



BUSINESSEUROPE  
Representative Register  
ID number: 3978240953-79  
2 March 2010

## **IMPROVING ANTITRUST PROCEEDINGS**

### **BUSINESSEUROPE contribution to the European Commission consultation for improving transparency and predictability of antitrust proceedings**

#### **EXECUTIVE SUMMARY**

- **BUSINESSEUROPE** is very supportive of further transparency and predictability antitrust procedures. The assurance of procedural fairness contributes to vigorous and credible enforcement of antitrust law.
- EU antitrust procedures do not meet the standards of the the European Convention on Human Rights. There is a compelling need for a fundamental reform, which should be urgently addressed by the Commission.
- Procedures and safeguards should be introduced within the current EU setting to improve fairness and help ensuring sound administration and decision-making. These principles should also be applied to sector inquiries, leniency applications and settlement proceedings, currently not addressed by the best practices.
- The Commission's enforcement process lacks a proper separation of investigative and decision-making functions. In this paper, **BUSINESSEUROPE** suggests concrete ways in which the separation between these functions can be improved. Such measures include a major reform of the hearing officer's mission and the separation of the departments in charge of investigating the case and of drafting the decision.
- Due process and sanctions are interconnected: the general raise in the level of fines should meet with an increase in procedural rights. The Commission enjoys extensive powers in setting fines: more predictability and clarity with regard to sanctions would not only be fair to companies, but would also increase deterrence.
- Companies subject to investigations should be granted the possibility to prove their compliance efforts and have this recognised and valued by the Commission. This would encourage businesses to implement effective compliance programmes, helping to successfully prevent illegal actions from arising in the first place.
- There is room for improvement within the procedural practices of all competition authorities in the EU and worldwide. It is important that the Commission engages in a dialogue on due process with Member States' competition authorities and with other agencies worldwide to ensure that best practices are adopted internationally. Recommended best practices should be developed within the OECD and the ICN



2 March 2010

## **IMPROVING ANTITRUST PROCEEDINGS**

### **BUSINESSEUROPE contribution to the European Commission consultation for improving transparency and predictability of antitrust proceedings**

#### INTRODUCTION

BUSINESSEUROPE is very supportive of the Commission's initiative to adopt documents explaining how antitrust procedures work in practice, with the aim of further enhancing the transparency and the predictability of antitrust proceedings.

The documents consist of best practices for antitrust proceedings, best practices for the submission of economic evidence, and guidance on the role of the hearing officers in the context of antitrust proceedings.

We are pleased to have the opportunity to provide our comments and suggestions on the Commission's documents, and particularly the best practices on the conduct of antitrust proceedings ("best practices").

#### GENERAL COMMENTS

The assurance of procedural fairness not only helps to protect the businesses involved but also contributes to vigorous and credible enforcement of antitrust law. The relevant benchmark for procedural fairness is the concept of a "fair trial" enshrined in Article 6 of the European Convention on Human Rights ("ECHR") as interpreted by the European Court of Human Rights. The right to a fair trial is also enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union, which has recently become part of primary EU law, with the same legal value as the Treaties.

BUSINESSEUROPE finds the three documents under consultation useful in that they provide an overview of the main procedural aspects of EU antitrust investigations. However, the procedures described therein still fall short of a "fair trial" under Article 6. In fact, it is now evident that Commission antitrust procedures do not meet the standards of the ECHR. That is a major dent in the whole enforcement system. There is a compelling need for a fundamental reform, and the Commission should start addressing this broader issue.

Another, major deficiency of the documents is that they do not cover leniency applications nor the settlement procedure – which are probably the two most important and most complex features of EU competition law investigations. We also believe that sector inquiries should be covered by this exercise.

As specified in the documents themselves, their purpose is to provide guidance and to increase the understanding of the investigation process. We believe that this is a very important objective. BUSINESSEUROPE supports initiatives aimed at creating a more transparent, accessible and user-friendly regulatory framework for businesses. However,



we suggest that the three documents contain a clear and more explicit reference to the binding value and the level of commitment that their adoption implies for the Commission.

