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Some Reflections Upon Reading the Commission Draft Paper on Best Practices in Antitrust Proceedings

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In any democratic country based on the rule of law, just as it is a fundamental principle that citizens are entitled to a fair trial before the courts,[2] it is—or at least it should be—a fundamental principle that proceedings before public authorities assure citizens a due process. As regards the European Union, the principle of a right to a due process before the public authorities has now been formulated in Article 41 of the European Union's Charter of Fundamental Rights which reads "Every person has the right to have his or her affairs handled impartially, fairly and within reasonable time by the institutions and bodies of the Union." The administrative practices of all the institutions of the Union must respect this principle.

The recently published Commission draft paper on "Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU" is, in principle, a laudable and useful paper setting out the practices which the Commission's Directorate General for Competition (DG Competition) will follow in its proceedings in cases regarding possible infringements of either of the two aforementioned Articles. It is also commendable that the Commission, before deciding the final form and contents of the paper, has invited interested parties to present their comments and possible suggestions for modifications or further points to be included in the paper. I do not doubt that, once the Commission has had the possibility to scrutinize the no doubt numerous suggestions and comments and taken due notice thereof, the resulting document will become a helpful guide for parties involved in competition proceedings before the Commission, ensuring increased transparency of the proceedings to the benefit of all parties concerned, including the parties under investigation, third parties, and the Commission itself.

A predictable and transparent procedural framework is a worthy aim in itself and the Best Practices will go some way to achieving this. However, in order for the Commission to adhere to its stated aim of giving a "high priority to due process and fairness in antitrust proceedings,"[3] the document should not principally be an enumeration of existing practices but should indeed put in place truly "best" practices in antitrust enforcement. Best practices should include real (and necessary) improvements of the administrative proceedings leading to an administrative enforcement regime which is beyond reproach and which thus fully guarantees due process and fairness in antitrust proceedings before the Commission.

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[2] *See* Article 6 of the European Convention on Human Rights

[3] *See* the statement by the former Commissioner for Competition, Ms. Neelie Kroes, in the press release accompanying the launch of the draft

While the existing draft paper provides useful guidance and thus should lead to further predictability and transparency, it falls short of establishing truly "best" practices in antitrust proceedings. There are, in my view, a number of improvements and/or clarifications which should be made on a number of points regarding the proceedings. Such points include inter alia:

- increased transparency during the investigative phase of a case (i.e. before the issuance of a statement of objections);
- improved protection against self-incrimination (or at least a clearer description of what the existing level of protection covers);
- ensuring that the oral hearing before the Commission is changed so that it becomes a key feature of the process and parties no longer feel that participating in a hearing does not serve any purpose;
- ensuring real independence of the Hearing Officer and enlarging his/her powers to include (more than just) a look into the substance of a case;
- ensuring more reasonable and realistic time limits for the parties in the various phases; and
- increased information from DG Competition to parties regarding progress of cases.

In this comment, I shall, however, not discuss the above mentioned issues in any more detail but shall deal with another issue which is an important part, indeed the most crucial part, of what due process is all about; the issue of "impartiality and fairness" of the administrative proceedings[4] which, as noted above, is a central principle of Article 41 of the Charter of Fundamental Rights. This is an issue which is not at all mentioned in the draft paper, yet is what the Best Practices paper should be and probably is aimed at ensuring.

I do want to address this issue for a reason specific to my own experience; which is that, in a large number of cases before the EU courts in Luxembourg (indeed from the very first cases with which I had the pleasure to deal as a judge at the then CFI), applicants have put forward a plea in law and arguments in support thereof claiming that the proceedings before the Commission were vitiated by a lack of objectivity from the officials who had investigated, examined, and in reality decided the case. The officials were claimed to have acquired a so-called "tunnel vision" as a result of which they were claimed to have refused to consider or even look at evidence or factual circumstances in favor of the undertakings concerned.[5] This kind of argument has also frequently been made at conferences on competition law by lawyers who have participated in competition proceedings before the Commission. The essence of that kind of argument is that the public authority is claimed not to have been impartial or fair in its examination of a case. Were that to be true, it would mean a violation of the principles of good administration and not meet the requirements of due process.

[4] I do not in this small contribution deal with other specific aspects of due process such as the right to be heard, access to documents, and proper reasoning of decisions. Nor, indeed, do I deal with the much wider question of whether the present structure of the investigation and decision-making system of the European Commission is at all capable of meeting the requirements of due process under Art 6 ECHR. For such a wider discussion, *see* I. Forrester, 34 E.L. Rev. at 817 (2009). Consequently I shall not, in this respect, enter into the discussion of whether or not a complete overhaul of the system might be preferable or necessary; in particular, for instance, changing it into a judicial-based system where the Commission/DG Competition investigates a case and, if it believes a case can be made for infringement, brings charges before a court which decides on the case.

[5] "Tunnel vision" might probably in colloquial terms cover both what Wouter Wils calls "confirmation bias" and "hindsight bias," *see* Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function*, 27 WORLD COMPETITION: L. & ECON. REV. 202,215 (2004).

It is, of course, an argument that easily lends itself to be abused, which can be seen from the imprecise and general nature in which such arguments have often been presented to the courts. However, at the same time, it is precisely because of its nature that it is often difficult to produce convincing evidence of a lack of objectivity and fairness—which is probably the reason why such arguments have rarely, if ever, convinced the courts.

The mere fact that such arguments are often put forward before the courts and, otherwise, in public, is, however, worrying in itself. It is rare that you have smoke without at least a small fire. It means, at least, that lawyers must have often felt—even if possibly not being able to pinpoint exactly why or where or, indeed, perhaps without any real reason—that their clients were not being treated impartially or fairly. I do not, personally, have any real reason to believe that the excellent professional officials working within DG Competition do not try to be both impartial and fair in their investigations. It is, however, I think a well known fact that, once you have been working intensively and sometimes for a very, very long time on a particular case, it is easy to acquire a sort of "tunnel vision," not seeing the forest for the trees.

