**EUROPEAN COMPETITION LAWYERS FORUM**

**Antitrust timelines review**

**(6 November 2017 working draft)**

# **The problems with delay and the importance of the rights of defence**

## There is scope for improvement in EU antitrust procedures. The fundamental principle is that antitrust investigations should be conducted as efficiently and expeditiously as possible, consistent with a strong adherence to the parties’ rights of defence and the need for robust, evidence-based decisions. It is also important that the Commission’s procedure is, to the extent possible, followed in a manner that is transparent and consistent across cases.

## Timely justice as well as a certain level of transparency in the way investigations are handled would benefit the companies under investigation, the Commission and consumers. Protracted and opaque investigations burden and disrupt companies and take up Commission resources. The underlying competition law breaches may cause additional competitive and consumer harm if the Commission takes too long to act.

## Flexibility in antitrust investigations is important, but greater transparency and clarity around timeframes would encourage regulators and parties to move forward efficiently.

## However, excessively shortening the procedures may play against the interest of undertakings when they have to prepare documentation (the current system may have more advantages than disadvantages in this regard).

# **Examples of the current challenge and improvement measures in place in other jurisdictions**

## There are numerous examples of very lengthy Commission antitrust investigations: *Brussels Airlines / TAP Air Portugal*; *Slovak Telekom*; *Refrigerants (Honeywell and Dupont*).

## The FTC and European NCAs are already developing ways to improve antitrust investigation procedures, transparency and timeframes for investigation. The FTC’s reforms include streamlining and limiting relevant time periods, reviewing dockets and closing old investigations where appropriate.

## There are several examples of statutory time limitations to antitrust procedures:

### In Spain, the deadline for the National Markets and Competition Commission (CNMC) to adopt and notify a decision on infringement proceedings is 18 months from the day after the formal initiation of proceedings, although the deadline may be suspended for the reasons legally established (e.g. to request additional information or rectify errors, if administrative or judicial appeals are lodged, if settlement negotiations are initiated, etc.). The 18-month deadline is divided into two phases: (i) a 12-month investigative phase conducted by the Directorate for Competition, and (ii) a 6-month decision phase before the Council of the CNMC. In its decision to initiate formal proceedings (which is immediately made public), the CNMC will disclose the main facts, parties under investigation and alleged antitrust infringement.

### In Poland, antitrust proceedings shall be, in principle, completed within 5 months (the competition authority can extend this deadline (and in practice often does so), but any extension requires a brief written justification where a new deadline should be established; in addition any party to the proceedings is entitled to file a formal complaint if the procedure is protracted without grounds).

### In Portugal, the deadline for the Portuguese Competition Authority (AdC) to adopt and notify a statement of objections on infringement proceedings is 18 months from the day after the initiation of proceedings, although the deadline may be extended for the reasons legally established. The issuance of a statement of objections opens an investigative phase that, in principle, should be concluded after a maximum period of 12 months, from the notification of the statement of objections (this deadline can also be extended if need be). If after the investigative phase the AdC concludes that an infringement took place, the AdC can issue a decision.

### Hungary, the Netherlands, Belgium and México are other countries where time limitations apply to antitrust investigations.

### Although these time limitations give more transparency to the proceedings, before the formal initiation of such proceedings (which can sometimes take a long time), transparency does not only depend on time limitations. Other procedural safeguards could be put in place to increase transparency.

## In the United Kingdom there are no statutory time limitations to antitrust investigations, however, when the Competition and Markets Authority (CMA) decides to open a formal investigation, it will also publish on its webpage a notice of investigation setting out a case-specific administrative timetable for the investigation. If the timetable changes during the investigation, it will be updated in the notice of investigation, including reasons for the changes that have been made. Initially, the timetable will cover the investigative stages up to the CMA’s decision on whether to issue a Statement of Objections. If the CMA issues a Statement of Objections, the timetable will be updated with indicative timing of the steps to the end of the investigation. Clients appreciate this system. However, it might be burdensome for the authority to establish an estimate of the deadlines for each case and to reason every deviation from the initial timetable.

