COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE EUROPEAN COMMISSION'S CONSULTATION ON ANTITRUST PROCEDURAL RULES

September 2022

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section and International Law Section (the "Sections") of the American Bar Association ("ABA") respectfully submit these comments in response to the public consultation by the European Commission (the "Commission") on the evaluation of antitrust procedural rules (the "Consultation").[1]

The Antitrust Law Section ("ALS") is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The ALS provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the ALS have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the ALS has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[2]

The International Law Section ("ILS") focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total more than 10,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS's over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.[3] With respect to competition law and policy specifically, the ILS has provided input

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[1] *EU Antitrust procedural rules – evaluation*, EUR. COMM'N, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/public-consultation_en.

[2] Past comments can be accessed on the ALS's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

[3] *About Section Policy*, AM. BAR ASS'N, https://www.americanbar.org/groups/international_law/policy/about/.

for decades to authorities around the world.[4]

A. General Effectiveness

The Sections congratulate the Commission on its decision to evaluate the procedural rules that have governed the Commission's antitrust investigations under European Union ("EU") law since the adoption of Council Regulation (EC) No 1/2003 ("Regulation 1").[5] Regulation 1 has proven highly effective in ensuring the uniform application of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") and creating a framework for the parallel enforcement of EU antitrust law by the Commission and national competition authorities ("NCAs"). Nonetheless, in the nearly 20 years since Regulation 1's adoption, economic developments such as digitization have led to changes in the way EU antitrust investigations are conducted, and the European Courts have adopted numerous judgments on procedural issues, making this evaluation timely.

In relation to the Consultation's question about the effect of Regulation 1's removal of the possibility to notify business agreements to the Commission to seek negative clearance or an exemption, this change required businesses to take responsibility for self-assessing the legality of their agreements and freed Commission resources. On the other hand, the strict criteria in Regulation 1 for the Commission to provide guidance on the legality of business agreements before they are entered into reduced transparency and limited communications between the Commission and the business community. Experience during the Covid-19 pandemic highlighted the value of such communications for the business community and antitrust authorities alike. The Sections hope that potential changes to Regulation 1 and/or Commission guidance and procedures will facilitate communications with the antitrust community.

The Sections welcome the opportunity to contribute to the Commission's evaluation. Indeed, the Sections have a longstanding interest in promoting fair and effective antitrust procedures, as reflected in the 2019 report of the Section of Antitrust Law's Procedural Transparency Task Force on the assessment of global competition agency implementation of ABA Best Practices for Antitrust Procedure (the "2019 Report").[6]

B. Powers of Investigation

Regulation 1 grants the Commission extensive powers of investigation, ranging from the power to issue requests for information, take statements, conduct inspections and engage in sector inquiries. The Sections consider that these tools remain appropriate and sufficient for effective antitrust investigations. As the Commission's practice has evolved, however, several areas for

[4] Past comments can be accessed on the ILS's website at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

[5] Council Regulation (EC) No 1/2003 of Dec. 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 O.J. (L 1) 1.

[6] PROCEDURAL TRANSPARENCY TASK FORCE, AM. BAR ASS'N, ASSESSMENT OF GLOBAL COMPETITION AGENCY IMPLEMENTATION OF ABA BEST PRACTICES FOR ANTITRUST PROCEDURE REPORT (2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2019/sal-procedural-transparency-2019-04-29.pdf.

potential improvement have emerged, in part reflecting wider developments such as the digitization of the economy.

Regulation 1 allows the Commission considerable discretion in conducting investigations. While the general principle of proportionality limits this discretion, the Sections are not aware of published guidance on the type and extent of investigations the EC may choose to pursue.

Commission investigations have sometimes been criticized for their excessive length. The length of Commission investigations can be partly explained by the complexity of economic factors and cross-border elements, but the absence of any deadlines can also contribute to excessively lengthy investigations. The use of commitment decisions, intended to expedite investigations, can also be a source of delay, including the time required to market test proposed commitments and the risk that the target may withdraw commitments before adoption of a decision.

To the best of our knowledge, Commission investigations are subject to no specific management practices to ensure that the expected costs of an investigation are proportionate. The digitization of the economy has expanded the types and volumes of evidence available, potentially making Commission investigations more effective but also increasing the cost and other burdens imposed by such investigations, both on private parties and on the Commission itself.

