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Quickguides

Competition law investigations by the European Commission



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Quickguide overview

This Quickguide summarises the procedure followed by the European Commission when investigating a suspected breach of EU competition law, the possible outcomes of an investigation, and key rights of defence which must be respected. Topics covered include:

- How an investigation is likely to start
- Powers to demand the production of information and/or search premises
- Limits on the powers to obtain evidence
- The parties' rights of defence
- Settlement
- Possible outcomes: decisions, penalties and remedies
- Interim measures
- Appeals
- Rights of complainants and other third parties

A one-page flowchart providing an overview of the investigation process is also included at the back of this Quickguide.

Brexit

On 31 January 2020, the UK ceased to be a member of the European Union, commonly referred to as "Brexit". However, EU law continues to apply with full force and effect in the UK during the Brexit Transition Period (at the time of writing, scheduled to end on 31 December 2020). This Quickguide therefore considers applicable EU law alongside domestic UK law during the Transition Period. It does not consider the potential impact of Brexit on UK competition law post the Transition Period, as this will depend on the terms of the UK's future relationship with the EU, which were not clear at the time of writing.

For further information on any of these areas please speak to one of the contacts listed on the final page of this Quickguide, or your usual Ashurst contact.

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Competition law investigations by the European Commission

1. Introduction

A core function of the European Commission in Brussels (the Commission) is to undertake investigations of alleged infringements of EU competition law. If an infringement is suspected and the necessary standard of proof is satisfied, it may gather evidence through formal or informal requests for information or through on-site searches of premises (so-called "dawn raids"). This Quickguide explains the law, process and issues surrounding competition investigations by the Commission and the flow diagram at the end of this document summarises the various stages.

2. Underlying competition law provisions

Anti-competitive agreements

Briefly, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits anti-competitive agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition and which may affect trade between Member States. Agreements which are found to be anti-competitive may, nevertheless, be exempt from the prohibitions if they satisfy the following cumulative exemption criteria:

- the restrictions must lead to improvements in distribution or production, or promote technical or economic progress;
- consumers must enjoy a fair share of the resulting benefits;
- the restrictions must go no further than is necessary and to achieve the benefits; and
- the restrictions must not eliminate competition altogether.

The most serious types of anti-competitive arrangements are where the purpose, or "object", of the agreement is anti-competitive. This would include "cartel"-type agreements between competitors to fix prices, to share customers or markets, to limit output or investment, or to rig bids in response to an invitation to tender. Some types of information-sharing arrangements between competitors are also considered to be serious infringements. Any arrangements whereby a distributor is required to charge resale prices fixed by its supplier, or where the distributor is subject to an absolute prohibition on making cross-border sales within the EU (an "export ban") are also considered to be serious infringements. Such agreements are rarely capable of exemption, and are typically punished with heavy fines. Note, moreover, that cartel activities are also criminal offences in some Member States.

A second category of infringing agreements relates to those whose object is not in itself anti-competitive, but whose effect on the market-place may nevertheless be to restrict, prevent or distort competition, even if that is not the parties' actual intention. Such agreements include exclusivity provisions or non-compete restrictions in a distribution arrangement, or joint arrangements between competitors in relation to product standards, research and development or joint production. These types of infringements are more likely to be exemptible, or, if an investigation is launched, the competition concerns can often be dealt with by amending the terms of the agreement.

Abuse of dominance

Article 102 TFEU prohibits the abuse of a dominant position if it may affect trade between Member States. A dominant business is one which enjoys such market strength that it can act independently of its customers, competitors or suppliers. Being dominant is not prohibited in itself, but a dominant

business is under a special responsibility not to distort competition. Consequently, actions which might be wholly legitimate for a non-dominant business may be illegal for a dominant business.

Abuses fall into two broad categories:

- exclusionary abuses, where the dominant business uses its power to try to keep competitors out of the market, or to increase the difficulties which they face in competing. Examples include predatory pricing to force a competitor out of the market or certain forms of loyalty discounts which make it very hard for a competitor to win market share; and
- exploitative abuses, where the dominant business uses its power to impose unfair trading terms on its customers (or suppliers). Examples include charging excessively high prices or requiring unwanted goods to be purchased with the desired goods. As a matter of administrative priority, exploitative abuses are less commonly investigated by the Commission than exclusionary abuses.

