

MLex Ab Extra:

An opportunity for reform?

In light of the Commission's recent publication of best practices for antitrust proceedings, Rachel Cuff of Berwin Leighton Paisner considers whether guidance on cartel investigations should be re-examined



Rachel Cuff

Rachel Cuff is a senior associate and knowledge development lawyer for Berwin Leighton Paisner. Based in Brussels for the last eight years, she has experience advising clients on a wide variety of competition law issues, and particular expertise in EU cartel policy and procedure.

MLex's online market intelligence services have become indispensable primary resources for anyone requiring reliable, comprehensive, real-time intelligence, commentary and analysis about the impact of European regulation on businesses around the world.

MLex customer services +32 (0) 2 300 82 50
customerservices@mlex.com - www.mlex.com

AN OPPORTUNITY FOR REFORM?

In light of the Commission's recent publication of best practices for antitrust proceedings, **Rachel Cuff**¹ considers whether guidance on cartel investigations should be re-examined

The European Commission's fight against cartels, which has long been a priority of its Directorate General for Competition, shows no signs of diminishing under the tenure of the new Competition Commissioner, Joaquín Almunia, who considers cartels "undoubtedly the most damaging form of infringement of competition rules."² As the crackdown on cartels becomes increasingly sophisticated, using more – and better – techniques and procedures, so the need for detailed guidance from the Commission has grown. The Commission now has the opportunity to refine and consolidate its antitrust procedures, and it is to be hoped that it will take full advantage of this chance to provide effective guidance to practitioners and companies alike.

Guidance has already been produced to cover specific procedural aspects including the leniency programme, settlement, and the conduct of inspections. At the beginning of this year, the Commission published provisional guidance intended to have a broader application – a set of "Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU" ("Best Practices").³ The Best Practices aimed to increase levels of fairness, transparency and predictability in antitrust proceedings, while maintaining effective procedures, and were broadly welcomed by practitioners as providing further insight into and understanding of the Commission's methods in analysing potential breaches of the EU antitrust rules.

Although the Commission has been applying the Best Practices since their publication, it held a public consultation on the document, and will adopt a final version in the near future.

In the meantime it has warned practitioners that the final guidelines will fall within the existing legal framework and that there is no substantive reform in the offing.

The Best Practices relate to all antitrust cases and not only to cartel investigations. There was even some uncertainty at its introduction as to whether the guidance applied to cartels at all, although the Commission has since confirmed that it does except where specified otherwise. However, a level of ambiguity remains in a number of key areas relating to cartel cases, and clarification by the Commission would be opportune.

Dawn raid procedure

Given that unannounced inspections are a serious and, for the parties involved, a stressful occurrence, this is an area in which it is vital for there to be procedural clarity. The Commission's

"Explanatory note to an authorisation to conduct an inspection" contains a considerable amount of useful guidance regarding the conduct of "dawn raids."⁴ However, it was published several years ago and, given that this is an area where practice develops swiftly (in particular due to technological advances), recent developments may not be incorporated into the current written guidance. For example, decisional practice indicates

that the Commission considers that information stored on servers outside the EU may be obtained during a raid, provided that such information can be accessed from within the EU, and that a subsidiary company can be considered to have access to the data of its parent company. Updated guidance on these and other areas, including legal professional privilege, could provide much-needed clarity.

A level of ambiguity remains in a number of key areas relating to cartel cases, so clarification would be opportune

Confirmation of procedural steps

Previously, in cartel cases, the fact that a Statement of Objections had been sent to parties was confirmed by the Commission only if specific questions were asked by the press, and frequently only where one or more parties had publicly confirmed receipt. However, the Commission will now publish information regarding the opening of proceedings, which in cartel cases is at the time of adoption of the Statement of Objections. It appears from recent cases that the Commission will continue its previous practice of keeping any announcement on the subject brief, and not identifying any of the entities involved. If this practice continues, then such clarity regarding the procedural status is to be welcomed.

However, additional questions remain regarding the extent to which the Commission will publicise other procedural steps. How will it deal with situations where the case against one or more parties is dropped during the course of the investigation, but continued against others? The Best Practices state that the Commission will not publish this information until the time of the final decision. However, a party dropped from the scope of the Commission's investigation may well wish to publicise this fact and to receive public confirmation from the Commission, in particular if there has been any press speculation regarding its involvement or any impact on its share price.

