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Hear Me Out! Failing to Respect the Parties' Right to be Heard May Come at a High Price

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In recent years, there has been much talk of 'due process' and of ensuring a fair and impartial case handling by competition authorities. The EU Courts consistently stress the importance of respecting the parties' defence rights but often end up siding with the European Commission. By finding no violation of the parties' defence rights they signal that the Commission respects these rights and manages to ensure a fair and balanced case handling. That was until June this year.

It is now clear that the EU Courts will not always stand by the Commission and that a failure to respect the parties' defence rights may have devastating consequences, not only for the Commission but potentially also for the effective enforcement of the EU competition rules.

On 15 June, the General Court delivered its ruling in *Qualcomm*. There, the Commission's failure to respect the right to be heard led the General Court to annul the infringement decision in its entirety, quashing the €997 million fine imposed on the US chipmaker. The following day, the Commission was hit by yet another blow as the Court of Justice of the European Union (the ECJ) delivered its rulings in the optical disk drive cartel cases. Establishing an infringement of the parties' defence rights, it set aside the General Court´s ruling and partly annulled the Commission's infringement decision.

Are the EU Courts becoming tougher on the Commission? The short answer is yes. They are setting a higher standard for the Commission, requiring more now than a decade ago.

Qualcomm

A detailed report of the General Court's ruling in *Qualcomm* was posted in KCL on 21 June 2022, see here. In short, the General Court criticised the Commission for failing to inform Qualcomm of certain interviews that it had conducted with third parties during the investigation and for failing to take proper notes during these interviews. Finding that the information provided during the meetings could have been relevant for Qualcomm's defence, the General Court declared that the Commission had failed to respect Qualcomm's right to be heard. As the administrative procedure leading up to the adoption of the infringement decision had been vitiated by procedural errors affecting Qualcomm's right of the defence, the General Court declared that the contested decision must be set aside.

The Optical Disk Drive Cases

In 2015, the Commission adopted an infringement decision against several producers of optical disk drives. In its decision, it found that the companies had colluded in relation to procurement tenders organized by Dell and HP. The investigation had uncovered a network of parallel bilateral contacts to manipulate bids.

During the administrative procedure leading up to the decision, the Commission had sent out statements of objections to the parties, declaring that it considered them to have participated in a single and continuous infringement of Article 101 TFEU. When the Commission later adopted its infringement decision, the parties were found to have participated in a single and continuous infringement which consisted of several separate infringements of the Treaty Article. The statement of objections had made no reference to any separate infringements.

The View of the General Court

The Commission decision was challenged before the General Court. The applicants argued that the finding that they had participated in separate infringements constituted a breach of their defence rights, and that the decision was not sufficiently reasoned regarding the existence of separate infringements. The General Court did not accept the applicants' arguments and upheld the Commission's decision. According to the General Court, a single and continuous infringement is by necessity made up of separate infringements. There was therefore no need to address this issue specifically already in the statement of objections.

The View of the ECJ

This was not the view taken by the ECJ. Acknowledging that the concept of a 'single and continuous infringement' presupposes a complex of practices that may also constitute, in themselves, an infringement of Article 101 TFEU, the ECJ declared that it cannot be deduced therefrom that each of those practices must necessarily be characterised as a separate infringement. This requires the Commission to identify and legally characterise as such each of those forms of conduct and, next, adduce proof of the involvement of the undertaking concerned to which those practices are imputed, the ECJ continued.

The ECJ then declared that when the Commission intends to allege not only a single and continuous infringement, but also separate infringements, observance of the defence rights requires it to set out, in the statement of objections, the elements necessary to enable the addressees to understand that it alleges against them both a single and continuous infringement and each of those separate infringements. As the Commission had failed to do so, the appellants' defence rights had been infringed, the ECJ concluded. This in turn led it to set aside the General Court's rulings and to annul the Commission decision to the extent that it found the appellants to have participated in several separate infringements.

What is Required for a Decision to be Quashed?

Both *Qualcomm* and *Optical Disk Drives* concern the parties' right of the defence. This is a composite term, including, *inter alia*, a right to be heard. The right is reflected in Article 27 of Regulation 1/2003 which declares that (i) the Commission may only base its infringement decisions on objections on which the parties have been able to comment and (ii) the parties shall be granted access to the file. The statement of objections must clearly set out all the essential matters on which the Commission relies at that stage, such as the facts, the characterisation of those facts and the evidence relied upon. Accessing the file allows the parties to acquaint themselves with the evidence in the case file and to express their views effectively on the conclusions reached by the Commission in the statement. Access to the file is thus one of the procedural safeguards intended to protect the rights of the defence and to ensure that the right to be heard can be exercised effectively.

Infringement of the Defence Rights Required

For the EU Courts to quash an infringement decision in these situations, the Commission must have committed a procedural error. This, however, is not enough. There must also be an infringement of the parties' defence rights. It appears that the EU Courts' view on what constitutes a procedural error has gradually evolved. Two decades ago, the failure to record a meeting or a telephone conversation did not necessarily constitute a procedural error. Today, it is not only considered a procedural error, it may also amount to an infringement of the parties' defence rights, and as in the case of *Qualcomm*, lead to the annulment of the Commission's decision.

