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Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of the Hearing Officer

Check Against Delivery
Seul le texte prononcé fait foi
Es gilt das gesprochene Wort

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Ladies and Gentlemen,

It is a pleasure to address the OECD's Competition Committee again.

The European Commission has asked to take the floor today in order to present a summary of the main changes contained in the new Best Practices for antitrust proceedings and the submission of economic evidence, as well as in the revised mandate of the Hearing Officers.

This so-called "procedural package" was adopted yesterday, and you are therefore among the first to be informed of the details.

We are very proud of the end result especially because this package is the product of our discussions with stakeholders over more than a year. We listened to their suggestions and sought to include as many as possible in the final texts. We also tested the draft Best Practices for nearly a year and further fine tuned them over this period. I think that we succeeded in answering most of our stakeholders' concerns.

We are confident that the package enhances transparency and procedural guarantees, while maintaining the need for efficient processes.

We went through this exercise because we wanted to improve the transparency of our procedures, so that parties to our cases know clearly what to expect and understand the path that these cases follow, step by step.

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

Experience has taught us that more interaction with parties enhances our fact-finding, making us a more proficient agency. In particular, this interaction gives us a better understanding of the products, the players and the markets at hand. It also helps us avoid factual errors or ensures their swift rectification.

By enhancing fair treatment and transparency we also win stakeholder respect – an investment that pays-off in the form of easier relations with parties, more out-of-court settlements and so on. Ultimately, by increasing transparency, we also become more accountable towards the wider public, especially towards the consumers whose interests we always seek to protect in our enforcement action.

These were the reasons that stood behind our work in this area.

I would now first like to give you a broad overview of the EU enforcement system, before moving onto the specific details of the changes we adopted yesterday.

1. The EU antitrust enforcement system.

1.1. 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, 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 our procedure. It has performed well over the years as confirmed by the Courts, and this is why we chose not to carry out a more radical reform.

In the very recent *Menarini* judgment¹, 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 deemed that in this case national courts were sufficiently equipped to review the sanctions, and in fact carried out a full review.

In practice, this means that companies have adequate means to challenge their authorities' sanctions and that their right to a fair trial is ensured. Indeed, the judgment confirms that an administrative system where an agency imposes sanctions which are subject to full review by an independent court should comply with fundamental rights law.

This is a welcome development which confirms the legitimacy of administrative systems, a model followed by many 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.

1. 2. A full set of procedural rights

In our 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. And of course, general principles of law , including fundamental rights, apply.

During the investigation phase, parties in antitrust proceedings have several key rights, such as the right not to self-incriminate and to be informed whether they are potentially suspected of having committed an infringement. Once the investigation phase is complete, the parties have the right to be heard. Parties receive a Statement of Objections and have the right to

¹ Judgment of the ECtHR of 27 September 2011, *A. Menarini Diagnostics S.R.L. v. Italy*, Application No 43509/08

access the Commission's investigation file in order to prepare their written and oral defence. They can raise any point they deem appropriate, including contesting facts or evidence relied upon and can submit any expert opinion they wish to produce.

They also have the right to a formal Oral Hearing – chaired by the Hearing Officer, who is an independent official - at which they can further develop their defence. Finally, if the Commission ultimately adopts a prohibition decision, it must be fully reasoned, so that parties can exercise their right of appeal to the European Courts.

1.3. Checks and balances at every step of the procedure

In addition to these fundamental procedural rights, the Commission has put in place a series of 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. At DG Competition, cases follow a clear-cut path:

- (a) there is a priority examination of antitrust cases under which case teams submit their proposed course of action to in-house scrutiny, at an early stage, to assess whether cases merit further examination;
- (b) a coordination unit provides case support throughout proceedings;
- (c) the Chief Economist Team advises on all economic matters; and
- (d) peer review panels are set up in complex cases in order to provide a "fresh pair of eyes", advising on coherence, economic, legal and procedural issues.

Ultimately, the decision is taken by a College of 27 Commissioners. 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.

In addition, the Hearing Officers are specifically tasked with safeguarding procedural rights. And before adopting decisions, the Commission hears Member States' competition experts in the Advisory Committee. Prior to a decision being submitted to the College, other Commission departments responsible for economic policy and the relevant sector at issue in a case are also consulted.

As you can see, over the years we have built an administrative enforcement that lives-up to the highest standards of professionalism and due process. As Commissioner Almunia has frequently said – for instance in Florence about a year ago or in Paris and Budapest earlier this year - our system is second to none.

