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**Response to the Consultation on the Draft Commission
Best Practices on the Conduct of Proceedings concerning
Articles 101 And 102 TFEU**

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I. INTRODUCTION

1. We welcome the European Commission (the “Commission”) initiative to propose a set of detailed procedures for implementing the provisions of Articles 101 and 102 TFEU (the “Best Practices Code” or the “Code”). We consider that the European Commission's proposals (i) are designed to raise awareness of investigative procedures, transparency, efficiency and predictability of antitrust proceedings (ii) have beneficial effects on those involved in the proceedings and for third parties by clearly identifying the intermediate steps of the procedures and their duties incumbent on each of these stages.
2. We believe it is important to highlight from the beginning the soft-law nature of the Code. A soft-law act is a document that is not mandatory either for the parties charged with its implementation or for the parties to whom it is addressed. However, soft-law instruments are often used by the European Commission and they proved to be a successful alternative to the hard-law instruments for whose adoption long and burdensome procedures are required. In addition, it is a tradition of competition authorities all across the world to adopt rules governing competition breaches in the form of a soft-law instrument. We believe the soft-law nature of the Code should not impair on its success. Only the involved parties’ attitudes can ensure the success and the uniform implementation of the Code.
3. We consider the Code of Best Practices as being one of the most advanced documents concerned with guaranteeing the rights of the parties involved in competition breach investigations. The adversarial nature of the investigation, the privilege against self-incrimination and the regulation of hearing officers represent important steps in that direction.
4. Also generally speaking, in order to ensure the stated objective of the Code we consider that the principle of transparency should be provided since the preliminary stage of the receipt and analysis of complaints. This should provide the parties directly concerned and third parties with the possibility to send comments and additional information that the Commission may rely on in order to determine in this regard the complaints admissibility or inadmissibility.
5. We also deem as necessary (i) to centralize and detail of the involved parties’ rights at every stage of proceedings (ii) the presentation of the rights of the parties in case the Commission resolves, for example, the rejection of the complaints, (iii) the legal actions that may be filed by those against decisions of the Commission during the proceedings (i.e. the decision concerning a request of information, on the performing of inspections), and (iv) the effects of proceedings commencement (i.e. the date on which the Commissions’ status of limitation concerning sanction for violation of the provisions of Articles 101 and 102 TFEU was interrupted).

II. THE INVESTIGATION PHASE

II.1. Origin of cases

6. In paragraph 9 of the Best Practices Code we deem as necessary that the legitimate interest notion to be detailed in filing a complaint by reference to the development of the case-law of European Courts (i.e. the competitors¹, the licensee affected by anti-competition provisions included in a license agreement², the exclusive agent of the distribution system, the traders affected by the prohibitions to perform export³ activities, the economic operators to which the right to an essential input access was denied by the dominant economic operators, etc.).
7. We also deem as necessary (i) to present the conditions under which the public authorities (local or regional) may justify a legitimate interest in filing a complaint and to clarify that the legal/natural person filing the complaint shall be bound to prove the legitimate interest⁴ (save for the complaints filed by the Member States) and (ii) the consequences of a complaint withdrawal.
8. Moreover, in order to increase the transparency and to allow a constructive and effective phase development, we appreciate as desirable the direct notification of the concerned parties (the claimant agent from the complaint) about (i) the submission of a complaint, the facts alleged to be committed by it even by sending a non-confidential copy of the complaint (ii) the rights of the natural persons or entities that have filed complaints (i.e. the right of access to documents which the Commission's interim assessment relies on in case it was provided with the information concerning the Commission's intention to reject the complaint, the right to receive a copy of objections notification and to comment upon them and the right to be heard).
9. In order to ensure a high degree of knowledge of procedures and of the involved parties' rights, there should be specified also rights of the claimants who have filed complaints within the Code when the Commission decides to reject the complaint. In this regard, there shall be mentioned the conditions under which they may file a complaint with the national courts and which are the remedies of law which they may exercise against the Commission's decision to reject the complaint in question.

