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Best Practices for the Conduct of Antitrust Procedures: *Further Thoughts*

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I. INTRODUCTION

On March 3, 2010, the European Commission (the "Commission") completed the public consultation of two "Best Practices" documents on the conduct of antitrust procedures under Articles 101/102 of the Treaty on the Functioning of the European Union ("TFEU") and the procedures of Hearing Officers.² This article describes the Article 101/102 procedures in light of the Best Practices in comparison with the procedures employed by other leading competition law enforcers, in particular the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ").

The Best Practices were issued amid intense debate concerning the Commission's dual role as prosecutor and judge and the lack of adversarial fact finding procedures, against the backdrop of the significant fines imposed by the Commission for anticompetitive conduct. Many leading academics and practitioners have raised concerns about the protection of due process in light of the European Convention of Human Rights ("ECHR") and the forensic quality of the evidence relied on by the Commission in its decisions.³

These criticisms are not new. The first criticisms of the system date back to the 1970s and the most recent round to the mid 1990s.⁴ About 10 years ago, similar concerns about the

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² The Best Practices do not apply to (i) infringement proceedings against Member States based on Article 106 TFEU in conjunction with Articles 101/102 TFEU; (ii) EC Merger Regulation proceedings; or (iii) State aid proceedings. In addition, leniency and settlement procedures for cartels are subject to specific procedures under the Leniency Notice (OJ C 298, 8 December 2006) and the Commission Regulation (EC) No 622/2008 of 30 June 2008 regarding the conduct of settlement procedures in cartel cases. See Best Practices at ¶¶ 2-3. In the same timeframe, the Commission also conducted its consultation for a third Best Practices document concerning the submission of economic evidence, but this is beyond the scope of this article.

³ See, e.g., Venit, *Human All Too Human: The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82*, EUROPEAN COMPETITION LAW ANNUAL 2009 (Ehlermann & Marquis eds.) (2009); Submission by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3 *Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings* (February 16, 2010); Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, E.L. REV. 817 (2009); Slater, Thomas, & Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, Global Competition Law Centre Working Paper (04/08); see also Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, WORLD COMPETITION, 201 (2004).

⁴ See, e.g., Montag, *The Case for a Radical Reform of the Infringement Procedure under Regulation 17*, 8 EUR. COMPETITION L. REV. 428 (1996), and Ehlermann, *Decision Making at the Centre in C.D.* ROBERT SCHUMAN CENTRE ANNUAL ON EUROPEAN COMPETITION LAW (Ehlermann & L.L.Laudati eds.) (1996); Graupners, *Commission Decision-Making on Competition Questions* 10 C. M. L. REV. 291 (1973).

combination of prosecutorial and adjudicative powers and evidentiary standards were again raised in the context of merger control review procedures after a series of Commission prohibition decisions.⁵

The Commission's Best Practices clearly go a long way in improving the transparency of the Commission's antitrust proceedings. However, commentators may still question whether the Best Practices go far enough in addressing the concerns regarding the Commission's dual role as prosecutor and judge and the absence of adversarial fact-finding procedures.

Some new issues have also been raised recently in connection with the Lisbon Treaty, as a result of which fundamental rights guaranteed under the European Charter for Human Rights ("Charter") will acquire the full value of primary EU law.⁶

We describe below the key features of the U.S. DOJ's prosecutorial model and the FTC's administrative model, and compare them against the EU's procedures under Articles 101/102 TFEU.

II. THE U.S. SYSTEM OF PUBLIC ANTITRUST ENFORCEMENT

The public enforcement of the federal antitrust laws is primarily in the hands of the Antitrust Division of the DOJ and the FTC.⁷ While both the DOJ and the FTC can enforce civil antitrust cases, only the DOJ has the authority to prosecute criminal cases under the Sherman Act.

