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I. INTRODUCTION

Competition law enforcement in the European Union ("EU") is based on a system of parallel competences in which the European Commission ("Commission") and the national competition authorities of the Member States ("NCAs") can apply Article 101 (prohibiting anticompetitive agreements) and 102 (prohibiting abuses of dominant position) of the Treaty on the Functioning of the European Union ("TFEU"). Cases are allocated according to the principle of "proximity": If the conduct under scrutiny directly affects competition within a given territory, the case is allocated to the relevant NCA; if the conduct affects the entire EU market, or a substantial part of it, the case is dealt with by the Commission.

Furthermore, as the European Union has exclusive legislative competences on competition law *vis a vis* Member States (see Article 3 TFEU), the Competition Act of each Member State substantially mirrors the European rules and, in any case, cannot contain provisions in contrast with the European principles. Similarly, decisions of the NCAs and national judges cannot contradict previous decisions of the Commission.

In Italy, these principles are enshrined in the first article of the national Competition Act (Law no. 287 of 1990), whose rules must be interpreted in light of the principles on competition within the EU legal system.

However, the NCAs, including that of Italy, retain much autonomy over the procedural aspects of antitrust proceedings. Indeed, although all are bound to consistently apply the principles of EU law, the national jurisdictions independently decide the structure of, and the powers granted to, their NCAs to ensure that they fit the respective administrative and judicial systems and traditions. Consequently, antitrust enforcement systems vary significantly from one Member State to another.

To be constrained by the same rules on the merits while being subject to procedures that considerably differ, does indeed create imbalance for companies (most of the time active throughout Europe) and put the non-contradictory application of competition law and the functioning of the EU internal market at risk.

Under such a framework, the role of competition lawyers should also be to stimulate a debate on the best practices throughout Europe, so as to guarantee an homogeneously fair, transparent and swift procedure for the benefit of all parties, in investigations that—as is often

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the case—can result in hefty pecuniary penalties (up to 10 percent of the group's worldwide turnover).

In an endeavor to contribute to this task, this article, by describing the main differences between the procedural rules applied by the Commission and those enforced by the Italian authority ("Authority"), attempts to highlight how the substantial procedural differences may significantly alter the achievement of a truly due process, and the scope of the companies' right of defense and the way they can exercise it.

In particular, this paper focuses on: (i) the consequences of proceedings being formally opened at different stages by the Commission and the Authority, (ii) the differences in the companies' access to the case file, (iii) the prominent role played in the European Union by the Hearing Officer ("HO"), and (iv) the consequent different structures of final hearings.

As will be shown, in the investigative phase the Italian procedure seems to guarantee due process more than the EU regime, while the reverse is true for the decisional phase, which appears more effective and less formalistic in Europe than in Italy.

II. STARTING AN INVESTIGATION AND TIME LIMITS

The key difference between EU and Italian procedural rules lies in how the Commission and the Authority start investigations and proceedings.

The Commission (usually) starts an investigation with a decision ordering an unannounced inspection ("dawn raid") of the premises of the company suspected of having infringed competition rules. A decision may only concern a single company; so if a cartel investigation involves ten companies, the Commission adopts ten decisions. The decision (a copy of which is handed to the addressees on arrival at the premises) only contains a brief description (typically a few lines) of the subject matter and purpose of the investigation and the market allegedly affected by the anticompetitive conduct. It does not contain the names of the other parties, a detailed description of the markets and the contested conduct, or the term within which the Commission is supposed to close its investigation.

More importantly, the decision, in itself, does not open the formal proceedings. This may appear a formal detail, but it is not. Indeed, under EU law, the effective dialogue between the parties and the Commission on the substance of the case can start only after the formal opening of the proceedings, which, under the consistent approach of the Commission, in cartel cases coincides with the notification of the Statement of Objections ("SO").[2]

The idea behind this approach is that, until the Commission has thoroughly investigated the case and concluded that there could indeed have been an alleged breach of competition rules (as formally described in the SO), there is actually no reason to open formal proceedings and, consequently, the dialogue with the parties. Moreover, a long investigative phase following the dawn raids is also a means to reap the benefits of the prisoner dilemma as much as possible to trigger a higher number of leniency applications.

[2] *See* European Commission, Antitrust manual of procedures - Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012.

While these arguments certainly have their own logic, the issue that they do not cover and that makes the procedures undoubtedly unbalanced for companies is that the SO is typically notified after years of investigation.

Consequently, for years there are no formal ongoing proceedings and, therefore, no rights of defense to be exercised. Parties are left without any significant information on the merits of the case or the time limit for the proceedings. All this while being the potential addressees of a decision imposing a very large fine and—at least for listed companies—under the obligation to inform the market about the ongoing investigation, because such a circumstance is considered price sensitive information which could significantly affect their financial and economic condition. Moreover, companies also have to accrue (for years) significant funds, so as to be in a position, if an infringement is ascertained, to pay the fine without risking economic crisis or bankruptcy.