We would like to emphasize the importance for the Commission to engage at the same time in an international dialogue on procedural fairness with other agencies to ensure that best practices are adopted internationally. There is room for improvement within the procedural practices of all competition authorities. Ultimately recommended best practices should be developed within fora such as the OECD and the ICN. As an example, a project to improve the effectiveness of competition agencies around the world was recently carried out by the ICN. We suggest the Commission that this exercise in the context of ICN is repeated for due process matters.

The same logic applies to European National Competition Authorities (NCAs). Antitrust proceedings in the EU should be conducted by the different authorities applying the same principles and the same level of respect for due process. We encourage the Commission to explore the opportunity to invite NCAs to adopt similar documents. This is particularly important for businesses in order to ensure a transparent and accessible regulatory framework for the enforcement of competition law across the EU.

#### SPECIFIC COMMENTS

Notwithstanding the standards set up by Article 6 ECHR, and particularly the requirement of an independent and impartial tribunal, the administrative setting of the European Commission's enforcement process is characterised by a combination of investigative and decision-making functions. Its inherent weakness is the lack of a proper separation of these powers. Furthermore, the final decision on the imposition of a sanction is taken by the College of Commissioners, which is a purely political body and is only associated with a case at the very final stage.

Since a fundamental, structural reform is likely to require amendments of the Treaty, it cannot take place in the short term. Therefore, BUSINESSEUROPE is of the strong view that procedures and safeguards should be introduced within the current administrative setting, so as to improve fairness and due process and help ensuring sound administration and decision-making. In particular, it is essential to find other ways to achieve an increased separation between the different phases and responsibilities in the procedure. In this paper, BUSINESSEUROPE suggests concrete ways in which the separation between these functions can be improved.

BUSINESSEUROPE does not believe that a reform of the Treaty is necessary to make significant amendments to the current system to ensure due process. It should also be noted that Article 103 of the Treaty on the Functioning of the EU already affords Commission and Council considerable scope to define the organizational functions of the institutions in applying Articles 101 and 102. Various measures could be adopted without any need for a Treaty reform. Such measures should go beyond what the current draft best practices contain to ensure more adequate separation of powers and respect of due process.

- **Separation of powers**

As mentioned above, separating investigative and decision-making functions would lead to a fairer proceeding and would significantly decrease the risk of bias.

One practical change which could be implemented within the current administrative setting is the creation of two completely separate departments within the Commission: an investigative department in charge of the investigation and a legal department which would be entrusted of drafting the decision. A “Chinese wall” should be created between the two units. The Courts reviewing the decision should carefully verify that this separation is duly respected.

A separate legal department not involved in the investigative phase and entrusted of fully reviewing the facts and allegations proposed by the investigative unit before drafting a decision would be a first step towards the separation of investigative and decisional powers. A similar system is already used at Member State level, notably by the Dutch Competition Authority, with very satisfactory results.

- **Hearing Officer**

A major reform of the role of the hearing officer is particularly important in this context. In the European system, hearing officers are not part of DG Competition’s staff, but still they are directly attached to the office of the competition Commissioner. In this framework, there is a risk that the hearing officer might not be (or perceived to be) sufficiently independent.

A more independent hearing officer would constitute a significant improvement. The hearing officer could, for instance, be attached to the President or Secretary General’s office but report directly to the entire College of Commissioners.

We also believe that hearing officers should have a more prominent role in proceedings:

- by foreseeing two hearings: one on the merits and facts of the case, another on the factors taken into account for the determination of the sanctions;
- at the moment of taking the decision: the hearing officer should present independently the case and the proposed decision to the College of Commissioners, taking as an example the role of the Advocate Generals in front of the European Courts.
- by increasing his/her office’s resources.

This option would be the ideal complement to the separation of the investigative and legal units described in the previous chapter.

A further problem is that at present evidence is not presented at the hearing to the decision-maker (the College). The hearing is presided by the Hearing Officer who has no role in deciding the outcome of the case. In addition, companies under investigation have no right to examine the witnesses against them. This is problematic given the increasing reliance by the Commission on leniency applications. These are statements made by lawyers of the leniency applicants, setting out “second-hand” evidence. This removes the possibility of assessing the credibility of those declarations.