The DOJ has the authority to investigate and prosecute potential violations of Sections 1 and 2 of the Sherman Act (the U.S. analogues to Articles 101/102 TFEU), and the Clayton Act. However, the DOJ does not have the power to adopt decisions finding an infringement, impose cease and desist orders, or impose fines during its investigation. Instead, the DOJ must prosecute its case before a Federal District Court, and prove its case by a "preponderance of the evidence" standard.⁸

The FTC is an independent regulatory agency that was established in 1914 to enforce consumer protection measures, including antitrust. It consists of five Commissioners appointed by the President subject to Senate confirmation for seven-year terms. The FTC's Bureau of Competition is responsible for conducting antitrust-related investigations and can either decide to close the investigation or recommend the Commissioners either accept a settlement or litigate the case.⁹ The Commissioners decide by majority whether to accept the recommendation. The FTC is vested with the direct power to enforce Section 5 of the FTC Act that contains a broad

⁵ See, e.g., KOLASKY, CONGLOMERATE MERGERS AND RANGE EFFECTS: IT'S A LONG WAY FROM CHICAGO TO BRUSSELS;" (Nov. 2001).

⁶ See in that connection Jaeger, *The impact of the Lisbon treaty on judicial review in the EU*, presentation given at EU Litigation 2010 conference, Brussels, March 5, 2010. See also Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, E.L. REV., 817 (2009); Slater, Thomas, & Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, Global Competition Law Centre Working Paper (04/08).

⁷ The FTC and the DOJ follow a clearance procedure to determine which agency will handle a particular case.

⁸ It is the stated enforcement policy of the DOJ to bring criminal actions only in the context of clear, intentional, *per se* violations of the Sherman Act, such as price-fixing or bid-rigging.

⁹ Use of compulsory process in an investigation must be authorized by the Commission. If the Commission has authorized compulsory process, the staff must obtain the Commission's authorization to close the investigation.

prohibition against all "unfair methods of competition," as well as the Clayton Act and the Robinson Patman Act.¹⁰

If the FTC Commissioners decide to prosecute an antitrust case,¹¹ the FTC staff will serve an administrative complaint to the respondent that describes at least the issues involved, the alleged violations, the remedies requested by the FTC, and also outlines the rights and obligations of respondents. After the respondent answers the complaint,¹² the discovery process begins under the supervision of the Administrative Law Judge ("ALJ"), during which each party issues demands for documents and interrogatories, takes depositions of the other's witnesses, and requests admissions of evidence into the record. The FTC and the respondent then have a full trial before the ALJ with each party developing its arguments and evidence, and cross-examining each other's witnesses.

The FTC has both investigative/prosecutorial and decisional functions, like the European Commission. However, there are several procedural safeguards built into the FTC's system to avoid potential conflicts that could arise from the combination of prosecutorial and decisional functions within the same agency.

- Once the FTC issues the complaint, a clear separation between the FTC's investigative/prosecutorial and decisional functions takes effect. The FTC rules prohibit any employee or agent of the FTC trial staff that investigates and prosecutes the case (the "Complaint Counsel") from any *ex parte* communication with the FTC Commissioners, the ALJ, or other FTC staff involved in the FTC decisional process. Also, the FTC Commissioners, the ALJ, and FTC staff involved in the FTC decisional process are prohibited from any *ex parte* communication with any third party outside the FTC in connection with pending FTC proceedings.
- The ALJ is an FTC employee, but she/he is independent of both the FTC Commissioners and the FTC's Bureau of Competition. The ALJ's duty is to conduct fair and impartial hearings, and to base findings of fact and initial rulings on legal conclusions that conform to FTC decisions, policy directives, and Rules.¹³
- The discovery process is an adversarial process that seeks to identify all information that is relevant to the allegations of the complaint, the proposed relief, or the defense of any respondent. Moreover, it is the ALJ and not the Complaint Counsel that ultimately

¹⁰ While the FTC does not have direct enforcement authority with respect to the Sherman Act, its authority to challenge "unfair methods of competition" under Section 5 of the FTC Act has been interpreted to include all practices condemned under the Sherman Act.

