

RESPONSE TO DG COMP CONSULTATION:**BEST PRACTICES ON THE CONDUCT OF ANTITRUST PROCEEDINGS
AND GUIDANCE ON PROCEDURES OF THE HEARING OFFICERS****1. INTRODUCTION**

- 1.1 Baker & McKenzie is grateful for the opportunity to participate in the Commission's consultation on best practice in respect of antitrust investigations and the procedures of the Hearing Officers.
- 1.2 We support the Commission's desire to introduce greater transparency and predictability into its antitrust procedures. Guaranteeing a fair, transparent and predictable process is obviously key to the rights of defence and will also enhance the efficiency of the Commission's investigations.
- 1.3 We also commend the Commission for having decided to consult widely on this important topic. The consultation comes at a time when the international competition community - for example through the OECD - is discussing how national antitrust agencies can improve their systems. The procedures adopted by the Commission, as one of the world's leading antitrust agencies, are of paramount importance since they will no doubt influence procedures adopted by other antitrust agencies.
- 1.4 The Commission's Best Practices paper includes a number of genuine improvements - including the offering of State of Play meetings and the disclosure of key submissions. These innovations will genuinely assist companies involved in enforcement proceedings and will no doubt begin to streamline investigations.
- 1.5 Notwithstanding these improvements, it is our view that the Commission should now move to extend the innovation to all relevant procedures and also implement more fundamental improvements to its procedural framework. The ECHR is likely to be ratified by the EU in the short term and there is, we believe, a genuine question as to whether the current system would be regarded as compatible with the ECHR.
- 1.6 **Section 2** of this response contains our specific comments on the consultation on Best Practices on Antitrust Procedures. **Section 3** sets out our views on the draft Guidance on procedures of the Hearing Officers. **Section 4** sets our concerns in relation to the compatibility of the Commission's current procedural framework with the ECHR, and suggests measures for reform.

2. LISBON TREATY: A WINDOW OF OPPORTUNITY

- 2.1 The Lisbon Treaty provides for the EU to accede to the ECHR and this is expected to occur in the short term. It is inevitable that the Commission's antitrust procedures will be scrutinised by the European Court of Human Rights following a reference from the EU Courts.

- 2.2 The legal debate regarding the lack of separation of powers within the Commission and the Article 6(1) entitlement to a trial before an independent tribunal is well documented.¹
- 2.3 In broad terms, proponents of the current system argue, on the basis of a tax surcharge case (*Jussila v Finland*²) that antitrust enforcement belongs to a 'non-hardcore' area of the criminal law, meaning that there is no need for a formal separation of the investigative and decision-making powers within the Commission as long as there is the possibility of a full appeal (which is argued to be available in the EU Courts).
- 2.4 However, it is our view that, quite apart from the issue of whether the intensity of the review conducted by the EU Courts is sufficient to amount to a "full appeal", there are strong grounds to suggest that the Commission's concentration of investigative and decision-making powers would not withstand scrutiny under the ECHR.
- 2.5 In particular, it is questionable whether the *Jussila* case is conclusive on the issue of whether antitrust enforcement falls with the lesser category of non-hardcore criminal law. In particular, the *Jussila* case involved a tax issue and not an antitrust violation which, in contrast, typically results in severe financial and reputational consequences.
- 2.6 The June 2009 ruling of the European Court of Human Rights, *Dubus SA v France*,³ concerning disciplinary proceedings brought by the French Banking Commission is instructive. The ECtHR ruled that the proceedings violated Article 6(1), pointing to the lack of impartiality and independence in the proceedings, principally the absence of a distinction between the Banking Commission's functions of prosecution, investigation and adjudication.
- 2.7 This debate also comes at a time when the fining practice of antitrust agencies is coming under increasingly critical review.⁴
- 2.8 Overall, it seems to us that the current focus on due process provides a segueway for the Commission to adapt its procedures to ensure compliance with the ECHR. We suggest that this is achieved by separating out the investigative and decision-making roles within the Commission. There would be no need for major institutional changes. A central issue for parties is the lack of an adversarial hearing - i.e. an opportunity to argue the case against the case team in front of a neutral party responsible for the decision. Major improvements can therefore be made without major institutional changes.
- 2.9 For example, the case team could remain as the 'investigator-prosecutor' but would need to convince the independent party responsible for the decision that there was a solid case. This might be achieved by enhancing the role of the Oral Hearing and Hearing Officer.