Abuse of a dominant position is never capable of exemption, although certain conduct will not be considered abusive if it can be shown to be "objectively justified". For example, a dominant undertaking's refusal to supply a customer is typically considered to be an abuse, but it may be permissible if there are objectively justifiable reasons for the refusal, such as the poor credit history of the customer which makes it an unacceptable commercial risk.

3. Starting an investigation

A breach of EU competition law will most commonly come to the attention of the Commission as a result of:

- a complaint made by a third party such as a competitor or customer;
- a whistle-blower (i.e. a party to a cartel seeking leniency (see below));
- the transfer of a case to the Commission from one or more national competition authorities (there is a policy of transferring cases to the Commission where it would be best placed to investigate);
- an investigation in another area (for example, broad sectoral investigations may uncover suspicions of specific anti-competitive practices which could then become the focus of new and separate investigations); or
- the Commission's own inquiries.

The Commission has wide discretion regarding whether to open an investigation into a possible infringement of competition law and it is important to note that it does not take on every case which comes to its attention. The EU courts have confirmed that the Commission is entitled to apply its administrative priorities and to decline to pursue certain cases following an initial assessment.

Once the decision has been taken to pursue a case with a view to reaching a final decision, the Commission will formally commence proceedings. This can take place at any time between the start of the investigation and the issue of a statement of objections (see below).

4. Leniency

In order to encourage whistle-blowing, reductions or even total immunity from fines are available to businesses which reveal the existence of cartel behaviour to the Commission. Under EU competition law, leniency is only available in relation to cartel-type infringements between competitors.

The Commission will grant full immunity to a member of a cartel where it is the first to come forward with information, which in the Commission's view will enable it either to carry out a "targeted inspection" (i.e. a "dawn raid", discussed further below), where this has not already taken place, or to find an infringement of Article 101 (where there has previously been insufficient evidence).

In order to qualify for immunity, a cartel participant must provide a "corporate statement" setting out:

- a detailed description of the cartel arrangement;
- the names and addresses of all cartel participants;
- the names, positions, office locations and, where necessary, home addresses of all individuals involved in the cartel activity;
- information on any other competition authorities which have been, or will be, approached for immunity/leniency; and
- any other evidence relating to the cartel available to the applicant.

A corporate statement is made orally to the Commission, which will record it. This procedure is followed because it avoids requiring the business to create a written document which sets out the cartel evidence and which might subsequently have to be disclosed in private litigation (generally, the extent to which documents from the investigation might be disclosable to third parties to support litigation is a controversial issue at present).

Furthermore, the undertaking must co-operate "genuinely, fully, continuously and expeditiously" with the Commission throughout the investigation, must end its involvement in the cartel (unless instructed otherwise by the Commission), and must not have destroyed, falsified or concealed evidence when contemplating its application. It must also not reveal that it has sought leniency to the other cartel participants.

An undertaking which took steps to coerce the participation of other undertakings in a cartel is expressly excluded from eligibility for immunity from fines, although it may still qualify for a reduction in the amount of a fine.

Where full immunity is no longer available, businesses may still be able to qualify for a reduction in exchange for volunteering evidence about the infringement which provides "significant added value" to the Commission's investigation. Undertakings which provide significant added value, and which co-operate with the Commission genuinely, fully, continuously and expeditiously, may be eligible for a reduction of 30 to 50 per cent for the first undertaking, 20 to 30 per cent for the second undertaking, and up to 20 per cent for subsequent undertakings.

However, seeking leniency raises a number of important strategic issues. A party to an infringement needs to consider carefully the broader implications, including:

- will applying for leniency increase exposure to possible follow-on actions for damages brought by parties harmed as a result of infringing conduct? The potential value of such claims needs to be considered against the potential level of any fine for the infringement. As noted, the extent to which a third party might be able to strengthen a private litigation claim by gaining access to evidence provided as part of a leniency application (or, more generally, which has been collected in the context of a competition investigation) is a heavily contested issue which is being considered in a number of cases currently before the EU courts;
- is leniency available in other jurisdictions affected by the infringement? If so, simultaneous leniency applications may be required so that other cartel members do not seek leniency first in other jurisdictions; and
- is there personal liability in other jurisdictions, such as criminal sanctions? If so, would the leniency application also trigger exposure to – and protection against – such personal sanctions?