¹¹ In merger cases, the FTC, in addition to issuing an administrative complaint, may also seek a preliminary injunction and temporary restraining order before a federal court to prevent the parties from closing their transaction and combining their assets prior to the resolution of the administrative complaint.

¹² The respondent has several procedural options in addition to or instead of responding to the complaint, including filing a motion to extend the deadline, motion to dismiss the complaint, and/or deciding not to contest the allegations set forth in the complaint. In the latter case, the admission will constitute a waiver of evidentiary hearings, and the admission together with the complaint will provide the record for ALJ's initial decision.

¹³ An ALJ may disqualify herself/himself on her/his own initiative or be disqualified by a motion of a party. 16 C.F.R. § 3.42(g)(2).

determines what will become part of the record, based on rules that are similar to the Federal Rules of Civil Procedure followed by the Federal District Courts in civil actions.¹⁴

- The hearing before the ALJ is a full trial during which the FTC staff has the burden of proof under a "preponderance of the evidence" standard, like the DOJ does before Federal Courts.¹⁵

The ALJ's initial decision can be appealed by the respondent or the Complaint Counsel to the FTC, with the five Commissioners acting as an appeals court reviewing the ALJ's decision on the facts and the law. If the FTC's decision is adverse to the respondent, the respondent may appeal the FTC decision to a U.S. federal court of appeals.

III. ARTICLE 101/102 PROCEDURES IN LIGHT OF THE BEST PRACTICES

The EU 101/102 procedures potentially leading to fines or other sanctions can be distinguished between the investigative phase and the phase leading to a prohibition.¹⁶

In its investigative phase, the Commission gathers information through formal written requests for information, unannounced onsite inspections (so-called "dawn raids"), interviews, and informal meetings. The Case Team of the Directorate General for Competition ("DG COMP") in principle has discretionary control over the selection of relevant facts, their interpretation, and assessment. At this stage of the proceeding, the defendant has limited or no access to the facts or materials that form the basis for the Commission's facts case.

The second part of the Commission's Article 101/102 procedures leading to a prohibition decision begins with the notification of a Statement of Objections ("SO") to the defendant. The SO sets out the preliminary position of the Commission regarding the alleged infringement of Articles 101 and/or 102 and also indicates whether the Commission plans to impose fines at the end of the procedure.¹⁷ After the SO is notified, the defendant has the right to access the Commission's file, respond to the SO, and have an Oral Hearing. Unless the DG Comp decides to abandon the case, a final decision is adopted by the College of Commissioners.¹⁸

The draft Best Practices introduce additional procedural steps to improve transparency including:

- State of Play meetings between the Case Team, senior DG COMP management, and the defendants at several key stages of the procedure.¹⁹
- Triangular meetings among DG Competition, the defendant(s), and third parties.²⁰

¹⁴ If the FTC regulations do not specifically address a matter, the ALJ and the parties may consult the Federal Rules of Civil Procedure for guidance. FTC Operating Manual, note 4 at § 10.7 (2005).

¹⁵ The procedure before the ALJ has substantially converged with the federal court procedure over the years. See Hoffman and Royal, *Administrative Litigation at the FTC: Past, Present and Future*, ANTITRUST L.J. No. 1 (2003).

¹⁶ This article does not cover the Article 9 commitment procedures, which are essentially settlement procedures.

¹⁷ Best Practices, ¶¶ 76-77.

¹⁸ Best Practices, ¶¶ 71-100.

¹⁹ Best Practices, ¶ 57.

²⁰ Best Practices, ¶¶ 61-63.

