

# Due process in EC competition cases: A distinguished institution with flawed procedures

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*LT* Administrative decision-making; Competition law; Due process; EC law; Enforcement; European Commission; Fairness; Fines; Investigations; Procedure; Right to independent and impartial tribunal

*This article contends that the European Commission's procedures for enforcing competition law are inadequate and do not match the importance and prestige of the institution as a world leader in antitrust enforcement. The topic is especially urgent due to the heavy consequences of being found to have infringed competition rules, the punitive and adjudicatory nature of the process, and the increasingly important case-law of the European Court of Human Rights. The article identifies three weaknesses in the current system: the adoption of a decision finding guilt by 27 political appointees who have not heard or studied the evidence; the lack of any hearing before a decision-maker; and the fact that the same case team in the Commission handles both the investigation of the case and the reaching of a decision. An institution as talented and prestigious as the Commission does not deserve such unique, and uniquely unsatisfactory, procedures. This article suggests some palliatives which would not necessarily involve Treaty change but which would endow Europe's premier competition authorities with better processes. It is proposed that the determination of the facts be made by a qualified person or trio of persons who would hear both prosecution and defence on equal terms, would reach a conclusion on the factual and legal soundness of the accusations, and would then pass to the College of Commissioners a draft decision for endorsement or rejection. The author submits that the Commission ought to act before it is faced with a negative finding by a competent court about its current practices.*

## A successful institution

In the course of my professional lifetime, European competition law has evolved from being a slightly obscure preoccupation of a small number of lawyers, economists and officials, to being one of the world's two leading competition law systems. The

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Directorate-General for Competition (“DG Competition”) of the European Commission is unique within that institution in that its officials have the power to investigate, raid business premises and private homes, question witnesses, reach conclusions, demand concessions, impose penalties and enforce those penalties, in court if necessary. The prestige, power and success of DG Competition is all the more striking as, institutionally, the Commission has weakened *vis-à-vis* the Member States who are for the moment in the ascendancy in the perpetual shifting of forces as between national and Community authority. The officials staffing DG Competition must assuredly be among the world’s most prominent enforcers. They would deserve high marks for intellectual creativity, diligence and hard work.

Prior to his arrival in post, the present, very distinguished, Director General served the European Commission at very senior levels in several different jobs. The Commissioner, after some wobbles at her Parliamentary confirmation hearing in 2004,<sup>1</sup> has become a media celebrity and is the photogenic face of European competition law enforcement. The Commission has taken some spectacular Art.82 EC decisions and has successfully defended these in court, not having lost a dominance case in over 25 years. The Commission’s vigour in the war against cartels has passed striking and is approaching iconic. The level of fines which it imposes is astonishingly high and is rising. In the friendly and wholesome rivalry between competition agencies around the world, the European Commission is probably, at the time of writing, a short head in front of the US antitrust agencies.

It is not only against conventional private-sector targets of antitrust enforcement that the Commission has made an impact. The institutional contribution made by competition officials and their colleagues to the shaping of Community policies has been very important. DG IV (subsequently rebranded as DG Competition or the Directorate-General for Competition) addressed, along with other Commission services, the problems posed by subjects such as copyright law, anti-dumping measures, obstacles to trade between Member States, Member State protectionism, support for national champions, trade relations with countries which offered attractive products that were blocked on various pretexts, usually rooted in some form of protectionism, draft legislation; and, of course, significant EU enlargement, bringing in new Member States with a tepid commitment to free-market disciplines. The voice of the institutional advocate for competition and for choice was a precious one which might not otherwise have been heard. We cannot know, for example, when the French Government’s independent blockade over the importation of Japanese cars would have ended if DG IV had been silent on the topic, even though the Commission lacked the courage to challenge the French practices directly under the EC Treaty. European competition law applies to the state, a European first, and the Directorate-General has shown courage over the years in pressing Member States not to export their unemployment to other Member States via subsidies to national enterprises. So none of the comments which I shall be making about how competition cases are decided, and by whom, should cast any doubt on the Commission’s huge achievements with respect to state aids or the other matters where it has done so much to help create a reasonably open and reasonably fair marketplace stretching from the Atlantic to the

<sup>1</sup> Candidates for appointment as Commissioner are grilled by a Committee of the European Parliament before their confirmation as Commissioner. Mrs Kroes was given a particularly severe time.

Black Sea. Regrettably, however, the talented and prestigious institution is weakened by unique,<sup>2</sup> and uniquely unsatisfactory, processes and procedures.<sup>3</sup> This article will describe those imperfections, and suggest palliatives which would not involve a Treaty change but which would endow the European Commission's Competition Directorate-General with less unfortunate procedures.

### The procedures of the Commission

This is not a new topic. I recollect Alfred Gleiss, a prominent German lawyer, complaining in the 1970s that the Commission had acted as "judge and jury" when it inflicted a fine upon his client for participation in a cartel. In those days, such criticisms were not widely supported. Indeed, they were to some extent a code for arguing that the competition rules should not be enforced at all, since their formal mechanisms were imperfect. The institution was young and its early decisions were carefully selected, so matters never reached the current pitch of tension.

But the strangeness of the processes was noted. In 1973, one commentator, having described the cumbersome internal procedure by which Commission decisions are taken, questioned,

"whether the interests of equity are served best by frequent review of draft documents alone, or whether consideration should be given to granting the opportunity to an 'accused' firm to ask questions, and be entitled to answers, to examine as many as possible of the documents on which the Commission bases its findings, or even formally to question the relevant Commission officials or experts, on whose 'testimony' the Commission's ultimate finding will be based".<sup>4</sup>

She went on to note that,

"it is understandable that the Commission would not favour adversary-type proceedings, but firms liable to be fined literally millions of dollars may well feel aggrieved at not being guaranteed the chance to know the facts on which their 'sentence' is based. The normal methods of conducting administrative proceedings are not necessarily satisfactory when the administrative sanctions are so severe".

During the intervening 36 years, much has been written by legal practitioners, businessmen and academics on the fairness of the Commission's procedures.<sup>5</sup> Other Community institutions have joined in the debate: as long ago as 1981, the Parliament,

<sup>2</sup> According to a recent OECD report, *European Commission—Peer Review of Competition Law and Policy 2005*, no other OECD jurisdiction assigns decision-making responsibility in competition enforcement to a body like the Commission where, when the Commission decides a matter, no Commissioner, including even the Competition Commissioner, will have attended the hearing.

<sup>3</sup> This article considers the enforcement of "antitrust" law, i.e. the regulation of infringements by companies of Arts 81 and 82 EC. It does not consider the specific procedures which apply to the notification and approval of mergers, although some of my conclusions should resonate also as to merger decisions.

<sup>4</sup> F. Graupner, "Commission Decision-Making on Competition Questions" (1973) 10 C.M.L. Rev. 291.

<sup>5</sup> See, for example, F. Montag, "The Case for a Radical Reform of the Infringement Procedure under Regulation 17" (1996) 8 E.C.L.R. 428, 430 and more recently, Professor Dr Jürgen Schwarze and Professor Dr Rainer Bechtold, *Deficiencies in European Community Competition Law: Critical analysis of current practice and proposal for change* (Gleiss Lutz, September 2008); D. Slater, S. Thomas and D. Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?* (Global Competition Law Centre Working Paper 04/08) and the paper by A. Andreangeli et al.,

in its Resolution on the Commission's annual report on competition law, called on the Commission to consider the establishment of an intermediate tribunal to deal with competition cases or the appointment of an independent person to manage the investigative process and handle certain procedural aspects.<sup>6</sup>

Many of these reflections, written when the basic procedural structure of decision-taking was relatively young, remain as valid today as they were 30 years ago.<sup>7</sup> The topic has acquired especial urgency today for several reasons. First, more people have had experience of competition cases, and a fair number of them are dissatisfied. More cases are being investigated, prosecuted and decided, so more companies, and their lawyers, have had the experience of defending themselves in Brussels. Practitioners, officials, company executives, in-house counsel, witnesses, outside counsel and experts in various domains have thus been exposed to a competition case. A separate, but related, phenomenon is the level of fines which are imposed for breaches of Arts 81 and 82 EC. Tens of millions of euros may now seem mild, hundreds of millions are not uncommon, and the billion mark has been passed. In one sense, it is predictable that the huge level of the fine creates outrage among those who have been found guilty, but in a more detached sense, it is perfectly appropriate for the legal profession and legal scholars to consider whether the procedures which generate such penalties are apt for such huge responsibilities.

Secondly, the exceptional success of the Commission in competition cases means that its own practices need to be the best in the world, and that business people, lawyers, officials, shareholders, employees and others be convinced that they are adequate, robust and incapable of being politically influenced.

Thirdly, the growing importance of the European Convention on Human Rights and Fundamental Freedoms (ECHR) has greatly enhanced awareness in national circles of the rights which civilised European democracies honour. Companies in Europe are eligible for ECHR protection to a greater extent than companies can claim the constitutional protections of the Bill of Rights in the United States.<sup>8</sup> Corporate bodies have prevailed in the European Court of Human Rights (ECtHR) in a number of cases.<sup>9</sup> Every signatory

"Enforcement by the Commission: The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System" prepared for the fifth annual conference of the Global Competition Law Centre held in Brussels, June 11–12, 2009. For an interesting—and carefully researched—alternative view, see the paper by F. Castillo de la Torre, "Evidence, Proof and Judicial Review in Cartel Cases" published for the 14th Annual EU Competition Law and Policy Workshop of the European University Institute, June 19–20, 2009, and forthcoming in (2009) 32 *World Competition*. Wouter Wils has kindly shown me an advance copy of his article "The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights" to be published in (2009) 33 *World Competition*, proposing a distinction between the procedural protections necessary for "hard core criminal" matters and for other criminal matters caught by art.6 ECHR.

