Fordham Competition Law Institute
Annual Conference on International Antitrust Law and Policy
Session on "Enforcers' perspectives on international antitrust"
Thursday 23 September 2010

Safeguarding due process in antitrust proceedings

Check Against Delivery

Check Against Delivery

Seulle texte prononce fait foi

Es glit das gesprochene work

Alexander ITALIANER
Director General
Directorate General for Competition
European Commission

1. Introduction:

Ladies and Gentlemen,

One year ago, I received my first introduction to this excellent conference as a member of the audience. It is even more of a pleasure to be here today and to speak at Fordham for the first time since I took over as Director General for Competition of the European Commission.

Our first session focuses on "enforcers' perspectives" and I thought that today would be a good opportunity to share a few thoughts with you about **due process** in antitrust proceedings.

As enforcers, our role is to enforce competition rules correctly and efficiently. But we also have a fundamental duty to respect due process and the right to a fair hearing. And we have a fundamental duty to **enforce the law in a timeframe relevant to the market and to the infringement**.

The EU antitrust system is an administrative one, fundamentally similar to the legal systems in place in many EU Member States (not only for antitrust enforcement). The European Commission investigates and decides on the outcome of cases, including on the amount of fines that can be imposed on companies. These are vast responsibilities. It is only logical that the legal community scrutinises what we do and that due process issues are debated. This debate has indeed stirred interesting opinions over the last two years.

I can assure you from the outset that the European Commission takes the needs of due process, impartiality and fairness extremely seriously. This is the only way to confer legitimacy upon our enforcement work, and it is fundamental for us taking decisions, but also taking the right decisions.

While we strongly believe in the merits of our system and that no fundamental changes are warranted, we want to continuously improve what we do.

As you may know, with the entry into force of the **Lisbon Treaty** as of 1 December 2009, the European Union Charter of Fundamental Rights has become legally binding on the EU institutions and on our Member States when they act in the scope of EU law. The Charter enshrines the principle that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union". I can assure you that we **do not take such words lightly**.

Today I would like to start with an update on our recent initiative on antitrust Best Practices and then say a few words on the advantages of our system in practice.

2. Working on improving the system: the Package of Best Practices

There are good safeguards built into our system, but due process is not a rigid or static concept. It should evolve in parallel with the dynamic development of antitrust law: we need to constantly examine and improve our procedures.

This is why in January we consulted stakeholders publicly on our procedures in the form of a **Best Practices** package covering:

- Antitrust proceedings,
- The role of the Hearing Officers (on the basis of a document elaborated by the Hearing Office) and,
- The submission of economic evidence.

The purpose of these Best Practices is to make our procedures more transparent, predictable and, ultimately, more efficient. We have had Best Practices in the field of mergers for some years. They have worked very well, bringing a step change in the way the Commission case teams, companies and their legal advisors interact and establishing a sense of openness that was beneficial to all sides.

• Our **antitrust Best Practices** are intended to do the same: they complement rights of defence with additional measures, in the interest of ensuring procedural fairness across sectors. They detail our proceedings, starting with how the Commission decides upon case priority and ending with the adoption of a decision.

- They also highlight certain areas where the Commission will amend its procedures, such as for example on state of play meetings, or explain how new instruments such as the commitment procedure, work in practice.
- The Guidance Paper on the role the Hearing Officers clarifies their role and explains how companies can make better use of the opportunities provided by an Oral Hearing.
- The **Best Practices on the submission of economic evidence** are intended to streamline the submission and assessment of such evidence. They also explain how our teams, including the Chief Economist, interact with parties submitting such evidence.

The Best Practices package has already been provisionally applied since January, but still needs to be finalised on the basis of the **results of the stakeholder consultation.** We received around 50 answers from a broad range of stakeholders, lawyers, competition law practitioners and business associations. Their detailed comments have been published on our website.

