Rights of defence in EU antitrust proceedings

Produced in partnership with Steptoe and Johnson LLP

Undertakings involved in antitrust proceedings before the European Commission enjoy rights of defence which safeguard their interests. The observance of such rights by the Commission is a fundamental principle of EU law and has been further bolstered by the entry into force of the Treaty of Lisbon, as the latter makes the EU Charter of Fundamental Rights (CFR) legally binding and provides for the accession of the EU to the European Convention on Human Rights (ECHR).

Rights of defence in commission antitrust proceedings

A number of procedural steps taken by the Commission in the course of antitrust proceedings may have a lasting adverse impact on the undertakings' rights of defence. In view of this, Regulation 1/2003 aims at striking a balance between: (i) the effective enforcement of EU antitrust rules, and (ii) the respect of the undertakings' rights of defence. The undertakings' rights of defence include:

- the privilege against self-incrimination
- the right to be heard
- the right to be assisted by legal counsel, including the protection of communications between legal counsel and the undertaking on the basis of the legal professional privilege (LPP), and
- the right to good administration.

Each is analysed in further detail in the sub-sections that follow.

The privilege against self-incrimination

The Commission is empowered to request information to be supplied to it, as is necessary to detect an infringement of EU antitrust rules. Regulation 1/2003 makes no reference to a right to remain silent from which undertakings faced with such requests may benefit.

The Court of Justice has ruled that certain limitations to the Commission's powers of investigation are implied by the need to safeguard the undertakings' rights of defence. However, according to the Court of Justice, to acknowledge the existence of an 'absolute' right to remain silent would go beyond what is necessary in order to safeguard the rights of defence.

References:
Case C-374/87 Orkem v Commission, para 32
Case T-112/98 Mannesmannröhren-Werke v Commission, paras 63 and 66

The Court of Justice has rather found that:

- the Commission is entitled to compel an undertaking to: (i) provide information regarding facts known to the undertaking, and (ii) disclose relevant pre-existing documents that are in the undertaking's possession. This is despite the fact that such information and documents may be used by the Commission to establish against the undertaking the existence of anticompetitive conduct. The undertaking is still able to contend that the information and documents produced have a different meaning from that ascribed to them by the Commission

  References:
  Case T-112/98 Mannesmannröhren-Werke v Commission, para 65
  Case C-301/04 P Commission v SGL Carbon AG, para 49
- in contrast, the Commission is not entitled to compel an undertaking to provide it with answers which may involve an admission on the undertaking's part of the existence of an infringement of

EU antitrust rules, which is incumbent upon the Commission to prove. If, nonetheless, the undertaking voluntarily supplies answers of such nature, it cannot then claim that the privilege against self-incrimination has been infringed.

References:
Case T-112/98 Mannesmannröhren-Werke v Commission, para 67
Case T-48/02 Brouwerij Haacht v Commission, para 107
Case T-446/05 Amann & Söhne and Cousin Filterie v Commission, para 329

An undertaking which refuses to supply information to the Commission and invokes the privilege against self-incrimination may refer the matter to the Hearing Officer. The Hearing Officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies, which will be taken into consideration in any Commission decision subsequently adopted. The undertaking may appeal a Commission decision which requires it to supply information in violation of the privilege of self-incrimination.

References:
Decision of the President of the Commission on the function and terms of reference of the hearing officer in certain competition proceedings, art 4(2)(b)
Case T-112/98 Mannesmannröhren-Werke v Commission

Where an undertaking claims that its privilege against self-incrimination has been infringed by the Commission, it needs to establish that:

- the Commission exercised coercion against the undertaking in order to obtain the information. In particular, the Commission must have requested the information from the undertaking by means of a binding decision, non-compliance with which could result in penalties--and not by means of a simple request for information
- there was actual interference with the undertaking's rights of defence. This means that the Commission must have in fact used aspects of the undertaking's answer in order to incriminate it.

References:
Case C-238/99 P Limburgse Vinyl Maatschappij and Others v Commission, para 275

The privilege against self-incrimination does not apply to documents or data collected by the Commission during a dawn-raid. However, it may be invoked as regards questions that the Commission may ask company representatives and members of staff during the dawn raid.

For undertakings' rights of defence during Commission dawn raids, see further, European Commission's powers of inspection and the rights of defence.

The right to be heard

Where the Commission decides to formally initiate infringement proceedings against an undertaking, a number of procedural guarantees are activated in order to protect the undertaking's right to be heard.

