McDermott Will & Emery

The European Commission's New Best Practice Guidelines on Antitrust Proceedings

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The European Commission's new guidelines for best practices during antitrust procedures introduce some new elements that could be beneficial for companies under investigation, complainants and interested third parties if handled in the right way.

The European Commission published on 17 October 2011 its new guidelines for best practices during antitrust procedures. The guidelines cover the main proceedings concerning alleged infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union (cartel investigations and abuse of dominance). They explain the investigation phase up to the statement of objections (SO), the procedure after the SO, the commitment procedures and the procedure for the rejection of complaints, as well as some technical points concerning the adoption, notification and publication of decisions. The new guidelines apply to future cases but also to all pending cases where procedural steps still have to be taken.

The stated objective of the new guidelines is to increase transparency of the antitrust procedure, to induce closer involvement of the parties during the procedure, and to secure fair treatment of the undertakings under investigation. While the guidelines do not revolutionise antitrust proceedings, they introduce some new elements that could be beneficial for companies under investigation, complainants, and interested third parties if handled in the right way. The main value of the guidelines is that they provide an up-to-date, coherent and transparent set of rules on which undertakings can rely in antitrust investigations.

The following are the new elements of the best practice guidelines:

- Relevant parameters for the calculation of fines will be outlined at the SO stage.
- State of play meetings will be held in cartel cases, not just in abuse of dominance cases.
- Access to "key submissions", such as the non-confidential version of the complaint, and economic studies, will be granted prior to the SO.
- The mandate and role of the Hearing Officer will be extended.
- The rejection of complaints will be published.
- The standard of analysis for economic evidence has been clarified.

Parameters For Calculating Fines Outlined at SO Stage

The European Commission will now include the relevant parameters for the calculation of a possible fine at the time of the SO, not just in the final decision. This concerns parameters such as duration and gravity of the cartel, intentional or negligent infringement, and aggravating or attenuating circumstances. The European Commission will also include information on the sales that will be taken into account for the calculation of the fine. The administrative procedure will thus not only concern the finding of an infringement but also the elements to be taken into account for the calculation of a fine.

In the past, undertakings have systematically challenged the European Commission's fining decisions in court and have often achieved a significant reduction of the fine. The new best practices may ensure that the undertakings will be able to discuss the relevant parameters with the European Commission before the final decision, not just in the appeal proceedings before the European General Court (GC). This may lead to a situation where the level of fines is more appropriate and better justified. In a best case scenario, this may even lead to a decrease in appeals, with obvious advantages for the undertakings, the European Commission, and the GC. However, in situations in which the parameters for the calculation of fines are in dispute during the administrative proceedings, it is likely that undertakings would still bring an appeal.

In order to take full advantage of the changes, undertakings must be prepared to discuss the parameters for the calculation of the fines earlier in the proceedings and in parallel with the discussions about the existence of the alleged infringement , the products concerned, and the geographical and temporal scope of the infringement. This may in addition make possible the tactical use of arguments and a trade-off between the infringement discussions and the fines discussions, similar to a settlement discussion.

However, it should be noted that there is a risk that companies engaging in discussions on the setting of the fine could be considered by the European Commission as implicitly acknowledging the infringement. As such, they could be more strongly penalised without benefitting from the 10 per cent reduction in case of settlement. To avoid this, companies should address this possibility and make it clear that discussing the parameters of a potential fine is no admission of guilt.

State of Play Meetings

The European Commission will in the future conduct regular state of play meetings during antitrust proceedings. Up until now, these meetings have taken place only in abuse of dominance proceedings. The meetings will allow the undertakings under investigation to discuss the progress of the proceedings with the European Commission services. State of play meetings may be conducted either in person or via videoconference. State of play meetings

will usually be bilateral, between the undertaking under investigations and the European Commission. In exceptional cases, the meetings may also include complainants.

