup>43</sup> Equally, the GC has been reluctant to make use of its power to adjust the fine in the absence of any illegality of the Commission decision, although it would legally be entitled to do so.

<sup>37</sup> *Id.*, paras 122-123.

<sup>38</sup> See, e.g., Wils, *op cit*, pp. 29-31.

<sup>39</sup> See Case T-340/03, *France Telecom v Commission*, [2007] ECR II-107, para 129: “As a preliminary point, it should be recalled that, as the choice of method of calculation as to the rate of recovery of costs entails a complex economic assessment on the part of the Commission, the Commission must be afforded a broad discretion (see, to that effect, Case C-7/95 P *John Deere v Commission* [1998] ECR I-3111, paragraph 34, and the case-law cited). The Court’s review must therefore be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.”

<sup>40</sup> B. Vesterdorf, “The Court of Justice and Unlimited Jurisdiction: What does it mean in practice?”, GCP, June 2009, available at: [www.globalcompetitionpolicy.org](http://www.globalcompetitionpolicy.org).

<sup>41</sup> Case T-4/92, *Dunlop Slazenger v Commission*, [1994] ECR II-441; Joined cases T-191/98, T-212/98 to T-214/98, *Atlantic Container Line AB a.o. v Commission*, [2003] ECR II-3275; Joined cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon a.o. v Commission*, [2004] ECR II-1181.

<sup>42</sup> Vesterdorf, *op. cit.*

<sup>43</sup> See Case T-116/04, *Wieland Werke v Commission*, judgment of 6 May 2009, paragraph 32: “where the Commission has a discretion, for example, as regards the amount of increase for the purposes of deterrence, review of the legality of those assessments is limited to determining the absence of manifest error of assessment”. In the following paragraph, the Court did clarify that: “Nor, in principle, does the discretion enjoyed by the Commission and the limits which it has imposed in that regard prejudice the exercise by the Community judicature of its unlimited jurisdiction.”

- 2.3.8 It is submitted that this is inconsistent with the ECHR as well as unfair from a due process perspective more broadly for the penalties not in practice to be reviewed by a court of full jurisdiction. In particular, the failure of the Court to be involved when fines are increased for deterrence is incompatible with the ECHR.<sup>44</sup>

Some commentators have argued that it would be very difficult for the GC to institute such a process of review because of the “daunting task” of developing a consistent approach amongst different chambers of the GC.<sup>45</sup> If true, this merely confirms the incompatibility of the current system with the ECHR – even if formally the GC has full jurisdiction on fines, it is not in a position to exercise that power at present.

#### **Absence of suspensory effect of an appeal**

- 2.3.9 Appeals before the GC have no suspensory effect in general,<sup>46</sup> something which raises issues under ECHR case law.<sup>47</sup> Absent the very rare granting of interim measures, the fine must be paid or (if the Commission is willing to accept it – which is increasingly rare) a bank guarantee produced. And even if the Commission were to accept a bank guarantee, this does not cure the absence of suspensory effect of the appeal given the cost of a bank guarantee for large fines can in itself be very high and thus be penal in nature – not least given that the costs of the bank guarantee cannot necessarily be recovered if the appeal is successful.<sup>48</sup>

## **2.4 Proposals for reform**

- 2.4.1 We urge the Commission to explore actively the possibilities for real reform beyond the issues considered in the “Best Practices in antitrust proceedings” consultation.
- 2.4.2 Given the Treaty of Lisbon provides that the EU will accede to the ECHR, and particularly in the light of the Charter of Fundamental Rights of the EU, now is the time to resolve the fundamental due process problems set out above. In an ideal world, we would recommend that the Commission would hand over the power to take decisions involving penalties to an independent court or tribunal (whether the GC or another community court.) Then penalties would be imposed by the Courts not the Commission, resolving the ECHR issue. However we acknowledge that such reform will take time to put into place.<sup>49</sup> So we would also suggest that intermediate solutions should be considered and implemented in the more immediate term, while awaiting fundamental reform.
- 2.4.3 There are two particular areas in which we suggest reform is needed.
- 2.4.4 First, the Commission’s procedures must be reformed so that factual determinations are made by an independent decision-maker which has heard the case of all parties and thoroughly assessed the evidence. There are various ways in which this could be achieved, removing the multiplicity of inconsistent roles that characterises the current system, without it being necessary to remove the formal decision-making role of the College of Commissioners.

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<sup>44</sup> See Case T-13/03, *Nintendo v Commission*, judgment of 30 April 2009, para 80, where the Court applied a manifest error test in assessing whether the Commission was entitled to triple a fine for deterrence based on a novel approach.

<sup>45</sup> Castillo, *op cit*, op. 578.

<sup>46</sup> Article 242 EC.

<sup>47</sup> ECtHR, Judgment of 27 January 2004, *Kyprianou v Cyprus*, para 45; ECtHR, *Vastberga Taxi v Sweden*, Application no 36985/97, para. 120: “A system that allows enforcement of considerable amounts of tax surcharges before there has been a court determination of the liability to pay the surcharges is therefore open to criticism and should be subjected to strict scrutiny”.