5. The Commission's powers to demand the production of information or to search premises

The Commission can obtain evidence about the alleged infringement in a number of ways. Most commonly, it will gather information by sending written questions to the parties (and relevant third parties) but it is also able to undertake unannounced searches for evidence at business premises (known as "dawn raids"). The latter is most common where a serious infringement, such as a cartel, is suspected.

Request for information

In the conduct of an investigation, the Commission may request information either by formal decision or, more commonly, by an informal request. While there is no obligation to comply with an informal request for information, the Commission is likely to take a formal decision requesting the information if the business in question refuses to supply it voluntarily. Failure to comply with a formal Commission decision (including the supply of incorrect, incomplete or misleading information, or failure to respond within the required time limit) may incur penalties of up to one per cent of total group turnover, even if the failure to comply was merely negligent and not intentional. In practice, the Commission has imposed fines for failure to comply with an information request decision in a number of cases.

Requests for information may be directed at businesses which are suspected of an infringement, and also third parties which are not suspected of an infringement, but which are, for example, purchasers in (or suppliers to) the markets in which an infringement is suspected and so may have valuable evidence in their possession. The Commission can also direct requests at the governments and competition authorities of Member States.

The Commission is authorised to request "all necessary information" for the purposes of enforcing the prohibitions contained in Articles 101 and 102 TFEU. The Commission has discretion to determine what information is "necessary" for the purposes of its investigation, although parties can challenge a decision on the grounds that the information requested is not necessary or is excessive. In the first instance, the scope of the request should be discussed with the Commission and, if appropriate, the Commission's independent Hearing Officer (see below), whose role is to safeguard procedural rights. However, the lawfulness of a Commission decision can be reviewed only by the EU Court of Justice.

If a recipient of a formal information request considers that the deadline for response set by the Commission is insufficient to enable it to respond fully, an extension may be requested. If the Commission refuses to grant an extension, the Hearing Officer can intervene (at the request of the recipient) and take a final decision on the extension request.

Inspection of premises – "dawn raids"

The Commission has wide powers to "conduct all necessary inspections of undertakings and associations of undertakings". Those powers include the power to:

- enter any premises, land and means of transport used for the business;
- examine business books and records;
- take or obtain copies or extracts of such books or records;
- seal business premises and books or records; and
- ask a person for explanations of facts or documents relating to the inspection, and record the answers.

The Commission typically uses forensic search software tools to search for documents, emails and other data.

In the exercise of its powers, the Commission may conduct inspections either by an authorisation, or by a formal Commission decision. A person may refuse to submit to an inspection by authorisation but not to an inspection by formal decision. In either case, the provision of false, misleading or incomplete information can be punished with fines of up to one per cent of an undertaking's worldwide aggregate group turnover. Failure to submit to an inspection by a formal Commission decision may result in a fine of up to one per cent of an undertaking's turnover.

The Commission officials carrying out an inspection are required to produce the written authorisation or decision, which must specify the subject matter and purpose of the inspection, and the penalties for non-compliance. A decision must also state the date of the inspection, and the right to have the decision reviewed by the EU Court of Justice.

Besides business premises, the Commission may be authorised by decision to inspect any other premises, land or means of transport, including the homes of directors, managers and other members of staff, where there is a "reasonable suspicion" of a "serious violation" of Article 101 or 102 TFEU. However, a Commission decision cannot be exercised in these circumstances without the judicial authority of the relevant Member State (e.g. a warrant).

6. Limits on the Commission's powers to obtain evidence

There are important limitations on the Commission's powers to obtain evidence, whether by way of a written request or during a dawn raid, although these issues tend to come up more acutely in the context of a dawn raid situation. Relevance of the document, legal professional privilege and the privilege against self-incrimination must all be considered. The fact that a document contains highly sensitive confidential commercial material, however, has no impact on the Commission's powers to obtain it, although the Commission is under an obligation to protect confidential information from disclosure, also discussed below.

