



RECOMMENDED FRAMEWORK FOR BEST PRACTICES IN INTERNATIONAL COMPETITION LAW ENFORCEMENT PROCEEDINGS

1. INTRODUCTION

1.1. Preliminary Statement

1.1.1. This draft proposal has been prepared by the Due Process Task Force of the Competition Committee of the United States Council for International Business. It sets forth a recommended framework for certain best practices to guide competition law enforcement investigations and decisions applicable to all matters, including unilateral conduct and cartels. This proposal is structured as a framework for best practices, as opposed to a more detailed, prescriptive “code,” in an attempt to set forth specific recommendations on basic principles, while recognizing the need for individual competition authorities to have discretionary latitude to work out and implement the details of these practices within their individual competition policy systems.

1.1.2. This proposal is not intended as a comprehensive list of due process protections. The drafters acknowledge other important statements of best practices that deal in whole or in part with procedural matters, such as the 2005 Recommendation of the Council on Merger Review of the Organization for Economic Cooperation and Development. The procedural safeguards listed here are intended to add to such best practices and the existing protections offered by national competition law enforcers and to extend them more broadly to all types of competition matters.

1.2. Background and approach

1.2.1. Businesses today are more likely than ever to come into contact with competition authorities outside their home jurisdictions. The internet and the global transportation infrastructure enable businesses today to interact with an increasingly broad range of customers and suppliers throughout the world in a relentless drive for efficiency. As a result, business practices that once were local in scope now may impact the citizens and business communities of multiple countries. Perhaps reflecting this, governments have increasingly adopted and refined laws to promote and protect competition, and have established the agencies required to enforce such laws.

1.2.2. The best practices proposed in this document are intended to promote the adoption of procedural safeguards for all types of competition matters, directed at ensuring that due regard is given to the fundamental fairness of the processes by which competition authorities enforce their laws in an increasingly global context. As described in the “best practices” identified below, we believe it is essential that competition enforcement agencies embrace the principles of transparency, early and continuing engagement, due process, non-discrimination and accountability in order to operate effectively in this heterogeneous environment. Given the extent to which the actions of a given nation’s competition authority directly impact firms outside its borders, such

principles are essential not only to ensure fairness to firms being investigated, but also to more effectively pursue the policies that underlie competition laws, promote greater respect for competition law, competition authorities and their enforcement decisions, and ensure the more efficient utilization of the limited resources of competition authorities worldwide.

1.2.3. The adoption of such best practices would not only ensure procedural fairness for those involved, but would also importantly strengthen vigorous, efficient enforcement of competition laws in a number of respects. For example, frequent and open engagement with firms under investigation enhances the ability of agencies to gather relevant information, increases efficiency by focusing the parties on the issues in which agencies are actually interested, and strengthens the internal deliberations of agencies by enabling them to better understand the firms' arguments, and the facts that support those arguments, before, rather than after, the agencies decide whether to recommend formal charges. Providing due process protections to firms under investigation enable competition authorities to ensure that their decisions (even if adverse to respondents) are respected by all parties. High standards of transparency and openness increase support for the decision-making processes of competition authorities by instilling in regulated parties and the public a sense of confidence that decisions are made fairly and consistently. Transparency also facilitates voluntary compliance with competition laws because businesses and their counselors can better predict the likely reaction of authorities to a contemplated course of conduct or transaction if they understand the basis for prior decisions and have confidence that the law will be applied consistently and objectively. Further, protecting the confidential information submitted by the respondents and relevant third parties can ensure that agencies have access to information that will strengthen enforcement decisions and public trust in the ultimate conclusion. Thus, increased procedural fairness can strengthen agency decision-making and increase public confidence in agency decisions, benefitting businesses, competition authorities and the consumers they serve.

2. RECOMMENDATIONS FOR BEST PRACTICES

2.1 Transparency

2.1.1 Competition laws and regulations, including the procedures and practices governing enforcement proceedings, should be transparent so as to enable companies to conform their practices to the applicable laws in those jurisdictions in which they currently operate and to evaluate the laws of those jurisdictions in which they may operate. To the extent that companies operating internationally become involved in an enforcement investigation, it is essential that they understand the procedures that govern such proceedings, the statutory or other legal authority under which they are taking place, and the allegations actually being made in such proceedings in sufficient detail to ensure that such companies can defend themselves. National competition authorities have published the substantive laws and regulations governing competition law enforcement and many of the procedural rules governing enforcement proceedings, and should continue to make such laws and rules public.

