

RESPONSE TO

The Commission of the European Communities

**Best Practices on the conduct of proceedings concerning Articles 101 and
102 TFEU**

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Response to DG Competition on the 'Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU'

1. GENERAL COMMENTS

- 1.1 We welcome the Commission's initiative to set out in one document the various procedural steps involved in antitrust investigations. Rather than being a final product, we hope that this will be a first step in the process towards developing a set of best practices guidelines on the conduct of proceedings in antitrust cases.
- 1.2 As currently drafted, the document is for the most part a useful summary of the Commission's current practices rather than a description of best practices. We believe however that the consultation should take the opportunity to solicit views as to how the Commission's practices could be enhanced to ensure the robust protection of due process and the rights of defence consistent with the European Convention of Human Rights (ECHR). It should also take into account any legitimate concerns that may be raised about current procedures.
- 1.3 Although the current text indicates that special procedures apply in respect of leniency, and that these procedures are not covered by the guidance, best practice guidance should as a minimum still explain what can be expected and, for example, set out the parties' rights in the assessment phase where a leniency application has been made by other parties, unknown to some of the parties. Numerous issues arise for undertakings when involved in cases where leniency applications have been or may have been made by other parties. The uncertainty and lack of transparency in such cases places undertakings in very difficult situations where they may feel pressured to accept certain proposals without any guarantee as to the result. This creates an unacceptable degree of legal uncertainty, and creates a clear "inequality of arms" between undertakings and DG Competition.
- 1.4 A further point to be considered is the issue of minimum procedural safeguards at Member State level. In view of the decentralised enforcement of the EU competition rules and the Commission's proposals for decisions by national competition authorities and national courts in competition matters to be binding throughout the EU, the Commission should also, together with the ECN, ensure that minimum procedural rights are in place and respected throughout the EU.
- 1.5 Areas which we suggest would merit further consideration as part of a review of current procedures include the following:
- Considering whether there is scope for greater transparency during the investigative phase of a case, prior to the SO.
 - Considering whether the time allocated for response to the SO should be more generous – often extensions are granted which suggests that the initial time allocated was insufficient. Many parties find it surprising that the Commission may take several years to investigate a case and prepare an SO and yet they are allowed perhaps 2-3 months to respond. The issue of deadlines, which applies both in the context of responding to the SO and information requests, is important. Proportionality of deadlines is essential in order to ensure that parties are treated fairly through these various processes. It is also linked to the issue of transparency – the more the parties

know about the case being investigated against them the greater the preparation they are able to do in advance of the SO therefore the less time they may need to respond to the SO.

- It would be helpful if deadlines for information requests could be more tailored to the amount of the information requested. For example, the Commission could consider the issue of draft requests which allow the parties to comment on the scope of the requests and the availability of the information sought. Such processes are more likely to ensure time limits are appropriate for the information being sought. The Commission could also avoid sending requests before major holidays (or at least allow for the fact that employees of the respondent may be on leave).
- The SO could include more information on fines and should as a minimum set out the general principles according to which the fine will be calculated in addition to gravity and duration. The fining guidelines contain a number of factors, such as the relevant turnover to be used as a starting point, and it should be possible for the Commission to provide more detail in respect of these factors.
- Usefulness of the role of the Hearing Officer and lack of independence of this role. The draft Best Practices document states, in paragraph 73, that the Hearing Officers are completely independent of DG Competition. Despite this, we note that the Hearing Officer is clearly not independent of the Commission itself (as they are part of the Commission's administration) and in particular are not independent of the Commissioner responsible for competition given that they are attached administratively to the office of the Competition Commissioner. To ensure independence, it would be at least necessary as a minimum for the Hearing Officers to be appointed by the President of the Commission and for the Hearing Officer's office to be attached to the President. Ideally candidates should not come from DG Competition but rather from the Legal Service of the Commission or even from outside the Commission (as is the case with the post of the Chief Economist). As for the role of the Hearing Officer, currently the role is mainly confined to procedural issues. In our view, this should be significantly extended to cover the substance of the case, providing the Hearing Officer with the power and task of informing the Competition Commissioner and the College of Commissioners directly not only of any procedural deficiencies but also of his or her views on the substance of the case. In such a case, it would be necessary to ensure that a sufficient level of staff is made available to the Hearing Officer.
- The conduct of oral hearings could be improved. Under the current practice, oral hearings are increasingly seen as an irrelevant feature of the procedure rather than a key feature of the procedure. Suggestions for improvements in order to increase the usefulness of the hearing include the following. Very senior personnel should always be present, including the Director of the case as well as members of the Cabinet and of the Legal Service. In addition, such presence should be continuous. The existing practice under which, on occasion, senior management has an intermittent presence does not reflect well or inspire much confidence in the process – this would not be acceptable in any procedure before a tribunal, where the decision makers of a case are present throughout the hearing and listen directly to the presentations and evidence presented. It would also be useful if the peer review panel were present at the oral hearing (and sat separately from the Commission team to reinforce their independence). In addition, the role of the peer review panel should be enhanced, with the ability for the parties and the case team to ask questions at the hearing.

- It would also be helpful if the Commission could aim to harmonise and provide for consistency in respect of its confidentiality practices. For example, where recipients receive a non-confidential version of the SO there are currently several variations of a letter requesting more or less onerous confidentiality guarantees for the recipient, including asking the recipient to agree that it could be subject to criminal proceedings if confidentiality is breached.
- Procedures should generally be faster and more detailed indicative timelines made available.