¹ These issues were recognised by the OECD in its 2005 peer-review report which considered that some explicit separation between the investigative and decision-making functions within the Commission may be inevitable to secure judicial confidence in the quality of the Commission's decisions. See also *Due process in EC competition cases: a distinguished institution with flawed procedures*, Ian S. Forrester, *European Law Review*, 2009; *The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights*, Wouter Wils *World Competition*, Volume 33 No.1, March 2010.

² *Jussila v Finland*, Judgment of the European Court of Human Rights (Grand Chamber) of 23 November 2006, Application no. 73053/01.

³ Application no.5242/04

⁴ See for example the judgment of the Paris Court of Appeal (19 January 2010) reducing significantly the fines imposed on a number of steel companies (www.autoritedelaconcurrence.fr/doc/ca08d32_siderurgie.pdf). In Germany, press reports from February 2010 suggest that a ruling of the higher regional court in Dusseldorf will require the German competition authority to revisit its approach to cartel fines <http://www.dw-world.de/dw/article/0,,5279083,00.html>.

- 2.10 First, the Oral Hearing could be transformed into a true debate by giving the parties under investigation the opportunity to test the evidence relied upon by the case team; and cross-examine each other and witnesses. Senior Commission officials should also be available to discuss the case.
- 2.11 This adversarial hearing could take place before the Hearing Officer(s) whose role could be enlarged to determine the facts (rather than simply focus on procedural issues) and report in writing on whether the evidence proves the allegations made. (Indeed, we note that the Hearing Officer already prepares a report regarding the substance of the case.) If the Hearing Officer's report determining the facts were then made available to the parties its conclusions could not readily be ignored.
- 2.12 These non-radical changes would go some way to separating out the decision-shaping function from the case-team's fact-finding role improving the Commission's process and the credibility of its final decision.

3. COMMENTS ON BEST PRACTICES ON THE CONDUCT OF ANTITRUST PROCEEDINGS

Scope and purpose

Treatment of Cartel Cases

- 3.1 Paragraph 3 indicates that "the specificities of the conduct of cartel proceedings require a number of special provisions, in order, notably, not to interfere with possible leniency applications".
- 3.2 This appears to imply that the procedural improvements being made to the Investigation Phase will not apply to cartel cases. For example, State of Play meetings will not be available (though paragraph 60 says some meetings might be arranged, "where appropriate") and Triangular meetings, which are held after the opening of proceedings and before the issue of the Statement of Objectors (SO) (see paragraph 63) would also not be available in cartel cases. Cartel defendants will not be entitled to review key submissions (paragraph 68).
- 3.3 The Commission's consultation on best practices is clearly intended to be the EU reaction to the discussions ongoing in various fora, not least the OECD Competition Committee, regarding standards of procedural fairness in competition proceedings. However, the approach in the BP document will deny cartel cases the opportunities for openness and engagement which the Commission is seeking to introduce. Cartel cases are, of course, not least among those where the defendant is most in need of a fair procedure. The general discussion of procedural fairness is intended to cover all civil competition proceedings and there is no reason why civil cartel cases need to be excepted from the process, although of course in some jurisdictions cartels are prosecuted under criminal law, where generally higher standards for protection of the defendant's rights apply.
- 3.4 The need to safeguard the role of leniency in EU cartel practice is clear. However, in our view, the Commission's approach risks denying procedural protections unnecessarily broadly to cartel cases. Cartels may require a longer initial phase, to ensure maximum input under leniency, but that is not a reason for the Commission to proceed straight to its SO and preliminary conclusions without first opening proceedings and allowing defendant(s) to confront the initial concerns and dialogue with the investigators.
- 3.5 Paragraph 5 states that the specificity of an individual case may require an adaptation of the Best Practices. This gives the Commission a broad discretion not to apply the Best Practices. We recommend that paragraph 5 includes an explicit commitment that departures will only be

made where it is in the interests of procedural certainty, transparency or fairness and where the Commission provides reasons for such a departure.

