

Fairness in EU competition law enforcement

British Chambers of Commerce EU & Belgium – 20 June

Ladies and Gentlemen:

It is a pleasure to be back at your EU Committee briefings. Many thanks for your invitation and for the topic proposed for our exchange of views this morning.

There has been much talk about fairness in competition-control circles since Commissioner Vestager revived the term by consistently referring to it in her public statements throughout her term of office in the present Commission.

Interviewed by *The Guardian* on social media a couple of weeks ago, for instance, she said that competition authorities have “to make sure you have fair competition and that democracy still serves consumers.”¹

I said the Commissioner ‘revived’ the term because fairness has always been a value underpinning EU competition law and its enforcement.

The Treaty’s competition articles, materially unchanged since 1957, make reference to a “fair share” for consumers and to “unfair purchase or selling prices or other unfair trading conditions” in articles 101 and 102 TFEU, respectively.

‘Fair competition’ is even recognised as one of the foundations of the EU.

The phrase features among the first paragraphs of the preamble to the Treaty on the Functioning of the European Union.

Competition enforcers, like all public-policy actors, must take their legal mandates seriously. This is why fairness is a part – an important part – of the rationale for the implementation of EU competition law.

Granting fair business conditions to all companies with operations in Europe's single market is a bedrock of the Commission’s action.

Indeed, consumers regard illegal anticompetitive practices not only as harmful for their interests, but also as unfair.

The realisation that fairness has pride of place in public policy informs other Commission actions as well.

Vice-President Timmermans stated that the broad initiative called *A New Deal for Consumers* launched last month was about “delivering a fairer Single Market that benefits consumers and businesses”.²

¹ *The Guardian*, June 9, 2018. Available at <https://www.theguardian.com/world/2018/jun/08/margrethe-vestager-eu-tech-regulator-i-fear-social-media-will-deactivate-democracy>

But while ‘fairness’ is a guiding principle, it is not an instrument that competition enforcers can use off the shelf to go about their work in detail. In each and every case the Commission looks into, it must dig for evidence; conduct rigorous economic analysis; and check findings against the law and the guidance provided by the European Courts.

Every decision taken by the Commission is the result of a bespoke assessment.

But if you step back, the notion of fairness will emerge from the decisions as landscapes and human figures emerge from the paintings of Seurat or Signac.

Procedural fairness in merger review

So, there is no trade-off between the notion of fairness on the one hand and painstaking work on individual cases on the other.

In fact, fairness is deeply rooted in the Commission’s procedures and guides its work.

Let me look at merger control to make this point.

Here, we can see first and foremost the importance of procedural fairness. It implies that the notifying parties – the companies that submitted their planned deal for review – have the right to be heard before any <adverse?> decision is taken as a result of our assessment.

This right is enshrined in different ways in the procedural framework of EU merger control, from the binding provisions of the Merger Regulation to the soft-law Best Practices on the conduct of merger proceedings.

The parties have many opportunities to exercise their right.

In a State-of-Play meeting they are informed orally about the state of the investigation and have the opportunity to give their views.

When the Commission decides to open a Phase Two investigation, it has to produce a reasoned decision to which the parties may respond in writing.

A Statement of Objections is issued if competition concerns are maintained in Phase Two.

The notifying parties have more opportunities to be heard after this step, too.

They can access the Commission's file and present their arguments in writing and at an oral hearing.

In addition, procedural fairness extends beyond the companies directly involved in the proposed deal.

Third parties are invited to give their views and arguments by reacting to the notices published in the Official Journal and within the framework of the Commission's market investigation and market testing of remedies.

² A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement. Press release, 11 April, 2018. Available at http://europa.eu/rapid/press-release_IP-18-3041_en.htm

Moreover, third parties with a legitimate interest may request a non-confidential copy of the Statement of Objections and attend oral hearings – as long as this does not encroach with the protection of the notifying parties' confidential information.

And if the Commission were to fail anywhere along the process, the respect of procedural fairness is guarded by the Hearing Officer and the Union Courts.

On another level, procedural fairness also implies that comparable cases are treated in the same way, procedurally as well as on substance.

This is why, for example, the categories of cases that may benefit from a simplified treatment are clearly defined.

