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A Right of Confrontation for Competition Hearings Before the European Commission

Procedural fairness lies at the bedrock of justice.¹ Among all procedural rights in the American judicial system, the right of a criminal defendant to confront and cross-examine government witnesses is one of the most vital.² Cross-examination allows criminal defendants to test the perception and memory of witnesses, while giving a neutral fact-finder a first-hand view of the witnesses' consistency, credibility, and biases.³ As Wigmore noted, it is "the greatest legal engine ever invented for the discovery of truth."⁴

On September 12, 2009, Christine Varney, the United States Assistant Attorney General for Antitrust, called on "competition agencies, international organizations, and the antitrust community to discuss procedural fairness more broadly, focusing on the opportunity to refine procedures that parties can understand and rely on as a means of removing unnecessary uncertainty from enforcement efforts."⁵ Nowhere is procedural fairness more important in competition law than in cartel enforcement, an area of the law dealing with agreements among competitors to restrain trade through actions such as "price-fixing, market allocation, and bid-rigging,"⁶ where fines and prison sentences can have catastrophic consequences for defendants.⁷

¹ See David E. Shipley, *Due Process Rights before EU Agencies: The Rights of Defense*, 37 GA. J. INT'L & COMP. L. 1, 50-51 (2008); Christine A. Varney, Ass't Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Procedural Fairness, Address Before the 13th Annual Competition Conference of the International Bar Association 1* (Sept. 12, 2009) (transcript available at <http://www.justice.gov/atr/public/speeches/249974.pdf>).

² See *Crawford v. Washington*, 541 U.S. 36, 42 (2004).

³ See Fred O. Smith, *Crawford's Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1518 (2008).

⁴ 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (2d ed. 1923).

⁵ See Varney, *supra* note 1, at 4.

⁶ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *FIGHTING HARD CORE CARTELS: HARM, EFFECTIVE SANCTIONS AND LENIENCY*

This note focuses on the adequacy of procedural safeguards in cartel enforcement proceedings in the European Union (“EU”). Specifically, it will investigate the European Commission’s⁸ (“EC” or “Commission”) use of “paperless” applications⁹ for leniency from fines and oral statements gathered during cartel investigations absent a right to confront and cross-examine witnesses. Because co-conspirators are rewarded with leniency based upon either the sufficiency or “added value” of the information they offer to the Commission,¹⁰ they have an incentive to paint this evidence in a light least favorable to their fellow cartel members and most favorable to themselves.¹¹ Without a mechanism for targeted corporations to directly ascertain the truth of those allegations,¹² the use of oral statements as evidence in EC cartel enforcement proceedings raises a number of the classic evils against which the rights of confrontation and cross-examination are designed to protect.¹³ Recently, commentators have argued that because oral statements in the EC are unsworn, declarants are not subject to compulsory process, and the prosecuted parties are not afforded an opportunity to confront and cross-examine declarants, the use of these statements as evidence violates the rights that targets of EC cartel enforcement proceedings should enjoy.¹⁴ However, the solutions that these critics have offered go too far—requiring a wholesale reform of EC competition

PROGRAMS 11 (2002), available at <http://www.oecd.org/dataoecd/41/44/1841891.pdf> [hereinafter O.E.C.D., FIGHTING HARD CORE CARTELS]; Jason D. Medinger, Comment, *Antitrust Leniency Programs: A Call for Increased Harmonization as Proliferating Programs Undermine Deterrence*, 52 EMORY L.J. 1439, 1439 (2003).

⁷ Imran Aslam and Michael Ramsden, *EC Dawn Raids: A Human Rights Violation?*, 5 COMPETITION L. REV. 61, 62 (2008); Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 EUR. L. REV. 817, 825-29 (2009); Donald Slater, Sébastien Thomas & Denis Waelbroeck, *Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need for Reform?*, 3-4, 10-11 (The Global Competition Law Centre Working Papers Series, Working Paper 04/08), available at <http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf>.

⁸ The European Commission is the administrative body of the European Union charged with enforcing its competition laws. Treaty on the Functioning of the European Union, art. 105, Sept. 5, 2008, 2008 O.J. (C 115/47).

⁹ Robert Grasso, Note, *The E.U. Leniency Program and U.S. Civil Discovery Rules: A Fraternal Fight?*, 29 MICH. J. INT’L L. 565, 577, 582 (2008); Julian M. Joshua, *Oral Statements in EC Competition Proceedings: A Due Process Short-Cut?*, COMPETITION L. INSIGHT, Dec. 7, 2004, at 1 (2004).

¹⁰ See discussion *infra* Part II.B.1.

¹¹ Forrester, *supra* note 7, at 833.

¹² See discussion *infra* Part IV.A.

¹³ See discussion *infra* Part IV.A.

¹⁴ See discussion *infra* Part IV.B.

procedure. This note proposes a more conservative solution grounded in the right of confrontation jurisprudence of the United States.

Part I of this note will provide a brief historical overview of the global development of competition law, cartel enforcement, and leniency programs, and will present the United States' approach as a model. Part II will outline the relevant competition laws of the EU, as well as the standards of procedural fairness that currently undergird those laws. Part III will argue that the current procedural safeguards have not kept pace with the EC's substantive and procedural trends toward a criminal and adversarial system. Lastly, Part IV will survey competing proposals for procedural reforms in the EC and will offer a counterproposal. Specifically, this note will argue that the correct solution to the inadequacy of the current EC competition hearing procedures is to amend the regulations governing cartel enforcement to allow for a right to confront and cross-examine witnesses modeled on the American approach, as outlined in the Supreme Court's decision in *Crawford v. Washington*.¹⁵

I. BACKGROUND AND THE AMERICAN MODEL

In order to understand the current European cartel enforcement regime, it is first important to understand the goals and development of competition laws. In general, competition laws are designed to promote competition in market economies for the benefit of consumers,¹⁶ a goal achieved through two basic means: (1) laws prohibiting excessive market power, and (2) laws designed to deter and prosecute unfair competition among competitors.¹⁷ The first category includes the regulation of mergers and acquisitions, as well as anti-monopoly laws, while the second category, which is the subject of this note, concerns the preservation of competition and market fairness.¹⁸ Additionally, a full understanding of modern European cartel enforcement requires a familiarity with the cartel enforcement regime of the

¹⁵ 541 U.S. 36, 60-65, 68 (2004).

¹⁶ See Eleanor M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, 43 INT'L LAW. 151, 152 (2009) [hereinafter Fox, *Linked-In*].

¹⁷ Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1782 (2000) [hereinafter Fox, *Antitrust and Regulatory Federalism*].

¹⁸ *Id.*

United States, which remains a dominant influence in the shaping of EC competition policies and procedures.¹⁹

A. *Background*

In response to the proliferation of industrial combinations, known as “trusts,” the United States enacted the Sherman Act of 1890, which was designed to (1) “prevent[] the high prices associated with monopoly or cartel activity” and to (2) protect[] the right of every person to practice a trade of choice.”²⁰ For the next fifty years, aggressive competition enforcement was largely limited to the United States.²¹ However, the second half of the twentieth century saw a significant increase in competition laws globally.²² Today, competition laws are enforced in over 100 jurisdictions,²³ including multiple cross-border competition “networks.”²⁴ One area of competition law, cartel enforcement, is executed through a number of investigative and deterrent mechanisms designed to ferret out cartel activity, which is notoriously secretive.²⁵ And while global competition authorities differ in their approaches to cartel enforcement, one mechanism has proved especially effective at cartel detection and enforcement: the “leniency program.”²⁶

Under a leniency program, a competition authority encourages cartel members to self-report anticompetitive

¹⁹ See Wouter P.J. Wils, *Is Criminalization of EU Competition Law the Answer?*, 28 WORLD COMPETITION L. & ECON. REV. 117, 136-37 (2005); A. Paul Victor, et al., *International Cartels Roundtable*, 2003 FORDHAM CORP. L. INST. INT'L ANTITRUST LAW & POL. 93, 100 [hereinafter *International Cartels Roundtable*].

²⁰ Lawrence A. Sullivan & Warren S. Grimes, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 6 (2000).

²¹ Fox, *Linked-In*, *supra* note 16, at 152.

²² *See id.*

²³ *Id.* at 154.

²⁴ Fox, *Antitrust and Regulatory Federalism*, *supra* note 17, at 1782.

²⁵ See Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime* 9, available at <http://www.justice.gov/atr/public/articles/240611.pdf> (last visited June 26, 2010) (“[C]artel activity is almost invariably covert, and participants often engage in affirmative acts of concealments.”).

²⁶ O.E.C.D., *FIGHTING HARD CORE CARTELS* *supra* note 6, at 7. (“Leniency programs uncover conspiracies that would otherwise go undetected and also make the ensuing investigations more efficient and effective. Experience shows that these programs work.”); Julian M. Joshua, *That Uncertain Feeling: The Commission’s 2002 Leniency Notice*, EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 512 (Claus-Dieter Ehlermann & Isabela Anatnasiu eds., 2006) (“[N]o self-respecting antitrust agency with any aspiration to effective enforcement is without a leniency policy.”).

conduct in return for a conditional promise either to refrain from bringing criminal charges or to reduce potential fines.²⁷ Leniency programs destabilize cartels by creating a “prisoner’s dilemma,” fostering distrust among co-conspirators and providing an incentive for each member to turn in its fellow cartel participants to competition authorities.²⁸ The leniency program has been described by American officials as “[u]nquestionably . . . the greatest investigative tool ever designed to fight cartels.”²⁹ The first cartel leniency program was developed in 1978 in the United States.³⁰ Today, nearly fifty countries have enacted leniency programs.³¹ These programs have been highly successful, resulting in extraordinary fines and significant prison sentences.³²

B. *The American Model*

The United States takes an aggressive approach to criminal cartel enforcement. The Assistant Attorney General for the Antitrust Division of the Department of Justice has stated that cartel conduct is “unambiguously harmful.”³³ The United States Supreme Court has described cartels as “the supreme evil of antitrust.”³⁴ Government officials have justified criminal prosecution of cartel offenses on a number of grounds, including the secretive nature of cartels,³⁵ the existence of

²⁷ See Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 454, 473-77 (2006).

²⁸ See Roger W. Fones, Rony P. Gerrits & Nicole D. Devero, *Antitrust Leniency Programs and their Impact on the Aviation Industry*, AIR & SPACE L., at 1, 19 (2008) (internal quotations omitted); Leslie, *supra* note 27 at 455.

²⁹ Scott D. Hammond, Dir. Of Crim. Enforcement, Antitrust Div., U.S. Dep’t of Justice, Cornerstones of an Effective Leniency Program, Presented Before the ICN Workshop on Leniency Programs 2 (November 22-23, 2004) (transcript available at <http://www.justice.gov/atr/public/speeches/206611.pdf>) [hereinafter Hammond, Cornerstones of an Effective Leniency Program].

³⁰ J. Anthony Chavez, *More Aggressive Action to Curb International Cartels*, 1739 PRACTISING LAW INSTITUTE: CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 807, 818 (2009); Hammond, Cornerstones of an Effective Leniency Program, *supra* note 29, at 3 & n.1.

³¹ See Chavez, *supra* note 30, at 853.

³² See, e.g., *id.* at 847-48.

³³ Christine A. Varney, Ass’t Att. General, Antitrust Div. U.S. Dep’t of Justice, Striving for the Optimal Balance in Antitrust Enforcement, Remarks Prepared for The Council on Foreign Relations 14 (Oct. 8, 2009) (transcript available at <http://www.justice.gov/atr/public/speeches/250814.pdf>).

³⁴ *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

³⁵ *International Cartels Roundtable*, *supra* note 19, at 96. James Griffin, who was then the Deputy Assistant Attorney General for the Antitrust Division of the U.S.

criminal intent when participating in a cartel, and the inherently anticompetitive conduct of cartels.³⁶ The American impulse to view cartel conduct as criminal has “been part of the American antitrust system from the beginning,”³⁷ and it is an impulse that is reflected in its laws, severe penalties, and aggressive enforcement techniques.³⁸ However, the United States also maintains a robust set of procedural protections, which guard against prosecutorial abuse and ensure respect for the fundamental rights of defendants at trial.³⁹

1. The Antitrust Laws

Section 1 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”⁴⁰ Despite the breadth of Section 1 prohibitions, U.S. criminal cartel enforcement primarily focuses on price-fixing,⁴¹ bid-rigging,⁴² and market allocation⁴³ between competitors—known as the “hard-core” antitrust offenses.⁴⁴ The penalties for

Department of Justice, noted that international cartels, “like all other cartels, are secret in nature. Often victims don’t even know they are being victimized, and increasingly cartel members are taking actions to ensure that they do not leave significant evidence around. . . .” *Id.*

³⁶ See Werden, *supra* note 25, at 5.

³⁷ Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 694 (2001).

³⁸ See Wils, *supra* note 19, at 122-24.

³⁹ *Id.*

⁴⁰ 15 U.S.C. § 1 (2006).

⁴¹ See U.S. DEP’T OF JUSTICE, PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR 2 (2005), available at <http://www.justice.gov/atr/public/guidelines/211578.pdf> (“Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their goods or services are sold. It is not necessary that the competitors agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy.”) [hereinafter PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES].

⁴² See *id.* (“Bid rigging is the way that conspiring competitors [sic] effectively raise prices where purchasers — often federal, state, or local governments — acquire goods or services by soliciting competing bids.”).

⁴³ See *id.* at 3 (“Market division or allocation schemes are agreements in which competitors divide markets among themselves. In such schemes, competing firms allocate specific customers or types of customers, products, or territories among themselves.”).

