EU Guidelines

BEST PRACTICES ON THE CONDUCT OF CARTEL AND ABUSE PROCEEDINGS

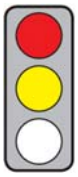
Status: 6 April 2010

Centrum für Europäische Politik

MAIN ISSUES

Objectives: The Commission intends to increase the transparency of cartel and abuse proceedings.

Parties affected: Companies that are party to proceedings due to a suspected infringements of Art. 101 and Art. 102 TFEU.



Pros: The transparency of cartel proceedings is increased.

Cons: (1) The Guidelines do not contain any binding statements; any self-commitment on the part of the Commission is avoided by using soft wording.

(2) From a constitutional point of view, European cartel proceedings continue to be questionable due to the bundling of investigative and decision-making powers in the Commission and the lack of legal control.

CONTENT

Title

Commission Guidelines from 6 January 2010: **"Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU"**

Brief Summary

Unless otherwise provided for, the numbers quoted refer to the Commission Guidelines from 6 January 2010, whereas the Articles quoted refer to Regulation (EC) No. 1/2003 by the Council of 16 December 2002.

- **Scope and purpose**
  - The Best Practices Guidelines describe the course of action of European cartel and abuse proceedings (abuse of market power), from the Commission's initial decision whether or not it chooses to deal with a case, right up to the potential approval of a decision.
  - In secondary legislation, the execution of antitrust rules (Art. 101 and 102 TFEU) is laid down in the Implementing Regulation (EC) No. 773/2004 and in the Regulation (EC) No. 1/2003.
  - Best Practices provide guidelines which, according to the Commission, reflect the best conduct of cartel and abuse proceedings. They are to complement existing instruments regulating cartel proceedings in compliance with the ECJ jurisdiction (No. 6 f.).
  - They are not a legally binding instrument but represent proven procedures based on the Commission's experience in applying Regulation (EC) No. 1/2003 and the Implementing Regulation (No. 5).
  - As of their date of publication, the Commission intends to apply the Guidelines to ongoing and future cartel and abuse proceedings. It reserves the right to deviate from that rule in individual cases (No. 5).
  - The Guidelines' purpose is to enhance the transparency and predictability of such proceedings and to reduce their length (see Roadmap of cartel and abuse proceedings).
- **Origin of cartel and abuse proceedings**
  - The Commission may investigate an alleged infringement of Art. 101 or 102 TFEU:
    - if undertakings, citizens or Member States report a suspicion (No. 8) or
    - on its own initiative, for instance when certain facts indicate an infringement (No. 10).
  - In an initial assessment phase the Commission first investigates the undertakings concerned (No. 11), the relevant markets and the alleged anti-competitive conduct.
  - In general, affected undertakings find out that they are subject to a preliminary investigation when the Commission requests them to voluntarily provide information (No. 14 and Art. 18 (2)). In this context the undertakings concerned are reminded of their right to refuse to provide self-incriminating information (No. 14).
  - In the course of investigations the Commission might decide to:
    - stop investigations and close a case,
    - assign the case to a national antitrust authority or
    - to open official cartel and abuse proceedings.
  - Following the initial assessment, the Commission opens formal cartel or abuse proceedings if the alleged antitrust behaviour (No. 12)
    - seriously restricts competition and contains the risk of harming consumers and/or
    - is important for defining EU competition policy and/or
    - is relevant for ensuring a coherent application of antitrust rules in the EU.

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- **Formal cartel and abuse proceedings**
  - The Commission may request "all necessary information" (Art. 18).
    - The Commission may request information from
      - directly affected undertakings which are under suspicion of antitrust behaviour and
      - other undertakings or associations which might have relevant information.
    - The provision of information is
      - voluntary if requested by the Commission as a "simple request" or
      - mandatory if the information is "requested by decision".
    - Since it is possible that information may also be forwarded to third parties or be published, the undertaking concerned (No. 37) must indicate if such information is confidential and explain why this is the case, as well as provide a non-confidential version of the information.
  - The Commission may conduct "all necessary inspections" (Art. 20).
    - In particular, the officials and other accompanying persons authorised by the Commission may enter any premises of the undertakings concerned, inspect all books or other records and take copies (Art. 20 (2) lit. a–c).
    - Documents do not have to be submitted if the undertaking concerned refers to the legal professional privilege ("LPP") of confidentiality (No. 47). However, this applies only to communications with external lawyers.
  - The Commission can offer to call a "state of play meeting", at which the undertakings concerned are informed as to what stage the procedure currently finds itself and are given the chance to give their views on this.
    The meetings take place at the following times (No. 57):
    - "shortly" after the opening of the proceedings and
    - at an "advanced" stage in the investigations.
  - In addition to the meetings of directly affected parties the Commission may also initiate voluntary "triangular" meetings with all parties involved (No. 61). This could be beneficial, in particular, if the parties concerned have opposing views.
  - Throughout the entire investigation, a hearing officer – to be appointed by the Commission and reporting to the Commissioner responsible for competition – is to ensure a fair procedure (No. 73).
    The mandate of the hearing officer is subject to a decision taken by the Commission in 2001 (2001/462/EC). The hearing officer is particularly responsible for:
    - the organisation and conduct of oral hearings,
    - informing the Commissioner responsible for competition of the results of a hearing and
    - arbitrating disputes between the Commission and the undertakings concerned.