<sup>6</sup> Resolution on the Tenth Report of the Commission of the European Communities on Competition Policy [1982] OJ C11/78 of January 18, 1982.

<sup>7</sup> In September 2009, in her annual survey of current competition policy questions, Commissioner Kroes included due process in the traditional speech on competition law at Fordham Law School. "The Lessons Learned" speech at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University New York, September 24, 2009 (reference SPEECH/09/408).

<sup>8</sup> Broadly speaking, the privileges given by the Bill of Rights, the first 10 Amendments to the US Constitution (protection against self-incrimination, unlawful search and seizures, freedom of speech and assembly, and the rest) are enjoyed by natural persons, not legal persons. Corporations enjoy more limited constitutional rights, via the equal protection clause of the 14th Amendment.

<sup>9</sup> The last of many is *Dubus SA v France* (App. No.5242/04), not yet reported, June 11, 2009, discussed below; see also, fn.40.

of the ECHR has had to modify its practices in one way or another to satisfy its ECHR obligations (criminal justice, social security, voting, residence, immigration, the handling of terrorism, privacy, access to medical care, duty to answer officials' questions, prisons, and many other fields). The right to a fair trial enshrined in Art.6 ECHR has been extensively examined, and its scope has expanded. It is natural that the European Commission should be held to the same standards of behaviour.

I submit that the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the ECHR. Condemned parties have often invoked these arguments before the Community courts, so far with little success. The number of cases has grown and the concerns become more strident as the penalties have become fiercer. A number of cases currently pending before the courts raise fundamental questions about the Commission's investigation and decision-making procedures. For example, Saint Gobain's appeal against the Commission's 2008 *Car Glass* decision raises inter alia the question of whether the imposition of a fine imposed by an administrative authority which holds simultaneously powers of investigation and sanction is compatible with the right to an independent and impartial tribunal and of the right to respect for the presumption of innocence.<sup>10</sup>

Let us briefly recall the ECHR problem at this stage.<sup>11</sup> Under the ECHR, the general rule is that the determination of criminal charges, whether or not they are called "criminal", must be made at first instance by an independent tribunal.<sup>12</sup> The ECtHR allows the determination of civil rights and obligations and certain criminal offences to be entrusted to administrative authorities, provided that the persons concerned are able to challenge any decision thus made before a judicial body that has full jurisdiction and that provides the full guarantee of Art.6 ECHR rights.<sup>13</sup> The ECtHR has indeed accepted a two-tier judicial review system on an exceptional basis in cases concerning civil rights and obligations,<sup>14</sup> for "disciplinary cases" involving the military,<sup>15</sup> and for criminal cases involving "minor offences".<sup>16</sup> It has not yet had the opportunity to pronounce on the compatibility of Commission procedures with the ECHR, but its jurisprudence on analogous questions is, I suggest, highly indicative.

The limited jurisdiction exercised by the Community courts in challenges to Commission competition decisions exacerbates the problem.<sup>17</sup> Thus formally, the original condemnation of a company by the Commission is called an administrative decision, and instead of being eligible for full review on the merits, the review is a control of legality, not a full appeal ("was it unlawful?" not "was it wrong?").

<sup>10</sup> *Saint-Gobain Glass France v Commission* (T-56/09), action brought on February 13, 2009 (pending).

<sup>11</sup> See, on this topic, the excellent work by W. Wils, *Principles of European Antitrust Enforcement* (Hart, 2005), para.170.

<sup>12</sup> *Jussila v Finland* (2007) 45 E.H.R.R. 39 at [40].

<sup>13</sup> W. Wils, *Principles of European Antitrust Enforcement*, 2005, para.170, citing.

<sup>14</sup> *Le Compte v Belgium* (1982) 4 E.H.R.R. 1 at [51].

<sup>15</sup> *Albert v Belgium* (1983) 5 E.H.R.R. 533 at [29].

<sup>16</sup> *Öztürk v Germany* (1984) 6 E.H.R.R. 409 at [56] (a minor traffic violation).

<sup>17</sup> I.S. Forrester, "A Bush in Need of Pruning: the Luxuriant Growth of 'Light Judicial Review'" paper published for the 14th Annual EU Competition Law and Policy Workshop of the European University Institute, June 19–20, 2009, to be published in *2009 Competition Law Annual* (Hart Publishing).

The matter will be all the more pressing when the European Union accedes to the ECHR, as is foreseen by the Lisbon Treaty.<sup>18</sup> Until now, the Community courts have scrutinised the Commission's procedures through the lens of the Community's general principles of law, of which fundamental rights (including the right to a fair trial) form a part. In so doing, the Community courts "draw inspiration" from the national constitutional traditions and international treaties to which Member States are signatories, such as the ECHR. However, the courts have so far declined to apply the ECHR and the case law of the Strasbourg European Court of Human Rights directly, since the ECHR as such is not part of Community law.<sup>19</sup> This has led to some subtle but significant divergences between ECHR and EC law.<sup>20</sup>

The essence of my criticism is that the Commission's decision-making processes, which were adopted in 1962 and which have not fundamentally changed in the interim, are completely inadequate to discharge the huge responsibilities assigned to the Commission by the EC Treaty. In all the following remarks, let it be clear that I make no reproach of the diligence or personal honour of the officials involved. It would be foolish to say that they always condemn innocent companies. Indeed, the system yields "acquittals" in the sense that allegations in the statement of objections may be abandoned or narrowed in the final decision. Officials do not intend to be unfair, and are careful to respect the interests of the defence within the framework ascribed to them. Nor do I assert that those who engage in cartel activity should be generously treated. I simply add my voice to the groundswell of opinion in favour of procedures that are worthy of the distinguished institution and appropriate for the important policy it pursues.

### Three weaknesses of the current system

There are three separate categories of problem. First, the decision should be taken by a tribunal or in a quasi-judicial manner by an official, yet it is taken by a college of 27 political appointees who take such a decision collectively by majority vote. No competition agency on earth takes decisions this way, nor does any criminal instance in any democratic country. There is the institutional possibility that political considerations will influence—pollute is perhaps too strong—the decision making. I have been involved in cases where that has happened. Such political episodes are rare today, but they could occur. Politicians, no matter how eminent and no matter how well advised, should not decide private litigations, still less public prosecutions.

<sup>18</sup> TEU Art.6(2), as amended by the Lisbon Treaty, would provide that: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

<sup>19</sup> *Mannesmannröhren-Werke AG v Commission* (T-112/98) [2001] E.C.R. II-729; [2001] 5 C.M.L.R. 1 at [5]9: "It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, inasmuch as the Convention as such is not part of Community law (*Mayr-Melnhof v Commission* (Case T-374/94) [1998] E.C.R. II-1751, paragraph 311)."

<sup>20</sup> Compare for instance the ECtHR's wide application of the privilege against self-incrimination, covering also indirect incrimination through the duty to respond to questions of fact which would establish an infringement, in *Saunders v United Kingdom* (1997) 23 E.H.R.R. 313 with the ECJ's limited approach set out in *Orkem SA v Commission* (374/87) [1989] E.C.R. 3283; [1991] 4 C.M.L.R. 502 at [29]. This is discussed in Aslam and Ramsden, "EC Dawn Raids: A Human Rights Violation?" (December 2008) 5 *The Competition Law Review* 61. See also the review of *Orkem* by I.S. Forrester and C. Norall (1989) 9 Y.E.L. 305.

The second cluster of problems relates to the hearing: there is *no* hearing by a decision-maker. The hearing gives the accused company the chance to restate its case to the case team which is accusing it, but not to argue before a neutral judge, hearing officer or other person who will decide on guilt or innocence. The hearing is not public (a lesser flaw), and only rarely brings about a change of mind on the part of the authority. The hearing officer is a distinguished official to whom important functions could be ascribed, but the hearing officer has very limited functions, essentially relating to the physical conduct of the hearing, access to the file, and maintaining the confidentiality of the proceedings. She hears, and could decide very competently were she accorded that power, but does not decide. The Advisory Committee of Member State competition authority delegates attends such hearings and can put questions, after which it votes its opinion on the Commission's proposed action in the case. I believe that the Advisory Committee has not, within living professional memory, voted against the Commission at this stage.

The case team is the third problem. The Commission receives complaints about rivals or business partners, confessions which accuse other parties of wrong-doing (leniency applications), filings about major mergers, and a mass of information about many economic, commercial, corporate and industrial topics. Some of these matters call for the opening of an enquiry (which may blossom into a full-blown case), with requests for information, responses from several sources, internal decisions to proceed with the case, statements of objections, hearing, and decision. These investigations, which usually take years in large cases, are pursued by case teams inside DG Competition. There is extensive horizontal co-operation between colleagues within DG Competition, the Legal Service and other Commission services. Proposed action can be submitted to especially careful internal review by so-called panels of Commission experts. These are conducted in private so the parties do not know what transpires at them, but they are meant to be rigorous. However, the case team is responsible both for investigating the case, proposing a decision and discussing the penalty or other remedy to be imposed. The combination of prosecutorial function and the adjudicating or decision-making function is undesirable. Even though there is extensive supervision and checking by internal Commission processes of the wisdom of going forward, the problem remains.

True, the Commission's procedures have evolved over the last 40 years. It has not been deaf to criticisms, and has adapted in a number of ways in response to these. These procedural developments are codified in Regulation 1/2003<sup>21</sup> and a host of accompanying Notices. While these reforms are commendable, I submit that they have not been sufficient to endow Europe's premier competition authority with the processes it deserves. I will now review these several problems in more detail.