With specific regard to the Guidance on procedures of the Hearing Officers, we note that that paragraph 10 states that “an undertaking subject to investigatory measures can rely in full on its rights of defence only once a Statement of Objections has been notified to it”. The notion underpinning the Court’s reasoning in the judgment quoted by the Commission is that the undertakings concerned are not able to rely in full on the rights of the defence during the phase preceding notification of the statement of objections solely because the Commission has not yet formulated the accusations relating to the alleged infringements found by it<sup>1</sup>.

- We suggest the above statement is revised, making clear that “examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights are fully effective, that is to say, the second phase of the administrative procedure. The assessment of the source of any undermining of the effectiveness of the rights of the defence must extend to the entire procedure and be carried out by reference to its total duration”<sup>2</sup>.
- This is also the case for paragraph 12, stating that “an undertaking has *the right* to rely in full on its rights of defence once a Statement of Objections has been notified to it” (emphasis added). In fact, before a statement of objections is notified, a company simply does not have the concrete possibility to rely on its rights of defence, because it does not know any accusations relating to the alleged infringements against it. The current wording, on the contrary, seems to suggest that in that stage companies are not entitled to such rights of defence, which is certainly not the Commission’s intention. We therefore propose that the abovementioned sentences are deleted.

In this context, we also suggest that the entire role of the hearing officers in the investigative phase is reconsidered. Once they achieve further independence, they should also be given more responsibilities in terms of general supervision of the entire process.

#### • Initial assessment and handling of complaints

Paragraph 12 of the best practices says that the Commission will retain the right not to investigate a given case if it is “not deemed to merit further investigation”. This provides for a very wide degree of discretion. In practice, the Commission can reject complaints more or less as it sees fit. We believe complainants should be guaranteed that their cases get real attention and proper assessment. It is not suggested that the Commission should be obliged to investigate all complaints, regardless of their contents. Facts and circumstances put forward may be inconclusive, but still carry enough substance to indicate there might be a case worth pursuing. If so, the Commission should probe the matter at least one step further to test whether the complaint is meritorious or not. Also, when complaints are indeed rejected (or referred elsewhere), it is important for those having filed them to clearly understand the reasons for the decision, including why the case did not meet Commission prioritisation principles, if that is the case.

---

<sup>1</sup> Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, par. 47.

<sup>2</sup> Case C-105/04, par. 50.



Fair and effective complaints handling is of great importance to companies, not least SMEs. However, it is also of the essence to the credibility of the entire enforcement system, and hence to the Commission itself. Therefore, the scheme and principles outlined above should be put in place and be supported by adequate resources.

- **Transparency and timing**

The best practices (par. 55) establish that State of Play meetings will be offered by the Commission at certain stages of the procedure. This is an excellent way of providing further transparency. The draft should clarify that the companies under investigation have a right to request such meeting explaining clearly that the Commission has an obligation to accept reasonable requests for meetings.

Paragraph 60 states that “although state of play meetings would normally not take place in the context of cartel proceedings, meetings with senior management may also be arranged with the parties in cartel proceedings”. We suggest that – unless there is any valid justification for the exclusion of cartel proceedings – state of play meetings are offered as a rule also to parties to cartel proceedings. In addition, we suggest that companies should be free to decide the appropriate level of management to attend the meetings on their part.

Currently there are no sufficient safeguards on timing. Deadlines only exist in merger control, but even in this area extensions are often the rule. A clearer timeframe would be beneficial: the first of the state of play meetings mentioned in the draft best practices (par. 57) should be used by the participants to plan together an implementation schedule for the procedure. Paragraph 57(1) only says the commission “may” indicate a tentative timing: BUSINESSEUROPE is of the strong opinion that this should become a mandatory step whenever possible. We also suggest that state of play meetings should be attended by the Chief economist and the legal service whenever necessary.

It is not clear whether triangular meetings (par. 61) are open also to complainants. We suggest that this should require the agreement of the parties.