The Investigative Phase

- 3.6 Paragraph 12 indicates that the Commission will focus on cases where, *inter alia*, "it appears likely that an infringement could be found". This wording, which presupposes an infringement at a very early stage, reflects DGCOMP's unfortunate tendency to prejudge cases. The Commission will, of course, have competing priorities, meaning that there is a legitimate need to consider cases which might, if soundly-based, result in the greatest impact on consumer welfare etc but this is a very different to a preliminary assessment of whether the company has violated the antitrust rules (which is of course contrary to the presumption of innocence).
- 3.7 Paragraph 17 states that, following the opening of proceedings, the Commission will endeavour to deal with the case in a timely manner. Given how fundamental the length of proceedings is to due process, we recommend that the Commission should set out an indicative timetable for the remainder of the investigation, including intended timings for key milestones within the procedure (e.g. access to file, issue of SO, State of Play meetings, the Oral Hearing etc). Paragraph 57 explains subsequently that, during the State of Play meeting after opening of proceedings, the Commission may indicate a tentative timing for the case. However, in our view, that the establishment of an indicative timetable should become part of all antitrust cases before the Commission at an earlier stage. Clearly, such a timetable should not abbreviate the portion of the procedural timetable, often very short, allocated to the defence to prepare and present their case in response to the allegations and for the investigation team to evaluate the defence.
- 3.8 Paragraph 19 states that the Commission may make public the opening of proceedings provided this does not harm the investigation. Paragraph 20 indicates that the parties will be informed of this in advance. In our view, the Commission should not publish details at such an early stage given the risk of irreparable harm to the companies involved. Failing this, we suggest that the parties are given an opportunity to comment on the possibility of publication under paragraph 19 to ensure that the legitimate interests of the investigated parties are also taken into account by the Commission.
- 3.9 Paragraphs 31 and 32 deal with requests for information. The Best Practices should state that the Commission will always take account of the burden which information requests impose on business and minimize this consistent with their objectives. As such, the paper should go further in paragraph 32 by indicating that the Commission will always discuss quantitative data requests in advance with the parties. The current draft of the best practices paper only acknowledges that such discussions are "particularly useful".
- 3.10 Paragraph 33 states that the Commission may return (to the parties) information which it adjudges to be "irrelevant". In our view, the Commission should only be able to return information it regards as irrelevant if the party providing the data, on receipt of the Commission's reasoned comments on it, agrees that it is not relevant. This exchange should be included on the file.
- 3.11 Paragraphs 38 et seq. deal with meetings and other contacts with the parties and third parties. However, these provisions do not fully address the comments of the Ombudsman in the Intel case, which indicated that the Commission should ensure that a proper internal note, to be placed on the file, is made of the content of all meetings and telephone calls with third parties where information is gathered or where important procedural issues are discussed.⁵ The

⁵ <http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark#h18>

Commission itself should make a full (not a 'brief') note of meetings, which should mention the attendees, not simply the undertakings present as well as all of the information communicated, and the Commission should not merely rely of the attendees to produce records, although those should also be placed on the file. These principles also apply to Triangular meetings (since paragraphs 61-63 do not refer to a record being made).

