Why Competition Commissioners should be cautious in commenting publicly on active antitrust cases

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Anti-competitive practices: EU law; European Competition; Impartiality; Media

A. Overview

This article examines the duty on EU Competition Commissioners to act impartially in discharging their functions as investigators, prosecutors, and decision-makers in EU antitrust cases and explains why application of that guideline is to ventilate caution in commenting publicly on active cases where the companies under investigation are still exercising their rights of defence.

B. The role of EU Competition Commissioners

EU Competition Commissioners wield considerable power: they may order dawn raids, subject companies to lengthy investigations, and propose decisions to impose substantial fines or to prohibit mergers. In addition to exercising a quasi-judicial role as decision-makers, Competition Commissioners preside over the 800 lawyers, economists, and other officials who comprise DG COMP, the Commission Directorate General that oversees the application and enforcement of EU competition rules. 1

Commission Commissioners therefore “unite the functions of investigator, prosecutor and judge”. As a result, the EU system, even more so than many other administrative systems, carries inherent risks. The OECD has observed in this regard that “[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique”, while various commentators have recognized the risk of prosecutorial bias, criticized the absence of a public hearing before the ultimate decision-maker, called on the Commission to hold hearings “before a new team which would hear with an open mind the case team’s arguments as well as the arguments in defense from the investigated companies”, and suggested that the combination of the Commission’s investigative, prosecutorial, and judicial functions “puts into doubt the independence and objective nature of the entire procedure”.

In response to these concerns, successive Competition Commissioners have acknowledged that “due process and scrupulous attention to procedural fairness are...
Competitors must therefore demonstrate the highest standards of objectivity and impartiality, so that "justice should not only be done, but should manifestly and undoubtedly be seen to be done." 6

C. The importance of impartiality

The Commission's duty to act in accordance with the principle of good administration, which includes a commitment to a President based impartially is enshrined in the Charter of Fundamental Rights of the European Union ("CFR").

"The requirement of impartiality encompasses, on the one hand, subjective impartiality, insofar as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, insofar as there must be sufficient guarantees to exclude any legitimate doubt as to bias or personal prejudice. "Successive Competition Commissioners have in turn recognized that "[o]ur compliance with fundamental rights is an integral part of our enforcement practice, at all stages of our cases," and the European Code of Good Administrative Behaviour, which governs the conduct of Commission officials, provides that

"[q]uality service calls for the Commission and its staff to be courteous, objective and impartial. Staff shall always act objectively and impartially, in the Community interest and for the public good."

The duty to remain impartial, impartial, and objective means that evidence should be examined with an open mind and that only after all the available evidence has been considered, weighed, and tested, and all available rights of defence have been exhausted can a conclusion be reached on the legality of a given practice, agreement, course of conduct, or transaction. Pre-judgment or the appearance of pre-judgment should be avoided, including, of course, by the Competition Commissioner, who presides over the officials charged with investigating a given practice or transaction and is ultimately charged with acting as decision-maker. Accordingly, it is incumbent on Competition Commissioners to keep their minds open until an investigation has been completed. The circumstance that Competition Commissioners rarely, if ever, review the full body of written evidence available to them when making a finding makes it even more important that they avoid rushing to judgment or expressing a view when it would be premature or inappropriate.

International Chamber of Commerce, Decision on Procedure, Policy Statement, December 2010

"The duty of the Commission to act impartially extends not only to the stage of carrying out investigations, but also (and so formally) to senior agency assessment. "In the case of active antitrust cases, the Competition Commissioner must remain impartial, including because any such impression may aggravate the risk of confirmation bias or negatively affect a company's market value.

The duty to remain impartial is especially crucial in the context of the Commission's enforcement practice at all stages of its cases. Finally, the European Code of Good Administrative Behaviour, which governs the conduct of Commission officials, provides that

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This burden is difficult to discharge to the relevant evidentiary standard. The EU Courts' jurisprudence in this respect may be contrasted with that of the European Court of Human Rights ("ECtHR"), which has recognized it may be difficult to prove an adverse effect or pre-judgment has affected the outcome of a given proceeding, but has nevertheless found a violation of due process in a number of cases,9 holding that "it is no answer to a charge of bias to look at the terms of a decision and to say that, based on actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence."10

E. Striking the right balance

The increased profile and importance of antitrust investigations has been heightened by heightened media and public interest in ongoing cases. In response to that interest, the Commission has become increasingly transparent: it maintains and updates daily a database containing the procedural status of matters under investigation.11,12,13,14,15,16

Judges generally lack the requisite legal effect to be "binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position,"17 in the EU case, the application brought before the EU Courts challenged the Commission's "decision" to provide journalists with a copy of the allegedly prejudiced letter. Moreover, in cases where pre-judgment has been alleged, the EU Courts have been reluctant to annul the decisions in questions, requiring applicants to bear the burden of demonstrating it had not been. As a result, the procedural irregularities did not have the actual procedural irregularities not occurred.