We very much welcome the procedure according to which DG competition might discuss with the addressees the scope and format of the request for information. This should reduce administrative burden of the companies and similar practices should be used throughout the investigation (not limited only to scope of request for information).

While the draft (par. 132) specifies that a press release will be published after the adoption of a decision, there is no reference to the importance of informing the public on the outcome of judicial review.

- **Leniency and settlements**

In BUSINESSEUROPE’s view a major deficiency of the document is that it does not cover the leniency programme and the settlement proceedings for cartels. In order to avoid undermining the effectiveness of these instruments, current rules on collecting, managing and sharing evidence in these contexts should be re-evaluated. Business secrets should be better protected and confidential information voluntarily submitted by leniency applicants should not be used in damages cases. In addition:



- On leniency: as there are no generally applicable rules for allocating leniency cases between national authorities and the Commission, companies need to make multiple applications for leniency in every Member State that could be affected by the cartel. This process tends to be unjustifiably difficult in practice, as the leniency programmes in the Member States have different formal requirements and also diverge in their legal consequences. This uncertainty on the competent authority has negative side-effects on the programme. A one-stop shop for leniency applications would be an important step to improve the legal certainty for companies willing to cooperate with the competition authorities. As an example, the first NCA receiving an application could become the single reference point for leniency applicants.
- In paragraphs 11-13 of the draft, the Commission says that it will address the allocation of cases within the ECN and that it may discard cases at an early stage. In this context, we believe an applicant for leniency should not get into the position to remain unprotected due to the Commission simply discarding his case. The draft should contain statements ensuring the protection of the applicant even when the matter has been discarded, with the exception of cases where the application is manifestly unmeritorious.
- More clarity on the functioning of settlements proceedings for cartels is needed. Companies need to be aware of all the possible consequences they might face – e.g. in terms of exposure to possible actions for damages – when applying for a settlement or when refusing a settlement proposal from the Commission.

- **Sector inquiries**

Sector inquiries are formally a different thing from proceedings but certain issues are common to both. As is often noted, the extent to which inspections are used as part of an inquiry or as initiation of an investigation has become unclear. The way this is currently regulated by Regulation 1/2003 clearly gives ample discretion to the Commission.

Sector inquiries are a complex, lengthy and costly process for both the Commission and the enterprises involved. BUSINESSEUROPE is of the strong opinion that the burden deriving from these procedures could and should be relieved, through improvements that would make the process more efficient while equally achieving the objectives:

- The scope of the enquiry should be defined more clearly and specifically, consulting the companies concerned, to avoid the risk of the process expanding beyond what is necessary along the way;
- The amount of data requested is enormous and often requires companies to employ a large amount of resources for long periods of time to respond to the Commission's questionnaires: requests should be more targeted and multiple requests in a short timeframe should be avoided;
- The way data are requested: companies keep data according to their specific needs. The Commission wishes to obtain this data in a uniform format and in a short timeframe. Reformatting these data to fit the questionnaire requires a lot of time and resources. Data should be accepted in the original format;
- Information should be requested by addressing the legal department (if available) which can best coordinate the response, rather than formulating questions to different employees within the same organisation;



- Inspections: the extent to which inspections are used as part of an inquiry or as initiation of an investigation has become unclear. On-site inspections should only be carried out on the basis of evidence previously found during the sector inquiry. Without the justifiable suspicion of antitrust infringements, they run contrary to the basic principles of human rights and justice, as they permit to search private property without any objective reason, amounting to fishing expeditions. We believe that the authorisation of a judicial authority to search companies' premises should always be required. The European Convention on Human Rights is now directly applicable, and article 8 ECHR applies also to legal entities, including offices. The European Court of Human Rights imposes strict requirements on the justification of an on-site inspection. Since an investigation of a suspected cartel and a sector inquiry are different proceedings, a sector inquiry being directed against innocent subjects, one wonders whether on-site inspection in a sector inquiry can be regarded as being "necessary in a democratic society".

- **Legal professional privilege**

The attitude taken by the Commission with regard to legal professional privilege for in-house counsel is a source of concern. In BUSINESSEUROPE'S opinion, when in-house legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline, his legal advice should be privileged. When consulting their own in-house lawyers, executives must be able to rely on their counsel's professional secrecy and should not be discouraged from consulting them because confidential deliberations risk being disclosed.

