



March 3, 2010

**International Division**

Carles Esteva Mosso  
European Commission  
Director—Directorate General for Competition  
Brussels

Dear Mr. Esteva Mosso,

The U.S. Chamber of Commerce is pleased to have the opportunity to review and comment on the European Commission's newly identified best practices for the conduct of antitrust proceedings. We welcome the Commission's willingness to further engage on this important subject. Therefore, we respectfully submit that the Commission take into account the comments it receives through this consultation and look to revise its due process best practice guidelines to reflect concerns raised with what has been drafted, but more importantly address several concerns which the current drafts have left unaddressed. Finally, once finalized, it is important that DG Competition's actual practices closely adhere to its identified best practices.

Our comments are offered in the belief that due process is central to any legitimate legal proceeding. It is also important to note that our members are often divided on antitrust matters as businesses often complain about mergers that involve their competitors, cheer on cases of single-firm dominance that targets their competitors, and can themselves be victims of cartels where business plays the role of consumer. However, our members are completely united in the belief that antitrust proceedings must be transparent, predictable, and above all fair.

Before offering specific comments on the three papers open for consultation, it is important to note that the U.S. Chamber of Commerce's membership includes many U.S. affiliates of multinational companies headquartered outside of the United States. In addition, the Chamber's concerns regarding due process in antitrust proceedings extend beyond Europe to many other jurisdictions around the world. This is why the Chamber is committed to advancing international recommended best practices with regard to due process in antitrust proceedings within international forums such as the OECD, APEC, and ICN.

The Chamber would make the following comments with regard to the three current drafts:

## General Best Practices Document

- The first paragraph mentions the purposes of the Best Practices: (i) Enhance efficiency of the investigation and ensure a high degree of transparency; and (ii) predictability. There is one more reason that should be a stated goal for having best practices, and it is to ensure fairness or accuracy in the results of investigations so that consumer welfare is enhanced.
- With respect to grounds for investigation and parameters of data requests, there remains a degree of unpredictability. Section 2.5.1 Paragraph 32 (proceedings document) says that DG Competition “defines the scope and the format of the request for information” and is not obligated to convey that information to the company under investigation or to other parties subject to information requests. Section 2.5.1, Paragraph 31 also provides that the Commission will enjoy an unspecified “wide margin” in determining what information is necessary to verify the existence of an alleged infringement.
- The paragraphs 38 through 41 addressing DG Competition meetings, etc. with others should make it clear that DG Competition has an obligation to record in writing any potentially exculpatory evidence collected by any third party *and* then make it known and available to the party under investigation. Paragraph 40 is helpful, but could be further clarified along the lines mentioned so that the “brief note” to be placed in the file by DG Competition is more than a recitation of logistical details and topics discussed. This duty to record exculpatory evidence is especially important where third parties decline DG Competition’s invitation to substantiate their oral statements with written materials per paragraphs 39 and 41. It is also important that DG Competition take a liberal approach in deciding what is potentially exculpatory evidence; sometimes cases turn on evidence that only third parties have in their possession and something that may not seem very relevant at an early stage in the investigation might be or lead to something extremely relevant later on as the case develops.

The Chamber also has concern that the legal professional privilege (LPP) is confined to “independent lawyers” as noted in paragraph 47. We are not aware of any good reasons for preventing extension of the LLP to in-house counsel. Where in-house legal counsel is qualified and complies with rules governing professional conduct, his or her legal advice should be privileged. It is important for executives within a company to be able to rely on internal counsel and trust that otherwise privileged conversations with outside counsel are equally protected and respected with their in-house attorneys.

- Regarding paragraph 53, pertaining to information exchange between competition authorities, it is important that all relevant evidence (both as to possible anti-competitive conduct and exculpatory) pertaining to the issues of interest to another agency be shared.
- The State of Play meeting details outlined in paragraphs 55 through 60 of the “proceedings document” are an excellent step toward increased transparency. The draft guidelines should be revised to make clear that the companies under investigation have a right to request such meetings and that the Commission is obligated to grant all reasonable requests. In addition, the State of Play meetings need to be substantive and require DG Competition to provide the parties with insight into the legal, factual and economic theories that are being considered in the case. Such disclosure as to the direction DG Competition investigation is headed is important if the goals mentioned in paragraph 55 regarding transparency and investigative efficiency (as well as fairness, another critical objective) are to be accomplished.
- Transparency concerns also persist in DG Competition’s leeway to dismiss complaints in the initial investigation phase based on non-public determinations that they are inadequately substantiated, and to prioritize those it assesses to be of greater impact to the marketplace without clarifying the basis of such assessments.
- Because of the potential for enormous document production requests, compounded by further stipulations that respondents comply with formatting preferences and rewrite confidential documents for disclosure, the average four- to- eight- week timeframes for responses outlined in Paragraph 87 (proceedings document) may often present undue burdens to respondents. The minimum period to respond should be longer than four weeks.
- While deadlines imposed upon companies are stringent, there are inadequate stipulations with regard to the Commission’s timeframes and deadlines. The language on timing does not require the Commission to indicate parameters, forecasts or plans regarding the time frame for investigations and the same is true of the appeals process. Paragraph 57 (proceedings document) only indicates that the commission “may” indicate a tentative time frame, a potentially debilitating impediment to companies for whom important transactions are left pending while investigations, hearings and appeals are underway.

