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Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

-- Issues Paper by the Secretariat --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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15 JUNE 2010

Issues Paper

1. Introduction

1. In February 2010 the Working Party N. 3 (WP3) of the Competition Committee held a roundtable on procedural fairness. During that meeting, it was decided that a follow up roundtable on additional procedural fairness topics would be scheduled for the June 2010 meeting. The WP3 Chair asked the Secretariat to prepare a short Issues Paper identifying the key questions related to the topics for discussion that could be addressed in the WP3 roundtable on 15 June 2010. In her letter of 29 March 2010, the Chair invited the OECD members and observer countries to submit written contributions to the Secretariat by no later than 31 May 2010.

2. The February 2010 roundtable focused on transparency issues in civil and administrative enforcement proceedings (i.e. not criminal procedures) including both merger and non-merger antitrust proceedings (cartels and single firm conduct) and merger review. Specific topics for discussion included transparency relating to the law and agency procedures and practice, party contacts with the agency involved, notice and opportunities to be heard, hearings, publication and timing of decisions and closing statements. These topics raised a great deal of interest among the delegations and the key points to come out of the discussion included:

- All delegations considered transparency and procedural fairness as essential requirements not only for the parties involved in a competition proceeding, but also as a key part of efficient and effective case management by the competition authority.

- Transparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement actions and decisions. They also assist agencies in allocating their resources more efficiently, focussing on cases really worth pursuing.

- Countries have very different enforcement systems. Common law countries tend to have court-based enforcement, while civil law countries tend to have an administrative-based system. Transparency rules are very different in the two systems.

- Two areas were discussed in more detail: (i) how and when the various jurisdictions make the parties aware of the existence of investigations and/or of the objections that the agency intends to raise against them; (ii) the degree to which the parties can interact with the officials handling the investigation and with the decision-making body.

- While all delegations recognised the importance of informing the parties of the allegations brought against them and of the need for the agency to be open to meeting with the parties, the ways in which this is accomplished in practice vary significantly. Some jurisdictions provide ample information on the case, its scope and its timetable at a fairly early stage of the investigation, while other countries postpone that communication to the formal closing of the investigation and opening of formal proceedings. While some countries have an open policy and welcome early and frequent contacts with the parties and a continued dialogue throughout the proceedings, other countries only offer the parties the opportunity to discuss the case with the agency in a formal setting (e.g. oral hearing), and some countries opt for a more ad hoc approach.

- While differences do not necessarily indicate that one system is more transparent or fair than another, delegations recognised that this is an area where more work could be done by the OECD. Parties involved in multi-jurisdictional cases including different legal and cultural restraints should reasonably perceive the enforcement systems to which they are exposed as fair and transparent.

3. The follow up roundtable in June 2010 roundtable will include discussion of transparency issues in civil and administrative enforcement proceedings (i.e. not criminal procedures), and will focus on a variety of other topics including requests for information to targets of investigations, the decision making process, settlements, confidentiality, and judicial review.

2. Institutional design and decision making process

4. Convergence on the institutional design of antitrust enforcement agencies is often considered less important than convergence on the analysis of substantive policy issues. However, when it comes to ensuring that an agency's operations and decision- making processes are perceived to be transparent by the parties involved in the enforcement proceedings and by the public at large, institutional design matters a great deal. If transparency on the substantive, legal and economic standards applied by the agency is important, it is also key that procedures which support the decision- making process are designed to allow parties and third parties to take an active role in the process. Similarly, it is important that institutions are willing to interact openly with the parties involved regarding the legal and economic theories that they may apply, as well as underlying factual concerns in particular cases. In other words, a transparent and fair enforcement process requires a combination of effective institutional design, sound administrative practice and open legal culture.

5. Various procedures can be set up to encourage the interaction between the investigating team, the decision maker and the parties to an investigation. Similarly, various procedural mechanisms and internal checks and balances can be established to ensure that decision makers obtain comprehensive information and that such information is tested in a rigorous, evaluative process. Countries have adopted a number of measures to promote such sound decision-making processes. While such procedures and mechanisms may, to some extent, have an effect on a speedy resolution of the investigation, they also provide the necessary objective analysis and evidence to support sound competition decisions.

6. These procedures and mechanisms may include:

- The use of devil's advocate (or peer review) panels, i.e. internal review by a 'fresh pair of eyes' to ensure the theory of harm is supported in theory and in facts;

- The use of specialised economists to review and test the robustness of the economic analysis underpinning proposed decisions;

- The use of specialist legal advisors, such as internal or external legal departments, to help decision-makers;

- The use of external analysts or experts to address specialised / technical issues.

