

March 3<sup>rd</sup> 2010

## AmCham EU calls for Improvements in Due Process in EU Competition Cases

The American Chamber of Commerce to the European Union (**AmCham EU**) appreciates the European Commission's (**Commission**) willingness to increase the transparency of its antitrust investigation procedures and to consult stakeholders on how those procedures could be improved further. Nevertheless, AmCham EU believes that, in a number of respects, the Commission could and should take bolder steps in order to address the widespread concerns about due process and fairness, in particular given the significant sanctions that the Commission now routinely imposes in Art. 101 and 102 TFEU cases.

The key due process concern is that, as the prosecution and decision-making functions at DG Competition are not sufficiently separated, effective checks and balances are needed to ensure that cases are efficiently prioritised, focused and if warranted, terminated at an early stage. This concern could be addressed by changes to DG Competition's internal organisation. AmCham EU urges the Commission to consider such further steps, which would show that the institution is not simply attempting to justify the status quo, but striving to continuously improve its procedures.

But even within the four corners of the relatively less ambitious Best Practices and Hearing Officers' Guidance, AmCham EU believes that significant improvements are needed in order to improve due process and the exercise of the rights of defence, but also to make administrative processes more efficient. Good administration, including the fair, impartial and timely handling of one's affairs, is a fundamental right (Art. 41 of the Charter) and not a matter of administrative discretion.

- **Earlier interaction in all types of cases.** "Early engagement" mechanisms (in particular the opening of proceedings and access to key submissions before the Statement of Objections) should be available as of right, also in cartel cases. State of play meetings should also be scheduled at a time when the parties' submissions can still have an impact on the Commission's thinking, e.g. before it decides to open proceedings and before it issues a Statement of Objections. An extension of the scope of the investigation following the opening of proceedings should be an exceptional occurrence.
- **Internal checks and balances.** The Best Practices should cover the Commission's internal checks and balances and describe which cases and at which stage of proceedings the Commission will organise, for example, an internal peer review. It would also improve the due process if defendants were given the possibility of proposing the organisation of an internal peer

review after the opening of proceedings but prior to the adoption of a Statement of Objections.

- **Avoiding appearance of prosecutorial bias.** The Best Practices should include a statement that DG Competition will seek, collect and record information that is exculpatory as well as incriminating, and that its aim is first to establish the facts and then to apply the law to those facts, rather than seek to pursue cases where it appears likely that an infringement will be found. As such, DG Competition should also carefully consider any requests from defendants to gather potentially exculpatory information from third parties where only the Commission is able to do so.
- **Legal professional privilege (LPP).** The Best Practices should recognize LPP also for communications with non-EU qualified lawyers, and barring exceptional circumstances also for communications with in-house counsel. The scope of LPP should not be limited to advice regarding pending EU administrative proceedings. Companies should be able to invoke LPP without fear that they will be sanctioned for alleged “delaying” tactics.
- **Improving the effectiveness of oral hearings.** The effectiveness of oral hearings could be improved in a number of ways, in particular by regularly giving pre-hearing access to other parties’ written replies, and by ensuring the regular presence of senior DG Competition management that can act as neutral fact finders, such as the Director of Directorate A.
- **Expanding the Hearing Officers’ role.** The Hearing Officers should be given an expanded mandate and more prominent role at all stages of the investigation. The Hearing Officers should have greater involvement in the investigatory phase, for instance in ensuring that information requests do not call for self-incriminating information, vetting privilege claims, and in ensuring proper handling of sector enquiries. The Hearing Officers’ role in commitment and settlement procedures should be clarified. Their independence should be strengthened by attaching them to another part of the Commission, for example the Secretariat General or the Legal Service, and they should be provided with dedicated staff. In addition, taking into account the importance of discussions concerning the role of the Hearing Officer, AmCham EU respectfully argues that DG Competition should not close its file on the matter until the Organisation for Economic Co-operation and Development (OECD) has also done so within its own framework.
- **Indicative time lines for the conclusion of investigations.** The right of every person to have their affairs handled “within a reasonable time” is explicitly recognized as part of the right to good administration under Article 41 (1) of the Charter of Fundamental Rights. It would thus be appropriate for the Best Practices to indicate the typical timeframe for any given type of investigation. It would not appear unreasonable to expect the Commission, as a general rule, to open proceedings within six months of commencing its initial assessment, to adopt an SO within six months of opening proceedings, and a decision within six months of the oral hearing.