⁴⁴ ABA SECTION OF ANTITRUST LAW, CRIMINAL ANTITRUST LITIGATION HANDBOOK 3 (2d ed. 2006); Baker, *supra* note 37, at 694-95 (“Over time . . . the DOJ, and more importantly the courts, gradually developed distinguishing lines between the kinds of anticompetitive conduct that should be punished criminally and the remaining conduct, which would only be subject to civil injunctions by the government and private

criminal antitrust violations in the United States are potentially severe. Under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”), guilty corporations face fines as high as \$100 million, while individuals may face up to \$1 million in fines and ten years in jail.⁴⁵ These aggressive and ever-increasing penalties have led to the collection of over \$5.3 billion in fines over the last fifteen years.⁴⁶

2. Powers of Investigation and the Division’s Leniency Program

The United States Department of Justice’s Antitrust Division (the “Division”) enforces the Sherman Act by conducting investigations and prosecuting offending corporations and individuals in federal court.⁴⁷ Division investigations employ a wide array of aggressive techniques, including wiretaps, informants, and search warrants, to discover cartels and to build cases.⁴⁸ However, above all other techniques, the Corporate and Individual Leniency Programs have been the “most effective generator of international cartel cases” for the Division.⁴⁹

The Division first adopted its Corporate Leniency Program in 1978, and subsequently revised it in 1993.⁵⁰ The

damage cases by injured victims. Thus, price-fixing, bid-rigging, and customer and market allocations came to be regarded as criminal, while most other conduct (for example, joint venture rules, standard setting practices, and vertical restraints) came to be regarded as only suitable for civil prosecution.” (citations omitted); Michael Lazerwitz & Adam Miller, *USA, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO CARTELS & LENIENCY 2009* 261, available at <http://www.iclg.co.uk/khadmin/Publications/pdf/2577.pdf> (internal quotations omitted).

⁴⁵ See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, §215, 118 Stat. 661, 668 (2004); Chavez, *supra* note 30, at 855-61; Michael D. Hausfeld, Michael P. Lehmann & Megan E. Jones, *Observations from the Field: ACPERA’s First Five Years*, 10 SEDONA CONF. J. 95, 96-97 (2009).

⁴⁶ See Chavez, *supra* note 30, at 836.

⁴⁷ PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES, *supra* note 41, at 1.

⁴⁸ Chavez, *supra* note 30, at 824-26.

⁴⁹ Scott D. Hammond, Dir. Of Crim. Enforcement, Antitrust Div., U.S. Dep’t of Justice, A Summary Overview of the Antitrust Division’s Criminal Enforcement Program, Presented Before the New York State Bar Association Annual Meeting 5 (Jan. 23, 2003) (transcript available at <http://www.justice.gov/atr/public/speeches/200686.pdf>) [hereinafter Hammond, Summary Overview].

⁵⁰ Hammond, Cornerstones of an Effective Leniency Program, *supra* note 29, at 3 n.1. Describing the changes from 1978 to 1993, Hammond noted that “[t]he Amnesty Program was revised in three major respects. First, the policy was changed to ensure that amnesty is *automatic* if there is no pre-existing investigation. . . . Second,

revised program sets forth two means of achieving leniency, “Part A Leniency”⁵¹ and “Part B Leniency,”⁵² which are differentiated based on whether the Division is aware of the illegal activity being reported at the time when the corporation

the Division created an alternative amnesty, whereby amnesty is available even if cooperation begins *after* an investigation is underway. Third, if a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the corporation and agree to cooperate also receive automatic amnesty.” *Id.*

⁵¹ Under Part A Leniency, the Division will grant a corporation leniency if, before an investigation has begun, it meets six criteria:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

U.S. DEPT OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY 1-2 (1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.pdf> [hereinafter CORPORATE LENIENCY POLICY].

⁵² Under Part B Leniency, if a corporation does not meet the requirements for Part A Leniency, it may qualify for leniency if—before or after an investigation has begun—it meets the following seven criteria:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation’s role in it, and when the corporation comes forward.

Id. at 2-3.

first applies for leniency. In 1994, the Division also released an Individual Leniency Policy, which encourages “individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware.”⁵³ Additionally, only the first corporation or individual to approach the Division is granted leniency, creating a race between conspirators.⁵⁴

Leniency applications to the Division may be made in writing or orally,⁵⁵ although full cooperation inevitably requires witness statements and the production of relevant documents.⁵⁶ The availability of oral—or “paperless”—leniency is vital to the success of the program, because “amnesty does not protect recipients from liability in private damage actions, [such that] companies would be loathe to participate or cooperate if there were a substantial risk that the evidence they provide the Justice Department could be used against them in the civil suits that inevitably follow.”⁵⁷

In the event that a corporation or individual is granted leniency, the Department of Justice issues a Conditional Leniency Letter, which contains the conditions of leniency and the cooperation required of that corporation or individual.⁵⁸

⁵³ U.S. DEPT OF JUSTICE, ANTITRUST DIV., LENIENCY POLICY FOR INDIVIDUALS 1 (1994), available at <http://www.justice.gov/atr/public/guidelines/0092.pdf>. In order to qualify for individual leniency, the applicant in question (1) must approach the Division before it has received any information about the anticompetitive conduct and prior to the initiation of any investigation or corporate application for leniency; (2) must report the illegal activity “with candor and completeness” and “provide[] full, continuing and complete cooperation to the Division throughout the investigation;” and (3) the individual must not have “coerce[d] another party to participate in the illegal activity” and must not have been the “leader in, or originator of, the activity.” *Id.* at 1-2.

⁵⁴ See CORPORATE LENIENCY POLICY, *supra* note 51.

⁵⁵ William Kolasky, *Criminalising Cartel Activity: Lessons from the U.S. Experience*, 12 COMPETITION & CONSUMER L. REV. 207, 213 (2004).

⁵⁶ See Lazerwitz & Miller, *supra* note 44, at 264.

⁵⁷ Kolasky, *supra* note 55, at 213.

⁵⁸ This cooperation includes seven elements, requiring the corporation to: (a) provide “a full exposition” of all the facts relevant to its anticompetitive conduct; (b) produce the remaining, non-privileged, relevant documents related to that conduct; (c) to secure and encourage current and former “directors, officers, and employees” to provide all relevant information related to the conduct; (d) to facilitate the appearance of such employees for interviews and testimony related to the reported anticompetitive activity; (e) to use its “best efforts” to ensure “complete[], candid[], and truthful[]” responses to all interviews, grand jury appearances, and trials; (f) to use its “best efforts” to ensure that such individuals “make no attempt either falsely to protect or falsely to implicate any person or entity;” and (g) to make all reasonable efforts to pay restitution to those injured by any anticompetitive conduct reported that effects the United States. U.S. Dep’t of Justice, Antitrust Division, Model Corporate Conditional

Furthermore, the Corporate Conditional Leniency Letter extends leniency to those directors, officers, and employees who provide relevant information and admit to anticompetitive activity, subject to further conditions.⁵⁹ If the applying corporation or individual meets the conditions for leniency and the Division receives the benefit of the information that the leniency applicant provides, the Division will grant Final Leniency.⁶⁰

Where the Division determines that there is sufficient evidence to proceed with a prosecution—generally where there is direct evidence of collusion—it may convene a grand jury⁶¹ to determine whether there is enough evidence to bring formal charges against the alleged conspirators.⁶² Once formal charges are brought, federal cartel cases are tried in open court before a judge and jury, with attendant procedural rights for defendants and a requirement that the alleged conduct be proven beyond a reasonable doubt.⁶³

3. Procedural Fairness in the United States

While the United States has historically approached cartel enforcement with vigor—whether through persistent investigation, innovative programs, or devastating penalties—its zealotry has been tempered by a robust set of procedural safeguards, including (1) constitutional safeguards, (2) statutory safeguards, and (3) policy safeguards.⁶⁴ One vital constitutional provision is the criminal defendant's right to

Leniency Letter 2-3 (2008), available at <http://www.justice.gov/atr/public/criminal/239524.pdf> [hereinafter Model Corporate Conditional Leniency Letter]; see also U.S. Dep't of Justice, Antitrust Division, Model Individual Conditional Leniency Letter (2008), available at <http://www.justice.gov/atr/public/criminal/239526.pdf>.

⁵⁹ See CORPORATE LENIENCY POLICY, *supra* note 51, at 4 ("If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation.")

⁶⁰ See U.S. DEP'T OF JUSTICE, ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 24-27 (2008), available at <http://www.justice.gov/atr/public/criminal/239583.pdf>; Model Corporate Conditional Leniency Letter, *supra* note 58, at 1.

⁶¹ DEP'T OF JUSTICE ANTITRUST DIV. GRAND JURY MANUAL, I-2-I-7 (1991), available at <http://www.justice.gov/atr/public/guidelines/206542.pdf>.

⁶² *Id.*

⁶³ These procedures are required under the Sixth Amendment of the United States Constitution. See U.S. CONST. amend. VI; see also Wils, *supra* note 19, at 124.

⁶⁴ Wils, *supra* note 19, at 124.

confront and cross-examine the prosecution's witnesses at trial.⁶⁵ This right is buttressed by criminal and procedural sanctions for untruthful witness practices.⁶⁶ One recent and notable case, *United States v. Stolt-Nielsen S.A.*, demonstrates the necessity of these procedural safeguards.⁶⁷

a. Constitutional Safeguards—The Right of Confrontation

The Constitution of the United States enshrines a panoply of rights for criminal defendants at trial.⁶⁸ These rights form the procedural backbone of the adversarial system, one which presumes the innocence of defendants and includes both a jury and “a judge who does not . . . conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”⁶⁹ One of the key facets of the adversarial system in the United States is the right of a defendant to confront and cross-examine witnesses against him or her. The Supreme Court has held this right to exist in the Fifth, Sixth, and Fourteenth Amendments to the Constitution.⁷⁰

First, the Sixth Amendment Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him”⁷¹ Centuries of Supreme Court case law have interpreted this clause as requiring “an opportunity for cross-examination by defense counsel in front of the jury, ordinarily with the defendant and the witness both in the courtroom.”⁷² The Confrontation Clause serves a number of purposes, reflecting a cold view of the inquisitorial practices of

⁶⁵ U.S. CONST. amend. VI.

⁶⁶ These protections are both statutory and contractual. *See, e.g.*, 18 U.S.C. § 401-02, 1503, 1621, 1623 (2006); *see also* Model Corporate Conditional Leniency Letter (2008), <http://www.justice.gov/atr/public/criminal/239524.pdf>.

⁶⁷ *United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 609 (E.D. Pa. 2007); *see discussion infra* Part I.B.3.c.

⁶⁸ *See* U.S. CONST. amends. V, VI. These rights include the right against self-incrimination, the right to a speedy and public trial, the right to an impartial jury, and the right of the accused to confront adverse witnesses. *Id.*

⁶⁹ *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

⁷⁰ U.S. CONST. amend. V, VI, XIV; *Crawford v. Washington*, 541 U.S. 36 (2004); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁷¹ U.S. CONST. amend. VI.

⁷² David A. Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1635, 1645 (2009).

Continental Europe (and their brief use in England), and effectuating important practical objectives.⁷³ First, the Confrontation Clause, together with its attendant right to cross-examination, serves as a shield against inquisitorial practices that were commonplace in medieval and renaissance England.⁷⁴ These practices were first introduced through the English Marian bail and committal statutes, under which justices of the peace, acting both as investigators and prosecutors, were required to interrogate suspects and witnesses *ex parte* in order to determine whether to discharge or commit the suspects until trial.⁷⁵ The results of these examinations were certified in court, and while they were not originally intended to serve as evidence against the defendant at trial, over time that practice began to invade the adversarial system.⁷⁶

The danger of these practices came into clear view during the trial of Sir Walter Raleigh in 1603.⁷⁷ There, the defendant Raleigh was tried for treason based on the *ex parte*, signed confession of his alleged accomplice, Lord Cobham, who had been imprisoned.⁷⁸ Because Cobham later retracted his

⁷³ *Crawford*, 541 U.S. at 51.

⁷⁴ *Id.* at 44-45; Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 569-70 (1992) (“With the ascent of the Tudors, the English crown began to exercise more control over its enemies by importing techniques from the civil law in to the indigenous, essentially accusatorial, system of criminal procedure. Criminal proceedings took on a more inquisitorial slant with the use of preliminary examinations and increased reliance on prerogative courts . . . During the sixteenth and seventeenth centuries, justices of the peace conducted preliminary examinations in ordinary criminal proceedings at common law. The justices—government officials who exercised police, administrative and judicial functions—privately interrogated the suspect, his accusers, and the witnesses against him. These examinations were then introduced into evidence to the detriment of the defendant who had neither the assistance of counsel nor the ability to call witnesses on his behalf In cases of great political importance, however, the Privy Council, or the judicial members of the Council, examined the suspect and the other witnesses. At trial, proof usually consisted of reading statements that had been made out of court, such as depositions, confessions of accomplices, and letters. In his history of the common law, Stephen concluded that this prosecution on the basis of written statements ‘occasioned frequent demands by the prisoner to have his “accusers,” *i.e.* the witnesses against him, brought before him face to face.”) (internal citations omitted).

⁷⁵ *Crawford*, 541 U.S. at 44-45.

⁷⁶ *Id.* However, some commentators have challenged the Court’s historical accuracy on this point. *See, e.g.*, Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 107-08 (2005); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 224 (2005).

⁷⁷ *Crawford*, 541 U.S. at 44.

