



Proceedings for the application of Articles 101 and 102 TFEU:

Key actors and checks and balances

Under the Treaty on the Functioning of the European Union ("TFEU"), the European Commission has responsibility for enforcing the competition rules contained in Articles 101 and 102 TFEU¹. The European Union ("EU") enforcement system is that of an integrated public authority which investigates and has the power to order infringements to be brought to an end and to impose sanctions. The EU system corresponds to the institutional choice of many countries, including the majority of EEA Member States². Commission decisions are subject to comprehensive legal review by the Courts of the European Union, namely the General Court (formerly the Court of First Instance) and the Court of Justice.

Directorate General for Competition

Within the European Commission, the Directorate-General for Competition ("DG Competition") is primarily responsible for enforcing Articles 101 and 102 TFEU. DG Competition is administratively organised in Directorates, each consisting of three to five Units. Most Directorates have a

specific sectoral focus, while Units within the Directorate specialise in different competition policy instruments. Each of the sectoral Directorates comprises, thus, at least one Unit specialising in antitrust enforcement. In addition, a separate Directorate is dedicated to cartel enforcement across sectors.

The investigation of a case is allocated to the relevant Unit, both from a sectoral and instrument point of view. It is managed by a case team, which is in charge of all the different phases of the procedure of the case and acts as the primary interface between DG Competition and the parties. The case team is normally managed by a Head of Unit or by an experienced official acting as a case manager. The case team is supervised by the senior management of DG Competition. The Director General is responsible for putting forward any proposals for decision to the Commissioner.

The Commission is entitled to set priorities among the potential cases before it.³ Accordingly, all cases, irrespective of their origin, are subject to an initial assessment phase during which DG Competition assesses whether the case merits further investigation. In this regard, DG Competition focuses its enforcement resources on cases in which it appears likely that an infringement could be found, in particular on cases with the most significant impact on the functioning of competition and risk of consumer harm, as

¹ With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the TFEU. The two sets of provisions are in substance identical. For the purposes of this document, references to Articles 101 and 102 TFEU should be understood as references to Articles 81 and 82 of the EC Treaty when appropriate.

² See Case *Menarini v. Italy*, Application 43509/08, Judgment of ECHR of 27.9.2011, on the compatibility with Article 6 ECHR

³ Case T-24/90 *Automec v Commission* [1992] ECR II—2223, para 77.

well as on cases which are relevant with a view to defining EU competition policy and/or to ensuring the coherent application of Articles 101 and/or 102 TFEU.

Checks and balances within the Commission

In order to ensure that all relevant views and evidence are properly taken into account before a final decision is adopted, and that the assessment proposed by the case team is sound and takes account of parties' arguments, a number of checks and balances have been established. They are of a different nature and operate at different stages of the decision-making process.⁴

Checks and balances internal to DG Competition

Chief Economist

The Chief Economist assists in evaluating the economic impact of the Commission's actions in the competition field, and provides guidance on methodological issues of economics and econometrics in the application of EU competition rules. He/she contributes to individual competition cases as appropriate, in particular in cases involving complex economic issues and quantitative analysis. In complex cases a member of the Chief Economist's team might be seconded to the case-team. He/she also assists with cases pending before the Court of Justice of the European Union, at the request of the Legal Service.

He/she reports independently to the Director-General of DG Competition and provides independent advice to the Commissioner responsible for Competition on cases or policy issues which he/she has followed.

Peer Review

The "peer review" function forms part of DG Competition's internal checks and balances. It is intended to provide for a "fresh pair of eyes" to look at all or certain aspects of the assessment performed by the case team. The Director General, in agreement with the Commissioner, decides in which cases to have a peer review panel. Depending on the case, a peer review panel may be held either before the issuance of the Statement of Objections or after the replies by the parties to the Statement of Objections or the oral hearing, if one is held. Once it is decided that a peer review will take place, a Peer Review Team is appointed. The organisation of the panel and the members of the Peer Review Team are not made public and the peer review of a case does not involve in any way the parties subject to the proceedings or any third party.