- Review of key submissions by the defendant. Possibility to review and comment on a non-confidential version of the third party complaint.²¹
- Documentation of meetings. A non-confidential version of any written documentation prepared by undertakings in relation to a meeting (or a call) with the Case Team, together with a brief note prepared by DG COMP that will be made accessible as part of the Commission's file.²²
- The introduction of a negotiated disclosure procedure and data room procedures for access to the file.²³
- Presence of senior management (Director or Deputy Director General) in Oral Hearings in antitrust cases.²⁴
- Possibility for Hearing Officer to allow questions on written or oral submissions.²⁵

However, even though these steps are certainly positive, they arguably still fall short of the degree of transparency that would be available through an adversarial fact-finding process before an independent adjudicator. For example:

- Triangular meetings, which represent a welcome introduction of an adversarial element in the Commission's investigatory phase, will be held only exceptionally, at the Commission's discretion, if the Commission Case Team deems it desirable to hear the views of all parties in a single meeting.
- It is not clear whether the “brief note” of meetings or calls with third parties will constitute a proper record of the content of meetings or calls with third parties, which would enable third party defendants to use records of such meetings as exculpatory evidence.²⁶
- The Oral Hearings remain essentially only an opportunity for the parties to orally develop arguments that have been already submitted in writing; there is no possibility for cross-examination.²⁷ Although the Hearing Officer may allow questions on any of the issues raised by a written or oral submission among participants, it remains to be seen how this will apply in practice.²⁸

IV. COMPARISON WITH THE DOJ AND FTC PROCEDURES

Before proceeding to litigate the case, the DOJ and FTC staff and senior management typically will have had a number of meetings with the parties, and the vast majority of investigations are closed or settled without reaching trial. Only if the parties fail to reach a

²¹ Best Practices, ¶¶ 65-68.

²² Best Practices, ¶¶ 40.

²³ Best Practices, ¶¶ 84-85.

²⁴ Best Practices, ¶ 94.

²⁵ Hearing Officer Best Practices, ¶¶ 56-57.

²⁶ Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission, available at <http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark>

²⁷ Best Practices, ¶ 93.

²⁸ Hearing Officers Best Practices, ¶¶ 56-67.

settlement will the DOJ or the FTC litigate the case before the Federal Court (in DOJ and FTC merger cases) or the ALJ (in FTC antitrust cases). More importantly, both the DOJ and the FTC bear the burden of proof before an impartial adjudicator to show that there is an antitrust violation, and this has been described as a crucial parameter in their decision as to whether to take enforcement action or not.²⁹ This is different in the Commission's procedures, where the Commission's decisions take effect immediately³⁰ and are only subject to *ex post* judicial review before the General Court and the European Court of Justice based on a narrow set of possible grounds of annulment.³¹

In addition, the DOJ and FTC procedures contain significant procedural safeguards to ensure that the evidence that will be used by the Federal Judge or the ALJ is reliable:

- In Federal District Court cases, the Federal Rules of Civil Procedure (or Federal Rules of Criminal Procedure) and the Federal Rules of Evidence apply in order to determine *inter alia* what evidence is admissible into the record. In FTC administrative proceedings, the hearings are conducted under the Commission's Rules of Practice, which are similar in many respects to the Federal Rules of Evidence.
- The extensive use of sworn testimony, which could expose individuals to perjury charges, and the cross-examination of witnesses provide significant safeguards to ensure forensic quality of the evidence that is included in the record. The defendants have the right to contest the evidence put forward by the prosecution through exculpatory evidence and/or cross-examination that could help reveal contradictions and inconsistencies in testimony.

The EU's procedure, in contrast, is and remains administrative in nature and in conception. A comparison of the EU and U.S. procedures reveals the following salient differences:

- **No clear separation of prosecutorial and decisional powers.** The Commission's enforcement decision taken at the end of the investigation is adopted by the full College of Commissioners; however, they merely receive and endorse the draft decision proposed by the Competition Commissioner. Like the Competition Commissioner, the other Commissioners do not attend the Oral Hearing. The Competition Commissioner is briefed by the DG COMP officials dealing with the case and other Commission services such as the Legal Service, Chief Economist, policy coordinators, and the Hearing Officer. Although difficult cases are, in some instances, subjected to internal "peer review" panels within DG Competition to test the strength of the Commission's case, there is very limited transparency as to how these checks and

²⁹ See, e.g., Kolasky, *supra* note 5.