When such allegations are made, I believe it is imperative for the public authority to be aware of this perception of itself and do what is necessary to avoid that kind of image—which can, in itself, jeopardize the legitimacy and, hence, efficacy of the enforcement system as a whole. It is in this regard worth remembering the old saying—and finding by the European Court of Human Rights (ECtHR)—that justice must not only be done; it must also be seen to be done.[6]

In the present administrative system the Commissioners, who are designated by the 27 national governments—and not specifically on the basis of any knowledge of competition law nor indeed on the basis of any other stipulated particular experience or knowledge of legal matters—are those who are responsible for and take final decisions with very severe consequences for the undertakings concerned. But they are doing so without direct or in-depth knowledge or detailed understanding of the legal and factual elements of the case presented to them and little or no real involvement in hearing evidence and arguments presented by the companies under investigation. In such a situation, it is of the utmost importance that the administrative proceedings followed by DG Competition before a decision is presented to the College of Commissioners for adoption are beyond any reasonable reproach from the point of view of due process, in order to simply respect the above mentioned Article 41 of the European Union's Charter of Fundamental Rights. The whole administrative process covering investigations of antitrust violations, including day-to-day practices, should respect the central due process principle of impartiality and fairness and be beyond reproach.

It is, therefore, in my view imperative that the Commission puts in place a more ambitious Best Practices document whose main aim is to ensure respect of due process, fairness, and impartiality. Such a document should set out clearly and unequivocally principles and day-to-day practices which would make sure that DG Competition and its civil servants understand, accept, and adhere to the principle that in all cases it is their duty not only to try to find all evidence against the undertakings under investigation but also, without any prejudice, to examine all the evidence which might speak in favor of the undertakings concerned.[7] It is furthermore their duty to impartially and fairly appreciate the totality of the facts of the case, to carefully examine all the arguments put forward by the undertaking in question, and—I

[6] Delcourt v Belgium (1979-80) 1 E.H.R.R. 355, [31].

[7] *See* cases T-30/91 and T-36/91, Solvay/Commission and ICI/Commission, (1995, II-1775 and II-1847).

submit—if necessary during the administrative phase of the case to assist the undertaking being investigated in finding exculpatory evidence if such evidence seems to reasonably exist and the undertaking itself is not in a position to produce it without the help of the authority.[8] It is, finally, a duty under the principle of due process and good administration that DG Competition and its civil servants at all times treat undertakings fairly by adhering to the principle that, as in criminal cases, the undertaking under investigation is presumed to be innocent until proven guilty.

Such are the demands of due process for any public authority. They should apply with even greater force in a situation where a public authority has powers to take legally binding decisions with very significant negative implications on the addressee, including the imposition of fines—often extremely heavy fines. In such a situation, which is the one of antitrust proceedings before the Commission, it is of the utmost importance that the above elements of due process are scrupulously adhered to in order to ensure the legitimacy of the system as a whole. Breach of due process principles before the Commission, of course, entitles the addressee to a decision to have recourse to the EU courts. Such recourse does not, however, suffice to prevent negative impressions about due process being formed leading to constant and increasing criticism of the system which jeopardizes its legitimacy and ultimately its efficacy.

In conclusion, I think it would be wise for the Commission to tackle these issues head-on and take the necessary steps to avoid such criticisms of the due process aspects of its system in the future. I am not going through any detailed suggestions in this paper—many commentators have made suggestions and no doubt the Commission has received a number of useful suggestions in the recent consultation on the draft Best Practices. I note that such steps, which do not require any changes to the Treaty, might usefully include:

- greater separation of investigating teams from decision-making teams;
- strengthening of the peer review panels;[9]
- strengthening of the role of the Hearing Officer,[10]—in particular by enlarging his/her mandate to include also a critical look at the substance of the case; and
- amendments to the oral hearing to ensure far better procedures, including cross-examination of parties and the presence of senior hierarchy such as officials from each Commissioner's cabinet.

It is to be hoped that the new Commissioner responsible for competition will follow the path of a former Commissioner, Mr. Mario Monti, who, after a series of merger decisions were annulled in 2002 by the EU courts, took steps to improve the internal proceedings on merger control on a number of important points. There is, however, as suggested above still room for

[8] The case law of the EU Courts in Luxembourg is not entirely clear on this point. The judgment in case T-314/01 Avebe v Commission [2006] ECR II-3083, ¶ 71 et seq. comes very close to a finding of such an obligation. It must, however, be on the conditions that the undertaking has tried in vain or clearly has no way of obtaining the documents, has indicated to the Commission sufficiently clearly and convincingly where the document(s) may be found, has explained why they are presumed important as being exculpatory, and has described as clearly as possible which document(s) are required. Otherwise the Commission is just invited to go on a fishing expedition for the undertaking, taking time thus delaying procedures.

[9] The introduction of peer review panels within DG Competition has been a welcome novelty. For it to be a real response to the criticism of lack of fairness and impartiality, the persons sitting on the peer review panel should, however, not be recruited from within DG Competition, but from the Commission legal service or other parts of the Commission. The risk of any suspicion of partiality vis-à-vis colleagues within the same service should be avoided.

[10] The Hearing Officer should in any event be completely independent from the DG Competition and therefore perhaps be hired by and belong to the cabinet of the President of the Commission.

important improvements and the current debate on the draft Best Practices in antitrust proceedings is a good opportunity for the Commission to put in place practices which can truly be considered "best" from a due process perspective.