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Editorial
Developing Due Process in EC Competition Law

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It was not so long ago that mention of due process and competition in the same breadth would see most competition specialists' eyes glaze over. Competition law was about substantial issues of law and economics - due process was a marginal subject, focussing on access to the Commission's file and the role of the Hearing Officer. It would have been inconceivable to have a wide-ranging group of scholars, practitioners and regulators from across the Union spending eight hours discussing due process issues. However, at the Vth CLaSF workshop in April we were able to have an informative and broad discussion concerning a host of due process issues which would have stunned some of the early specialists in the competition field. We were able to extensively discuss a number of procedural issues as varied as self-incrimination, through privilege, to double jeopardy, fining policy and recidivism.

There are three reasons for this development of procedural competition law. Firstly, the increase in the number of cartel cases dealt with by the Commission since the mid-1990s. Prior to that date the Commission investigated very few cartel cases. Without cartel cases the development of procedural competition law tended to be a lot slower, as the overwhelming majority of the Commission's workload was made up of regulatory cases where there was no major law-enforcement objective, any penal sanction would be minimal and the Commission's major objective was often to just develop regulatory principles. However, following the adoption of the 1996 Leniency Notice, the number of cartel cases dealt with by the Commission accelerated. This acceleration was given a major boost by the adoption of the US style 2002 Leniency Notice, as result of which the Commission is now dealing with approximately 50 cartel cases; that is more cartel cases than the entire period from 1958 to 2002.

Cartel cases matter for the development of procedural competition law because it is largely in such cases that questions such as the extent of the right of the Commission to ask questions under Article 18 of Regulation 1, the scope of any legal professional privilege when the Commission undertakes an on the spot inspection under Articles 20 and 21 of Regulation 1, or the question of the Commission's recidivist policy are likely to arise. Due to the secretive nature of cartel activity and the need to apply significant investigative powers against such practices, together with the heavy sanctions that such serious anti-competitive behaviour attracts, the more cartel cases there are the greater

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likelihood that due process issues will be aired both in Oral Hearings and then before the CFI.

The second factor is the development over the last two decades of a substantial and largely consistent European Court of Human Rights (ECtHR) case law which is likely to provides a substantial degree of legal support for counsel to defendant undertakings to argue that the existing guarantees that such undertakings already enjoy in proceedings before the Commission and the CFI should be extended and developed.

The third factor is the modernisation programme and in particular the development of a network of competition authorities. The development of the network, in which cases can be re-allocated amongst the Commission and the national authorities and where little or no procedural harmonisation has taken place, raises truly difficult and challenging due process issues.

Together the impact of a stronger enforcement practice against cartels; the development of the ECtHR case law and the modernisation programme are raising a wide range of complex procedural issues which have remained hitherto unexplored.

Dr Renato Nazzini in his article 'Some Reflections on the Dynamics of Due Process Discourse in EC Competition Law' reflects this broader impact that the due process debate is having on procedural competition law. Dr Nazzini fleshes out the very interesting point that procedural competition law at both EC and national level is undergoing a process of transplantation of legal concepts from national to international, to EC and then back down to national systems. On his broader canvass he examines the *ne bis in indem* rule, self-incrimination, legal professional privilege, and the rights of third party in competition procedures. What Dr Nazzini observes is two types of interaction in the due process debate which are likely to impact upon the development of procedural standards in competition law. The first: a vertical interaction between the Community and the Member States, and; the second, a horizontal action between the Member States. As he says,

> 'This on-going process shifts the focus from national law requirements to transnational concepts and principles'.

Dr Nazzini goes on to suggest that the result may be the convergence of procedural standards not so much by binding rules but by a process of learning, best practice and adaptation which could be described as 'spontaneous harmonization' and that this may be more appropriate in this field because of technical and context specific nature of procedural law.

Ms Arianna Andreangeli in her paper 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: One Step Forward, Two Steps Back?' highlights the impact of the operation of case allocation rules in light of the already controversial issue at Community level, the application of legal professional privilege. As Ms Andreangeli, makes very clear the lack of common procedural rules between the Member States and the Member States and the Commission raises some very serious questions for the effective protection of the rights of the defence. It has to be open to question how it can be acceptable in a

case involving allegations of price-fixing, the most serious competition infringement, potentially resulting in very heavy fines, subsequent damages actions and potential significant reputational damage that the network of European competition authorities can contemplate a situation in which information that is privileged in one jurisdiction can be seized in another Member State where privilege is narrower and sent to that first jurisdiction where it can be used in evidence against a defendant undertaking. As Ms Andreangeli says:

> 'the lack of harmonisation of procedural and evidential rules, and especially of a uniform notion of legal professional privilege is likely to play havoc with legal certainty and to undermine the effectiveness of the right of investigated undertakings to be subjected to a fair procedure both at Community and national level'.

Ms Kristina Nordlander's article 'Recidivism: Legal Certainty for Repeat Offenders', raises some very interesting and as yet largely unexplored issues surrounding the Commission policy to recidivism in cartel cases. Given that the Commission's own limitation period for competition infringements is 5 years can it be acceptable that there is no limitation period in respect of recidivist activity? There have even have been cases where the Commission has taken into account in calculating a fine recidivist behaviour from 40 years ago. Clearly as more and more leniency applications are turned into cartel prohibition decisions, the disparity between the Commission's limitation period and the lack of a limitation period for recidivism to be taken into account is likely to result in defendant undertakings raising this issue as a matter raising questions of legal certainty and under Article 6 ECHR.