

Skadden, Arps, Slate, Meagher & Flom LLP and affiliates

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

## 1. GENERAL REMARKS

- 1.1 Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates welcomes the opportunity to comment on DG Competition's Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU (the "*Best Practices*").
- 1.2 We greatly appreciate DG Comp's recognition of the importance of increasing the transparency of its procedures in antitrust cases. However, with only a few important, but limited exceptions, the Best Practices codify already existing practices. We respectfully encourage DG Comp to address more directly the causes underlying concerns about due process, fairness and the quality of decision-making in antitrust proceedings which have recently been the subject of extensive discussion.<sup>1</sup> We do so in the belief that enhancing the quality of DG Comp's decision-making would benefit both the Commission and third-party stakeholders.
- 1.3 In this context, we respectfully submit that the key concern is not limited to due process issues. It is at least equally important that DG Comp's fact-finding procedures be strengthened in order to increase the forensic quality of Commission decisions. The current administrative system gives the staff of DG Comp discretionary control over the selection of the relevant facts, their interpretation and assessment, and the timing and scope of the defendant's access to them.<sup>2</sup> We respectfully submit that the quality of DG Comp's fact finding would be improved by the addition of adversarial procedures designed to test the selection and interpretation of the evidence relied on by the staff. Defendants have strong incentives to test the Commission's factual findings. Providing them with the effective procedural means to do so under the supervision of a neutral party or body charged with establishing the facts could go a long way to improving the

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<sup>1</sup> See, e.g., Submission by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3 "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings", of 16 February 2010; Forrester, Due process in EC competition cases: A distinguished institution with flawed procedures [2009] E.L. Rev., 817; Slater, Thomas and Waelbroeck, Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?, Global Competition Law Centre Working Paper 04/08); see also Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis, [2004] World Competition, 201.

<sup>2</sup> See, e.g., Venit, Human All Too Human: The Gathering and Assessment of Evidence and the Appropriate Standard of Proof and Judicial Review in Commission Enforcement Proceedings Applying Articles 81 and 82, to be published in: Ehlermann/Marquis (eds.), European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases (available at [www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Venit.pdf](http://www.eui.eu/Documents/RSCAS/Research/Competition/2009/2009-COMPETITION-Venit.pdf)).

quality of the fact-finding in Commission decisions and ensuring that they are forensically robust.

- 1.4 The concerns about the Commission's dual role as prosecutor and judge and the absence of procedures to test its fact-finding during the administrative procedure would probably be most effectively addressed by a structural separation of the prosecutorial and adjudicative functions. Under this approach, antitrust decisions would be taken by an institutionally independent court in the form of judgments on the basis of evidence presented to it by the Commission and the defendants. However, we recognize that such a reform would require amendment of the TFEU and may therefore not be attainable in the foreseeable future.
- 1.5 In the following discussion we focus on reform proposals which should be achievable within the existing Treaty framework. In so doing, we have limited our comments to what we perceive as the key issues. We have intentionally taken this concise approach in order to reduce DG Comp's burden in reviewing the initial response to its request for comments. We are prepared to provide further input should DG Comp decide to pursue a more thorough reform of its existing procedures.

## **2. CREATION OF AN INDEPENDENT INSTITUTIONAL ENTITY EMPOWERED TO MAKE FINDINGS OF FACT AND ADOPT COMMISSION DECISIONS**

- 2.1 Under the current system, there is no separation between the functions of investigator/prosecutor and judge, all of which fall within the provenance of DG Comp. In particular, given the limitation of the Hearing Officer's mandate to procedural issues and the Hearing Officer's role as an adjunct of the Competition Commissioner, there is no provision for a hearing before an independent party or panel charged with establishing the facts in an antitrust case. An attempt at effective reform would recognize that antitrust cases are, by their nature, unavoidably prosecutorial and would seek to address the institutional and procedural *lacuna* in the existing system.<sup>3</sup>
- 2.2 *Institutional change:* We respectfully urge that the Commission entrust fact-finding in antitrust cases to an impartial arbiter (*e.g.*, a Hearing

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<sup>3</sup> There has been some reported criticism of a possible shift to a "prosecutorial" enforcement model. (See "EC's Almunia opens internal review of antitrust procedures", Mlex 1 March 2010). We respectfully submit that antitrust enforcement proceedings are by their nature unavoidably prosecutorial at least where they result in a finding of infringement. For that reason, it is not a question of *replacing* the existing administrative system with a prosecutorial one. Rather, the issue is whether the quality of DG Comp's antitrust fact-finding would be improved by the introduction of adversarial procedures that would permit more rigorous testing of the staff's selection and interpretation of the evidence under the supervision of a neutral arbiter. We believe that the reforms we suggest would result in such an improvement irrespective of how one characterizes the existing system.

