

CRA Conference on Economic Developments in Competition Law

Brussels, 9 December 2009

"Due process in antitrust"

Philip Lowe
Director General
DG Competition

Just as there are different legal systems around the world, there are also a variety of different competition law enforcement systems. These systems are each shaped by national legal traditions, as well as other cultural, social and historical factors.

Companies under investigation for infringements of Articles 81 and 82 – now Articles 101 and 102 of the Treaty on the Functioning of the European Union - must be able to exercise their rights of defence. That is to say, that these companies must be given the opportunity to be heard and to put their case effectively, in the context of the investigation and decision-making process. That is an integral part of our process, about which we care very much.

If we do not ensure due process we run the risk of enforcing wrongly. That would be contrary to our objective of making markets work better for businesses and consumers, and constitute an unwarranted intervention in companies' commercial behaviour and commercial strategy. And, in any case, any decision we adopted which did not comply with due process should, rightly, be overturned by the European Courts.

I will start by making a few general points about the EU competition enforcement system, before looking at the rights of companies under investigation and the role of complainants.

The EU administrative enforcement system

Under the EU administrative enforcement system for competition, the European Commission both investigates potential infringements of the competition rules and adopts binding decisions (as well as fines – but that is a whole other topic, which I understand will be the subject of a separate panel), under judicial control exercised by the European Courts in Luxembourg. And our system is not unique. In Europe, the majority of EEA Member States have opted for similar administrative systems.

We are sometimes criticised for this – some commentators argue that the system is intrinsically unfair and cannot ensure the rights of defence of companies under investigation. But our procedures and our compliance with parties' rights of defence have been repeatedly tested in court and found to be fair and legally sound.

First, we preface application of EU competition law with a comprehensive set of papers giving guidance to companies on substance and procedure. Second, our rules provide for obligations of disclosure (access to file...) transparency (reasoned SO; reasoned and attackable decisions...) and the right to be heard (hearings; state of play, etc...). In addition, the debate on lack of independence of the EU competition authority misses the fundamental point that its unique institutional set-up derives from the Treaties establishing the EU. The Commission as a whole is established as an institution independent of outside influence. The ink, by the way, is barely dry on the ratification of the Lisbon

Treaty, so I do not imagine that there is much appetite among our 27 member states for revisiting institutional structures. However the debate as to how to improve our processes remains open and hopefully will result in some significant progress towards the very best practices for a competition authority whose decisions have importance and consequences for the market.

Advantages to the system

An administrative enforcement system such as ours also has a number of positive advantages.

It allows the authorities to build up considerable knowledge and expertise in investigations of competition problems in all the major sectors of the economy. One significant feature of EU competition policy in recent years has been our focus on sector inquiries – such as in the retail banking and business insurance sectors, the energy sector and the pharmaceutical sector.

In the context of these inquiries we have been able to use our investigative tools in order to understand how competition works in a given sector and to identify where enforcement action might be appropriate in order to resolve a competition problem that results from company behaviour; or, where it would be more helpful to pursue regulatory or legislative reform to address the competition issues identified. For instance, in the energy sector we have pursued a two-pronged approach, combining competition enforcement action (with seven decisions across the Member States) with legislative reform (the Third Energy Package).

DG Competition is also in a privileged position to advocate competition from within the Commission and can push for the inclusion of competition objectives and regulatory reform across the EU's policy agenda.

From an organisational point of view, organising teams along market lines concentrates knowledge and expertise on key sectors, whether gained from examining the impact of State aids, a merger or a potential infringement of the antitrust rules.

In addition to having market expertise, an administrative authority such as DG Competition is able to support its investigations and decision-making where necessary with sound economic analysis. Assuming that the alternative to an administrative enforcement system would have to be a court-based system, it seems to me that there may be difficulties inherent in assessing an extensive range of fact and opinion, including complex economic analysis, in a court setting. However both systems aim to arrive at something near to the right judgement on the available facts. It seems nevertheless that there is no evidence that suggests an advantage, as a matter of principle, in favour one system over another.

Safeguards in the system

In addition to the external control exercised by the Courts over our investigative and decision-making processes, we have an elaborate system of internal checks and balances to counter any suggestion of institutional bias:

- DG Competition investigates under the leadership of the Commissioner responsible for competition – but 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 in the investigation;
- The Hearing Officers are tasked with watching specifically over procedural rights – and they report directly to the Competition Commissioner;
- The Chief Economist advises on the economic robustness of a case;
- Peer review panels are set up in complex merger and antitrust cases in order to provide a "fresh pair of eyes", checking the factual, legal and economic basis of cases and procedural issues and coherence;
- The Advisory Committee, made up of competition experts from the 27 Member States, is consulted;
- Other Commission directorates-general, responsible for economic policy and the relevant sector at issue in a case, are consulted;
- When the Competition Commission submits a draft decision to the College of Commissioners, the opinion of the Legal Service and other DGs, the Hearing Officer and the Advisory Committee are included in the file.