Relevance

The Commission is not entitled to go on a "fishing expedition" to find evidence of competition law infringements. In a dawn raid situation in particular, the issue of relevance is a key issue in limiting the documents which the Commission is entitled to see. As noted above, the Commission's authorisation papers or decision will set out the subject matter of the dawn raid and it is not entitled to search more widely than the limits of the subject matter. If there is any ambiguity in the statement of the subject matter of the raid (for example, the time period concerned, the geographic area, the precise products and/or services being investigated), it is important to clarify the exact parameters for the raid from the outset.

Legal professional privilege

It is important to note that there may be significant differences between the rules relating to legal professional privilege under national and EU law. The EU rules are typically narrower than the rules of privilege applied in common law countries such as the UK, but may be similar to the rules of privilege applied in civil law countries – or even wider (some Member States have no rules of privilege at all).

In accordance with EU case law, communications are privileged where they are between a client and an independent lawyer who is qualified to practise in an EU Member State, and where the communications are made in the interests of the client's defence.

In practice, this means that:

- advice given to a business by a lawyer employed by that business (in-house counsel) is not protected under the EU rules of privilege. This point is actively applied by the Commission: for example, it is not uncommon for officials to require access to the documents and IT files of in-house counsel during a dawn raid. As a limited exception to this rule, where the in-house lawyer's

communication is purely summarising advice obtained from independent external lawyers, it will retain the privilege that attached to the original advice; and

- advice given by lawyers, including independent external lawyers, who are not qualified in one of the EU Member States, will not be protected from disclosure to the Commission. This point is less developed and less often applied.

In the event of a dispute over the privileged status of a document, the Commission may not read the contents of the document until the issue of privilege has been resolved and it is found that the document is not privileged. In a dawn raid situation, the disputed document will be placed in a sealed envelope which is kept in the Commission's possession until a decision on privilege is reached. Following recent procedural changes, a dispute concerning privilege can be brought before the Hearing Officer (this role is discussed further below). The Hearing Officer will endeavour to work as a mediator to enable the parties to agree a mutually acceptable outcome, but if this is not possible then he or she can make a (non-binding) recommendation to the Commission. However, the final decision ultimately remains with the Commission, subject to appeal to the General Court.

Privilege against self-incrimination

Under EU law, undertakings and individuals benefit from a privilege against self-incrimination. The Commission may compel an undertaking to provide pre-existing documents or information which are incriminating, but cannot compel the provision of oral answers which might involve an admission on its part of an infringement. However, the Commission is permitted to ask limited questions during a dawn raid (for example, asking for explanations of acronyms or abbreviations) so care has to be taken to ensure legitimate questioning does not stray into prompting self-incriminating answers.

The Hearing Officer has powers to make a recommendation to the Commission in cases involving a dispute over potentially self-incriminating information. However, the final decision ultimately remains with the Commission, subject to appeal to the General Court.

Confidentiality and disclosure

As noted above, the fact that a document is commercially and strategically highly confidential is irrelevant in terms of whether it has to be disclosed to the Commission. However, there are protections in place to ensure that disclosure to the Commission does not result in any wider loss of confidentiality for "business secrets". Where the Commission has obtained information in the course of an investigation (whether through a dawn raid or written request), the information is protected by confidentiality obligations which prevent the Commission from disclosing the information, and only permit its use for the purpose for which it was acquired. However, this duty of confidentiality and non-disclosure is expressly without prejudice to the use of the information for the purposes of the investigation, including sharing the information with the competition authorities of Member States, and allowing third parties access to non-confidential versions of documents for the purposes of preparing their defence.

7. Exercising the parties' rights of defence and settlement

Before it adopts an infringement decision or a decision regarding interim measures or fines, the Commission must ensure that the parties to an alleged infringement know the case against them and are given an opportunity to be heard. The Commission can base its decisions only on those matters on which the relevant undertakings have been able to comment. This entitlement is the core of the parties' "rights of defence". The Commission's new Best Practice Guidelines set out the procedure which it will follow in this context.

State of play meetings

The Commission has recently adopted a practice of holding "state of play" meetings with all involved parties at appropriate points in the investigation (usually shortly after opening of proceedings and, again, at a later stage, once the Commission has reached some preliminary views on potential competition concerns). In the case of cartels, only one state of play meeting will be offered, after the oral hearing.

Attending such meetings is entirely voluntary, but they are intended to offer a useful opportunity for open and frank discussion with the Commission, and to inform the parties of the status of proceedings at key points in the investigation procedure.