2.1.2 A firm cannot address the allegations made and claims being pursued against it unless the competition authority informs the firm of the allegations, the claims, and the evidence supporting the claims. To ensure procedural fairness and effective decision-making, the exchange of such information between the competition authority and the firm or firms under investigation must take place through all stages of an investigation and proceeding, including prior to the completion, issuance or adoption of any Report, as defined in ¶ 2.1.7 below. There should be a strong presumption in favor of disclosing facts, documents, theories and legal authority to the investigated party, as early in the investigative process as is practicable, consistent with other national laws.

2.1.3 There is a tension between the transparency required to enable the subjects of an investigation to address the allegations asserted against them, and the confidentiality required to protect the legitimate business secrets of the parties and non-parties that participate in such investigations. Competition authorities must address both concerns in order to encourage market participants to participate in their investigations, ensure that they can gather the information required to make informed, objective decisions, and safeguard the ability of firms under investigation to defend themselves.

2.1.4 Upon initiation of an investigation, the competition authority should inform the party being investigated of the fact of the investigation and the legal authority (that is, the specific statutory and regulatory provisions) under which the agency may proceed. The level of disclosure should increase over the course of such an investigation.

2.1.5 Following initiation of the investigation and well before preparation of a statement of charges (such as a Statement of Objections (Europe), Examiner's Report (Korea) or Advance Notification (Japan)), the agency should provide the subject of the investigation with copies of all complaints, together with any supporting evidence submitted by the complainants, subject to the provisions of ¶ 2.1.6 below. The complainants or other firms that have supplied the information should have the opportunity to redact confidential information from the version of the materials provided to the parties under investigation; however, the competition authority should ensure that such redactions are not so great as to deprive the subject of the investigation of meaningful notice.

2.1.6 During the course of the investigation, the agency should disclose to the subjects of the investigation all materials submitted by complainants or third parties that are relevant to the claims being pursued by the agency. These materials should include all relevant items of both inculpatory and exculpatory information. The parties submitting the materials should have the ability to designate as confidential all or some of the materials submitted, with the understanding that the agency will ultimately be able to rely in its decision only on information that has been disclosed to the parties under investigation. In the event the statutes or regulations of the jurisdictions preclude the provisions of specific documents or other information to the parties under investigation at this stage of the proceeding, the agency should provide the parties being investigated with a summary of the information withheld on confidential grounds that is as detailed as possible without implicating the legitimate confidentiality concerns of the submitting party. To ensure efficiency in the investigation and an adequate opportunity for the

subject of the investigation to discuss and respond to such information with the investigation team, such disclosure should occur well in advance of the preparation of a written Report as discussed below in ¶ 2.1.7.

2.1.7 In the event relevant agency officials recommend a formal charge against the parties under investigation, the written Report containing that charge (the “Report”) should identify all claims that the agency will pursue during the hearing, as well as all documents, statements and other evidence upon which the agency relies, and intends to present during the hearing, to support any finding or conclusion. For example, the agency should disclose to respondents the underlying data (including the source(s) of such data) and methodology it has used to prepare any chart, graph, table or other analysis relied upon in the Report. Contemporaneously with the issuance of this Report, the agency should provide the respondents with copies of such evidence, including information designated as confidential, provided the respondents give the undertaking mentioned in the confidentiality principle set forth below in ¶ 2.3.3.

2.1.8 A transcript of the hearing before the agency should be made, with a copy provided to the respondents.

2.1.9 The agency also should specify and publish the procedures and criteria that are necessary for respondents to resolve an enforcement action by mutual consent with the agency.

2.2 Engagement

2.2.1 Market participants are the primary sources of information that enable a competition authority to understand the conduct under investigation, the competitive dynamics driving competition in the affected markets, and the effects of such conduct on competition and consumers. Such an understanding enables an agency to fully evaluate the accuracy and import of the allegations before it. Firms under investigation, like other market participants, are highly relevant sources of such information, and the competition authority should fully engage them as part of its efforts to ensure that its decisions are objective and grounded in a thorough and accurate understanding of the relevant facts. Such engagement provides an important procedural safeguard for the parties being investigated and provides vital assistance in enabling the competition authority to fully understand the practices under investigation and the impact of those practices on competition.

2.2.2 During the investigation and well in advance of the issuance of a Report, the agency staff conducting the investigation should meet regularly with the parties being investigated to discuss the nature of the agency’s concerns, the allegations and evidence giving rise to such concerns, and the factual, economic and legal theories under consideration that would support a potential finding that the parties have violated the competition law of the jurisdiction. Engagement requires not only that the investigated party present its views, but also that the agency’s investigating staff explains its evolving views of the facts and claims at issue. Such consultations should be conducted with sufficient specificity to fairly advise the parties being investigated of the subject matter of

the investigation and the relevant evidence and theories and to provide such parties a genuine opportunity to respond to such concerns well before any Report is issued.