- **Closing a case (Option 1): Finding and termination of infringements (Art. 7)**
  - Where the Commission finds that some of the "objections" raised against an undertaking might be justified, it informs the party concerned by way of a "statement of objections".
    It provides information as to:
    - the objections raised against an undertaking concerned (No. 76),
    - whether the Commission intends (No. 77) to impose fines (Art. 23) and
    - whether behavioural remedies (e.g. the prohibition of coupling products) or structural remedies (e.g. unbundling) are planned for rectifying infringements of competition rules (No. 78).
  - The addressees of such a statement may reply to it in writing. For that purpose the parties are granted access to the investigation files (No. 80).
  - The undertaking concerned may apply for an oral hearing in order to comment on the objections raised against them (No. 92). The hearing must be attended by the hearing officer, the director or deputy director general ("senior management") and the case team of Commission officials responsible for the investigation (No. 94).
  - If in the course of the proceeding new evidence is identified that corroborates the existing objections, this is conveyed to the undertaking concerned in a so-called "letter of facts", giving them the opportunity to comment on the new evidence (No. 97).
  - In a final step the Commission decides whether the conduct of the undertaking concerned infringes Art. 101 or 102 TFEU. If necessary, it imposes a fine and/or obliges the undertaking to cease its conduct or to carry out structural remedies.

- **Closing a case (Option 2): Commitments (Art. 9)**
  - Where the Commission intends to adopt a decision without imposing fines in order cease infringements of Art. 101 or Art. 102 TFEU, the undertakings concerned may submit voluntary commitments to address the Commission's competition concerns (No. 101).
  - In the case of a voluntary commitment, the Commission does not – in contrast to option 1 – state an infringement.
  - To this end the Commission issues a "preliminary assessment" where it (No. 107)
    - summarises the key facts of the case and
    - identifies the competition concerns that must be alleviated.

On the basis of the preliminary assessment, the undertakings concerned can define and propose appropriate commitments (No. 108).

– Before taking a final decision the Commission publishes the proposed commitments in order to enable third parties to comment on them ("market test", No. 114 and Art. 27 (4)).
  - If no objections are raised by third parties, the Commission may declare the commitment to be binding.
  - If objections are raised by third parties, the Commission may propose other commitments which can be accepted by the undertakings concerned.

► **Closing a case (Option 3): Rejecting a complaint**

– The Commission may reject a complaint based on the alleged infringement of Art. 101 or Art. 102 TFEU. This is possible if:
  - the complaint lacks substantiation (No. 124),
  - there is no sufficient evidence for an infringement (No. 124) or
  - the case lacks "Community interest" (No. 121) as the efforts for further investigations – in particular where the internal market is affected only to a minimal degree – would be disproportionate.

– If the Commission decides to reject a complaint it will first inform the complainant accordingly, who then may provide a comment within a certain period.
  - If the complainant fails to comment in due time the complaint is deemed withdrawn (No. 125).
  - In case the statement of the complainant does not lead to a different assessment of the complaint, the Commission rejects the complaint (No. 126).

► **Further aspects of "Best Practices"**

– Undertakings that are protected by the legal professional privilege of confidentiality (LPP) do not have to disclose any documents (No. 47).
  - If an undertaking refers to its protection, it must submit a redacted version of the document concerned (No. 48) and substantiate its claim, for instance by:
    - stating the author and addressee of the document and/or
    - allowing Commission´s officials a mere cursory look at the main headlines.
  - Where the Commission's officials responsible for investigations consider that an undertaking wrongly claims the protection of LPP they may copy the document concerned and leave it in a sealed envelope until
    - the Commission decides to approve the LPP (No. 51), or
    - a court decides whether or not the respective document falls subject to the LPP (No. 51).
  - If an undertaking invokes LPP merely as a delaying tactic or to impede investigations the Commission may impose fines (Art. 23 (1)).

– The undertakings' inspection of the Commission's files is problematic where confidential information would be disclosed.
  - In order to relieve the undertakings concerned from having to submit a non-confidential version of all information, the Commission recommends two new procedural practices according to which the undertakings concerned mutually provide full access to all confidential information.
    - The first procedural practice includes the additional option to restrict the circle of persons being granted the right ("negotiated disclosure procedure") (No. 84).
    - In the second procedural practice access to file is granted only at the Commission's premises and is subject to the supervision of a Commission official. In addition, the circle of persons is restricted. The right to access files is normally granted to an external legal counsel of an undertaking who may not disclose any information to their client ("data room procedure") (No. 85).

– The Commission expressly states that the undertakings concerned may decide to forego receiving important information in their mother tongue (Nos. 24-29), thus helping prevent delays caused by having to provide translations.