2. **SPECIFIC COMMENTS ON THE INVESTIGATIVE PHASE**

Initial assessment and case allocation

- 2.1 In paragraph 14 of the Best Practices document, the Commission makes it clear that undertakings will be informed of the privilege against self-incrimination. It would be useful if the Commission could summarise its approach to privilege in this document as the current draft does not explain what this privilege covers. In this respect, in our view the current position on privilege, which as we understand it prevents the Commission from asking oral questions which could lead to direct self-incrimination but can still seek the provision of self-incriminatory documents is illogical. In order to respect the privilege against self-incrimination, the Commission should be prevented from forcing undertakings, under threat of fines, to forward to the Commission a pre-existing document that contains precisely the answers to the questions it is not allowed to ask orally. It is one thing for the Commission, during the course of an inspection at the premises of an undertaking to find and copy such documents (which is after all the purpose of an investigation), but quite a different thing to demand of the undertaking that it finds such documents and forwards them to the Commission. In our view this is an important point and this approach to self-incrimination should be clarified and reviewed.
- 2.2 In paragraph 15, the Commission states that it will indicate a time frame within which it will endeavour to inform the complainant of the action it proposes to take as a consequence of the complaint. It would be helpful if the Commission could at the same time inform the undertaking subject to the complaint of the action it intends to take.

Opening of proceedings

- 2.3 The Commission should also indicate a time frame within which it will decide whether or not it will open formal proceedings. One year after the start of an investigation appears an appropriate period after which the Commission can be expected to have gathered sufficient information about the case for it to be in a position to inform the undertakings concerned whether or not the case will proceed, and if so, what the expected timeframe will be for issuing a statement of objections and provide an outline of the case being investigated. Not knowing whether or not the Commission will pursue a case for an unreasonably long period following the initial investigation creates an unacceptable level of uncertainty for the undertakings concerned, and can be expected to have a negative impact on important business decisions regarding investment and other key commercial issues. For the same reasons it would also be of great benefit to business if the Commission could also publicise the fact that a case has been closed against certain parties and the Commission should also

consider the extent to which the parties themselves can publicise this fact, instead of having to wait for lengthy periods (months or years) for the Commission to reach a final decision.

Information requests

- 2.4 In paragraph 30 the Commission sets out its powers under Article 18 of Regulation 1/2003, but without indicating the limits to those powers. The Commission should refer to any limits imposed by the privilege against self-incrimination.

Meetings and other contacts with the parties and third parties

- 2.5 In paragraph 40 the draft mentions notes taken by DG Competition during meetings with parties. It should be made clear that such notes should be approved by the party concerned in order to make sure that such notes correctly reflect the said party's statements at the meeting in question.

3. SPECIFIC COMMENTS ON PROCEDURES LEADING TO A PROHIBITION DECISION

Comments relating to the nature of the fines and impact on procedure

- 3.1 Despite Article 23(5) of Regulation 1/2003, according to which cartel decisions are not of a criminal nature, there are strong arguments that the level of cartel fines, their purpose and the nature of the proceedings is such as to equate cartel fines with criminal sanctions. According to the jurisprudence of the European Court of Human Rights ("ECtHR"), the categorisation of procedures and penalties is autonomous and cannot be decided unilaterally by the body determining the procedure or imposing a sanction¹. In the context of competition law, the ECtHR held that penalties imposed by national competition authorities may be of a criminal nature².
- 3.2 In the light of the Commission's fining policy and recent high fines, it is more important than ever that the proceedings concerning Articles 101 and 102 TFEU provide sufficient safeguards of the interests of the parties under investigation. Any such safeguards should either mirror or be close to safeguards guaranteed in criminal investigations.
- 3.3 The Best Practices correctly state that the right to be heard before a final decision affecting the person's interests is taken is a fundamental principle of EU law. The right to be heard is also contained in the European Convention on Human Rights ("ECHR") – Article 6; and the Charter of the Fundamental Rights of the European Union ("Charter") – Article 41(2) and Article 47.
- 3.4 Since fines imposed by the Commission are arguably of criminal or quasi-criminal nature, the process leading to their imposition should reflect the safeguards offered in a criminal procedure. One such safeguard is the principle of immediacy, which requires that a court imposing criminal sanctions should have a first-hand picture of the alleged offence and the offender. Such a first-hand picture can be obtained only by direct participation in every hearing.

¹ Judgment of 8 June 1976 in *Engel v The Netherlands*

² Judgment of 27 February 1992 in *Société Stenuit v France*

- 3.5 Commission decisions are taken by the College of Commissioners (who collectively vote on the final decision), and it seems therefore deficient that the Commissioners never participate in the investigation, read the files or listen to the oral presentations of the undertakings. This results, on the one hand, in the College of Commissioners taking decisions without first-hand knowledge of the case (i.e. their decision is based exclusively on reports listing to other people's impressions and opinions) and, on the other hand, it prevents the undertakings concerned from being heard by the Commissioners (as the authors of the final decision).
- 3.6 The process leading to the imposition of a fine is split into two stages. Firstly, the Commission investigates the facts. Secondly, it opens formal proceedings and reaches a final decision which potentially results in very large fines. Since the Commission acts both as an investigator (fact-finding phase), prosecutor (Statement of Objections) and judge (adjudication and adoption of the decision including the imposition of a fine) it could be argued that the process is not impartial and that it therefore does not comply with Articles 41 and 47 of the Charter.
- 3.7 As fines for breaches of competition law are often based on the leniency testimony provided by other undertakings, it is regrettable that the procedure does not provide for any possibility of the right to interrogate the persons making statements alleging the liability. Article 6(3) ECHR provides that anyone charged with a criminal offence should be able to examine, or to have examined, witnesses against him and also to put forward witnesses on his behalf. The incompatibility of the procedure by which fines for breach of competition law are imposed with Article 6 ECHR can be seen in the ECtHR case of *Haas v Germany* where the ECtHR held that: "Where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6"³

³ judgment of 17 November 2005 in *Haas v Germany*