Statement of objections

In order to respect the parties' right to know the case against them, once it has collected sufficient information and evidence to support a case of infringement, the Commission will issue a "statement of objections" to the parties. The Commission will also issue an accompanying press release to the wider public, although this will not usually contain any significant detail beyond the fact that the statement of objections has been published.

The statement of objections is often a lengthy document, setting out the case against the parties and allowing them an opportunity to respond to the allegations. It will include the relevant facts and supporting evidence, the Commission's legal analysis of such facts and evidence, and its conclusions. The parameters within which any potential fine will be calculated will also be included, such as the year which will be used to calculate the relevant turnover of the company. The parties may respond to the statement of objections in writing within a specified time limit (typically two months). If the Commission proposes to rely on particular documents in support of its case, these should also be supplied to the parties.

The parties' response to the statement of objections is essentially their defence. Where the response identifies weaknesses in the evidence or analysis in the statement of objections, the Commission may decide to address those issues again in a supplemental statement of objections.

Access to the file

Subject to the protection of third parties' legitimate business secrets, the relevant undertakings must also be given access to the Commission's file as part of their rights of defence. This literally means giving the parties (and their lawyers) access to the documents which the Commission has collected in the course of its investigation.

Where an investigation is based on a formal complaint, the parties subject to investigation will be provided with a (non-confidential) copy of the complaint and any key submissions made by the complainant at an early stage (unless this is likely to prejudice the investigation).

Following issue of the statement of objections, the parties (and their lawyers) will be given access to other relevant documents on the Commission's file, to enable them to see the evidence against them set in the context of the whole body of evidence. This also gives the parties an opportunity to identify any exculpatory evidence which supports their defence. The right of access to the file is subject to certain limitations:

- it does not extend to the internal documents of the Commission or the competition authorities of Member States. Internal working papers or research produced by the Commission case team will therefore be excluded, as will any communications about the case between the Commission and any national competition authorities; and
- the confidentiality of other parties' information must be respected (subject to certain conditions). The Commission will ask all parties whose documents are on the file to identify any business secrets or other confidential information within those documents, to provide reasons for the claims of

confidentiality, and to provide the Commission with non-confidential versions of the documents. Access will be given to the non-confidential versions only.

Oral hearings

As a further element of the rights of defence, any party against whom the Commission intends to reach an infringement decision, or who has demonstrated sufficient interest in the case, may request an oral hearing. Oral hearings are not akin to a court hearing as there is no adversarial element as such. Each party is given an opportunity to present the key elements of their defence to the Commission's case team. Third parties who have been actively involved in the case as complainants or as providers of evidence may also be invited to participate in the oral hearings.

The Hearing Officers

Commission investigations are overseen by two Hearing Officers. The Hearing Officers are not part of the Commission's case team but have separate reporting lines to ensure their independence from the case officials. The role of the Hearing Officers is to "contribute to the objectivity, transparency and efficiency" of the proceedings: essentially to ensure that the investigation respects the parties' rights of defence.

The Hearing Officers' role was originally mainly limited to overseeing and chairing the oral hearings, and dealing with procedural disputes in the later stages of the investigation such as matters relating to access to the file. However, the role has been expanded and it is intended that they will be involved in the investigation at an earlier stage. It should be noted, however, that the Hearing Officer's powers to take decisions are very limited – in relation to the most important disputes (concerning, for example, privilege or self-incrimination as opposed to, for example, deadlines for the submission of information) they are often able only to make recommendations to the Commission about how it should act.

Settlement

The Commission offers a procedure whereby parties which are prepared to admit liability and waive their full rights of defence can enter into "settlement" discussions. Where a settlement is agreed, the investigation will typically be much shorter and streamlined, and the party concerned will be rewarded by a ten per cent reduction in its fine (separate and additional to any reduction for leniency, discussed above).

The Commission will usually explore parties' interest in engaging in settlement discussions after formally initiating proceedings in respect of a cartel case, but before issuing a statement of objections. However, it is possible that settlement may be discussed prior to formal initiation of proceedings where the Commission has chosen to undertake a detailed informal investigation. For example, in the LIBOR and EURIBOR cartel investigations, the Commission announced that settlement had been agreed with a number of parties on the same day that formal investigation proceedings were initiated (prompting complaints to the European Ombudsman (decisions currently pending) by non-settling parties that their rights of defence were infringed by the announcement that a cartel existed before they were given a chance to properly defend themselves against the allegations).