### **A comment on the nature of EC competition decisions**

*The process involves serious penalties of a criminal nature: the phenomenon of high fines*

It is a pity, but not surprising, that press coverage of important competition decisions is dominated by the fines imposed. The bigger the fine, the more coverage. Since

<sup>21</sup> Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the EC Treaty [2003] OJ L1/1.

the phenomenon of fines is so visible as a topic, and since severe punishment is generally regarded as a criminal and judicial matter, I begin by reflecting on the fines imposed for infringements of EC competition law. Unfortunately, the vigour of successive commissioners in enforcement has been judged by the level of fines they have imposed. The record of €896 million for a substantive infringement,<sup>22</sup> previously held by Saint Gobain for its role in the car-glass cartel, was exceeded in the case of Intel in May 2009, which was fined €1.06 billion.<sup>23</sup>

I note that European competition fines greatly exceed in monetary terms the penalties imposed for other corporate offences which are harmful to society. For example, in the United Kingdom, the largest fine imposed to date under the Market Abuse (Financial Services and Markets) Act 2000, levied against Shell in 2004 for “particularly serious” market abuse in relation to mis-statements of its proven reserves, was £17 million. Recent fines imposed on companies responsible for fatal breaches of health and safety regulation have ranged from £1.5 million (imposed on Great Western Trains for the 1997 Southall train crash) to £3.5 million and £7.5 million (on Network Rail and Balfour Beatty respectively for the 2000 Hatfield train derailment), to £15 million on Transco (for the 1999 fatal explosion in Larkhall). In the area of environmental damage, the highest fine since 2000 following a prosecution by the Environment Agency was £240,000, imposed on Sevalco for deliberately falsifying records of cyanide discharges into an estuary over several years. In a high-profile French case, the 1999 Erika oil spill, Total was fined €375,000 in 2008.<sup>24</sup> Companies may also face heavy sanctions in some Member States for breaching data protection laws. In July 2009 the United Kingdom’s Financial Services Authority fined three HSBC firms a total of over £3 million for not having adequate systems and controls in place to protect their customers’ confidential details from being lost or stolen. The country with the harshest fines on companies for data protection infringements is Spain, which, in 2001, fined the maker of the Big Brother television programme €1.1 million for failing to protect the personal data of applicants for the programme. Under new data protection laws in Germany, sanctions for substantive infringements are limited to €300,000.<sup>25</sup> I note for the sake of completeness that each of these matters involved infringements of national law, not cross-border infringements, but suggest that this is not a material difference.

The purpose of this digression into the amount of the fines and the goals of deterrence and disgorging of illicit profit is not to argue how much of a fine would be right in any given case. It is to point out that the logic and discourse of the enforcers is perfectly comparable to the logic and discourse of the criminal law: what penalties exist? Are they high enough to show society’s disapprobation? Do they effectively deter? Do they match public concerns about the incidence of the repressed conduct?

<sup>22</sup> Remarkable fines can also be imposed for procedural infringements, for not complying with a decision, for failing to co-operate with an investigation or for failing to make a filing in due time. In February 2008, Microsoft was fined €899 million under Art.24(2) of Regulation 1/2003 on the grounds that it had not complied with a Commission Decision of March 2004 (COMP/37.792-*Microsoft*).

<sup>23</sup> Commission Decision D(2009) 3726 final of May 13, 2009 (COMP/37.990-*Intel*).

<sup>24</sup> See press report: <http://fr.reuters.com/articlePrint?articleId=FRMAN65085820080116> [Accessed October 5, 2009].

<sup>25</sup> The German Federal Data Protection Act (*Bundesdatenschutzgesetz* (BDSG)).

As to the amount of the fines imposed by the Commission, they exceed fines imposed by the public authority in any democracy of which I am aware for any offence. We must of course recognise that the comparability of sentences is a very slippery and imprecise science. Driving at an excessive speed, breaches of the peace, physical assault and theft of money from an employer are morally different in several ways, yet judges have to do their best in each case to set a proper penalty for each particular offence. I do not say that an enterprise which neglects safety precautions on a railway network, or pollutes a river through negligent lack of care or deliberate wilfulness, is more or less morally guilty than the enterprise whose employee discusses with a competitor what prices or customers each should pursue. Each of these kinds of behaviour damages society and can injure citizens. Each may be committed through negligence or deliberately. Each is prohibited, yet may generate profit for the enterprise by saving expense or increasing income. Perhaps competition infringements, which may damage consumers over a lengthy period and which can cover several countries, are different to other economic crimes, and no doubt some would argue they are worse or at least more deserving of punishment. But a thousand times worse? I doubt it.

So far as I am aware, the infringements punished today are not in essence more severe than those of 10 or 20 years ago, but the fines have become many times heavier each decade. In 1984, 1994 and 2004, fines totalling, respectively, €/ECU 41 million, 395 million and 895 million were imposed.<sup>26</sup> The principal reason offered today for this increase is deterrence.<sup>27</sup> This is explicitly and repeatedly confirmed by the language used in the Commission's fining guidelines<sup>28</sup> and more recently in its report on the functioning of Regulation 1/2003, in which it states that,

“fines with sufficient deterrent effect, coupled with an effective leniency program, constitute the most efficient weapon in the Commission's armoury to fight cartels. In particular, deterrent fines prevent companies from entering into cartel agreements and entice cartelists to blow the whistle on existing cartels in return for immunity or a reduced fine under the leniency notice”.<sup>29</sup>

The Commissioner's discourse, and the Commission's, suggest that if companies continue to infringe, the Commission will continue to increase the penalties, so that they will become so grave that companies will abandon their risky conduct and steer clear of the competition rules.<sup>30</sup>

<sup>26</sup> Figures, to the nearest million, are derived from Commission decisions and the author's annual reviews of EC Competition Law in the *Yearbook of European Law* (Oxford University Press).

<sup>27</sup> Recent public statements of the Commission are littered with reference to deterrence. For instance: “The fines that we impose also send a message that deters future offences and forces executive culture change. In this way fines are also an effective signal to the dozens of other would-be cartelists and rule-breakers.” (Commissioner Kroes speech at IBA Conference, SPEECH/09/106, March 12, 2009.) Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/106&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed October 5, 2009].

<sup>28</sup> Guidelines on the method of setting fines imposed pursuant to Art.23(2)(a) of Regulation 1/2003 [2006] OJ C210, which refer to the objective of deterrence at paras 4, 7, 25, 30, 37.

<sup>29</sup> SEC(2009) 574 final, *Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003* (April 29, 2009), paras 124–125.

<sup>30</sup> See for instance Commissioner Kroes' speech, “The Lessons Learned” at the 36th Annual Conference on International Antitrust Law and Policy, Fordham University New York, September 24, 2009: “Fines were not deterrent in previous decades. Just think about that for a moment . . . year after year we would

I pursue the criminological theme to voice scepticism about this rationale of deterrence. It assumes that a company's management decides to infringe after weighing the benefits thereof against the risk of a possible penalty. Such cases may have existed in the past and may even exist today, but, at least in my experience, problematic horizontal contacts between competitors' employees are usually made by individuals without the knowledge of senior management. If the purpose is to change the behaviour of the individuals who commit misdeeds, there is a much more efficient way of doing so than fining their employers ever higher sums of money.<sup>31</sup> Imposing penalties on the individuals personally is much more likely to make a change in the behaviour of others. Correspondingly, it seems strange to penalise a company whose top management deliberately and systematically planned its cartel activities in the same fashion as a company whose vigorously-communicated compliance policy was ignored by several employees in one department of one wholly-owned subsidiary. Likewise, if the goal is to encourage chief executives and general counsel to police compliance rigorously inside their businesses (not easy to do with respect to novel abuses under Art.82 EC), I suggest that a threatened fine of €20 million is just as likely to make senior managers insist on compliance throughout the organisation as a threatened €200 million fine.

Moreover, the infliction of higher and higher fines on companies seems not to have reduced the number of competition law infringements. I query whether ever higher fines will have a more deterrent effect. The case for criminal sanctions on individuals has been made by a former president of the CFI.<sup>32</sup> Criminal sanctions cannot realistically be enforced today by the Commission; as the current Director General for Competition has pointed out, this would require a complete overhaul of the Commission's investigative powers and procedures and the creation of a European criminal court.<sup>33</sup> A more realistic alternative could be a Community Directive which obliges Member States to provide for criminal penalties in their national legislation for individuals who commit serious infringements of competition law, following in the footsteps of the Directive on Environmental Crime.<sup>34</sup>

These doubts about the logic of deterring potential infringers by enormous fines imposed on companies may be right or wrong. The key point for the purposes of this article is that it is increasingly difficult to deny that they are criminal in severity. The notion that the Commission's fines are administrative and not criminal in nature, set forth in Regulation 1/2003,<sup>35</sup> sits uncomfortably with the notion of a criminal charge as defined by the European Court of Human Rights, which depends to a large extent on the nature

catch a cartel and impose a fine that would have little or no effect on a company's incentives. What is the point of that? Now, taking better account of the economic impacts of abuses and cartels, we fine in order to deter, linking the fine to the relevant sales of the infringing company. If we catch recidivists—the French glass company Saint-Gobain is a good example—the fine increases are severe. So, in adopting a clear policy basis for deterrent fines and a focus on the most serious infringements of course the fines have increased!”

<sup>31</sup> For an interesting analysis of the “economic efficiency” of antitrust procedures, see A. Louvaris, “A brief overview of some conflicts between economic efficiency and effectiveness of the administration or judicial process in competition law” in Drexl, Idot and Moneger (eds), *Economic Theory and Competition Law* (Cheltenham: 2008), Ch.15.

<sup>32</sup> Bo Vesterdorf, “Are fines the final answer to cartels in Europe?” (2009) 25915 *Concurrences* 1.

<sup>33</sup> Philip Lowe, “Cartels, Fines, and Due Process” (June 2009) 2 *Global Competition Policy*.

