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European Commission Addresses Due Process Concerns over EU Antitrust Proceedings



The issuance by the European Commission of a new set of best practices in antitrust proceedings, as well as its attempt to reinforce the role of the hearing officer, have sparked up the debate about the European antitrust procedure.

Even though criticism of EU antitrust procedure has always been present in EU competition law discussions, it is a subject that remains key from a due process standpoint because of the commission's need to use extensive investigative powers in antitrust cases paired with the heavy sanctions imposed on infringers.

Unlike U.S. practice, EU competition law enforcement occurs in an administrative, not criminal, system. In this system, the Commission combines the roles of prosecutor, judge, and jury. Under current procedures, companies accused of violating EU competition law cannot cross-examine witnesses, even when they might have been involved in incriminating them, nor can they have the matter heard by a third party (other than the commission's case team). The final decision is taken by politically appointed commissioners, most of whom only first hear of the case when they are summoned to vote. EU competition law practitioners complain that, as a practical matter, if the commission forms a strong view about a case early in the

procedure, it is an uphill battle to change the likely outcome during the following stages leading to a decision.

The European Commission has long defended these procedures as fair and transparent and built on sound legal and economic analysis, but it has now taken steps to address the criticisms by issuing new best practices in antitrust proceedings. These best practices seek to achieve effective procedural improvements by increasing transparency and certainty. They set out, for the first time, a description of the different stages of a proceeding, and they oblige the commission to keep the parties informed at all times of the state of proceedings and to offer advance clarity on the possible outcome of the case. The commission's new best practices also reinforce the role of the hearing officer, an independent commission official that guarantees procedural rights. Most notably, the role has been expanded in order to allow escalation of procedural rights at any stage of the process, rather than only after the Statement of Objections is

issued. All these measures increase the commission's interaction with relevant parties during the procedure.

The EU's projected accession to the European Convention of Human Rights might present a new opportunity to challenge the EU competition procedure as it stands today. Even though, at present, the commission's administrative decisions can be subject to review by European courts, it might be that commission decisions are not compliant with the kind of judicial scrutiny that is established in the European Court of Human Rights. The court has already declared itself competent to rule on fines imposed in competition law proceedings by National Competition Authorities of the European member states.

This new angle to a much discussed debate will be a topic sure to dominate the EU competition stage in 2012.

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