

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION  
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW  
TO THE EUROPEAN COMMISSION  
REGARDING CONSULTATION DOCUMENTS ON  
IMPROVED TRANSPARENCY AND PREDICTABILITY IN COMPETITION PROCEEDINGS**

**Best Practices for Antitrust Proceedings,  
Best Practices for the Submission of Economic Evidence  
(Both in Antitrust and Merger Proceedings) and  
Guidance on the Role of the Hearing Officers in the Context of Antitrust Proceedings**

**March 3, 2010**

*The views expressed herein are presented jointly on behalf of these Sections only. These Comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.*

**INTRODUCTION**

The Section of Antitrust Law and the Section of International Law of the American Bar Association (collectively, “Sections”) submit the following comments in response to the public consultation commenced on 6 January 2010 by the European Commission (Commission) in connection with procedures, submission of economic evidence, and guidance on the role of the Hearing Officers in competition proceedings, as described in the three Consultation Documents issued simultaneously with the public notice of the consultation. The Commission indicated that the Consultation Documents will be applied provisionally as from that date, and that it would consider adjustments to those documents based on views submitted by interested parties.<sup>1</sup>

In announcing the consultation, Commissioner Kroes commented, “The Commission has consistently given high priority to due process and fairness in antitrust proceedings. These three documents provide companies with further certainty and transparency about the relationship between them and the Commission during an antitrust case. I warmly invite all stakeholders to provide us with their comments on how to yet further improve our practices.” The Sections strongly support the Commission’s commitment to due process and fairness in antitrust proceedings. They also note the extensive detail and high degree of care evident in the Consultation Documents, which could serve as a positive model for similar initiatives by other competition agencies. The Commission has undertaken a series of useful amendments to its practices, as described in the Consultation Documents, in order to clarify and enhance the predictability of the obligations of parties to the Commission’s competition proceedings, as well as the Commission’s reciprocal responsibilities in the conduct of its proceedings. While the Sections present a number of comments intended to suggest further improvements, in general they strongly support the numerous positive and helpful contributions of the Consultation Documents.

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<sup>1</sup> See, Commission Press Release, “Antitrust: improved transparency and predictability of proceedings”, 6 January 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&guiLanguage=en> (visited 8 February 2010).

The membership of the Sections includes over 33,000 lawyers, economists and other professionals from over forty-five countries, although most are based in the United States. The Sections hope and intend that these comments will assist the Commission in evaluating and amending, as appropriate, the practices described in the Consultation Documents. These comments were drafted from the perspective of the Sections and are grounded on the historical development of the U.S. antitrust law insofar as this development has involved extensive experience with similar issues. However, these comments also draw heavily upon the experience of members of the Sections who practice competition law in the EU, either as the primary focus of their practice or as part of a competition practice transcending particular jurisdictions.

While the Sections limit their comments to the Consultation Documents, we believe that the Commission should at an appropriate time solicit comment on certain more fundamental issues that underlie the procedures employed for resolution of competition cases before the Commission. A large number of commentators have applauded the protections afforded European citizens by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) that ensure fair treatment and due process by government instrumentalities. Indeed this year the Franklin D. Roosevelt Four Freedoms Award was bestowed on the European Court of Human Rights *inter alia* for its enforcement of the right to a fair trial. While the Sections do not take a view as to application of the Convention to the decision-making process in EU competition cases, we do note the importance of due process by independent and impartial decision-makers in cases brought by government instrumentalities generally. As indicated above, in launching this consultation Commissioner Kroes noted the importance of both due process and fairness in proceedings brought under EU competition law.

The procedural fairness of the Commission’s decision-making process in competition cases has not been free from criticism. That the investigations, decisions to initiate proceedings and findings of liability are all made by the same entity, *i.e.*, the Commission, is an often cited example. The institutional limitations on the opportunity of undertakings to test allegations of fact is another. The degree of deference accorded to the Commission by the EU courts and the deliberate pace of appellate proceedings have also evoked concerns. As a final example, the Commission's views on Legal Professional Privilege in competition proceedings have stimulated some controversy. While the Sections do not address those issues here, we do respectfully suggest that at an appropriate time the Commission should solicit public comments on and undertake an examination of each of these issues in terms of their ultimate effect on the fairness, accuracy and efficiency with which its competition cases are brought and decided.

The comments of the Sections are provided paragraph-by-paragraph according to the numbering scheme adopted in each of the three Consultation Documents. The Sections would be pleased to explain or expand upon their comments in greater detail, or to assist the Commission in any other appropriate way.