Officer) or panel independent of DG Comp<sup>4</sup> and the Competition Commissioner. Under this proposal, the Hearing Officer or panel, endowed with the requisite powers and staff, and reporting to the President of the Commission, would (i) preside over a significantly expanded oral hearing (see point 2.3 below); (ii) determine the relevant facts on the basis of the evidence presented to it by the case team, the defendant and any third parties admitted to the proceedings; and (iii) make substantive findings that would be taken into account by, or form the basis of, the Commission's decision.<sup>5</sup>

- 2.3 *Adversarial oral hearing:* To be effective, the reform proposed in point 2.2 would require the introduction of adversarial procedures and the expansion of the oral hearing into a quasi-trial on substantive issues. These procedures should allow the defendant to contest the facts and their interpretation as presented by the case team and would, *inter alia*, include (i) the introduction of affirmative evidence in the form of witness statements and oral testimony concerning the facts and expert testimony concerning economic issues; and (ii) the ability to challenge, including via oral cross-examination, witness statements and oral testimony relied on by the case team (on both factual and economic issues). In turn, DG Comp would also be able to present evidence and cross-examine the defendant's witnesses. We believe that the right to present and cross-examine witnesses would greatly improve the quality of evidence relied upon in a final decision and result in forensically sounder decisions to the benefit of all concerned.

### **3. INCREASED INTERACTION BETWEEN DG COMP AND THE DEFENDANT AT EARLIER STAGES OF THE PROCEEDINGS**

- 3.1 The Best Practices suggest various mechanisms to increase the interaction between DG Comp and the defendant, including State of Play meetings. We welcome this approach as a significant improvement of the existing practice.
- 3.2 Earlier interaction in State of Play meetings prior to the issuance of the SO, which may only occur several years into the Commission's investigation, is important because a discussion at this earlier stage will assist the fact-gathering process.

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<sup>4</sup> We respectfully submit that the deficiencies in the existing administrative system cannot be adequately addressed by internal peer-review. While of considerable potential value, peer-review (i) is only voluntary; (ii) imposes substantial internal costs; and (iii) lacks transparency and institutional independence.

<sup>5</sup> Several options are possible and may merit further exploration. For example, the arbiter or panel could (i) adopt the final decision; (ii) issue a report establishing the facts; or (iii) prepare a draft decision or report which could be accepted or rejected by the College of Commissioners who would adopt the final decision.

- 3.3 Early interaction is important in both Article 101 and 102 proceedings (and is, in effect, incorporated in the Commission's cartel settlement procedures). However, it is of particular importance in Article 102 investigations in which the factual circumstances and their legal assessment tend to be more ambiguous and – importantly – often hinge on the characterization of the defendant's conduct or documents by a complainant which can lead to an imbalance in the fact-gathering process.
- 3.4 For the same reasons, we also propose regular use of triangular meetings at an early stage of the investigation rather than only exceptionally as proposed in the Best Practices.

#### **4. CONSERVING RESOURCES AT THE ACCESS TO FILE STAGE**

- 4.1 Under the existing practice, access to the file is encumbered by the burdensome process of (i) redacting confidential material from file documents (a process that the Commission must supervise); and (ii) resolution of the defendant's claims to redacted material. Both procedures impose significant time and resource costs on all concerned and can involve appeals to the Hearing Officer (and in some cases, such as third-party confidentiality claims, interim appeals to the General Court) and may eventually provide a basis for challenging the Commission's decision on appeal. The burdensomeness and inefficiency of this process is further exacerbated by the conflicting strategic incentives that defendants, on the one hand, and complainants and third parties, on the other hand, have with respect to disclosure and file access. An alternative procedure providing full access to un-redacted third-party documents subject to non-disclosure obligations would save the time and energy that go into the existing redaction process and would also counter any actual or perceived selectivity on the part of DG Comp in resolving file access issues.
- 4.2 Against this background, we warmly welcome the suggestions at §§ 83-85 of the Best Practices to provide the defendant access to un-redacted copies of third-party documents pursuant to (i) a "negotiated disclosure procedure" involving non-disclosure agreements ("*NDA*s") between the defendant and third parties; and (ii) the "data room" procedure.
- 4.3 However, we respectfully recommend that the use of the proposed disclosure procedure be made mandatory. The conclusion of NDAs has already been successfully used by the Commission in some proceedings. Our experience suggests that third parties themselves have a strong interest in avoiding burdensome redactions and providing un-redacted copies of documents to the defendant on a negotiated basis. Any confidentiality issues raised by third parties could be addressed by limiting access on the defendant's side to a "clean team" comprising, *e.g.*, the defendant's external counsel, outside experts, and in-house litigation counsel. Adoption of this approach would (i) reduce the time it takes the Commission to issue an SO; and (ii) facilitate earlier and complete file access by the defendant. The former would increase the efficiency of the

Commission's procedures while the latter would address potential due process issues that may result from the tight deadlines imposed for the SO response and issue of complete file access, and improve the quality of Commission decision-making by giving defendants earlier and more complete access to the evidence.

- 4.4 With regard to the "data room" procedure as currently envisaged in the Best Practices, the Commission's proposal appears to be limited to *physical* data rooms. We recommend that the data room procedure be expanded to permit access to 'virtual' data rooms, subject to the appropriate NDAs, by the defendant's "clean team" irrespective of their physical location.