II.2 Initial assessment and case allocation

10. We believe the initial assessment represents an important phase in the Commission's investigation. Therefore, we are aware that it is important to clarify the admissibility criteria of a complaint lodged with the Commission. Taking into account that an investigation can be initiated ex officio, but also as a result of receiving information from various sources, we believe it is important to describe the nature of information which can be relevant for the Commission and

¹ Case IV/30698 -ECS/AKZO OJ [1985] L 374/1.

² Case IV/30017- Breeders' rights roses OJ [1985]L 369/9.

³ Case 792/79R Camera Care v Commission [1980] ECR 119.

⁴ Commission Notice on the handling of complaints .

which eventually leads to the opening of an investigation and the nature of information considered *ab initio* as being irrelevant. We believe these clarifications would ensure not only a higher transparency of the proceedings, but would also represent an important guarantee against the abuse of the right to petition.

11. We consider that it is desirable to clarify the admissibility criteria for the initiation of an investigation. Some of the elements that we deem important are: (i) sufficient indications as to the existence of a breach; (ii) the seriousness of the breach; (iii) prevention of the replication of efforts.
12. We consider it is important to highlight the effects produced by the information received by the Commission in the inadmissible cases. The Code should clarify first of all the information received in the inadmissible cases are kept or if, on contrary, they are destroyed. Second, the Code should clarify if such information can be used by the Commission at a later point in time against the same undertaking or against another undertaking.
13. We consider that the impartiality of the proceedings should be considered from the earliest stages of the investigation. In this respect, the Code should contain a minimum set of rules concerning the possibility of excluding Commission members from the group assigned with a certain investigation and the possibility to declare them unable to sit in the investigative group at issue.
14. We believe it would be advisable to draft a list containing the parties' rights and obligations during the preliminary phase of the investigation. Such a list, even if drafted only for information purposes, would allow a clear identification of the actions which the Commission may take and would increase the degree of foreseeability. Alternatively, such a list could be part of the set of documents which are sent to the undertakings when an investigation is opened. This option would leave the Commission a broader margin of appreciation without affecting the undertakings' right to information.
15. We believe it is important to define what priority is for the purpose of the Commission's investigation. In this sense we deem especially important to define: (i) when a party can request priority for their files, (ii) which are the parties entitled to request this and (iii) which are the criteria for considering a file as having a certain priority. In addition, taking into account the consequences which a case which was granted priority would have, we believe it would be advisable to set up a special procedure for this purpose. Such a procedure would ensure the adversarial nature and the opposability of the proceedings.
16. Concerning the Commission's jurisdiction for dealing with the cases lodged with it, we consider that clear rules should govern this field. Thus, first of all, we consider it is necessary to clarify the situations in which the Commission is entitled to allot a case to a national competition authority and the opposite. Second, we consider it is necessary to adopt rules that would govern the parallel proceedings. The consequences of the lack of such rules are exemplified by the case Mastercard Europe/International in which the Commission sent a notice of objections in 2003, but that did not hinder the national competition authorities from continuing the proceedings on the basis of domestic provisions. Lastly, we

consider that it is important to adopt clear rules concerning the possible positive or negative conflicts of competence.

17. Taking into account the scope and the consequences of an investigation, we deem necessary to make clear whether the Commission has the right to disclose to other EU or national authorities information obtained during its investigations. We hold the opinion that disclosure of such information would be possible only within criminal proceedings and only if the criminal proceedings at issue are at an advanced stage. The fulfilment of these conditions could ensure that criminal proceedings would not be initiated on the basis of the Commission's exclusive information.