Finally, the EU administrative model includes, in practice, a rigorous review by the European courts, particularly on factual issues, which goes well beyond what I understand to be standard judicial review – even though the Court does allow the Commission some margin of appreciation in relation to complex economic assessments or technical matters. But that margin of appreciation, as recent Court judgments have made clear, is subject to a close scrutiny of the relationship between facts, the theory of harm and the final conclusion. The more our theory of harm depends on dynamic market elements, the more convincing our evidence must be.

In practice, and this is clearly explained by the Court of First Instance in particular in paragraphs 87 to 89 of its 2007 Microsoft judgment, its review includes: (i) establishing whether the evidence put forward by the Commission in support of its decision is factually accurate, reliable and consistent, (ii) whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation, and (iii) whether it is capable of substantiating the conclusions the Commission draws from it.

The rights of companies under investigation

Turning now to look at the rights of companies under investigation by the Commission for infringing the antitrust rules:

Defendants in our procedures have for example:

- the right to receive a Statement of Objections – i.e. a written and 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;
- a right of access to the Commission’s investigation file: access to file is a difficult and time-consuming exercise, particularly when the parties want to see information that third parties regard as confidential: the case-team and the Hearing Officers then need to balance the request for confidentiality against the parties rights of defence; in some cases, we have used a data room (where access to confidential information is give to a restricted group of persons such as external counsel who are not allowed to disclose it to the company concerned);
- the right to submit comments in writing on the Commission’s objections, including any expert opinion they like to produce;

- the right to a formal oral hearing – chaired by the Hearing Officers, who report directly to the Commissioner for Competition - and which are attended by senior officials; while it is true that cross-examination of individuals at these hearings is not foreseen – this is not part of continental European legal tradition – the parties can ask each other and the Commission questions at the oral hearing;
- the right to receive a fully reasoned decision, so as to be able to exercise their right of appeal to the European Courts.

These rights make the EU system arguably one of the most transparent competition enforcement systems in the world.

Rights of defence in commitments proceedings

Commitments decisions were instituted by Regulation 1/2003 – and in their short life time they have proved to be very popular. A number of companies find commitment decisions an attractive option – and from our perspective, commitments may be useful in interests of speed and of achieving results on the market more quickly. Of course this has to be balanced, against the interest in having a full prohibition decision (either for legal certainty or to serve as a precedent). As there is no finding of infringement in commitments proceedings, the procedural safeguards for the companies involved are of course different. But in all cases the parties are fully aware of the allegations and evidence against them and they are in no way obliged to offer commitments. The parties have full opportunity to contest liability and to test the proportionality of proposed remedies.

Looking at the energy sector, commitments were accepted after a Statement of Objections in the Distrigas and EDF cases, and after a preliminary assessment in the E.ON, RWE and GDF cases. These cases resulted from a concerted effort to

understand the competition issues and to enforce the competition rules in the energy sector, namely our sector inquiry, so there is maybe a sense in which they are well suited to commitments. But there is no sense in which our decision to accept commitments in these cases amounts to a "regulation" of the sector.

Commitments are of course enshrined in a formal decision by the Commission, which can be appealed to the European courts, notably by third parties, as we have seen in the Alrosa case (De Beers). This is the by the way a key distinguishing mark of the European system: the protection of the rights of third parties and the degree of symmetry there must be in the proof provided by the Commission as a justification to prohibit a practice or a transaction, or to clear it, with or without commitments, and to reject a complaint.

In respect of cartel settlement discussions too, there is no abandonment of the need for a Statement of Objections, notwithstanding an admission of liability by the settlement applicants.

The role of third parties

So third party complainants may have an important role to play in antitrust investigations. However, to put that in perspective, it may be worth having a look at the figures. In 2009 to date we have received 49 antitrust complaints, and we have adopted 1 antitrust prohibition decision (Intel) and 3 antitrust commitments decisions (RWE gas foreclosure, Ship classification and GDF foreclosure).

I think that this suggests that we are not in thrall to complainants. Indeed, the focus of our enforcement policy in recent years has been very clearly on eliminating consumer harm, not harm to competitors.

On the other hand, a company that has suffered as a result of anticompetitive conduct by its competitors, its suppliers or its customers, is entitled to bring this

to our attention and may be entitled to certain procedural safeguards, including the right to see a non-confidential version of any Statement of Objections and to submit its comments. The complainant may sometimes also be heard at the oral hearing. And, in any event, the complainant is entitled to a decision on its complaint.

Best practices in antitrust

We are currently reflecting on some improvements to our antitrust procedures which would give more transparency and predictability for parties and enhance the efficiency of our enforcement.

As some of you are already aware, we have some proposals for best practices in antitrust proceedings, which we may incorporate into DG Competition's own working methods. However, the Hearing Officers are also examining issues which fall under their competence, including the organisation of oral hearings. Finally, given the increasing amount of data being sent to us by parties, the Chief Economist is also looking at the possibility of guidance on submission of economic evidence.

The Commission is at present reflecting on how to take these different initiatives forward so that improvements can be implemented as soon as possible.