The analysis of the replies is ongoing and I can already tell you that **most** stakeholders welcomed the best practices as a development in the transparency of our antitrust work. Their specific demands covered a wide array of topics and included: access to the non-confidential replies to the Statement of Objections of other parties; access to other key documents as a matter of general practice; a separate Statement of Objections as regards fines; more cautious wording in our press statements; inviting complainants to state of play meetings... to mention just a few examples.

These comments varied in scope and stakeholders' opinions frequently differed. I must also recall that the proposals put to us are not always representative, commonly shared or free of interest. But that's what one expects from stakeholders.

We will take on board as many of those suggestions as possible without endangering the efficiency of our proceedings.

Going beyond the Best Practices documents, some **stakeholders asserted** that, since our system combines investigative, prosecutorial and decision-making functions, **it is prone to bias and does not comply with the right to a fair hearing**. They call on us to introduce further checks and balances. Along the same line, some suggest that the powers and role of the Hearing Officers should be enhanced, also calling for cross-examination and a quasi judicial hearing.

We will continue to assess in the weeks to come which suggestions for improvement we could integrate into our system.

But, as Vice-President Almunia has stated last week in Florence, major structural changes to our competition enforcement and institutional structures are not an option. We respect the views of those who argue that the European Commission as administrative authority cannot guarantee the same procedural safeguards as a judicial system. However, we find these concerns out of touch with the legal systems of many EU Member States, and not necessarily justified.

It is indeed important to acknowledge that both the administrative and judicial systems (such as the US) are based on solid legal traditions, each poised to respect procedural rights anchored in these traditions. The architecture of our systems differs but not the ultimate aim of getting to the truth while respecting the rights of the parties. This is why I do not think we can say that one system is better than the other.

I would however like to share with you over the next minutes a few thoughts on what I think are the strengths of our EU administrative system.

3. Advantages of an administrative enforcement system.

The administrative model is not specific to antitrust enforcement. In many civil law jurisdictions, it is used in a wide range of areas such as consumer protection, environmental protection, financial services, etc. In such civil law cases, the administrative authorities have powers to carry out investigations, impose fines if necessary or withdraw licenses to operate.

The Commission pursues an inquisitorial model of decision-making and therefore carries out its **own investigation**. It does not just review and adjudicate on material provided to it by the parties. The Commission has the burden of proving the infringement and throughout the proceedings it strives to respect the rights of defendants, complainants and third parties.

- 1) For example, defendants benefit from a series of rights:
- The right to receive a reasoned Statement of Objections giving companies the
 opportunity to respond, including any expert opinion they may want to put
 forward,
- The right to access the case file,
- The right to an **Oral Hearing**, chaired by impartial Hearing Officers who report directly to the Competition Commissioner. We have just announced that our new Hearing Officer will be Wouter Wils, a member of the Legal Service, not DG Competition, and a name that will be familiar to very many of you as a leading expert on EU procedural law.
- These checks and balances provide **meaningful results**. Between 2007 and 2009, 17 out of 21 cartel cases were amended after the parties exercised their rights of defence, and one case dropped. Similarly 6 out of 7 abuse of dominance cases were also modified. Many of these amendments were substantial. And these statistics don't even take account of the cases we drop at earlier stages of the investigation.
- Finally, we issue **reasoned decisions** both when we uphold a complaint and when we reject one. And we give **publicity** at each step of the procedure.
- 2) In contrast to the US public enforcement system, complainants also have strong rights. These include the right to see a non-confidential version of the Statement of Objections and to submit comments. They are sometimes heard at

Oral Hearings. In any event, they are entitled to a decision related to their complaints – whether the outcome is positive or negative for them. And this decision can be appealed before the Courts.

Frankly speaking, when you look at the detail of the very high standards of transparency and accountability that we have adopted, you can see that our system stands second to none.

3) Of course, the right to be heard is not equivalent to a right to be agreed with. And this is why, when we are satisfied that sufficient safeguards are in place, we aim to reach a decision as quickly as possible. Procedural perfection in the absence of tangible results would amount to a failure of our work.

