Linklaters

Response by Linklaters LLP to the European Commission's Consultation on EU antitrust procedural rules

Contents

1 Introduction 2
2 Confidentiality rings 2
3 Recordings of interviews before and after an inspection decision 3
4 The "cooperation procedure" in non-cartel cases 3
5 Handling of complaints 4
6 Cooperation with NCAs 5

1 Introduction

We welcome the opportunity to comment on Regulation 1/2003 and its implementing regulation, Regulation 773/2004 in the context of the European Commission's evaluation of EU antitrust procedural rules.[1]

We support the Commission's stated goal of evaluating the antitrust procedural framework following changes to the economic landscape, e.g. digitisation, since Regulation 1/2003 entered into force. In particular, we are supportive of measures that improve the transparency, speed and digital age readiness of antitrust procedure and that clarify the rights of defendants and third parties. However, we encourage the Commission to avoid changes that would unduly encroach upon the rights of defendants or their employees or the presumptions of innocence that underpin enforcement action.

2 Confidentiality rings

We suggest that the Commission reassesses the feasibility of introducing alternative arrangements for data sharing, including confidentiality rings.[2] These arrangements have the potential to make data sharing in the context of antitrust procedures more pragmatic and decrease the overall length of the procedure. The Commission has published guidance on the use of voluntary confidentiality rings in 2018, but is generally reluctant to use this arrangement unless the parties insist. In the UK, however, confidentiality rings are routinely used in antitrust proceedings when they are considered "*necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process*".[3] The CMA provides templates for confidentiality ring undertakings, disclosure room undertakings and disclosure room rules on its website. In our view, the Commission should also rely more often on confidentiality rings in antitrust cases. Currently, parties lose time examining overly redacted documents or escalating access to file disputes to the Hearing Officer.

In essence, confidentiality rings allow a balancing of the rights of defence against third party confidentiality rights. They can reduce the number of access to file complaints and lighten the logistical burden of the Commission. At the same time, they give third parties sufficient comfort that their documents are treated confidentially. Naturally, the Commission would need to rethink its

[1] The views expressed herein are those of the Linklaters lawyers who prepared this response and cannot be assumed to represent the views of any clients of Linklaters. The Linklaters lawyers who contributed to this paper are, in particular, Will Leslie, Joost Dibbits, Cécile Manong, Jihane Mirode, Maxime Liebaert, Mabel Baratech Diaz, Etienne Perrin.

[2] CMA definition of confidentiality rings: '*Confidentiality rings enable disclosure of specific quantitative and/or qualitative data or documents to a defined group. The group is determined on a case-by-case basis but, generally, disclosure is made to the relevant parties' external (legal and/or economic) advisers.*' See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270249/CMA6_Transparency_Statement.pdf.

[3] Competition and Markets Authority, "Transparency and disclosure: Statement of the CMA's policy and approach", January 2014, para. 4.29.

approach regarding the commitments it makes to third parties. These commitments are currently too strict and would hinder the implementation of any confidentiality arrangement considered for the proceedings. For example, the Commission has at times made strict commitments to third parties that the information they provide will not be disclosed to anybody outside of the Commission.

3 Recordings of interviews before and after an inspection decision

There is uncertainty about which interviews the Commission must record in the context of an antitrust investigation.[4] More specifically, this uncertainty relates to an alleged distinction between interviews conducted before and interviews conducted after an inspection decision. In *Intel v Commission*, the ECJ clarified that the Commission is required to record all interviews it conducts in the context of an investigation.[5] The ECJ: "*There is nothing in the wording of that provision or in the objective that it pursues to suggest that the legislature intended to establish a distinction between two categories of interview relating to the subject matter of an investigation or to exclude certain of those interviews from the scope of that provision.*" In *Les Mousquetaires & ITM Entreprises SAS*, which is currently before the ECJ, the Commission argues that it is not required to record interviews if they are carried out *before* the formal opening of an investigation. The Commission argues that finding otherwise would contradict the need for speed when adopting inspection decisions and would prevent the Commission from relying on evidence which only exists in oral form.[6]

We suggest that the Commission clarifies its procedure for conducting an investigation, both before and after an inspection decision. This would benefit the Commission, parties subject to an investigation and third parties. Interviews are an important part of the evidence available to the Commission when it wants to adopt investigative measures, such as inspections, irrespective of whether the interview takes place before or after the adoption of an investigation decision. Companies that are subject to an investigation should be able to examine records of all incriminating evidence as part of their right to access to file.

4 The "cooperation procedure" in non-cartel cases

We suggest the Commission codifies the so-called cooperation procedure which has come to the forefront in non-cartel cases in the past years (and also has done so before the entry into force of Regulation 1/2003)[7]. Whereas the application of this procedure is to be encouraged, as it has the merit of closing an enforcement gap for (non-cartel) antitrust cases, we believe the lack of an explicit legal framework and the improvised "soft law" character of it should be remedied.

[4] Article 27(2) of Regulation 1/2003 guarantees the parties' right of access to the Commission's file. This right entails that an undertaking must be able to examine all the documents in an investigation that might be relevant for its defence. Those documents include the recordings of statements which the Commission is entitled to take from natural or legal persons on a voluntary basis under Article 19 of Regulation 1/2003. Article 3 of Regulation 773/2004 provides the rules as to the recording of such interviews.