If the Commission considers it appropriate, it may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions. Where settlement discussions commence, the Commission will reveal to the party concerned the facts alleged against it, its interpretation of those facts, the gravity and duration of the alleged infringement, the attribution of liability, an estimation of the range of likely fines and the evidence used to support the Commission's objections. The Commission will also provide access to non-confidential versions of specified documents on the case file at that time. The purpose of these discussions and disclosures is to enable the parties to make an informed decision on whether or not to settle.

If a party opts for settlement, it must make a formal request in the form of a settlement submission (which can be provided orally), which must contain:

- an acknowledgement of liability for the infringement;
- an indication of the maximum amount of the fine which the party foresees and would accept under the settlement procedure;
- confirmation that the party has been adequately informed of the objections, and has had sufficient opportunity to respond to the Commission;
- confirmation that the party does not envisage requesting access to the file or an oral hearing (unless the settlement submissions are not reflected in the Commission's statement of objections and final decision); and
- the party's agreement to receive the statement of objections and final decision in an agreed official language of the EU (normally, the statement of objections would have to be translated into all the languages of the cartel participants).

The Commission will still issue a statement of objections in a settlement case, but it will usually be briefer and the party will have a shorter period in which to confirm the statement. There should be nothing in the statement of objections of which the party was not already aware and which it had not already accepted as part of the settlement discussions. Since the processes of access to the file and oral hearings will have been waived as part of the settlement, the Commission will then move directly to a final decision (following required internal consultations) without any further procedural steps, at least as regards the settling parties. The full normal procedure will still be followed in relation to any parties to the infringement who have not elected to settle the case.

Procedural concerns arising in the context of the settlement procedure may be brought before the Hearing Officer for review.

8. The end of the investigation – decisions, penalties and remedies

An investigation may end in a number of ways:

- an infringement decision;
- a commitments decision;
- a finding of non-infringement; or
- an informal case closure.

Infringement decision

Where the Commission concludes that the parties have infringed the competition prohibitions, the investigation process ends with the issue of a decision, in which it will set out the relevant law and the facts of the case, apply the law to the facts, and draw its conclusions.

Where the infringement was either intentional or negligent (which in practice will almost always be the case), the Commission may impose a fine of up to ten per cent of the undertaking's worldwide aggregate group turnover for the preceding business year. The Commission has a stated methodology for the calculation of fines and will take into account the severity of the infringement, its scope and duration, any mitigating or aggravating factors, the extent of co-operation during the investigation, etc. The fine will also be adjusted to reflect any reductions for leniency and/or settlement (discussed above). Although fines are rarely close to the ten per cent maximum, they may be very high in absolute terms (for example, Intel was fined €1.06bn for an abuse of a dominant position and four parties to the trucks cartel were fined a total of €2.9bn, with the highest individual fine being €1.0bn and the immunity applicant avoiding a fine of €1.2 bn). In exceptional circumstances, where the form of infringement is considered to be "novel", the Commission may impose only a "symbolic" fine (such

as the €1,000 fine imposed on the Swiss consultancy AC Treuhand in respect of its role as a "facilitator" in the organic peroxides cartel), but such cases will be rare.

Where the Commission finds that there has been an infringement of Article 101 and/or Article 102 TFEU, it may require that the infringement is brought to an end. It may also impose behavioural or structural remedies which are proportionate and necessary to bring the infringement to an end. A behavioural remedy is essentially a requirement relating to the future conduct of the business such that by behaving in a certain way the competition concerns will remain resolved; a structural remedy, by contrast, is a solution which removes the competition concerns in a permanent way (most often involving divestment or long term contractual arrangements or licences). However, the Commission may only impose structural remedies where there is no equally effective behavioural remedy, or where the behavioural remedy would be more burdensome than the structural remedy for the relevant undertaking.

Commitments decision

Where the Commission intends to take an infringement decision but the parties are prepared to amend their arrangement to remove the competition concerns, the Commission has power to take a formal commitments decision, recording and formalising the remedies which have been proposed. Such a decision is not an infringement decision: instead it constitutes a finding that there are no longer grounds for action by the Commission, with no finding that there has been a breach of competition law.