In order to facilitate its review of the case, the Peer Review Team is given full access to the file and the case team. After the review by the Peer Review Team, a Peer Review Panel chaired by a Scrutiny Officer is convened. The aim of the Peer Review Panel is to have an open discussion on the line proposed by the case team. The Panel can either identify areas where further work is necessary; identify objections that should be dropped; recommend that the case is not pursued further; or recommend that the case team continue with the case on an unchanged basis. The Panel's recommendations are purely internal and are not disclosed to the parties to the proceedings, complainants or any other third party. The

⁴ It is important to underline in this respect that these checks and balances are part of the Commission's internal deliberation process. Accordingly documents prepared in this context – with the exceptions explicitly foreseen – are not part of the accessible file and shall not be disclosed to the parties concerned, complainants or other interested/third parties.

recommendations of the Panel are reported to the Director-General, who is responsible for making a proposal to the Commissioner that reflects all available evidence and analysis to the Commissioner.

Other Checks and Balances forming part of the Commission's Decision Making Process

The Hearing Officer

Respect for the rights of the defence, and the right of every person to be heard before a decision which would affect him or her adversely is taken, constitute fundamental rights in EU law.⁵ The Commission is committed to ensuring that the effective exercise of all procedural rights is respected in its proceedings.

The Hearing Officers have been assigned by the President of the Commission the function of ensuring that the effective exercise of procedural rights is safeguarded throughout proceedings.⁶ The Hearing Officers are not part of DG Competition. For administrative purposes, they are attached to the Competition Commissioner. In exercising their functions, the Hearing Officers act independently.

One of the main functions of the Hearing Officers is to act as independent arbiter where a dispute on the effective exercise of procedural rights between parties and DG Competition arises. Where a mutually acceptable solution cannot be found, the Hearing Officer can, depending on the subject-matter, make a recommendation or take a decision.

In addition to dispute resolution, the Hearing Officers are directly involved in

certain parts of the proceedings, including in particular the organisation and conduct of the oral hearing. The Hearing Officer reports to the Competition Commissioner on the oral hearing and the conclusions to be drawn with regard to the respect for the effective exercise of procedural rights during the proceedings as a whole. In addition, and separately from this interim report, the Hearing Officer may submit observations on the further progress and impartiality of the proceedings. More generally, the Hearing Officer may present to the Competition Commissioner observations on any matter arising out of the proceedings.

Before the final decision is taken, the Hearing Officer prepares a final report to the College of Commissioners on the question whether the effective exercise of procedural rights has been respected during the administrative procedure and whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views. This report is also sent to the parties subject to the proceedings and published in the Official Journal of the European Union together with the final decision.

The Legal Service and other associated Commission services

Before a document is submitted to the College of Commissioners, DG Competition consults other Commission departments with a legitimate interest in the draft text (so-called "associated services")⁷.

The Legal Service reports directly to the President of the Commission. It provides legal advice to the Commission and all

⁵ Articles 41 and 48 of the Charter of Fundamental Rights of the EU.

⁶ Decision C (2011) 5742 of the President of the European Commission of 13 October 2011 on the function and the terms of reference of the hearing officer in certain competition proceedings.

⁷ Article 23(3) of the Rules of Procedure as amended by Commission Decision of 24 February 2010 (2010/138/EC, Euratom), OJ L55 of 05.03.2010, p. 60.

Commission directorates-general, including DG Competition, in order to ensure the legality of the Commission's actions and decisions and represents the Commission in courts.

As a general rule, it must be consulted by DG Competition on all drafts or proposals for legal instruments, on all documents implementing the competition rules which may have legal implications, and on all documents applying the competition rules in concrete cases.⁸ Indeed, the Legal Service plays a vital role throughout the entire procedure applying the competition rules in concrete cases, as its advice is regularly sought on many aspects of substance and procedure that are likely to have an impact on the legality or the outcome of the case in progress. The Legal Service has access to all the documents of a case and meets regularly the case team in order to be able to provide its independent legal advice.

Other Commission directorates-general responsible for the products, services or policy areas concerned in a particular case are also consulted as "associated services". For instance, DG Enterprise and Industry, which most notably is responsible for industrial policy, policies related to the Innovation Union and SME policy, is regularly consulted.

Advisory Committee

Regulation 1/2003 establishes that prior to taking a prohibition decision under Article 7, ordering interim measures under Article 8, taking a commitment decision pursuant to Article 9, making a finding of inapplicability under Article 10, imposing fines further to Article 23, imposing periodic penalty payments pursuant to Article 24(2) or withdrawing the benefit of a block exemption regulation on the basis

⁸ Article 23(4), *ibid.*

of Article 29(1), the Advisory Committee is consulted.⁹

For the discussion of individual antitrust cases, the Advisory Committee is composed of representatives of the competition authorities of the Member States.