<sup>34</sup> Directive 2008/99 on the protection of the environment through criminal law [2008] OJ L328/28.

<sup>35</sup> Regulation 1/2003 Art.23(5).

of the offence and the nature and severity of the penalty.<sup>36</sup> A separate doubt is that the levying of fines helps the budget of the European Union, a phenomenon which has been noted from time to time by Commissioners over the years as one consequence, presumably advantageous, of a heavy fining policy.<sup>37</sup> Thus the institution has a financial interest in the levying of high fines since their collection makes it easier to achieve (via the Member States' contributions) the Community budget.

*Article 6 of the European Convention on Human Rights: The basic principles*

Article 6 of the ECHR states in pertinent part:

- “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . .
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - ...
    - (b) to have adequate time and the facilities for the preparation of his defence;
      - ...
      - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

When is a matter criminal?

If the legal sanction imposed for breaching a rule has the principal objective of deterring future violations, where the violation of that norm is generally perceived as inherently “bad” or contrary to the common values shared in a democratic society, and where the norm is generally addressed to an undefined group of persons, a “criminal charge” under Art.6 would be involved.<sup>38</sup>

A very recent illustration is *Dubus v France*.<sup>39</sup> The Dubus company challenged the disciplinary proceedings of the French *Commission Bancaire*, complaining of a lack of independence and impartiality. The Court took the view that the Banking Commission,

<sup>36</sup> Judgment of June 8, 1976, *Engel v Netherlands* (1979-80) 1 E.H.R.R. 647 at [81]–[82]; Judgment of February 21, 1984, *Öztürk v Germany* (1984) 6 E.H.R.R. 409 at [49]. In *Stenuit*, the European Commission for Human Rights held that a fine imposed in competition proceedings was a criminal charge due to the level of penalties at stake: decision of the Commission of Human Rights of February 27, 1992, *Société Stenuit v France* (1992) 14 E.H.R.R. 509.

<sup>37</sup> See for instance the remarks of Commissioner Neelie Kroes on the Car Glass Cartel at the press conference of November 12, 2008. (SPEECH/08/604, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/604&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed October 5, 2009]).

<sup>38</sup> D. Slater, S. Thomas and D. Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?* (Global Competition Law Centre Working Paper 04/08).

<sup>39</sup> Judgment of *Dubus SA v France* (App. No.5242/04).

in condemning Dubus, should be regarded as a “tribunal” for the purpose of Art.6. After citing the *Engel* criteria,<sup>40</sup> the Court noted that, while the penalty which had been imposed was categorised in domestic law as an administrative sanction, the penalty was removal from the register or a fine up to the level of its minimum capital, or both. It considered that such significant financial consequences can be regarded as penal sanctions. The penal nature of a sanction depends on the gravity of the *potential* sanction, and not on the gravity of the sanction in fact imposed. It noted that the sanction in this case was such as to affect the credit of the company, entailing undeniable consequences on the company’s capital. The Court not only took the view that the Banking Commission, when it imposed the fine, should be considered to be a “tribunal” for the purpose of Art.6(1) ECHR, but also that, in the circumstances, the sanction had a “*coloration pénale*” and was a criminal charge for the purpose of that article.<sup>41</sup> The case is referred to further below, on the problem of having the same officials performing both the investigation and the decision-drafting.

In the case of EC competition enforcement, Arts 81 and 82 EC are general rules applying to all undertakings and are, therefore, general norms of a binding character. A primary purpose of the competition rules and the Commission’s power to enforce them is the protection of society against damage caused by anti-competitive conduct. The fines imposed on those who breach these rules have a punitive and deterrent character. They are, in relative and absolute terms, very heavy. They are a very serious financial sanction

<sup>40</sup>i.e. the nature of the offence and the nature and severity of the penalty. See judgment of the ECtHR of June 8, 1976, *Engel v Netherlands* (1979–80) 1 E.H.R.R. 647 at [82], in which the Court held, in order to determine whether a given “charge” vested with a disciplinary character nonetheless counts as “criminal” within the meaning of Art.6 ECHR, “it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States. The *very nature of the offence* is a factor of greater import. . . . However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the *degree of severity of the penalty* that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the ‘criminal’ sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so”.

<sup>41</sup>The relevant parts of the judgment, only available in French, are as follows: “*La Cour observe que la requérante s’est vue infliger un blâme, sanction de nature administrative en droit interne. Toutefois, la lecture de l’article L. 613-21 du CMF (paragraphe 24 ci-dessus) démontre que la société requérante pouvait encourir une radiation et/ou une sanction pécuniaire ‘au plus égale au capital minimum auquel est astreinte la personne morale sanctionnée’. De telles sanctions entraînent des conséquences financières importantes, et partant, peuvent être qualifiées de sanctions pénales, (mutatis mutandis, Guisset c. France, no 33933/96, § 59, CEDH 2000-IX). En effet, la Cour rappelle que la coloration pénale d’une instance est subordonnée au degré de gravité de la sanction dont est a priori passible la personne concernée (Engel et autres précité, § 82) et non à la gravité de la sanction finalement infligée. Elle constate également, à l’instar de la requérante, que le blâme qui a été prononcé était de nature à porter atteinte au crédit de la société sanctionnée entraînant pour elle des conséquences patrimoniales incontestables. La Cour est d’avis que la Commission bancaire, lorsqu’elle a infligé à la requérante la sanction du blâme, devait être regardée comme un ‘tribunal’ au sens de l’article 6 § 1 de la Convention (voir en ce sens l’arrêt Sramek c. Autriche, 22 octobre 1984, § 36, série A no 84, et la jurisprudence abondante qui a suivi). Par ailleurs, il résulte des paragraphes précédents que cette sanction, dans les circonstances de l’espèce, avait une ‘coloration pénale’. Ainsi, la Commission bancaire a statué en tant que ‘tribunal’ et sur le ‘bien-fondé d’une accusation en matière pénale’, au sens de l’article 6 § 1 de la Convention. Partant, l’exception d’incompatibilité ratione materiae soulevée par le Gouvernement doit être rejetée.” (*Dubus v France* (App. No.5242/04) at [37]–[38].)*

in theoretical maximum and in actual practice. The punitive nature of competition fines is confirmed by the way in which they are announced by the Commissioner.<sup>42</sup>

Why is this relevant to a discussion of the Commission's procedures? Because conduct subject to criminal sanctions deserves procedures which satisfy criminal standards of rigour, thoroughness and due process. The determination of a "criminal charge" (as opposed to the determination of "civil rights and obligations") requires additional safeguards set out in Art.6(3). A defendant in such a case has the right to be informed promptly and in detail of the nature and cause of the accusation; to adequate time and the facilities to prepare a defence; to defend himself in person or through legal assistance of his own choosing (with free legal assistance if necessary); and to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The consequences in national law are a further reason to demand rigour. Article 16 of Regulation 1/2003 provides that a national court ruling on anti-competitive practices which are already the subject of a Commission decision "cannot take decisions running counter to the decision adopted by the Commission". The green shoots (or black ones, depending on one's viewpoint) of follow-on damages actions by aggrieved competitors and customers are appearing in national courts in several Member States (especially England), encouraged by the Commission<sup>43</sup> and the promise of riches on an American litigation scale. Criminal liability can flow in some Member States for individuals inculpated by Commission findings.<sup>44</sup> An Irish court has sentenced a cartel organiser to prison, and dozens of Europeans are in American prisons for cartel offences. It will one day happen that criminal proceedings are brought in the United Kingdom against an individual who has been found by the Commission to have participated in a cartel.

All the more reason for the Commission to be endowed with procedures adequate to the modern era and to the importance of the cases in hand. If it is correct that in light of the severity of the sanctions imposed, the nature of the charges made, the terms in which the public authority announces its condemnations, and the other factors with which practitioners are familiar, the repression of a competition law infringement pursuant to the powers granted by Regulation 1/2003 involves the determination of a charge which is criminal in nature, then it is plain that the procedures leading to such a condemnation do not satisfy Art.6(1).

<sup>42</sup>"The fines that we impose also send a message that deters future offences and forces executive culture change. In this way fines are also an effective signal to the dozens of other would-be cartelists and rule-breakers." Commissioner Kroes, "Many achievements, more to do" opening speech at International Bar Association conference (Brussels: SPEECH/09/106, March 12, 2009). Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/106&format=HTML&aged=0&language=EN&guiLanguage=en> [Accessed October 5, 2009].

<sup>43</sup>When issuing press releases on fining decisions in a cartel case, the Commission now systematically includes the standard text: "*Action for damages*. Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine."

<sup>44</sup>The UK Enterprise Act 2002 made it a criminal offence for an individual dishonestly to take part in certain forms of cartel conduct. A person convicted may be liable to up to five years imprisonment and a fine.

## EC competition decisions are not “administrative”

The “administrative” label given to Commission decisions in Regulation 1/2003 and its predecessors is advanced as a reason to justify why the Commission should not be held to the same standards as a “tribunal”.<sup>45</sup> One response is to note that competition law and constitutional law must give priority to reality, not to titles or labels. It cannot be correct that a prosecution for a grave economic crime, susceptible to a penalty of tens or hundreds of millions of euros, is “administrative” such that there is no need to grant a “fair and public hearing . . . by an independent and impartial tribunal” and that, likewise, the accused need not have the opportunity “to examine or have examined witnesses against him”. It should be a cause for embarrassment that even though accession to the ECHR has been imminent for years, no relevant adaptation of processes has been made. It would be inexcusable to make no adaptation to current processes in light of currently-voiced concerns. The Commission must be ready to satisfy Art.6 in some manner.

