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**COMMENTS OF THE AMERICAN BAR ASSOCIATION'S
SECTION OF ANTITRUST LAW
ON STRENGTHENING THE ROLE OF THE HEARING OFFICER
IN THE COMPETITION DIRECTORATE GENERAL'S
ENFORCEMENT PROCESSES**

These views are being presented only of behalf of the Section of Antitrust Law and 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 position of the ABA.

The Section of Antitrust Law of the American Bar Association respectfully offers the following comments in connection with the Commission's upcoming report on the role of the Hearing Officer in the Competition Directorate General's enforcement process. The Section supports the Commission's initiative in this important area and welcomes the opportunity to participate in an open discourse on these issues. The time is ripe for a re-examination and further strengthening of the Hearing Officer's role, particularly given the Commission's current proposals to reform Articles 81 and 82 of the EC Treaty and its ongoing review of the Merger Control Regulation. Strengthening the Hearing Officer's role, as an adjunct to these reforms, could lead to significant improvements in the accountability and transparency of the Competition Directorate-General's enforcement processes.

The post of the Hearing Officer was established to guarantee that an independent member of the Competition Directorate-General would play a key role in protecting a party's right to be heard and its rights of defense, "in the interest of contributing to the objectivity, transparency and efficiency of the Commission's competition proceedings."¹ In practice, however, individual parties have limited interaction with the Hearing Officer. Moreover, individual parties cannot ascertain whether the Hearing Officer effectively carries out its mission, because these parties are denied access to the Hearing Officer's reports. This lack of transparency and accountability is exacerbated by the fact that the Hearing Officer's report generally is not provided to the College of Commissioners and its determinations are not considered decisions reviewable by the European Courts. Thus, individuals often perceive the activities of the Hearing Officer to be shrouded in mystery, such that the Hearing Officer cannot effectively attain the goals of transparency, accountability and efficiency for which the post was created.

In addition to these issues, further concerns have been raised in relation to the Hearing Officer and the protection of the rights of defense in the merger context, due, in large part, to tight timing constraints implicated in the merger arena. Whereas the EU's strict merger review deadlines are praised by business and practitioners alike, commentators have observed that time pressures involved in securing approval of a merger often impede parties from enjoying their

¹ Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission, OJ L 33, 21.12.1994, pp. 67-69. The post, created in 1982, was expanded to mergers in 1990 and to safeguard parties' access to the Commission's file and the confidentiality of documents, in 1994.

rights of defense and/or their right to a hearing. These deadlines also appear to provide the Merger Task Force with unintended bargaining leverage in remedy negotiations with individual parties.² Recent amendments to the Rules of Procedure of the Court of First Instance, introducing a “fast track” procedure, may help to alleviate some of these concerns.³ However, the introduction of enhanced procedural safeguards within the Merger Task Force’s review processes, including via the extension of the Hearing Officer’s powers and responsibilities, could also prove beneficial in this context.

Recognizing that the Commission’s modernization effort is likely to extend the Competition Directorate-General’s powers of inquiry in relation to Articles 81 and 82, additional procedural safeguards also are required to ensure that information is obtained and used pursuant to these new powers in a manner consistent with the rights of defense.⁴ The extension of the Hearing Officer’s powers to include oversight into these areas, could be one solution to ensuring that the appropriate protections are adopted within the Commission’s internal processes.

With these concerns in mind, a number of suggested reforms to the Hearing Officer’s role deserve the Commission’s attention. Such reforms include requiring disclosure of the Hearing Officer’s final report to the College of Commissioners with a copy to the individual parties in advance thereof, extending the Hearing Officer’s powers to include mediating remedy negotiations between parties and the Merger Task Force,⁵ and explicitly providing for specific decisions of the Hearing Officer to be considered reviewable acts by the judiciary in the course of judicial review of the Commission’s actions. These reforms aim to ensure that the Hearing Officer effectively protects the rights of defense of individual parties while contributing to the objectivity, transparency and efficiency to the Commission’s competition enforcement process. However, there are many other suggestions that have been expressed by numerous other bodies, which warrant further study. We submit that the foregoing suggestions would help to address some of the shortcomings that are perceived to exist with the European Commission’s merger review process, while stakeholders continue to search for ways to address the fundamental problem, namely, the practical absence of an effective right for the merging parties to challenge adverse Commission decisions before the Court of First Instance in a timely fashion. We are

² See e.g., Alec Burnside, *Governance of EC Merger Control – Bumps in the Level Playing Field*, in EC MERGER CONTROL: TEN YEARS ON – PAPERS FROM THE EC MERGER CONTROL 10TH ANNIVERSARY CONFERENCE, Int’l Bar Ass’n., Sept. 2000.

³ See Amendments to the Rules of Procedure of the Court of First Instance of the European Communities, O.J. L 332, 19.12.2000, pp. 4-6.

⁴ The Comments of the Section of Antitrust Law of the American Bar Association on the European Commission’s “White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty,” submitted to you on 3 November 1999, examine the procedural issues raised by the reform proposal more fully. The Comments of the Section can be found on the Section’s website at <http://www.abanet.org/antitrust/eumodern.html>.

⁵ See e.g., House of Lords, Select Committee on European Union, Nineteenth Report, STRENGTHENING THE ROLE OF THE HEARING OFFICER IN EC COMPETITION CASES, 21 November 2000, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldselect/lducom/125/12501.htm>, for an appraisal of this extension of powers as well as other suggestions to improve and strengthen the Hearing Officer’s role.

hopeful that the recent reforms, effective February 1, 2001, in the rules of the Court of First Instance will prove effective in this regard.

We urge the Commission to open its review to public comment, to ensure that this important reform benefits from transparency and the exchange of a broad range of perspectives. The ABA's Section of Antitrust Law would welcome the opportunity to participate in any such further review.

Respectfully submitted,

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