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**SEV's Comments on Commission's public consultation on best practices on antitrust proceedings and submission of economic evidence.**

**1. INTRODUCTION**

- 1.1 The Hellenic Federation of Enterprises ("**SEV**") welcomes the opportunity to comment on the Commission's draft package of documents setting out guidance and best practices on the Commission's antitrust procedures, namely the Best Practices for antitrust proceedings, Best Practices for the submission of economic evidence (both in antitrust and merger proceedings) and Guidance on the role of the Hearing Officers in the context of antitrust proceedings.<sup>1</sup> The comments provided focus mainly on the Best Practices for antitrust proceedings (the "Best Practices") and focus on particular aspects of the Best Practices.
- 1.2 SEV is the foremost employers' organisation in Greece, aiming to facilitate competitiveness and boost economic growth at national and EU level both by leading entrepreneurship in Greece and by promoting business ethics. SEV represents its members' interests both at national and EU level (including as member of Business Europe) facilitating a two-way dialogue between its members and political institutions.
- 1.3 The comments provided in this document reflect the views of the representatives of SEV's members and do not necessarily reflect the position of any particular member of SEV.

**2. GENERAL COMMENTS**

- 2.1 The Commission's stated aim in publishing the three documents is to further enhance the transparency and the predictability of Commission antitrust proceedings and to make it easier for companies under investigation to understand how the investigation will proceed, what they can expect from the Commission and what the Commission will expect from them.<sup>2</sup>

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<sup>1</sup> Published by the Commission for consultation on 6 January 2010 at:  
[http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/index.html](http://ec.europa.eu/competition/consultations/2010_best_practices/index.html)

<sup>2</sup> Press release of 6/1/2010 (IP/10/2) "Antitrust: improved transparency and predictability of proceedings" available at:

- 2.2 SEV very much welcomes the publication of such guidance. SEV has consistently advocated the need for a market economy with free competition which is a basic factor for development and economic progress. To this effect SEV has also consistently stressed the need for a comprehensive competition law enforcement regime in Greece and across the EU and for a regime which is transparent and easy to understand for businesses. Indeed, SEV consistently supports initiatives aimed at creating a more transparent, accessible and user-friendly regulatory framework for businesses. The documents in question, which as the Commission stated on the occasion of their publication, provide the reader with an "A-Z of antitrust proceedings" will be an extremely useful guide to businesses.
- 2.3 However, apart from codifying existing practice and providing guidance on the day to day handling of cases, a major aim of the Best Practices should be to ensure that the Commission's procedures are indeed based on "best" practice and that the Commission's procedures adhere to principles of due process with full respect of the rights of defence of undertakings under investigation.
- 2.3.1 Given the nature of antitrust proceedings which result in fines which could arguably be characterised as criminal or quasi-criminal, the procedures in question should comply with standards of a "fair trial" as these are enshrined in Article 6 of the European Convention on Human Rights ("ECHR") as interpreted by the European Court of Human Rights (ECtHR) as well as in Article 47(2) of the Charter of Fundamental Rights of the European Union.
- 2.3.2 In this respect the Commission's procedures still fall short of the standards required and could not be considered as "best practice" for antitrust enforcement.
- 2.3.3 The procedures in our view can and ought to be reformed more significantly. More radical reform may require change in the relevant provisions of the Treaty but significant reforms can still be made (and ought to be made) under the existing framework.
- 2.3.4 The draft Best Practices should therefore be seen as an interim document and in our view the Commission should strive to improve its procedures further and to promote truly best practices for antitrust enforcement at EU level and at national level (within and outside the EU).
- 2.3.5 We would welcome an international dialogue on procedural fairness with other authorities around the world, for example through the OECD, ICN, ECN and other bodies. In particular, within the ECN, the Commission should take the lead in improving its own procedures but also in ensuring that best practices on due process issues are promulgated at national level and that National Competition Authorities (NCAs) apply a high level of respect for due process. Businesses operating in the EU, including SEV members, find it important to have a user-friendly, transparent and predictable regulatory framework for antitrust enforcement across the EU.