Also, the Commission has published several guidance documents on how it carries out its assessment – such as the Horizontal and Non-Horizontal Merger Guidelines and the Remedies Notice. These guidance documents are crucial to ensure a predictable, rigorous and consistent process.

Let me add a comment here.

All these guarantees are given within the short and set deadlines typical of merger review. And this is one of the best examples I can give you that, in our daily practice, there is no trade-off between fair procedure, thorough assessment and swift decisions.

State aid corporate tax cases

But keeping fair competition conditions across the single market is not only about procedure. The notion of fairness is involved in investigations and decisions in substantive ways.

Take the State aid corporate-tax cases, such as the tax arrangement granted by the Irish authorities that allowed Apple to effectively pay only €50 in tax for every million euros in profit.

Much has been said about this decision and today I will not delve into its legal reasoning, which is currently being tested in Court. I will just point out that the treatment enjoyed by Apple is hardly fair on its rivals which paid the standard corporate tax rate.

The Commission's investigation into Belgium's Excess Profit scheme is another good example.

Under this scheme, multinational groups that agreed to invest or move activities into Belgium were given a tax exemption of 50% up to 90% of the profits realised with these activities. Following the Commission decision in January 2016, almost €750 million in unpaid taxes have been recovered from 35 beneficiaries.

Both cases raise fairness questions beyond the legal reasoning.

Was it fair for Apple to benefit for over 20 years from tax breaks that were not available to its competitors? Was it fair that certain multinational companies were offered tax breaks to move activities to Belgium, or start them there, while their Belgian competitors had to pay the full rate?

At the same time, these cases are excellent examples which illustrate that Commission decisions are not based on a "fairness reasoning" as such, but on a painstaking assessment against the specific

legal rules that have fairness as their rationale. In the case of State aid control, the Commission can only make a case if it shows that an undertaking or a group of undertakings has received an unjustifiable selective advantage.

If we cannot make the case, the Commission must, in all fairness, recognise that a tax deduction – even if it is perceived as unfair – is beyond the remit of State aid control. It may tackle it eventually through other legal disciplines, but not through competition law.

Cartels

Questions of fairness are also raised when dealing with secret cartels, which are perhaps the anticompetitive practice most people instinctively feel as unfair. It is no coincidence that secret cartels are viewed by competition law as hardcore restrictions and that they are an enforcement priority for the Commission.

Here, I will look at the three cartel decisions in the car sector the Commission issued on the 21st of February this year.

The first of these, involving maritime car carriers, concerned the transport of new cars, trucks and other large vehicles by sea. Five companies coordinated the prices they would charge and divided up customers between them.

The second concerned spark plugs, where three companies agreed not to compete with each other and keep their respective customers.

In the third, the braking systems case, the parties coordinated their behaviour including on pricing.

These last two cases are just the latest in a series of major investigations into cartels in the automotive parts sector.

All these cases show the unfairness of cartels on several levels:

- It is unfair that, by coordinating their behaviour on pricing and customers instead of competing, the members of these cartels may have extracted high profits;
- It is unfair that car makers may have been subject to higher costs, be that for the supply of parts or the provision of transport services; and
- It is unfair that, as some of these extra costs may have been passed on to final consumers, they may have ended up paying more for their cars.

More generally, car manufacturing is a major European sector. In 2016 alone the EU exported €190 billion worth of cars. Increasing the price of car parts or the cost of exporting cars in an artificial way can threaten European industry and jobs.

But, again, the Commission cannot and does not rely on the concept of fairness feeling as such. It has to make the cartel case.

Abuse of dominance

Excessive pricing

Next to cartels, the practice that law-abiding entrepreneurs and consumers find particularly unfair is exploiting a position of dominance to impose excessive prices – or unfair prices, to use the Treaty phrase.

Two recent excessive-pricing antitrust investigations are the ongoing in-depth investigation against the pharmaceutical company Aspen and the investigation involving Gazprom that was concluded with the decision of May 24, 2018.

In the Aspen case, we are investigating information indicating that the company may have imposed very significant and unjustified price increases of up to several hundred percent for certain medicines.

This is still being investigated. And so fairness also implies that I state here that the investigation is just this for the time being – an investigation as of today with no conclusion.

