

COMPETITION ENFORCEMENT IN THE EU: PUBLIC AFFAIRS' STRATEGIES AND TRANSPARENCY IN THE EU DECISION-MAKING PROCESS

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EU competition policy: based on political discretion?

Many would agree that Brussels' legislative priorities guide competition policy and enforcement. Under President Juncker's mandate, the creation of an Energy Union, a Single Digital Market, and a better functioning internal market have been at the top of the agenda.

In a recent interview with the Guardian, EU's Competition Commissioner Margrethe Vestager noted that now *"Europe has a chance really to reconnect and serve our citizens"*.^[1] Along the same line, the Directorate-General for Competition (DG COMP) undertakes action that could, to Vestager's view, establish trust to society and the notion of fairness: from tackling barriers in the digital sector (pay-TV case & geo-blocking) to fighting tax benefits granted to giants like Apple, Starbucks or Fiat. Also, the Competition Commissioner has a track record of taking tech companies that might misuse consumers' data to task. A few weeks ago, she announced a preliminary investigation into Amazon's potential antitrust violations due to the use of third-party sellers' data.

Commissioner Vestager recently stressed that the enforcement of competition ensures that markets in Europe serve people and not the other way around.^[2] Therefore, competition enforcement can be a useful tool to serve the EU's broader policy objectives, while gaining consumers' trust. In this context, Vestager has the discretion to decide which cases to take on. She has made clear that her portfolio needs to reflect citizens' interests.

A challenging element of Vestager's agenda is to find a compromise between policy priorities, consumers' welfare, openness or data security and privacy in fast-moving markets. Subsequently, this requires engagement with a wide sphere of stakeholders including industry representatives, investors, third parties, NGOs, associations, and individual consumers. Through regular contacts with market stakeholders, DG COMP gathers information on the structure and development of digital markets, trends, and concerns.

Public affairs: why and when to step in

The traditional legal approach of competition enforcement must take into account other policies pursued by the European Commission. This is where public affairs or as commonly called "lobbying activities" step in. Companies subject to investigations put in place public affairs' strategies, to mitigate regulatory risks and successfully bring forward their interests before DG COMP.

But what is the added value of a public affairs' strategy in antitrust cases, mergers or state aid? There are many different angles through which a case can be presented to decision-makers and arguments can be placed. Public affairs' strategies involve a combination of regulators, national governments, and institutional actors depending on the nature of each case. Undertakings engage with decision-makers to maintain the status quo of the legislative framework or influence the competition dynamics of a specific business sector or a case: decision not to open a formal investigation, authorization of a merger or approval of a state aid scheme.

Commissioner Vestager has stressed that *"Antitrust enforcement does not happen in a vacuum"*.^[3] An open and transparent interaction between EU enforcers and market stakeholders produces benefits for companies and removes competition inefficiencies. Lobbyists can alert bring to the attention of DG Competition and other institutional actors, valuable information on the structure of a market or the impact of a given decision on competitors and consumers' welfare. This ability is key to strike the right balance between market functioning and the impact that competition enforcement has at the socio-economic level.

[1] Margrethe Vestager: "We are doing this because people are angry" (2017). Available at: <https://www.theguardian.com/world/2017/sep/17/margrethe-vestager-people-feel-angry-about-tax-avoidance-european-competition-commissioner>.

[2] The future of European values, Terra Nova 10th Anniversary Debate, Paris (2018). Available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/future-competition_en.

Transparency and accountability of EU decision-making process: in a nutshell

Engagement of stakeholders promotes transparency and accountability of the relevant decision-making process. Participation in the EU decision process is already indicated in Articles 11 and 15 of the Treaty of the European Union (TEU), which calls for European institutions to engage in an “open, transparent and regular dialogue with representative associations and civil society” and to “conduct their work as openly as possible” respectively.^[4]

In 1997, to ensure openness and transparency of their activities, public affairs’ advisors established the Society of European Affairs Professionals (SEAP)^[5] accompanied by a code of conduct regulating the industry. A few years later, the European Public Affairs Consultancy Association (EPACA)^[6], initiated their activities formalizing the long-standing code of conduct applying to the lobbying profession and establishing self-regulatory structures for enforcing it.

