



Antitrust procedure

The Commission example

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Hearing Officer team for competition proceedings

These slides accompany the explanation of the *acquis* to Albania and North Macedonia and may only be used for that purpose. Their content is subject to further development of the *acquis* and interpretation by the Court of Justice of the European Union.



Public enforcement of EU antitrust law

- General legal framework
- Requirements of procedural fairness
- Antitrust procedure before the European Commission



Part 1

GENERAL LEGAL FRAMEWORK

The Treaties (TEU and TFEU)

- Article 6 TEU
 - Charter of Fundamental Rights of the European Union
- Articles 101 & 102 TFEU
- Article 103 TFEU
 - Council 'regulations or directives'

Council Regulation (EC) No 1/2003

- Notification system under old 'Regulation No 17' abolished
- Articles 101 & 102 TFEU directly applicable in full by
 - the Commission
 - national courts
 - **n**ational **c**ompetition **a**uthorities (**NCAs**) in EU
- Commission may adopt 'implementing provisions'
 - Commission Regulation (EC) No 773/2004

EU competition law & national law

- Article 3(1) Regulation 1/2003
 - conduct that 'may affect trade between Member States'
 - if NCAs and national courts apply 'national competition law', they must also apply EU antitrust law
- Article 3(2)
 - conduct caught but not prohibited by Art. 101 cannot be prohibited under national competition law
- Not affected:
 - stricter national rules on unilateral conduct
 - national merger control rules
 - national rules with a different objective

NCAs applying EU antitrust law

- Article 5 Regulation 1/2003
 - 'in individual cases'
- No power to find absence of breach
- Not only fines and periodic penalty payments
- **European Competition Network (ECN)**
 - ECN+ Directive (2019/1)

Member State courts

- Art. 6: 'national courts' can apply EU antitrust
- Art. 15: cooperation & Member State courts
- Art. 35: courts can be designated as NCAs
- Damages Directive (2014/104/EU)

National procedural autonomy, but ...

- only 'in the absence of EU rules'
 - C-439/08, *VEBIC* (2010)
- principle of equivalence
- principle of effectiveness
- Article 51(1) of the Charter



Part 2

REQUIREMENTS OF PROCEDURAL FAIRNESS

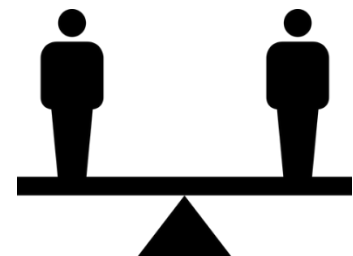
Fundamental rights

- European Convention for the Protection of Human Rights and Fundamental Freedoms
- General principles of EU law
- The Charter



Right to good administration

- Article 41(1) Charter
 - 'every person has ... the right ... affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies' of the EU
- Article 41(2) - 'This right includes:'
 - a) right to be heard (before adverse individual measures)
 - b) 'access to the file' (while respecting confidentiality)
 - c) obligation to give reasons



Other relevant fundamental rights

- Art. 7 Charter ('home and communications')
- Art. 47 Charter ('effective remedy & fair trial')
- Art. 48 Charter
 - presumption of innocence
 - rights of the defence (recital 37 Reg. 1/2003)
- Art. 49 Charter
 - legality
 - proportionality
- Art. 50 Charter
 - no second trial or punishment for same criminal offence

Commission antitrust enforcement structure

- College of Commissioners (28 members)
 - 1 Commissioner for Competition
- Directorate-General for Competition (**DG COMP**)
- Legal Service
- Hearing Officer
- Decisions are Commission decisions
 - some decisions delegated

Several roles of Commission



Compatibility with right to fair trial

- Art. 23(5) Reg. 1/2003 & '*Engel* criteria'



- Judicial review



COURT OF JUSTICE
OF THE EUROPEAN UNION

- Administrative checks and balances



Judicial review

- review of legality before General Court
 - Art. 263 TFEU
- unlimited jurisdiction regarding fines
 - Art. 261 TFEU and Art. 31 Regulation 1/2003
- appeal to Court of Justice
 - points of law only
- possibility of interim relief
 - Arts 278 & 279 TFEU



Administrative checks and balances

- Statement of Objections
- oral hearing
- 'state of play' meetings
- input from outside COMP 'case team'
 - e.g. 'peer review' exercises
- Legal Service
- 'associated services'
- Hearing Officer
- Advisory Committee



International 'soft law' initiatives

- **I**nternational **C**ompetition **N**etwork
 - ICN Framework for **C**ompetition **A**gency **P**rocedures (the 'CAP')



- **O**rganisation for **E**conomic **C**ooperation and **D**evelopment
 - transparency & procedural fairness