- **Access to file process.** Given the burdens and delays of the access-to-file process as currently practiced, AmCham EU welcomes the Commission’s openness towards alternative mechanisms, such as the “data room” and “negotiated disclosure” rules. The Hearing Officers’ could play an active role in brokering compromises and thus facilitate greater use of these alternative access-to-file mechanisms, notably access to material deemed confidential by external counsel.
- **Use of economic evidence.** The Best Practices Guidelines on Economic Evidence should indicate when detailed quantitative data requests are actually necessary and proportionate in the first place, particularly during pre-notification in merger cases. More generally, effective case management could help reduce burdensome requests that are not clearly linked to any theories of harm seriously considered by the case team.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled \$1.8 trillion (€1.24 trillion) in 2008 and currently supports 4.8 million direct jobs in Europe.*

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# Explaining AmCham EU's position on Due Process in EU Competition Cases

INFORMATION PAPER

March 3<sup>rd</sup> 2010

This information paper contains a more detailed explanation of the recommendations made in the American Chamber of Commerce to the European Union's (**AmCham EU**) position statement on DG Competition's Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU (Best Practices in Antitrust Proceedings) and for the Submission of Economic Evidence and Data Collection (Best Practices for Economic Evidence), as well as the Hearing Officers' Guidance on procedures of the Hearing Officers (Hearing Officers' Guidance).

## INTRODUCTION

AmCham EU appreciates the European Commission's (**Commission**) willingness to increase the transparency of its procedures and to consult stakeholders on how those procedures could be improved further. AmCham EU welcomes the additional transparency resulting from the codification of the Commission's and Hearing Officers' procedures and practices, including recent improvements such as the systematic introduction of state-of-play meetings in antitrust cases.

Nevertheless, AmCham EU believes that in a number of respects, the Commission could and should take bolder steps in order to address the concerns about due process and fairness that are increasingly voiced by the users of the system - companies and the competition bar in particular, given the significance of sanctions that the Commission now routinely imposes in Art. 101 and 102 TFEU cases.

The key due process concern is that the prosecution and decision-making functions at DG Competition are not sufficiently separated, which may result in a perceived or real prosecutorial bias, even at the earliest stages of investigations. Effective checks and balances are needed to ensure that cases are efficiently prioritised, focused and if warranted, terminated at an early stage. This concern could be addressed by structural measures that do not require a change of the Treaty or Regulation 1/2003. For instance, the decision-making (as opposed to the fact-gathering) function within DG Competition could be allocated to a specific Directorate or to a quasi-independent administrative tribunal established within DG Competition, or to the Hearing Officers under a significantly strengthened mandate. Alternatively, DG Competition should institute effective case-file review procedures with the DG Competition hierarchy or peer review, in order to satisfy the hierarchy that the case warrants further investigation and the allocation of resources.

AmCham EU urges the Commission to consider such further steps, which would show that the institution is not simply attempting to justify the status quo, but striving to continuously improve its procedures. Such continuous reform is

particularly important given that the Commission is perceived as a role model within the European Competition Network and among the global enforcement community.

But even within the four corners of the relatively less ambitious Best Practices and Hearing Officers' Guidance, AmCham EU believes that significant improvements are needed in order to improve due process and the exercise of the rights of defence, but also to make administrative processes more efficient and thereby reducing the burden on the Commission and companies alike. Good administration, including the fair, impartial and timely handling of one's affairs, is a fundamental right (Art. 41 of the Charter) and not a matter of administrative discretion.

