Mr Torben TOFT

Principal Administrator
International Relations Unit
Competition DG, European Commission

Investigation procedures and techniques in monopoly cases

Presentation at
The International Symposium on Anti Monopoly Enforcement

Beijing, 13 – 14 December 2007

TABLE OF CONTENTS

1. INTRODUCTION

Investigation procedures and techniques in monopoly cases is a vast and important issue. Let me try to highlight some of the issues that we in the EU find important.

In doing so, I will follow the order of Chapter VI of the Anti Monopoly Law on Investigation of suspected monopolistic conduct. This should take me through the following topics:

Who should enforce competition law?

How do cases start in the EU?

What are our investigative powers?

What are the essential rights of defence?

2. WHO SHOULD ENFORCE COMPETITION LAW?

Article 85 of the EC Treaty is parallel to Article 38 of the Anti Monopoly Law which empowers the Anti-monopoly Enforcement Authority to investigate suspicious monopoly behaviour. Article 85 of the EC Treaty empowers the European Commission to apply the rules of the EC Treaty prohibiting restrictive agreements and the abuse of dominant positions. The European Commission shall enforce these prohibitions on its own initiative and shall investigate cases of suspected infringements. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

In addition in the EU, since the modernisation reform in 2004, EU competition law can also be enforced by the National Competition Authorities of the Member States. The enforcement work is coordinated in a European Competition Network. In this network information is exchanged, cases are allocated to be dealt with by the most appropriate agency, competition policy is outlined and solution of cases is coordinated.

The European Competition Network is a well functioning network. It is a good model for the enforcement of competition law in jurisdictions where there are more competition authorities and possibly with regional branch offices.

The Anti Monopoly Law moreover foresees civil liability for infringers of the Anti Monopoly Law in its Article 50. This could potentially lead to a strong private enforcement if the Chinese courts become well equipped and the procedures streamlined for this task.

In the EU actions for damages for the infringement of competition law have been extremely limited and the enforcement has been carried out almost exclusively by the European Commission. The Commission is looking at the conditions under which private parties can bring actions for damages before the national courts of the Member States for breach of the Community antitrust rules. Facilitating damages claims for breaches of the antitrust rules will not only strengthen the enforcement of competition law, but will also make it easier for consumers and firms who have suffered damage from an infringement of competition law rules to recover their losses from the infringer.

I am convinced that private actions would help develop a culture of competition amongst market participants - including consumers - and raise awareness of the competition rules.

3. WHAT ARE THE APPROPRIATE INVESTIGATIVE POWERS?

Turning back to the European Commission as enforcer of the competition rules, I would like to mention our main investigative powers or tools.

The EC Treaty contains less on procedures than the Anti Monopoly Law. The European procedural antitrust rules are contained in various secondary regulations. Some of these regulations contain the general rules for the implementation of the EC Treaty provisions including the investigative powers of the Commission. Moreover, the Commission has been empowered to adopt various non-regulatory documents, which may take various forms (notices, guidelines, *etc*). Such documents are intended to explain in more detail the policy of the Commission on a number of issues, either relating to the interpretation of substantive antitrust rules or to procedural issues, such as access to the file.

4. HOW THE COMMISSION'S CASES START?

A few years ago the European system was changed from an *ex ante* control to an *ex-post* control system. It is now for the undertaking themselves to assess whether or not they are compliant with the competition rules. While there is still a notification procedure in merger control, we no longer receive notifications in anti-trust case, which was our main source of cases in that area of the law. Our sources for new cases are today:

- Own initiative *(Ex officio)* cases;
- Complaints;
- Leniency applications in cartel cases.

4.1. Own initiative procedures

We rely on the following sources of information to launch *ex officio* procedures:

– Any legal or physical person may inform the Commission of alleged infringements of the competition rules. For this purpose, the Commission has created a special website to collect information from citizens and undertakings and their associations who wish to inform the Commission about suspected infringements. The Commission is very careful to protect the identity of informants that request the protection of their identity. It is therefore positive that Article 38(2) of the AML renders it possible for the Anti-monopoly Enforcement Authority to protect to the names of the reporters confidential.

– Market monitoring. The agency is divided up in sectoral units with a view that the individual case officers would gather sectoral knowledge through the general and specialized press, the internet and databases.