Part 3

ANTITRUST PROCEDURE BEFORE THE EUROPEAN COMMISSION

Part 3 – overview

- a) preliminary investigative phase
- b) procedures leading to decisions
- c) involvement of third parties

Preliminary investigative stage

- Sources of cases
- Initial assessment & priority setting
- Investigative instruments
 - Requests for information, interviews, inspections, sector enquiries
- Opening of proceedings
 - Art. 11(6) Reg. 1/2003
- Position on how to proceed



Requests for information (Article 18 Regulation 1/2003)

- Article 18(2): simple requests



- Article 18(3): requests by decision

- Possible fines and periodic penalty payments



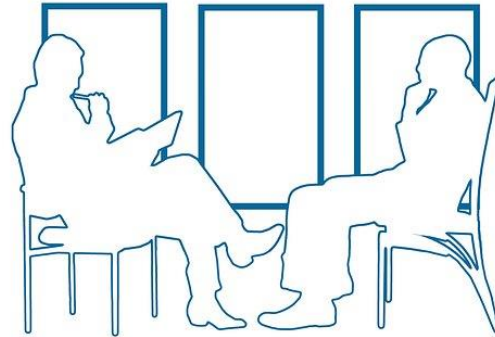
Inspections (Articles 20 - 22 Regulation 1/2003)

- Art. 20 - business premises
- Member State assistance
 - NCA (on request)
 - police (where appropriate)
 - Art. 22
- Fines & penalty payments
- Art. 21 – ‘any other premises’



Interviews (Article 19 Regulation 1/2003)

- consent required
- no penalties
- formal requirements in Regulation 773/2004
- C-413/14 P, *Intel v Commission* (2017)



Limitations on Commission's coercive powers of investigation

- Legal professional privilege
 - 155/79, *AM&S v Commission* (1982)
- Privilege against self-incrimination
 - 374/87, *Orkem v Commission* (1989)



Standard procedure

statement of objections

- delimits case

written response

- [request for oral hearing]

[testing &/or refining]

- [objection(s) or case dropped]
- Supplementary SO
- Letter(s) of facts

access- to-file

- [further access requests]

[oral hearing]

- non-adversarial
- HO issues internal report(s) afterwards

drafting, consult- ation

Finalising & adopting a decision

- DG COMP refines assessment and drafts
- Rebuttal; 'letter of facts'
- interservice consultation
 - Legal Service
 - associated services
- 'state-of-play' meetings and turnover requests
- Advisory Committee
- Hearing Officer's Draft Final Report & Final Report
- College of Commissioners



Other post-investigative procedures

- Commitments
- Cartel settlement procedure
- Non-cartel cooperation



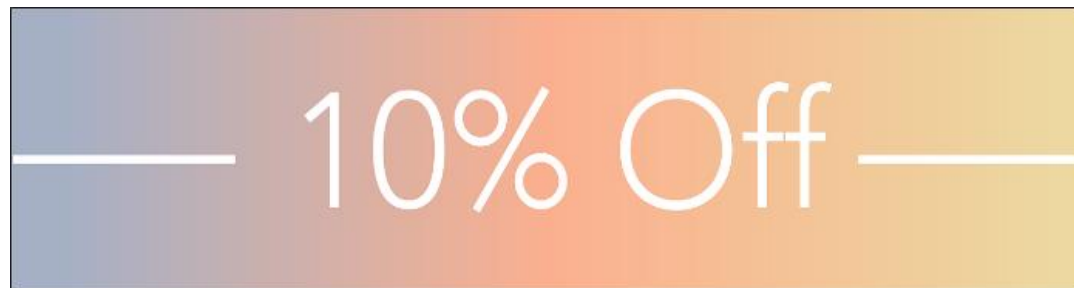
Commitments (Article 9 Regulation 1/2003)

- Exploratory discussions
- 'Preliminary Assessment'
- Formal offer of commitments
- Evaluation and market testing (Art. 27(4))
- [Revised commitments]
- Decision
- (Non-)compliance
 - fines and periodic penalty payments
 - reopening of procedure



Cartel settlement procedure

- 2008: new Article 10a Regulation 773/2004
- party acknowledges facts and liability
- exploratory meetings
- Settlement Submission
- concise statement of objections
- decision



Non-cartel cooperation procedure

- practice as yet uncodedified
- finding of infringement
- inspiration drawn from cartel settlement procedure
- case-by-case



Third parties

- Complainants & informants
 - requests for anonymity
 - rights not same as those of parties concerned
- Addressees of investigative measures
- Hearing of third parties
 - complainants
 - 'interested third persons'
 - market testing of proposed commitments

Key takeaways

- Importance of procedural fairness
- Commission and national authorities as joint enforcers of EU antitrust law
- Judicial review of Commission decisions complemented by checks & balances at the administrative stage

Questions?