Policy Context

In 2009 the Commission published a Communication on the evaluation results of cartel and abuse proceedings pursuant to the Regulation (EC) 1/2003. On the one hand, it concludes that there are certain aspects that need further evaluation; on the other hand the Commission also states that amendments to the existing rules and practice are not necessarily required [COM(2009) 206, p. 10)].
The "Best Practices" Guidelines were published on 6 January 2010 in a package that included two other documents. These describe first the role of the hearing officer and second best practices in conveying economic evidence in cartel and abuse proceedings. At the same time, the Commission opened a consultation, which finished, however, on 3 March 2010. The Guidelines in their current form have been applicable since the beginning of January, irrespective of whether or not amendments will possibly result from consultation procedures.

Options for Influencing the Political Process

Leading Directorate General: DG Competition

ASSESSMENT

Although the Best Practices Guidelines provide a helpful overview of the European cartel and abuse proceedings, they merely reflect the Commission's view. They do not constitute a binding legal instrument and therefore **do not offer reliable guidance to affected undertakings**. Self-commitments are mainly prevented by the Commission itself, as it refers to necessary deviations in individual cases (No. 5) and regularly uses wording that refers to aims of a non-binding character to which one should aspire ["DG Competition will endeavour", e.g. No. 15, 17, 54].

The sanctioned European cartel and abuse procedure must be viewed critically from a constitutional point of view – it leaves the **Commission** holding all the strings. It **has the role of the investigation authority, the prosecution authority and of the judge**. At the administrative level the Directorate General Competition is solely in control of the procedure. The undertakings affected are deprived of a neutral decision-making instance which is not prejudiced by investigations. Finally, it is the College of Commissioners that decides on infringement, although only the DG Competition and at best the Competition Commissioner really know the cases. The Commissioners do not attend the hearings – not even the Competition Commissioner; they are merely informed and advised on it.

These procedural shortcomings are not eliminated through the appointment of a hearing officer, even if they are to conduct hearings "in full independence" (Art. 14 (1) VO (EC) No. 773/2004). Their position is not neutral as they are appointed by the Commission and must report to the Competition Commissioner; moreover, their decision as to whether or not they will carry out a hearing are subject to a prior approval of the competent director of the DG Competition [cp. Art. 6 sqq., 11 sqq. Decision (2001/462/EC)].

Essential procedural aspects should be regulated statutorily since the constitutional principle requires legal certainty in proceedings in order to grant a fair course of procedure. This applies equally to the undertakings' right to refuse to provide information and to testify and to the legal professional privilege to protect correspondence between undertakings and their lawyers. To date, these areas have mainly been governed by European jurisdiction.

Therefore, the basic differentiation between external and internal lawyers is not appropriate [cp. the restrictive case law ECJ, C-155/79, No. 21, 24; ECFI, T-125/03 und T-253/03, No. 168]. The existing reserved case law on the right to refuse to testify or provide information accepts only a restricted right for undertakings to refuse to provide information in that replies may be refused which comprise the admission of an infringement [ECJ, C-374/87, No. 35; ECFI, T-112/98, No. 67].

Constitutional aspects of the European cartel procedure will become virulent when the EU joins the European Commission on Human Rights (ECHR), as provided for by the Treaty of Lisbon (Art. 6 (2) TEC). The EU legal system will thus be subjected to the external control of the European Court of Human Rights. The European cartel procedure in its current form could infringe the right of a fair procedure (stipulated in Art. 6 ECHR) if the Court decides that it is to be characterised as criminal procedure. In interpreting a criminal complaint in terms of Art. 6 ECHR, amongst other things the general nature of the misconduct and the severity of the sanction are decisive criteria (so-called "Engel-criteria" – cp. ECHR No. 39665/98 and 40086/98 – Decision of 9 October 2003, 1. Principle).

The European antitrust rules are generally applicable standard rules which are aimed at ensuring free competition across the entire EU. Though the European Regulation Law states that the fines are not if a criminal nature (Art. 23 (5)), it cannot be denied that their purpose is to penalise and at the same time deter undertakings from infringements.

Alternative Procedure

A reform of the secondary legislation basis of cartel procedure would be preferable to the non-binding Best Practices Guidelines by the Commission. A first step towards an improvement could be to upgrade the position of the hearing official in that it should be granted more independence by the Commission.

Possible Future EU Actions

Though it is unlikely, it cannot be excluded that the Commission amends the Guidelines following the contributions made in the course of the consultation procedure. The contributions will be open to view upon their publication under: http://ec.europa.eu/competition/consultations/closed.html.

Conclusion

The Best Practice Guidelines on the conduct of cartel and abuse proceedings provide a helpful overview but no reliable guidance due to their non-binding nature: It is not clear to what extent the Commission will refer to its own proposals made in the Guidelines when it comes to concrete cases, as it reserves the right to deviate from those rules where necessary. The cartel and abuse procedure remains questionable in constitutional terms. In fact, a reform of secondary legislation is necessary.