THE EUROPEAN COMMISSION'S NEW PROCEDURAL PACKAGE: INCREASING INTERACTION WITH PARTIES AND ENHANCING THE ROLE OF THE HEARING OFFICER

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Abstract: *This article outlines how the European Commission strives to enhance transparency and procedural fairness as an integral part of its enforcement of the EU competition rules. In particular, it describes the key elements of the recently adopted "procedural package", namely Antitrust Best Practices, Best Practices on the submission of economic evidence and the revised Terms of Reference of the Hearing Officer.*

Summary: 1. Introduction. 2. The EU antitrust enforcement system. 2.1. The Commission as public enforcer. 2.2. A full set of procedural rights. 2.3. Checks and balances at every step of the procedure. 3. Further enhancing transparency and predictability of proceedings. 3.1. Antitrust Best Practices. 3.2. Best Practices on the submission of economic evidence. 3.3. The Terms of Reference of the Hearing Officer. 4. Conclusion.

1. INTRODUCTION

Competition authorities have a duty to remove impediments to competition, ensuring timely outcomes for markets and consumers. The result matters, but what matters equally is the manner in which the results are achieved. Indeed, competition agencies' actions gain additional legitimacy from the transparent way in which an agency acts and the degree to which an agency is perceived to be fair in applying its procedures.

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This article addresses the way in which the European Commission as competition enforcer strives to enhance transparency and procedural fairness as an integral part of its enforcement practices. This has led to the adoption on 17 October 2011 of a Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (Antitrust Best Practices")[1], Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases ("Best Practices on the submission of economic evidence")[2], as well as a Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings ("Terms of Reference of the Hearing Officer").[3]

The so-called procedural package is the product not just of the Commission's commitments to improve its procedures, but is also the result of discussions with stakeholders. The Commission listened to their suggestions and many are reflected in the final texts. The Commission also tested the draft Best Practices for nearly a year and further fine tuned them over this period. The outcome enhances transparency and procedural guarantees while maintaining the overarching need for efficient processes.

The Commission undertook this exercise because it wanted to improve the transparency of its procedures, so that parties to its cases know clearly what to expect and understand the path that these cases follow, step by step and from an early stage. Experience shows that more interaction with parties enhances fact-finding, making the Commission a more proficient agency. In particular, this interaction gives a better understanding of the products, the players and the markets at hand. It also helps the Commission to avoid factual errors or to ensure their swift rectification.

An important part of this package also concerns the strengthening of the role of the Hearing Officer as the guardian of procedural rights throughout the entirety of our antitrust and merger proceedings.

The Best Practices on the submission of economic evidence give parties a better idea of what is expected when they submit economic data and thereby facilitates its assessment by the Commission.

1 OJ C308, 20.10.2011, p. 6.

2 http://ec.europa.eu/competition/antitrust/legislation/legislation.html.

3 OJ L275, 20.10.2011, p. 69.

This article is divided into two principal sections: (1) a broad overview of the EU competition enforcement system; and (2) the specific details of the procedural package.

2. THE EU ANTITRUST ENFORCEMENT SYSTEM

2.1. The Commission as public enforcer

In the EU competition law enforcement system, the Commission acts as public enforcer. It investigates and decides on the case by administrative decision, subject to full judicial review by the General Court, with a final appeal possible before the Court of Justice of the EU.

As regards the enforcement of Articles 101 and 102 TFEU[4], the Commission investigates potential infringements of competition rules and adopts binding decisions, including the imposition of fines. These decisions are subject to judicial review on all points of fact and law. The EU Courts can perform an unlimited review of the evidence, of the factual findings and of the legal qualification of this evidence. They may also annul, increase or reduce the amount of the fines imposed by the Commission.

This system is sound and fair. It is anchored in the rule of law and the respect of the rights of parties at all stages of the procedure.

In the recent *Menarini* judgment[5], the European Court of Human Rights ruled on an antitrust case in which the Italian competition authority had imposed a fine. The Italian competition authority is - like the European Commission - an integrated authority that adopts decisions imposing fines, subject to a two-tier judicial control. While every system has its particularities, the institutional set-up of the case was therefore very similar to the EU system.