- 3.12 Paragraph 43 deals with formal statements. We suggest that as a general rule these should be conducted at face-to-face meetings with interviews by telephone or electronic link being the exception where a meeting cannot be arranged. This will protect the integrity of the Commission's information gathering, since there is no way of knowing what is happening to a person at the other end of a telephone line or video link, and allow the investigators to evaluate a witness.
- 3.13 It is most disturbing that paragraph 52 deals with unfounded claims to legal professional privilege. The Commission appears to be singling out LPP for special treatment by stating that it may seek to increase the fine (for the underlying substantive infringement) when a defendant is seeking, through legal means, to reopen the debate and ask the Courts for the law to be developed. Indeed, we note that this threat is not made in relation to information requests and obstruction/incomplete or incorrect information generally - see section 2.5, footnote 28. The general principles of law common to the laws of the Member States on which LPP is based may obviously evolve over time and a party seeking to test the possible development of the law in this area is legally entitled to do so and should not face a threat of increased fines if they do.
- 3.14 Paragraph 57(2) refers to the possibility of a State of Play meeting at an advanced stage of the investigation. An opportunity to meet with the Commission prior to the opening of proceedings is vital and should as a matter of best practice always be given. Open and frank discussions will give the parties an opportunity to address any possible misinterpretations or inaccuracies with respect to the most important facts and legal aspects at the core of the Commission's case as well as provide the case team with an opportunity to confirm and cross-check its arguments before proceeding with them. This meeting should therefore be held with the officials responsible for deciding whether or not to proceed to issue a Statement of Objections.
- 3.15 Paragraph 61 refers to the possibility of Triangular meetings. The Commission should as a general rule, and not merely 'exceptionally', suggest a Triangular meeting where two or more opposing views have been put forward as to key data or evidence, whether the meetings will involve complainant(s) and defendant(s) or two or more defendants. The Hearing Officer should also be present.
- 3.16 Paragraphs 65 - 67 cover the review of key submissions. The right to review key submissions should include all complaints, not just formal ones. As a matter of course, the defendant should have the right to comment on other key submissions, not least economic reports submitted by others as well as documents found in inspections and other evidence.
- 3.17 Paragraph 77 relates to fines, explaining that the SO will, if fines are contemplated, refer to the Fines Guidelines. In our view it should go much further and set out the fine intended or at least the detailed reasoning and methodology as to how it will be calculated. At present, there is a lack of transparency regarding fines to be imposed on the parties. Due process would be considerably improved - and appeals avoided - if parties subject to the investigation had an opportunity to comment on the proposed fine (and methodology).
- 3.18 Paragraphs 83-85 deal with confidential information. However, these paragraphs do not recognise that the defendant(s)' right of access to the file and evidence is more critical than the burden on other parties (paragraph 83 line 2). We make two specific points in this regard:

- The alternative procedures should be at the genuine, unpressurised agreement of the defendant. The suggestion in paragraph 85 (line 12) that there may be a situation where a party could 'unduly refuse' to waive its right to access to the file in favour of a data room process is an unacceptable attempt to limit the rights of defence and should be deleted.
 - The data room process should not 'normally' be limited to only the external counsel or economic advisors of the party. A defendant should have the right to have its own representatives (not only its legal advisers) review information in the data room, recognising that the personnel concerned may need to be limited but may at least include in-house counsel and appropriate key individuals responsible internally for handling the case.
- 3.19 Paragraph 89 indicates that the Commission may "in the interests of fair and effective enforcement" provide access to a non-confidential versions of other parties' responses to the SO (or excerpts of it). In our view, the defendant should have the right to see non-confidential versions of other defendants' responses to the SO generally and not merely excerpts.
- 3.20 Paragraphs 92-94 cover the Oral Hearing. In our view, the following amendments should be made:
- Paragraph 92 should indicate that the Hearing will held sufficiently after the submission of all Responses to the SO and the provision of them to the other defendants to enable Commission officials, including all who will attend the Hearing, and the other defendants to have fully considered the defences raised and evidence submitted in support of them.
 - Paragraph 93 states that the purpose of the Hearing is to allow the parties to develop orally their arguments; supplement these arguments and to inform the Commission of other matters that might be relevant. In our view, this is too narrow. Paragraph 93 should be expanded so that the Hearing is also an opportunity for the defendant to test the Commission's evidence, particularly statements relied upon and witnesses.
 - Paragraph 94 deals with who will be present from the Commission. In our view, a Director is typically too close to the investigation team. Therefore, at least a Deputy DG should attend. The Legal Service should always be present. Further , the Economist's team should be also be represented - given the Commission's commitment to an economic approach to analysis and enforcement.
- 3.21 Paragraph 98 deals with access to the file following a supplementary SO. It seems to us that this paragraph takes a very narrow approach to access to the file after the SO. In the event that the Commission gathers evidence after issuing the SO, all of this - whether inculpatory or exculpatory - should be available to the defendant, not just the inculpatory elements on which the Commission intends to rely (as the current wording provides).
- 3.22 Turning to the Article 9 commitments procedure, paragraph 108 explains that the Preliminary Assessment will "serve as a basis for the parties to formulate appropriate commitments addressing the competition concerns expressed by the Commission...". It is necessary for the Commission to provide formal guidance on the circumstances in which it considers commitments to be "appropriate". Indeed, footnote 56 to para. 101 should be modified to refer to the outcome of the CFI judgment in the Alrosa case on appeal. We suggest that the Best Practices document uses the wording from the Commission's Staff Working Paper on the Report for the Functioning of Regulation 1/2003 - i.e. "according to the principle of proportionality and the right to be heard, commitments made binding on the basis of Article 9