This type of decision cannot be accompanied by fines so is typically used where the competition concerns are less serious and where, for example, the Commission does not wish to impose fines for deterrence-related policy reasons. Commitments decisions most commonly concern "effects" infringements, where the underlying purpose of the parties was not anti-competitive.

Non-infringement decision

In some cases, the Commission may decide to issue a non-infringement decision (although they are rare). Non-infringement decisions are essentially issued where it would be in the EU public interest to do so – for example, where the legal analysis is novel or particularly complex so that there is precedent value in setting out the Commission's reasoning for the benefit of the national competition authorities and the business sector and advisers. It should be noted that the Commission is the only body which can issue a non-infringement decision: national competition authorities do not have power to do so.

Informal case closure

It is more common, where there is no finding of infringement and no commitments to be formalised, for the Commission to bring a case to an end with an announcement that the file will be closed. This is an informal outcome – the Commission would be able to reopen the file should it become clear that, in fact, competition concerns remain.

Publication of decisions

The Commission is obliged to publish the decisions which it takes in relation to infringements, commitments, a finding of inapplicability, fines and periodic penalty payments and interim measures (discussed below). It also publishes its decisions rejecting a complaint (or at least a summary of such decisions).

The Commission must have regard to the obligation to protect parties' business secrets. Typically, the key elements of a decision will be announced by way of a press release and sent to the parties in full at that time, but there will then be a delay while the parties are consulted in relation to whether the decision contains business secrets. A full non-confidential version of the decision will be published in due course (in practice this can take a considerable amount of time).

9. Interim measures

The duration of a competition investigation is typically measured in years rather than months. In cases where the alleged infringement is causing immediate damage, there is a risk that – by the time the Commission has investigated the facts, followed the procedure required by the rights of defence and reached its conclusions – the outcome is of theoretical interest only as the harm done by the anti-competitive conduct in the interim is irreparable. In cases where this concern exists, it is possible to request interim measures from the Commission, pending a final determination of the case. The Commission has broad discretion to impose interim measures on its own initiative, where there is a prima facie finding of an infringement of Article 101 or 102 TFEU, and the risk of serious and irreparable damage to competition requires urgent action. In practice, however, interim measures are not often requested and very rarely granted. This is partly because the requirements are fairly hard to meet (the requirement of irreparability in particular is a high standard) and partly because even this accelerated procedure is fairly slow.

Given the ability of the national courts and competition authorities to apply Articles 101 and 102 TFEU, it may be preferable to consider seeking an injunction from the national court. In the UK at least, this would typically be a much swifter process, although there are cost implications. In addition, the English courts, for example, will often require the party seeking the injunction to undertake to be responsible for any damages which may be payable to the addressee of the injunction in the event that no infringement is found (a "cross-undertaking in damages"), which can act as a significant disincentive from seeking injunctive relief.

10. Appeals

The European General Court has power to review all Commission decisions, and may quash them in whole or in part. The General Court may also increase, reduce or annul any penalty imposed. Appeals against infringement decisions can therefore challenge the whole decision or just the imposition (and calculation) of fines. The recipient of a decision must lodge its appeal within two months of notification of the decision or its publication in the Official Journal. It should be noted that third parties may have standing to appeal a decision, in addition to the addressees of the decision. For parties which are not recipients of the decision, time for lodging an appeal starts to run from the 15th day following publication in the EU Official Journal.

An appeal to the General Court is on a judicial review basis, verifying that the correct process and proceedings were adhered to, rather than a full appeal on the correctness of the assessment and conclusions. That said, EU judicial review is typically a deeper review than, for example, English judicial review. Grounds for appeal to the General Court include inter alia failure to respect the right to be heard, inadequacy of reasoning, procedural irregularities, error of law, error of fact and lack of competence.

A further right of appeal from the judgment of the General Court lies to the European Court of Justice, although this is limited to points of law.

Appeals are common, particularly where fines have been imposed. In the event that a decision is overturned, the Commission will very often reopen the case, address and correct the faulty reasoning or procedure which has been identified by the court, reissue its decision and reimpose fines.