Notes of meetings and contacts

The Commission's Best Practices indicate that a note will be made of all meetings, and that such notes will usually form an accessible part of the Commission's file and be made available to other parties. Parties are asked to submit an agenda prior to any meeting, as well as an accompanying memorandum or presentation, and are invited subsequently to substantiate in writing any statements made at the meeting. The creation of a set of minutes agreed by both the Commission and the relevant party would perhaps be ideal, but the Commission considers that this would create an undue administrative burden. The Commission is keen to create a "paper trail" of all meetings and of all substantive phone calls.⁵ A suggestion by the European Ombudsman that any interviews might be recorded using audio or video does not seem to have been taken forward.

In principle, the creation of such a thorough procedural record is a welcome innovation. However, it remains to be seen how well this will operate in practice, and if further guidance will

be needed. To what extent will parties choose in practice to submit follow-up notes of meetings? Will parties and the Commission agree on what constitutes a substantive phone call worthy of being recorded? Will any benefits be outweighed by the additional administrative burden for the parties of creating agendas, meeting notes and possibly non-confidential versions of them all?

A party dropped from the scope of the investigation may well wish to publicise this fact and to receive public confirmation

Access to confidential information contained on the Commission's file

Parties are entitled to provide non-confidential versions of their submitted evidence, which will be made available to other parties during the Commission's "access to file"

procedure. The Best Practices contain some guidance as to procedural practices that may be used to alleviate the burden of redacting confidential information, including use of the "negotiated disclosure procedure" and the "data room procedure," which involve granting access to confidential information to a "restricted" circle or group. However, relatively limited information is provided regarding these practices and, if and as their use increases with time, this should be augmented by the Commission.

Where, however, these procedures are not followed and information is redacted from non-confidential versions of documents included on the Commission's file, the Commission must ensure that it applies its rules in a standardised fashion. The levels of redaction of information requested by some parties may be considered excessive. The problem becomes more apparent later in the investigative process, when the Commission is arguably more willing to accept significant

Later in the investigative process, the Commission is arguably more willing to accept significant levels of redaction

levels of redaction in the interests of finalising the Statement of Objections and readying the file for review. It is hoped that the Commission considers publishing detailed guidance, including examples, as to what information can legitimately be considered confidential in the preparation of non-confidential versions both of evidence for the Commission's file and of the Commission's final decision.

Publication of the Commission's decision

The Best Practices state the Commission's aim to publish a full non-confidential version of the final decision "as soon as possible,"⁶ and this is certainly an area in which improvement is necessary. Currently, the time taken for a non-confidential version to be published can be considerable. For example, the Commission's decision in the Chloroprene Rubber case⁷ was published on 5 December 2007 and, at the time of writing, the full non-confidential version of the decision is not available,

AB EXTRA – ANTITRUST BEST PRACTICES

almost 30 months later. Although the length of delay in this case is unusual, delays in other cases are also serious. Decisions following which non-confidential versions have not yet been made available include Aluminium Fluoride (decision of 25 June 2008), Calcium Carbide (decision of 22 July 2009) and Heat Stabilisers (decision of 11 November 2009).⁸

Such delays have a direct and negative effect on the ability of potential claimants to bring follow-on damages actions in national courts. In particular given that the Commission's proposed legislation in relation to damages actions has stalled, such roadblocks to the pursuit of follow-on actions must be removed.

Further, the delay in publication creates an uneven playing field both for companies and for their legal advisers. Certain elements of the Commission's procedural and decisional practice will alter over time and, absent publication of the decisions, only those involved in the relevant cases will have that information.

In relation to the leniency programme, for example, significant procedural developments, including the ability to provide corporate statements orally and thereby reduce the risk of disclosure in the US courts, only became widely communicated when the Commission published a revised version of its Leniency Notice in 2006.⁹

Disseminating the information more swiftly can only serve to make both companies and legal advisers better informed and to ensure that future cases can proceed more efficiently. The Commission must help to ensure that companies are able quickly and effectively to obtain information and advice that enables them to assess their position.

The Commission is taking welcome steps to speed up the publication of non-confidential versions of the decision. The Best Practices state that, should disputes arise regarding the extraction of business secrets, the Commission will publish a version of the decision containing all redactions requested by the parties pending further discussions regarding the disputed parts.

At the time of writing, a provisional non-confidential version of the Commission's decision in the Candle Wax case¹⁰ has been made available, to be followed by a final version. Provided that the delay in producing a final non-confidential version is short, this move is to be welcomed.

Time to tidy up?

It is hoped that the Commission will now take the opportunity to refine and clarify certain outstanding points, such as those discussed above. However, there is a clear opportunity for it to go further.