⁷⁸ *See generally* 1 CRIMINAL TRIALS 389-520 (David Jardine ed., 1850).

confession, Raleigh argued that the confession should not be used against him, and demanded to have Cobham brought before the court, believing that Cobham would not corroborate his previous confession in open court with Raleigh present.⁷⁹ The Court refused this request and sentenced Raleigh to death.⁸⁰ The public viewed this refusal as an egregious perversion of common law procedure, and it ultimately spurred the institution of the protective procedural rights of confrontation and cross-examination both in England and the early United States.⁸¹

However, while some commentators have asserted that the purpose of the Confrontation Clause in American jurisprudence ends with “anti-inquisitorialism,”⁸² in fact, the clause finds solid grounding in practical objectives well-served by the rights.⁸³ These purposes include the ability to test the perception and memory of a witness; the ability of the trier of fact to view a witness’ “demeanor and language” when subjected to questioning; the ability to focus a witness’ testimony on key issues or discrepancies; the ability to immediately challenge a witness’ story; and the ability to reveal potential biases in a witness’ account.⁸⁴ At its core, the Confrontation Clause is “designed to promote the truth.”⁸⁵

⁷⁹ At the trial, Raleigh stated, “It is now clear that he hath since retracted; therefore since his accusation is recalled by himself, let him now by word of mouth convict or condemn me.” *Id.* at 434.

⁸⁰ *Crawford*, 541 U.S. at 44.

⁸¹ *Id.* at 44, 47-48; see also Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk”*, 14 WIDENER L. REV. 427, 429-30 (2009) (“Langbein found cross-examination to be a necessary . . . response to three occurrences in the English trial system: the growing use of lawyers to present prosecutions in both the investigative and trial stages; the reward system that offered bounties to those who provided testimony establishing that a crime reached the severity (or degree of financial loss) to qualify as a felony and thus invited fraudulent testimony, the corrupt motive of which required cross-examination as an antidote; and the crown witness system for obtaining accomplice evidence in gang crimes, a prosecutorial technique that created further risks of perjured testimony.”) (citing JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 246 (2003)).

⁸² Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 694 (1996) (describing the history behind the Confrontation Clause as one “born of revulsion against trial by affidavit.”); see also Sklansky, *supra* note 72, at 1688-94.

⁸³ *Davis v. Alaska*, 415 U.S. 308, 316-17 n.4 (1974); Amar, *supra* note 82, at 688; Berger, *supra* note 74, at 560-61; Fred O. Smith, *Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause*, 60 STAN. L. REV. 1497, 1518 (2008).

⁸⁴ *Davis*, 415 U.S. at 316; Smith, *supra* note 83, at 1518.

⁸⁵ Amar, *supra* note 82, at 649, 688.

Recently, the Supreme Court clarified the meaning of the Confrontation Clause in a series of groundbreaking cases,⁸⁶ beginning with *Crawford v. Washington*.⁸⁷ In *Crawford*, the Court relied on American and English common law to reach an understanding of the Confrontation Clause intended to reflect its original meaning.⁸⁸ Specifically, the Court held that “testimonial” hearsay statements,⁸⁹ when made by a witness who is not present at trial, are inadmissible as evidence unless (1) the witness is unavailable and (2) the defendant previously had the opportunity to cross-examine the witness.⁹⁰ The Court broadly defined a “witness” as any person who “bears testimony,” and further defined testimony as “typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁹¹ As a result, the *Crawford* standard rejected the test set forth in an earlier case, *Ohio v. Roberts*, which admitted hearsay statements of witnesses not available for cross-examination so long as those statements bore sufficient “indicia of reliability.”⁹² In overruling *Roberts*,

⁸⁶ *Melendez-Diaz v. Mass.*, 129 S. Ct. 2927 (2009); *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford*, 541 U.S. at 44-45.

⁸⁷ *Crawford*, 541 U.S. at 44-45.

⁸⁸ *Id.* at 43-50. Although some critics have called into question the accuracy and rigor of the majority’s historical analysis, see, e.g., Davies, *supra* note 76, at 114-20, the purpose of recounting the history and holding of *Crawford* here is solely to highlight the dangers of inquisitorialism that the opinion addresses, and the ways in which it attempts to formulate a confrontation framework that protects against those dangers.

⁸⁹ “Hearsay” is defined in U.S. federal law as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” FED. R. EVID. 801(c).

⁹⁰ *Crawford*, 541 U.S. at 68.

⁹¹ *Id.*; see also Sklansky, *supra* note 72, at 1646 (“Introducing evidence of an out-of-court accusation from someone who never testifies raises some of the same concerns as examining a witness outside the defendant’s presence: in either case the defendant has no opportunity to cross-examine the accuser in front of the jury.”).

⁹² *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) (“[W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”). Notably, and most egregiously, in the years leading up to the *Roberts* decision, a number of appellate circuits extended the so-called “residual” hearsay exception, FED. R. EVID. 807, to admit grand jury testimony of witnesses who did not testify at trial. Berger, *supra* note 74, at 610 (in describing the dangers of this practice in the context of prosecutorial overreach, Professor Berger stated the following: “[A]dmitting grand jury testimony by a now-unavailable declarant pursuant to the residual hearsay exception . . . is clearly incompatible with a prosecutorial restraint interpretation of the Confrontation Clause. These statements are elicited, and often prepared, by the prosecutor. It is difficult to imagine why the statement of

the *Crawford* Court argued that “[r]eliability is an amorphous, if not entirely subjective, concept,”⁹³ such that the *Roberts* test is “permanently” unpredictable and does not adequately conform to the purposes of the Confrontation Clause.⁹⁴ Thus, despite the criticism of the *Crawford* majority’s originalist interpretation of the Confrontation Clause, commentators have praised the majority’s “more principled” approach.⁹⁵

The applicability and necessity of cross-examination have also been recognized in the context of civil and administrative hearings, grounded in the Fifth and Fourteenth Amendment Due Process Clauses.⁹⁶ In *Goldberg v. Kelly*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment required “the opportunity to be heard;” that is, a hearing “at a meaningful time and in a meaningful manner.”⁹⁷ Additionally, the Court noted that “[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”⁹⁸ Later, in *Mathews v. Eldridge*, the Court further clarified the *Goldberg* standard in the context of the Fifth Amendment, creating a test under which courts balance three factors to determine whether procedural safeguards in a given case are sufficient; namely, (1) “the

Cobham put before a grand jury would differ significantly in the content from the accusation he made against Sir Walter Raleigh. The prosecutor has an incentive to lean on the prospective witness to shape the grand jury testimony in accordance with the prosecution’s theory of the case in order to secure an indictment and to freeze the witness’s story as much as possible.”)

⁹³ *Crawford*, 541 U.S. at 63.

⁹⁴ *Id.* at 68 n.10.

⁹⁵ Robert M. Pitler, Symposium, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of its Past: Introduction*, 71 BROOK. L. REV. 1, 33-34 (2005) (“[M]uch to its credit, the *Crawford* majority focuses on statements secured by law enforcement interrogation of individuals who respond with testimony-bearing statements. The introduction of such statements at trial and the defendant’s inability to cross-examine the absent declarant are a core concern of the Confrontation Clause. Thus, centering analysis on practices that are modern-day counterparts to the abuses targeted by the Clause is particularly appropriate [T]he categorical exclusion of testimonial statements absent cross-examination of the declarant surely should prove a more principled, and less subjective approach than, and without the ‘unpardonable vice’ of, the *Roberts* indicia of reliability framework.”); Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 BROOK. L. REV. 297, 297 (2005) (“I applaud the change from *Ohio v. Roberts* to *Crawford v. Washington*.”).

⁹⁶ U.S. CONST. amend. V, XIV § 1.

⁹⁷ *Goldberg*, 397 U.S. at 267-68 (1970) (explaining that in the context of termination of benefits, an administrative procedure, such as a hearing, requires “timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.”) (emphasis added).

⁹⁸ *Id.* at 269.

private interest that will be affected by official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁹⁹ As such, whether or not a strict, incarceratory liberty interest is involved, the American system constitutionally recognizes the need for confrontation and cross-examination in judicial proceedings.

b. Statutory and Policy-based Protections

Defendants’ rights are also protected through statutory and contractual provisions designed to ensure witness truth-telling.¹⁰⁰ First, the Federal Rules of Evidence (“Federal Rules”) provide a number of protections for defendants in criminal and civil cases, including (1) a requirement that all witnesses must swear or affirm to “testify truthfully,”¹⁰¹ and (2) rules bearing on hearsay testimony, which bar out-of-court statements offered for the truth of those statements absent one of the enumerated exceptions to or exemptions from the Federal Rules.¹⁰² Furthermore, non-evidentiary statutory law prohibits perjury, the making of false statements or declarations, actions in contempt of court, and obstruction of justice.¹⁰³ Lastly, in the cartel enforcement context, the Division’s leniency agreements include contractual requirements of witness appearance and truthfulness as conditions of leniency.¹⁰⁴ The practical effect of these statutory rules and contractual provisions in the context

⁹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁰⁰ *See, e.g.*, 18 U.S.C. §§ 401-02, 1503 1621, 1623 (2006).

¹⁰¹ FED. R. OF EVID. 603 (“Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”).

¹⁰² FED. R. EVID. 801-07.

¹⁰³ *See, e.g.*, 18 U.S.C. §§ 401-402, 1503 1621, 1623.

¹⁰⁴ For example, the Division’s Model Conditional Leniency Agreements note that witnesses:

when called upon to do so by the United States, [testify] in trial and grand jury or other proceedings in the United States, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503-1521), in connection with the anticompetitive activity being reported.

of the Division's leniency program is to strongly discourage leniency applicants from providing false or misleading testimony, to penalize those corporations and individuals who seek to obtain leniency or punish co-conspirators through dishonesty, and to ensure compliance with the above-mentioned constitutional provisions, including the Confrontation Clause.¹⁰⁵ In fact, the Division has used allegedly untruthful statements as a basis for revoking conditional leniency, as in the case of *United States v. Stolt-Nielsen S.A.*¹⁰⁶ However, the true lesson of *Stolt-Nielsen* lies in its revelation of both the pervasiveness of witness dishonesty and the necessity of a right of confrontation in cartel proceedings.

c. The Case of United States v. Stolt-Nielsen S.A.

The necessity for the right of a defendant to confront adverse witnesses has been demonstrated clearly and recently in the cartel enforcement context. In 2003, the Antitrust Division revoked conditional leniency from Stolt-Nielsen S.A., a Norwegian company involved in a cartel within the bulk chemical shipping industry.¹⁰⁷ The Division's revocation was grounded in the allegations of co-conspirators who had been successfully prosecuted on the basis of evidence contained within Stolt-Nielsen's leniency application to U.S. antitrust authorities.¹⁰⁸ These co-conspirators alleged that Stolt-Nielsen had failed to take "prompt and effective action" to terminate its involvement in the conspiracy after it first discovered the anti-competitive activity.¹⁰⁹ Following a series of civil proceedings challenging the revocation of leniency,¹¹⁰ the Division indicted Stolt-Nielsen for its self-reported Sherman Act violations.¹¹¹ However, the district court dismissed the indictment, finding after an evidentiary hearing that the Division's allegations that Stolt-Nielsen breached the leniency agreement were meritless,

¹⁰⁵ Hammond, Summary Overview, *supra* note 49, at 5.

¹⁰⁶ *United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 609 (E.D. Pa. 2007).

¹⁰⁷ *Id.* at 614.

¹⁰⁸ *Id.* at 614, 623.

¹⁰⁹ *Id.* at 616.

¹¹⁰ Stolt-Nielsen had successfully sought to enjoin the Division from revoking leniency. *Stolt-Nielsen S.A. v. United States*, 352 F. Supp. 2d 553, 555 (E.D. Pa. 2005). However, the Third Circuit reversed the district court's ruling, *Stolt-Nielsen S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006), after which the Division filed its indictment.

¹¹¹ *Stolt-Nielsen*, 524 F. Supp. 2d at 615.

and therefore that the Division's revocation of leniency and subsequent prosecution was improper.¹¹² Importantly, the court found that the testimony of the Division's witnesses—the cooperating co-conspirators—lacked credibility.¹¹³

First, the court noted that each of the witnesses had a strong motive to lie to the Division in exchange for leniency in their own criminal sentences.¹¹⁴ Second, when confronted on cross-examination, the witnesses' were not credible and were repeatedly impeached.¹¹⁵ The Division witnesses' testimonies were self-contradictory and riddled with material misstatements of fact, which appeared both in the live testimony and in sworn grand jury statements.¹¹⁶ Absent the right to cross-examine these government witnesses, it is unlikely that Stolt-Nielsen would have been able to prevail in its motion, and could have faced extraordinary fines and prison terms based almost entirely on the false testimony of its co-conspirators.¹¹⁷ The case of *Stolt-Nielsen* highlights the acute danger of using the out-of-court statements of co-conspirators—even when sworn—to establish cartel violations, as well as the unassailable value of cross-examination in the antitrust context.

¹¹² *Id.* at 628.

¹¹³ *Id.* at 623.

¹¹⁴ *Id.* (“Each witness . . . had a strong motive to seek leniency from the Division and to retaliate against a competitor that had implicated him in a criminal conspiracy.”).