Our in-built safeguards amount to checks and balances that ensure fairness in our procedures. I have heard recurrent voices say that the Commission case teams acquire a so-called "tunnel-vision" when investigating a case.

I think we have to assess this "tunnel-vision" argument against reality:

- In each case, there is a **core case-team** to start with. And it is true that teams put a lot of effort into the investigative process and the cross-checking of evidence, which means they may have a wish to push cases forward. But such teams do not operate in a vacuum.
- Policy and scrutiny experts intervene at key stages. Economic concepts and data are reviewed by the Chief Economist Team who reports directly to me. "Peer review panels" are set up in all complex cases. Such panels are a

mirror of the existing team (lawyers, economists), made up of officials from other parts of DG Competition. They screen the difficulties of the case and test it thoroughly. They have a very important role in dismissing prosecutorial bias arguments and looking at cases with a fresh pair of eyes.

- The Legal Service, a different and independent branch of the Commission, provides scrutiny throughout the case. Since it is the Legal Service that will ultimately defend our decisions in Court, they have every interest to test the case for soundness.
- **Hearing Officers** chair the Oral Hearings and adjudicate independently on a number of key procedural issues, which are crucial in determining the scope of a party's rights. For example, recognising one company's right to confidentiality could be perceived as curtailing another's right to see the evidence in the Commission's file.
- Finally, decisions are adopted by the **College of 27 Commissioners** who are genuinely independent of national, political and business interests.
- There is sometimes confusion between the role of the Commission as an enforcement body (e.g. we also take Member States to Court for not respecting EU law), and its role in putting forward political or legislative proposals. What is common between these roles is that they are exercised in full independence and in serving the general interest. In that sense we are as independent as the European Central Bank for instance, whose independence provisions are based on those of the Commission.

• Most importantly, our decisions (and those of the Hearing Officers) can be appealed in Court. The EU General Court thus represents the ultimate guarantor for due process, since it exerts in-depth scrutiny of the relationship between facts, the theory of harm and the final decision. The Court of Justice provides the ultimate legal scrutiny. The Courts review the legality of our decisions and have unlimited jurisdiction with regard to fines. This makes them look very carefully at issues like duration of the infringement and geographic scope. The Courts exercise a particularly strong review in cartel cases, since in such cases the Commission's margin of appreciation is limited.

Another key advantage of our system compared to a purely judicial system lies in the development of our in-depth **sectoral expertise**. This sectoral knowledge, often strengthened by sophisticated economic analysis and a thorough investigative process has enabled us to deal with very complex cases.

We have also been able to incorporate **state of the art economic analysis**. As an enforcement authority, we have the responsibility to lead this sort of development – a responsibility that may be very difficult for a Court to fulfil, if we deem that the alternative to our system would be for instance a judicial one.

The European Commission is in a unique position because it has this broad analytical overview and because it is independent from political and commercial interests. This position gives us sufficient **political clout** to ensure that our decisions are taken seriously and that they bring tangible results.

Conclusion

Ladies and Gentlemen,

I have tried to give you a comprehensive view of the opinions that have been put on the table in terms of suggested improvements to our administrative antitrust system. I have also spoken at length about the strengths of our system and informed you about our willingness to improve this system where possible.

We will soon finalise our Package of Best Practices and you will see that we have carefully listened to the views of our stakeholders. For example, as mentioned by Commissioner Almunia last week in Florence, we will work on improving the way hearings take place: who is allowed to intervene, what types of contributions can be made and to best integrate the conclusions of the Hearing Officers in our decisions.

Going beyond these Best Practices, our door will remain open for constructive criticism and suggestions from leading practitioners such as today's audience. Due process should not be seen as end in itself. However, complying with due process requirements is a prerequisite condition for us in our work as enforcers. We have a duty to enforce competition rules correctly so as to fulfil our objective of making markets work better for businesses and consumers.

I look forward to listening to your remarks now. Thank you.