The Court ruled that Article 6 ECHR was complied with, in particular in view of the fact that: (i) the decisions of the administrative competition authority were subject to judicial review in which it was assessed whether the competition authority had used its powers appropriately; and (ii) with

4 Treaty on the Functioning of the European Union, which entered into force on 1 December 2009. Article 101 TFEU covers restrictive agreements and Article 102 TFEU addresses abuses of dominant position.

5 Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, Application No 43509/08.

respect to fines, the court could verify the suitability of the sanction and had the power to change the amount imposed.

Given that the EU system of competition enforcement is very similar, this judgment confirms the legitimacy of administrative systems, a model followed by many EU competition agencies. It also corroborates the case law of the European Court of Justice which has repeatedly found the EU system of competition enforcement to fulfil the requirements of Article 6 ECHR on the right to a fair trial.[6]

With regards to merger control, the EU Merger Regulation[7] also provides for a regime of integrated public enforcement, whereby the Commission is vested with exclusive jurisdiction to review and decide upon concentrations notified to it of an EU dimension[8], subject to the control of the Courts of the European Union.

2.2. A full set of procedural rights

In the EU system, there are detailed enforcement procedures which ensure that the parties are able to fully defend themselves and have a high level of procedural guarantees.[9] Over and above the statutory provisions governing the procedures, general principles of law including fundamental rights apply.

During the investigation phase, parties in antitrust proceedings have several key rights, including the right not to self-incriminate and the right to be informed of whether they are potentially suspected of having committed an infringement.

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6 Case T-54/03 *Lafarge SA v. Commission*, [2008] ECR II-120, in particular para 39, Case T-348/94 *Enso Espanola SA v. Commission* [1998] ECR II-1875, paras 55-65, Case T-154/94 *Aristrain v. Commission [1999]* ECR II-645, paras 30 to 41. The Charter of Fundamental Rights of the European Union does not provide for additional rights in this regard: Declaration 1 annexed to the Lisbon Treaty specifies "[*t*]*he Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States*."

7 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

8 Those concentrations that met the turnover thresholds of Article 1(2) and (3) of the EU Merger Regulation or that are referred to the Commission by Member States pursuant to Articles 4(5) and 22 thereof.

9 See further Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p.1, the EU Merger Regulation, *ibid* at footnote 7 above, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty OJ L 123, 27.04.2004, p. 18 and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1.

Once the investigation is complete and the Commission reaches a preliminary position that the parties may have infringed Article 101 and/or 102 TFEU or that a proposed concentration may significantly impede effective competition in the EU, the parties have the right to be heard. Indeed, the Commission cannot base a decision on objections that the parties have not had the opportunity to comment upon. Parties receive a Statement of Objections – i.e. a written formal document setting out the Commission's objections to their conduct, the reasons for these objections and the evidence on which these objections are founded. The parties have the right of access to the Commission's investigation file in order to enable them to prepare their written and oral defence. This consists of the right to submit comments in writing on the Commission's objections. Parties can raise any point they deem appropriate, including contesting facts or evidence relied on and can submit any expert opinion they like to produce.

Parties also have the right to a formal Oral Hearing – chaired by the Hearing Officer, who is an independent official – at which the parties can further develop their defence.

Finally, if the Commission ultimately adopts a prohibition decision, it must be fully reasoned, so that parties are able to exercise their right of appeal to the European Courts.[10]

2.3. Checks and balances at every step of the procedure

Over and above the fundamental procedural rights which are entrenched in law, the Commission has comprehensive internal checks and balances to ensure a sound outcome in its cases.

Within the European Commission, the Directorate-General for Competition is primarily responsible for enforcing Articles 101 and 102 TFEU and the EU Merger Regulation.

Within DG Competition a number of safeguards have been put in place: (a) there is a priority examination of antitrust cases under which case teams submit their proposed course of action to in-house scrutiny from an early stage to assess whether cases merit further examination; (b) a case coordination unit provides case support throughout proceedings; (c) the Chief Economist advises on whether cases are economically sound; and (d) peer review panels

10 Pursuant to Article 296 TFEU, a decision must state the reasons on which it is based. In cases where a decision has been inadequately reasoned, the EU Courts must raise this point even if the applicant does not do so, see e.g. Case C-166/*95P Commission v Daffix* [1997] ECR I-983, para 24.

are set up in complex merger and antitrust cases in order to provide a "fresh pair of eyes", advising on coherence, economic, legal and procedural issues.

