Chapter 22
The EU Competition Procedures from the Perspective of a Counsel

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1. INTRODUCTION

There is a hidden beauty to procedural matters. In a discipline as open and dynamic as competition law, substance tends to attract most of the attention. Many see substantive competition law as fertile ground to develop and debate creative theories but perceive procedure as a source of hurdles, dull tasks and deadlines regulated in black letter regulations or soft law instruments containing all relevant answers. From the perspective of outside counsel, this could not be further from the truth. Without procedure, substance is but abstraction. Procedure and substance live in symbiosis to the extent that the division between the two may not always be apparent. At a time when, as we will explain below, the margin for substantive discussions in actual cases may be narrowing, procedural questions retain their interest. In practice, from the perspective of outside counsel, procedural questions are often the most interesting ones. While substantive competition law discussion may connect our discipline to economics, procedural principles and rules play a critical role in ensuring that competition law does not lose its last name. There is also a hidden relevance to procedural matters. Procedural principles and rules have largely shaped the evolution of EU competition law, guided its application and contributed to its legitimacy and soundness. The evolution in EU competition procedures over the years has impacted, and in many ways even transformed, the nature of the work that outside counsel perform. In more immediate terms, procedural questions are also what most often determines the outcome of individual cases ('*It's the procedure, stupid*!'). This is particularly relevant to outside counsel. Unlike other repeat players, like competition authorities or courts, outside counsel are less bound by policy and consistency considerations and are driven by a fiduciary duty to advance their clients' best interests, generally within the context

of a particular controversy. As outside counsel, both the nature and the measure of our work crucially depend on procedure. In what follows, we seek to explain how.

2. THE ROLE OF PROCEDURE IN SHAPING THE NATURE OF THE PRACTICE OF EU COMPETITION LAW

Outside counsel can advise clients, argue for them before authorities and courts, negotiate for them and, in some cases, even lobby for them. The role of outside counsel in competition cases varies depending on the nature of each case. The nature of those cases, and of our work, is largely determined by procedural considerations. In the early days of EU competition law, under Reg. 17, the day-to-day work of many outside counsel essentially consisted in notifying agreements to the Commission or ensuring their conformity with Block Exemption Regulations and in defending their legality under then Art. 85(3) EC, now Art. 101(3) TFEU.[1] The procedural overhaul that came with Reg. 1/2003 fundamentally changed the practical application of Arts 101 and 102 TFEU, and so have subsequent procedural developments.

EU competition law has progressively evolved into a decentralised system that largely relies on enforcement by NCAs and national courts and on undertakings' self-assessment of their practices. Competition regimes have also flourished across the world, thereby globalising the discipline. This paradigm shift transformed competition law and, with it, the role of outside counsel. The progressive enhancement of competition authorities' enforcement toolkit over the years has also impacted enforcement priorities and decisions and changed the nature of the cases in which outside counsel are called upon to intervene. The introduction of the Commission's leniency policy in 1996 led to decades of focus on cartel enforcement and related EU Court litigation, shifting attention away from vertical agreements that had, for many years, largely occupied authorities and practitioners.[2] This change of orientation was accompanied by enhanced investigation powers and a constant increase in EU competition fines. The quasi-criminalisation of competition law sanctions led outside counsel to pay increased attention to the compatibility of EU competition procedures with fundamental rights and with the procedural guarantees required by the ECHR. While the EU Courts have confirmed that the EU enforcement system complies with due process requirements flowing from Art. 6 ECHR,[3] discussion on these points, largely driven by outside counsel,[4] may have contributed to improvements in the system, like

1. B.E. Hawk, 'System Failure: Vertical Restraints and EC competition law' (1995) CML Rev 973-989.
2. For an overview of how antitrust policy has evolved over its five first decades, *see* P. Ibáñez Colomo, A. Kalintiri, 'The Evolution of EU Antitrust Policy: 1966-2017' (2020) Mod Law Rev 321-372.
3. *See* K. Lenaerts, 'Due process in competition cases' (2013) NZKart 175-182.
4. *See*, *e.g.*, I. Forrester, 'Due Process in EC competition cases: a distinguished institution with flawed procedures' (2009) EL Rev 817-843; I. Van Bael, *Due Process in Competition Proceedings*, 2011, Kluwer, pp. 357-363; and D. Slater, S. Thomas, D. Waelbroeck, 'Competition law proceedings before the [EC] and the right to a fair trial: no need for reform?', 2008, The Global Competition Law Centre Working Papers Series, GCLC Working Paper 04/08.