## PROPOSED CHANGES TO IMPROVE DUE PROCESS

The following changes to the current Best Practices and Hearing Officers' Guidance would in AmCham EU's view greatly contribute to improving due process:

**Earlier interaction in all types of cases.** AmCham EU welcomes the Commission's recognition that early engagement with potential defendants, for instance by opening proceedings prior to issuing a Statement of Objections (SO) making key submissions available prior to formal access to file, and instituting state of play (SOP) meetings, not only facilitates the effective exercise of rights of the defence, but also helps the Commission focus its investigations on the key cases and issues at an early stage. Nevertheless, the Best Practices leave room for improvement in this respect:

- It appears that a number of the mechanisms for early engagement, in particular the opening of proceedings before the Statement of Objections, access to key submissions, and SOP meetings, will not be available for cartel cases, which constitute the majority of the Commission's antitrust investigations. AmCham EU sees no justification for this limitation. Indeed, it is not unusual in such cases that a real debate on the merits takes place only once the SO is issued, typically after many years of investigation. It is not infrequent for the Commission to subsequently have to fundamentally revise or even drop its case at that late stage of the procedure.
- SOP meetings are currently foreseen at stages of the procedure when key procedural decisions have already been taken by the Commission: *after* the opening of proceedings, *after* the Commission has identified certain competition concerns, *after* the Statement of Objections. While SOP meetings are useful in those situations, they should (also) be scheduled at a time when the parties' submissions can still have an impact on the Commission's thinking, e.g. *before* it decides to open proceedings and *before* it issues a Statement of Objections.
- The Commission reserves the right to extend the scope and/or addressees of the investigation following the opening of proceedings,

also at the moment of issuing the SO. The Best Practices should state that this should be an exceptional occurrence. No undertaking should find itself in the position of receiving an SO “out of the blue” with only minimal time to prepare for its defence.

**Internal checks and balances.** The Best Practices should cover the Commission’s internal checks and balances and describe which cases and at which stage of proceedings the Commission will organise, for example, an internal peer review. It would also improve the due process if defendants were given the possibility of proposing the organisation of an internal peer review after the opening of proceedings but prior to the adoption of a Statement of Objections.

**Avoiding appearance of prosecutorial bias.** The Best Practices for Antitrust Proceedings at times read as if DG Competition views its role primarily as a prosecutorial body driven by the desire to find infringements, rather than as an administrative agency charged with comprehensively investigating both incriminating and exculpatory facts. Thus, even at the initial assessment stage, the Best Practices give priority to cases “*in which it appears likely that an infringement could be found*”<sup>1</sup>, which is at odds with the assertion that even a subsequent decision opening of proceedings does not prejudice in any way the existence of an infringement.<sup>2</sup> The Best Practices view requests for information as “necessary” if they might enable the Commission to “*verify the existence of the alleged infringement*”, but not the absence thereof.<sup>3</sup> To avoid misperceptions, the Best Practices should include a statement that DG Competition will seek, collect and record information that is exculpatory as well as incriminating, and that its aim is primarily to establish the facts and then apply the law to those facts. As such, DG Competition should also and that it will carefully consider any requests from defendants to gather potentially exculpatory information from third parties where only the Commission is able to do so.

**Legal professional privilege.** The Best Practices for Antitrust Proceedings limit the recognition of legal professional privilege (LPP) to situations in which (a) the lawyer in question is admitted in one of the 27 EU Member States; (b) does not have an employment relationship with his or her client; and (c) the communications in question are written communications that relate to an administrative proceeding likely to lead to a decision finding an infringement under Articles 101 or 102. These limitations are not appropriate for Best Practices:

- **Inclusion of communications with in-house counsel.** AmCham EU has consistently opposed the exclusion of communications between in-house lawyers and their clients from LPP because such exclusion undermines in-house counsels’ ability to ensure effective compliance. While the issue is currently pending before the Court of Justice in the *Akzo* case, this should not prevent the Commission from recognizing

<sup>1</sup> Best Practices for Antitrust Proceedings, at para. 12.