The Commission has extensive powers under Regulation 1/2003. It has the power to require the provision of information; to interview any legal or natural person (with the person’s consent) and to take statements; to undertake inspections of business and private premises, land and means of transport, and to require explanations of facts or documents relating to the subject matter and purpose of the investigation. Commission inspectors on “dawn raids” arrive in force, early in the day, and search files, computer records, emails and personal diaries, in a manner comparable to a search by the police, examining magistrate, customs or other repressive authority.<sup>46</sup> The Commission has the power to find that an infringement has been committed; to impose structural and behavioural remedies to the infringement committed; to impose interim measures; to accept commitments, where it would otherwise intend to adopt a decision finding an infringement; and to impose fines or periodic penalty payments for both procedural infringements and substantive infringements. These functions confirm the hybrid nature of the Commission’s role—partly prosecutorial, partly determinative. That provokes some reflection on the notion of “quasi-judicial” decision-making, a concept which was developed with important contributions from the great teacher of English public law and barrister, Professor Sir William Wade Q.C., whose works on administrative law identified basic concepts which have developed in importance over the past 50 years as courts are increasingly faced with disputes about the management or administration of legal rules.

Sir William wrote on the distinction between an “administrative” function and a “judicial” function, and the elusive “quasi-judicial” function.<sup>47</sup> In English public law, there exist a number of factors to be taken into account in determining whether an entity or person must act in a quasi-judicial manner: whether the performance of the function terminates in an order that has conclusive effect (does a decision have the force of law without

<sup>45</sup> Philip Lowe, “Cartels, Fines, and Due Process” (June 2009) 2 *Global Competition Policy*.

<sup>46</sup> Where a seal affixed to the door of a room overnight during an inspection on E.ON’s premises showed signs of damage, a fine of €38 million was imposed: Decision relating to a fine pursuant to Article 23 paragraph 1 lit. e) of Council Regulation 1/2003 for breach of a seal (COMP/B-1/39.326—*E.ON Energie AG*).

<sup>47</sup> For example H.W.R. Wade’s 1949 article “‘Quasi-Judicial’ and its Background” (1948–1950) Cambridge L.J. 216. More recently, see the appendix on the classification of functions in De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (London: Sweet & Maxwell, 1995).

needing to be confirmed or adopted by another authority?), or whether the process has certain formal or procedural attributes (has the decision-making body been endowed with the “trappings of court”: does it determine matters in cases initiated by parties? does it normally sit in public? Can it compel the attendance of witnesses? Can it impose sanctions and enforce the obedience of its own command?). Does the tribunal, in making its decision, also interpret, declare and apply the law?<sup>48</sup> Those whose acts are quasi-judicial must adopt appropriate care in taking decisions and must have suitable procedures.

The Commission, in its collegiate role of decision-maker in competition cases,<sup>49</sup> determines cases pursued by Commission investigators. However, in so doing, the Commission increasingly acts as the arbiter of disputes between individual companies: the competition cases which it decides are often instigated by private parties, either as complainants, or in the case of cartels, as leniency applicants. In a case concerning an alleged abuse of a dominant position, both complainant and dominant company will put forward facts and legal arguments purporting to show why there was—or was not—an abuse. In cartel cases, leniency applicants will have presented the facts purporting to reveal the existence of a cartel. The defendant company may have put forward another—conflicting—view of the facts and law. The Commission becomes the arbiter of the dispute. It applies substantive law having heard the arguments of the defendant company, in written submissions and during the oral hearing. Its decisions have the force of law, without the need for confirmation by any other authority. Its decisions may be challenged before the Court of First Instance, through an action for annulment under Art.230 EC, but the “limited review” carried out by the Court reduces this to an appeal on points of law.<sup>50</sup> The fines it imposes can be enforced by national authorities.

These features would assuredly oblige a public authority to reach its decision in a quasi-judicial manner. Political influence or lobbying or the possibility thereof would be utterly antithetical to a quasi-judicial determination. That brings us to how decisions are taken.

### **Specific problems with the present system**

#### *The final decision is made by politicians*

If we work backwards from the decision itself, we may note the circumstances in which the decision is taken. A college of 27 commissioners sits round a table (usually on a Wednesday) with the Secretary General of the Commission, and adopts a number of decisions on important matters falling within its remit. The Commission is an international organisation, so its role and functioning is different to that of a national cabinet of ministers, but there are similarities in that each Member of the Commission is (like a minister in a national government) responsible for a different portfolio, that there is collective responsibility, and that deals between commissioners are hammered out politically with give-and-take reflecting the portfolios, nationalities and political persuasions of the commissioners. It is therefore possible that the disposition to be

<sup>48</sup> De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 1995.

<sup>49</sup> Provided for at Art.85(2) EC.

<sup>50</sup> As to the extent of the Court’s power or duty to review the case see I.S. Forrester, “A Bush in Need of Pruning”, 2009.

taken of a particular competition case may be the subject of political lobbying to any commissioner, or to the commissioner specifically responsible for competition matters. Most competition law practitioners in Brussels can cite several examples. In the modern convention, the Competition Commissioner endeavours to limit the number of communications of a lobbying nature which are made to her directly; and if she receives one side, she is likely to receive all sides. Other commissioners are certainly in the habit of receiving representations from governments, companies and trade associations relevant to pending competition cases. I know of at least one celebrated case (in the 1990s) where the decision was adopted as part of the unblocking of a number of stalled dossiers. Thus the imposition of anti-dumping duty on bicycle parts, the protection of the herring population, and the taking of a controversial competition decision could be traded-off the one against the other. It is of, course, welcome that in modern practice the Competition Commissioner and her cabinet try to limit the opportunity for political lobbying by governments, compatriots, interested parties or others. However, it cannot be justified that a political body staffed by political figures takes administrative decisions which impose penalties of criminal severity.

Administrations can regulate, legislate, investigate and reach conclusions with perfect propriety. They can, in certain cases, impose penalties, as do tax authorities, refuse collectors, and parking administrators. A cabinet of ministers cannot vote on the guilt or innocence of a company accused of an economic crime. It is unimaginable that a new Member State would be allowed to adopt a competition law regime under which the Prime Minister and cabinet of the country decided on guilt, innocence and penalty in a competition matter. The Commissioner is neither in person nor in function a judge. And the College of Commissioners is assuredly not a court. It is a political body, and political bodies in a democracy cannot well decide matters of guilt or innocence.

Additional thoughts in the same direction are that the Commissioner, although briefed by her expert staff, has not attended the hearing of the accused company and will not have heard in a comprehensive way from the accused company about the case. She may have been given copies of key documents and will certainly have discussed matters with her staff; and in very large cases, she will often have received delegations from interested parties. These commendable steps are not enough to make the process lawful.

*The fine is set by a process of "alchemy"*

It has already been noted that media reports focus too much on the fines imposed. Although formally speaking, competition decisions are taken, like all other decisions, by the College of Commissioners and not by the Competition Commissioner herself, by tradition, commissioners run their individual responsibilities. In practice, the setting of competition fines is a rather personalised matter conducted by the Commissioner with her staff, in a process which has been described by a Commission Director General as "alchemy".<sup>51</sup> The amount of the fine is selected by the Commissioner and her close team very late in the process. It is normally revealed to the cabinets of the other 26 commissioners in the meeting of the chefs de cabinet, which takes place the day before the

<sup>51</sup>The term has been used informally by the current Director General, Philip Lowe, in a number of speeches.

College of Commissioners meets on the Wednesday to adopt the decision formally. Neither the company in question nor the Advisory Committee has the opportunity to make formal submissions on the level of the fine. Originally, this was done to maintain confidentiality. The practice is being called into question in at least one case, on the grounds that the lack of any opportunity by the company to be heard on the method for calculating the fine is contrary to the company's right to a fair hearing under Art.6 ECHR.<sup>52</sup>

This point is of modest importance by comparison to the large point of principle. A political entity and a political personage ought not to decide guilt or innocence.

### *The hearing*

The oral hearing provided for in Regulation 1/2003, which takes place at a very advanced stage of a competition law case, does not correspond to a hearing as the term is understood by most civil or criminal lawyers. Its purpose is to give the parties the opportunity to supplement their written defence by making oral presentations to the Commission. They will typically bring along lawyers and other experts, such as economists, and give a presentation and elaborate on specific points that they think are particularly important. There is no obligation on the Commission to respond to points or questions. The hearing is held in a large conference room, with the opposing parties facing one another across long rows of metal tables, the Member States round the edge of the room, with the hearing officer and members of the Commission Legal Service looking on from another long table. The curious physical layout is a metaphor for the obscure role of the hearing. The hearing is not a trial. There is only a limited opportunity for the accused company to challenge the evidence against it, including the witnesses upon whose testimony the Commission relies.

The danger of a lack of rigour in challenging the evidence is particularly relevant with respect to the evidence provided by companies with interests hostile to those of the company under attack. Take, for example, leniency applicants. There is no denying that leniency is a valuable tool in uncovering secret cartels. Cartels can be broken by the risk of confessions implicating others in exchange for immunity from fines. Leniency applicants have a clear interest in showing serious wrongdoing by their competitors. The juicier the information they provide, the more chance they have of being deemed to have provided "significant added value" and obtaining a reduction in their fine, or total immunity; and, in the process, they will have created big trouble for their competitors. The same concern arises, *mutatis mutandis*, in the case of complainants, who assert that the factual realities of the marketplace reveal the existence of an infringement and a need for Commission intervention. It is very common for the facts to be the subject of diametrically opposite views. So while it is certain that disputed points of evidence will be considered, that evidence will not be sifted, balanced and analysed by a neutral decision-maker who has heard both parties.