II.3. Opening of proceedings

18. Considering the practice of the European Courts, there should be specified within the Code the legal consequences deriving from procedures initiation (i) the interruption of the status of limitation of the Commission's right to impose fines (ii) the liability discharge to the extent another competition authority was assessing the same file.
19. In case neither the Regulation 1/2003, nor the Regulation 773/2004 does clearly describe the nature of the specific act for the procedures release, the Best Practices Code is intended to fill this omission. From the analysis of point 21 derives that the parties are formally notified by a letter of the procedures' initiation. Considering the effects of this measure, we consider essential (i) to define the major elements to be included therein, (ii) to clarify the nature of the act in question by reference to the ECJ⁵ decisions, namely whether it represents or not a challenging act.
20. The Commission's letter concerning the procedures' initiation should contain the following information: (i) the goods or services that will form the subject-matter of the investigation; (ii) the alleged breach; (iii) the relevant legal provisions; (iv) the parties; (v) the alleged prejudice that was produced by the breach; (vi) the relevant geographical scope; (vii) whether the investigation has an international or a global scope.
21. According to Regulation 1/2003, the party or authority alleging a violation of Articles 101 or 102 TFEU is required to prove its existence in accordance with the legal standard. Although the legislation above provided refers to the standard of evidences, however, it avoids defining that standard leaving the European Courts to proceed to those definitions.
22. In light of ECJ case-law, the Code should maintain within the Commission's liability the following duties: (i) to establish, especially, all acts which may lead to the conclusion that an economic operator had taken part in such violation and was responsible of this fact, (ii) to bring sufficient, consistent and accurate

⁵ Case 60/81 International Business Machines Corporation v. Commission [1981] ECR 2639.

evidences, convincingly proving the existence of circumstances leading to the apprehension of an infringement of competition law⁶.

23. Thus, we propose the Code supplementing in the sense of clarifying the standard of evidence filed with the Commission.
24. Concerning the nature of the evidence adduced during the Commission's investigations, we welcome the Code's provisions concerning the economic evidence. However, we believe that the issue of the illegally obtained evidence is not sufficiently covered in the Code. It is true that paragraph 77 of the Code indicates that the parties could at any point be interrogated concerning the serious and "clean" nature of the evidence. However that provision does not impose a duty to check within each set of proceedings if the evidence was legally obtained. Taking into account the importance of the nature of evidence for adversarial proceedings, we believe the Commission should (i) have the obligation to check if the evidence used for taking a decision was legally obtained, (ii) clearly establish what an illegally obtained evidence is (e. g. evidence obtained in breach of the confidentiality obligation or evidence obtained in breach of national or EU law) and (iii) have the obligation to ignore the illegally obtained evidence.

II.4 Information Requests

25. Pursuant to paragraph 36 of the Code, the undertaking that received a request of information from the Commission can request an extension of the deadline for submitting the answer. In order to increase the degree of proceedings transparency, we believe that it is not enough to identify the date when such requests may be issued by using the expression "sufficiently in advance". We appreciate that a maximum deadline for formulating such requests would be more advisable.
26. In accordance with the case-law of the European Courts, the Code should expressly include the obligation of the Commission to clearly specify within the requests for information the intended purpose, the illegal acts, which intends to analyze/investigate. There should also be required to include the obligation of the Commission to ask only for necessary information to the alleged objective and that are related to the facts deemed as illegal.

II.5 Meetings and other contacts with parties and third parties

⁶ Joined cases 29/83 and 30/83 CRAM and Rheinzink v Commission [1984] ECR 1679, paragraph 20, according to which „The Commission failed to provide precise and coherent evidences in order to justify its position in accordance to which the parallel behaviour of the parties is the result of a concerted action“; Joined cases C-2/01 P and C-3/01P BAI and Commission v. Bayer, [2004] ECR, page I-23) paragraph 62; Case C-185/95 P Baustahlgewebe v Commission [1998] ECR page 8417) paragraph 58, and Case C-49/92 P Commission v Anic Partecipazioni, paragraph 86, Case T-62/98 Volkswagen v Commission [2000] ECR, paragraph 43.