<sup>2</sup> Best Practices for Antitrust Proceedings, at para. 21.

<sup>3</sup> Best Practices for Antitrust Proceedings, at para. 31.

that as a “best practice”, it will normally respect LPP for in-house legal advice unless there are clear indications that LPP is being misused.

- **No limitations on communications with outside counsel.** By the same token, it is incompatible with the notion of “best practices” to limit LPP to written advice given by EU-qualified lawyers and in the narrow context of EU administrative proceedings. The reference to “written communications” is at best unclear; in the digital age, any form of recorded communications (including recordings of interviews or voice mails) should be protected. Not recognizing LPP for advice given by non-EU qualified lawyers is inconsistent with the increasingly extraterritorial reach of the Commission’s investigations and global convergence of the substantive competition rules, and runs contrary to principles of international comity.<sup>4</sup> The limitation to pending investigations discourages companies and their counsel from engaging in a full and frank discussion of potentially anticompetitive behaviour and its potential consequences, and thus undermines their efforts to ensure compliance within their organizations to prevent or bring to end infringements of Article 101 or 102 TFEU.
- **No threat of sanctions for invoking LLP.** AmCham EU believes that it is inappropriate for a Best Practices document to threaten companies with sanctions if they invoke LPP “as delaying” tactics. The scope of LPP, in particular at EU level, is subject to vigorous debate and its practical application frequently a matter on which reasonable people can disagree. Parties should not face the risk of severe sanctions for invoking their rights.

**Improving the effectiveness of oral hearings.** The effectiveness of oral hearings could be improved in a number of ways:

- **Pre-hearing access to other parties’ written responses to the SO.** In cases involving multiple parties, in particular cartel cases, the Commission only exceptionally grants access to non-confidential versions of other parties’ written replies.<sup>5</sup> This practice is not conducive to an effective preparation of the hearing, because parties can only guess what arguments other parties will make. It also does not allow undertakings effectively to defend their rights in cases in which their interests are often fundamentally opposed to those of co-defendants (e.g. in cartel cases with leniency applicants and non-cooperating parties). Giving all addressees of the SO access to (non-confidential versions of) the written responses of the other addressees would enable the parties to identify the issues that are key to their individual case. The Hearing Officer could then hold an organizational meeting with the parties’ representatives in advance of the hearing and on that basis

<sup>4</sup> For instance, US law generally recognizes that communications between European-qualified lawyers and their clients are privileged, and a consistent failure to accord the same treatment to communications between US lawyers and their clients in the context of international investigations may risk provoking US courts to limit European parties’ ability to invoke LPP, for example, in class action litigation.

<sup>5</sup> Best Practices for Antitrust Proceedings, at para. 89.

structure the hearing in a way that avoids duplication and leaves sufficient time for parties to make the points that are key to their own defence.

- **Ensuring continuous presence of senior DG Competition management that are perceived as neutral fact-finders.** AmCham EU welcomes the Commission’s commitment to ensure the “*continuous presence of senior management*” at hearings.<sup>6</sup> However, in practice, the Director attending the hearing has often been closely involved in the preparation of the case and typically speaks on behalf of the case team at the hearing, and is thus not perceived by parties as an unbiased fact-finder. While ideally the Deputy Director General, the Director General, or indeed the Commissioner would be present throughout the hearing, AmCham EU appreciates that this will not always be realistic. A practical solution would be to institutionalize the continuous presence of the Director of Directorate A, whose role in overseeing policy and the consistency of decisions makes him or her a natural candidate for taking an unbiased view of the factual and legal issues discussed at the hearing.