11. Rights of complainants and other third parties

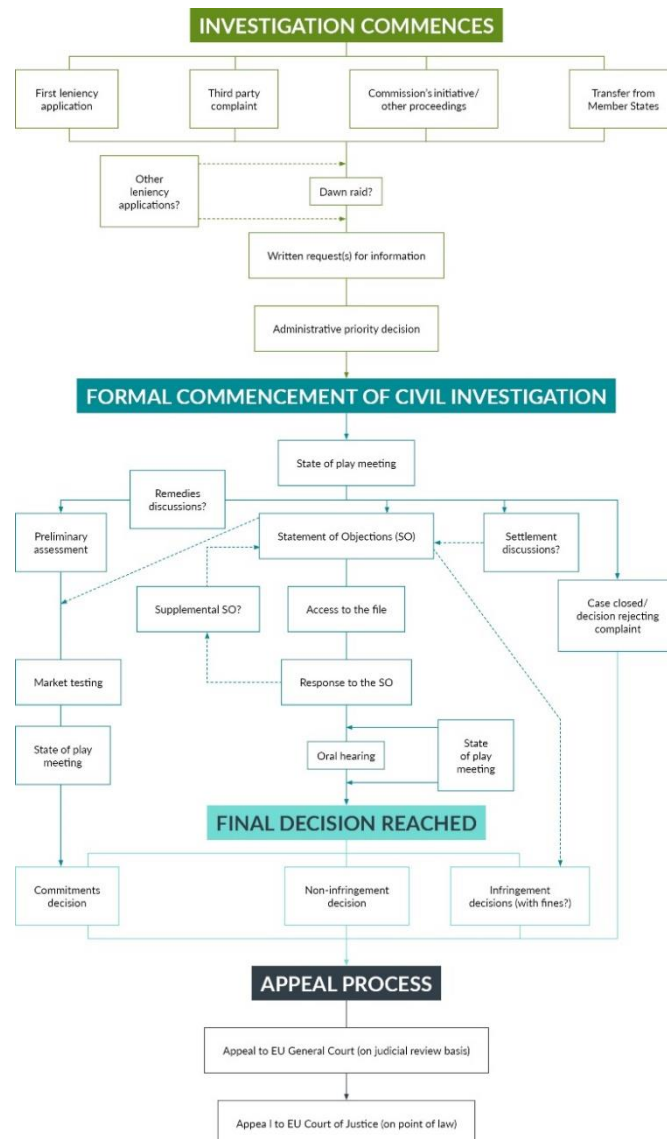
Third parties play an important role in competition investigations and in many cases are the driving force behind them. Businesses which submit a complaint to the Commission highlighting an alleged infringement enjoy the strongest third party rights in relation to a competition investigation. If the Commission is intending to reject the complaint, it must inform the complainant of its reasons, to which the complainant can respond. The complainant is entitled to see the documents on which the Commission's reasoning is based (in non-confidential form). If, having considered the complainant's response, the Commission still wishes to reject the complaint, it will issue a rejection decision. That

decision can be appealed to the General Court. As noted above, the Commission is not under any duty to investigate every case and can therefore reject a complaint for reasons based on its administrative priorities rather than the substantive merits of the case.

If the complaint is taken up, the complainant is entitled to receive a non-confidential copy of the statement of objections (or a summary of the nature and subject matter of the case where the condensed settlement procedure is being followed). It may also request to attend and express its views at the oral hearing of the main parties (although it has no right to do so). The complainant is not, however, entitled to have access to the file.

Third parties which are not formal complainants may also be involved in competition investigations. This may happen where the Commission believes that a third party is in possession of useful evidence. It is not unusual for informal information requests to be sent to third parties and, where the third party does not co-operate, the Commission can issue a formal decision requiring the production of information (enforceable with financial penalties). Similarly, the Commission has powers to conduct dawn raids at third party premises. Usually, however, the Commission will aim to involve third parties on a consensual basis. Third parties are free to submit their views in writing on a case and can also be invited by the Commission to participate in the oral hearings, although they will not usually be offered "state of play" meetings. Where remedies or commitments are being considered, these will invariably be "market tested", i.e. the proposed remedies or commitments will be disclosed to third parties for their comments.

12. Overview of the investigation process



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If you would like further information on this guide, please speak to your usual contact at Ashurst or one of our contacts listed below.



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