After this brief overview, I would like to turn now to what is new, to the changes brought forward by the package adopted yesterday. Because although our system is good, we wanted to make it even better.

2. Further enhancing transparency and predictability of proceedings

2.1. Antitrust Best Practices

The Best Practices for antitrust proceedings aim to enhance the transparency and predictability of the Commission proceedings. We adopted Best Practices on merger proceedings back in 2004 and we have seen that they 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 us to consider that antitrust proceedings would also benefit from the introduction of similar measures.

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 to offer 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. The Commission also commits to systematically publish all its decisions rejecting complaints (or a summary) so that stakeholders have a more accurate picture of the grounds for rejection.

The Antitrust Best Practices therefore enhance the opportunities for parties to interact with the Commission services from an early stage.

State of Play meetings with parties will enhance this interaction and will occur at key points in the proceedings. Such State of Play meetings are key to ensuring that the Commission is aware of the parties' arguments from an early stage, thereby enabling us to only move forward with robust cases. This is underscored by our commitment to formally open proceedings earlier and to disclose key submissions of complainants or third parties prior to the Statement of Objections being issued.

Specific State of Play meetings are also foreseen in commitment proceedings, cartel proceedings and for complainants in cases where the Commission has formally opened proceedings but intends to reject the complaint.

We have also brought changes with respect to the interaction with parties on fines. A section on fines is now included in the Statement of Objections. 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 fining amounts, but elements such as relevant sales figures to be taken into account, as well as the years that will be considered for the value of such sales.

We have 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 us 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 its fines are as accurate as possible and also help us avoid post-decision corrections.

Finally, we have introduced greater transparency 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.

2.2. Best Practices on the Submission of Economic Evidence

Yesterday, we have also published a DG Competition Staff Working Paper on the submission of economic evidence.

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 us 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.

2.3. The mandate of the Hearing Officer

To the extent that parties have a concern about the respect 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 our antitrust and merger proceedings since 1982. He or she is independent from the case handling services and plays a crucial role as independent arbiter in disputes between the case teams and parties.

However, this role was limited to the stages in our proceedings that follow the sending of the Statement of Objections. We deemed that now was the right moment to extend the role of the Hearing Officer as this would reinforce the overall protection of procedural fairness. Revised terms of reference have now been adopted. They strengthen the role of the Hearing Officer as guardian of procedural rights.

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

However, his fundamental mission remains in place. While the Hearing Officer will indeed become the guarantor of procedural rights, he will not act as a judge on the substance of the case.

That being said, the Hearing Officer 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.

The revised terms of reference explicitly specify for the first time that the Hearing Officer shall act independently in performing his duties. This was always the case in practice, but an explicit statement is a useful additional guarantee.

With the new terms of reference, the role of the Hearing Officer as a potential interlocutor on procedural rights issues becomes all-encompassing. For example, 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 potentially suspected of having committed an infringement. Should this not be followed, the Hearing Officer now has an express power to intervene.

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. In essence, the Commission may not during its inspections copy documents that benefit from legal privilege. This means that our inspection teams bring back documents for which privilege is claimed, in sealed envelopes. The matter must then be resolved without the documents having been seen.

A party that claims this privilege can now ask the Hearing Officer to review the document and formulate a view on whether it is or not privileged. This would apply not just in antitrust inspections, but also to inspections and investigatory measures under the Merger Regulation.

This new role of the Hearing Officer should go a long way to facilitating disputes about such claims and avoid unnecessary litigation. 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.

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. 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.

Following the issuing of the Statement of Objections, the Hearing Officer plays a key role as the guarantor of the right to be heard. The new terms of reference clarify the Hearing Officer's dispute resolution role with regard to parties' access to the Commission's file. 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. Moreover, the revised mandate strengthens the key role of the Hearing Officer regarding the conduct of the Oral Hearing, for example, by empowering him 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 remit of the reports which the Hearing Officer makes to 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.

Finally, the new extensive role of the Hearing Officer means that he 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.

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

It shows that we construe our system in a flexible enough manner to allow for constructive criticism and change.

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

The Commission has endeavoured to enhance the legitimacy of its actions by engaging in a process of adjustment of our practices, obtaining further stakeholder input and concluding with a package that makes good sense, and succeeds in having more transparent procedures while keeping them efficient.

We hope that our experience will inspire other agencies to further work in improving transparency and accountability, which we can only encourage.