2.2.3 Information requests issued by the competition authority to parties and non-parties alike are an important resource for gathering information relevant to investigations. Relying solely on such requests, however, would limit the ability of the competition authority to gain a full understanding of the conduct under investigation and the impact of such conduct on competition. Engagement by the agency in a dialogue with the parties under investigation reduces the likelihood that the agency will ultimately be surprised by arguments made in response to its report or during a hearing and enables the agency to more fully test its theories during the course of an investigation. This engagement improves the agency's ability to allocate its resources efficiently, provides procedural safeguards to the parties under investigation and potentially could narrow the scope of the disputed issues that ultimately need to be resolved during a hearing.

2.3 Confidentiality

2.3.1 The ability of a competition authority to assure market participants that the confidentiality of non-public business secrets will be protected is vital to the agency's ability to effectively investigate potentially unlawful behavior. As discussed above, however, under some circumstances there can be a tension between the need to safeguard the confidentiality of information and the need to enable the parties being investigated to defend against the allegations asserted against them. The practices proposed in the Transparency section above attempt to reconcile these goals.

2.3.2 It is important, however, to ensure that confidentiality protections extend only to information that is legitimately in need of protection from disclosure. The competition authority should in its procedural rules provide clear guidelines identifying the criteria used to define confidential information in a manner consistent with the laws of the jurisdiction.

2.3.3 It is important that competition authorities have in place and implement strict rules requiring agency personnel to protect the confidentiality of information gathered as part of investigations. Such rules should ensure that (i) the agency does not share information designated "confidential" by the parties under investigation, the complainants or third parties with anyone other than the parties being investigated, agency personnel working on the investigation or outside experts retained for that purpose; and (ii) the parties being investigated do not disclose such materials to anyone other than their counsel, retained experts and employees working on the investigation, provided that the persons listed in (ii) above execute a written undertaking not to disclose confidential material to any other person and not to use the confidential material for any purpose other than the preparation of a given party's defense.

2.3.4 To the extent that confidential information is disclosed during a hearing, that portion of the hearing should be closed to anyone other than agency personnel and the respondents, including those individuals that have executed the undertaking referenced in ¶ 2.3.3.

2.3.5 The agency should provide the respondents, complainants and third parties with the opportunity to request that information they submitted that meets the agency's criteria for confidential treatment be redacted from the public version of its decision, upon a showing by the disclosing entity that publication is likely to result in significant competitive harm.

2.4 Due process/fairness

2.4.1 Enforcement proceedings conducted by competition authorities should operate within a framework that ensures that fundamental due process rights of the parties concerned are respected, and that appropriate safeguards are established to ensure the enforceability of those rights by the parties concerned.

2.4.2 Mechanisms should be established to ensure that decisionmaking is based strictly on the facts and that the applicable legal standards are applied objectively in each case. For example, the agency should establish internal controls that prevent the development of a systemic or specific bias to reach a specific conclusion in any investigation.

2.4.3 When prosecutorial and adjudicatory functions are housed within the same agency, such agencies should implement procedural safeguards, including the employment of fact finders who are independent of investigating and prosecuting employees, to ensure a fair and transparent process. Following the issuance of the Report, ex parte contacts between the agency staff presenting the case against the respondents and the agency officials acting as decision-makers (including their staffs) should be prohibited.

2.4.4 If the agency makes a public statement regarding its receipt of a complaint and/or the initiation of an investigation, it should make clear that it has reached no conclusion about the merits of the complaints or the lawfulness of the conduct that is the subject of the complaint or investigation.

2.4.5 In order to ensure that agency decisions are objectively grounded in the facts, the agency staff conducting investigations should possess, or have available to it, resources sufficient to understand the nature of the conduct under investigation and the competitive impact of such conduct. Depending on the subject matter being investigated, agencies should consider the need for expertise in a variety of areas, such as economics, technology, industry expertise, and accounting. A competition authority should ensure that the staff conducting an investigation includes, or is supplemented by, persons having the expertise necessary to fully understand the factual circumstances being investigated.

2.4.6 The agency should allow the parties to be represented not only by counsel licensed to practice in the agency's jurisdiction, but also by counsel licensed in the party's home jurisdiction acting in conjunction with the former. The agency should respect the legal professional privilege.

2.4.7 The agency should allow counsel for the party to be present at on-site inspections of a party's premises and during interviews of a party's employees and potential witnesses.

2.4.8 The agency should appoint an appropriate agency official who is not involved in conducting the investigation (such as, for example, a member of the agency's General Counsel Office or an agency hearing officer) to resolve disputes between the investigators and any party or non-party regarding information requests.