Notwithstanding the already-significant degree of transparency concerning on-going cases, journalists and others, including spokespeople and market analysts who follow the outcome of antitrust proceedings, are eager to obtain additional developments in high-profile cases. Although it may be unrealistic to expect Commission Professionals to refrain from responding to questions about the status of on-going cases and the Commission's then-current thinking on matters under investigation, interest in such cases makes it all the more important that Competition Professionals are careful in their public comments lest they be misunderstood to have pre-judged or pre-determined the outcome. 

The following examples from former Commissioner Almunia's tenure underline the difficulties associated with striking the right balance.

• In connection with the Landbeck and Servier cases, then-Comissioner Almunia signaled the Commission's intention to reach adverse decisions in October 2012, well before the investigations in question had ended, stating that "If in the pharmaceutical industry, Landbeck and Servier received our objections before the summer break. We are concerned that these companies could now try to keep markets closed to cheap generic medicines. I hope that the decisions we will adopt — hopefully in 2013 — will benefit generic players in the industry that leave a lot to be desired."

Fines were imposed on Landbeck in June 2013 and on Servier in July 2014.

• By way of background, EU investigations in antitrust cases may last several years, and in merger cases several months before a statement of objections (to the opening of an investigation) is issued. The Commission's public comments are therefore designed to "foster clarity as to the status of an ongoing case and provide parties with the opportunity to respond to the statements of objections."18 In June 2012, the Commission's Press Service launched a "Statement of Objections Newsletter," which was launched to "provide parties with a better understanding of the Commission's thinking in ongoing cases."19

• More open business model together with respect to its provisional assessments set out in the statement of objections."[Benbow AE, Independent Music Publishers & Authors Association (IMPALA) (C-411/06) [2006] ECR 1-1695 at 1695, and 711] Fines reached in a matter of antitrust investigations do not carry any evidentiary weight of their own and may be dated from a final verdict.51

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F. The case for clearer guidelines

DG COMP has adopted a Code on Ethics and Integrity that prohibits officials from "creating confusion or uncertainty when making public statements" and "discussing any case or policy matter which is still at the preparation or discussion stage on which the Commission has not adopted any position." The Code further provides that "contacts with the media should be handled carefully by all Commission staff" and recognizes that "this is of specific relevance for DG COMP staff, given the nature of the work and the immediate consequences that any public statement may have on the business world." Officials are directed to channel any media requests to the Competition Commissioner.

The Code, although valuable, is less forceful than guidance developed by the Antitrust Division of the US Department of Justice ("DOJ"). This prohibits officials, including the agency heads, from commenting on active proceedings other than through the DOJ's Office of Public Affairs.

The Antitrust Divisions Manual states that "public out-of-court statements regarding investigations, indictments, on-going litigation, and other activities should be minimal, consistent with the Department's responsibility to keep the public informed. Such comments as are made are handled through the Office of Public Affairs.

The Manual further states that "[t]he Division does not wish to prejudice the rights or affect the interests of anyone accused of a crime or a civil violation of the antitrust law," that "[g]enerally, even the existence of particular criminal investigations should not be acknowledged or commented upon," and that, "[b]ecause charges that result in an indictment or a civil action are not to be anticipated or proved in court, not in a newspaper or broadcast, public comment on such charges should be limited to a fair statement of the rights and interests of individuals and companies.


65 DOJ Antitrust Division Manual ChVII Antitrust Division Relationships with Other Agencies and the Public Section H2 available at https://www.justice.gov/atr/public/policy/chvii.html?


64 See, e.g., DOJ Antitrust Division Manual Ch VII Section H2.

63 For example, it is not enough for a senior DOJ lawyer to analyze a complaint and write an opinion statement that the agency will file in court. It must be clear to all parties, including to make it known his thinking on the preparation or discussion stage on which the Commission has not adopted any position.

62 See, e.g., DOJ Antitrust Division Manual Ch VII Section H2.

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