## In Italy, antitrust investigations are opened by way of a reasoned decision[[1]](#footnote-1) detailing: i) the facts, ii) the parties under investigation, iii) the alleged antitrust infringement, iv) the team responsible for dealing with the case, v) a tentative time-period within which the investigation has to be concluded (typically 12 months). The decision is then immediately made public on the ICA website. Any extension of the duration of the investigation has to be taken by way of an equally reasoned decision. As a result, the average duration of antitrust investigations in Italy tends to be between one and two years and proceedings are fairly transparent.

## In Germany, the duration of antitrust investigations of the Federal Cartel Office (FCO) is not limited by statute or guidelines. Moreover, the FCO will not customarily issue a timetable or tentative time period for its investigation. However, the FCO is, as a general principle of law, prohibited from unlawfully delaying the investigation. Courts have in the past reduced fining decisions on account of excessive duration. Factors in determining excessive duration are *inter alia* the length of and burden resulting from the delay, the seriousness of the (antitrust) violation, and the scope and complexity of the investigation. In one case, the Higher Regional Court Düsseldorf held that an investigation should have taken two years, rather than three and a half years. It held that even though the investigation of the FCO involved a great number of undertakings (sixty-one) and complex issues, it was not exceptionally difficult or extensive, due to the cooperation of the undertakings involved, the few witness statements required, and the FCO’s prior knowledge of the facts.

# **Proposals for the reform of EU antitrust investigation procedures**

## In view of the different positions taken in other jurisdictions, there are a number of ways in which the Commission’s antitrust procedures might be improved. For example:

### **Statutory deadline**: As in Spain, Portugal and Poland, time limitations to antitrust investigations could be set together with the possibility of suspending the procedure in justified cases.

### **Target timeframes**:Indicative target timeframes could be set for each phase of the investigation. Although it may be appropriate to adjust these timeframes depending on the particular case, the Commission could use the timeframes as a default starting position and provide reasons for any departure:

#### Complaint assessment: e.g. 4 months (in line with the current period set out in the *Complaints Notice* period);

#### Initial assessment: e.g. 6 months from initial contact with the party under investigation to deciding whether to formally open proceedings;

#### Investigation phase: e.g. 12-18 months from opening proceedings to the issue of an SO or the closing of proceedings; and

#### Final decision: e.g. 12 months from issue of an SO to final decision or closing of proceedings.

#### If parties engage in commitments discussions or settlement discussions, it will likely be necessary to adjust the target timeframes. The Commission and the parties should discuss an appropriate timetable for each step of the commitments procedure and settlements procedure.

### **Detailed timetables:** The Commission could be required to communicate a detailed timetable to the parties at the start of an investigation, using the target timeframes as a benchmark. The Commission should provide reasons if theproposed timetable differs from the target timeframes. The timetable should be published shortly after it is communicated to the parties unless there are clear justifications for not doing so.

### **Timetable changes**:The Commission could be required to promptly communicate and publish any changes to the timetable made during an investigation and the reasons for the change.

### **Identification of persons/entities under investigation:** The Commission could be required to identify (at least within a period of 4-6 months of the date of the beginning of the investigation) the persons/entities which are going to be investigated.

### **Delimitation of scope and duration of the investigation:** The Commission could also make its proceedings more transparent by opening the antitrust investigations by way of a reasoned decision detailing the facts under scrutiny; the parties to the investigation; the potential theories of harm; the team responsible for dealing with the case; a (non-mandatory) time period within which the investigation has to be concluded.

### **Expanded Hearing Office role**: The role of the Hearing Officer could be expanded to include receiving complaints and resolving disputes about delays and non-adherence or variations to the investigation timetable.

### **Annual reporting**: The Commission could be required to report annuallyon its antitrust investigations, identifying: (i) the extent to which the Commission has complied with the target timeframes; (ii) the average investigation duration; (iii) the number of new, ongoing and closed investigations and their outcome; and (iv) the number of complaints received by the Commission and their outcome.

1. The issuance of the decision opening the investigation systematically coincides with the date of the first formal investigative act taken by the ICA, i.e. the inspection. [↑](#footnote-ref-1)