**Use of letter of facts.** AmCham EU welcomes the Best Practices’ commitment to giving at least some degree of access to the file where the Commission issues a letter of facts.<sup>7</sup> However, the Best Practices’ intention to limit such access in situations in which “*the Commission only intends to rely upon specific evidence that concerns only one or a limited number of parties and/or isolated issues*” is troubling. It is only in those situations that a letter of facts, rather than a supplementary SO, should be contemplated in the first place. In particular given that there is no right to an oral hearing following the issuance of a letter of facts, the Best Practices should state that letters of facts should be used only in truly exceptional circumstances.

**Expanding the Hearing Officers’ role.** The Hearing Officers have clearly played an important and constructive role in improving the procedure before DG Competition in recent years. AmCham EU believes that the Hearing Officers’ mandate should be widely interpreted or that they should be given an expanded mandate, in order to provide them with a more prominent role at all stages of investigations before DG Competition:

- **Structural independence.** To perform their role effectively, especially if their mandate is enlarged, the Hearing Officers need to have the necessary resources at their disposal. Currently the number of staff available to them is determined by the Commissioner for Competition. This obviously creates an unhealthy dependence on the very institution whose work the Hearing Officers’ are to scrutinize and take an independent view on. The Hearing Officers should be attached to a different part of the Commission, for example to the Secretariat General or the Legal Services, and should be provided with a dedicated staff.

<sup>6</sup> Best Practices for Antitrust Proceedings, at para. 94.  
<sup>7</sup> Best Practices for Antitrust Proceedings, at para. 98.

- **Greater involvement investigatory phase.** The Hearing Officers' Guidance emphasizes their limited role during the investigatory phase. However, there are numerous ways in which the investigative phase can be conducted that prejudice an undertaking's rights in a way that cannot be remedied after the SO is issued:
  - For instance, information requests may call for self-incriminating information, and may thus present the undertaking with the risk of either (i) risking sanctions for non-compliance, including a possible allegation of obstruction; or (ii) providing the self-incriminating information – information that once in the Commission's file will inevitably affect the conduct of the investigation, and deprive the undertaking of the possibility of voluntarily providing this information as “added value” if it elects to cooperate under the Leniency Notice.
  - Similar issues arise with disputes over potentially privileged information, especially given the threat in the Best Practices that invoking privilege as a “delaying tactic” may give rise to an obstruction allegation. The Hearing Officers' Mandate, Guidance, and DG Competition's Best Practices should be amended to give Hearing Officer a right to intervene in such situations, rather than simply a mediator function.
  - Given the Commission's far-reaching powers in the area of sector enquiries, it would also appear appropriate for the Hearing Officers to have a role in ensuring that DG Competition respects the principle of proportionality in exercising those powers, for example with respect to the scope and frequency of information requests and the use of inspections.
  - The Hearing Officers could also become involved where there is a dispute about whether the DG Competition is observing the Best Practices, for instance where the parties suspect that DG Competition is taking an unduly narrow view of what constitutes “key submissions” that should be made available to the parties at the latest after the opening of proceedings.
  - Indeed, the Hearing Officers could well have a role in chairing peer review panels. This will not only take pressure off individual panel members, but it will help to institutionalise the panels, which AmCham EU see as a critical factor in ensuring due process procedures, focused investigations, and greater efficiency and objectivity in case management.

**Clarification of Hearing Officers' role in commitment and settlement procedures.** Because the Hearing Officers' current Mandate pre-dates the introduction of commitment and settlement procedures, it does not confer any explicit powers on the Hearing Officer in this regard. Perhaps for this reason, the Hearing Officers' Guidance makes only a brief mention of commitment



procedures and does not contain any reference to settlement procedures at all, even though the Commission’s notice on settlement procedures provides that the “*parties may call upon the Hearing Officer at any time during the settlement procedure*”. Especially given the relative novelty of these procedures, and the risk that undertakings may feel pressured to abandon their rights of defence in order to mitigate the threat of very high fines or other intrusive remedies, the Hearing Officers should have clear-cut powers and remain closely involved in these discussions as a matter of course. This requires an amendment of their Mandate as well as the Hearing Officers’ Guidance and DG Competition’s Best Practices. In addition, taking into account the importance of discussions concerning the role of the Hearing Officer, AmCham EU respectfully argues that DG Competition should not close its file on the matter until the Organisation for Economic Co-operation and Development (OECD) has also done so within its own framework.

