

The European Commission reacts to Criticism: New Best Practices on the Conduct of Antitrust Procedures published

Emphasis on Transparency and Procedural Rights

Introduction

On 17 October 2011, the European Commission (“Commission”) adopted a series of measures which “aim at increasing interaction with parties in antitrust proceedings and strengthening the mechanisms for safeguarding parties’ procedural rights.” The measures consist of the Commission’s Notice on best practices in the conduct of antitrust proceedings under Article 101 TFEU (prohibition of anti-competitive agreements) and Article 102 TFEU (prohibition of abuses of dominance), a new mandate for the hearing officer and best practices for the submission of economic evidence (“Best Practices Package”).

In the EU, the Commission investigates and decides a case, including the amount of the penalties imposed on infringing companies. As a result, the issue of due process has become one of the most controversial topics discussed in recent years. The Commission has been criticized for a lack of transparency during its investigations and a lack of predictability as regards the substantive outcome and duration of its investigations. Taking the same approach as it took to merger control cases many years ago, in January 2010, the Commission launched a consultation on its proposal to adopt a best practice notice addressing antitrust proceedings, the role of the hearing officer and the submission of economic evidence.

The consultation resulted in the Best Practices Package that has just been published. It is generally based on the documents opened for consultation in January 2010, which have been applied since. However, the Best Practices Package has also taken into account the Commission’s experience since January 2010, as well as suggestions made by stakeholders during the consultation period.

Features of the Best Practices Package

The Commission’s document on best practices for the conduct of antitrust proceedings (the “Antitrust Best Practices”) generally explains the Commission’s investigative process and measure that respect rights of defence. The decision on the function and terms of reference of the hearing officer in certain competition proceedings (the “Hearing Officer Decision”) strengthens the function of the hearing officer as guardian of procedural rights. The document on best practices on the submission of economic evidence explains the criteria to be met by economic submissions and the way in which the Commission addresses this issue.

Antitrust Best Practices

The Antitrust Best Practices clarifies procedural elements and provides for greater interaction between the Commission and the parties in antitrust investigations. The most important aspects are described below. It should be noted, however, that some procedural measures will not apply to investigations of hard-core cartels, for example, price fixing or customer sharing arrangements.

Opening of Proceeding

The parties under investigation should be informed of the initiation of proceedings sufficiently in advance to enable them to prepare and coordinate their own communications strategy (*e.g.* to shareholders, financial institutions etc.) before the Commission will make the proceedings public.

Meetings with the Commission

In the investigative phase, the Commission may offer meetings with the companies under investigation, complainants or (although this is unlikely in cartel cases) third parties. In particular, the Commission may hold so-called “State of Play” meetings during the investigation, to give the companies under investigation and the Commission an opportunity to discuss the case openly. These state-of-play meetings will occur shortly after the initiation of proceedings, later in the process when the investigation is sufficiently advanced, after the companies have had a chance to respond to the Commission’s statement of objections (in which it lays down the preliminary factual and legal conclusion arising from its investigation) or after the oral hearing (should this have taken place). In cartel matters, the Commission will offer a state-of-play meeting after the oral hearing.

Key Submissions

Shortly after the initiation of proceedings and prior to issuing a statement of objections, the Commission will provide the companies with the opportunity to review non-confidential versions of key submissions. Key submissions include non-confidential versions of significant submissions of the complainant or interested third parties, such as complaints and economic studies, but not replies to requests for information.

The parties will be able to understand the allegations made against them at the investigative phase, while the administrative process benefits from having access to possible defences alleged by the parties at an earlier stage. At a later stage, the Commission will share such documents with the companies only if it is in the interests of the investigation to do so and does not risk unduly delaying the investigation. The Commission will also respect reasoned requests from the complainant or interested third parties for non-disclosure of their submissions prior to the statement of objections, where they have genuine concerns regarding confidentiality, including fears of retaliation and protection of business secrets.

It is notable that, in cases involving hard-core cartels, the Commission will not offer the party under investigation the opportunity to review key submissions.

Statement of Objections: Calculation of Fines and Inability to Pay

The Commission will include in the statement of objections a clear indication whether it intends to impose fines. The Commission also indicates that, even if it considers it is under “no legal obligation” to do so, for the sake of transparency, it will include in the statement of objections detailed information on the parameters relevant to the calculation of a possible fine. These parameters will include the relevant sales figures to be taken into account and the financial year(s) that will be considered for the value of such sales. If it intends to depart from the elements set out in the statement of objections, it will provide the parties with an opportunity to make their views known.