[5] ECJ, judgment of 6 September 2017, C-413/14P (Intel v Commission).

[6] Opinion of Advocate General Pitruzzella, 14 July 2022, C-682/20 (Les Mousquetaires & ITM Entreprises SAS v Commission), paras. 127-128.

[7] See, for example, Commission decision of 22 December 1987, (Eurofix-Bauco/Hilti) and Commission decision of 24 July 1991 (Tetra-Pak II).

Indeed, so far, the application of this procedure has largely taken place on an *ad hoc* basis, with the *ARA*[8] (2016) and, more importantly, *Guess*[9] (2018) fact sheets being the only real basis for it[10].[11] These fact sheets, however, are strongly marked by the facts that underpin them and do not provide a sufficient basis for the vast array of cases in which the cooperation procedure can be, and has been, applied. Even though this lack of explicit codification is understandable from the outset (i.e. when the Commission was not sufficiently experienced with it to properly codify it in legal text and thus required more flexibility), we hold that the Commission, in the meantime, has gained enough experience with this procedure to be able to codify it in a suitable manner. The Commission has had over seven years of experience with the procedure since the *ARA* fact sheet, in a multitude of cases with sufficient variation as to their procedural steps (e.g. cooperation before/after the Statement of Objections, cooperation on some or all areas[12] and hybrid cooperation procedures[13]) and infringements (i.e. Article 101 or 102 TFEU)[14].

This lack of an explicit legal framework is also in stark contrast with the leniency and cartel settlement procedures. As such, we believe that the Commission, at the very least, could formally set out the aims of cooperation, alongside the circumstances and extent to which defendants can be rewarded for cooperation. It is also desirable that the precise obligations of the companies and perhaps even the available range of fine reductions would be indicated. Indeed, the decisional practice shows, for example, that the potential range of fine reductions can go from 10% to 50%, but these reductions are still fully based on an *ad hoc* analysis, without any guidance, which is arguably not transparent enough for the companies involved.

Lastly, it is clear that the codification of this procedure would lead to more legal certainty, which in turn could lead to greater success of the procedure itself, as companies would be able to make a more informed choice based on a more formal source whether or not to cooperate. Such success would logically also lead to a freeing up of resources for the Commission, which could then be used where they are most needed, based on its priorities.

5 Handling of complaints

The framework regarding complaints to the Commission could benefit from an update in accordance with existing case law.[15] One example is the Commission's power to reject a complaint based on

[8] Commission Fact Sheet, Antitrust: Reduction of Fines for Cooperation (ARA), 20 September 2016, https://ec.europa.eu/competition/antitrust/ara_factsheet_en.pdf.

[9] Commission Fact Sheet, Antitrust: Reduction of Fines for Cooperation (Guess), 17 December 2018, https://ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

[10] This is also exemplified by the Commission decisions following *Guess*, as the press releases of these decisions include a reference to the *Guess* fact sheet. See for example: Commission Press Release, Antitrust: Commission fines AB Inbev €200 million for restricting cross-border sales of beer, 13 May 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2488; Commission Press Release, Antitrust: Commission fines hotel group Meliá €6.7 million for discriminating between customers, 21 February 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_302.

[11] We concede that the application of this procedure has taken place on the basis of Articles 7 and 23 of the Regulation 1/2003, in combination with Article 37 of the 2006 Fining Guidelines, but it is clear that these Articles do not provide for any clarification as to its application and procedure.

[12] The three areas in which parties can cooperate are: (i) acknowledgement of liability for an infringement, (ii) cooperation by the voluntary provision of clarification of evidence; and/or (iii) help in the design and implementation of remedies.

[13] Commission decisions of 20 January 2021, *Video Games*, in which Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax chose to cooperate, whereas Valve did not.

[14] The procedure has, inter alia, been applied in agreements involving resale price maintenance and cross-border trade restrictions, as well as practices involving abuse of a dominant position (refusal of access to infrastructure).

[15] See Articles 5-9 of Regulation 773/2004 and the Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, 2004/C 101/05.

lack of sufficient Community interest.[16] In particular, the Commission, when rejecting a complaint, needs to take into account "*the size of the market concerned and of its economic importance*" where the complaint expressly relates to multiple countries or the entire EU.[17] The Commission, when it rejects a complaint based on the limited size of a market, also has a duty to give reasons: "*the mere references to the relative sizes of those markets in comparison to the others do not enable the Court to assess the accuracy of the finding that the complaint concerns, at most, a market of limited size and, thus, the economic importance of that market is also limited*".[18] According to the recent *Sped-Pro v Commission* judgment, the Commission needs to verify, when rejecting a complaint on the ground that an NCA is better-placed than the Commission, that the national authorities concerned are capable of safeguarding the complainant's rights. The General Court: "*La jurisprudence impose donc déjà à la Commission, avant de rejeter une plainte pour défaut d'intérêt de l'Union, de s'assurer que les instances nationales soient en mesure de sauvegarder d'une façon satisfaisante les droits du plaignant*".[19]

In addition, Article 5(1) of Regulation 773/2004 allows the Commission to dispense with the information normally required in complaints as per Form C.[20] This has led, in practice, to inconsistencies in the treatment of complainants. We would suggest setting a more transparent standard for information requirements and to give complainants a clearer understanding of when the Commission may dispense with the obligation of providing the information listed in Form C.

