The European Commission Opens Up: Final Guidance on Conduct of Investigations Is Published

By: Matthew Hall
McGuireWoods LLP, Brussels

In October 2011, following a very long gestation period, the European Commission (EC) published the final version of its guidance on how it will conduct competition law investigations [1] (the "Procedural Best Practices"), together with related documents. The package covers investigations concerning both Article 101 (the basic ban on anti-competitive agreements and practices in the EU, which covers cartels) and Article 102 (the ban on abuse of a dominant position in the EU) of the TFEU (Treaty on the Functioning of the European Union).

The EC has described the package as intended to "[increase] interaction with parties in antitrust proceedings and [strengthen] the mechanism for safeguarding parties' procedural rights." In addition to the Procedural Best Practices, the package includes: a revised mandate for the Hearing Officer (an EC official charged with enforcing the procedural rights of parties being investigated by the EC);[2] and guidance on the submission of economic evidence in competition cases.[3]

The Background

The package, which was published in draft in January 2010,[4] is to a large extent a response to the continuing barrage of challenges to and criticism of the EC's procedures on EU law and on fundamental rights (human rights) grounds. These criticisms relate to a great extent to the EC's investigation and fining of cartels, which fall under Article 101.

The principal focus of the EC's competition law enforcement will continue to be cartels. At the same time, due principally to the continued very high fines imposed on cartelists, virtually every EC cartel fining decision is appealed on procedural (as well as substantive) grounds. The EC needed to be careful in putting this package of documents together and this probably explains the long delay between the publication of the draft and the final versions of the package.

Key Points of the New Guidance Package

The principal document contained in the package is the Procedural Best Practices. This runs through each of the stages of an EC competition law investigation and describes what the parties can expect. It starts with a consideration of the "investigative phase," when the EC is collecting evidence, including through dawn raids, and deciding whether to formally open an investigation. It then considers "procedures leading to a prohibition decision," covering those cases in which after the investigative phase the EC decides that there is a case to answer and therefore sends to the parties a Statement of Objections setting out its preliminary statement of case. The final main section of the document considers commitment procedures, under which the EC is able to settle non-cartel cases without a formal decision in return for commitments as to future behaviour. Somewhat unexpectedly, this has become an important and increasingly-used procedure outside the cartel sphere.[5]

The guidance does not cover cartel settlement procedures, which are subject to separate guidance. This is also an increasingly important procedure, which the EC is focusing on in order to reduce the workload required by its cartel investigations and in particular to reduce the number of appeals. In return for a 10 percent fine reduction, parties are required to admit liability and waive certain procedural rights (thus effectively giving up their ability to appeal, absent discrimination in the EC's treatment of the various settling and any non-settling parties).[6]

The following are the key points of interest from the package:[7]

- The Statement of Objections will set out in a good level of detail the factors relevant to any eventual fine, which should allow the parties to make a reasonable estimate of its likely level (the actual fining amounts will not be provided). The EC specifically makes the point that this information will be over and above what it is legally required to provide an describes this as "a major novelty."

- Voluntary formal meetings with the EC (the "State of Play" meetings), including in cartel cases, are allowed for. At these meetings the parties are informed of the status of the investigation and are able to respond. They are intended to allow for "frank and open" discussion.
- Outside the cartel sphere, if an investigation has been prompted by a complaint, the parties are provided with greater access than previously to submissions made by third parties.
- Through the Hearing Officer, parties now have a right of independent review of procedural claims during the entire investigation process. The EC describes his new role as "all-encompassing" in relation to procedural rights issues.

It can be seen that these points are intended to reduce the element of "surprise" in any ultimate decision of the EC or to "draw out" and therefore hopefully (from the point of the view of the EC) nullify potential complaints about the operation of the procedure. For example, the EC no doubt hopes that the new front-loading exercise concerning the likely level of fines will, by allowing a party to put forward arguments on this crucial point in its response to the Statement of Objections, reduce the number of appeals. This may take some time, however, as it is only when (and if) fines are no longer so frequently overturned or reduced on appeal, that more parties will begin to consider the possibility of a fine reduction no longer to outweigh the effort and expense of making an appeal. So far as concerns the operation of the procedure itself, the early involvement of the Hearing Officer in relation to issues concerning the deadline for a response to a questionnaire, for example, should equally reduce later arguments on such points.

Conclusion

The EC's procedures set out in the Procedural Best Practices document in particular are to a large extent already used. In addition, procedure on the ground is constantly developing. Nevertheless, publication of the Procedural Best Practices means that parties can now in practice rely on and enforce the requirements on the EC which are contained in it. Any deviation from the procedures will risk an appeal and a decision being struck down on procedural grounds. The EC will be very careful to stick to its own rules.

Nevertheless, despite the publication of these documents, potentially of even greater importance will be the promised publication by the EC of a sanitized version of its internal procedural handbook, which is used by case teams when investigating competition law cases. The EC has been implacably opposed to the publication of this document, but has been forced to do so by the EU Ombudsman following a complaint about its refusal to provide access to it.

There are many aspects to the procedural issue in competition law cases, as demonstrated by this involvement of the Ombudsman. The ever-expanding area of human rights protection will also continue to provide fertile ground for argument.

Turning from the detail of procedure to the bigger picture, it is worth remembering that the basic thrust of EU competition policy remains. In particular, there will be no let up on cartels (whatever the industry, size of market or duration) and on particular industry issues of particular interest (such as, in the pharmaceutical sector, patent settlement agreements, as well as dominance issues in relation to the digital industries and financial services). Fine levels will also be unaffected. As ever, well-advised companies will seek to avoid competition law problems in the first place and proper compliance advice is crucial in this regard.

---

[1] Commission notice on best practices for the conduct of proceedings under Articles 101 and 102 TFEU (Treaty on the Functioning of the European Union), OJ C 308/6, 20 October 2011.

[2] Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275/29, 20 October 2011. The Hearing Officer's role also covers investigations under the EU Merger Regulation.

[3] Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases. As the name indicates, this document also applies to investigations under the EU Merger Regulation.

[4] A draft guidance paper on the procedures of the hearing officer was one of the documents published for consultation in January 2010. The revised formal mandate was ultimately adopted instead of a final version of this guidance.

[5] The most recent example being the finalization, on 15 November 2011, of commitments offered by Standard & Poor's to end an Article 102 TFEU investigation.

[6] The most recent settlement decision came on 19 October 2011 and concerned a CRT glass cartel.

[7] Some of these changes were introduced at the time of the consultation in January 2010.