The Commission must address the undertaking a Statement of Objections (SO)

The SO, which states the objections raised by the Commission against the undertaking's conduct, must be addressed to the undertaking in written form.

References:
Regulation 773/2004, art 10(1)

In terms of content, the SO needs to be exact and complete--even if succinct. It should enable the undertaking to take cognisance of the conduct complained of by the Commission, in order for the undertaking to properly defend itself before the Commission adopts its decision.

References:

Case T-305/94 Limburgse Vinyl Maatschappij NV v Commission, para 263
Case T-228/97 Irish Sugar v Commission, para 35
Case T-5/00 Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission, para 33

In particular:

- the SO must clearly set out:

  References:
  Case T-10/92 Cimenteries CBR and Others v Commission, paragraph 33
  - the facts on which the Commission relies, and
  - the Commission's legal classification of them.

- the SO is not clear enough when it does not indicate in which capacity (eg as the parent company of the offender) an undertaking is called upon to answer the allegations made therein.

  References:
  Case C-322/07 P Papierfabrik August Koehler and Others v Commission, para 39
  Case C-612/12 P Balast Nedam NV v Commission, para 25

In settlement proceedings, a SO is issued only after:

References:
Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases

- the Commission has orally outlined its objections to the undertaking, and
- the undertaking has had (limited) access to the Commission's evidence and introduced a formal settlement request in the form of a settlement submission.

A SO is normally not issued in the context of commitment proceedings. The Commission prefers to engage in commitment discussions with the undertaking after the investigation is concluded but before a SO is issued. The Commission drafts a 'preliminary assessment' (rather than a full-fledged SO) which summarises the main facts of the case and succinctly identifies the competition concerns. In practice, the Commission often issues such preliminary assessment only after the undertaking has offered a first set of commitments--which obviously raises a number of concerns as regards the observance of the right to be heard. In case the commitment proceedings are discontinued, the ordinary procedure will apply, ie a full-fledged SO may need to be drafted and addressed to the undertaking. (For more detail on the commitments process, see further, EU commitments--policy and process).

References:
Regulation 1/2003, art 9(1)
Antitrust of Manual Procedures, page 180, s 3.2

The undertaking must be allowed to access the Commission's file

After the notification of the SO, the Commission has an obligation to make available to the undertaking all (non-confidential versions of) documents (whether in the undertaking's favour or otherwise) which the Commission has obtained through the course of its investigation.

References:
Regulation 773/2004, art 15(1)
Commission Notice on the rules for access to the Commission file in cases pursuant to Articles [101 and 102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation 1/2003

The following are exempted from this obligation:

References:
Regulation 1/2003, art 27(2)
Case T-7/89 Hercules Chemicals v Commission, para 54

- business secrets of other undertakings
- internal documents of the Commission (eg notes, drafts, working papers), and
- other confidential information (eg documents that may allow complainants to be identified).

In practice, the Commission usually provides the undertaking with a CD-ROM that contains an electronic version of the file.

The fact that the undertaking was not given proper access to the file during the administrative procedure does not, in itself, mean that the Commission decision must be (wholly or partially) annulled. Specifically:

- the fact that an incriminating document was not communicated to the undertaking does not affect the validity of the objections in the Commission decision, if there is other documentary evidence of which the undertaking was aware and which specifically supports the Commission's findings

  References:
  Case C-107/82 AEG v Commission, para 24
- as regards exculpatory evidence, it needs to be examined whether the lack of proper access to the file prevented the undertaking from perusing documents which were likely to be of use in its defence. An infringement of the rights of defence will be deemed to exist if there is even a small chance that the outcome of the administrative procedure might have been different if the undertaking could have relied on the relevant document(s).

  References:
  Case T-25/95 Cimenteries CBR and Others v Commission, paras 240 and 241

In settlement proceedings, the undertaking is granted limited access to the file. In practice, the Commission provides the undertaking with inculpatory evidence in its possession that relate to the scope of the infringement that the Commission has in mind. However, in case the settlement discussions are discontinued, the ordinary procedure will apply, ie full access to the file will be granted.

References:
Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of the Council Regulation (EC) No 1/2003 in cartel cases, ss 15, 16 and 20(d)

In commitment proceedings, no access to the file is expressly foreseen. In practice, the Commission may grant the undertaking access to some evidence in order to provide it with insights as to the allegations of anticompetitive conduct. However, in case the commitment proceedings are discontinued, the ordinary procedure will apply, ie full access to the file will be granted.