¹¹⁵ *Id.* at 623-27. When discussing the credibility of co-conspirator Hugo Finlay, the court noted that he “was impeached repeatedly with prior inconsistent sworn testimony,” first denying knowledge of the conspiracy “despite the fact that he had actively participated in it.” *Id.* at 624. In addition, when confronted about allegations he had made with regard to an anticompetitive *quid pro quo* agreement, Finlay “conceded on cross-examination that he had no personal knowledge of such a *quid pro quo*.” *Id.* With respect to another co-conspirator witness, Jarle Haugsdal, the court noted that Haugsdal had “provided repeated false accounts” about his company’s role in the conspiracy in his plea agreement, and that his “sworn grand jury declaration . . . was replete with material misstatements of fact.” *Id.* at 624-25. Furthermore, “[w]hen confronted with the inconsistencies, Haugsdal was uncertain how or by whom his declaration was prepared.” *Id.* at 625. Moreover, while cooperating witness Erik Nielsen testified “[o]n direct examination . . . that Stolt-Nielsen continued to participate in the conspiracy after [it discovered the anticompetitive conduct], when confronted with examples of vigorous post-March 2002 competition, Nielsen conceded that it was not ‘business as usual,’ [*i.e.* anticompetitive,] and repeatedly disavowed familiarity with the business,” stating that he “was not involved at all,” and “not familiar at all with these matters.” *Id.* at 626. Finally, and most incredibly, one cooperating witness, Bjorn Sjaastad, stated that “he was not aware that his conduct was illegal until he read [a newspaper] article reporting on antitrust violations in the parcel-tanker industry.” *Id.*

¹¹⁶ *See id.* at 623-27.

¹¹⁷ *Id.* at 623.

II. THE EUROPEAN COMMISSION APPROACH TO CARTEL ENFORCEMENT

Similarly to the United States, the EU has had a significant history of cartel enforcement, animated from the start by the need to protect the European common market.¹¹⁸ Cartel enforcement falls within the purview of the EC, an “integrated” administrative agency within the EU that performs its own investigations, regulatory enforcement, and adjudications.¹¹⁹ Investigations typically begin either with a customer complaint sent to the EC,¹²⁰ *ex officio*,¹²¹ or through an application for leniency.¹²² The investigatory stage of cartel enforcement in the EC is conducted by the Directorate General for Competition (“DG Competition”).¹²³ These investigations use aggressive techniques inspired by American criminal cartel enforcement, and increasingly rely on oral evidence gathered in leniency applications and raids on targeted individuals and businesses.¹²⁴ Upon a determination that there is sufficient evidence to prosecute undertaking party, the DG Competition case team prepares a “Statement of Objections,” which outlines the factual bases for the violation alleged.¹²⁵

The filing of a Statement of Objections triggers a series of procedural “rights of defense” for the alleged infringers, including the “right of access” to the DG Competition case file

¹¹⁸ Directorate General for Competition, European Commission, <http://ec.europa.eu/dgs/competition/mission/> (last visited Apr. 20, 2010) (“The mission of the Directorate General for Competition (DG Competition) is to enable the Commission to make markets deliver more benefits to consumers, businesses and the society as a whole, by protecting competition on the market and fostering a competition culture. We do this through the enforcement of competition rules and through actions aimed at ensuring that regulation takes competition duly into account among other public policy interests.”).

¹¹⁹ Michael Trebilcock & Edward Iacobucci, *Designing Competition Law Institutions*, 25 *WORLD COMPETITION L. & ECON. REV.* 361, 380-83 (2002).

¹²⁰ DG COMPETITION, BEST PRACTICES ON THE CONDUCT OF PROCEEDINGS CONCERNING ARTICLES 101 and 102 TFEU 6 (2010), http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf [hereinafter BEST PRACTICES].

¹²¹ *Id.* at 6-7 (“The Commission may also open a case on its own initiative (*ex officio*), for instance when certain facts have been brought to its attention, or further to information gathered in the context of sector enquiries, informal meetings with industry or the monitoring of markets, or on the basis of information exchanged within the European Competition Network . . .”).

¹²² *Id.* at 7.

¹²³ BEST PRACTICES, *supra* note 120, at 6-17; Aslam & Ramsden, *supra* note 7, at 61; VAN BAEL & BELLIS, *COMPETITION LAW OF THE EUROPEAN COMMUNITY* § 10.10 (2004).

¹²⁴ Forrester, *supra* note 7, at 833.

¹²⁵ BEST PRACTICES, *supra* note 120, at 18.

and the “right to be heard” by the Commission.¹²⁶ The primary catalysts for these procedural developments have come from common law Member States, the United States, and the European appellate courts, specifically the Court of First Instance (“CFI”)¹²⁷ and the European Court of Justice (“ECJ”).¹²⁸ Ultimately, these procedural rights were formalized in EC Regulations 1/2003 and 773/2004, which represent a convergence of the procedural safeguards in the EU and those of adversarial criminal justice systems in the United States and elsewhere.¹²⁹ However, despite the fact that the EC has continually improved the defensive rights of accused entities, it has neglected to impose one fundamental and necessary right: the right of confrontation.¹³⁰

A. *Competition Law and Procedure in the EU*

The EU prohibits anticompetitive conduct in Article 101 of the Treaty on the Functioning of the European Union (“TFEU”).¹³¹ Specifically, Article 101(1) prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”¹³² An “undertaking,” for the purposes of Article 101, covers a broad array of entities,

¹²⁶ Michael Asimow & Lisl Dunlop, *The Many Faces of Administrative Adjudication in the European Union*, 61 ADMIN. L. REV. 131, 144 (2009); David E. Shipley, *Due Process Rights Before EU Agencies: The Rights of Defense*, 37 GA. J. INT’L L. 1, 32 (2008) (“The formal commencement of a procedure by the communication of a statement of objections triggers the right to be heard . . .”).

¹²⁷ With the passage of the Lisbon Treaty, the CFI is now entitled the “General Court;” however, because the pre-Lisbon decisions and authorities cited here refer to the “CFI,” this note will refer to the court by its former name. See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, art. 2, O.J. C 306/1, at 43 (2007).

¹²⁸ EC decisions are subject to judicial review by the CFI on issues of fact and law, and further subject to legal review before the ECJ. Carl Baudenbacher, *Judicialization of European Competition Policy*, in ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 354 (B. Hawk, ed. 2003); Asimow & Dunlop, *supra* note 126, at 146.

¹²⁹ Asimow & Dunlop, *supra* note 126, at 144.

¹³⁰ IAN S. FORRESTER & ASSIMAKIS P. KOMNINOS, AM. BAR ASSOC. EUROPEAN UNION ADMIN. LAW PROJECT, EU ADMINISTRATIVE LAW: COMPETITION LAW ADJUDICATION 63, http://www.abanet.org/adminlaw/eu/SectRptAdj-Competition-Komninos_spring2006.pdf.

¹³¹ Treaty on the Functioning of the European Union, *supra* note 8, at 88.

¹³² *Id.*

including all legal and natural persons participating in economic or commercial activity.¹³³

Regulation 1/2003 sets forth the rules related to the enforcement of Article 101, and delegates enforcement responsibility both to the EC through the DG Competition and to Member States of the European Union.¹³⁴ Under this regulation, the EC has the authority to “impose on [infringing undertakings] any behavioral or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement to an end.”¹³⁵ The EC is also authorized through Regulation 1/2003 to impose penalties—specifically and exclusively fines¹³⁶—on offending undertakings.¹³⁷ These fines have exceeded 13 billion euros over the last 15 years.¹³⁸ Finally, under Article 230(1) of the EC Treaty, decisions made

¹³³ See Simon Holmes & Philipp Girardet, *European Union*, THE INT’L COMP. LEGAL GUIDE TO CARTELS & LENIENCY 66, 66 (2009).

¹³⁴ Regulation No. 1/2003, art. 11-24, O.J. L 1/1, at 10-18 (2003) [hereinafter Regulation 1/2003].

¹³⁵ *Id.* at 9. However, before the Commission may issue a decision regarding an undertaking, it must consult the Advisory Committee on Restrictive Practices and Dominant Positions (the “Advisory Committee”), which is comprised of representatives of Member States and prepares opinions on draft Commission decisions. The Commission must consider the opinions of the Advisory Committee with the “utmost account” in preparing a final decision. *Id.*

¹³⁶ Baudenbacher, *supra* note 128, at 354. In fact, the Commission has asserted its non-criminal character expressly “because it did not want Article 6 of the European Human Rights convention to be applied to it.” *Id.* Under Article 6 of the ECHR:

[e]veryone charged with a criminal offence has the following minimum rights: (a) to be informed promptly . . . of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (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; [and] (e) to have the free assistance of an interpreter if he cannot understand or speak the language of the court.

Slater et al., *supra* note 7, at 4 n.10.

¹³⁷ The regulation states that the Commission may impose fines up to 10% of the undertaking’s “total turnover” in the previous business year in the event that the undertaking has infringed Article 101 or contravened an “interim measure” imposed upon the undertaking, or if the undertaking has failed to comply with a commitment it has made in response to a preliminary finding of infringement. Regulation 1/2003, *supra* note 134, art. 23, at 16-17.

¹³⁸ EUROPEAN COMMISSION, OFFICIAL STATISTICS ON EC FINES [hereinafter EC FINE STATISTICS], available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (last updated Oct. 7, 2009).

by the EC are subject to appellate judicial review by the CFI and ECJ.¹³⁹

B. Sources of Oral Evidence in EC Cartel Cases

The EC utilizes a multifarious approach to investigation and evidence-gathering that is heavily influenced by the American model.¹⁴⁰ While in the past the Commission's evidence was limited, to a large extent, to documentary evidence, its modern approach increasingly relies on oral evidence gathered from (1) the EC Leniency Program and (2) its investigations. As explained below, this modern approach bears heavily on the adequacy of EC procedural fairness.

1. The EC Leniency Program and Paperless Applications

The first source of oral evidence in EC cartel cases arises in the form of oral applications for leniency, which were introduced in the EC's 2002 revision to its 1996 Leniency Program.¹⁴¹ The program was revised in 2002 and then again in 2006 "because [the EC] wanted it to be more attractive and . . . closer to the American program."¹⁴² The current leniency program—outlined in the EC's "Leniency Notice"—provides conditional immunity from fines to the first undertaking that approaches the Commission with evidence of cartel activity.¹⁴³ This evidence must be in the form of a corporate statement that is sufficient to allow the Commission (1) to "carry out a targeted inspection in connection with the alleged cartel" ("Point 8(a) Immunity"),¹⁴⁴ or (2) to "find an infringement of

¹³⁹ See Holmes & Girardet, *supra* note 133, at 67.

¹⁴⁰ *International Cartels Roundtable*, *supra* note 19, at 100.

¹⁴¹ Joshua, *supra* note 26, at 16.

¹⁴² *International Cartels Roundtable*, *supra* note 19, at 100; see WILLIAM E. KOVACIC, FTC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 166 n.799 (2008), available at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf> (last visited Mar. 13, 2010).

¹⁴³ *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, ¶ 8(a), 2006 O.J. (C 298) 18 [hereinafter *Commission Notice*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>.

¹⁴⁴ *Id.* ¶ 8(a). In order to qualify for Point 8(a) Immunity, the applying undertaking must approach the Commission before it has "sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection." *Id.* ¶ 10. Furthermore, the leniency notice provides that an applicant for 8(a) Immunity must provide the Commission with (a)

Article [101 TFEU] in connection with the alleged cartel” (“Point 8(b) Immunity”).¹⁴⁵ Additionally, the Leniency Notice provides fine reduction for subsequent applicants that provide “significant added value” to the EC’s investigation, defining “added value” with reference to “the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission’s ability to prove the alleged cartel.”¹⁴⁶ As in the United States, all applicants must meet a series of preconditions designed to ensure cooperation with the EC, evidence preservation, and effective and immediate withdrawal from the conspiracy.¹⁴⁷

Corporate statements made for leniency purposes may be submitted either in written or oral form.¹⁴⁸ Oral statements were first allowed in the 2002 revision to the Leniency Notice, a modification encouraged by American lawyers as a means of protecting applicants from U.S. civil antitrust lawsuits brought by customers, indirect purchasers, consumers, and others.¹⁴⁹ In

evidence in the form of a “corporate statement” and (b) other evidence, including contemporaneous evidence of the conspiracy available to the applicant. *Id.* ¶ 9.

¹⁴⁵ *Id.* ¶ 8(b). Where the EC has already initiated an investigation into cartel conduct without recourse to a Point 8(a) Immunity applicant, a cartel participant may qualify for Point 8(b) Immunity if it is “the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement containing the kind of information . . . which would enable the Commission to find an infringement of Article [101 TFEU].” *Id.* ¶ 11.

¹⁴⁶ *Id.* ¶ 25, at 20.

¹⁴⁷ *Id.* ¶ 12, at 18. First, the applicant must cooperate “genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission’s administrative procedure.” *Id.* ¶ 12(a). Second, the applicant must have ended “its involvement in the alleged cartel immediately following its application, except for what would, in the Commission’s view, be reasonably necessary to preserve the integrity of the inspections.” *Id.* ¶ 12(b), at 19. Third, the applicant “must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities.” *Id.* ¶ 12(c). The last requirement outlined in the Leniency Notice concerns the applicant’s role within the cartel; namely, the applicant must not have coerced any other co-conspirator to join or remain a part of the cartel. *Id.* ¶ 13.

¹⁴⁸ *Id.* ¶ 9(a), at 18 n.2.