The Sections respectfully recommend that the Commission explore avenues to address these issues in future amendments to Regulation 1 and related Commission measures. First, publishing information on the Commission's procedures for determining which investigations to prioritize and pursue may help increase transparency and predictability. Second, setting deadlines for major steps in Commission investigations and discussing these with interested parties would increase transparency and help expedite investigations, even if these deadlines would be subject to change to reflect new information and/or unforeseen developments. Third, if they are not doing so already, requiring the case team to assess the relative benefits and burdens associated with significant steps, such as requesting investigation targets and/or third parties to conduct extensive document reviews, based on pre-established public guidelines, would help to ensure that Commission investigations are effective and proportionate.

C. Procedural Rights of Parties and Third Parties, Handling of Complaints

Regulation 1 and the Commission's internal procedures ensure that the targets of investigations and their counsel have reasonable opportunities to present their views in face-to-face meetings with Commission officials conducting the investigation. The Sections submit that it is important that the Commission strike a correct balance between providing the targets all the necessary evidence and respecting any complainants' right of confidentiality.

The Commission grants the parties access to its file only after it issues a Statement of Objections ("SO"), relatively late in the investigation process. The SO is typically comprehensive, detailed and fully informs the parties of the objections raised against them. Although an SO and related press statements generally state specifically that the SO does not prejudge the outcome of the investigation, the SO reflects an official, if preliminary, determination that an infringement has occurred by the same team responsible for drafting the final decision. Providing access to the file

only after the decision-maker has reached a preliminary conclusion risks limiting the usefulness of the process for both the parties and the Commission, since the case team may be less receptive to new information after a formal position has been taken.

The Commission's procedures for access to its file might also benefit from modification, to avoid a perception that investigations are not impartial. Parties currently must request access within five working days of receipt of the SO. They gain access to the file on only a single occasion. Any further access is subject to the Commission's discretion, even if a party determines that it needs access to undisclosed information such as confidential information, business secrets, or internal documents.

The Commission limits access to a restricted group of legal and/or economic advisors of parties, under strict confidentiality obligations, increased security measures and appropriate supervision. Advisors are allowed to take notes and print documents, but not to take such printouts and notes outside of the data room, and Commission officials ensure they are destroyed. Advisors cannot communicate externally with anyone and can provide only a non-confidential data room report to the targets.

These strict rules have not insulated the Commission from allegations of inadequate record-keeping and openness to influence by third parties. Indeed, failures to keep adequate records of informal contacts and off-the-record communications have put the legality of Commission decisions at risk.[7] The strict time limits may also seem disproportionate where the Commission's investigations have gone on for several years.

The Sections respectfully recommend that the Commission explore changes to increase the usefulness of parties' access to the Commission's files, both to the parties and the Commission. For example, providing access to the Commission's file earlier in the procedure, before the case team has formalized its position on the existence of an infringement, could lead to more informed decision-making and enhance the parties' rights of defense. The Sections encourage the Commission to explore other procedures, such as the use of confidentiality rings, to make access to the Commission's files more meaningful while protecting the confidentiality of the parties and third parties.

Although the Commission has taken steps to enhance the impartiality of its procedures over the years, including notably creating the role of Hearing Officer, the Sections believe that further improvements could be made in this respect. One possibility that would be consistent with the Commission's overall procedures could be drawn from the practice of the UK Competition and Markets Authority ("CMA"). Once the CMA has issued an SO, the Case and Policy Committee appoints a three-member Case Decision Group, which decides whether to issue an infringement decision and the appropriate amount of any penalty.[8] The case team, including the Senior

[7] Case T-235/018, Qualcomm v. Commission, Judgment of June 15, 2022, available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=263808&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1679783.

[8] *Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8*, COMPETITION & MARKETS AUTHORITY, 11.35-37, https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-

Responsible Officer, are not members of the Case Decision Group, ensuring that the final decision is taken by officials who were not involved in the decision to issue the SO and any Draft Penalty Statement.

In the EU context, the College of Commissioners will of course remain the ultimate decision-maker, but creation of a similar group to advise on procedural steps involving antitrust investigations could be useful. More specifically in the context of hybrid staggered settlement procedures, the Sections believe it would be advisable to appoint a new, distinct case team to handle the "standard" part of the procedure to reduce the risk of the "standard" case being prejudged.