References:
Antitrust of Manual Procedures, page 177, s 7

The undertaking must be allowed to respond to the SO within a certain time-limit

In its reply to the SO, the undertaking may put forward its views as to:

References:
Regulation 773/2004, art 10(2) and (3)
Case T-228/97 Irish Sugar v Commission, para 35

- the truth and relevance of the facts and circumstances alleged, and
- the objections raised by the Commission.

The findings eventually made in the Commission decision must be based on objections on which the undertaking has had a chance to comment. The Hearing Officer ensures that the Commission decision is not based on objections of which the undertaking has not been appraised.

References:
Regulation 1/2003, art 27(1)
Case C-238/99 P Limburgse Vinyl Maatschappij and Others v Commission, para 103
Decision of the President of the Commission on the function and terms of reference of the hearing officer in certain competition proceedings, art 16(1)

The undertaking may request to develop its arguments at a (non-public) oral hearing

The right of the undertaking to make oral observations is conditional upon the previous submission by it of a reply to the SO.

References:
Regulation 773/2004, art 12(1)

The Commission may not use the oral hearing to present new factual and/or legal allegations (ie the Commission may not use the oral hearing as a substitute for a SO).

The oral hearing is organised and conducted by the Hearing Officer. The Hearing Officer may make observations on the substance of the case. While the Commission is not obliged to follow the Hearing Officer's observations, it usually takes them into account.

References:
Regulation 773/2004, art 14
Decision of the President of the Commission on the function and terms of reference of the hearing officer in certain competition proceedings, arts 10-13

In settlement proceedings, the undertaking confirms in its settlement submission that it will not request an oral hearing. However, in case the settlement discussions are discontinued, the ordinary procedure will apply, ie an oral hearing may be requested by the undertaking.

References:
Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases

In commitment proceedings, no oral hearing is foreseen. However, in case the commitment proceedings are discontinued, the ordinary procedure will apply, ie an oral hearing may be requested by the undertaking.

References:
Antitrust of Manual Procedures, page 177, s 7

The right to be assisted by legal counsel

Undertakings have the right to be assisted by legal counsel throughout the procedure, including in the preliminary investigative phase (eg during Commission dawn raids) and after antitrust proceedings are formally initiated against them (eg in accessing the file and preparing the reply to the SO).

Correspondence between the undertaking and its EEA-qualified external legal counsel that has been exchanged for the purpose and in the interest of the undertaking's rights of defence benefits from LPP and is, therefore, confidential. The Commission may not require to be supplied with and/or examine such correspondence.

Correspondence between companies and internal legal counsel does not benefit from LPP. However, as an exception, the following documents may still benefit from LPP:

- correspondence between companies and internal legal counsel that merely reports on the content of communications with external legal counsel (pure summaries)

- preparatory documents drawn up by internal legal counsel exclusively for the purpose of seeking legal advice from external legal counsel in exercise of the rights of the defence.

In case of doubt, the burden is on the undertaking to prove that the correspondence at issue benefits from LPP.

References:
Case C-155/79 AM & S v Commission
Case T-30/89 Hilti v Commission
Case T-125/03 Akzo Nobel Chemicals and Ackros Chemicals v Commission

For details on the scope of EU legal privilege, see further, Legal privilege in EU and UK competition cases.

The right to good administration

The right to good administration encompasses the right of undertakings to have their affairs handled impartially, fairly and within a reasonable time by the Commission, as well as the obligation of the Commission to give reasons for its decisions.

References:
Charter of Fundamental Rights of the European Union, Art 41(1)

In this regard, the Court of Justice has ruled that:

- the sending of a large number of requests for information after the adoption of the SO may affect the effective exercise by an undertaking of its right to comment on the objections against it. The Commission's requests for information must comply with the principle of proportionality. The obligation imposed on the undertaking to supply information should not be a burden which is disproportionate to the needs of the inquiry

  References:
  Case T-191/98 Atlantic Container Line and Others v Commission, para 418
- the Commission must act within a reasonable time in adopting decisions following administrative proceedings relating to antitrust policy. The question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular:

  References:
  Case T-213/95 Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbeddrijven (FNK) v Commission, paras 56 and 57
  - its context
  - the various procedural stages followed by the Commission
  - the conduct of the parties in the course of the procedure
  - the complexity of the case, and
  - its importance for the various parties involved

- failure to act within a reasonable time may constitute a ground for annulment only in the case of a Commission decision finding an infringement, where it has been proved that such failure adversely affected the ability of the undertaking to defend itself

  References:
  Case T-5/00 Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v Commission, para 74
- where a Commission decision is annulled as regards an undertaking because the SO was not sufficient to enable the undertaking to understand the objections against it, the Commision may address the undertaking a second, rectified SO and re-adopt its decision. The lapse of time

between the infringement and such second SO does not necessarily breach the rights of defence.