DG Competition investigates cases under the leadership of the Commissioner responsible for competition – and decisions are taken by the College of 27 Commissioners, who are independent of national and business interests. The Commission Legal Service, attached directly to the President, advises the College on the legality of each draft decision and is involved at key steps of the case.

The Hearing Officer is specifically tasked with safeguarding procedural rights. Before adopting decisions, the Commission hears Member States' competition experts in the Advisory Committee. Prior to a draft decision being submitted to the College, other Commission departments responsible for economic policy and the relevant sector at issue in a case are consulted. When the Competition Commissioner submits a draft decision to the College of Commissioners, the opinion of the Legal Service and other Directorate-Generals, the Hearing Officer and the Advisory Committee are included in the file.

The Commission considers that the EU enforcement system is constitutionally sound and ensures a high standard of procedural rights. However, in every system improvements can always been made.

To that end, the Commission reviewed its case handling and enforcement procedures and has requested stakeholders' input. As a result, it has decided that some adjustments are necessary and adopted the so-called procedural package which will be described in the next section.

3. FURTHER ENHANCING TRANSPARENCY AND PREDICTABILITY OF PROCEEDINGS

The package adopted by the Commission has two key aspects: (i) Antitrust Best Practices and Best Practices for the submission of economic evidence to enhance the transparency and predictability of proceedings, in particular by increasing interaction with the parties; and (ii) revised Terms of Reference for the Hearing Officer which will strengthen the mechanisms for safeguarding procedural rights.

3.1. Antitrust Best Practices

The Antitrust Best Practices enhance the transparency and predictability of Commission proceedings under Articles 101 and 102 TFEU. Best Practices

on the conduct of merger proceedings were adopted in January 2004[11] and have increased understanding of the merger review process, leading to greater efficiency and a high degree of predictability and transparency. It was therefore a natural step for the Commission to consider that antitrust proceedings would also benefit from the introduction of similar measures.

The Antitrust Best Practices enhance transparency and predictability through a number of key innovations.

The Antitrust Best Practices provide for the first time a guide on how proceedings take place before the Commission, from the investigation phase, to the different types of decisions which may be taken. This gives parties and other stakeholders a clear picture of what to expect at each stage of antitrust procedures. It also gives guidance as to how commitment proceedings, that were introduced in 2004, work in practice, so that parties know how best to proceed if they are contemplating offering commitments.

Key stages in proceedings, namely the opening of cases, the sending of a Statement of Objections, the closure of proceedings and the adoption of a decision will now be made public, either by press release or an announcement on DG Competition's website.[12] The Commission also commits to systematically publish all its decisions rejecting complaints (or a summary thereof) so that stakeholders have a more accurate picture of the grounds for rejection.[13]

The Antitrust Best Practices enhance the opportunities for parties to interact with the Commission services in the course of competition proceedings from an early stage and allow them to be better informed of the state of play of proceedings. In particular, State of Play meetings with parties will occur at key points in the proceedings, namely shortly after the opening of formal proceedings, at a sufficiently advanced stage in the investigation and once the Statement of Objections is issued.[14] Specific State of Play meetings are also foreseen in commitment proceedings, cartel proceedings

11 Http://ec.europa.eu/competition/mergers/legislation/legislation.html.

12 Paragraphs 20, 91, 76 and 147 of the Antitrust Best Practices ("BP").

13 Paragraph 150 of the BP.

14 Paragraphs 63 and 64 of the BP.

and for complainants in cases where the Commission has formally opened proceedings but intends to reject the complaint.[15]

Such State of Play meetings help to ensure that the Commission is aware of the parties' arguments from an early stage, thereby enabling it to develop a fuller understanding of the markets and practices in question. This is underscored by the Commission's commitment to formally open proceedings earlier and to disclose key submissions of complainants or third parties prior to the Statement of Objections being issued.[16]