Notwithstanding the significant impact of these factors on their finances and market position, as mentioned, companies are not entitled to any interlocution with the Commission on the merits and the timing of the investigations.

Experience shows, moreover, that in the vast majority of cases, once it serves the SO the Commission has already consolidated its views on the case. At which point, any dialogue has little chance of influencing the overall procedure or the Commission's understanding of the case. This is even more so in proceedings started in response to a leniency application. Here, the evidence provided by the applicant inevitably has a decisive influence on the Commission's view and, by the time the SO is served, the case handlers have already been working on the file for months, if not years, without the parties having had a single opportunity to be heard.

Many of the mentioned concerns are absent in Italian proceedings. Indeed, the Authority can enforce its investigative powers (including the possibility to raid companies' premises) only after proceedings have been formally opened. Therefore, the decision to start an investigation coincides in time with the opening of the proceedings and, as a result, the dialogue with the parties (also by means of several hearings held at different stages of the investigation) starts immediately. In particular, companies are informed of the other companies involved and provided details of the alleged collusive conduct and the markets potentially affected.

Another important difference is that the decision opening the proceedings contains the time limit within which the Authority must conclude its investigation. Although the limit can be extended, and sometimes is, it certainly gives a reliable time frame for the proceedings and a compass for the parties to organize their defenses and future activities.

III. ACCESS TO THE FILE

A further prominent difference between the EU and the Italian procedural rules is that, in Brussels, companies can only access the file once the SO is notified, which as mentioned, is usually years after the Commission has inspected the companies' premises and collected the documents comprising the file.

Until that moment, the companies float in a sort of blind stand-by condition where all they can do is answer the (often vague) requests for information from the Commission and, attempt to guess, from the questions, the outcome of the investigation and the extent of any

charge. When finally granted access, companies find themselves in a disproportionate situation in that the Commission has had years to analyze the (thousands of) documents and information and form its views on the case (as formalized in the SO), whereas the companies only have access for a scant time before having to submit their written reply to the SO.

Again, the situation appears more balanced in Italy, where the temporal coincidence between the starting of proceedings and of investigations allows the parties under scrutiny to exercise their rights of defense from the very beginning.

This means that companies can access the case file as soon as the Authority has collected the documents, independent of their origin (e.g. inspections, requests for information, third parties' submissions). In practical terms, companies access the file several times during the proceedings (every time the Authority adds new information to the file) and have a fair amount of time to study it—equal to that at the Authority's disposal.

IV. THE ROLE OF THE HEARING OFFICER

At the EU level, however, once the SO is notified (*i.e.* the proceedings are formally opened) and, thus, access to the case file is granted, the Hearing Officer starts to actively play his or her significant role in checking and (possibly) balancing the power of the Commission.

In Commission proceedings, the HO is entrusted with guaranteeing the effective exercise of the parties' rights of defense and full adherence to the procedural rules. Anytime disagreement arises between the Commission (or rather, the Directorate General for Competition carrying out the investigations) and the parties, the issue can be referred to the HO for an independent review. The HO is appointed by the Commission and, for administrative purposes, is attached to the office of the commissioner responsible for competition. Even so, HO acts independently of the Commission, as has been consistently proved over the years.

Particular powers are granted to the HO regarding: access to the case file (for instance, a party can request access to a document that the Commission has in its possession but does not intend to disclose); disputes concerning the protection of business secrets and confidential information contained in the documents acquired by the Commission; requests for an extension of time to reply to the SO; and the execution of the final hearing. At the end of the proceedings, but before the final decision, the HO submits a written report assessing the effective exercise of procedural rights at any stage of the proceedings.[3]

Notwithstanding the HO's very limited role in the investigative phase, once the proceedings are formally opened, the presence of an independent HO is certainly important for the parties, as they know that they can refer to him or her at any time once the proceedings is started, to have their rights safeguarded. In a system where the administrative proceedings are solely managed by the Commission—from the investigation to the final decision—the presence of an HO constitutes a significant guarantee against possible abuse and undue compression of the parties' rights.

[3] *See* Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, 2011/695/EU, OJ L 275/29.

The presence of an independent HO is a good practice within the EU system that could be extended to the national level to better guarantee the impartiality of the process and to enhance the degree of protection of the parties' right of defense once charges have been formally made against them.

V. FINAL HEARING

And this is indeed proven by the way the final hearing is held. Actually, both Italian and EU procedural rules provide the addressees of the SO an opportunity to present their arguments at an oral hearing before the final decision.

However, in Brussels, due to the presence of the HO and the opportunity for the parties (including the Commission) to ask questions, the structure of the hearing is more effective and less formalistic than in Italy.

