

European Commission
Directorate-General for Competition
Antitrust Registry
Ref.: HT. 2285
1049 Bruxelles/Brussel
BELGIQUE/BELGIË

Madrid, 19th February, 2010.

Dear Sirs,

Regarding DG COMP public consultation on “*Best practices in antitrust proceedings and submission of economic evidence; Hearing Officers' guidance paper*”, I would like to submit the following, in relation to the documents:

- “**Best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases**” (henceforth referred to as the “submissions document”) and
- “**Best practices on the conduct of proceedings concerning Articles 101 and 102 TFEU**” (henceforth referred to as the “proceedings document”).

1. Cases concerning the application of articles 101 and 102 TFEU are always initiated by the Commission’s services, i.e., it is the Commission who, in first instance, assesses and decides whether articles 101 and 102 should be applied to the analysed case. In the proceedings document it is explained that there is an initial assessment after the case has originated either as a consequence of a complaint or by an ex officio initiative.

2. If articles 101 and 102 are to be applied, a **previous assessment** on the possibility of an undertaking following “*practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*” has been performed. In other words, prior to the submission of economic evidence and data collection concerning the application of articles 101 and 102 TFEU, a suspicion has been raised that certain undertaking might be subject to the mentioned articles.

3. The absence of practices described in the previous paragraph is impossible to demonstrate from a pure logical standpoint. As it is shown in the academic literature and sometimes referred to with an example that is, as well, popular, it is impossible to demonstrate the non existence of leprechauns. The burden of proof must fall on the party trying to demonstrate the existence of that which is the object of discussion, be it leprechauns or certain market practices.

4. It is therefore not praise worthy to accept that a certain undertaking will have to submit evidence or data to show the non existence of certain practices. It could be argued that these evidences or data are related to the demonstration that those practices, deemed to fall under circumstances expressed in article 101.1, may be waived off that application where the provisions set in article 101.3 are met.

5. **It would be unfair to ask such undertaking to submit data or evidence following the best practices explained in the submissions document under consultation to show the relevance of article 101.3 if, at the very beginning, the party that has to prove that article 101.1 is pertinent to the case, is not subject to the same standard.** Therefore, it should be established that the party raising the issue of application of articles 101 and 102 must follow the same best practices and adhere to the procedures and rules defined in the document, be it the complainant an undertaking, or market participant, or the European Commission services acting autonomously ex officio.

6. Considering that it is so difficult to provide economic evidence and data in cases concerning 101 and 102 TFEU, it should be very valuable and educative if the EC services, leading by example, accepted to stick to the same rules in submitting evidences and data concerning the cases in which a suspicion is expressed that a certain practice might fall under article 101.1 and prior to requesting any data, evidence or information from the parties involved (whether article 101.3 is relevant or not). The departing case is always the assumption that a bad practice has been followed; that statement should be backed by data and evidences under the same rules and standards as those contained in the documents under consultation.

7. In other words, **prior to requesting the undertakings a certain procedure and the fulfilment of certain standards, those procedures and standards should be respected by the same EC services that propose the documents explaining them.** It should not be the case that an undertaking must follow a best practice when in the previous step (and necessarily there is a previous step, as has been shown) the other party has not followed it, being, at least, in a better position to be respectful to the best practice.

8. In line with the comments made above, the proceedings document should be amended in its **Section 2.2 – Initial assessment and case allocation** to reflect that the decision by DG COMP to open a proceeding should be based on an initial assessment where the submissions document provisions have been followed by DG COMP. Annex 1 of the document should include in the Initial Assessment box another line stating “ – Best practices for the submission of economic evidence and data collection to be followed”.

9. It would be very helpful if instead of setting new rules and standards, even under the disguise of “best practices”, with the only evident result of being costly, the European Commission services could lead by example and provide, in advance, instances of those practices applied to real cases, in the same way as they would demand from market participants. If this was the case, a more fruitful relationship would be attainable and competition cases would lose some thorns that make them so entangled and intricate.

Yours sincerely,

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