In addition, in 2011, the European Parliament and the European Commission merged their existing transparency register platforms in a joint EU Transparency Register following an inter-institutional agreement in 2011.^[7] The aim of the EU’s Transparency Register is to track and observe all external efforts to participate in the EU decision-making process.

Execution of a public affairs strategy

A public affairs strategy tackles challenges deriving from each individual competition case or legislative initiative and turns them into opportunities in support of clients’ interests. As previously noted, the strategy must acknowledge the overall policy dynamics and priorities.

In this context, public affairs’ activities include a number of strategic tactics:

1. Stakeholders’ mapping

The Stakeholder mapping process identifies crucial institutional actors based on their legislative initiative nature or from a case by case review: from the Directorate-General for Energy (DG ENER) to the Economic and Monetary Affairs (ECON) Committee of the European Parliament.

2. Setting an outreach strategy

In-depth knowledge of EU policies and decision making allows public affairs advisors to:

- Understand how EU institutions could perceive certain elements of a case;
- identify allies that can contribute to the final decision of the College of Commissioners and consequently DG COMP;
- develop messages that can be positively perceived and supported by EU decision and policymakers.

3. Use of traditional and social media platforms

Reaching out to public audiences, EU officials, industry stakeholders, or Member States’ governments are vital to eliminate reputational risks, especially in antitrust and state aid cases. Platforms are a means to effectively and rapidly communicate messages, studies, position papers and other similar materials to a wide range of shareholders that can be influential to the outcome of the case.

[3] Foreign Policy Association, NYC (2015), available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/future-competition_en.

[4] Briefing on EU Transparency Register (2014), available at: <http://www.europarl.europa.eu/EPRS/EPRS-Briefing-542170-European-Transparency-Register-FINAL.pdf>.

[5] <https://seap.be/>.

[6] <https://epaca.org/>.

[7] Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, (2011), OJ L191/29. <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:191:0029:0038:EN:PDF>

In practice

In practice, widening the discussion around a competition case contributes towards a more holistic approach on the side of the European Commission:

State aid

A. In 2010, the European Commission concluded that a Swedish media support scheme did not grant any selective advantage favouring a category newspapers' publishers contrary to Article 107 of the TFEU.

In this case, the public affairs strategy was implemented to preserve the activity of small and medium-sized newspapers and to ensure media plurality. These arguments proved to be vital for the European Commission, which concluded that state support to newspapers in Sweden was in line with EU state aid rules.

In particular, the European Commission considered that traditional newspapers were important for media pluralism and for boosting the cultural, democratic and public debate in Europe. The scheme was approved following a reduction of the aid intensity for state support to metropolitan newspapers.

B. A Spanish tax scheme applying to large retailers was considered an impediment to the creation of new jobs and growth. The interests of the National Retailers' Association were into risk and engagement with the European institutions was vital. In this context, the public affairs strategy was divided into two parts:

- Raising political concerns within the European Parliament at that time of drafting a report on regulatory barriers in the retail sector.
- Providing the European Commission facts and evidence on the incompatibility of the tax schemes with the EU state aid rules and the internal market.

On the basis of the aforementioned strategy, the European Commission decided to negotiate with Regional Authorities and introduce changes in the regimes in order not to damage small retailers.

Mergers

A merger in the paper industry led the parties to high market shares and therefore raised concerns about the compatibility with the internal market. The public affairs strategy supported the parties in explaining to the European institutions that:

- the paper industry was in decline due to the pressure deriving by online media;
- the transaction would ensure that the restructuring of the market would take place in an orderly manner and thanks to the interplay of market forces.

The European Commission acknowledged the aforementioned elements and approved the merger considering that competitors had enough capacity to enable them to react to attempts by the parties to raise prices.



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