The Sections also submit that changes to the Commission's approach to oral hearings could benefit both the parties and the Commission itself. Oral hearings typically take place between six to eight weeks after the target submits the written response to the SO. It is DG COMP's practice to "ensure the continuous presence of senior management (Director or Deputy Director General) in oral hearings in antitrust cases, together with the case team of Commission officials responsible for the investigation,"[9] but the Commission does not require the continuous attendance of necessary attendees (such as the Commissioner, Chief Economist and Legal Service), which can make the hearings less useful.

Some consider oral hearings unnecessary where the parties intend to offer commitments, as the hearings may narrow the window for agreeing to commitments. Others suggest that oral hearings tend to favor complainants, which can affect a party's decision to request one. Hearings may end up being either a summary of the investigation, or a way for the Commission to obtain inculpatory evidence from the targets, and the utility of such hearings can therefore be limited.

The usefulness of an oral hearing can also be impacted by the sequence of an investigation: oral hearings are held after the issue of an SO, when there is little scope for constructive discussion between the Commission and the targets. At the same time, the case team may see its role as having to defend its case and can adopt a hostile approach to the parties.

In addition, neither the Commission nor the parties have the right to question or cross-examine witnesses. Cross-examination is a proven tool for quick and effective testing of evidence. Giving interested parties and the Commission itself an opportunity to conduct cross-examination in oral hearings could help test the evidence on all sides to fully explore its reliability and persuasiveness, thereby adding to the credibility of the proceedings.

The Sections respectfully recommend that the Commission explore ways to make oral hearings more useful in eliciting information at a stage in the proceedings when such information is most likely to be useful to the Commission's investigation. For example, another oral hearing could be held prior to the issuance of the SO. Oral hearings could allow for calling and cross-

procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases.

[9] PROCEDURAL TRANSPARENCY TASK FORCE, AM. BAR ASS'N, *supra* note 6, at 50.

examining witnesses. The continuous presence of relevant Commission team members should be required throughout the hearing.

D. Commission Decisions

According to Article 296 TFEU, Commission decisions must state the reasons on which they are based in a clear and unequivocal manner to enable the parties concerned to ascertain the reasons for the measure. The SO must clearly set out the legal assessment of the facts raised and identify the documents used as evidence in support of the objections. SOs and infringement decisions are very detailed, indicating the essential facts and matters of law.

Commitment decisions also contain a summary of the facts of the case and the Commission's legal assessment. However, commitment decisions tend to be much less detailed than infringement decisions. The relative lack of detail may make commitment decisions less informative for market participants other than the targets, which in turn makes them less useful than they could be to businesses and counsel self-assessing the legality of proposed conduct. This is particularly unfortunate in view of the limited ability of businesses to discuss potential competition issues with the Commission under Regulation 1 and the fact that commitment decisions are often used in cases raising novel legal issues.

Article 8 of Regulation 1 governs the Commission's authority to impose interim measures. To do so, the Commission must follow a two-pronged test: (1) there must be a prima facie violation of the EU antitrust laws, and (2) the risk of serious and irreparable harm to competition must be urgent. If those two requirements are satisfied, whatever interim measure is imposed must also be proportional to the aim that the Commission seeks to achieve.

Irrespective of which side a company might be on—either urging the Commission to intervene or being the target of a potential decision—it is challenging, based on currently available guidance and Court jurisprudence, to develop a good sense of how the Commission might decide individual cases. The General Court has held that the burden of proof that the Commission must meet to satisfy the prima facie requirement is seemingly less stringent than would be required for a final decision on infringement, but where the Commission might draw the line is unclear. The same level of uncertainty applies to the second prong of the test. What level of "serious and irreparable harm" is required, how tangible must it be, and how imminent? For all these reasons, it is respectfully suggested that the Commission provide additional guidance on its approach to the imposition of interim measures under Article 8 of Regulation 1.