– Sector inquiries may give rise to follow-up cases as a result of the information gathered.

– As I mentioned earlier the EU competition authorities corporate in a European Competition Network. In the European Competition Network we have a database,

which permits us to communicate the opening of cases, exchange and gather of information. The information gathered by means of this network has also lead to the launch of cases.

4.2. Complaints

Complaints are another important source of cases.

4.2.1. Who and how to complain?

Any natural or legal persons that can show a legitimate interest are entitled to complain to the Commission. The Commission has issued a notice to the public on the handling of complaints by the Commission. The mandatory use of a *complaints form* is meant to ensure that complaints are well substantiated. The Form requires complainants to submit comprehensive information in relation to their complaint with copies of relevant supporting documentation reasonably available to them and, to the extent possible, provide indications as to where relevant information and documents that are unavailable to them could be obtained by the Commission.

4.2.2. How to deal with the complaints?

The Commission prioritizes the handling of complaints and pursues only a limited number of complaints which are of Community interest.

The Commission must examine carefully the factual and legal elements brought to its attention in complaints in order to assess the Community interest in further investigating the case. The Commission, however, is not required to conduct an investigation into each complaint or to take a decision on the existence or non-existence of an infringement. The Commission is entitled to prioritise complaints according to their Community interest. I understand that you have the same possibilities under Article 38 of the Anti Monopoly Law and I can highly recommend that you make use of this possibility.

The Commission may reject a complaint on a lack of Community interest for example if:

– the complainant can bring an action to assert its rights before national courts,

– the alleged infringements are not sufficiently serious or their consequences persistent,

– the practices in question have ceased, or

– the undertakings concerned agree to change their conduct.

The assessment depends on the circumstances of each individual case. Where the Commission forms the view that a case does not display sufficient Community interest to justify investigation, the Commission may reject the complaint on that ground. Such a step can be taken either before commencing an investigation or after taking investigative measures.

4.2.3. The European Commission's complaint procedure

In case the Commission does not want to deal with a complaint, the Commission's procedure for dealing with complaints has three different stages:

1. During the first stage the Commission examines the complaint. It may collect further information in order to decide what action it will take on the complaint. That stage may include an informal exchange of views with the complainant to clarifying factual and legal issues. In this stage, the Commission may give an initial reaction to the complainant allowing the complainant an opportunity to expand on his allegations in the light of that initial reaction. If the complainant fails to respond within the time-limit, the complaint is deemed to have been withdrawn.

2. If the complainant persists in a second stage, the Commission may investigate the case further. Where the Commission considers that there are insufficient grounds for acting on the complaint, it will formally inform the complainant of its reasons and offer the complainant the opportunity to submit any further comments within a time-limit. If the complainant fails to respond within the time-limit, the complaint is deemed to have been withdrawn.

3. If the complainant persists, in the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant and either initiates a procedure against the subject of the complaint or adopts a decision rejecting the complaint. The decision must clearly state the reasons for rejecting the complaint in such a way as to enable the complainant to ascertain the reasons for the rejection and to enable the competent Community Court to exercise its power of review in case the complainant appeals the Commission's rejection decision.

The Commission is under an obligation to decide on complaints within a reasonable time and it has offered an indicative time frame of four months from the reception of the complaint.

4.2.4. The complainant's position

If the Commission pursues a complaint and initiates proceedings against the suspected infringer, the complainant will have a limited number of rights:

– Where the Commission addresses a statement of objections to the companies complained of, the complainant is entitled to receive non-confidential version of the statement of objections.

– The complainant is invited to comment in writing on the statement of objections.

– Furthermore, the Commission may afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been addressed, if the complainants so request in their written comments.

4.2.5. Conclusion on complaints

In conclusion on complaints, I note that in the EU the Commission has the right to prioritise and to deal only with selected complaints. On the other hand, the complainant has the right to have a formal rejection of his complaint, which can be appealed to the Community Courts. Finally, if the Commission pursues the case, the complainant has some association with the case.

4.3. Leniency procedure

Along with the other detection and investigation tools at the European Commission's disposal, the leniency policy proves very successful in fighting cartels.

In essence, the leniency policy offers companies involved in a cartel - which self-report and hand over evidence - either total immunity from fines or a reduction of fines which the Commission would have otherwise imposed on them.