¹⁴⁹ Bertus van Barlingen & Marc Barennes, *The European Commission’s 2002 Leniency Notice in Practice*, 3 EUR. COMPETITION NEWSL. 6, 8 (2005) (“[T]he Commission allows [oral leniency applications] . . . in order to ensure that by making an application under the Commission’s Leniency Notice, undertakings are not worse off than non-cooperating cartel members in respect of civil procedures for damages.”); Joshua, *supra* note 26, at 14 (explaining that “[t]he exposure arises from the mathematical certainty that any announcement of an antitrust investigation in the US will trigger a welter of expensive and burdensome treble damages claims.”); 2003 FORDHAM CORP. L. INST 120 (ed. Barry Hawk 2004) (As Olivier Guersent, the former DG Competition noted, “[W]hat we want to protect from discovery is this very incriminating document that the applicants assemble for the Commission, and that is basically a roadmap to these documents. . . . We do believe these types of document [sic] should not be disclosed in civil trials because if they are, then they unbalance the

this so-called “paperless” procedure, the applicant or its attorneys may recite the relevant facts required for leniency onto a tape, which becomes “original evidence” added to the investigation file.¹⁵⁰ After the applicant delivers its oral testimony, it will be “granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission’s premises[,] and to correct the substance of their oral statements within a given time limit.”¹⁵¹ The EC shields the oral statement transcripts from discovery during the course of the investigation, and maintains unattested transcripts as an “internal resource” such that they are not discoverable either with the Statement of Objections or to civil plaintiffs.¹⁵² However, while protected from civil discovery, these oral statements are considered “evidence” in cartel cases against co-conspirators,¹⁵³ a policy recognized both by the CFI¹⁵⁴ and by the EC.¹⁵⁵ Furthermore, and as more fully explicated below, Regulation No. 1/2003 allows EC competition case teams to “interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation,” including interviews during the course of the leniency application process.¹⁵⁶ However, these interviews are strictly voluntary, and the EC may not require individuals to give testimony under oath.¹⁵⁷

trial extremely severely, and it acts as an extreme disincentive to apply for immunity in the European Union.”).

¹⁵⁰ van Barlingen & Berennes, *supra* note 149, at 10. Originally, however, the oral statements were designed solely to gather “dawn raid sufficient” information. Julian Joshua, *The European Cartel Enforcement Regime Post-Modernization: How is it Working?*, 13 GEO. MASON L. REV. 1247, 1262 (2006) (“In the EC, however, the oral process has slipped from the provision of information sufficient to trigger a raid—that is, the information gathered is used as no more than a road map to the evidence—to being treated by the Commission as itself conclusive evidence of the violation.”).

¹⁵¹ *Commission Notice*, *supra* note 143, ¶ 32.

¹⁵² Joshua, *supra* note 26, at 15.

¹⁵³ van Barlingen & Berennes, *supra* note 149, at 8; Joshua, *supra* note 26, at 17.

¹⁵⁴ *JFE Eng’g Corp. v. Comm’n*, Joined Cases T-67/00, T-68/00, T-71/00 & T-78/00, 2004 E.C.R. II-2514, 2587 ¶ 192 (noting that “no provision or any general principle of Community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings”). Specifically related to oral statements, the court—deciding the issue based on the 1996 Leniency Notice—stated that informational evidence “need not necessarily be provided in documentary form.” *Tokai Carbon Co. Ltd. v. Comm’n*, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 & T-252/01, 2004 E.C.R. II-1181, ¶ 431.

¹⁵⁵ van Barlingen & Berennes, *supra* note 149, at 9.

¹⁵⁶ Regulation 1/2003, *supra* note 134, art. 19(1), at 14.

¹⁵⁷ BEST PRACTICES, *supra* note 120, at 12; Koen Lenaerts, *Some Thoughts on Evidence and Procedure in European Community Competition Law*, 30 FORDHAM INT’L L. J. 1463, 1469 (2007); Council Regulation No. 773, art. 3, 2004 O.J. (L 123) 20.

Thus, the leniency program involves two species of oral evidence, the applications and the interviews, neither of which is sworn or subject to cross-examination.¹⁵⁸

2. Investigation and Oral Interviews

The second source of oral evidence in EC cartel cases arises from investigations into alleged violations of European competition laws, as authorized under Regulation 1/2003.¹⁵⁹ First, where the EC has reason to believe that there is a distortion or restriction in the common market, it may investigate any specific industry or market with respect to the apparent distortion or restriction, and may request any necessary information from undertakings, including information related to “all agreements, decisions and concerted practices.”¹⁶⁰ Additionally, the EC may, by request or decision, “require undertakings and associations of undertakings to provide all necessary information” to assist with the investigation.¹⁶¹ In the event that an undertaking provides false or misleading information, or does not provide the requested information within the prescribed time limit, the undertaking may face a fine of up to 1% of its “total turnover in the preceding business year”¹⁶²

In practice, a team led by a DG Competition case manager will conduct the investigation into the alleged violations, which may include either a document request or a “dawn raid” on a targeted business.¹⁶³ Increasingly, investigations are spurred by leniency applications, which require “dawn raid sufficient” evidence.¹⁶⁴ During the course of

¹⁵⁸ Lenaerts, *supra* note 157, at 1468-69 (“The Commission is entitled to rely on these submissions in order to establish the existence of an infringement. Since the principle is that the evaluation of evidence should be unfettered, this type of evidence is admissible under Community competition law. However, in the administrative procedure, the Commission does not have the power to compel persons to give evidence under oath.”) (quoting *Rhône-Poulenc SA*, 1991 E.C.R. II-867, II-954) (Vesterdorf, J.).

¹⁵⁹ Regulation 1/2003, *supra* note 134, art. 17-22, at 13-16.

¹⁶⁰ *Id.* art. 17, at 13.

¹⁶¹ *Id.* art. 18(1), at 13.

¹⁶² *Id.* art. 23(1)(a)-(b), at 16.

¹⁶³ A dawn raid is an early morning, “on-the-spot” investigation of a business office or private residence conducted by EC officials—at times with the assistance of law enforcement from the member state—pursuant to Regulation 1/2003 Articles 18 through 21. See Asimow & Dunlop, *supra* note 126, at 156; Imran Aslam & Michael Ramsden, *EC Dawn Raids: A Human Rights Violation?*, 5 COMPETITION L. REV. 61, 65-67 (2008); Regulation 1/2003, *supra* note 134, art. 18-21, at 13-16.

¹⁶⁴ Joshua, *supra* note 9, at 4.

an investigation, “the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.”¹⁶⁵ Further, the case team may ask individuals to provide voluntary oral explanations of the documentary evidence it collects in connection with the dawn raids,¹⁶⁶ which may include searches of businesses, residences, and automobiles.¹⁶⁷ The testimonial evidence gathered in these interviews and explanations may be used as evidence in the Statement of Objections, and is not sworn or subject to cross-examination.¹⁶⁸

C. *Procedural Safeguards in the EC*

In the event that the DG Competition case team discovers violations in the course of an investigation, it may seek approval from the Legal Service and the Competition Commissioner, as well as a committee of European Member States, to outline a “Statement of Objections,” which includes (1) the charges against the undertaking and (2) the time limit for the undertaking to respond to the allegations.¹⁶⁹ Upon the filing of a Statement of Objections, the undertaking is afforded a series of procedural rights, including (1) the right to access the Commission’s file against the undertaking¹⁷⁰ and (2) the right to be heard in writing or at an oral hearing.¹⁷¹

1. The Right of Access to File

Parties subject to a Statement of Objections are “entitled to have access to the Commission’s file,” excepting business secrets and confidential information such as internal documents prepared by the EC and Member States of the EU.¹⁷² The right of access was first articulated in *Solvay v. Commission*, in which the CFI explained the purpose of the right; namely, “to enable addressees of statements of objections

¹⁶⁵ Regulation 1/2003, *supra* note 134, art. 19(1), at 14.

¹⁶⁶ Lenaerts, *supra* note 157, at 1469.

¹⁶⁷ Regulation 1/2003, *supra* note 134, art. 20-21, at 14-15.

¹⁶⁸ *Id.*

¹⁶⁹ BEST PRACTICES, *supra* note 120, at 18-19; Asimow & Dunlop, *supra* note 126, at 156.

¹⁷⁰ Shipley, *supra* note 1, at 39-43.

¹⁷¹ *Id.* at 36-39.

¹⁷² Regulation 1/2003, *supra* note 134, art. 27(2), at 19.

to examine evidence in the Commission's file so that they are in a position effectively to express their views on the conclusions reached by the Commission in its statement of objections on the basis of that evidence."¹⁷³ Furthermore, the Court outlined the "equality of arms" principle, which states that the information available to the Commission and the undertaking at issue must be equal.¹⁷⁴

2. The Right to Be Heard

The right to be heard was first outlined in *Transocean Marine Paint Ass'n v. Commission*, where the CFI noted that "a person whose interests are perceptibly affected by a [d]ecision taken by a public authority must be given the opportunity to make his point of view known."¹⁷⁵ Later, in *Hoffmann-La Roche & Co. v. Commission*, the CFI generalized the procedural rights of undertakings, stating that "the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim" of infringement.¹⁷⁶ The right to be heard is now formalized in Regulation 1/2003, which requires that, prior to making a decision with respect to an alleged violation of TFEU Article 101, the Commission must give the alleged violators an "opportunity to be heard" on the matters set forth in the Statement of Objections.¹⁷⁷

Oral hearings are conducted by a Hearing Officer independent of the investigative team.¹⁷⁸ The CFI has held that

¹⁷³ Case T-30/91, *Solvay SA v. Comm'n*, 1995 E.C.R. II-1775, 1802.

¹⁷⁴ Shipley, *supra* note 1, at 40.

¹⁷⁵ Case 17/74, *Transocean Marine Paint Ass'n v. Comm'n*, 1974 E.C.R. 1062, 1079-80.

¹⁷⁶ Case 85/76, *Hoffmann-La Roche & Co. v. Comm'n*, 1979 E.C.R. 461, 512.

¹⁷⁷ The hearing procedures themselves are more fully explained in a subsequent, clarifying regulation, Regulation 773/2004, which states that the parties must be given an "opportunity to develop their arguments at an oral hearing" prior to the Commission consulting with the Advisory Committee. Commission Regulation No. 773/2004, art. 12, 2004 O.J. (L 123) 21 (EC) [hereinafter Regulation 773/2004]; Regulation 1/2003, *supra* note 134, art. 12, at 19; *Joined Cases 100-103/80, SA Musique Diffusion Francaise v. Comm'n*, 1983 E.C.R. 1825, 1881-84; Shipley, *supra* note 1, at 36.

¹⁷⁸ Regulation 773/2004, *supra* note 177, art. 14(1), at 21 ("Hearings shall be conducted by a Hearing Officer in full independence."); *Committee Decision of 23 May 2001 on the Terms of Reference of Hearing Officers in Certain Competition Proceedings*, 2001 O.J. (L 162) 21 ("The conduct of administrative proceedings should therefore be

these hearings are “adversarial” in nature, and each hearing generally follows these steps: (1) the Commission presents its case, (2) the defending parties and any relevant third parties present their case in response to the statement of objections, (3) representatives of the Member States and the Commission may ask questions regarding the arguments presented in the defending parties’ presentations, and (4) the Hearing Officer may provide the parties with an opportunity to make brief, concluding remarks relating to issues previously discussed during the hearing.¹⁷⁹ Additionally, EC competition hearings are recorded.¹⁸⁰

During its presentation to the Commission, a defending party has the right to submit testimony in response to the Statement of Objections, may call on its own fact and expert witnesses, and may submit questions to the Hearing Officer, who then has the discretion to put the questions to Commission witnesses.¹⁸¹ However, unlike in adversarial systems such as the United States, parties in hearings before the European Commission “do not have the right to cross-examine the Commission, other parties (co-defendants) or third persons whose testimony is heard at the hearing,” and “[t]he Commission does not cross-examine the parties, but it may question them after the presentation with respect to their oral

entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings.”). As the EC states:

The hearing officer brings a new pair of eyes to trade proceedings and is fully impartial. As an official of DG Trade experienced in trade issues, he has a thorough knowledge of the system from the inside, but is not involved in ongoing investigations or conducting trade proceedings himself. The hearing officer is independent from the Commission investigators and receives no instructions from them about his substantial role.

DIRECTORATE-GENERAL FOR TRADE, EUROPEAN COMM’N, HEARING OFFICER PRACTICAL INFORMATION, *available at* http://ec.europa.eu/trade/tackling-unfair-trade/hearing-officer/practical-information/index_en.htm (last visited Mar. 13, 2010); *see also* Forrester, *supra* note 7, at 834.

¹⁷⁹ *See* DIRECTORATE-GENERAL FOR COMPETITION, EUROPEAN COMM’N, THE HEARING OFFICERS: GUIDANCE ON PROCEDURES OF THE HEARING OFFICERS IN PROCEEDINGS RELATING TO ARTICLES 101 AND 102 TFEU (EX- ARTICLES 81 AND 82 EC) 11-15 (2010) [hereinafter DG COMPETITION, THE HEARING OFFICERS], http://ec.europa.eu/competition/consultations/2010_best_practices/hearing_officers.pdf; *see also* Forrester & Komninos, *supra* note 130, at 61; Regulation 773/2004, *supra* note 177, art. 14, at 21-22.

¹⁸⁰ THE HEARING OFFICER, EUROPEAN COMM’N, INFORMATION ON THE ORAL HEARING TO WHICH YOU ARE INVITED 3, *available at* http://ec.europa.eu/competition/hearing_officers/info2.pdf (last visited June 26, 2010).