27. Commission's attention towards the efficient performance of the investigation by holding meetings with the concerned parties and third parties should be welcomed. In case of complaints, these meetings should be held since the preliminary phase of analysis, thereby enabling a claimant company to provide documents, information on which the Commission could decide that it is not necessary to initiate the investigation.
28. The Best Practices Code should also include the obligation of the Commission to prepare minutes, notes of those meetings, to the extent that the Commission intends to use them as evidence, to be provided to the involved parties immediately after the completion of the respective meetings or to be included in the category of documents to which the parties have access during the file consultation stage. In this regard, the Code should expressly exclude such documents from the category of internal documents inaccessible to the parties during consultations. In addition, the parties involved in an investigation should have access to the documents prepared for meetings immediately after the meeting and not at a later point in time.

II.6 Inspections

29. Paragraph 46 of the Code should be supplemented by including a provision which shall provide the right of appeal of the companies under investigation against the decision of inspections performance.

II.7 Possible outcomes of the investigation phase

30. The investigations closed by the Commission may not be reopened unless there are "sufficient new evidences". The notion of new evidence should be clarified in the content of the Code, thus there should be explicitly provided that the documents already submitted with the Commission's file are not deemed as new evidence. Also, we considered necessary to introduce certain provisions specifying in their content the claimant's right of appeal against the decision by means of which the Commission resolves not to continue the proceedings.

III. PROCEDURES LEADING TO A PROHIBITION DECISION

31. Within the national practice the national competition authority intended to grant a limited probative value of evidence provided by the parties involved after the hearing session. Considering these recent developments we consider appropriate to include a provision which should mention that the evidence provided by the parties after the hearing session has the same probative value as the evidence filed during the procedures performed previously to the hearing.
32. In addition, in relation to the deadline for communicating the observations to the Commission's objections, we believe it should be extended to compensate for the fact that the Commission does not grant immediate access to the file. The deadline for submitting the answer to the received observations should be the same for all the parties concerned: the undertaking under investigation, the complaining party, the third parties.
33. Concerning the issue of the access to the file, we appreciate that it is important to

grant access not only to the evidence that the Commission intends to use, but to all obtained evidence, including evidence that is favourable to the parties.

IV. COMMITMENTS PROCEDURES

34. Paragraph 103 of the Code specifies that in case a commitment resolution exists there are no other grounds for filing an action by the Commission. However, considering the provisions of section 13 and article 11 (6) of the Regulation 1/2003, the Code should specify the practical effects of such resolution over the national authorities and courts.

V. DECISION'S APPROVAL, NOTIFICATION AND PUBLISHING

35. The Code should mention the Commission's obligation to establish clearly the facts and the legal reasons which it takes into account when taking its decisions. This would permit: i) all those interested to learn about the Commission's reasoning and ii) the courts to establish the well-founded and legal nature of the Commission's decisions. For clarity reasons, section 131 of the Code should be supplemented by specifying the communication⁷ methods of the decisions, respectively by means of registered mail, the challenge term shall elapse from the receipt date of the decision.

VI. PROVISIONS CONCERNING THE HEARING OFFICERS

36. The Code of good practices concerning the hearing officers includes detailed provisions in relation to their rights and obligations. We welcome the Commission initiative to clarify this aspect of the proceedings. In the same time, we believe that improvement could be made in the following two domains.
37. Paragraph 40 of the Code stipulates that in exceptional situations observers can be admitted to the oral hearings. We deem necessary (i) to enumerate the situations in which the observers can be admitted to the oral hearing, (ii) to establish who can participate as an observer (mass-media, scholars, NGOs etc) and (iii) to allow the parties involved to request or to contest the decision admitting observers to the oral hearings.
38. Paragraph 58 of the Code imposes the obligation to abstain from disclosing documents or information obtained during the oral hearings. We consider that the general formulation of this principle is not sufficient and that more detailed rules are necessary. First of all, rules with preventive nature should be established (e.g. the limitation of the number of persons who have direct access to the sensitive documents). Second, the legal consequences of disclosing such information should be established, namely the liable persons and the nature of the responsibility at issue.

⁷ Case 42/85 Cockerill- Sambre v Commission [1985] ECR, 3749.

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