The Antitrust Best Practices also include detailed information about when and how to submit inability to pay requests and their assessment by the Commission. Upon request of the parties, the Commission will take into account the undertaking’s inability to pay and reduce or cancel the fine. This assessment will take into account whether the fine that would otherwise be imposed might irretrievably jeopardise the economic viability of the undertaking in question. The parties will need to submit detailed and up-to-date financial information to support their claim. The Commission will review financial statements for recent years and forecasts for the current and coming years, look at ratios measuring financial strength, profitability, solvency and liquidity, and evaluate the undertaking’s relationships with outside financial partners and with shareholders. The assessment will be made close to the adoption of the decision, on the basis of up-to-date information, irrespective of when the request was submitted.

Commitment Procedures

The Antitrust Best Practices includes detailed information about how commitments procedures work in practice, from the initiation of discussions, to the preliminary assessment and testing with third parties. To increase transparency, the Commission will publish a press release setting out the key issues of the case and the proposed commitment and will invite complainants and third parties to submit comments. The Commission reiterates its view that commitments should be made available only in cases where it does not intend to impose fines.

Rejection of Complaints

In the interest of transparency, the Commission will publish its decisions rejecting complaints, either in full or as a summary, on its website. If this is required to protect an legitimate interests, the published version will not identify the complainant.

Strengthening of the Role of the Hearing Officer

The Antitrust Best Practices, in conjunction with the Hearing Officer Decision, introduce a new mandate for the hearing officer, who in the past has been primarily responsible for ensuring the right to be heard, the right to access to file, and for organising and conducting the oral hearing.

Under the new mandate, the hearing officer will have a greater role as a mediator in solving procedural disputes arising in antitrust proceedings. This enhanced role will be particularly relevant in connection with the following:

Legal Professional Privilege

Where there are disputes with the Commission concerning the principle of confidentiality of communications between lawyers and their clients (legal professional privilege) and documents seized during inspections, the parties may ask the hearing officer to review the document in question. Without revealing the content of the document, the hearing officer will express his/her view on the issue, may take appropriate steps to promote a mutually acceptable solution and may issue a (non-binding) recommendation to the Commission.

Self-Incrimination

The parties will also be able to turn to the hearing officer if they feel that responding to Commission's requests for information could force them to admit to an infringement. The hearing officer may make a reasoned recommendation as to whether the right against self-incrimination applies, and will inform the responsible director at the Commission.

Other Issues in Investigative Phase

The parties may also refer to the hearing officer disputes regarding the failure of the Commission to inform them of their status in the proceedings, namely, whether they are subject to an investigation and, if so, the subject matter and purpose of that investigation.

Despite regular criticisms, the Antitrust Best Practices maintain that parties should as matter of course respond to the Commission's information requests within two weeks from receipt. Now, the parties can seek the assistance of the hearing officer in connection with disputes over extensions of deadlines for replies to information requests in antitrust investigations. Addressees of a statement of objections may refer to the hearing officer their disagreement with the time set for the reply.

Preparation of the Oral Hearing

The hearing officer may supply in advance to the persons invited to the hearing a list of questions on which they are invited to make their views known and may also indicate the focal areas for debate, taking into consideration the facts and issues which the addressees of the statement of objections who have requested the oral hearing wish to raise.

Commitment Procedures

The Parties will be able to resort to the hearing officer at any time during antitrust commitment procedures to ensure the effective exercise of their procedural rights.

Reporting Obligations

Under the new mandate, the hearing officer may make observations to the Commission on the progress and impartiality of the proceedings, to ensure that in preparation of draft Commission decisions all relevant facts, favourable or unfavourable to the parties concerned, including factual elements relevant to the gravity and duration of any infringement, are duly considered. Also, the hearing officer will prepare a final report on the respect of the effective exercise of procedural rights during the whole procedure, including the investigative phase.

Submission of Economic Evidence

As economic analysis and economic data play a greater role in administrative proceedings, the objective of these best practices is to ensure that economic analyses meet a certain standard, to facilitate the efficient gathering and exchange of facts and evidence (in particular quantitative data), and to use in an efficient way reliable and relevant evidence obtained during the administrative procedure.

The Commission provides for guidance on how economic models should be built, tested, and presented, and it encourages the parties to consult it on the kind of empirical analysis they consider appropriate in the context of a specific case. The Commission should also grant access to economic data and codes on which it has relied for its final economic analysis, including those submitted by third parties.

The Commission also identifies best practices in responding to requests for quantitative data (for example, costs, output, sales, prices, capacity, product characteristics, delivery flows, customer characteristics, tender details, entry barriers, business strategies, and market shares). It also recommends that parties should consult it early regarding the type of data available, to facilitate provision of any data requested by the Commission in the future. The Commission can, “when appropriate and useful”, send the parties a draft data request, inviting them to suggest any modifications that would lessen the compliance burden whilst still enabling production of the necessary information.

Conclusion

The Best Practices Package, as an expression of current practice that is considered best for all concerned, is a welcome and useful communication, and in particular the increased importance of the hearing officer will help to improve due process. However, transparency on the use of investigatory tools such as inspections, requests for information and interviews is still minimal and it can be hoped that the relevant developments in the Package are expanded over time.

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