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Best Practices in Article 101 and 102 Proceedings: Some Suggestions for Improved Transparency

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I. INTRODUCTION & CONCLUSION

DG Competition has recently published draft three guidance papers[2] setting out best practices for antitrust proceedings. The aim is to enhance transparency and predictability in the Commission's proceedings, while ensuring the efficiency of investigations into suspected competition law violations. This article focuses on the Commission's Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU (the Best Practices) and considers potential improvements regarding access to documents and information in the Commission procedure.

The Commission has developed a number of practices to increase both efficiency and transparency during the investigative phase; these have now been fleshed out in the Best Practices. These practices include different kinds of meetings and disclosure of key submissions prior to the Statement of Objections ("SO"), thereby providing the parties concerned with some insight into the investigation and allowing them to express their views at an early stage in the proceedings. Nevertheless, the Commission could do more within the current institutional structure, in particular, to increase transparency and due process in the critical phase between SO and the Commission's decision. The Competition Commissioners and other Commission officials have often emphasized that due process is safeguarded since there are a number of "checks and balances" and that the decision is ultimately made by other people than those involved in the investigation. Against this background, two particular suggestions for further improvement will be made. First, the Commission should let the company under investigation (the defendant) have continuous access to the file from the SO until it has finalized the draft decision. The defendant then knows what is being submitted to the Commission and is given the opportunity to respond prior to the decision being made. Second, the defendant should be given access to, and the opportunity to comment on, key documents drawn up within the Commission during this critical phase.

A brief comparison will be made to how similar procedural issues are handled by the Swedish Competition Authority ("SCA"). This is relevant since the Swedish system involves an institutional structure with a division between the investigator (the SCA) and the adjudicator (the Stockholm City Court) and far-reaching transparency (under the principle of public access)—two aspects that have often been criticized as missing in the current Commission procedure.

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[2] Best Practices on the conduct of proceedings concerning articles 101 and 102 TFEU; Best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases; and Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102.

II. WELCOME INITIATIVES BY THE COMMISSION

The Best Practices describe different types of meetings that the Commission may hold during the investigative part of the investigation, distinguishing between informal meetings, State of Play meetings, and Triangular meetings.

Informal meetings or phone calls can be organized with complainants, defendants, and third parties. According to the Best Practices the parties present will be invited to subsequently substantiate their statements or presentations in writing. This documentation (or a non-confidential version thereof) will, together with a note prepared by DG Competition, be added to the file and accessible to the defendant at later stages of the proceedings.

State of Play meetings should provide the opportunity for open and frank discussions and allow defendants to make their points of view known throughout the procedure. These voluntary meetings aim to enhance efficiency in the process and ensure transparency and communication between DG Competition and defendants. Such meetings are likely to give the relevant parties a better understanding of where the investigation is going and where the focus of the Commission is.

Triangular meetings (i.e. meetings with the complainant(s), the investigated party, and the Commission) are interesting since they give parties the opportunity to hear the facts and arguments presented by the other side and to present their own views—for example, on key data or evidence. The Commission also envisages that exchange of non-confidential submissions between attending parties may take place prior to such meetings. Apart from the benefit of making the parties directly involved in the process, the Commission's fact-finding exercise may benefit from direct discussion and exchange with all relevant parties present.

From a transparency point of view, these different meetings provide the parties concerned (both defendants and complainants) with some insight into the investigation and allow them to express their views at an early stage in the proceedings. It is, for the same reason, gratifying that the Commission in the Best Practices has developed the practice of letting parties comment on key submissions made by other parties.[3] In cases based on formal complaints, the investigated party will be provided the opportunity to review and comment on a non-confidential version of the complaint. The reply by the defendant may be provided to the complainant. On a case-by-case basis the parties will also be requested to comment on other key submissions made by other parties. Similarly, the Commission may exchange non-confidential versions of the parties' replies to the Statement of Objections.

Similar to triangular meetings, document exchanges give the procedure an adversarial element, providing the parties concerned with opportunities to be both informed and involved. These practices are likely to lead to a more efficient and transparent investigation and provide the Commission a clearer picture of key facts and evidence. These procedural elements are welcome and go beyond the Commission's formal obligations in Regulation 1/2003 and relevant notices.[4]

[3] See Best Practices on the conduct of proceedings concerning articles 101 and 102 TFEU, ¶ 67.

[4] *See e.g.* Commission Notice on access to file ([2005] OJ C 325/7), Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ([2001] *OJ L 145/43)* and Article 27(2) of Regulation (EC) No 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([2003] OJ L 1/1).