The hearing takes place in the absence of the final decision-makers. The Commission's case team and other officials (such as representatives of the Commission's Legal Service)

<sup>52</sup>Such an argument is made in Saint Gobain's appeal against the Commission's decision in the Car Glass cartel, *Saint-Gobain Glass France v Commission* (Case T-56/09), action brought on February 13, 2009 (pending), a case in which the author has no involvement.

will be present, and will listen with courteous care to the arguments made by the accused company (in most cases those arguments will have been heard before). The Member States, in the form of the Advisory Committee, look on and put questions and, in due course, may vote on the wisdom or not of the proposed decision. The Advisory Committee is naturally deferential to the authority which has spent years preparing the case. As noted above, so far as I am aware, the Advisory Committee has not in 30 years voted against the adoption of a Commission Decision. To the extent there are imperfections of procedure within the Commission, they are not remedied by the Advisory Committee.

We have come a long way since the early days of EC competition law, when cases were carefully picked, decisions were few and penalties were modest. The regime had been set up in 1962, it was a relatively obscure topic, and the fines were not confiscatory though they could, in theory, be painful. At a time when the institution was young and the real and theoretical extent of its powers remained uncertain, the shaping of the procedures for the enforcement of EC competition law was affected by the enormous contributions of a number of individual officials. Their personal scholarship and their dedication to the shaping of sound law meant that they were reluctant to endorse decisions where there was factual or legal doubt and a risk of defeat in Court. In those days, the criticisms concerned more the choice of cases than the fairness of the process. I recollect that in the 1970s, hearings were conducted by the Director in charge of the case team. The Director, in a sense, was there to hear his staff and the accused company battle out their differences. He was evidently not neutral, but he was presiding over one stage in a continuing administrative process. The file was not very thick, and the contested facts might not be very many.

Procedural reforms occurred to respond to particular problems in specific cases, such as the Commission's decision in 1981 to appoint an independent hearing officer to preside over the hearing.<sup>53</sup> When the hearing was chaired by the Director of the Directorate leading the investigation, this heightened a perception that the Commission, when reaching its decision, might be minded institutionally not to have an openness to alternative ideas. This development followed a celebrated controversy. In the *IBM Art.82 EC* case,<sup>54</sup> relations between the company and the Commission's staff were tense; press comments suggested the Commission had made up its mind, and the hearing promised undignified fireworks. The decision was made to bring in an outsider, a retired DG IV director, to preside over the hearing. That official was charming, and firm, and the hearing was a dignified event at which neither side convinced the other but where arguments were rigorously exchanged. Subsequently, the post of hearing officer was institutionalised.

The Commission recognised the problem in its *11th Report on Competition Policy*:

“Although the Commission has no reason to believe that they [the oral hearings] are not conducted fairly at present, it intends to emphasize the objectivity of the hearing. With this in mind it envisages appointing hearing officers, duly authorized to chair hearings, vested with genuine autonomy and the right of direct access to the responsible Member of the Commission. This would provide an even better

<sup>53</sup> Commission of the European Communities, *11th Report on Competition Policy* (1981), point 26.

<sup>54</sup> The Commission's decision of December 19, 1980 to open an investigation and to issue a statement of objections regarding infringements of Art.86 (now 82) EC was unsuccessfully challenged before the ECJ (*IBM v Commission* (60/81) [1981] E.C.R. 2639; [1981] 3 C.M.L.R. 635). The case was eventually settled (European Commission's *14th Report on Competition Policy* (1984), point 94).

guarantee that the Commission, when stating its views on an individual case as a decision-making authority, would be fully informed of all features of the case whether favourable or unfavourable to the undertakings.<sup>55</sup>

Interestingly, the Commission also referred to the possibility of introducing administrative law judges to investigate and decide competition cases, similar to the administrative law judges appointed by the US Federal Trade Commission. The Commission dismissed this suggestion, because it had not proved fully satisfactory in the competition field in the United States and, moreover, because such an authority “does not seem compatible with the institutional scheme of the Treaty”. Even after the change, a hearing by accusers is structurally not likely to be thought to show “objectivity”, regardless of the scrupulousness of the accusers.

Thus the original reason for the naming of a hearing officer was that of seemliness—the notion that no one should decide his own case, *nemo iudex in causa sua*, that it was undesirable to imply that the prosecuting service was in charge of concluding the case and organising the hearing of the company’s defence. At that stage, it could have been decided to alter the decision-making process itself, creating a hearing *before the decision-maker*, or before a person charged with clarifying factual issues. But the reform was, in reality, very modest. If successive hearing officers played a role in convincing the Commission that the case was on the wrong track, this was not by rendering a formal favourable ruling but by a quiet word with colleagues.

The hearing officer’s role was initially limited to the organisation and conduct of the hearing, and has, over time, widened to cover other procedural questions, in particular safeguarding the confidentiality of documents and business secrets, and access to the Commission’s file. The hearing officer must report to the Commission on the procedure, and may report on the substance (those reports are not available to the parties). The Commissioner will also receive advice from the Legal Service, and commonly from other services, and will have ready access to all shades of opinion with the Competition Directorate-General.

This matches the pattern that emerged in the 1980s and 1990s of a growing awareness by the Commission of the need to be more procedurally scrupulous in making competition decisions, while not fundamentally changing how decisions were taken. Access to the file was not addressed in the original Regulation 17<sup>55a</sup> or any implementing legislation. In a line of judgments, the Court restricted the Commission’s ability to use documents which have not been disclosed to the defendant company, and confirmed the right of defendant companies and their advisors to examine documents which may be useful for their defence.<sup>56</sup> Following *Soda Ash*, the Commission in 1997 issued a Notice setting out how the obligation to give parties access to the file would be discharged in practice. The rules were fine-tuned in light of experience by a 2005 Notice.<sup>57</sup>

<sup>55</sup> Commission of the European Communities, *11th Report on Competition Policy*, 1981, point 26.

<sup>55a</sup> Regulation No.17: First Regulation implementing Articles 85 and 86 of the Treaty OJ 13, 21.2.1962, pp.204–211.

<sup>56</sup> For instance *SA Musique Diffusion Française v Commission* (100 to 103/80) [1983] E.C.R. 1825; [1983] 3 C.M.L.R. 221 at [5]; *AKZO Chemie BV v Commission* (C-62/86) [1991] E.C.R. I-3359; [1993] 5 C.M.L.R. 215 at [24]; and *Solvay et Cie v Commission* (“Soda Ash”) (T-30/91) [1995] E.C.R. II-1775; [1996] 5 C.M.L.R. 57.

<sup>57</sup> Notice on the rules for access to the Commission file in cases pursuant to Arts 81 and 82 of the EC Treaty, Arts 53, 54 and 57 of the EEA Agreement and Regulation 139/2004 [2005] OJ C325/7.

The person who presides over the hearing, although a very distinguished civil servant of long experience, has no function to decide on the substance. The hearing officer's function is to ensure that the hearing proceeds correctly and that the limited procedural rights of the accused company are respected. Those rights amount essentially to being able to make representations about the case. The hearing officer determines such matters as confidentiality of documents, access to the file, the date and duration of the hearing, and the extent to which the right of the defence have been respected. These are significant matters and it is good that they are competently and neutrally decided, but the officer's powers are manifestly not sufficient to satisfy modern standards for determining guilt or innocence. The hearing does not constitute what is called for by Art.6 of the ECHR. A hearing at which the decision-maker is absent and the decision-drafters, although present and politely attentive, are deeply sceptical, although their minds may not formally already be made up, is not a "public hearing by an independent and impartial tribunal".

*Fusion of the investigation and decision-making functions*

The same officials should not both investigate and decide. Police can gather evidence and accuse a suspect, but we do not allow them to decide on guilt. A certain "prosecutorial bias" can flow from the entrusting to a single set of persons the functions of investigation, prosecution and adjudication.<sup>58</sup> The existence of such bias is not in itself a criticism of individual officials, but is a reflection of the investigative structure itself once proceedings have been commenced and investigative resources have been deployed. These general psychological factors can affect the most talented and ethical professionals. Wouter Wils, a considerable scholar and well-experienced Commission official, distinguishes between confirmation bias, hindsight bias and policy bias.

*Confirmation bias* arises from the natural tendency for a case investigator to favour evidence that supports his belief that a competition infringement has been committed.<sup>59</sup> Police look for their suspect's fingerprints or footprints: that is perfectly normal. *Hindsight bias* flows from the natural desire to justify one's past efforts, in particular to hierarchical supervisors and outsiders. It has been argued that it,

"is understandable in human terms that Commission officials sometimes want to push through what they perceive to be 'their' case. And it explains why arguments put forward by the parties often appear to fall on deaf ears".<sup>60</sup>

As a result, case teams may be reluctant to adjust previously held views (honestly and legitimately held) in light of information coming to light later in the investigation.<sup>61</sup> In such circumstances, the official can be minded to continue to work towards an infringement decision, ignoring or diminishing the information adverse to the case, so as to justify and confirm the earlier decision to continue the investigation. The third

<sup>58</sup> Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function" (2004) 27 *World Competition: Law and Economic Review* 202.

<sup>59</sup> Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function" (2004) 27 *World Competition: Law and Economic Review* 202, 215.

<sup>60</sup> Montag, "The Case for a Radical Reform of the Infringement Procedure under Regulation 17" (1996) 8 E.C.L.R. 428, 430.

<sup>61</sup> Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function" (2004) 27 *World Competition: Law and Economic Review* 202, 216.

type of bias, *policy bias*, arises from the desire of officials and authorities to show a high level of enforcement activity. The importance attached to the fines is exemplified by the statistics published by DG Competition on its website<sup>62</sup> and by the speeches of successive competition commissioners justifying decisions imposing fines and the high level of these fines. As Wils concedes, this entails,

“a potential risk of abuse, in that dubious cases might be pursued or fines might be inflated in order to keep up the statistics”.<sup>63</sup>

I repeat yet again that these difficulties or weaknesses do not in any way impugn the skill or honour of the concerned officials.