³⁰ There is a possibility for defendants to seek interim measures against Commission Decisions before the General Court, but these are granted only in very exceptional circumstances.

³¹ Grounds for an action for annulment against a Commission Decision before the General Court include lack of competence, infringement of essential procedural requirements, the TFEU or a rule of law related to its application and misuse of power.

balances operate in practice in any given case and there is no clear separation of the investigatory/prosecutorial and adjudicative teams within the Commission.³²

- **The role of the Hearing Officer and the nature of the non-public Oral Hearing.** The Oral Hearing is not a trial that results in a finding of fact or a judgment. Rather, it is a closed-door session that provides an opportunity for the Case Team and the defendant to reiterate views that have already been articulated in the SO, in the case of the Commission, and the reply to the SO, in the case of the defendant. Neither the defendant nor the Hearing Officer has the right to cross examine either the Commission or third party interveners and it is only on rare occasions that the Hearing will change the course of the case, although there have been some notable cases in which this has happened.
- **Control of the evidence by the prosecution.** The DG COMP Case Team that investigates and prosecutes the case has control over the file and has a considerable degree of discretion on what information should be part of the file. In the United States, the prosecution (in the DOJ cases) and the FTC's Complaint Counsel do not have control over the file. Instead, the "file" is under the control of an independent adjudicator—the judge—and is constituted through adversarial discovery proceedings before the judge (in DOJ cases and FTC merger cases) or the ALJ (in FTC antitrust cases), in accordance with the applicable rules of evidence. The forensic quality of the process before the federal judge and the ALJ is further reinforced by the parties' ability to depose and cross-examine witnesses, submit exculpatory evidence and contest the admissibility of evidence that does not conform to the applicable rules of evidence. In contrast, there are no rules of evidence and no ability to cross-examine witnesses in the EU procedures. The defendant in a European antitrust proceeding merely has the right to review the Commission's file and submit a reply addressed to the same Case Team that drafted the SO.
- **No power to compel sworn testimony and no cross-examination.** Testimony is relatively unimportant in EU proceedings. The Commission's investigative tools and powers deal principally with, and rely heavily on, documentary information and written submissions. Although the Commission can conduct interviews pursuant to Article 19 of Regulation 1/2003, this is only voluntary and unsworn oral testimony. In addition, as discussed above, cross-examination is not currently possible during the Oral Hearings.

V. CONCLUSIONS

The issuance of the Best Practices clearly is a positive development because of the addition or institutionalization of procedures designed to improve transparency. However, the

³² Contrary to the DOJ and the FTC, which make their internal procedures publicly available, DG COMP has yet to publish its internal procedural manual. The procedural manual of the Antitrust Division of the DOJ is available at www.usdoj.gov/atr/public/divisionmanual/index.htm while FTC's operating manual is available at www.ftc.gov/foia/adminstaffmanuals.shtm.

EU Commission procedures remain essentially administrative in nature, and the Best Practices do not address the fundamental structural problem of combining the roles of prosecutor and judge in a single body, nor the concerns raised about due process and forensic quality of the evidence used to impose sanctions, which would in essence require a more adversarial process.

Recent statements by Judge Jaeger, the President of the General Court, suggest that the Lisbon Treaty could provide an opportunity, or indeed may impose, a more significant overhaul of the Commission's procedures. As Judge Jaeger stated, while before the Lisbon Treaty there was a "correspondence" between community law and the Charter of fundamental human rights, now the Charter has the full value of "primary law", something which "truly demands a change of perspective".