### **3. SPECIFIC COMMENTS**

3.1 We provide specific comments on certain selective issues of particular interest. Our comments are not meant to be comprehensive and absence of comments on particular aspects should not be taken to mean that SEV necessarily agrees with the approach taken in the Best Practices.

#### **3.2 Scope of the Best Practices**

3.3 As outlined above, the Best Practices should not only codify existing practice, as the current draft does, but should go beyond current practice to an improved procedure with greater respect for due process and the rights of defence.

3.4 The Best Practices specifically state that they do not cover leniency and settlement procedures.<sup>3</sup> As part of an effort to increase transparency of antitrust procedures so that businesses have a full understanding of how these procedures work in practice, SEV would welcome further guidance and best practices concerning these procedures.

3.5 The Best Practices also do not cover sector enquiries. While sector enquiries are different to proceedings against specific undertakings, they form an important part of the Commission's competition law enforcement activities and constitute a very significant burden on businesses. SEV would welcome best practice guidance in this area as well to increase transparency and to ensure that such procedures take place in a way that minimises burden on businesses.

#### **3.6 Requests for information – timing for response to requests for information and for the reply to the SO**

3.7 SEV understands that information requests are an important power for the Commission to be able to investigate cases under the competition rules. However, SEV notes that information requests should request information which is truly necessary for the assessment of the case and avoid placing unnecessary burden on business, in particular third parties not directly connected with the investigation in question.

3.8 With regard to timing, SEV believes that two weeks (as specified in paragraph 34 of the Best Practices) to respond to an information request which can be detailed and voluminous does not appear sufficient. The Best Practices should specifically acknowledge that there will be many instances where requests for an extension to the deadline will be well founded.

3.9 Similarly time allocated for response to the Statement of Objections (SO) should be more generous. The issue of deadlines, which applies both in the context of response 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.

#### **3.10 State of Play meetings**

3.11 SEV welcomes the introduction of State of Play meetings in antitrust procedures. This feature will increase transparency and will enable businesses to have direct access to the Commission to discuss the case at key stages of the procedure. SEV also welcomes the express

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<sup>3</sup> Paragraph 3 of the Best Practices.

acknowledgement in paragraph 64 of the Best Practices of the possibility to have meetings with senior hierarchy of DG Competition or with the Competition Commissioner.

3.12 It would be useful to offer State of Play meetings not only to companies under investigation but also to complainants. Complainants have an important role to play and in particular SMEs rely on the Commission (and NCAs) to enforce competition law against their bigger rivals where concerns exist. Complainants enjoy procedural rights and there does not seem to be a sufficient reason to exclude them from having the right to State of Play meetings at certain stages of the procedure. It is also not clear why State of Play meetings should not be available in cartel procedures (see paragraph 60 of the Best Practices).

3.13 It would be useful to offer a State of Play meeting also before proceedings are initiated rather than as currently stated only after proceedings are initiated. The Commission intends to inform parties of the stage of an investigation prior to opening of proceedings (paragraph 14 of the Best Practices): this may be an appropriate point for a first State of Play meeting which could be used effectively by both the undertakings and the Commission to clarify any issues prior to the initiation of proceedings and possibly to avoid any such initiation of proceedings.

#### 3.14 **Timetable**

3.15 Unlike merger procedures which have a more predictable timetable (albeit increasingly less so), antitrust procedures currently suffer from a lack of a predictable and effective timetable. It would be to the advantage of both the Commission (higher levels of enforcement and more efficient enforcement) and companies (predictability and reduction of uncertainty) if a clear and sufficiently expeditious timetable was agreed early on in the procedure, e.g. at the first State of Play meeting. The Commission should try to adhere to such an agreed timetable.

#### 3.16 **Rights of defence, due process and Oral Hearing**

##### *Fines, due process and separation of powers*

3.17 The nature of antitrust proceedings results in fines which could arguably be characterised as criminal or quasi-criminal. This is particularly so given the levels of fines achieved under the Commission's 2006 fining guidelines which have reached extremely high levels, exceeding in some instances EUR 1 billion imposed on individual companies. It is therefore more important than ever for the procedures in question to comply with standards of a "fair trial".