E. Fines and Limitation Periods

Financial penalties have long been a main enforcement instrument of competition authorities. The EC has stated that "the purpose of the fines is twofold: to impose a pecuniary sanction on the undertaking for the infringement and prevent a repetition of the offence, and to make the prohibition in the Treaty more effective."[10] Fines for anticompetitive acts are imposed not only to restitute the illegal gains and repair the harm caused to consumers and society, but also

[10] *Thirteenth Report on Competition Policy*, at ¶ 62, EUR. COMM'N (1984), https://op.europa.eu/en/publication-detail/-/publication/161bd425-29e6-4ac0-9b3d-0766ecdda8cd/language-en/format-PDF/source-265944110.

to make it unprofitable when cartelists and dominant firms weigh their expected direct and indirect costs of being fined by competition authorities against the expected gains from engaging in the unlawful conduct unilaterally or collectively.[11]

Determining the appropriate level of antitrust fines can be challenging. Competition authorities face a trade-off between imposing too small a fine that may suffer from type II enforcement error (failure to punish unlawful conduct) and insufficient deterrence, versus issuing too large a fine that may suffer from type I enforcement error (wrongly punishing innocent parties, thus discouraging pro-competitive behavior, undermining the proportionality of justice, hurting innocent stakeholders by lowering profitability and potentially forcing firms into bankruptcy, and raising unnecessarily high prosecution incentives).[12]

The EC has adopted a relatively simple set of rules of thumb in its approach to calculating fines to reduce the administrative burden and simplify the implementation of the rules, without including parameters such as the incremental cartel gains, the probability of the antitrust authority detecting the cartel, and any dynamic considerations.[13] These rules allow the EC to calculate the fines in a formulaic fashion, accounting for the undertakings' sales, the gravity and duration of the infringement, various aggravating or mitigating circumstances, and the cap not to exceed 10% of the undertaking's total worldwide turnover in the preceding year. The EC has issued increasingly large fines since 2005. For example, the EC recently fined Google € 2.42 billion.[14]

Economists caution that simplicity in setting fines may come at a price. For example, the EC's cap on fines based on a firm's total worldwide turnover tends to punish firms with diversified business lines and geographic presence, which may also be subject to punitive sanctions in other jurisdictions.

An area of debate by economists is whether the observed penalties imposed by the EC based on its rules could generate sufficient levels of deterrence and/or compensation as predicted

[11] *See generally* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983). *See also* Gary S. Becker, *Crime and Punishment: An Economic Approach*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT (Gary S. Becker and William M. Landes eds., 1968).

[12] Marie-Laure Allain, Marcel Boyer, Rachidi Kotchoni & Jean-Pierre Ponssard, *Are cartel fines optimal? Theory and evidence from the European Union*, 42 INT'L REV. OF LAW AND ECON. 38, 41 (2015). *E.g.*, Robert Kneuper & James Langenfeld, *The Potential Role of Civil Antitrust Damage Analysis in Determining Financial Penalties in Criminal Antitrust Cases*, 18 GEO. MASON L. REV., 953 (2011).

[13] *See, e.g.*, Kneuper et al., *supra* note 13; Vasiliki Bageri, Yannis Katsoulacos, Giancarlo Spagnolo, *The distortive effects of antitrust fines based on revenue*, 123 ECON. J. F545 (2013).

[14] European Commission Memo/17/1785, Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service (June 27, 2017), https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785.

by economic theory. A series of papers by Connor and Lande[15] and Combe and Monnier[16] empirically examined cartels fined by the EC and concluded that fines were overall sub optimal and did not generate the optimal level of deterrence. By contrast, papers by Allain and coauthors[17] constructed a dynamic framework, resulting in the conclusion that, on average the cartel fines issued by the EC are above the deterrence level. Katsoulacos and Ulph[18] considered additional factors such as legal uncertainty and the difference in time of the fine and the unlawful conduct, and arrived at similar conclusions against under-enforcement.

The Sections previously addressed the issue of the appropriate level of fines in the 2012 Joint Comments on the Office of Fair Trading's Draft Revised Guidance as to the Appropriate Amount of a Penalty. The Sections submitted that increasing the starting point to a maximum of 30% of the value of sales, with a 25% minimum for the most serious infringements, is disproportionate. The Sections "suggest[ed] that instead of a minimum starting point of 25% for the most serious infringements, the final Guidance should make clear that fines above 20% are reserved for hard-core cartels."[19] The Sections have also provided recommendations for both the leniency and settlement reductions for the Commission's Guidelines.[20] In particular, the Sections recommended that the Commission utilize a process that does not tip the balance against applying for leniency in cartel cases and follow the principle that the leniency applicant should never be worse off for having applied for leniency than it would have been if it did not cooperate with the Commission.[21]