The fusion of investigative and decision-making functions is incompatible with the notion of “an independent and impartial tribunal established by law” enshrined in Art.6 of the ECHR. It was noted above that in *Dubus v France*,<sup>64</sup> the lack of an “organic separation” within the French Commission Bancaire between those sections which prosecuted and sanctioned Dubus entitled the company to have reasonable doubts as to the independence and impartiality of the Commission Bancaire, such that there had been a breach of Art.6(1) ECHR. The features of the Commission Bancaire’s procedures which caused concern to the ECtHR will sound very familiar to readers in Brussels: there was no clear distinction between the functions of prosecution, investigation and adjudication in the exercise of the Commission Bancaire’s judicial power.<sup>65</sup> While the combination of investigative and judicial functions was not, in itself, incompatible with the need for impartiality, there should be no “prejudgment” or the appearance thereof on the part of the Commission Bancaire.<sup>66</sup> The Strasbourg Court noted that the applicant company might reasonably have had the impression that it had been prosecuted and tried by the same people, and had doubts about the decision of the Commission Bancaire, which, in its various capacities, had brought disciplinary proceedings against it, notified it of the offences and pronounced the penalty.<sup>67</sup> I suggest that when the European Commission’s procedures are, in due course, scrutinised by the Strasbourg Court through the lens of ECHR jurisprudence, it will be difficult for that Court to draw different conclusions.

Other competition authorities are conscious of the need to avoid prosecution bias by separating the distinct functions of gathering the evidence and preparing the accusation,

<sup>62</sup> See <http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf> [Accessed October 5, 2009].

<sup>63</sup> Wils, “The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function” (2004) 27 *World Competition: Law and Economic Review* 202, 217.

<sup>64</sup> *Dubus SA v France* (App. No.5242/04).

<sup>65</sup> *Dubus SA v France* (App. No.5242/04) at [56].

<sup>66</sup> *Dubus SA v France* (App. No.5242/04) at [57]–[58].

<sup>67</sup> *Dubus SA v France* (App. No.5242/04) at [60] reads as follows: “*De cet enchaînement d’actes pris au cours de la procédure juridictionnelle, il résulte, de l’avis de la Cour, que la société requérante pouvait raisonnablement avoir l’impression que ce sont les mêmes personnes qui l’ont poursuivie et jugée. En témoigne particulièrement la phase d’ouverture de la procédure disciplinaire et de la notification des griefs où la confusion des rôles conforte ladite impression (paragraphes 12 et 13 ci-dessus). La requérante a pu nourrir des doutes sur la prise de décision par la Commission bancaire dès lors que celle-ci décida de la mise en accusation, formula les griefs à son encontre et finalement la sanctionna. La Cour s’accorde avec l’analyse du Conseil d’Etat, qui n’a pas remis en cause la faculté d’autosaisine de la Commission bancaire, mais qui l’a subordonnée au respect du principe d’impartialité (paragraphe 27 ci-dessus), mais elle croit nécessaire d’encadrer plus précisément le pouvoir de se saisir d’office de manière à ce que soit effacée l’impression que la culpabilité de la requérante a été établie dès le stade de l’ouverture de la procédure.*”

and the taking of the actual decision. Practice is not yet consistent, and not every agency has perfect procedures. But the modern trend is clear. In France, the new Competition Authority—the “Autorité de la concurrence”—which took over from the former Competition Council on January 13, 2009, maintains a clear separation between its investigatory function and its sanctioning function. President Lasserre stated that the board of the new authority will play no role in the investigation of cases:

“For instance, I don’t give any directive to the case handlers, nor take any part in the way investigations are led. Moreover, neither the members of the board nor myself have access to the file before the companies have responded to the final phase of the investigation, in order to guarantee that we have an impartial view of the case. Conversely, our case handlers don’t take part in the decision, which is taken by a board whose members act in full independence.”<sup>68</sup>

In other countries, there is a more formal separation between the investigative and the decision-making functions. In Belgium, the competition authority (l’Autorité Belge de Concurrence/de Belgische mededingingsautoriteit) consists of a Competition Service (Service de la Concurrence/de Algemene Directie Mededinging, part of the Ministry of Economic Affairs) which carries out the investigation, a College of Competition Prosecutors (chaired by the Director General for Competition) which takes the decision to prosecute, and the Competition Council (Conseil de la Concurrence/de Raad voor de Mededinging) an administrative court which hears the case. In Spain, there are also distinct bodies within the National Competition Commission (Comisión Nacional de Competencia (CNC)) which conduct the investigation and adopt the final decision. The Investigations Directorate will carry out the investigation into an alleged infringement and, once this is concluded, will forward the file to the CNC Council together with a report on the infringement and a proposed decision. The CNC Council may, *ex officio* or upon proposal of any interested party, gather further evidence or carry out any additional actions to those already carried out by the Investigations Directorate. At the end of the procedure, the CNC Council will issue a decision. A comparable separation exists in South Africa.

The Commission’s competition enforcement procedures can further be contrasted to those of the United States, which is unique in its enforcement arrangements. First, the Antitrust Division of the Department of Justice (DOJ) may bring criminal proceedings under federal antitrust laws. Secondly, both the DOJ and the Federal Trade Commission (FTC) can bring civil cases before the US District courts. Third, the FTC may open administrative proceedings before its own administrative law judge. Finally, and most importantly, private parties bring civil actions before both state and federal courts for infringements of state and federal antitrust law. The latter phenomenon is a distinctive characteristic of US antitrust law, which is far “ahead” of Europe in this respect. Aspects of the FTC’s procedures are a useful point of comparison. The FTC was created in the early days of American antitrust history as a reaction to the phenomenon that the state rarely prevailed before the US courts. The creation of the agency deliberately involved the establishment of a decision-making system which combined elements of the prosecutorial and the judicial. The FTC is headed by five Commissioners’ presidential appointees. The

<sup>68</sup>“An interview with Bruno Lasserre” (August/September 2008) 11 *Global Competition Review*.

President chooses one of the five to be the Chairman. Cases are initiated in a manner somewhat comparable to the procedure in Brussels: complainants approach FTC staff to describe the problem and, after a process of lengthy internal review, a second-phase investigation can be initiated by the FTC Commission. The trying of this case is handled by an administrative law judge. Administrative law judges are eligible to deal with a wide range of cases involving the exercise of federal authority, and do not necessarily have any specialisation in antitrust matters. The trial is nevertheless prolonged and rigorous, with examination and cross-examination of witnesses under oath, a process which can regularly take several weeks. The administrative law judge's findings describe in great detail the judge's conclusions on the factual and legal matters at stake. However, these conclusions do not bind the five commissioners, who have then the quasi-judicial role of deciding on whether to condemn the behaviour at issue and impose remedies, or to close the case.

The commissioners operate at one stage like the Director General of DG Competition along with the Competition Commissioner in Brussels, in the sense that they choose to open and pursue a case. Thus on both sides of the Atlantic, prosecutorial discretion is involved in the choice of whether or not to open a case. The subsequent involvement of the commissioners could be termed quasi-judicial in the sense that when in the decision-making phase, they are obliged to refrain from inappropriate contact with the parties; the FTC staff are likewise constrained in their involvement in the decision-taking by the commissioners.

From the European point of view, a striking difference is the role of the administrative law judge in making factual determinations. The fact-finding procedures in Brussels are not remotely as vigorous as those prevailing in Washington. Even though US practitioners may regret the lack of specialisation of the administrative law judges, it cannot be doubted that the process for determining the facts is visibly far more painstaking than is the case in Brussels, notably in that it is "*contradictoire*", the French term which implies a procedure that involves the hearing of both parties on an equal footing. US practitioners criticise the policy-oriented determinations by the five Commissioners who alternatively wear a prosecutorial hat and a quasi-judicial hat. Thus the conclusions of the FTC Commissioners in Washington much more reflect the personal determinations of those five persons than is the case in Brussels, where the 27 commissioners are largely uninvolved in the drafting of the Competition Commissioner's decision.

In the FTC process, there are a number of internal checks which are meant to address the obvious problem that the same institution decides to prosecute a case and determines its outcome. First, an initial decision is taken by the independent administrative law judge following an adversarial trial. Secondly, FTC Commissioners are "walled off" from discussion with FTC staff while the matter is under adjudication. Third, the FTC Commissioners sit like judges and hear submissions directly from both the FTC staff and the defendant company. One could imagine the appointment of the Director General for Competition to execute a quasi-judicial decision-making role, but that would not cure the vice of the current situation where there is no hearing by a decision-maker. Thus the procedural arrangements and traditions of the FTC illustrate an alternative decision-making model, which is strongly criticised as procedurally inadequate by US practitioners but which none the less manages the fact-finding process much more satisfactorily than is the case in Brussels.

### Possible solutions

It is clear that if we were setting up a system to enforce Community competition law, we would not choose the current structures and practices which were adopted in 1962, updated intermittently since then. The Commission's importance and prestige in the field of competition law are qualitatively beyond the processes within which its staff is obliged to function. That is an easy statement. More difficult is to find a means of deciding cases which is acceptable or adequate, especially in light of the difficult conception and birth of the latest project for Treaty reform. Perfection for the next five years should not be the goal; adequacy would be a reasonable aspiration. Treaty change to remedy the flaws described in this article is unrealistic for the foreseeable future. Radical solutions, such as creating a new judicial panel of the Court of First Instance to make the final decision in competition cases, on the substantive infringement or the amount of the fine or both, are charming but will likely not be accepted and enter into force in my professional lifetime.