This benefits the Commission, allowing it not only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement.

The leniency policy also has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members.

In order to obtain total immunity under the leniency policy, a company which participated in a cartel must be the first one to inform the Commission of an undetected cartel by providing sufficient information to allow the Commission to launch an inspection at the premises of the companies allegedly involved in the cartel.

If the Commission is already in possession of enough information to launch an inspection or has already undertaken one, the company must provide evidence that enables the Commission to prove the cartel infringement. In all cases, the company must also fully cooperate with the Commission throughout its procedure, provide it with all evidence in its possession and put an end to the infringement immediately. The cooperation with the Commission implies that the existence and the content of the application cannot be disclosed to any other company. The company may not benefit from immunity if it took steps to coerce other undertakings to participate in the cartel.

Companies which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents "significant added value" to that already in the Commission's possession and have terminated their participation in the cartel. Evidence is considered to be of a "significant added value" for the Commission when it reinforces its ability to prove the infringement. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.

The Commission considers that any statement submitted to it within the context of its leniency policy forms part of the Commission's file and may therefore not be disclosed or used for any other purpose than the Commission's own cartel proceedings.

5. INVESTIGATIVE TOOLS FOR THE INVESTIGATION OF SUSPECTED INFRINGEMENTS

The Commission essentially has four investigative tools:

– Informal fact finding

– Requests for information

– Inspections

– Interviews

5.1. Informal fact finding

Informal fact finding is essentially what can be found in publicly available sources such as newspapers, libraries, databases, the internet, annual reports etc. This is admissible as evidence and will typically be used to explain the back ground of the case and put it in a context.

5.2. Written requests for information

The most widely used manner of gathering information in case investigations is by means of simple written requests for information. The simple written request for information is a letter to the undertaking, signed by an official at Head of Unit level, and if the undertaking does not reply, there is no sanction. There are however sanctions for incorrect or misleading replies.

The Commission may also request information by formal Commission decision, which is signed by the Director-General by delegation. The undertakings are obliged to answer. If there is no answer or a refusal to answer, the Commission may adopt a decision obliging the company to answer and impose penalty payments until the answer is made. The fines may range up to 1% of the turnover and daily penalty payments may range up to 5% of the daily turnover. The request for information decision can be the object of an appeal before the Court of First Instance but the appeal shall not have suspending effect.

5.3. Inspections

In the EU we operate with 3 types of inspection.

- Inspection by Commission decision: Surprise inspections are the most common in particular for cartel cases. It is compulsory for the undertaking to submit to those inspections under the threat of fines and periodic penalty payments.

- Simple inspection: Simple inspections are often used as a follow-up to dawn raid and we have the same powers of investigation but it is not compulsory for the undertaking to submit to them.

- Inspection at private premises: We may in exceptional cases inspect the private homes of company executives, if there is reason to believe that business documents are kept there.

I note that Article 39 of the AML appears to operate with essentially the same types of inspections and provides similar powers to those of the European Commission.

The future Chinese Anti Monopoly Enforcement Authority will moreover have additional powers compared to its European colleague:

- The Commission cannot impound or seize relevant evidence as foreseen in Article 39(4) of the AML, but must satisfy itself with a copy of the evidence in question.

- Nor does the Commission have powers to "*inspecting and inquiring the bank accounts of the undertakings concerned"* as foreseen in Article 39(5) of the AML.

While a Commission decision to inspect can be appealed, under the AML there seems to be no judicial control on the decision to undertake an inspection as Article 39 simply

requests that the inspections is approved by the major responsible person of the Anti-monopoly Enforcement Authority. From a European point of view I would consider it appropriate to introduce a control mechanism on the Authority's exercise of power.

5.4. Interviews

The Commission has the possibility 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.

The information provided by interviewees can be used as evidence in the subsequent course of the procedure.

There is no obligation on the interviewee to cooperate with the Commission. The interview is carried out on a voluntary basis. Accordingly the interviewee can discontinue the interview at any moment in time. Similarly there is no obligation on the interviewee to provide correct information. There are in particular no sanctions if the interviewee provides incorrect, incomplete or misleading information.