¹⁸¹ Forrester & Komninos, *supra* note 130, at 61.

submissions.”¹⁸² After the hearing, the Hearing Officer is responsible for preparing an interim and final report¹⁸³ for the College of Commissioners, which then decides whether to impose penalties on the defending undertaking.¹⁸⁴ Thus, while “[t]he procedure in [EC competition cases] comes very close to the full evidentiary hearing of the type required by . . . *Goldberg v. Kelly*,” the lack of cross-examination—especially given the increasing use of oral evidence—highlights the inadequacy of the present safeguards.¹⁸⁵

III. TRENDS IN EC CARTEL ENFORCEMENT TOWARD A CRIMINAL AND ADVERSARIAL MODEL, AND THE FAILURE TO MAINTAIN ADEQUATE PROCEDURAL SAFEGUARDS

The current state of EC cartel enforcement, as outlined above, represents the latest stage in an “important evolutionary process” with respect to its administrative procedure—one that has brought it strikingly close to the American model and now demands an attendant right to confrontation.¹⁸⁶ First, as investigations have become more aggressive and fines have increased, the EC cartel enforcement regime has become increasingly “criminalized.”¹⁸⁷ Second, EC procedures have become increasingly “judicialized,” adopting structures to provide independence of decision-making and to sever the oft-criticized role of the EC as investigator, prosecutor, and judge.¹⁸⁸ Third, as the EC has developed its procedures, there has been an increase in procedural rights

¹⁸² *Id.* at 63.

¹⁸³ These reports relate to both procedural and substantive issues, including whether the rights of defense were respected in the hearing and the Hearing Officer’s substantive observations on the course of the proceedings. DG COMPETITION, THE HEARING OFFICERS, *supra* note 179, at 16-17.

¹⁸⁴ Governance Statement of the European Commission 2 (May 30, 2007), http://ec.europa.eu/atwork/synthesis/doc/governance_statement_en.pdf.

¹⁸⁵ Julian M. Joshua, *The Right to be Heard in EEC Competition Procedures*, 15 FORDHAM INT’L L.J. 16, 57 (1991).

¹⁸⁶ Asimow & Dunlop, *supra* note 126, at 143-44; Philip Marsden & Peter Whelan, *Re-Examining Trans-Atlantic Similarities and Divergences in Substantive and Procedural Competition Law*, 10 SEDONA CONF. J. 23, 23 (2009).

¹⁸⁷ Forrester, *supra* note 7, at 834 (“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.”); *see also* Aslam & Ramsden, *supra* note 7, at 61-62; Slater, Thomas & Waelbroeck, *supra* note 7, at 4, 11.

¹⁸⁸ Forrester, *supra* note 7, at 830; *see also* Asimow & Dunlop, *supra* note 126, at 157; Lenaerts, *supra* note 157, at 1474; Shipley, *supra* note 1, at 14.

afforded to private parties before the EC.¹⁸⁹ However, the advent of oral leniency applications in the EC in 2002 and the increasing use of oral evidence in EC competition proceedings raise a number of questions about the sufficiency of extant procedural protections.¹⁹⁰ The credibility of oral leniency applicants is especially lacking because those individuals and corporations have a strong interest in embellishing the role of co-conspirators while minimizing the extent of their own participation in the cartel.¹⁹¹ Furthermore, the lack of procedures for confrontation and cross-examination in EC proceedings threatens the integrity of the entire fact-finding process,¹⁹² since “hearsay accounts given by lawyers fall short of any generally accepted evidential standards, especially if they are the only proof adduced by the Commission.”¹⁹³ While some commentators argue that the protections in the European Union adequately provide procedural fairness,¹⁹⁴ others are not convinced.¹⁹⁵ To secure procedural rights for corporations, and in light of the implementation of the oral leniency application, this note proposes that the EC should adopt a *Crawford v. Washington*-based approach¹⁹⁶ to confrontational rights. Adopting this approach will serve a vital, legitimating function in a system where policy changes have outpaced procedural adaptations.

A. *Criminalization of EC Cartel Enforcement*

The EC’s cartel enforcement regime has appropriated elements of American cartel enforcement since its inception.¹⁹⁷

¹⁸⁹ Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 COLUM. J. EUR. L. 241, 279 (2005); Lenaerts, *supra* note 157, at 1474; Wils, *supra* note 19, at 128.

¹⁹⁰ Joshua, *supra* note 9, at 1; Lenaerts, *supra* note 157, at 1474-94 (describing existent procedural protections in European Community Competition Law).

¹⁹¹ Forrester, *supra* note 7, at 833 (“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.”); Joshua, *supra* note 9, at 7.

¹⁹² Joshua, *supra* note 9, at 6.

¹⁹³ *Id.* at 16.

¹⁹⁴ Shipley, *supra* note 1, at 48.

¹⁹⁵ Joshua, *supra* note 9, at 1.

¹⁹⁶ *Crawford*, 541 U.S. at 68.

¹⁹⁷ Nicholas Green QC, *The Road to Conviction—The Criminalisation of Cartel Law*, in 2003 FORDHAM CORP. L. INST. 000, 28 (B. Hawk, ed. 2004) (though

When the European Union crafted the Treaty of Rome¹⁹⁸ in 1957, it “took as its inspiration for Articles 85 and 86EC, sections 1 and 2 of the Sherman Act.”¹⁹⁹ This influence extends to the means of investigation employed by the EC in cartel enforcement, as well as the ever-increasing fines that it levies on violators.²⁰⁰

1. Criminalized Investigations

Over time, the European Commission has adopted many of the investigatory techniques utilized by criminal enforcement regimes like the United States, and sometimes utilizes powers that go beyond those criminal systems.²⁰¹ First, the most invasive investigatory power of the European Commission is the “dawn raid.”²⁰² Under Regulation 1/2003, the Commission has sweeping authority to conduct searches of businesses, private residences, and private automobiles, subject only to minimal oversight by national courts.²⁰³ Furthermore, when the Commission effectuates these searches, it often utilizes the law enforcement mechanisms—including search warrants—and police personnel of the EU Member States.²⁰⁴ Some commentators have intimated that these techniques were inspired by the U.S. antitrust authorities’ successful use of criminal search warrants to retrieve business records from the homes of cartel participants.²⁰⁵ Irrespective of their source, however, it is clear that the increasingly aggressive EC investigations are closely aligned with criminal law enforcement techniques used in the United States.²⁰⁶

Second, the Commission adopted a leniency program—a tool that had traditionally been reserved for only the most

Green notes that the provisions were not “slavish[ly]” plagiarized from the Sherman Act).

¹⁹⁸ Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Gr. Brit. T.S. No. I (Cmd. 5179-II), in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Offl Pub. Off. 1987).

¹⁹⁹ Green QC, *supra* note 197, at 28.

²⁰⁰ Chavez, *supra* note 30, at 824-25; Wils, *supra* note 19, at 14.

²⁰¹ See Aslam & Ramsden, *supra* note 163, at 65-67.

²⁰² *Id.*

²⁰³ *Id.*; see also Holmes & Girardet, *supra* note 133, at 68.

²⁰⁴ *Explanatory Note to an Authorisation to Conduct an Inspection in Execution of a Commission Decision Under Article 20(4) of Council Regulation No 1/2003* (2008), http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf.

²⁰⁵ Chavez, *supra* note 30, at 825.

²⁰⁶ Aslam & Ramsden, *supra* note 7, at 64-67.

serious criminal conspiracies—in large measure as a result of the successful American experiment with its program in the criminal context.²⁰⁷ The EC further undertook to bring its leniency program in line with the US model through its 2002 and 2006 revisions, in which the most notable amendments involved the incorporation of confidentiality provisions and the oral leniency procedure.²⁰⁸ These provisions, designed to protect against disclosure in American civil litigation, brought the program “closer to the U.S. regime that is based on oral statements rather than written documents.”²⁰⁹ However, while the American system safeguards defendants from the use of these oral statements in trial through its entrenched procedural defense rights, the oral statements in the EC procedure only seemed to create “a number of new problems/issues,” including: (1) “issues related to the evidentiary value of recorded oral statements in Community antitrust procedures” and (2) “issues related to the modalities of exercise of the rights of defence of the other cartel members.”²¹⁰

2. Penalties Exhibit Criminal Qualities

The recent modernization efforts in EC cartel enforcement were “triggered by the need to restore the effectiveness of the fight against secret unlawful agreements.”²¹¹ One of the most significant ways the EC did this was to adopt “a considerable increase in the level of fines imposed by the Commission.”²¹² A CFI judge has noted that EC fines “have a criminal law character,” such that, increasingly “parties’ submissions can only be understood with the help of the terminology and concepts used in criminal law and procedure.”²¹³ While EC decisions against cartel participants between 1969 and 1995 totaled 3.329 million euros (comprising eighty cartel decisions), enforcement between 1996 and the end

²⁰⁷ Wils, *supra* note 19, at 127.

²⁰⁸ *International Cartels Roundtable*, *supra* note 19, at 100.

²⁰⁹ Olivier Guersent, *The Fight Against Secret Horizontal Agreement in the EC Competition Policy*, in 2003 FORDHAM CORP. L. INST. 43, 54 (B. Hawk, ed. 2004); *International Cartels Roundtable*, *supra* note 19, at 100.

²¹⁰ Guersent, *supra* note 209, at 54.

²¹¹ *Id.* at 45.

²¹² *Id.* at 47; *see also* Marsden & Whelan, *supra* note 186, at 23.

²¹³ Case T-1/89, *Rhone-Poulenc SA v. Commission*, 1991 E.C.R. II-867, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989F0001:EN:NOT>.

of 2003 totaled 3.45 *billion* euros (comprising thirty decisions), with fines exceeding 9 billion euros for the 2004 to 2009 timeframe (comprising 243 decisions).²¹⁴ This trend toward astronomical fines exhibits the increasingly punitive and quasi-criminal character of EC cartel enforcement, heightening the “relevance of general principles of substantive criminal law” and its attendant procedural safeguards.²¹⁵

Furthermore, Regulation 1/2003 provides for indirect criminal penalties through the operation of the cartel enforcement regimes of the Member States. Under Article 5 of Regulation 1/2003, “[t]he competition authorities of the Member States shall have the power to apply Articles [101] and [102] of the [TFEU] in individual cases,” and they may take decisions “imposing fines, periodic penalty payments or any other penalty provided for in their national law.”²¹⁶ As a result of this broad penalty authorization, Member States may levy criminal sentences on corporations and individuals alike, and such penalties have been extended in Ireland, Estonia, and the United Kingdom.²¹⁷ Thus, while these penalties are not directly imposed or adjudicated by the Commission, their availability through the Member States suggest that the Commission is willing to accept the appropriateness of criminal consequences for violations of EC competition laws.

3. EC Cartel Hearings Exhibit Important Adversarial Qualities

At the procedural level, the trend in EU cartel enforcement has been one toward a quasi-criminal, adversarial system, replete with many—but not all—of the rights found in adversarial systems.²¹⁸ First, although the CFI has declined to conclude that the Commission constitutes a “tribunal,” it contains many of the same characteristics.²¹⁹ Namely, it (1) is established by law, (2) is permanent, (3) exercises compulsory

²¹⁴ Guersent, *supra* note 209, at 48; *see also* EC FINE STATISTICS, *supra* note 138.

²¹⁵ Lenaerts, *supra* note 157, at 1485.

²¹⁶ Regulation 1/2003, *supra* note 134, art. 5, at 8-9; *see also* Wils, *supra* note 19, at 129.

²¹⁷ Wils, *supra* note 19, at 130.

²¹⁸ Marsden & Whelan, *supra* note 186, at 40; Wils, *supra* note 19, at 15; Baudenbacher, *supra* note 128, at 354; Julian Joshua, *Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law?* (1995), available at http://ec.europa.eu/competition/speeches/text/sp1995_044_en.html.

²¹⁹ Forrester, *supra* note 7 at 831; Shipley, *supra* note 1, at 36.

jurisdiction, (4) carries out *inter partes* proceedings,²²⁰ (5) applies the rule of law with evidentiary standards,²²¹ and (6) is, in certain important ways, independent.²²² For example, the role of the Hearing Officer, who conducts EC competition hearings and files reports regarding compliance with procedural rules, severs the relationship between the investigating case team and the decision-making College of Commissioners.²²³ This division of roles creates delineated prosecutorial and judicial functions, heightening the adversarial nature of the hearings and providing “an independent guarantor of the fundamental procedural rights of all parties.”²²⁴ Furthermore, the use of oral evidence in EC hearings has increased, which, while uncommon in inquisitorial hearings, stands as a hallmark of Western *adversarial* systems.²²⁵ Based on the trend toward an adversarial system, it is not surprising that there has been a concomitant shift toward greater procedural rights in the EC.

B. *Trend toward Greater Procedural Rights in EC Cartel Cases*

Undertakings in EC competition hearings were afforded very little by way of procedural rights at the inception of the EC.²²⁶ However, over time there has been a significant increase in the “rights of defence” for targeted undertakings, including the right of “access to file” and the “right to be heard.”²²⁷

²²⁰ See sources cited *supra* note 219.

²²¹ Guidance on Procedures, *supra* note 178, at 4. (“The Commission has to conduct its competition proceedings fairly and objectively while respecting the parties’ procedural rights. The Hearing Officers are, first of all, guardians of fair proceedings before the Commission. They safeguard the rights of defence of undertakings subject to proceedings relating to Articles 101 and 102 (ex- articles 81 and 82) as well as the procedural rights of . . . all . . . parties to the proceedings.”); Regulation No. 1/2003, *supra* note 134.

²²² DG COMPETITION, THE HEARING OFFICERS, *supra* note 179, at 5-6.; Baudenbacher, *supra* note 128, at 355; Regulation No. 773/2004, *supra* note 179, art. 14(1), at 21 (“Hearings shall be conducted by a Hearing Officer in full independence.”).