2.4.9 In the event the agency issues a Report alleging that the parties under investigation have violated the competition law of the jurisdiction, such parties should be provided the opportunity to submit a written response to the Report (the "Response"). The respondents should have the full opportunity to set forth in their Response their arguments and supporting evidence, including, but not limited to, factual evidence and expert opinion.

2.4.10 The agency should provide each respondent with sufficient time to prepare and present its Response, taking into account the length of the investigation, the breadth and complexity of the issues, and the need, if any, for the Report and the evidence relied upon in the Report to be translated into the native language of the respondent (or of the jurisdiction in which its headquarters is located), and for the Response to be translated into the local language of the competition authority.

2.4.11 The agency's obligation to disclose both inculpatory and exculpatory evidence to the respondents should continue following the submission of the Report through the close of the hearing.

2.4.12 It is the general practice of competition authorities to afford respondents, subsequent to the submission of their written Response, an opportunity to respond at a live hearing to the allegations asserted against them (except for those jurisdictions in which such allegations are presented in a judicial court). The schedule for such hearings should be announced after consultation with the respondents, and rules governing such hearings should be announced well in advance of the hearing. The respondents should have the opportunity to present their arguments and factual and expert evidence at the hearing, with adequate time available for such preparation and presentation in light of the complexity of the issues and the need, if any, for translation of materials. The applicable rules of procedure and evidence should be applied equally to the agency and the respondents.

2.4.13 The agency should have the burden of proving each element of the offenses asserted against the respondents through the submission of evidence during the hearing. The respondents should be given adequate opportunity to respond to such evidence, including the ability to directly address any witness testimony presented by the agency. The respondents should be provided sufficient time to respond to any new evidence or argument made by the agency that was not included in the Report.

2.4.14 The submission of additional evidence and argument by the agency and the respondents following the close of the hearing should be prohibited absent extraordinary circumstances. In the event such supplemental submissions are allowed, they should be disclosed to the other parties, which should be provided a reasonable opportunity to respond.

2.4.15 The agency's deliberative process is not final, and the resulting decision following the hearing should not be announced, until the agency has completed a final, approved version of the decision to be published. It is extremely important to avoid the disclosure of non-final draft or summary announcements of decisions against subjects of an investigation, so as to avoid economic harm to such parties during the period in which the deliberative process is conducted and to avoid giving the public the impression the agency has reversed a fully considered position in the event that its final decision modifies the previous, tentative conclusions.

2.4.16 No agency action or order should be effective until review and final action by the full agency is complete, and there should be a strong presumption that a stay of effectiveness will be granted if the subject of the investigation appeals such action or order to a court or other reviewing body. This principle should not be construed to prevent an agency from seeking preliminary injunctive relief if such relief is granted by an independent court, after a court hearing in which the subject of the investigation has an adequate opportunity to contest the agency's demand.

2.5 Non-discrimination

2.5.1 Competition authorities, courts, tribunals and other persons or agencies involved in the enforcement of competition laws should apply such laws, regulations, policies, practices and procedures in a non-discriminatory manner and without reference to the nationality of the firms before them.

2.5.2 For greater certainty, and without limiting the generality of the foregoing, laws, regulations, policies, practices and procedures should not be applied with the intention to assist the economic interests of local firms or industries by hindering the ability of foreign firms to compete.

2.6 Accountability

2.6.1 Written decisions by the agency should include findings of fact, conclusions of law, and explanations thereof.

2.6.2 Where the agency reaches a decision adverse to the subject of the investigation, the agency's decision should address all the major points and defenses of that party and should explain why such evidence and arguments were unpersuasive. Addressing defenses in this fashion helps to focus the agency's inquiry, assures the party that its presentation was understood and given a full hearing, provides a record for any appeal, and provides useful guidance for future business conduct.

2.6.3 The right of appeal of decisions issued by competition authorities should be to a court consisting of impartial judges. Mechanisms should be in place to ensure that the parties concerned have timely and effective rights of appeal.

3. CONCLUSION

We believe that the foregoing best practices, if adopted, not only would ensure that companies are accorded procedural fairness, but also would more effectively promote the policies that underlie competition laws, promote greater respect for competition law and its enforcement and ensure more efficient utilization of the enforcement resources of competition authorities worldwide, without jeopardizing the legitimate enforcement interests of any jurisdiction. Realization of these objectives will inevitably require some compromises by the international competition enforcement community, but the increasingly global nature of commerce dictates that competition authorities recognize the need for procedural safeguards that increase the transparency and fairness of their enforcement efforts. Unless different practices are dictated by genuine differences in underlying policy objectives or fundamental statutory constraints, it is submitted that the objective of achieving increased international harmonization reflected in these “best practices” principles should be followed.