It would seem that the Anti Monopoly Law gives the Anti Monopoly Enforcement Authority wider powers in Article 39(2) as it may question undertakings or individuals and requiring them to provide the relevant information and impose fines according to Article 52 of the Anti Monopoly Law if the subject does not cooperate.

We regularly make use of this instrument in leniency cases, in which companies provide information on a voluntary basis that can be used in cartel investigations. However the instrument is not limited to leniency cases and can also be used to interview persons that are not themselves subject to an investigation.

6. CONFIDENTIALITY

Article 41 of the Anti Monopoly Law requires the Anti-monopoly Enforcement Authority and their officials are obliged to keep confidential business secrets that come into their knowledge during the process of enforcement. This is a very important feature which is shared with the EU. The competition authority will acquire a lot of confidential business information when carrying out its tasks. It is necessary that it also protects such information from being divulged to third parties. Disclosure of confidential business information can significantly harm a person or and undertaking and if the authority cannot guarantee its protection, undertakings will become increasingly unwilling to volunteer information to the Authority.

7. RIGHTS OF DEFENCE

When infringements of competition law may result in severe sanctions, it is necessary to **ensure fully the parties' defence rights** during the administrative process and afterwards in the Tribunals. This is a fundamental principle in the EU.

7.1. The right to be heard

Also the Anti Monopoly Law gives the undertaking concerned and the interested parties under investigation the right to express their opinion which the relevant Anti-monopoly Enforcement Authority shall take into account. It is not, however, clear at what stage of

the procedure this hearing of the parties would take place and if this right of defence shall have any meaning, the relevant Anti-monopoly Enforcement Authority must hear the parties well in advance of taking its decisions.

In EU, once the investigation material has been gathered and the Commission has formed an opinion about the existence of an infringement, a statement of objections is presented to the undertakings concerned. They are thereafter given an opportunity to comment both in writing and orally on these objections. In this context, they are given access to the Commission investigation file in order to enable their effective exercise of the rights of defence against the objections brought forward by the Commission. The right of access to the file does not extend to confidential information and internal documents of the Commission or the competition authorities of the Member States.

7.2. The Hearing Officer

An important institution in the enforcement of EU Competition Law is the Hearing Officer. Briefly, his main tasks in competition proceedings are the following:

- to ensure the respect of the right to be heard, right to access to file and the fairness of the proceeding;
- to organise and conduct the oral hearings in competition proceedings;
- to report on the outcome of the oral hearing and on the respect of the right to be heard;
- to ensure that the undertakings' legitimate interest in confidentiality is respected;

I suggest exploring this issue more and setting clear and detailed rules in an administrative regulation.

7.3. Administrative reconsideration

In addition to the judicial review, Article 53 of the Anti Monopoly Law also provides for administrative reconsideration. I would recommend clarifying in the implementing rules who will carry out such administrative reconsideration and what the procedure would be. This would provide greater confidence and clarity in the review system.

8. TRANSPARENCY

Under Article 44 of the Anti Monopoly Law it is facultative for the Anti-monopoly Enforcement Authority to publish the decision it takes. I would like to remark that for competition policy to be effective, businesses and other parts of the government need to understand the rules of the game. Competition law and policy should be transparent and implementation should be predictable. The authority should demonstrate transparency both with regard to its decisions and its policy lines. An essential requirement is that the decisions of the authority are published so that the general public has easy access to those. We also recommend publication of policy lines to increase clarity and legal certainty. Competition matters often require complex analysis all of which can not be spelled out in law. In EU, for example, we have published a number of notices and guidelines to inform the public on the way in which we interpret and implement our law in practice. Transparency reduces firms’ costs of compliance and promotes confidence by

reassuring business that they are being treated fairly and that government is exercising its powers responsibly.

9. CONCLUSION

I have surfed the topic of *'Investigation procedure and techniques in monopoly case'*, however, time does not allow for more.

Reading the Anti Monopoly Law, it is my impression that China is well-advanced in the preparation of its anti-monopoly enforcement and that it is on a very good way.

You cannot deal with all cases and it is even not interesting to do so. Find the right cases and set a precedent. You will therefore have to implement your procedures in a manner which allows you to prioritise.

Transparency in your policy, procedures and of the decisions with appropriate rights of defence is very important to build a world-wide well accepted competition law regime.