The Commission has always been under a statutory obligation to give the parties a right to be heard before any infringement decision is adopted; to inform them in writing of its objections against them and to allow them the opportunity to make known their views on the objections. In the early days, the ECJ did not consider this to include a right to access the case file. It was only after the Commission had imposed such an obligation on itself in the 1980's that the ECJ recognised the right.

Once the parties had been granted a right to access the file, it became necessary to determine what should be put on the file. Should the Commission be required to record meetings, and, if so, should the records be put on the file and accessible to the parties?

Historically No General Duty to Draw up Minutes

In cases such as *TACA* and *Intel* the General Court declared that the Commission was under no general duty to draw up minutes of discussions in meetings or telephone conversations with complainants or other parties.

This view is also reflected in the Commission's own Manual of Procedures which states that the procedure for taking statements pursuant to Article 19 of Regulation 1/2003 and Article 3 of Regulation 773/2004 applies only when it is expressly agreed between the interviewee and DG COMP that the conversation will be recorded as a formal interview under Article 19. The manual requires interviewers to inform the interviewee of the possibility to record the interview and the

intention to do so in the case at question. It also states that the Commission is entitled to record the meetings but does not once mention any obligation on the part of the Commission to do so.

The First Steps towards a New and Stricter Standard

In 2009, the European Ombudsman criticised the Commission's actions during the investigation against Intel, declaring that the Commission had committed procedural errors when failing to (i) take minutes from a meeting with a representative from Dell, and (ii) put an agenda from the meeting on the case file.

In the subsequent court case, the General Court sided with the Commission and distinguished between formal and informal interviews, excluding informal interviews from the scope of Article 19 of Regulation 1/2003. This distinction was not accepted by the ECJ.

In its ruling in 2017, the ECJ declared that Article 19 constitutes the legal basis empowering the Commission to conduct interviews during investigations. The General Court had therefore erred in law when distinguishing between formal and informal interviews, excluding the latter category from the scope of the article. Moreover, it considered that the Commission was required to record, in a form of its choosing, any interview that it conducts for the purpose of collecting information relating to the subject-matter of an investigation.

The recording of meetings is thus no longer optional, and failure to take notes constitutes a procedural error. That said, not every procedural error may lead to an annulment of the Commission's decision. This requires an infringement of the company's defence rights. In *Intel*, the ECJ considered that the failure to record the meeting held with a senior executive at Dell did not constitute an infringement of the defence rights as Intel had not adduced any evidence to suggest that the Commission had failed to record exculpatory evidence which could have been useful for its defence. Intel could for example have requested that the executive was summoned before the General Court, the ECJ suggested.

In *Qualcomm*, the Commission had failed to record meetings with both informants, customers and competitors. The case file did not contain any information on these meetings, and it was not until after the adoption of the infringement decision and following explicit requests from Qualcomm that the Commission provided brief summaries of the meetings. Some meetings were not acknowledged by the Commission until during the proceedings before the General Court. This is probably one reason why the General Court sided with Qualcomm, noting that the infringements could not be remedied during the court proceedings as the examination undertaken there does not replace a full investigation of the case in the context of an administrative procedure. Furthermore, and equally important, the General Court considered that Qualcomm had shown that the information in question could have been useful for its defence.

A Tougher Stance?

This is not the first time that the EU Courts annul a Commission decision due to infringements of the parties' defence rights. In *Solvay*, the misplacing by the Commission of parts of the case file led the ECJ to annul its infringement decision. However, it is also evident that the Commission

must now play by a stricter rulebook.

When the Commission launched its investigation against Qualcomm in June 2014, the General Court had just delivered its ruling in *Intel*, allowing the Commission to distinguish between 'formal' and 'informal' meetings, declaring that the Commission had not been required to organise the meeting in question as a formal interview. Instead, it considered that 'the practical needs of the sound functioning of administration and the interest in providing effective protection of the competition rules justify the possibility for the Commission to carry out interviews which are not subject to the formal requirements laid down in Article 3 of Regulation No 773/2004'.

I will not speculate on what the outcome would have been had these cases been tried two decades ago, and any development towards a tougher standard is of course much welcome. From a due process perspective, there is no reason to distinguish between formal and informal meetings. In addition, infringement decisions should not contain other allegations than those found in the statement of objections. Today, the omissions by the Commission appear as flagrant infringements of the parties' defence rights.

At the same time, it should not be forgotten that, not long ago, the General Court considered that the Commission was not required to record all meetings or interviews. One cannot help but wonder whether at least some of the measures that the General Court now considers to be procedural errors and infringements of Qualcomm's defence rights would have been accepted by the same court at the time they were taken.

Hopefully, the current revision of Regulations 1/2003 and 773/2004 will result in clearer rules in this respect, ensuring not only effective enforcement of the EU competition rules, but also adequate fundamental rights protection.

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