<sup>48</sup> Case T-113/04, *Atlantic Container Line a.o. v Commission*, [2007] ECR II-171.

<sup>49</sup> While many authors have argued that no Treaty change would be required and that such reforms could be implemented via Article 103 TFEU (see GCLC, Report of Group III, *op cit*), it is clear that a more fundamental reform will require time to implement. . The question of whether Treaty change is needed is ultimately only a question of timing, as the need for a Treaty change can evidently not justify non compliance with the ECHR.

- 2.4.5 Second, it is necessary for the GC to expand the scope of its judicial review and conduct a full review of all factual and legal matters – including a full judicial review of issues that are complex. This is essential for the compatibility of a system in which decisions on matters defined as criminal for the purpose of Article 6 ECHR are adopted by an administrative body, assuming it is accepted that antitrust penalties are minor offences that may – under the case law of the ECtHR – be imposed by an administrative body in the first instance (see section 2.1 above).
- 2.4.6 Clearly the details of such reforms must be carefully considered. We believe it is necessary for the Commission to engage in a meaningful discussion, in consultation with stakeholders, on the reforms that would address the weaknesses identified above. ICC would be happy to contribute to that process.

### **3. Specific Comments on the Commission's Best Practices in Antitrust Proceedings and Guidelines on the Hearing Officer**

#### **3.1 Overview**

The Commission's best practices papers are welcome, but could be improved in respect of a number of key issues (including a number of important elements that were omitted) to successfully address concerns as to procedural fairness.

#### **3.2 Leniency**

The Commission's document does not set out best practices with regard to the procedural issues that result from leniency applications, especially with regard to third parties rights. For instance, third parties are not informed of the tenor of a leniency application filed by another party before a Statement of Objections is issued. This is problematic as the Commission might attribute more weight to potentially erroneous statements made by the leniency applicants (on the basis of which the Commission launched the inquiry) than to the explanations of the other defendants. Such an approach is unacceptable because it creates a clear inequality among the various parties involved in proceedings.

#### **3.3 Sector inquiries**

- 3.3.1 The best practices paper does not address sector inquiries. The European Commission should not have the same powers when it investigates a specific infringement as it does when it conducts a general "sector inquiry".
- 3.3.2 First, sector inquiries should not be launched by way of unannounced inspections as is the case in a targeted investigation. Arguably such an approach to a general inquiry is disproportionate to the aim pursued. Article 17 of Regulation 1/2003 needs to be amended to reflect this.
- 3.3.3 Second, the scope of the inquiry should be precisely defined at the outset to avoid this turning into a wide-ranging exploratory exercise. In this respect, the Commission should follow the example of the UK Competition Commission and consult with the undertakings about the scope of the questions prior to sending them. Such practice would help ensure that the Commission collects data that is meaningful in the context of this sector inquiry and avoids imposing undue burdens on respondents.

#### **3.4 Separation of roles as investigator, prosecutor and decision maker**

As explained above, fundamental institutional reforms are necessary given the Commission's status as investigator, prosecutor and decision-maker. While the current role of the Hearing Officer does not cure the ECHR problems with the overall system, we would support expanding the role of the hearing officer as a temporary measure, to improve the system prior to more fundamental reform. The hearing officer could be given control of the inquiry during the investigation/prosecution phase. However, for this to be seen to be effective, the hearing officer would need to be clearly independent from DG COMP and the Commissioner in charge of competition.

### 3.5 Improved rights of defence during inquiry

The Commission's paper inadequately addresses the rights afforded a target of an inquiry during the investigation. Instead it simply refers to the explanatory notice that the Commission issued back in March 2008.<sup>50</sup> However, that notice failed to acknowledge a basic right of self-defence. To remedy that omission, the best practices paper should protect a target's ability to refuse to answer questions that imply admission of an infringement. Further, the Commission should commit to avoid asking such knowingly leading questions. In order to guarantee the effectiveness of the right to remain silent, the Commission should commit to recording every question that the inspectors asks during the inspection so that the hearing officer and/or judge may be able to subsequently determine whether or not the fundamental right to remain silent was violated.

### 3.6 Legal Professional Privilege ('LPP')

The best practices paper repeats the Commission's historic position that LPP does not apply to in-house counsel. This point needs to be re-evaluated by the Commission because lawyers and in-house counsel are two branches of the same profession and that there is no justification for continuing the practice of differentiating the two. Such a review is all the more needed now that the Regulation 1/2003 has replaced the former exemption system and companies must now self-assess the legality of their conduct and the agreements they enter into, instead of applying for clearance before the European Commission.