In comparison, the Swedish general principle of public access to documents held by public authorities requires the SCA to grant access to the investigation file when the investigation commences. This means that the relevant parties have the possibility to request to see any material that is not subject to secrecy. The SCA may withhold specific documents if their disclosure would damage the ongoing investigation.[5] The SCA normally keeps an index available for inspection of all the documents that are part of the case file. Each document is named in a neutral manner that does not reveal the content of the document in case it should contain confidential information. Sufficient information is nevertheless provided to indicate what kind of document it is, at what time it was submitted or prepared by the SCA, and whether it is subject to secrecy. Even if all documents will not be made available, the procedure allows the investigated party, complainants, and third parties an insight into the ongoing investigation and the progression of the file. State of play meetings and other meetings are conducted at appropriate stages in the proceedings.

III. SCOPE FOR FURTHER IMPROVEMENT

The described Commission practices contribute to increasing transparency and openness in the investigative phase of the Commission procedure. If the Commission believes there has been an infringement of Article 101 or 102 TFEU it will proceed towards a prohibition decision by issuing an SO, detailing the Commission's preliminary conclusions on the matter. At this point, the addressee of the SO will also gain access to the investigation file, consisting of "all documents which have been produced and/or assembled [by DG competition] during the investigation," but will be excluded from internal documents, business secrets, and other confidential information.[6] The opportunity to review the file, respond to the preliminary findings presented in the SO, and request an oral hearing, should ensure that the right of defense is upheld.[7] According to Commissioner Almunia this process means that "companies can fully defend themselves on the Commission's concerns: they have the right to be heard both orally and in writing; they have access to the Commission's file and their procedural rights are guarded by the Hearing Officers, who report to me and the College."[8]

However, after the parties have submitted comments on the SO and possibly participated in an oral hearing, the Commission's procedure becomes an internal affair with virtually no transparency and very limited access to relevant documents and other information. This is troubling for several reasons.

First of all, the SO describes the Commission's preliminary views and cases are often substantially amended before the Commission makes its decision. Occasionally the case is even dropped. This means the (often rather lengthy) phase and process leading up to the decision is a very critical one. The defendant, complainants, competitors, customers, and other interested third parties can be expected to do their best to try and influence the final decision.

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[5] The SCA can decide that a specific document is subject to secrecy in a competition case if (i) the document contains business secrets, or (ii) access to the specific document would damage the ongoing investigation.

[6] Commission Notice on access to file ([2005] OJ C 325/7), ¶¶ 8, 10.

[7] *See* 3(1) CPI ANTITRUST CHRONICLE (March, 2010) for a collection of articles and comments on the Oral Hearing.

[8] Joaquín Almunia, *EU Antitrust policy: the road ahead*, International Forum on EU Competition Law, Brussels, 9 March 2010. *Available at*: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/81&format=HTML&aged=0&language=EN&guiLanguage=en

Moreover, in response to the critique that the Commission acts as the investigator, prosecutor, and judge, the Commission regularly refers to a number of "checks and balances" that, together with the fact that the decision ultimately is made by other people than those involved in the investigation, should safeguard due process. According to the previous Competition Commissioner, the issue of due process and legal certainty is resolved by the internal structure, with peer review, legal scrutiny, consultation with other Commission services, and the input from the Hearing officers and 53 external sources (27 other competition authorities and 26 other Commissioners).[9] Similarly, Commissioner Almunia recently stated that complex cases:

> gather officials of various profiles: case teams, policy coordinators and members of the Chief Economist Team, on top of the DG's management. Difficult cases are subject to a "peer review" panel and the Commission's Legal Service provides legal advice all along the process. Additional 'safeguards' include a review by national competition experts sitting in the Advisory Committee, and a review by other Commission directorates. But at the end of this extensive process, Commission competition decisions are adopted not by DG Competition, nor by me, but by the College of Commissioners—27 appointed Commissioners from across Europe…[10]

These aspects of the procedure, which supposedly ensure due process, are not further illuminated by the Best Practices. It would have been desirable if the Commission, taking into consideration its dual role as investigator and decision-maker, had displayed a higher level of ambition to ensure transparency in this context as well. Much of the uncertainty and non-transparency of the Commission's decision process revolves around the information on which the hierarchy in DG Competition, the cabinets of the 27 Commissioners, and, ultimately, the College of Commissioners base their views. The Commission could do more, within the realms of the current institutional setting, to provide clarity and enhance the rights to defense at this stage.