## PROCEDURAL CHANGES TO IMPROVE ADMINISTRATIVE EFFICIENCY

**Indicative time lines for the conclusion of investigations.** While the Best Practices indicate their expectations in terms of deadlines that undertakings should normally meet, they are largely silent about DG Competition’s own commitment to conclude investigations within a reasonable time frame. This is not satisfactory:

- The right of every person to have his or her affairs handled “*within a reasonable time*” is explicitly recognized as part of the right to good administration under Article 41 (1) of the Charter of Fundamental Rights. The need for resolution within a reasonable timeframe is especially important for Article 101 or 102 investigations that raise the threat of serious fines and other remedies that could severely affect companies’ business. Having such investigations pending over the period of several years creates substantial uncertainty, management distraction and process costs for the undertakings involved. This is notably critical as investigations do not necessarily result in a finding or decision. It would thus be appropriate for the Best Practices to set out a process whereby DG Competition (i) reviews, at the end of each stage, whether an investigation should be continued and (ii) if so, what the indicative timeframe might be for the next stage. What cannot occur, is for investigations to continue indefinitely or over a number of years, resulting in no finding.
- For example, it would not appear unreasonable to expect the Commission, as a general rule, to open proceedings within six months of commencing its initial assessment, to adopt an SO within six months of opening proceedings, and a decision within six months of the oral hearing. This would result in an overall time frame of about 22-24 months, which is still three times as long as a Phase II merger case. The Commission has shown in the merger context that it is able to handle even very complex matters within that time frame. Obviously, there will be cases where the investigation requires more time, but the

Commission could be expected to explain the need for such additional time to the parties.

- At a bare minimum, the Best Practices should provide that at the SOP meeting following the opening of proceedings and the reply to the SO or the hearing, DG Competition will give a clear indication of the time table for the conclusion of the investigation.

**Access to file process.** As currently practiced, the access-to-file process, while an essential pre-requisite for the exercise of the rights of defence, is also a major source of administrative burden and delay that is neither in DG Competition’s nor in the parties’ interest. AmCham EU welcomes the Commission’s openness towards alternative mechanisms, such as the “data room” and “negotiated disclosure” rules. More widespread use of latter would greatly facilitate access-to file in cartel cases, where there is typically a limited amount of information on the Commission’s file that is truly commercially sensitive. For all documents other than those designated as highly sensitive, restricting the circle of persons at each undertaking that can have access, coupled with strict and individualized non-disclosure obligations would seem much more efficient than the current process of overbroad redactions. While it may not be possible to require any party to agree to such an approach, the Hearing Officers’ using their authority and experience to actively broker compromises could greatly facilitate the use of these alternative access-to-file mechanisms.

**Use of economic evidence.** AmCham EU appreciates the recognition in the Best Practices on Economic Evidence that detailed requests for quantitative data impose substantial costs on undertakings. The Best Practices contain helpful guidance as to how lessen the burden, for example by providing for the discussion of draft requests, and the parties submitting samples. However, the Best Practices are currently lacking guidance with respect to when detailed quantitative data requests are necessary and proportionate in the first place. Not infrequently, the desire for data does not seem to be informed by a clear working hypothesis as to what that data could prove or disprove, but rather by the fact that it is available and may allow insights of some kind. It would also be helpful for the Commission to indicate under what circumstances, if at all, extensive data requests have a place in pre-notification discussions. In practice, there is sometimes a disconnect between the case team’s investigation and chief economist team’s lines of enquiry, which could be minimized by effective case management.

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