The consultation of the Advisory Committee provides a valuable opportunity for the Commission to discuss its draft decisions with experts from the competition authorities of the Member States in a confidential and dedicated forum prior to its decisions being adopted. This can contribute to improving the quality of the decisions adopted by the Commission. To ensure that the members of the Advisory Committee have full knowledge of the facts and law of the draft decision on which they are consulted, they receive, and have access to, the most important documents and other existing documents necessary for the assessment of a case and have the right to take part in the oral hearing.¹⁰

In order to enhance the Advisory Committee's understanding of the Commission's draft decision, the practice has developed of appointing a rapporteur from one of the competition authorities of the Member States, with a view to facilitating discussions in the Advisory Committee. The rapporteur shall accordingly exercise his/her task in a strictly objective way at all times following his/her appointment. To this end, the

⁹ Article 14 of Regulation 1/2003.

¹⁰ Article 11(2) of Regulation 1/2003 and Article 14(3) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (OJ L 171, 1.7.2008, p. 3).

identity of the rapporteur or the national competition authority where he/she is employed is not made public.

Consultation of the Advisory Committee can take place at a meeting convened and chaired by the Commission (Article 14(3) of Regulation 1/2003) or by written procedure (unless a Member State objects (Article 14(4) of Regulation 1/2003). In practice, a meeting is normally convened.

It is the normal practice of the Advisory Committee to recommend the publication of its written opinion and at the request of one or more members it may deliver a reasoned opinion in appropriate cases. The Commission shall take the utmost account of the opinion delivered by the Advisory Committee.

The College of Commissioners

Decisions about the application of Articles 101 and 102 TFEU are taken by the College of Commissioners, upon the proposal of the Commissioner responsible for competition policy.

By virtue of the Treaty on the Functioning of the European Union, Commissioners shall "*refrain from any action incompatible with their duties*". Each Member State has undertaken to respect this principle and not to seek to influence the members of Commission in the performance of their tasks.¹¹

The College of Commissioners meets as a general rule once a week (but can also act by written procedure, empowerment procedure or by delegated authority). Commission decisions shall be adopted if a majority of the Commissioners specified in the Treaty vote in favour.

¹¹ Article 245 TFEU.

External checks and balances

Judicial review

In accordance with Article 263 TFEU, the decisions adopted by the Commission are subject to legal review by the Court of Justice of the European Union, namely the General Court (formerly the Court of First Instance) and the Court of Justice. It follows from established case law that it undertakes a comprehensive review of the question as to whether or not the conditions for the application of the competition rules are met. As the General Court has stated, when it reviews the legality of a decision finding an infringement of Article 101(1) or 102 TFEU, the applicants may call upon it "*to undertake an exhaustive review of both the Commission's substantive findings of facts and its legal appraisal of these facts.*"¹² With regard to the review of complex economic and technical appraisals made by the Commission, the Courts of the European Union will assess "*whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers.*"¹³ However, while the Courts [of the European Union] recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Courts [of the European Union] must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and

¹² See Joined Cases T-25/95 etc *Cimenteries CBR and Others v Commission* [2000] ECR II-508, para 719.

¹³ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, point 87

whether it is capable of substantiating the conclusions drawn from it"¹⁴.

Moreover, the Court of Justice of the European Union has, by virtue of Article 31 of Regulation 1/2003, unlimited jurisdiction to review fines or periodic penalty payments imposed by the Commission. The Court of Justice of the European Union may cancel, reduce or increase the fine or periodic penalty payment imposed.¹⁵

In accordance with Article 264 TFEU, if an action for annulment is well-founded, the Court of Justice of the European Union will declare the decision of the Commission to be void. The Court shall, if it considers, this necessary, state which of the effects of the decision it has declared void shall be considered as definitive. The Court may therefore partially annul the decision to the extent that the void part can be severed from the whole, e.g. it may reduce the level of fine imposed in the original decision or find that an infringement was only proved to exist for a shorter time than found by the decision. If the Court opts for annulment, the Commission may restart the investigation at the point at which the error occurred.¹⁶

¹⁴ Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601, point 89; see, also Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, point 39

¹⁵ Article 229 EC and Article 31 of Regulation 1/2003

¹⁶ See for example, Commission Decision of 30 April 2004 in *Compagnie Maritime Belge*, OJ L171/28 of 2.7.2005 adopted after the Court of Justice annulled fines imposed in the original decision in Joined Cases C-395/1996 P and C-396/1996 P *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365.