3.18 In this respect the Commission's procedures still fall short of the standards required and could not be considered as "best practice" for antitrust enforcement. The current system combines investigative and decision-making functions. In addition, the College of Commissioners, which ultimately adopts the decision, is not really involved in hearing the evidence and is thus unable to make independent assessments. The current system with DG Competition investigating and being closely involved in the decision-making may lead to problems of bias or at least the perception of bias.

3.19 The procedures in our view can and ought to be reformed more significantly. More radical reform (such as providing the General Court or a specialist competition tribunal with the power to take decisions at first instance) may require change in the relevant provisions of the Treaty. However, significant reforms can still be made (and ought to be made) under the existing framework.<sup>4</sup> Apart from specific comments on the hearing, we do not comment on specific improvements but note that such improvements ought to include a clear separation of the investigative and decision-making functions (different teams or bodies within the Commission, greater role of the Hearing Officer etc) which is possible even within the current framework.

*Right to be heard, Hearing Officer and Oral Hearing*

3.20 The Best Practices state that the right to be heard is a fundamental principle of EU law and that the Commission is committed to ensuring the effective exercise of the right to be heard (paragraph 72 of the Best Practices). SEV welcomes this statement. In this respect the role of the Hearing Officer and the hearing is a key issue and SEV welcomes the further clarifications included in the Best Practices and in the Guidance on procedures of the Hearing Officers. However, SEV's view is that the Best Practices and Hearing Officers' Guidance do not go far enough to improve the system and ensure respect for due process and the rights of defence. The following specific comments are made in this respect:

3.20.1 The draft Best Practices, in paragraph 73, states that the Hearing Officers are independent of DG Competition. Despite this, we note that the Hearing Officers are clearly not independent of the Commission itself (as they are part of the Commission's administration) and in particular are not even independent of the Commissioner responsible for competition given that they are actually attached administratively to the office of the Competition Commissioner. In order to increase the independence of the Hearing Officers from DG Competition, it would be better if they were attached to the President of the Commission rather than to the Competition Commissioner.

3.20.2 As for the role of the Hearing Officer, currently the role is mainly confined to procedural issues. 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. The Hearing Officer's report could cover both procedural and substantive matters. To that effect it will be necessary to ensure that a sufficient level of staff is made available to the Hearing Officer.

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<sup>4</sup> We do not comment here on improvements that can be made to the appeal process before the EU Courts. However, we note that judicial review is naturally a very important part of the overall system of enforcement and that significant improvements can also be made to ensure more effective and speedy adjudication of cases before the EU Courts.

- 3.20.3 The conduct of oral hearings should be improved. Improvements to increase the usefulness of the hearing should include a requirement that 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 current system whereby the decision makers (the Competition Commissioner and other Commissioners) do not hear any evidence directly during a hearing appears deficient. As a minimum, members of cabinet and members of the Legal Service ought to be present.
- 3.20.4 Direct cross-examinations of witnesses ought to be allowed to enhance fact finding and ensure equality of arms and respect for the rights of the defence. This is particularly important given the increasing reliance of the Commission on leniency statements. Companies should have the right to cross-examine witnesses testifying against them.<sup>5</sup>
- 3.21 Undertakings should also have the right to be heard on the level of the fines and the methodology used by the Commission to calculate the fine before a decision is adopted. Under the current system, the methodology and tentative level of fine is not disclosed in the SO and undertakings do not have a specific opportunity to comment in writing or at the oral hearing. More transparency and predictability would be welcome and would strengthen due process as well as enforcement – it could also reduce the number of appeals which frequently focus solely on the level of fine imposed and factors taken into account by the Commission in imposing the fine.
- 3.22 **Final comments**
- 3.23 We welcome the statement in paragraph 137 of the Best Practices that the Commission intends to engage on a regular basis in a dialogue with the business and legal community and other stakeholders to discuss the experience gained through the application of Regulation 1/2003 and accompanying rules including the Best Practices. Indeed, as noted above, we believe that the Best Practices, while a welcome codification of existing practice, should be revised further to enhance due process through more significant improvements in the Commission's procedures.



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Dionissis Nikolaou  
Director General

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<sup>5</sup> In this respect, we note that 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.