The Treaty confers on the Commission powers to enforce competition law.<sup>69</sup> The Commission is constrained by the principle of "institutional balance" and, under the principle of attribution of powers laid down in Art.7(1) EC, may not delegate its own power to other institutions or bodies.<sup>70</sup> The College of Commissioners may delegate internally<sup>71</sup> acts of administration and management. This excludes the internal delegation of the adoption of decisions applying Arts 81 and 82 EC.<sup>72</sup>

Can we remedy the problem without Treaty change? Let us begin by noting what it is that causes concern. I suggest that there is a distinction between what is offensive in a formalistic sense (reflecting a mixing of the political and the judicial at the stage of the formal act of the institution) and what is unacceptable in a practical and common-sense way (reflecting unfairness or potential error in how the facts have been determined). On the one hand, it is obviously inexcusable and unacceptable that a body of politicians, no matter how eminent, should decide guilt or innocence and impose penalties in criminal cases or cases analogous to criminal cases. No other democracy is organised in such a manner. The Commissioner cannot effectively be both decision-maker and the chief of the prosecution service. Both positions are honourable, but they should not be combined. The Minister of Justice or the Chief of Police may announce a success, in the form of a reduction in the crime rate, or the efficiency of the investigators, or the number of offences successfully prosecuted. But the decision on guilt or innocence in a specific matter is an issue for the courts. The combination of the two roles is dangerous. However, the *substantive* vice of politicisation is, in reality, less acute than

<sup>69</sup> EC Treaty Art.85.

<sup>70</sup> For a fuller discussion of the constitutional limitations on the delegation of the Commission's powers, see the working paper, Andreangeli et al., "Enforcement by the Commission" forthcoming in (2009) 32 *World Competition*.

<sup>71</sup> There is a precedent for the delegation of powers in the context of staff cases. The Staff Regulations provide for the Community institution to delegate the powers conferred by those Regulations to an appointing authority (also known as "AIPN", after the French denomination "autorité investie du pouvoir de nomination"). See Art.2 of Regulation 31 (11 (EAEC)) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community [1962] OJ P45/1385 as amended.

<sup>72</sup> *BASF AG v Commission* (T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 & T-104/89) [1992] E.C.R. II-315; [1992] 4 C.M.L.R. 357 at [57] and on appeal *Commission v BASF* (C-137/92 P) [1994] E.C.R. I-2555 at [71].

it might appear since, in actual practice in the great majority of cases, members of the College of Commissioners do not have a hand in drafting the decision, although they are consulted about it in the final stages. I have been told anecdotally over the years of episodes where a commissioner would intervene concerning the levels of fine to be imposed, often on a national champion from the same Member State as the intervening commissioner: today, such interventions are rare although they do occur.

Thus as a formal legal matter, the vice is easy to identify. The decision is criminal in nature and is not taken by an independent and impartial tribunal. And if the matter were ever to arrive competently before the ECtHR, this element would perhaps be the strongest and most obvious imperfection. By contrast, the level of resentment, concern or sense of injustice felt by those who have been through the process does not essentially relate to the formalities of the final vote and the apposing on the Decision of the seal of the Commission by the Secretariat-General. Parties' concerns in actual practice relate more to the perceived unfairness of the intellectual process of reaching a conclusion. When diligent and honest officials investigate a case over a period of time, say four years, and then issue the statement of objections once the case is, say, 80 per cent concluded, it is fully understandable that officials are reluctant to be persuaded that they were wrong. This problem of "intellectual capture" of the Commission's services is perhaps more serious.

The vice of the hearing as currently organised is that there is no equiparation of the "case for the prosecution" and the "case for the defence". The hearing is an opportunity for the case team and the hierarchy of the case team to be persuaded they are mistaken. It is not the function of the hearing to allow the hearing officer, who presides, to reach a decision on guilt or innocence.

The unfairness of the process is often articulated as being that the conclusion of the procedure in the form of a negative Commission decision is vitiated by the political nature of that formal process; but the real source of the sharpness of the sentiment of unfairness lies in the absence of a hearing by an independent person of the factual and legal merits of the accusations levelled by case teams in DG Competition against the accused company. Thus the final formality would not be so objectionable if the text being adopted by a college of politicians had been drafted on the strength of, and with the benefit of, a true debate between opposing parties in the presence of a person who is neutral and impartial. If the decision-maker is functionally separate to the case investigator, then the problem of the case team's role is resolved. The case team would be the investigator-prosecutor, and would have to convince the decision-maker that there was a solid case. The substantive outcomes in particular cases would often not be much different, but their credibility would be greatly enhanced.

If the decision-shaping function were removed from the case team, the investigation could still be carried out, as today, by officials within DG Competition. One step further would be to establish an independent competition agency along the lines of OLAF.<sup>73</sup> This would isolate the fact-gathering function under one roof. The staff within such an agency could, for instance, deal with cases up to the statement of objections, and then submit the case to the hearing officer or the hearing tribunal.

<sup>73</sup> For a fuller discussion of a possible independent European competition authority, see the working paper Andreangeli et al., "Enforcement by the Commission" forthcoming in (2009) 32 *World Competition*.

Thus the system could be greatly improved and made more acceptable if the drafting of the decision were entrusted to an individual or group of individuals who had not been involved in the preparation of the prosecution case. Candidates for the discharge of such a function would be members of the judiciary, independent teachers or practitioners of law, and very senior Commission officials with the rank of deputy director general or director general. The current hearing officers would be ideally suited to such a role. Indeed they already carry out an assessment of the substance of the cases in their interim report, but this report is not made public and has no formal influence the final decision. If the persons were to sit in a tribunal as a trio, there could be a Commission representative alongside two others. If the “hearing officer” were to be a sole individual, ideally the role should not be filled by a member of DG Competition, but by another person with experience of competition cases, who could be attached to, say, the Commission President or the Secretary General.

Let us suppose that the hearing officer or hearing tribunal were satisfied that the accusations made were ill-founded, or needed further study. The hearing officer or the tribunal would so conclude, and the case relating to that statement of objections would go no further. If the accusations were well founded, the hearing officer or the tribunal would record this conclusion in a reasoned text. Since the Commission has institutional problems of delegating power, there would be a text with factual conclusions at this stage, but not a Commission decision. How to convert this conclusion into an official act of the relevant institution? That text would then be passed to the Commissioner responsible for Competition and presented to the College of 27 Commissioners. They would have the right to adopt the draft decision, or to reject it. They would not have the right to alter it either by modifying the factual conclusions reached by the hearing officer or the tribunal or by modifying the legal theories relied on. They would have the right to put questions and could invite reconsideration of the conclusions presented to them in the form of the draft decision, but they would be bound by the factual findings of the hearing officer or the tribunal. The College would not have the right to amend the content of the draft decision. Indeed, it could have no valid basis to alter a factual determination about who attended a lunch meeting; or whether customers feared retaliation; or whether exports were hindered. In this scenario, decisions would still be formally taken by the Commission, but they would be, and would appear to be, less political and more judicial. The problem of independence would not be eliminated, but the problem would be less flagrant. If the person or persons taking the decision were obliged to act in independence, and were truly independent of DG Competition, the problem would be materially eased. The problem of bad procedure would have been palliated. It would not be a perfect solution, but it would be a big improvement.

The persons who currently hold the position of hearing officer are experienced legal practitioners who would be suitable for judicial positions in a national legal order. They are independent from the setting of Commission enforcement priorities (although they remain close to DG Competition). They could play a substantive role in a reformed regime. At present, in their function as hearing officers, they merely decide on procedural matters (their words of warning or encouragement on the substantive merits are conveyed privately and informally today). Endowing the hearing officers with more important functions would be a step in the right direction. The hearing officer could organise a proper hearing to get to the bottom of the facts, and could report in writing. If that report

were made available to the parties its conclusions could not readily be ignored. However, this would call for time, staff, facilities and support far more extensive than is currently the case.

The hearing should take place in front of the person who will determine the facts. Otherwise, it is not really a hearing. Subject to confidentiality concerns, there is no reason why Commission hearings should not be public. The ECtHR has held that “[a]n oral and public hearing constitutes a fundamental principle enshrined in Article 6(1)”.<sup>74</sup> The presence of outsiders would engender an improvement in quality. It would require more solid standards of evidence, and of precision and moderation, than currently prevail. The hearing should provide for a more formal method of scrutiny, by allowing the defendant company to challenge the evidence against it, including the witnesses upon whose testimony the Commission relies. This would require modification to Regulation 1/2003: the hearing would no longer be optional for the parties. It would be an obligatory part of the procedure. In a number of cases, accused companies have waived a hearing believing that it would change no minds. The parties, as well as other natural and legal persons, would be obliged to appear before the decision-maker, to reply to the questions posed, and to tell the truth. A prosecution for dangerous driving should not have manifestly superior processes to determine facts than an important competition law prosecution on whose outcome thousands of jobs or millions of Euros or criminal liability may directly or indirectly depend.

Obviously, these reforms cannot be accomplished without the political confidence to make reforms before a crisis occurs (in the form of an adverse judgment). They also require far more resources than are currently accorded to the hearing officer; changes to Regulation 1/2003 to enhance the rigour of the processes to hear evidence; and more time than is currently devoted to the hearing. I submit that these are prices worth paying.

## Conclusion

In former times, criticising the disposition of the Commission’s roles was (or could be) a coded plea not to apply the competition rules at all. Those days are behind us. The substantive law is robust and intellectually solid. The talent is there. The money is there. The political support from Member States is there, as is the goodwill of the profession. I am not the first, and will certainly not be the last, to point out that the Commission’s processes and procedures for investigating and punishing competition infringements are deeply flawed and need to be significantly changed. This can be partially done without a change in the Treaty. I predict that the Commission will be unable to resist making such change within the next five years. It would do itself a service if it were to launch the process of making concrete some temporary palliatives to improve the currently plainly unsatisfactory situation.

<sup>74</sup> *Jussila v Finland* (2007) 45 E.H.R.R. 39 at [40].