State of play meetings may be an important tool for companies to discuss procedural and substantial issues. They could be used to resolve procedural objections that up until now have only been discussed on appeal to the GC. Undertakings may officially use the meetings to emphasise their arguments, to respond to specific allegations and to get a better sense of the issues they should focus on in their defence. Undertakings must, however, be very careful during state of play meetings. They may not always be beneficial, particularly if complainants are also present. Undertakings should consider whether they want or need such a meeting, what they want to achieve from it, and what the risks could be, e.g., giving a more important role to complainants. They must also consider carefully which arguments and procedural issues they want to discuss in the state of play meeting and which complaints they would rather raise in an appeals procedure.

Access to Key Submissions

The transparency of European Commission's investigations may be enhanced through the access given at an early stage of the procedure to the parties subject to the proceedings of the non-confidential versions of the key submissions—such as the complaint, economic studies, or other significant submissions—made by third parties. The European Commission will not, however, give access to replies to requests for information. The European Commission will respect justified requests by the complainants or interested parties for non-disclosure prior to the SO. In addition, access to key submissions will not be offered in cartel proceedings because of the particularities of a cartel investigation in order to avoid interference with possible leniency applications or settlement discussions.

Early access to key documents is certainly beneficial for undertakings under investigation. Companies will need to make sure that they tackle all the arguments presented against them at an early stage and guide the European Commission's investigation in the right direction.

Hearing Office Mandate Extended

The mandate of the Hearing Officer has been revised and extended. In practice, undertakings have in the past discussed procedural questions with the hearing officer before the SO but will now be allowed to do so officially. This means some unnecessary litigation may be eliminated because procedural questions can be settled during the European Commission's procedure and not on appeal before the GC. However, as undertakings were not always satisfied with the handling of their objections by the Hearing Officer in the past, it is not to be expected that all procedural issues will be solved simply by extending the Hearing Officer's mandate to discuss questions before the SO officially.

The Hearing Officer's mandate has also been extended to deal with legal privilege questions, a very important, practical aspect of antitrust proceedings. Under the new rules, companies claiming privilege over documents can address themselves to the Hearing Officer, entitle him to check the content of the documents and ask him to make a recommendation. The stance taken by the Hearing Officer in this respect will have consequences beyond public enforcement; it will also have an impact on private enforcement as plaintiffs increasingly seek access to the competition authorities' files.

Early involvement of the Hearing Officer could become a real plus for companies, but they will need to make good use of their opportunity to raise procedural questions to make it genuinely valuable. In addition, it will continue to be important to navigate carefully between different levels at the European Commission, in particular the case team, the cabinet of the Competition Commissioner, and the Hearing Officer.

Publication of The Rejection of Complaints

The European Commission will publish all decisions that reject a complaint, not just those of "general interest". The Commission may, however, decide whether to publish its entire decision or just a summary. This might become an important element to be taken into account by companies that consider complaining about another company.

Analysis of Economic Evidence

The paper on economic evidence describes the standards that analyses of economic evidence should observe, in particular with respect to how the relevant questions should be formulated, how to check the relevance and reliability of the data submitted, the criteria for selecting the empirical methodology used in the submission, and guidance on how the results should be reported and interpreted. It is recommended that the parties consult the European Commission at an early stage to discuss the types of empirical analyses that they may consider undertaking and the most suitable checks to be applied.

Outlook

The best practice guidelines offer no revolutionary changes. They simply introduce some new elements that may be beneficial for undertakings under investigation by the European Commission, if handled carefully and in the right way. Their real impact will depend largely on the European Commission's future practice. As mentioned above, one particular caveat relates to the opportunity to discuss the parameters for the calculation of the fines earlier in the proceedings: early fine discussions could be considered as an admission of an infringement of the European antitrust law, so companies will need to approach such discussions armed with solid legal advice.

The main value of the guidelines is that they provide a clearer and more coherent set of rules on which undertakings and their legal and economic counsel can rely. Together with the provisions for enhanced transparency and opportunities for discussions, it is to be hoped that the guidelines will reduce the need for appeals to the GC.

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