In the best practices for submission of economic evidence, there is no means provided for parties to challenge the evidence collected. This is a critical procedural fairness principle that ensures any findings are based on accurate and complete evidence.

While the Chamber welcomes the three papers put forward for comment by the Commission and believes that the papers provide much greater transparency into the EU process and institute some important reforms, we believe that the three papers unfortunately leave unaddressed significant concerns. Foremost, the Chamber would add its support for having the Commission address the need for more fundamental reforms to address its single, combined role as *prosecutor, judge, and jury*. That combined role creates conflicts of interest that are not fully addressed or easily resolved through greater transparency and more robust processes for handling evidence.

We recognize that jurisdictions with administrative authorities like the European Union aren't likely to be converted into judicial systems. However, we do believe that better safeguards can be adopted internally, essentially creating internal firewalls between the investigative team and decision makers, that would alleviate many of the current concerns while maintaining the existing legal framework and not requiring any changes to the recently adopted Lisbon Treaty.

### **Document on Procedures for Hearing Officers**

The paper that provides guidance on procedures relating to the role of hearing officer is perhaps an indirect attempt to get at the concerns raised by the business community regarding the need for separation of powers within the DG Competition. It is important, as the paper explains, that the hearing officer is not a member of DG Competition and is in fact independent. However, independence is only meaningful if the hearing officer is also empowered.

Currently the hearing officer lacks any real powers, so the hearing has no real legal value and does not help address the problem of DG Competition's combined role of prosecutor, judge and jury. Suggestions that could provide the hearing officer with a more prominent role include:

- Creating a role for the hearing officer to hear the facts of the case as part of any hearing. As a fact finder, the hearing officer should either make the decision or prepare a draft decision for acceptance or rejection by the College of Commissioners. Under this scheme, the hearing officer would report to the President of the Commission or the College of Commissioners (reporting to the Court would probably require a Treaty amendment and so is not practical). Empowering the hearing officer naturally changes the nature of the oral hearing by converting it into a trial of sorts with the Commission and the defendant having the ability to present evidence and cross examine the other party's witnesses. The hearing officer would then establish the facts of the case and/or prepare his decision on the basis of that adversarial process designed to ensure the accuracy of any negative findings.

- As the finder of fact, it then also would make sense for the hearing officer to serve as the presenter of the case and proposer of sanctions to the College of Commissioners.

The above recommendations should only require an amendment of Regulation 1/2003, which is feasible.

Additionally, the papers submitted for consultation do not address the common practice of “devil’s advocate” panels often formed within DG Competition to challenge the validity of the Commission’s arguments. Best practices for the use of these panels should be developed. It is also important given the complexity of many of today’s cases that “devil’s advocate” panels are fully briefed by the target of the inquiry and equipped with an understanding of the matter as is understood by the target. The Commission is not adequately challenged unless these panels are well equipped in terms of information.

Adoption of suggestions like these, as well as the consideration of others would begin to help develop the kind of internal firewalls the business community seeks.

In addition, due process continues to be important once an infringement has been determined and the Commission looks to issue sanctions or administer other remedies. The Commission should share with the effected parties the proposed sanction or remedy being considered in order for the infringing party to be able to make arguments as to the approach the Commission is considering adopting. In the case of cartels, the Commission should place more substantial reliance upon leniency and compliance programs as well as adopt guidelines for determining the circumstances in which infringing actions of a subsidiary might be deemed to be independent from its parent.

With regard to fines, using global turnover a baseline is inherently extraterritorial in nature. Revenue earned outside the EU aren’t relevant to violations of EU law, nor do they relate to the possible impact on European consumers. In addition, the current methodology used to calculate fines doesn’t attempt to directly capture consumer harm or in any direct way calibrate the fine to the damage done to consumer welfare.

The Chamber recommends that as part of an ongoing dialogue with the business community on the development of due process best practices for competition proceedings that DG Competition solicit comments in a future consultation from stakeholders on best practices with regard to due process in determining sanctions and remedies.

DG Competition should also address procedural matters related to sector inquiries to ensure such requests are narrowly cast and avoid becoming “fishing expeditions”. Sector inquiries are also a complex, lengthy and costly process for both the Commission and the industry sectors involved. Similarly to our recommendation with regard to remedies, the Commission should seek input on procedural best practices for sector inquiries.

In closing, the Chamber appreciates the Commission's transparency in publishing the three papers for public comment. We believe that the papers represent a good first step, but also believe that the Commission needs to look at issues more fundamental in relation to our concerns as well as launch additional consultation with regard to due process in remedies and sector inquiries. Finally, it is important to note that once the due process best practices are adopted, the Chamber would suggest that DG Competition commit to a periodic consultation going forward with stakeholders to ensure that there is consistency between what is prescribed in the documents and how in practice the Commission conducts antitrust proceedings.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sean Heather', with a long horizontal flourish extending to the right.

Sean Heather  
Executive Director  
Global Regulatory Cooperation  
U.S. Chamber of Commerce