The Antitrust Best Practices also introduce changes with respect to interaction with parties on fines. A more detailed section on fines is now included in the Statement of Objections.[17] This is a major novelty intended to provide greater clarity and to encourage parties to come forward with arguments in this respect early on. The Commission commits to provide, over and above what is legally required, the parameters for the calculation of possible fines. These would not be the actual fine amounts, but elements such as relevant sales figures to be taken into account, as well as the years that will be considered for the duration of each company's participation. The Commission has also clarified that parties can present their arguments on matters related to the calculation of fines at the Oral Hearing. This will open a channel for dialogue between parties and the Commission prior to a final decision and give them a better and earlier idea of how the Commission calculates the fines that may later be imposed on them. This exchange of information process should help the Commission ensure that the parameters on which it bases its fine calculations are factually correct. Finally, greater transparency is introduced with regard to 'Inability to Pay' requests, by clarifying at what stage such claims may be made and how and when they are assessed by the Commission. This should provide useful guidance to undertakings on the Commission's policy in this respect which has evolved in recent cases.

3.2. Best Practices on the submission of economic evidence

Another measure which has been taken to improve interaction with parties is the adoption of Best Practices on the submission of economic evidence.

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15 Paragraphs 65, 119, 121, and 132 of the BP.

16 Paragraph 17 and paragraphs 71 to 74 of the BP.

17 Paragraphs 84 to 90 of the BP.

The increasing importance of economics in complex cases means that the Commission often makes requests for substantial economic data during its investigation. Parties frequently submit arguments based on complex economic theories and sometimes they provide empirical analysis in support. In order to streamline the submission and assessment of such economic evidence, DG Competition has prepared Best Practices in this area too, outlining the criteria that economic and econometric analysis submitted to the Commission should fulfil.

This document also explains the practice of DG Competition's case team and of the Chief Economist team when interacting with parties which submit economic evidence.

3.3. The Terms of reference of the hearing officer

To the extent that parties have a concern about the effective exercise of their procedural rights, they can call on the Hearing Officer to resolve these issues.

The Hearing Officer is a key interlocutor who has guaranteed the right to be heard in the Commission's antitrust and merger proceedings since 1982. He or she is independent from DG Competition and plays a crucial role as independent arbiter in disputes between the case handling services and parties.

However, in the past, this role was limited to the stages in proceedings that follow the sending of the Statement of Objections. The Commission decided that the role of the Hearing Officer should be extended to reinforce the overall protection of procedural fairness.

To that end, revised Terms of Reference of the Hearing Officer were adopted which re-affirm and strengthen the role of the Hearing Officer as the guardian of procedural rights.

Crucially, the Hearing Officer has new functions throughout competition proceedings, including in the investigation phase and in the context of commitment decisions.[18] This means that parties now have a right of independent review of their procedural claims over the entire process.

From the earliest stage, the use of investigative measures in antitrust proceedings (a request for information or an inspection) triggers the right of an undertaking to be informed of its procedural status, that is, whether it is

18 Articles 4 and 15 of the Terms of Reference ("ToR") respectively.

potentially suspected of having committed an infringement. Should this not be followed, the Hearing Officer now has an express power to intervene.[19]

A significant development concerning the investigation phase is to allow the Hearing Officer to resolve legal professional privilege issues ("LPP"). The principle of LPP has been recognised by the EU Courts as a matter of fundamental rights.[20] In essence, the Commission may not during its inspections copy documents that benefit from legal privilege (attorney-client privilege). This means that inspection teams may bring back documents for which privilege is claimed, in sealed envelopes. The matter must then be resolved without the documents having been seen by DG Competition. A party that claims this privilege can now ask the Hearing Officer to review the document and formulate a view on whether it is privileged or not.[21] This would apply not just in antitrust inspections, but also to inspections and investigatory measures in cases potentially involving the imposition of fines under the Merger Regulation. Where a consensual solution cannot be reached in the first phase, the Hearing Officer can produce a reasoned recommendation to the Commissioner on the LPP issues raised. If the matter is not resolved on this basis, the Commission will examine it further. Where appropriate, it may adopt a decision rejecting the claim. The new role of the Hearing Officer in this context should go a long way to facilitating disputes about such claims and avoid unnecessary litigation.