Questions and Issues for Discussion

1. *What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation?*
2. *Are independent internal teams used during the decision making process? If yes, how are they composed? At what stage of the investigation do they get involved?*
3. *Is there an independent review of the case by specialised economists or legal teams? When do they become involved? Does the final decision depend on their approval?*
4. *Are there other channels of input directly to the decision-makers, aside from those responsible for the investigation of the case?*
5. *Are outside analysts or experts used to help decision-makers? When do they become involved and to what extent is their input relied on?*
6. *What other techniques or practices has your agency adopted to promote sound decision-making?*

3. Confidentiality issues

7. Many competition agencies have procedures to protect confidential information by regulating its internal use and public dissemination. These procedures provide companies involved in antitrust proceedings with the assurance of confidentiality they need to cooperate and share information with investigating authorities. Ensuring the protection of confidential information therefore improves the overall quality and public belief in the investigation process and strengthens the credibility of the enforcement decision. Confidentiality rules also prevent the antitrust investigation being used as a means to disseminate competitively sensitive information. Absent these necessary precautions and safeguards, there is a real risk that commercially sensitive information, such as investment plans or strategic goals, are inappropriately disclosed during the investigation process.

8. The protection of confidential information, however, needs to be balanced against the need to provide targets of competition enforcement proceedings with the evidence forming the basis of the case against them. Therefore, where competition authorities are relying on evidence seized from company A to make claims against company B, to what extent should company A be able to claim broad confidentiality for the documentation which forms the very basis of the argument against company B? Companies may also be concerned that information could be passed to another government agency, and with what happens to the information after the process is over. In order to allay these concerns it is important that competition agencies have clear and transparent procedures for the handling of confidential information.

Questions and Issues for Discussion

1. *How is confidential information defined? Is such information automatically considered to be confidential, or does the party have to identify it as such?*
2. *If confidential information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure?*
3. *Are there special procedures available for disclosure necessary to protect rights of defence, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses?*
4. *What are the legal frameworks in force for the protection of confidential information in the context of cooperation between Antitrust authorities? Is the protection afforded similar to that existing in a business's home country?*
5. *How does your agency balance a defendant's right to review and respond to evidence that will be used against it with the need to protect confidentiality?*
6. *How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect the confidentiality of targets of proceedings and possible effects on their reputation?*
7. *What are the penalties for negligent/intentional violation of confidentiality rules?*
8. *Who will have access to the information handed over? Is it susceptible to further disclosure? What happens to the information once the investigation is over?*

4. Requests for information to targets of investigations

9. During the course of an investigation competition agencies may issue requests for information (RFI), to parties and to third parties. RFIs may be used alone, e.g. to receive clarification on certain specific issues, or in conjunction with other forms of investigatory tools, e.g. information can be requested during the course of an inspection.

10. RFIs may be informal and voluntary or they may be formal and mandatory. Formal RFIs will usually be issued by decision, and the company to whom the RFI is addressed is required to respond to it. If a company fails to respond to a formal RFI, or provides information that is incomplete or misleading, fines can generally be imposed. The competition agency will generally have a relatively wide discretion as to what information it wishes to request provided that it falls within the scope of the investigation. However, agencies may not always provide sufficient reasons as to why specific information is required. RFIs usually include requesting the provision of confidential information and business secrets, although the dissemination and treatment of this information will be protected under confidentiality rules (see above).

Questions and Issues for Discussion

1. *What type of RFIs does your agency issue? Do you issue both formal and informal RFIs and how does the format differ?*
2. *What procedures, if any, does your agency have in place to review the requested information once it is received?*
3. *Is the party informed of the theory of the case and reasons for requesting the information?*
4. *Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency?*
5. *Do procedures and practices differ if the addressee of the request for information is not a party to the proceedings?*
6. *Are any penalties imposed for failing to comply with an RFI? Please provide details.*

5. Agreed resolutions of enforcement proceedings

11. Agreed resolutions of enforcement proceedings occur when parties to an antitrust investigation cooperate with investigating authorities by admitting their participation in the competition violation of which they are suspected. Resolving the case with the agreement of the parties involved allows the simplification of the agency's administrative procedure, and the freeing up of resources to concentrate on other cases. Agreed resolutions may also be referred to as settlements or consent decrees.[1] The advantages of agreed resolutions have resulted in an increase in their use to resolve cases. However, concerns are sometimes expressed regarding the lack of transparency in and guidelines about the settlement process; such a situation limits the ability of parties to assess effectively the policy goals of the agency, and therefore has triggered concerns regarding 'certainty' in the process.