Finally, we suggest that the Commission clarifies (a) the participation and rights of third parties in an antitrust investigation and (b) the rights of companies subject to an investigation vis-à-vis third parties.

6 Cooperation with NCAs

Articles 11-16 of Regulation 1/2003 provide a framework for cooperation between the Commission and NCAs.[21] This framework has proven to be vulnerable to two types of problems: (a) inconsistency of approach problems (e.g. see treatment of narrow parity clauses in the EU)[22] and (b) *ne bis in idem* problems (e.g. the EU and Italian *Amazon Buy Box* cases).[23] We are aware that the

[16] This option is only referred to in the Notice on the handling of complaints and could be updated in line with case-law.

[17] General Court, judgment of 15 December 2010, T-427/08 (CEAHR).

[18] General Court, judgment of 15 December 2010, T-427/08 (CEAHR).

[19] General Court, judgment of 9 February 2022, T-791/19 (Sped-Pro S.A.).

[20] Form C is an annex to Regulation 773/2004.

[21] Article 11 provides that the Commission and the NCAs apply EU law in close cooperation. An NCA needs to inform the Commission 'without delay' after commencing the first formal investigative measure (Article 11(2)). It also needs to inform the Commission no later than 30 days before the adoption of a decision (Article 11(3)). Article 11(6) provides that the initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty.

[22] See European Commission Staff Working Document, "Evaluation of the Vertical Block Exemption Regulation", 8 September 2020, SWD(2020) 172 final: "*The evaluation study confirmed the divergent approaches by NCAs in relation to the treatment of narrow parity clauses in the hotel booking sector. The evaluation study pointed out that several NCAs decided not to take action against narrow parity clauses because they considered that they had only a low or no negative impact on competition, as the hotels or restaurants were still able to offer lower prices on other online platforms. However, a different stance was taken by the German NCA in relation to a narrow parity clause in its case against Booking.com. It found that hotels would have no incentive to reduce prices on other platforms if they could not offer lower prices on their own (commission-free) sales channels. The German NCA also considered that Booking.com's narrow parity clauses would restrict competition between hotels by limiting their freedom to set prices.*"

[23] M. Cappai and G. Colangelo, "A unified test for the European ne bis in idem principle: the case study of digital markets regulation", 27 October 2021, available at SSRN: http://dx.doi.org/10.2139/ssrn.3951088: "*Indeed, the European Commission launched an investigation under Article 102 TFEU against Amazon for facts identical to those already addressed in a parallel Italian probe. Defining the relevant market as the European Economic Area with the exception of Italy, the Commission has de facto prevented the Italian Competition Authority from being relieved of its power to*

Commission launched an early warning system in 2016. This early warning system was introduced to allow "*discussing ongoing cases that raise novel issues at the earliest possible stage. It also facilitates early case allocation and/or coordination of novel cases with cross-border effects, run by several authorities."*[24] We believe that the Commission could explore a number of additional measures to make the framework more resistant to both type (a) and type (b) problems. In particular:

1. Increase cooperation earlier on in the process, including on market investigations, market monitoring and priority setting.[25]
2. The Commission could support the creation of transnational teams when similar investigations are conducted in different parts of the EU.[26] Podszun notes: *"this would 'crossfertilise' enforcement practice and help to build a real European set of cases".*
3. Specifically for type (a) problems, the Commission could consider creating a mechanism to raise inconsistency issues within the 30-day deadline of Article 11(4) of Regulation 1/2003, potentially with a dispute resolution mechanism.

Linklaters LLP

6 October 2022

prosecute the proceedings. If the Italian decision becomes final, it is likely that a double jeopardy defence would reinvigorate Amazon's appeal."

[24] ECN, Note on the outcome of meeting of ECN DGs on 17 February 2017, https://ec.europa.eu/competition/antitrust/ECN_meeting_outcome_17022017.pdf.

[25] European Court of Auditors, The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight, Special Report, 2020: "*75. Within the ECN (see paragraph 12), DG COMP cooperated closely with the NCAs in various working groups. However, in spite of the many contacts, in the period audited, DG COMP and NCAs did not closely coordinate their market monitoring and sector inquiries. DG COMP had no clear information about which markets NCAs specifically monitored and whether there were overlaps or gaps rather than complementarity with its own monitoring activities. DG COMP had also no full knowledge about Member States' enforcement priorities and had not endeavoured to coordinate its own priority-setting with them. This was partly because some NCAs were not empowered to set priorities, although Directive 2019/1 allows them to do so in future.*"

[26] R. Podszun, "Adaptative Antitrust enforcement – Evolutionary ideas for reforming Regulation 1/2003", *JECLAP*, 2020 https://academic.oup.com/jeclap/article/11/8/437/5912579?searchresult=1.