

Client Alert

Business Litigation & Antitrust Practice Group

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European Commission Reform of Antitrust Procedures and Revised Hearing Officer Mandate

On October 17, 2011, the European Commission (Commission) adopted a set of packages designed to safeguard parties' procedural rights and to increase interaction between the Commission and interested parties in EU antitrust proceedings. The package comprises best practices guidelines on the conduct of antitrust proceedings (Best Practices), a revised Hearing Officer Mandate and best practices for the submission of economic evidence and data collection.

Background

In January 2010, the Commission published for consultation draft best practices guidance on the conduct of antitrust proceedings before the Commission in the context of Articles 101 and 102 of the Treaty on the Functioning of the EU. The Commission also published guidance on the procedures of the Hearing Officers in relation to Article 101 and 102 proceedings, with the aim of making their role more transparent, as well as guidance on the submission of economic evidence and data collection in Article 101 and 102 and merger proceedings.

Notice on Best Practices in Antitrust Proceedings

The Commission has been applying draft Best Practices since January 2010 incorporating the following key changes in the Commission's conduct of EU antitrust proceedings:

- earlier opening of formal proceedings;
- state of play meetings at key stages in the proceedings;
- disclosure of key submissions in the investigatory phase;
- publicly announcing the opening and closure of a procedure and the sending of a Statement of Objections;
- guidance on the use of commitments to resolve antitrust proceedings.

The final Best Practices reflect a number of comments that were raised in the public consultation, as well as the Commission's own experience. According to the Commission, the Best Practices incorporate a number of key improvements including:

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- informing parties in the Statement of Objections of the main parameters for the imposition of fines;
- extending state of play meetings in cartels cases to complainants in specific circumstances;
- enhanced access to key submissions of complainants or third parties, prior to the Statement of Objections;
- publishing rejection of complaints, either in full or summary form.

Hearing Officer's Mandate

The role of the Hearing Officer in safeguarding procedural rights in EU antitrust proceedings was created in 1982. The Hearing Officer (i) organises and conducts hearings in antitrust and merger control proceedings; (ii) hears applications to be heard from third parties and determines who should be heard orally; (iii) resolves disputes relating to the disclosure of documents in the context of access to the Commission's files; and (iv) resolves issues of confidentiality. The Commission has decided that it is now necessary to clarify and further strengthen the role of the Hearing Officer who has the following new functions in the investigation phase:

- resolving issues regarding the confidentiality of communications between companies and external lawyers (legal professional privilege);
- intervening when a company considers that it has not been informed of its procedural status;
- resolving issues where parties consider that they have been asked to provide incriminatory evidence; and
- intervening in disputes about the extension of deadlines to reply to information requests.

Best Practices on the Submission of Economic Evidence and Data Collection

The increasing importance of economic evidence in complex antitrust cases means that the Commission often requests detailed economic data. Interested parties often provide arguments based on economics and supported with empirical analysis. The best practices on the submission of economic evidence and data collection set out the criteria economic and econometric analysis and evidence should satisfy and outline the procedure for dealing with such. The final text reflects the Commission's further thinking, and in light of comments received. The final text reflects among the following key revisions:

- that sound but imperfect economic evidence that does not meet the standard set out in the guidance will not be discarded if the alternative is to rely on other economic evidence that is not subject to similar standards;
- that the parties should consult the Commission as early as possible to discuss the most suitable checks to be applied to a given methodology; and
- more specific guidance on consumer surveys in order to ensure that this meets certain minimum standards.

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