the creation of the role of the Hearing Officer and the calibration of the EU Courts' standard of review.[5]

A transformational effect also followed the introduction of commitment decisions with Art. 9 of Reg. 1/2003, as these rapidly became the tool of choice for the Commission in non-cartel cases, particularly in the context of Art. 102 TFEU.[6] For a number of years, abuse of dominance became more about remedies and negotiations in the shadow of the law than about the actual interpretation of the law, even more so following the *Alrosa* judgment.[7] The subsequent introduction of cartel settlements in 2008 and of new breed non-cartel 'cooperation procedures' in 2016 also transformed the nature of cases before the Commission, as these have become less adversarial, more cooperative, and less likely to end up before the EU Courts.[8] These developments have necessarily impacted the role of outside counsel, detracting certain attention away from substance, but raising new fundamental, procedural questions regarding, for example, the principle of presumption of innocence,[9] third parties' rights and the principle of proportionality,[10] or the need to balance an undertaking's rights of defence with other considerations.[11] Negotiated solutions need to be guided and can only be overridden by procedural considerations and general principles of law.

In parallel, the decentralisation of competition enforcement has progressively changed the nature, and even the location, of outside counsel work. As NCAs and national courts have become the primary enforcers of the competition rules, practitioners have turned their attention to procedural questions involving the interaction between public and private enforcement and the interplay between proceedings before the Commission and NCAs, including in relation to competences,[12] the binding nature of decisions,[13] the interaction of leniency systems,[14] the risk of parallel proceedings[15] and the *ne bis in idem* principle.[16] This has also been the background to the recent adoption of the ECN + and Damages Directives. Both directives contain procedural rules aimed at ensuring the effectiveness of Arts 101 and 102 TFEU and seek to address some of the procedural issues arising with decentralisation, all while giving rise to new

5. C-272/09 P, *KME a.o. v. Commission*, EU:C:2011:810, para. 106; and C-386/10 P, *Chalkor v. Commission*, EU:C:2011:815, para. 67.
6. R. Stones, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) YEL 361-399.
7. C-441/07 P, *Commission v. Alrosa*, EU:C:2010:377.
8. N. Wahl, '*The* [Commission] *risks marginalizing courts and antitrust victims by reaching too many settlements with companies suspected of abusing their market clout … The increasing use of 'commitments' – through which companies, such as Google, offer to change their behaviour in return for cases being closed – means that the policymaker is escaping judicial scrutiny*', in L. Crofts, *Increase in EU settlements risks sidelining courts, victims, Wahl says*, 2014, Mlex.
9. T-180/15, *Icap v. Commission*, EU:T:2017:795.
10. C-132/19 P, *Groupe Canal + v. Commission*, EU:C:2020:1007.
11. T-79/19 R, *Lantmännen and Lantmännen Agroetanol v. Commission*, EU:T:2019:212.
12. *See*, *e.g.*, C-375/09, *Tele2 Polska*, EU:C:2011:270.
13. *See*, *e.g.*, C-547/16, *Gasorba SL v. European Commission*, EU:C:2017:891.
14. *See*, *e.g.*, C-428/14, *DHL Express (Italy) and DHL Global Forwarding (Italy)*, EU:C:2016:27.
15. *See*, *e.g.*, T-19/21, *Amazon.com a.o. v. Commission*, EU:T:2021:730.
16. *See* C-117/20, *bpost*, EU:C:2022:203 and C-151/20, *Nordzucker a.o.*, EU:C:2022:203.

procedural questions and phenomena, including the drying out of leniency cases,[17] which affects public enforcement and private practice alike. In this new context, new procedural questions are increasingly more likely to be resolved by means of preliminary rulings rather than direct actions.

