EU Consultations on Competition Best Practices and Hearing Officer Procedure - WilmerHale's Comments

2010-04-12

At the end of 2009, the European Commission published three documents on:

- Best Practices for EU Antitrust/Competition Proceedings;
- Best Practices for the Submission of Economic Evidence in Antitrust/Competition and Merger Cases; and
- Guidance on the Procedures of the European Commission's "Hearing Officers".

Comments were invited by 3 March 2010.

The WilmerHale Antitrust and Competition Group has submitted such comments, which may be accessed by clicking here.

The main themes of our comments are as follows:

1. Given the many different procedures involved and various European Commission guidance notes thereon, we suggest that it is time for a consolidated procedural rule publication by the Commission, together with a "route map" for third parties as to what to use when (para. 4; all references here are to our comments).

2. We note that much of the Best Practices for EU Antitrust/Competition Proceedings is confirmatory of existing practice, but welcome several of the initiatives put forward. For example, that senior DG Competition management will attend the Commission's Hearing in a case continuously (para. 20) and that all elements of importance for any subsequent calculation of fines will be included in a Statement of Objections (paras. 17-18).

3. However, we have focused on a number of important underlying issues about the Commission's approach, which we think need addressing. For example:

- We suggest that the Commission should abandon its apparent scepticism as to the abuse of legal professional privilege and respect its use as a fundamental tenet of democracy (paras. 29-36).
- We also suggest that there should be more transparency on how economic and other legal assessments are brought together in the decision-making process of the Commission.

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Notably, the Commission should explain more how to deal with apparently divergent demands from a Commission's case team, with a suggested standard process of meeting with the Head of Unit of the case team and the Chief Economist or his Deputy to clarify issues as appropriate (paras. 5, 43, 66-70).

- Investigative choices on how to review a case should be proportionate to the issue and context in question. Notably, if an issue can be economically assessed without extensive econometric studies, that should be done, because these economic data requests are now becoming frequent and can be both very time consuming and very expensive (para. 61).
- We also suggest that considerable effort should be made to use the existing and readily available data, rather than data prepared specially for the proceedings, since the loss of time in the proceedings and the huge cost of "cleaning" such data for econometric studies is often unacceptable (paras. 62-63).
- We suggest that the Commission should expand the role of the Hearing Officers in its competition proceedings and openly recognize their role to protect procedural rights before the issue of Statement of Objections, not just after. Notably, the rights of the defence cannot be lost in the "initial investigative" phase, then to be recovered in the phase of Hearing after the Statement of Objections. We suggest renaming them "Procedural Officers" to reflect the symbolic change of attitude (paras. 37-38 and 73-77).
- We think that there should be no question of it being held against the defence on appeal that the defence did not raise a matter before the Hearing Officer. Rather, the Commission should emphasise that DG Competition considers it entirely normal for a party to raise issues with the Hearing Officer wherever it appears relevant (paras. 78 and 80).

4. We also suggest that the Commission's approach to electronic discovery (searches of company data) should be discussed further and dealt with in the Best Practices on Antitrust/Competition Proceedings, in particular the practice of copying computer hard discs even though that may mean taking material which is (i) not within the scope of the investigation; (ii) privileged; and (iii) "private" (paras. 24 -28).

5. In general, we welcome the Best Practices on Economic Evidence and their objective to establish a targeted quality standard both for DG Competition, the defence and third parties. We welcome DG Competition's statement that it will apply these Best Practices as well as ask companies engaged in Commission proceedings to follow them (para. 48).

6. We welcome the idea that the Hearing in a Commission proceeding should be built up in importance, with senior DG Competition management present throughout, in addition to the case team. We think more could be done to make such Hearings effective; for example, it would be useful if Replies to Statements of Objections were provided to other defence parties (paras. 40-42 and 90).

7. Finally, we note the discussion about confidential materials in proceedings, "negotiated disclosure" procedures and data rooms, whereby defined lawyers and economists would be given access to all such material subject to confidentiality obligations. These raise delicate issues of confidentiality, the right of a company (not just its advisers) to know the case against it and the need

for efficiency, but it is useful to see these topics raised for further debate (para. 19).

Clearly, many other points are made in our comments. It is understood that the Commission has now received some 60 comments from interested parties and will be considering its reaction in the months to come.

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