Parties will also be able to call upon the Hearing Officer if they feel that they should not be compelled to reply to questions that might force them to admit to an infringement.[22] The Hearing Officer is given a new role with regard to disputes about extensions of the deadline to reply to decisions requiring information in antitrust investigations.[23]

Following the issuing of the Statement of Objections, the Hearing Officer will continue to play a key role as the guarantor of the right to be heard.

19 Article 4(2)d) ToR.

20 Case 155/79 *AM&S Europe Limited v Commission* [1982] ECR 1575; Order in Case T-30/89 *Hilti v Commission* [1990] ECR II-163; Joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523, as confirmed by Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, judgment of 14.9.2010.

21 Article 4(2)a) ToR.

22 Article 4(2)b) ToR.

23 Article 4(2)c) ToR.

The new terms of reference clarify the Hearing Officer's dispute resolution role with regard to parties' access to the Commission's file.[24] The Hearing Officer will continue to verify that only the objections on which parties had an opportunity to comment are relied upon by the Commission in the decision.[25]

Moreover, the revised mandate strengthens the key role of the Hearing Officer regarding the conduct of the Oral Hearing, for example, by empowering him or her to take all appropriate measures to prepare the Hearing, such as circulating a list of participants in due time or indicating beforehand the focal areas of debate. This should help parties to develop their arguments effectively at the Hearing. The essential function of the Hearing is also underlined, that is, an opportunity for the parties to exercise their rights of defence by developing their arguments orally.[26]

The remit of the reports which the Hearing Officer prepares for the Competition Commissioner and the College is extended to cover the effective exercise of procedural rights throughout proceedings. These reports are a crucial means to ensure the systematic follow-up of procedural issues raised during proceedings.[27]

The Hearing Officer also continues to have the right to make observations on substance on any matter arising out of any competition proceeding to the Competition Commissioner. This includes the right to suggest further investigative measures in antitrust proceedings.[28] This complements the other checks and balances within the Commission's enforcement system. Under the new Terms of Reference, the reporting obligations of the Hearing Officer regarding their core function – safeguarding the effective exercise of procedural rights – and further observations are more clearly separated. This is linked to the fact that the fundamental mission of the Hearing Officer remains in place the Hearing Officer is a guarantor of procedural rights he or she will not act as a judge on the substance of the case.

24 Articles 7 and 8 ToR.

25 Article 27(1) of Regulation 1/2003.

26 Articles 10 to 13 and Recitals 18 to 20 ToR.

27 Articles 14(1), 16 and 17 ToR.

28 Article 14(2) ToR.

The revised terms of reference explicitly specify for the first time that the Hearing Officer shall act independently in performing his duties.[29] This was always the case in practice, but is now explicitly recognised in the text.

Finally, the new extensive role of the Hearing Officer means that he or she will be able to look into all major types of Commission proceedings. This is not just the case for proceedings that run towards prohibition decisions with or without fines (for substantive and procedural infringements), but also for antitrust commitment procedures, where the Hearing Officer is given a new role similar to that which already exists for cartel settlement procedures. In both types of procedures, parties can call upon the Hearing Officer at any time in relation to the effective exercise of their procedural rights.[30]

4. CONCLUSION

The new package of Best Practices and the revised role of the Hearing Officer underline the Commission's commitment to listen to stakeholders and to improve its procedures where appropriate.

The Commission's competition enforcement system complies with fundamental rights and provides for a high level of procedural guarantees, but at the same time is sufficiently flexible to allow for constructive criticism and change.

The new procedural package is the result of in-depth internal reflections, taking into account broad stakeholder input. It increases the transparency of the Commission's procedures while maintaining efficiency and will thereby help to enhance the legitimacy of the Commission's actions. It is for our stakeholders to use and benefit from the new provisions in a considered manner.

Transparent and fair procedures benefit not just the parties, but are crucial for an effective and credible competition regime.

29 Article 3(1) ToR.

30 Article 15 ToR.