This issue is extremely relevant when considering the fundamental role of in-house counsel in carrying out the self-assessment foreseen by Regulation 1/2003. The Commission should arrive at a workable solution for all parties concerned, allowing companies to use in-house counsel to carry out "privileged" self-assessment.

- **Procedural guarantees and sanctions**

The debate on due process is interconnected with the issue of sanctions. In recent years, there has been a general increase in the level of the fines imposed by the European Commission for antitrust infringements. As mentioned in our submission to the consultation on the functioning of Regulation 1/2003, BUSINESSEUROPE believes that this increase should be accompanied by an improvement in the protection of the procedural rights of the parties. Furthermore, alternative types of sanctions could be considered.

The Commission's practice with regard to fines is obviously addressed by Regulation 1/2003 and the 2006 guidelines on fines. However, the Commission has wide discretion in setting fines: not only are the criteria general, but the Commission also enjoys extensive discretionary power as to how they are applied. It is currently impossible to understand the precise criteria and methods used to calculate sanctions, which weakens companies' rights of defence. The amount of the fine will depend on a number of determinations, such as the company cooperation in the investigation or its ability to pay. Moreover, defendants do not have an opportunity to comment on the basic amount for calculating the fine during the administrative procedure. The final amount of the fine is determined after the oral hearing has taken place, and is only announced in the decision.



BUSINESSEUROPE believes that having more predictability with regard to possible applicable sanctions would not only be fair towards companies, but would also increase deterrence. This would probably be beneficial to the quality of the Commission's investigative work and to enforcement in general.

BUSINESSEUROPE suggests that draft decisions be transmitted to the parties, who should be allowed to present their arguments on the proposed sanction and make observations on the economic elements that need to be taken into account for the decision. A report containing the provisional basis for the calculation of the fine should be sent to the parties in advance of the hearing on the determination of the sanction (see above, on the role of the hearing officer). As mentioned earlier, further consideration should also be given to whether the power of proposing the sanction could be assigned to a separate department that is not involved in the investigation.

It should also be clearer which entity will be subject to the sanction: the Commission regularly attributes liability to parent companies for the conduct of their subsidiaries. In light of the most recent Akzo-Nobel case law, this presumption of responsibility is *de facto* irrefutable. We suggest the Commission could adopt guidelines on the criteria it could accept for demonstrating the autonomy of subsidiaries.

- **Compliance**

Companies subject to investigations should at least be granted the possibility to prove their compliance efforts and have this recognised and valued by the Commission. This would also encourage businesses to adopt and implement an effective compliance programme, which in itself will help to successfully prevent illegal actions from arising in the first place.

- **Appeals**

The Commission has stepped up its enforcement actions but the effectiveness of this enforcement is brought into question by the delays in hearing appeals at the General Court (formerly known as the Court of First Instance).

Effective judicial remedies in the Community are being hampered by the delays in the General Court. The most obvious delay is in reviewing merger decisions which can range from just under 12 months to several years. This is not a realistic timetable for business which has the challenge of keeping a merger proposal alive and preventing the erosion of key benefits.

Apart from mergers, there are long delays in reaching decisions in other competition cases. The principles to be decided in these cases have a major impact on substantive issues.

In addition, appeals before the General Court have no suspensive effect on the sanction. The company must pay the fine inflicted by the Commission even if the decision has been appealed and is therefore not final.

A further issue, which is outside the remit of this paper, is that European Courts do not undertake a full judicial review of the facts on which a decision is based. However, the EU Courts' competence is limited to reviewing Commission's decisions, without the possibility to substitute their own decision to that of the Commission. This could be rectified to a



certain extent if the Courts would extend the scope of judicial review to the factual and legal assessment on which decisions are based.

Much has been achieved over the last few years to enhance the framework of competition law: the one area which has hardly been touched is the judicial review of Commission decisions. This deserves further attention and courts should be given more resources to guarantee effective judicial remedies in the Union in a shorter time.

\* \* \*