The level of guidance published by the Commission in relation to cartel procedure is substantial. The recently-published Best Practices add to the guidance already set out in Notices or Explanatory Notes on leniency, settlement, inspections, fining, and access to the Commission's file, as well as in the Implementing Regulation.¹¹ Given its fast-moving nature, developments in decisional practice may also be set out in Commission cartel decisions, and highlighted in press releases. The volume of guidance on EU cartel procedure has consequently become unwieldy, and the Commission would do well to

consolidate it, incorporating all guidance into one overarching document. In relation to merger procedure, for example, the Consolidated Jurisdictional Notice¹² provided a useful "tidying up" of the legislative landscape, incorporating four pre-existing Notices into one.

Significant sections of the Best Practices (such as those relating to commitment proceedings and state-of-play meetings) do not relate to cartel investigations, and this makes the guidance less clear. It would be more straightforward to have a separate document that relates solely to cartels, and which does not require selective reading. Further, the leniency and settlement regimes are so integral to EU cartel procedure that the publication of Best Practices that purport to relate to cartels whilst specifically excluding these regimes may serve to muddy the waters further.

Such cartel guidance should go further than simply consolidating existing legislation, but should ensure that current ambiguities noted above, and further lacunae in the Commission's guidance, are clarified and filled. For example, the Notices relating to the leniency and settlement regimes inevitably do not contain all details of the respective procedures. Settlement is only a nascent regime and, once more settled decisions are forthcoming, then further procedural detail should be incorporated into the guidance.

In contrast, the leniency programme has been in existence since 1996 but, although it has been recast twice since that date and now includes an admirable level of detail, it remains

Significant sections of the Best Practices do not relate to cartel investigations, and this makes the guidance less clear

Development of full cartel guidance will broaden understanding of policies, which must lie at the heart of any fair procedural system

a developing regime and further detail is always welcome. For example, the Commission might consider providing additional guidance on the provision of oral evidence, including the desired format, or further concrete examples of types of evidence that would constitute “significant added value” or cooperation “outside the scope of the Leniency Notice.”

Developments in areas such as the provision of oral evidence, or access to the Commission’s evidential file, are frequently rapid, and practitioners and companies alike should be kept informed of such developments. Although nothing can replace the knowledge acquired by practitioners through involvement in cartel cases and observing the Commission’s practice at first hand, there remains a need for such procedure to be codified to a certain extent to be sure all companies and advisers have access.

The Commission has itself admitted that part of the reason for publishing the Best Practices was that procedure differs between units in DG Competition. Given that they are contained within one directorate, the practice of the cartel units presumably remains relatively homogenous, but the improvement of written guidance could only serve to ameliorate this. Further, it appears that such guidance exists within the walls of DG Competition in the form of an internal handbook providing significant detail on the procedures to be followed in instances including the inadvertent disclosure of confidential information and the conduct of dawn raids.¹³

While certain elements have undoubtedly been incorporated into the Best Practices, the majority of such internal guidance has not been rendered transparent.

It could justifiably be argued that cartel procedure is a swift-moving beast, and that codification could risk stifling its development. However, such guidance need not incorporate every procedural nuance, rendering its revision necessary every time a Commission decision or court judgment tweaks such procedure. A rolling system of revision – perhaps annual – would be ideal. Although this would impose an administrative burden on the Commission, it would be offset by the efficiencies obtained in individual cases. Arguably it would not be necessary to hold a public consultation in relation to the regular revisions. The Commission could, for example, accept comments throughout the year as and when points of relevance arise, incorporating them into the next revision of the guidance as appropriate.

Above all, development of full cartel guidance will ensure broader dissemination and understanding of policies and practices, an aim which must surely lie at the heart of any fair procedural system. ■

Rachel Cuff is a senior associate and knowledge-development lawyer at Berwin Leighton Paisner LLP in Brussels.

Footnotes

- 1 The views expressed are those of the author, and do not necessarily reflect those of Berwin Leighton Paisner LLP, its partners or its clients.
- 2 Introductory remarks by Commissioner-designate Almunia to the European Parliament, 12 January 2010.
- 3 The Commission has also published “Best practices for the submission of economic evidence and data collection” and “Guidance on procedures of the Hearing Officers,” which are not the topic of detailed discussion here.
- 4 “Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003,” published in March 2008.
- 5 In particular given the finding by the European Ombudsman in November 2009 that the Commission’s failure to make a proper note of a meeting with Dell concerning the investigation into alleged anticompetitive behaviour by Intel constituted maladministration (Decision of the European Ombudsman closing his inquiry into complaint 1935/2008/FOR against the European Commission).
- 6 See paragraph 135 of the Best Practices.
- 7 Case 38.629.
- 8 Cases 39.180, 39.396 and 38.589.
- 9 Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11).
- 10 Case 39.181.
- 11 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Other Notices available at: <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.
- 12 Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.
- 13 As reported by MLex on 22 February 2010.