More recently, the upcoming Digital Markets Act will herald a new era for competition law. A new regulatory system based on blanket prohibitions will render the substantive legal discussions that often occupy outside counsel unnecessary, including in relation to market definition, dominance, and assessment of likely effects.[18] Instead, discussions on remedies will take centre stage. This paradigm shift towards *ex ante* regulation of some digital platforms will impact outside and in-house counsel work, leading to greater attention on *ex ante* compliance on the side of 'gatekeepers' and to greater policy-based non-legal lobbying on the part of complainants and other third parties. The interaction between this new regulatory system and other systems pursuing overlapping or similar goals (including EU and national competition law) will also offer fertile ground for procedural litigation and debate.

3. THE ROLE OF PROCEDURE IN SHAPING THE OUTCOME OF EU COMPETITION CASES

EU competition procedure not only affects the nature of outside counsel work but is also what often determines the outcome of those cases. Arts 101 and 102 TFEU are remarkably open-ended provisions based on 'imprecise legal concepts'[19] enforced by authorities enjoying a wide margin of discretion for any matters involving complex economic assessment. This means that constraints to the Commission's enforcement action will often be of a procedural nature. These constraints affect not only intermediate steps in proceedings (like the adoption of requests for information,[20] the conduct of inspections[21] or access to the file[22]) but also their very outcome in terms of fines,[23] remedies, and substantive findings.[24] In some cases, procedural rules might even affect the legal classification of facts. For example, labelling certain facts as constitutive of a

17. J. Ysewyn, S. Kahmann, 'The decline and fall of the leniency programme in Europe' (2018) Concurrences n. 1, 44-59.
18. Explanatory Memorandum of the Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final, p. 8: 'The Commission considered that Article 102 TFEU is not sufficient to deal with all the problems associated with gatekeepers, given that a gatekeeper may not necessarily be dominant, and its practices may not be captured by Article 102 TFEU if there is no demonstrable effect on competition within clearly defined relevant markets.'
19. T-167/08, *Microsoft v. Commission*, EU:T:2012:323, para. 91.
20. For a comprehensive overview of the practical issues that may arise in relation to request for information, *see* Opinion of AG Wahl, C-247/14 P, *HeidelbergCement v. Commission*, EU:C:2015:694. *See also* T-451/20 R, *Facebook Ireland v. Commission*, EU:T:2020:515.
21. C-583/13 P, *Deutsche Bahn a.o. v. Commission*, EU:C:2015:404.
22. T-79/19 R, *Lantmännen and Lantmännen Agroetanol v. Commission*, EU:T:2019:212, upheld by in C-318/19 P(R), EU:C:2019:698.
23. L. Ortiz Blanco, A. Givaja Sanz, A. Lamadrid de Pablo, *Fine arts in Brussels: Punishment and settlement of cartel cases under EC Competition Law*, Bruylant, 2008.
24. T-235/18, *Qualcomm v. Commission*, EU:T:2022:358.

cartel will rule out possible enforcement tools (namely commitment decisions) but will make other procedures available (namely leniency and the settlement route).

In any given case, the main constraint applicable to Commission decisions under Art. 7 (infringement decisions), Art. 8 (interim measures) and Art. 9 (commitments) of Reg. 1/2003 is the need to respect the requirements laid down by the case law of the EU Courts. The prospect of judicial review ensures the legitimacy of such decisions and also seeks to ensure their legality and soundness. That is why the arguments developed by outside counsel in any given case will often be based on (an interpretation of) the case law and will carry more persuasive value if they can point to a credible risk of annulment or reproach. What is particularly relevant for the purposes of this contribution is that the EU Courts' review of Commission decisions in these cases is also, when it comes to substance, largely a process-oriented review.[25] Indeed, judicial review at the EU level has particularly emphasised (often under the *Tetra Laval* standard of review) the need for the Commission to respect the rules on the allocation of the burden of proof, to take into account all relevant considerations to assess a complex situation and to state sufficient reasons to substantiate its conclusions.[26] Some of the most relevant cases of the past few decades in the context of Art. 101 and 102 TFEU, like *Cartes Bancaires* and *Intel*, can also be read under this procedural light.[27] Procedural principles and rules have often been the chisel with which the Courts have shaped substantive law.