²²³ DG COMPETITION, THE HEARING OFFICERS, *supra* note 178, at 6. The College of Commissioners is comprised of representatives of member states who are “completely independent in the performance of their duties[,] . . . neither seek[ing] nor tak[ing] instructions from any government or from any other body.” *Id.* Governance Statement of the European Commission 2, available at http://ec.europa.eu/atwork/synthesis/doc/governance_statement_en.pdf; see also Regulation No. 773/2004, *supra* note 177, art. 14(1), at 21.

²²⁴ Baudenbacher, *supra* note 128, at 356.

²²⁵ *Id.* at 355.

²²⁶ Asimow & Dunlop, *supra* note 126, 143.

²²⁷ At first, the accession of rights was inspired in part by intense pressure from the United Kingdom, which, having joined the EU, wanted to protect the fundamental rights of its citizenry. *Id.* at 143-46.

However, these procedural rights have almost exclusively focused on rights exercised before and after the EC hearing, and do not include a right to cross-examine witnesses.²²⁸ Certainly, in a purely inquisitorial system, confrontation is much less necessary, both because an inquisitorial approach takes power out of the hands of the individual parties and because live, testimonial evidence bears much less weight than documentary evidence.²²⁹ In the EC, however, the increasing use of oral testimony and adversarial postures creates a disjuncture between its substantive policies and procedural protections.²³⁰ As such, where the starting place and crux of high-stakes cartel enforcement is increasingly unsworn, *ex parte* oral testimony used explicitly as evidence of collusive conduct, procedural rights must include a right of confrontation.²³¹

IV. TOWARD A RIGHT OF CONFRONTATION FOR EC COMPETITION HEARINGS

While trends in EC cartel enforcement have kept pace with global cartel enforcement with respect to investigation and punishment, the EC has not made parallel strides in the area of procedural protections.²³² One fundamental right above all is lacking in EC competition procedure: the right of confrontation. The American constitutional right of a criminal defendant to confront and cross-examine witnesses against him provides a useful model for managing oral testimony that would bring necessary procedural fairness to the EC cartel enforcement regime.²³³

²²⁸ Forrester, *supra* note 7, at 831-32; Joshua, *supra* note 9, at 6-7; Philip Lowe, Director General, DG Competition, Speech at the CRA Conference on Economic Developments in Competition Law: Due Process in Antitrust, at 7 (Dec. 9, 2009), available at http://ec.europa.eu/competition/speeches/text/sp2009_19_en.pdf.

²²⁹ Lenaerts, *supra* note 157, at 1469.

²³⁰ Forrester, *supra* note 7, at 831, 833.

²³¹ Joshua, *supra* note 26, at 16 (“[H]earsay accounts given by lawyers fall short of any generally accepted evidential standards, especially if they are the only proof adduced by the Commission.”).

²³² Marsden & Whelan, *supra* note 186, at 40.

²³³ For the purposes of this note, the Sixth Amendment Right of Confrontation, and not the Due Process Clause (or Federal Trade Commission administrative procedure), provides the correct analogy, based on the *de facto* criminalization of cartel conduct in the EC and the increasingly formal and adversarial nature of EC competition hearings.

A. *The Necessity of a Right of Confrontation for EC Competition Hearings*

At the dawn of the adoption of the 2002 Leniency Notice, which first allowed for oral leniency applications, Emil Paulis, the former Director responsible for Policy and Strategic Support at DG Competition, stated that because “EU administrative proceedings [are] centered on an exchange of written arguments[,] . . . it does not serve the parties to cross-examine the Commission.”²³⁴ Further, in 1991 the ECJ held that—in the context of anonymous documents—the Commission need only perform “an overall assessment of a document’s probative value” to determine admissibility.²³⁵ However, because the evidence used in EC Competition hearings is now so heavily based on oral testimony, the document-based procedure of the past can no longer be credibly relied upon as a justification for the denial of confrontational rights.²³⁶

First, the use of oral leniency applications in the EC as evidence of cartel conduct raises many of the hearsay and credibility issues against which cross-examination is designed to protect.²³⁷ Because cartels are inherently secretive, the possibility of ferreting out and establishing infringement absent a confession or oral explanation of incriminating documents is often remote.²³⁸ At the same time, however, there is a strong incentive for individuals and corporations to embellish the conduct of co-conspirators in the leniency application process in order to achieve “significant added value,”²³⁹ and there is no direct right to test the accuracy of those statements in EC oral hearings.²⁴⁰

²³⁴ Emil Paulis, *Checks and Balances in the EU Antitrust Enforcement System*, in 2002 FORDHAM CORP. L. INST. 381, 385 (B. Hawk ed., 2003).

²³⁵ Case T-1/89, *Rhone-Poulenc SA v. Commission*, 1991 E.C.R. II-867, at II-954, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61989F0001:EN:NOT>.

²³⁶ Joshua, *supra* note 150, at 1262.

²³⁷ Sklansky, *supra* note 72, at 1646 (“Introducing evidence of an out-of-court accusation from someone who never testifies raises some of the same concerns as examining a witness outside the defendant’s presence: in either case the defendant has no opportunity to cross-examine the accuser in front of the jury.”).

²³⁸ Van Barlingen & Barennes, *supra* note 149, at 9; Joshua, *supra* note 9, at 1, 3, 5-6.

²³⁹ Forrester, *supra* note 7, 833; Joshua, *supra* note 9, at 5-6. The incentive to embellish is two-fold. First, an undertaking applying for leniency has an incentive to provide evidence of its co-conspirator’s bad acts while downplaying its own role to avoid being viewed as a “ring-leader,” which would prevent it from receiving leniency.

In this way, the use of oral testimony and oral leniency applications as evidence absent a right to confrontation or cross-examination is analogous to the obtainment and use of the untested, *ex parte* statements of Lord Cobham in Sir Walter Raleigh's trial—a practice viewed as anathematic to a fair trial in common law systems.²⁴¹ Continuing the analogy to the Raleigh trial, in EC procedure, the leniency-seeking co-conspirator will have prepared an out-of-court confession under intense pressure and with dubious accuracy, and the accused has no procedural right to compel the presence of the co-conspirator or to cross-examine the accusatory witnesses.²⁴² Additionally, in both cases the evil arises based in part upon an incompatible hybridization of adversarial and inquisitorial legal systems.²⁴³ Moreover, as demonstrated in the *Stolt-Nielsen* case, co-conspirators in the context of cartel enforcement may—and often will—lie in exchange for leniency or, in the case of also-rans, in retaliation for their co-conspirator's admissions to competition authorities.²⁴⁴ In fact, the role of the government witnesses in the *Stolt-Nielsen* case is not unlike the position of the “also ran” leniency applicants in the EC, since both had or have a strong incentive to shade co-conspirator conduct in the least favorable light.²⁴⁵ Therefore, given the need to utilize oral evidence in cartel cases and the trend toward adversarial and criminal cartel enforcement in the EC, the fairest solution is to implement procedural reforms that would provide a right of confrontation in EC competition hearings.

Second, in the context of “also-ran” undertakings, there is a heightened incentive to provide as much evidence of anticompetitive behavior as possible, since the level of fine reduction is tied to both the quantity and quality of the information provided. 2006 O.J. (C 298) 17, 20 ¶ 23-26 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>.

²⁴⁰ Forrester, *supra* note 7, at 833; Joshua, *supra* note 9, at 6-7.

²⁴¹ Sklansky, *supra* note 72.

²⁴² Forrester, *supra* note 7, at 833; Sklansky, *supra* note 72.

²⁴³ In Raleigh's trial, the adoption of inquisitorial practices in the English common law system prevented Raleigh from receiving a fair trial, whereas the current failure arises from the adoption of increasingly criminal and adversarial procedures without affording the accused fundamental rights. Crawford v. Washington, 541 U.S. 36, 44-45 (2004); Asimow & Dunlop, *supra* note 126, at 143; Forrester, *supra* note 7, at 833-36.

²⁴⁴ United States v. Stolt-Nielsen S.A., 524 F. Supp. 2d 609, 623-24 (E.D. Pa. 2007).

²⁴⁵ *Id.*

B. *Proposals for Achieving Procedural Fairness in the EC*

While the need for a right to confrontation within the EC is recognized by many, one remaining question is how the right should be introduced into the procedural scheme. First, some commentators call for an *explicit* criminalization of cartel conduct in the EC,²⁴⁶ which they view as a more effective means of both deterring cartel conduct and garnering procedural rights for targeted undertakings.²⁴⁷ Second, some contend that the inherent criminal nature of cartel conduct justifies an extension of the European Convention on Human Rights (“ECHR”) procedural protections, which include cross-examination, to the EC through the reviewing courts.²⁴⁸ Third, others suggest reform from within the EC as a part of a fundamental overhaul of EC procedure without direct reference to the ECHR.²⁴⁹ However, based on the EC apprehension of and distaste for these solutions, none are likely to be implemented.²⁵⁰ Instead, the best solution is to provide for a right of an undertaking subject to a Statement of Objections to confront and cross-examine any witness who provides *ex parte* oral testimony that the EC intends to use as evidence of a violation of the competition laws.

²⁴⁶ Despite a clear trend toward criminalization of EC cartel law, Regulation 1/2003 explicitly states that decisions of the Commission to impose fines for violations of Article 101(1) “shall not be of a criminal law nature.” Regulation 1/2003, *supra* note 134, art. 23, at 16-17; *see also*, Treaty on the Functioning of the European Union, art. 101, May 9, 2008, 2008 O.J. (C 115) 47, 88-89, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

²⁴⁷ Chavez, *supra* note 30, at 842-43; Slater, Thomas & Waelbroeck, *supra* note 7, at 4; Peter Whelan, *A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law*, 4 COMP. L. REV. 7 (2007), *available at* <http://www.clasf.org/CompLRev/Issues/Vol4Iss1Art1Whelan.pdf>.

²⁴⁸ Slater et al., *supra* note 7, at 4.

²⁴⁹ Joshua, *supra* note 26, at 14. For a similar and very recent overview of the inadequacies of EC competition procedures, criticizing the absence of cross-examination but ultimately advocating for a heightened standard of proof and more rigorous judicial review, *see generally* James Venit, *Human All Too Human: The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82*, in EUROPEAN COMPETITION LAW ANNUAL 2009: EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES (Claus-Dieter Ehlermann et al. eds., forthcoming 2010), *available at* <http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Venit.pdf>.

²⁵⁰ Marsden & Whelan, *supra* note 186, at 25.

1. The European Convention on Human Rights

Some commentators have argued that EC cartel enforcement *already* includes significant hallmarks of criminal enforcement such that it should be subject to the procedural safeguards of the ECHR, which includes a right to cross-examination.²⁵¹ According to this theory, because the ECJ “has always indicated its willingness to follow the case-law of the European Court of Human Rights (‘ECtHR’),”²⁵² and because the ratification of the Lisbon Treaty requires EU compliance with the ECHR,²⁵³ the Commission’s procedures should square with Article 6 of the ECHR, leaving “the adjudicating function in antitrust cases to . . . a [competition specific] ‘judicial panel’ attached to the CFI.”²⁵⁴ Other commentators have argued for a less institutionally disruptive ECHR-based solution, under which the hearings will be mandatory in order to ensure ECHR compliance, and the hearing officer will be elevated to the role of finder of fact and law.²⁵⁵

However, the call for judicial extension of the ECHR to EC cartel conduct is an ineffective and ultimately implausible solution. First, the European Union does not currently have the desire to formally criminalize cartel conduct.²⁵⁶ Further, because the hearings themselves were specifically designed to avoid ECHR application, any such modification will likely require outside introduction from the courts—as well as wholesale restructuring of EC competition procedure—which is impracticable.²⁵⁷ Additionally, the relevant courts have held that because the EC Commission is not a formal “tribunal” as defined under the ECHR, it is not subject to its procedural requirements.²⁵⁸ Finally, even if the levels of fines in EC hearings are “criminal” under the ECHR, commentators have noted that EC procedure is nonetheless compatible with Article 6 because the fines lie outside of the “hard core of criminal

²⁵¹ Forrester, *supra* note 7, at 828-29; *see also* Slater et al., *supra* note 7, at 4.

²⁵² Slater et al., *supra* note 7, at 3, 26 (noting that case law from the ECtHR has held that “[a]n oral, and public, hearing constitutes a fundamental principle enshrined in Article 6 § 1”).

²⁵³ Forrester, *supra* note 7, at 822.

²⁵⁴ Slater et al., *supra* note 7, at 46.

²⁵⁵ Forrester, *supra* note 7, at 841-43.

²⁵⁶ Marsden & Whelan, *supra* note 186, at 25.

²⁵⁷ Forrester, *supra* note 7, at 831.

²⁵⁸ Joined Cases 100-103/80, SA Musique Diffusion Francaise v. Comm’n, 1983 E.C.R. 1825, 1881-84.

law,” and therefore need not meet its stringent procedural requirements.²⁵⁹ Thus, a judicial extension of the ECHR is an inapt method for achieving procedural fairness in EC competition hearings.