5.1 European Commission Settlement Procedure

12. In 2008, the European Commission introduced a settlement procedure for cartel cases, under which parties admitting participation in a cartel may be able to obtain a 10% reduction in fines.[2] In the European model, the Commission has full discretion to decide whether a case is suitable for settlement and parties do not automatically have a right to settle. If the case is deemed appropriate for settlement, the Commission will inform the parties of the case against them and the relevant supporting evidence. If the parties wish to settle they must acknowledge liability and the duration and scope of the cartel in a 'settlement submission'. The Commission will then decide whether to accept the parties' settlement submission. If it does accept, the procedure will be abbreviated resulting in a decision which is shorter than usual. However, until the decision is taken the Commission retains the right to reject the proposed settlement and revert to the normal process. The European settlement procedure model is designed to achieve procedural savings.

5.2 United States Consent Decree Procedure

13. A consent decree is a settlement that is contained in a federal district court order. It reflects and agreement between the competition agency and the parties which concludes a lawsuit amicably, avoiding

1 Plea bargaining is only relevant in criminal procedures. See also DAF/COMP(2007)38 on Plea bargaining settlement of cartel cases.

2 See Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases (Text with EEA relevance), *Official Journal L 171, 1.7.2008, p. 3–5.*

the need to resolve a case by trial. The consent decree requires court approval in government cases, following a public comment period under the Tunney Act, and has the legal effect of a judgment. The advantages of using a consent decree include (i) reduced enforcement costs, (ii) reduced use of agency staff, (iii) increased speed of relief and (iv) legal certainty. As a result, a large majority of all complaints filed by the Antitrust Division of US Department of Justice are settled prior to trial by consent decree..

Questions and Issues for Discussion

1. *At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by mutual agreement with your agency? Does your agency actively seek to settle cases?*
2. *Are there restrictions on the types of cases that can be settled in this manner? Do parties have an automatic right to settle or does the agency have discretion over which types of cases are suitable for settlement?*
3. *Do parties need to admit guilt before an agreed resolution?*
4. *Can conditions be imposed on the parties as part of the settlement procedure? If yes what type of conditions?*
5. *What is the main motivation for your agency to adopt agreed resolutions? Are factors such as procedural savings and evidence gathering taken into account?*
6. *Does a party lose its right to appeal if it agrees to a settlement?*
7. *Can third parties view or comment on the settlement agreement?*
8. *Does your jurisdiction provide any guidelines on the settlement process and content of any agreement? How long does a settlement last? Can they be terminated or modified? Have any ex-post evaluations on the impact of settlements been carried out in your jurisdiction?*

6. Judicial Review and Interim Relief

14. As was discussed at the February 2010 roundtable on procedural fairness, in many OECD jurisdictions competition agencies have dual investigatory and prosecutorial roles. In addition to the procedures put in place internally to ensure procedural fairness, decisions by these competition agencies are also subject to legal review by an independent judicial body. This judicial review is a comprehensive assessment of whether or not the conditions for the application of the competition rules are met. In some jurisdictions, competition agencies will be accorded a certain degree of deference by the judicial body due to the agencies 'expert skills' related to complex legal and economic analysis involved in competition cases. However, the scope and focus of the judicial review may still be wide and may include an assessment of the complex economic and factual assessments carried out by the competition agency. The judicial body will then decide if the relevant procedural rules have been adhered to, whether the facts have been accurately found, and whether there is any evidence of misuse of powers, or manifest error of assessment. In other jurisdictions, the competition agency itself has no power to make binding factual and legal conclusions, and must present its case to an independent judicial body to obtain any relief.

15. In addition to seeking judicial review of a competition authority's decision, parties may also be able to apply to the judicial body for interim relief, i.e. measures suspending the operation of an agency decision pending an appeal. Under European law, for example, three conditions must be fulfilled before interim relief will be granted; (i) a *prima facie* case that the Commission's assessment is unlawful must be established, (ii) there must be the risk of serious and irreparable damage to the party, and (iii) the balance of interests must favour the adoption of such measures. Similar conditions apply in many other OECD jurisdictions.

Questions and Issues for Discussion

1. *At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred?*
2. *What level of deference does the judicial body grant to the agency's decision?*
3. *If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on that sanction or remedy?*
4. *Can the judicial body grant interim relief?*
5. *What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?*