References:
Case T-372/10 Bolloré v Commission, paras 106-109

Concerns on due process in Commission antitrust proceedings

Due process concerns in Commission antitrust proceedings relate, among others, to:

- the Commission wearing three hats at the same time, ie being investigator, prosecutor and adjudicator, and
- the Commission concluding so-called 'second generation' antitrust co-operation agreements with third-country competition authorities, the provisions of which may affect due process.

Each set of concerns is analysed in further detail in the sub-sections that follow.

The Commission acting as investigator, prosecutor and adjudicator

In the antitrust field, the Commission is acting as investigator, prosecutor and adjudicator--all in one. Such concentration of roles is arguably in tension with the prerequisites of the right to a fair trial, as articulated in Article 6(1) of the ECHR and Article 47 of the CFR.

Article 6(1) of the ECHR states that, in the determination of any criminal charge, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. According to Court of Justice case-law, Article 47 of the CFR corresponds to Article 6(1) of the ECHR.

References:
Case C-501/11 Schindler Holding and Others v Commission, para 36

According to the case-law of the European Court of Human Rights (ECHR):

- penalties imposed for violations of EU antitrust rules may constitute a criminal charge within the meaning of the ECHR

  References:
  A. Menarini Diagnostics SRL v. Italy, 27 September 2011, paragraphs 38 to 44
- the right to an independent and impartial tribunal is infringed under the ECHR if, in the context of the proceedings, the same person successively exercises the functions of investigator and adjudicator. As an exception, such successive exercise of functions may take place as regards minor offenses occurring in large numbers

  References:
  Case of Öztürk v Germany, 21 February 1984, para 56
  Case of De Cubber v Belgium, 26 October 1984, para 30
- it is doubtful whether infringements of EU antitrust rules may be considered to be minor offences, given the hefty penalties at stake as well as their grave reputational effects.

The ECHR's ruling in *Menarini* has created more questions than provided answers as to whether the Commission may act as investigator, prosecutor and adjudicator. The ruling states that the application of Article 6 of the ECHR does not exclude the imposition of a sanction by an administrative authority, as long as such sanction may be appealed before an independent and impartial tribunal with 'full jurisdiction'. It is unclear whether by this statement the ECHR effectively characterises antitrust offenses as minor offenses.

References:
A. Menarini Diagnostics SRL v. Italy, 27 September 2011, paragraphs 38 to 44
Opinion of Advocate General Sharpston in Case C-272/09 P KME Germany and Others v Commission, para 67

According to ECHR case-law, a tribunal has full jurisdiction where it has the power to quash the administrative authority's decision in all respects, on questions of both law and fact.

References:
Case of Schmautzer v. Austria, 23 October 1995, para 36
A. Menarini Diagnostics SRL v. Italy, 27 September 2011, paragraphs 38 to 44

It is doubtful whether the Court of Justice has full jurisdiction to review Commission decisions:

- the TFEU provides for a 'legality' review. Legality review and full review are arguably different concepts in scope. The Court of Justice's legality review is carried-out on the basis of the evidence adduced by the applicant in support of the pleas put forward by it. The Court of Justice has unlimited jurisdiction only as regards fines, ie the Court of Justice has the power to assess whether the amount of the fine imposed is reasonable and, if not, determine its level

  References:
  Articles 261 and 263 TFEU
  Regulation 1/2003, art 31
  Case C-272/09 KME Germany and Others v Commission, para 102
- the Court of Justice recognises that the Commission has a margin of discretion as regards complex economic or technical matters. When it comes to such matters, the Court of Justice confines its review to checking whether the evidence relied on:

  References:
  Case C-12/03 Commission v Tetra Laval, para 39
  Case T-201/04 Microsoft v Commission, para 89
  - is factually accurate, reliable and consistent
  - contains all the information which must be taken into account in order to assess the complex situation, and
  - is capable of substantiating the conclusions drawn from it.

