

**DG COMPETITION
DRAFT BEST PRACTICES PAPER ON THE CONDUCT OF
PROCEEDINGS
-CBI response to consultation – 3 March 2010**

The CBI welcomes the initiative of DG Comp in preparing this draft paper and is pleased to offer the following comments.

Scope of best practices policies

We believe it is important that the defendant in a cartel case should also have the benefit of the fair procedures outlined in this paper. Because of the seriousness of the charge the company concerned should not be denied the procedural improvements and safeguards during the investigation phase. Our understanding is that State of Play and Triangular meetings will not be available nor will cartel defendants be entitled to review key submissions.

We understand that cartel investigations require a longer initial phase to ensure maximum input under leniency. But we consider that DG Comp should reasonably allow a defendant to confront the initial concerns and have the opportunity of a dialogue with the investigators before proceeding with its SO and preliminary conclusions.

Sector inquiries

We would also propose that best practices policies should be extended into sector inquiries. These can be very burdensome on companies in terms of the scope of the inquiry and the data requirements. It was believed initially that on-site inspections would only be used where there was clear evidence of competition law breaches to justify such highly intrusive measures. But the launch of the pharmaceutical inquiry disproved this, with the result that business is unclear how these sector inquiries will be operated in future.

We would like to suggest therefore that the draft is revised to include a new section on sector inquiries which would then be subject to a further consultation.



Duncan Campbell Legal Adviser Company Affairs

DL: +44 (0)20 7395 8040 **DF:** +44 (0)20 7836 1114 **E:** duncan.campbell@cbi.org.uk

CBI Centre Point 103 New Oxford Street London WC1A 1DU

T: +44 (0)20 7379 7400 **F:** +44 (0)20 7240 1578 **W:** www.cbi.org.uk

Director-General: Richard Lambert President: Helen Alexander CBE

Registered No: RC000139 (England and Wales) Registered Office: CBI Centre Point 103 New Oxford Street London WC1A 1DU

Initial assessment

We would like to suggest that where a complaint is made to the Commission it should as a standard practice consider sending a non-confidential version to the defendant for its comment as soon as possible.

In the event the Commission decides to reject a complaint we propose that the defendant should also be notified.

Publication

In reviewing the issue of publication, we believe DG Comp should also bear in mind the considerable reputational damage that can be caused to the defendant in the event the charges are not proven. Share prices can be marked down substantially following media speculation on huge potential fines based on turnover.

It is important that before the Commission issues any press release it gives the parties concerned adequate warning and sight of the proposed release. In this way any obvious factual errors can be corrected and the parties will be able to deal with questions from the media, customers and employees.

LPP

We have discussed the issue of LPP for in-house counsel many times with the Commission. We look forward to the outcome of the current Akzo case when we hope it will be possible for DG Comp to agree some best practices guidelines, which recognise that in-house counsel have a professional commitment to competition law compliance.

Although we are well aware of DG Comp's stand on this issue, we are nevertheless disturbed by the statement that certain claims for LPP may be treated as aggravating circumstances justifying fines. We believe it should be recognised that companies may quite legitimately put forward claims for LPP and that therefore this statement is unduly combative. We would like to propose that DG Comp reconsiders this statement and adopts wording that is less hostile to LPP.

Access to the file

We question the present wording of the draft on access to the file on two points. The first is in relation to the use of the data room, where if a party unduly refuses to waive its right to access to the file or its right to confidentiality there can then be a decision under the Hearing Officer's Mandate. We have strong doubts as to whether there is the power to do this.

The second is where new evidence is identified after the SO has been issued, the parties concerned will have the opportunity of making their observations on the new aspects on which the Commission intends to rely. We suggest that the normal principles of access to the file should apply and the parties should be entitled to see the new evidence in full, not just the parts on which the Commission intends to rely.

Oral hearings

We welcome the Commission's recognition of the importance of the oral hearing and that senior management will participate in antitrust cases. To give a greater assurance of due process and equality of arms with the case team we suggest that the Deputy Director-General, the Legal Service and a person from the Chief Economist's team should invariably attend the hearing.

Due process in antitrust proceedings

These Best Practices guidelines are an important step in the evolution of EU antitrust proceedings and a further recognition of the right to a fair trial. In administrative proceedings in the UK, leading to the imposition of fines, the issue of compliance with Article 6 of the ECHR (European Convention of Human Rights) has generally been addressed by providing for an effective review by an independent tribunal. This body will have the opportunity to rehear the case on appeal.

As antitrust proceedings before the Commission have become more adversarial, with competitors pitted against each other, the standards for what constitute a fair trial are being increasingly challenged. At the same time defendants are regularly seeking judicial review of fines which have been imposed.

To improve judicial review by the EU courts, the CBI put forward in 2006 a proposal for a Competition Court as a judicial panel of the General Court (then the CFI). Following a review by the House of Lords EU Committee, in which the Commission gave evidence, it was considered that setting up a new Court should be deferred for the time being in favour of other improvements in procedure.

With the increasing focus on the Commission's due process and the need, for the Commission as well as defendants, to have a speedy resolution of contentious proceedings we believe there is now the opportunity for the new Commission to reconsider the broader issue of improvements in the EU courts.