Compared to the Swedish system, there are significant differences in the Commission's internal process after receiving the comments on the SO. First, in Sweden the general principle of public access to documents continues to apply after the issuance of an SO by the SCA. This means that the defendant can continuously ask for the documents in the file. Moreover, and more importantly, if the SCA's investigation leads to the finding of an infringement, the SCA can order an undertaking to terminate the infringement. However, the SCA is not competent to issue fines unless the party agrees to pay. In disputed cases, the SCA must bring an action before the Stockholm City Court and, on appeal, the Market Court. The investigation conducted by the SCA will therefore be scrutinized by the district court (with a department specialized in competition matters) that will have access to the same information and evidence, and hear the same arguments and witnesses as the defendant. The defendant will have equality of arms in arguing its case before the judge.

The Commission is, of course, not responsible for the current institutional structure, which will remain for the foreseeable future. Nevertheless, there is scope for improvement within the current structure.

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[9] Neelie Kroes, *The Lessons Learned 36th Annual Conference on International Antitrust Law and Policy*, Fordham University, New York, 24 September 2009. *Available at*: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=HTML&aged=0&language=EN&guiLanguage=en

[10] Joaquín Almunia, *supra* note 8.

A. Extend Access to the Commission's Investigatory File

Where the Commission identifies new evidence after the SO which it intends to rely upon, it will issue either a supplementary SO or a Letter of facts.[11] In those situations the defendant gets renewed access to the file, or at least to the specific evidence which the Commission intends to rely on. In other cases, the information or documents that the Commission receives during the period leading up to the decision will not be accessible. The assessment of the value and relevance of the information received after the SO is therefore exclusively with the Commission.

To safeguard the defendant's right of defense, the Commission ought to keep the investigatory file open until the draft decision has been finalized and provide the defendant with the opportunity to respond. This would at least ensure that all information, including information that is perceived to have less evidentiary value to the Commission's case team, would be accessible to the defendant. It ought to be the right of any defendant party to have access to the same information as the decision-making authority, not least what is being said and submitted by other parties that are trying to influence the Commission decision.

B. Provide Access to Key Internal Documents

The internal Commission structure and the described "checks and balances"—the aims of which are to ensure due process—lack a clear separation between investigative and decision-making functions and are clearly not transparent.

The college of Commissioners, the ultimate decision-maker, bases its legal and factual assessment on the draft decision prepared by the case team. The Commissioners have not taken part in any evidence nor been provided any presentation by the parties involved. The Commissioners will be briefed by the members of their respective cabinets, who also do not have direct access to the evidence and have not attended the oral hearing.

Against this background it seems crucial that the defendant, who has only seen the SO (which may be more or less outdated at this stage), should be allowed insight into key internal documents and analyses provided to and by the Commission bodies that are charged with the task of ensuring due process. If there is a distinction between the investigatory and decision-making power, the communication between the two should be open to the defendant. The Commission ought to consider what internal information it shares internally that in an adversarial process would be open to the defendant party.

The Commission itself notes that the Hearing Officer's Interim Report, on the written and oral procedure during the oral hearings, usually includes observations on the substance of the case, and that "such observations focus on the Commission's findings contested by the parties, which are liable to have decisive importance for the outcome of the proceedings and may relate to the withdrawal of certain objections, the formulation of further objections or, in any other way, make suggestions as to the further progress of the proceedings."[12] The Hearing Officer has an especially important role when considering due process, as he reports directly to

[11] Best Practices on the conduct of proceedings concerning articles 101 and 102 TFEU, ¶¶ 95-98.

[12] Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU, ¶¶ 7, 62-63.

the Competition Commissioner and may make observations on any procedural or substantive issues arising from the proceedings.[13]

Similarly, documents prepared for or by the Commission's other services in between investigative phase and the Commission's decision ought to be open for review by the investigated party. The Legal Service is entrusted with the task of ensuring the legality of the Commission's decision. The information that is provided to and by other Services is relevant not least given the decisive role of the cabinets of the 27 Commissioners in getting support for the final Commission decision.

This leads to the final suggestion. The defendant should be provided with a copy of the draft decision before it is submitted to the Advisory Committee for comments. The defendant's comments could then be submitted together with the draft decision to the Advisory Committee. This would give the defendant an opportunity to react to the Commission's assessment, before it is presented to the adjudicators in the college of Commissioners. It would also revitalize the role of the Advisory Committee and increase its importance in the procedure.

[13] *Id*, ¶ 7.