Excessive pricing was also part of the Gazprom decision the Commission took last month.

Many countries in Central and Eastern Europe depend on Gazprom for much or all of their gas supply. But it appears that, in some countries, Gazprom's contracts may have stopped its customers from reselling gas across borders.

This may have allowed Gazprom to charge unfair prices in certain countries. Gazprom's Eastern European customers paid much more for their gas than German customers, even though Russian gas travelled through Eastern Europe to reach Germany.

The commitments that the decision made binding on Gazprom offer a forward-looking and effective solution. They ensure that Gazprom's prices remain fair by introducing in Gazprom's contracts improved price-revision clauses linked to competitive Western European benchmarks, in particular gas hubs.

This innovative remedy leaves the determination of the price to market forces. It provides a level playing field to the customers of the dominant company without setting the price.

This is a telling illustration of the fact that also when it comes to remedies the fairness rationale does not lead competition law to “rules of thumb”. Quite to the contrary, it leads to a verifiable and objective benchmark.

Exclusionary practices

If it is illegal to impose unfairly high prices, it is also illegal to keep them artificially low so as to thwart one's rivals' ability to compete.

In exclusionary pricing practices, such as predation or margin squeeze, dominant companies take advantage of their scale and financial means to drive competitors out of the market by charging prices that do not allow the recovery of their costs for sustained periods of time.

They do so with the aim of making the competitive conditions in the markets they operate in unsustainable for otherwise viable competitors.

We are currently investigating whether Qualcomm engaged in predatory pricing against Icera, which – at the time of the alleged abuse – was one of its main competitors in the leading-edge segment of the market for UMTS baseband chipsets. Again, this is an ongoing investigation; the case is not yet concluded.

But this case is not a first. Several years ago, the Commission fined Wanadoo Interactive – a subsidiary of France Télécom – for engaging in a similar practice in ADSL-based Internet access services.

Companies can also use means other than pricing to harm competition. One example is the practice the Commission found when it looked into the licensing of standard essential patents – or SEPs – among mobile phone manufacturers.

The story of these cases is about keeping promises. Let me explain why.

Standards are usually set within standard-setting organisations, where members come together and agree to choose one technological solution over competing alternatives.

In order to guarantee access to the standardised technology to all players and prevent the holdup of competitors and potentially the entire industry, standard-setting organizations generally require technology owners to pledge they will license their SEPs on FRAND terms – and I stress in passing that ‘f’ in the acronym stands for ‘fair’.

In the Samsung and Motorola cases of 2014, the Commission clarified that an SEP holder who has given a commitment to license on FRAND terms cannot seek an injunction against an implementer of the standardised technology that is willing to take a license on such terms.

In plain language, the patent holders did not live up to their promises.

The Commission’s approach in these cases was confirmed by the Court of Justice in the Huawei v ZTE ruling of 2015. In that ruling, the Court held that Article 102 TFEU imposed certain conditions on SEP holders such as – and I quote – that they "must comply with conditions which seek to ensure a fair balance between the interests concerned" – ie, the interests of patent holders and those of the companies that need to use the standardised technology to stay in the market.³

Conclusion

With this, we have seen that the notion of fairness can be found in all the compartments of a competition enforcer’s toolbox: in merger review, in government support that gives selective advantage, and in cartels and other antitrust practices, especially when abuse of dominance is involved.

³ The full text of the judgement is available at <http://curia.europa.eu/juris/document/document.jsf?docid=165911&doclang=en>

I have tried to show that, far from being a fuzzy concept that can justify a freewheeling enforcement attitude, the notion of fairness – when properly understood – actually drives enforcers towards rigour and consistency.

The notion also reminds us of our ultimate goals: taking care of the interests and welfare of consumers and granting the same opportunities to all economic players with operations in the single market.

Meeting the demand from consumers that they be offered a fair deal produces not only an economic dividend but a social and political dividend as well. It helps to raise the level of trust in our societies and to rekindle the people's trust in business and public institutions – and both can use a surge in trust these days.

This is why I believe that fairness is *both* an accurate frame that we can use to talk about competition in expert circles – as we are doing this morning – *and* an effective way to involve European citizens at large in an informed conversation about the benefits of the market economy, competition and European integration.

Thank you.