4. THE ROLE, CHALLENGES, AND RESPONSIBILITIES OF OUTSIDE COUNSEL

Procedural requirements are far from unnecessary bureaucratic hurdles. While they might feel that way for the lawyer entrusted, for example, with redacting confidential information from thousands of documents or for the officials in charge of access to the file logistics, all these tasks are indispensable for the legitimate and effective enforcement of EU competition law. Procedural requirements laid down by legislatures or courts, like substantive ones, are not capricious; they all, with no exception, flow from general principles of law and from fundamental rights. They are an essential component of any system based on the rule of law. The role of outside counsel in this system is different to that of enforcers, courts and in-house counsel. EU law reserves some privileges (namely legal professional privilege[28] and access to certain confidential information[29]) to outside counsel. By the same token, outside counsel also have

25. K. Lenaerts, *The European Court of Justice and Process-oriented Review*, 2012, College of Europe, Research Papers in Law.
26. *See* M. Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) JECLAP 295-314; M. van der Woude, 'Judicial Control in Complex Economic Matters' (2019) JECLAP 415-423.
27. C-67/13 P, *Cartes Bancaires v. Commission*, EU:C:2014:2204; C-413/14 P, *Intel v. Commission*, EU:C:2017:632; and T-286/09 RENV, *Intel v. Commission*, EU:T:2022:19.
28. C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, EU:C:2010:512.
29. Commission, Guidance on the use of confidentiality rings in antitrust access to file proceedings, 2018, DG COMP.

obligations, including deontological ones, that do not apply to other actors in competition law, including other consultants.

However, above all, outside counsel have a special responsibility to contribute to a system based on the rule of law by defending clients to the best of their ability, all while upholding the highest ethical standards. An outside counsel cannot compromise on any of these two variables. Outside counsel will often be able to defend their clients' interests without engaging in meaningful procedural disputes, particularly in the era of negotiated solutions. Depending on their clients' interests, outside counsel might also intervene in cases in support of the enforcer's interpretation of the procedural rules. In a prominent minority of cases, however, it might not be possible for outside counsel to advance their clients' best interests while avoiding procedural disputes. This is why outside counsel invoking procedural safeguards or pointing to procedural breaches in individual cases are not necessarily 'playing tricks' or merely serving their clients' interests (as their fiduciary duty requires) at the cost of welfare[30]; they are also aiding in the proper administration of justice and the general interest (as their wider duty also requires).

Frictionless enforcement might, in fact, not be entirely desirable, for, without friction, there would be no progress and no evolution in the law. It is paramount that all actors in competition proceedings, be it undertakings, authorities, courts or lawyers, play by the rulebook; we all have the responsibility of holding each other to the highest standards, however, uncomfortable that might be in practice. Outside counsel, in particular, are bound by a duty to rely on substantive or procedural rules and principles when this may assist their clients, particularly in a discipline where enforcers enjoy great prosecutorial discretion, extensive investigative powers, a very wide margin of substantive manoeuver, and often no time limits to investigate and decide on cases. This, of course, does not mean that outside counsel should make every attempt to delay or erect hurdles in an investigation on the basis of meritless requests and actions. That, in fact, will most often not be in anyone's best interest, certainly not the client's. The case law, in any event, has developed safeguards to ensure that the correction of procedural errors will only lead to a decision's annulment in situations where the error was genuinely liable to alter the outcome of the case,[31] regardless of how serious the breach.[32] The fact that effective enforcement considerations are likely to prevail only underscores the importance of being scrupulous on procedure.

Over the years, outside counsel might have often been perceived as a proverbial pain in the neck, but they have played an important role in contributing to reforms and procedural improvements not only through their work in individual cases but also through publications, calls for greater transparency or responses to consultations, often through professional associations. The European Institutions deserve credit for their openness to observations and feedback from outside counsel, very particularly on the procedural front. The EU, including its competition enforcement system, is an inspiration and a model to other jurisdictions across the world. At a time of visible threats

30. R. Whish, *Do Competition Lawyers Harm Welfare?* (2020) Concurrentialiste.
31. C-413/14 P, *Intel v. Commission*, paras 96-102.
32. T-180/15, *Icap v. Commission*, EU:T:2017:795, paras 269-277.

to the rule of law, we have a shared responsibility to ensure that this remains the case, showing that effective enforcement is not in conflict with, but must rely on, scrupulous respect for general principles of law and fundamental rights.