must be strictly aligned on remedies that the Commission could have imposed in a proceedings under Article 7, thereby requesting a parallel analysis independent of the commitments offered by the parties concerned". This wording should be adopted even if only provisional until the Court of Justice rules on this issue.

- 3.23 Paragraph 117 explains that after the receipt of replies to the market test, a State of Play meeting will be organized and the parties will be informed of the substance and weight of the replies. It is key to ensure that the responses to the market test are assessed carefully by the Commission. The number of, say, adverse replies relative to the number of positive replies should not distract the Commission from a careful review of the substance of those adverse replies. The Best Practices should therefore state explicitly that the parties providing the commitments will be informed in advance of the State of Play meeting of the content of replies to the market test so that the State of Play meeting can be used to enable the Commission to assess, with the assistance of the parties, the appropriate weight to be attached to those replies. The defendant should have access to non-confidential versions of the replies to the market testing.

4. GUIDANCE ON HEARING OFFICER PROCEDURES

- 4.1 Paragraph 7 explains that, while the Hearing Officers oversee procedural matters, have decision-making powers, and adjudicate disputes, they may also make observations on substantive issues to the Competition Commissioner. In our view, it would be appropriate to extend the scope of the current Oral Hearing procedure to a full hearing in which the parties to the investigation have the opportunity to cross-examine each other and the Commission's evidence.
- 4.2 Paragraph 10 refers to the limited role played by the Hearing Officer during the investigative phase. However, there are clearly issues that arise during the investigative period (such as the scope of requests for information and reply deadlines, legally privileged documents, degrees of redaction of non-confidential documents) that would, in the event of a dispute between the Commission and any parties, benefit from an independent review and decision by the Hearing Officer, if such powers were explicitly added to its Mandate.
- 4.3 Paragraph 27 explains that the "deadlines" for responding to the Statement of Objections will not normally start running until access to the main documents in the Commission's file has been granted. To avoid inevitable debates over the highly subjective question of what constitutes the "main" or "important" documents, we suggest that the time limit only begins to run once full access to the file has been granted. This would also address the problems which can result where access to the file is granted on a more fragmented basis - e.g. in a 'drip by drip' fashion.
- 4.4 Paragraph 35 states that the Hearing Officer will decide on a request for "third party status" after having requested comments from the Commission. It seems to us that, in the interests of fairness, the defendant should also be able to comment on requests from third parties to be admitted to the procedure.
- 4.5 Paragraph 45 states that the Hearing Officer will determine the timing of the Hearing which will normally not take place before the written exchange of views has been concluded between the parties and all parties have had sufficient time to review the comments. In order for the Hearing to serve the purpose of due process, the Hearing should only take place after a sufficient period of time has elapsed after the submission of all responses to the SO - so that all parties including the Commission have had an opportunity to consider fully the nature of representations made and evidence put forward.
- 4.6 Paragraph 63 explains that the Interim Report prepared by the Hearing Officer is an internal Commission document which is not accessible to the parties to the proceedings. We query

whether this is consistent with the Hearing Officer's role as “independent guardian of the rights of defence” (as noted in paragraph 1 of the Guidance).

BAKER & McKENZIE

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