Indeed, at the national level, the hearing is chaired by the Authority itself (*i.e.* by the Collegium that decides the case) that, usually, gives the floor first to the internal unit that carried out the investigation and subsequently to the parties (to the immunity and leniency applicants first, if any). Consequently, the arguments of both the unit and the companies are presented in a rather static way, with little (if any) interaction among the parties.

At the EU level, on the other hand, the hearing is actively organized and chaired by the HO who can provide the parties with a list of questions that they will be asked, or with an indication of the focal areas for debate, before the hearing. More importantly, during the hearing, immediately after each party presents its arguments, the HO allows questions to be asked to the Commission and vice versa, in a sort of face to face confrontation that is totally unknown in Italian proceedings and can be, nonetheless, very important in clarifying key aspects of the Commission's theory of harm. Parties are also granted an opportunity to ask the other SO addressees questions and, in particular, any immunity and leniency applicant, to verify any contradictions or flaws in their statements to the Commission.

Such a structure gives the parties a real chance to challenge the Commission's view expressed in the SO and to bring into doubt the way it interpreted the documents contained in the case file. At the same time, Q&A sessions allow the Commission to ask the parties for explanations on the arguments presented in their written replies to the SO.

Furthermore, participation at the hearing of other Directories General possibly affected by the scrutinized conduct and of the representative of the NCAs makes the debate even more lively and concrete.

VI. CONCLUSIONS

This paper attempts to shed light on some of the main differences between EU and Italian procedural rules for cartel investigations. Given its short length, this paper could not describe all the differences in detail, or assess the dissimilarities in the enforcement of instruments at the disposal of the competition authorities, such as leniency programs and commitment decisions.

However, in describing the different approaches taken by the Commission and the Authority, this paper attempts to show that procedural choices are anything but neutral from the

perspective of due process and the right of defense that companies under scrutiny must be guaranteed.

If one considers the SO as the document marking the end of the investigative phase and the beginning of the decisional moment, some conclusions can be drawn by looking at what happens in Brussels and in Italy before and after the SO is issued.

Actually, in both jurisdictions, the SO is a (lengthy) document by which the authorities inform the parties of their conclusions and formalize the objections against them. The structure and scope of the document is very similar at EU and Italian level. The only significant difference follows the recent practice of the Commission that, long encouraged by the European Court of Justice, eventually tends to include a clear indication of the method and criteria it intends to follow in calculating the fines. This, coupled with the similarly detailed criteria set out in the fining guidelines[4] enables the companies to make a very educated guess as to the amount of the fines that could be imposed on them if the conclusions reached in the SO are confirmed in the final decision. In contrast, the Authority does not include information concerning the quantification of the fines in the SO nor has it, thus far, accepted the repeated invitations by the national judicature to adopt fining guidelines.

However, the procedural phases before and after the notification of the SO varies considerably between EU and Italy.

Indeed, in the investigative phase, the Italian rules protect companies much more than the EU rules. Dialogue with parties starts right after the beginning of the investigation, a fair amount of information on the scope of the case is shared with the companies and they are entitled to fully exercise their rights of defense, including the right to be heard and to access the file. By contrast, in Europe, opening proceedings occur only after years of investigation, throughout which time the companies' rights are not recognized, and parties are not entitled to a discussion with the Commission. This severely affects the companies' ability to effectively defend themselves and plan their economic activities. This issue is further compounded by the companies having little time to analyze an enormous number of documents and produce their written defenses, with great prejudice to their right to challenge the Commission's views.

As mentioned, if such an approach is understandable from the perspective of the enforcer (and of an intense use of the leniency program), it nonetheless seems too restrictive for (listed) companies' rights, and, as the Court of Justice has already hinted in the *Elf Acquitaine* case,[5] possibly in breach of the right to be informed "promptly (…) and in detail of the nature and cause of the accusation against him" as set out in Article 6 of the European Convention on Human Rights. By slightly modifying Regulation no. 773/2004 and its Manual of Procedure (mostly based on best practices and not on written rules), the Commission could easily address this issue.

[4] Commission notice on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003 [2006] OJ C 210/2.

[5] European Court of Justice, Case C-521/09P *Elf Aquitaine SA v European Commission*, Judgment of 29 September 2011.

On the other hand, once the investigation is closed and the SO is served, EU rules—mainly due to the presence of an independent HO—have proven to be less formalistic, more inclined towards a sound and due process and, all in all, more protective of parties' rights than the Italian ones. In this regard, the Authority could take on board the lessons learned by the Commission.

In particular, reaping the benefit of the recent and encouraging experience accumulated by the HO, the Authority could create a similar impartial figure empowered to manage the proceedings, any possible procedural disputes raised by the parties, as well as the oral hearing. Finally, as unanimously invoked by the entire national antitrust community, the Authority should also adopt clear fining guidelines and include in the SO explicit indications as to the amount of any possible fines.