### 3.7 Improved management of the file

- 3.7.1 The right to have access to the Commission's investigation file is well established. However, it does not always contain the notes of all the meetings between the Commission and the undertakings which may have been conducted on an informal basis. The Ombudsman in the Intel case<sup>51</sup> made clear that good administration requires proper and full documentation of all discussions/meetings aimed at or which actually include factual evidence.
- 3.7.2 The best practices draft still unfortunately indicates the Commission believes it should be able to pick and choose when to keep a record of "statements". Notes of all meetings (excluding internal DG COMP thinking and analysis) should be included in the case file and be made available to the parties. Safeguarding procedural fairness starts with a fair and full documentation of an entire inquiry, being prepared to share those findings with the parties involved, and not self-selecting what portions of the inquiry should be documented and shared.

### 3.8 Access to file and engagement during the investigation phase

- 3.8.1 To ensure procedural fairness and effective decision-making, the exchange of information between the Commission and the firm under investigation should take place on a continuing basis through all stages of an investigation, with the level of disclosure increasing as the investigation progresses. The Commission should thus grant access to the file during the investigation phase, such that all complaints, documents and other evidence relating to the subject matter of the investigation, whether inculpatory or exculpatory, should be disclosed to the firm(s) under investigation sufficiently in advance of the preparation of the Statement of Objections so as to enable the firm(s) to address the evidence and discuss the economic theories and legal analysis with the Commission in a spirit of constructive engagement. Such engagement would help to narrow the scope of disputed issues, correct misconceptions, reduce the likelihood that the Commission may be surprised by arguments made in response to its formal charges and would better enable the Commission to test its theories during the course of the investigation, thereby enhancing the quality of its fact finding and its ability to allocate its resources efficiently.

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<sup>50</sup> [http://ec.europa.eu/competition/antitrust/legislation/explanatory\\_note.pdf](http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf).

<sup>51</sup> *Final report of the Hearing Officer in Case COMP/C-3/37.990 – Intel*, OJ No C 227 of 22 Sept. 2009.

- 3.8.2 Respondent(s) (or respondent(s)' counsel) should be allowed access to all confidential information, subject to appropriate access and use restrictions, including the negotiated disclosure and data room procedures identified by the Commission.

### **3.9 Time limits**

- 3.9.1 The time limits set by the Commission to respond to requests for information and to a Statement of Objections are extremely short. The best practices outlined by the Commission in its paper do not make any attempts to alleviate these concerns.
- 3.9.2 With regard to requests for information, the Commission usually gives undertakings only one or two weeks to provide substantial data, something which cannot be viewed as "reasonable" (Best Practices, para. 35). While an extension can be granted upon request, it would be better if this were not necessary – in other words if the Commission accords reasonable time limits when it requests companies to provide extensive amounts of data and other information.
- 3.9.3 With regard to the response to the Statement of Objections, the Commission confirms that it usually gives a two-month period for the target to reply to the statement of objections. Such a period of time is supposed to take into account "the time required for the preparation of the submission and the urgency of the case". However, given the exponentially large size of the investigation file (due in particular to the use of computer forensic techniques), such a relatively short period of time does not ensure that the parties can properly access and analyze all the information that it contains before responding to the Statement of Objections.
- 3.9.4 This time limit is further inadequate given that the inquiry phase during which the Commission gathers its information used to issue the Statement of Objections typically takes a number of years. The right to a proper defence cannot be ensured when an undertaking only has two months to assess the result of years of work by the Commission and produce a response which properly addresses all the allegations against it.

### **3.10 Right to be heard regarding proposed penalties**

A revised best practices paper should require DG COMP to be under an obligation to outline how it intends to calculate the level of a potential fine as to allow the undertaking to be able to comment on specific factors (multipliers used, on leadership, on leniency aspects, on the unfairness of recidivist uplifts, on the company's ability to pay) being relied on to calculate the fine. Such a transparent approach and the acceptance of input regarding the calculation of the fine may avoid many unnecessary appeals. This should be done through a comment process or in a special oral hearing, after the Commission has determined an infringement. Essentially, a statement regarding the application of the Fining Guidelines to the particular case, including all the relevant facts, would become a separate statement of objections open for comment. There should be an opportunity to discuss (after the Statement of Objections but before a decision) the fining calculation as it will be concretely applied in the specific case.

### **3.11 Settlements**

Finally, the Article 9 Settlements procedure should be improved with regard to the duty of the Commission to state reasons. Currently, the Commission often restates its "preliminary views" in its final decision without addressing the evidence, comments and objections that it received in response of the Statement of Objections. On the contrary, the decisions recording settlements should be balanced and reflect the full state of the evidence in the file.

## **4. Conclusion**

ICC thanks the Commission for having opened this consultation process to discuss this important topic. If it would be of interest to the Commission, ICC would be happy to offer further thoughts on how to implement the ideas set forth above and would welcome the opportunity to engage in an ongoing dialogue with the Commission on this topic.

# The International Chamber of Commerce (ICC)

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**International Chamber of Commerce**

*The world business organization*

**Policy and Business Practices**

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