Despite such concerns, the Court of Justice has ruled that the review of legality, supplemented by the unlimited jurisdiction in respect of the amount of the fine, complies with Article 47 of the CFR. Specifically, the Court of Justice has noted the following:

- the Court of Justice's review:

  References:
  Case C-386/10 Chalkor v Commission, para 67
  Case C-501/11 P Schindler Holding and Others v Commission, para 38
  - concerns both the law and the facts, and
  - includes the power to assess the evidence, annul the contested decision and alter the amount of the fine

- in carrying out its review, the Court of Justice may not use the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and the facts

  References:
  Case C-386/10 Chalkor v Commission, para 67
  Case C-501/11 P Schindler Holding and Others v Commission, para 38
- failure to review the whole of the Commission decision on the Court of Justice's own motion does not contravene the principle of effective judicial protection. Compliance with this principle does not require the Court of Justice to undertake of its own motion a new and comprehensive investigation of the file.

References:
Case C-386/10 Chalkor v Commission, para 67

It was expected that the accession of the EU to the ECHR (mandated by the Treaty of Lisbon) would provide more clarity as to the compatibility of EU antitrust proceedings with the right to a fair trial, as articulated in Article 6(1) of the ECHR. However, the Court of Justice recently issued an opinion against the validity of the draft EU Agreement that was prepared for accession to the ECHR.

References:
Opinion 2/13 of the Court of Justice on the accession of the EU to the ECHR and Fundamental Freedoms and identifies problems with regard to its compatibility with EU law

The conclusion of second generation antitrust co-operation agreements

Second generation antitrust co-operation agreements between the Commission and third-country competition authorities provide scope for expanded information sharing between the authorities.

To date, the Commission has concluded a second generation antitrust co-operation agreement with the Swiss Competition Commission (COMCO). The agreement allows the Commission and COMCO to not only discuss, but also transmit to each other, information obtained in the course of their antitrust investigations. In particular:

References:
Agreement between the EU and the Swiss Confederation concerning cooperation on the application of their competition

- the Commission and COMCO may discuss with each other any information, including information obtained through the investigative process (eg a reply to a Commission request for information or documents seized during a Commission dawn raid), if necessary for their co-operation
- the Commission and COMCO may transmit to each other information in their possession, when the undertaking concerned has given its express written consent. In the absence of an express written consent, the Commission and COMCO may, upon request, transmit to each other information obtained through the investigative process, when they are investigating the same or related conduct.

In contrast, the agreement does not allow the Commission and COMCO to discuss or transmit to each other information:

- obtained under their leniency or settlement procedures, unless the undertaking that provided the information has given it express written consent, or
- obtained through the investigative process, if using the information would be prohibited under certain procedural rights and privileges, such as the right against self-incrimination and the LPP.

Given that the agreement between the Commission and COMCO is the first of its kind, it raises a number of questions as regards its implementation and, in particular, its potential interference with undertakings' rights of defence. Among others, it is unclear how it will be ensured that information transfers between the Commission and COMCO are not selective (eg limited to inculpatory evidence), as well as what control mechanisms may be used by an undertaking if it wishes to object to specific information transfers.

Shortcomings in Court of Justice proceedings with a potential impact on the rights of defence

Aside the issue of the level of review exercised by the Court of Justice, a number of other shortcomings in EU judicial proceedings may have an impact of the undertaking's rights of defence. Among others:

- appeals before the Court of Justice do not automatically suspend the application of the Commission decision. As a result, the undertaking is called upon to pay the fine or produce a bank guarantee pending judicial proceedings. Applications for interim measures against Commission decisions may be made, but are rarely granted
- an application for annulment of the Commission decision must be limited to 50 pages. This is despite the fact that the Commission decision itself may be hundreds of pages long. The Court of Justice may, moreover, limit the undertaking's right to submit a (maximum 25-page long) reply to the Commission's defence. On top of these, the admissibility conditions as regards annexes to the application for annulment are also rather restrictive, as annexes must explicitly be referred to in the application and must not contain any new arguments

  References:
  Practice Directions to parties before the General Court, point 10
  Case T-201/04 Microsoft v Commission, paras 91-100
- the Court of Justice primarily bases its review on the version of the facts established by the Commission. It rarely hears witnesses or experts in antitrust cases

  References:
  Case T-364/10 Duravit v Commission, paras 135, 147, 214, 204, 245, 253, 270, 283, 290, 305
- the duration of Court of Justice proceedings may be particularly lengthy. There is no specified time-frame within which the Court of Justice must render its judgment on a case before it. In this regard, recent case-law indicates that damages may be sought against the EU where the Court of Justice took an excessive length of time before reaching a decision on a case before it.

  References:
  Case C-50/12 Kendrion v Commission, paras 77-108