F. Cooperation with NCAs and Courts

Cooperation between the Commission and NCAs has been effective in promoting the uniform application of European competition law, in particular through the European Competition Network on the basis of the Commission Notice on cooperation within the Network of Competition

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[15] John M. Connor & Robert H. Lande, *How high do cartels raise prices? Implications for optimal cartel fines*, 80 TULANE L. REV. 513 (2005); John M. Connor, & Robert H. Lande, *The size of cartel overcharges: implications for US and EU fining policies*, 51 ANTITRUST BULL. 983 (2006); John M. Connor & Robert H. Lande, *Cartel overcharges and optimal cartel fines*, 3 ISSUES COMPETITION L. & POL'Y 2203 (2008); John M. Connor & Robert H. Lande, *Cartels as rational business strategy: new data demonstrates that crime pays*, 34 CARDOZO L. REV. 427 (2012). *But see* James Langenfeld, *The Empirical Basis for Antitrust: Cartels, Mergers, and Remedies*, 24 INT'L J. ECON. BUS. 233 (2017).

[16] Emmanuel Combe, Constance Monnier & Renauld Legal, *Cartels: The probability of getting caught in the European Union*, College of Europe, BEER Paper no. 12 (2008).

[17] Marie-Laure Allain, Marcel Boyer & Jean-Pierre Ponssard, *The Determination of Optimal Fines in Cartel Cases: Theory and Practice*, 4 CONCURRENCES 32 (2011); Allain et al., *supra* note 13.

[18] Yannis Katsoulacos & David Ulph, *Antitrust penalties and the implications of empirical evidence on cartel overcharges*, 123 ECON. J. F558 (2013).

[19] AM. BAR ASS'N, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE OFFICE OF FAIR TRADING'S DRAFT REVISED GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY (2012), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v4/at_comments_oft423con_20120125.pdf.

[20] AM. BAR ASS'N, JOINT COMMENTS OF THE ABA SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW IN RESPONSE TO THE COMMISSION OF THE EUROPEAN COMMUNITIES' REQUEST FOR PUBLIC COMMENT ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES AND REDUCTION IN FINES IN CARTEL CASES (2006), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v6/comments_ec-leniency.pdf.

[21] *Id*. at 3–4.

Authorities.[22] However, the cooperation between the Commission and the National Competition Authorities has not prevented diverging views between the Commission and NCAs on fundamental questions.

For example, *enforcement policy* in respect of vertical agreements has long diverged, with the German *Bundeskartellamt* prioritizing enforcement in respect of vertical agreements while the Commission and other NCAs have been less active in this area. Although practice in this area has recently appeared to be converging, this convergence is not necessarily the result of formal cooperation.

In respect of the *application of competition law*, several NCAs have developed approaches to the assessment of sustainability agreements that diverge from the Commission's, in particular as regards the fair share criterion Article 101(3) TFEU. To better inform businesses and to broaden the discussion of this and other topical competition law issues, the Sections respectfully suggest increasing the transparency of discussions between the Commission and NCAs. Increased transparency would increase the predictability of enforcement activities and help ensure efficient and coherent enforcement activities throughout the European Union.

Another area for potential improvement concerns Article 15 of Regulation 1 on cooperation with national courts. Article 15 could be more effectively used in proceedings before national courts. Such proceedings, especially in follow-on damages cases, often involve the interpretation of Commission decisions, the status of administrative proceedings and confidentiality obligations of the undertakings subject to administrative enforcement actions. For example, case C-588/20 (*Landkreis Northeim/Daimler*) is a request for a preliminary ruling addressing, *inter alia*, whether the Commission's decisions in the trucks cartel covered specialised trucks, in particular household refuse collection trucks. While the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of such decisions under Article 267 TFEU, the Commission would have been well placed to comment on this question on the basis of Article 15, reducing the ECJ's workload. We therefore suggest clarifying the scope of Article 15 and introducing a possibility for parties to proceedings before national courts to invite comments from the Commission or NCAs.

Conclusion

The Sections appreciate the Commission's consideration of these comments and would be pleased to discuss any such comments in more detail if useful.

[22] Commission Notice on Cooperation Within the Network of Competition Authorities, 2004 O.J. (C 101) 43, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0043:0053:EN:PDF.