2. Holistic Reform

Julian Joshua, former Deputy Head of the Cartel Unit of DG Competition, has seen first-hand the consequences of the 2002 EC procedural modernization efforts, and has developed a solution involving fundamental procedural reform within EC competition proceedings. In 1995, prior to the implementation of Regulation 1/2003 and the leniency program, he contended that the EC provided sufficient procedural safeguards.²⁶⁰ However, after the implementation of the leniency reforms in 2002, he began to advocate for a “bold and ‘holistic’ solution . . . encompassing the whole scope of the enforcement process,” both to improve the leniency program²⁶¹ and to protect the “due process” rights of implicated parties.²⁶²

First, where reliability is at issue, Joshua asserts that “contemporaneous documentary evidence” should be given more weight than statements that parties make during the course of proceedings, including oral corporate statements.²⁶³ Second, those statements made for the purpose of obtaining leniency should be viewed with particular caution, requiring a

²⁵⁹ Wouter P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR*, 33 *WORLD COMPETITION L. & ECON. REV.* 5, 17 (2010) (“Whereas the European Commission’s antitrust fining powers are not ‘criminal’ within the meaning of EU law, they are ‘criminal’ within the wider autonomous meaning of Article 6 ECHR. Inside the wider autonomous ECHR category of ‘criminal’, the requirements of Article 6 ECHR are different for, on the one hand, the ‘hard core of criminal law’, and, on the other hand, outside the hard core of criminal law. The European Commission’s antitrust fining powers . . . are outside the ‘hard core of criminal law’. Outside the hard core of criminal law, Article 6 ECHR allows for criminal penalties to be imposed, in the first instance, by an administrative or non-judicial body, that combines investigative and decision-making powers, provided that there is a possibility of appeal ‘before a judicial body that has full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision’. Article 6 ECHR thus allows the imposition of antitrust fines by the European commission and does not require any separation inside the Commission between investigative and decision-making functions, provided that the EU Courts, before which the addressees of Commission fining decisions can appeal, have ‘full jurisdiction, including the power to quash in all respects, on questions of fact and of law, the challenged decision’ . . .”).

²⁶⁰ Joshua, *supra* note 218.

²⁶¹ Joshua, *supra* note 26, at 21.

²⁶² Joshua, *supra* note 9, at 7.

²⁶³ *Id.*

“high degree of corroboration by independent documentary evidence.”²⁶⁴ Third, Joshua advocates for a procedure whereby oral evidence used to prove violations should be “reduced to writing in a formal witness statement, . . . signed by the individual, and endorsed and acknowledged by the company on whose behalf it is proffered.”²⁶⁵ Fourth, he calls for an almost complete ban on anonymity for statements used to prove infringement.²⁶⁶ Fifth, he simply states that “[d]eclarants should be available at the oral hearing for cross-examination by the parties incriminated.”²⁶⁷ Sixth, he advocates for amendments to the EU regulations to penalize corporations and individuals for giving misleading testimony.²⁶⁸ Lastly, he contends that oral leniency applications should serve merely as a “roadmap” for DG Competition investigations, and not as evidence of infringement.²⁶⁹

Such a comprehensive overhaul in EC competition procedure, however, is unworkable and unlikely.²⁷⁰ First of all, as with the ECHR reform approach mentioned above, the EC currently lacks an appetite for such sweeping reform.²⁷¹ Instead, a more palatable solution would provide real advancements in an incremental manner.²⁷² Second, the holistic reforms that Joshua proposes with respect to admitting oral hearsay testimony, based on a ‘reliability’ standard, contain the same dangers of subjectivity in the *Ohio v. Roberts* approach that the Supreme Court so persuasively rejected in *Crawford v. Washington*.²⁷³ In fact, the zealotry with which competition

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ Joshua, *supra* note 9, at 7.

²⁶⁹ *Id.*

²⁷⁰ Neelie Kroes, European Comm’r for Competition Policy, Antitrust and State Aid Control—The Lessons Learned 5, Address at the 36th Annual Conference on International Antitrust Law and Policy (Sept. 24, 2009), available at http://ec.europa.eu/competition/speeches/index_theme_6.html. (“I agree again with Christine Varney here—as enforcers we do have ‘special responsibility’ to ensure a fair and transparent process. But the great weight of evidence says we meet this responsibility.”).

²⁷¹ Marsden & Whelan, *supra* note 186, at 35.

²⁷² Forrester, *supra* note 7, at 840.

²⁷³ 541 U.S. 36. Although Joshua’s solution differs from the *Ohio v. Roberts* approach by virtue of its reliance on contemporaneous documentary evidence supporting reliability, the tendency in cartel enforcement in cartel cases to view each price quote and email through a conspiratorial lens means that co-conspirators can easily paint innocuous transmissions as severe violations. See, e.g., *United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 609, 619-20 (E.D. Pa. 2007).

authorities have relied upon apparently reliable—but ultimately false—oral evidence, as evident in the *Stolt-Nielsen* case, reveals the necessity of a robust right of confrontation above and beyond a requirement of contemporaneous documentary evidence.²⁷⁴ As a result, Joshua’s suggestions are simultaneously too comprehensive in scope and too soft in recommendation. A superior solution would embrace *Crawford*’s requirement that testimonial statements may only be admitted if the declarant is available for cross-examination.²⁷⁵

3. A Right of Confrontation in the Spirit of *Crawford*

One of the principal problems to arise from the 2002 Leniency Notice was the fact that procedures were implemented without preparing adequate procedural protections.²⁷⁶ While a number of commentators have recently advocated for increased procedural protections in EC competition hearings,²⁷⁷ to date the proposals have been infeasible. A more effective mechanism for securing procedural fairness for undertakings in EC competition hearings would allow cross-examination of adverse witnesses brought before the EC in the spirit of *Crawford v. Washington*.

Currently, Regulation 773/2004 states that “[t]he Hearing Officer may allow the parties to whom a statement of objections has been addressed, the complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing.”²⁷⁸ An effective solution would add the following to that regulation:

Undertakings subject to a Statement of Objections shall have an opportunity to cross-examine any witness upon whose oral statements—transcribed or otherwise—the Commission intends to rely in proving an infringement of Article 101 of the Treaty. The Hearing Officer shall include a statement concerning the credibility of each testifying witness in his report.

²⁷⁴ *Crawford*, 541 U.S. at 68.

²⁷⁵ Since the oral hearing is the first opportunity for the prosecuted undertakings to hear the Commission’s witnesses live, the requirement of previous cross-examination of unavailable witnesses set forth in *Crawford* is inapplicable here. *Crawford*, 541 U.S. 36.

²⁷⁶ *International Cartels Roundtable*, *supra* note 19, at 100.

²⁷⁷ See discussion *supra* Parts IV.B.1-2.

²⁷⁸ Regulation No. 773/2004, *supra* note 177, art. 7, at 21.

This solution has a number of benefits. First, it avoids the necessity for formal criminalization of cartel conduct, which is currently impracticable within the EC.²⁷⁹ Additionally, as mentioned above, there is currently no desire among the member states of the EU, the General Court, and the ECJ to criminalize cartel conduct, and as such, formal criminalization is an ineffective means of achieving procedural fairness.²⁸⁰

Although some may argue that a right of confrontation should only apply in criminal cases, and that therefore such a right is not necessary in EC hearings, the strong trend in cartel enforcement toward quasi-criminal investigations, an adversarial hearing model, and increasingly stiff financial penalties make the requirement that the hearings be criminal merely semantic.²⁸¹ Moreover, despite the lack of imprisonment as a punishment for violation of Article 101,²⁸² and the limitation of the American Confrontation Clause to “criminal prosecutions,”²⁸³ the imposition of crippling fines—affecting the lives and livelihoods of employees—even within a quasi-criminal framework provides a strong, prudential foundation for a right of confrontation in EC competition hearings.

Further, some might contend that the aforementioned proposal, which relies on an American case interpreting a jurisdiction-specific constitutional provision, represents an unjustified, anti-inquisitorial Anglocentrism.²⁸⁴ However, this challenge simultaneously ignores the reality of the English and American common law influence over the development of cartel enforcement in the EC,²⁸⁵ as well as the procedural trends toward a common law model that have taken shape within the EC itself.²⁸⁶ Therefore, even if the EC fails to fully criminalize cartel conduct, it should not be excused from extending key procedural rights that bear directly on truth-finding, especially when the procedures that already have been adopted so closely mirror those of common law systems.²⁸⁷ Lastly, irrespective of whether the EC disclaims the “criminal” nature of its cartel

²⁷⁹ Forrester, *supra* note 7, at 826.

²⁸⁰ Marsden & Whelan, *supra* note 186, at 35.

²⁸¹ See *supra* Part III.

²⁸² Baudenbacher, *supra* note 128, at 354.

²⁸³ U.S. CONST. amend. VI.

²⁸⁴ Sklansky, *supra* note 72.

²⁸⁵ Asimow & Dunlop, *supra* note 126, at 146.

²⁸⁶ See *supra* Part III.

²⁸⁷ See *id.*

enforcement regime,²⁸⁸ the system should, at base, be concerned with obtaining reliable, truthful evidence of the sort that only a robust right of confrontation can ensure.²⁸⁹ This is especially true where the credibility of its evidence-gathering techniques is in question.

Second, allowing cross-examination will provide an opportunity for targeted undertakings to directly test the credibility of the EC witnesses in the presence of a neutral hearing officer. In light of the *Stolt-Nielsen* decision, it is clear that the opportunity to cross-examine such witnesses is vital to a fair proceeding in the cartel enforcement context.²⁹⁰ Thus, while the proposal here may not affect the opinions of the DG Competition case team in its investigation, the Hearing Officer, charged with making credibility determinations, will need to make a decision as to the live credibility of each witness with respect to the statements collected in the leniency and investigation process. This will assuredly “improve the quality of the contradictory debate.”²⁹¹ Indeed, it will also provide necessary procedural protections that will both improve the quality of the evidence garnered in EC competition proceedings and the fairness afforded those facing judgment.

It may be argued that placing the Hearing Officer in the role of a decision-maker with respect to credibility raises the same reliability concerns that the Supreme Court so forcefully criticized in *Crawford*,²⁹² since the hearing officer will ultimately need to make a subjective determination about the credibility of the adverse witnesses. However, this challenge ignores the fact that the reliability test of *Roberts* was a threshold issue used to determine whether the out-of-court statements would be *admissible* as evidence, not whether the trier of fact would ultimately make a subjective judgment.²⁹³ Under the current proposal, the requirement of cross-examination means that any oral statement may *only* be used as a “roadmap” and not as evidence, unless the individual who made the statement is available for cross-examination. Moreover, because the Hearing Officer’s report is published in

²⁸⁸ See *supra* Part I.B.3.c.

²⁸⁹ See *supra* Part I.B.3.a.

²⁹⁰ *United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 609, 623 (E.D. Pa. 2007).

²⁹¹ Paulis, *supra* note 234, at 385-86.

²⁹² *Crawford v. Washington*, 541 U.S. 36, 61-65 (2004).

²⁹³ *Id.*

the Official Journal of the European Union,²⁹⁴ credibility determinations will shine a light both on the quality of the evidence and the efficacy of the procedures. As a result, the proposed solution will incentivize the DG Competition case teams to produce credible witnesses and ensure testimonial accuracy.

Finally, the solution proposed here is incremental and legislative, avoiding the problems that attend comprehensive overhauls and judicially-mandated reforms.²⁹⁵ Creating a right of confrontation and cross-examination in the *Crawford* mold first solves the immediate problem of admitting untested and unsworn oral statements gathered in the investigatory stage,²⁹⁶ while, at the same time, recognizing that oral statements are vital in uncovering conspiracies and incentivizing undertakings to apply for leniency.²⁹⁷ Additionally, this proposal gives the accused an opportunity to challenge the credibility of witnesses before a neutral hearing officer, creating a disincentive for individuals and applicants for leniency to lie. Further, the proposal advocated here requires only a minor amendment to an existing regulation, incurring comparatively less institutional and monetary costs than competing “holistic” solutions, and representing a single-but-necessary step in an incremental approach toward a robust set of procedural rights. Although some may contend that the current proposal fails to go far enough, the strength of the proposal lies in the fact that it will allow the Commission and targeted undertakings to ease into durable procedural protections. In this way, the current proposal avoids the dangers of the initial effort to allow oral corporate statements brought about in the 2002 amendments to the Leniency Programme—which while an important advancement, lacked necessary foresight and procedural protections, providing too much room for abuse by the DG Competition and leniency applicants.

²⁹⁴ Committee Decision on 23 May 2001 on the terms of reference of hearing officers in certain competition hearings, art. 16(3), 2001 O.J. L 162/21, at 24 (2001) (“The Commission shall communicate the hearing officer’s final report, together with the decision, to the addressees of the decision. It shall publish the hearing officer’s final report in the Official Journal of the European Communities, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.”); European Commission, Hearing Officers Reports, *available at* http://ec.europa.eu/competition/hearing_officers/reports.html (last visited Mar. 16, 2010).

²⁹⁵ Forrester, *supra* note 7, at 840.

²⁹⁶ See *supra* Part IV.A.

²⁹⁷ van Barlingen & Barennes, *supra* note 149, at 9; Joshua, *supra* note 9, at 5-6.

V. CONCLUSION

The introduction of procedures for accepting oral statements in the leniency and investigatory contexts represented an important addition to EC competition procedure. However, the consequences of relying on oral statements as evidence against co-conspirators include both a shift toward the adversarial system of justice and a marked increase in the need for procedural protections to prevent abuse and to ensure testimonial accuracy. Centuries of common law have demonstrated that the best way to protect against overzealousness in law enforcement and dishonesty in testimonial statements by co-conspirators is through cross-examination. Therefore, in order to ensure procedural fairness in the EC, there must be a right for accused undertakings to confront and cross-examine those witnesses on whose oral statements the EC intends to rely as evidence.

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