

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT**

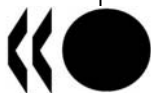
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**15 June 2010**

*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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**JT03285223**



1. This paper supplements the submissions filed by the Business and Industry Advisory Committee (BIAC) on 8 February 2010 in connection with the OECD Competition Committee's Working Party No. 3 Roundtable, "Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings", held on 16 February 2010.

## 1. Decision-making process

**What procedure 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? Are independent teams used internally? Is there an independent review of the case by specialized economists? Are there other channels of input directly to the decision-makers? Are outside analysts or experts used to help decision-makers? What other techniques or practices has your agency adopted to promote sound decision-making?**

2. A central principle of procedural fairness is that authorities should seek to gather evidence in order to establish an accurate factual record on the basis of which sound competition law and policy can be applied. Investigators should therefore be expressly obliged to carry out their task fairly and to take full account of the need to ascertain, collect and record all relevant evidence, without prejudice as to whether such evidence is supportive of charges or exculpatory in nature.

3. Investigators must take responsibility for gathering all of the information, bearing in mind, particularly in cartel cases, that the evidence of a leniency applicant may not always provide the complete picture. The prospect of an early resolution to an infringement investigation must not lead an agency to short-cut the evidence-gathering procedure.<sup>1</sup>

4. Evidence should be recorded comprehensively and in a manner that can be made available to the defendant (e.g. an agenda and full record of all facts and matters discussed and provided to investigators during meetings and other discussions with complainants, witnesses and third parties should be made and kept on the investigation file).<sup>2</sup>

5. Investigators should have the expertise and resources necessary to collect and evaluate all relevant evidence, to understand the conduct under investigation and to evaluate its impact, including appropriate legal, economic and linguistic skills and specialist support. This requires agencies to have in-house economists or to use external economists who will scrutinise often complex antitrust issues and open a dialogue with the parties under investigation, through their counsel and their economists.

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<sup>1</sup> Cases in the UK may illustrate these concerns. The OFT recently withdraw a criminal prosecution it had brought against a number of individuals following the emergence of new evidence (which had not been disclosed to the defence team). The OFT also indicated that it intends to examine whether the leniency applicant had provided full and complete evidence. <http://www.of.gov.uk/news-and-updates/press/2010/47-10>. In its *Dairy* and *Tobacco* investigations, the OFT reached settlements ('early resolution agreements') with a number of companies. However, in the light of evidence obtained subsequently, the OFT decided to drop certain elements of its case - which may give rise to a need to re-visit the original settlements. <http://www.of.gov.uk/news-and-updates/press/2010/45-10>.

<sup>2</sup> For example, it is noted that the DG Competition consultation document on "Best practices on the conduct of Art 101/2 TFEU proceedings" ([http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/index.html](http://ec.europa.eu/competition/consultations/2010_best_practices/index.html), paragraphs 38-45) does not fully address the criticisms of the European Ombudsman in respect of the Intel Article 102 investigation. In its decision, the Ombudsman indicated that the Commission should ensure that a proper internal note, to be placed on the file, is made of the content of all meetings and telephone calls with third parties where information is gathered or where important procedural issues are discussed. (<http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark#hl8>).

6. Investigators should respect the rights of every firm to seek legal advice from counsel of their choice. This should include the recognition of legally-privileged status for all advice from in-house counsel and other lawyers advising the firm, whether or not they are admitted to practice in the jurisdiction of the investigation. It should also include permitting a firm to have its chosen counsel, including counsel from outside the jurisdiction, if acting under the supervision of counsel admitted to practice in the jurisdiction, present at all appropriate stages in the proceedings, including at on-site inspections and during interviews of a firm's employees and potential witnesses.

7. A firm targeted by an investigation should be advised of the applicable procedure and timing, be kept informed of the progress of the case, and be given the opportunity to discuss the case and respond to agency concerns throughout the investigatory procedure. In BIAC's opinion, the rights of defence should be recognised in a full, on-going manner and not, as is currently the case in a number of jurisdictions, be limited to a one-off right to respond to fully developed formal charges presented at the end of the investigation, by which time investigators' views, and the course of the evidence gathered, may have become entrenched. In the practical experience of businesses involved in enforcement proceedings, an early opportunity to comment on agency concerns can be crucially important to minimise misunderstandings and secure a fair process.

8. The agency should disclose the facts, documents, theories and legal authority to firms under investigation as early in the investigative process as is practicable.<sup>3</sup> Such disclosure should take place, in any event, sufficiently in advance of the preparation of any written statement of charges so as to enable the firm(s) under investigation to address relevant evidence, facts, theories of harm, and legal authorities with the investigators prior to the finalisation of the statement of charges. Investigators should also be available to meet regularly with firms being investigated to discuss the agency's concerns, to explain its evolving view of the facts, evidence and claims at issue and to provide the parties a genuine opportunity to respond to such concerns on an early and on-going basis. The agency should agree to meetings with a party based upon an agenda of issues for discussion to ensure a meaningful, two-way dialogue at those meetings.

9. A commitment by agencies to such on-going transparency and engagement will not only allow firms a full and fair right to respond but will also help to narrow the scope of disputed issues, correct misconceptions, reduce the likelihood that the agency may be surprised by arguments made in response to its formal charges and enable the agency to test its theories during the course of the investigation, thereby enhancing the quality of the agency's fact-finding and its ability to allocate its resources efficiently.

10. In particular, BIAC recommends the following as minimum standards for transparency and engagement on a stage by stage basis during the investigation.

- Initiation - A firm targeted by an investigation should be given written notice of the fact of the investigation; its objective, legal basis and scope; indicative timeline of the investigative process; as well as the investigation team<sup>4</sup> as soon as the implementation of appropriate confidentiality safeguards allow. There should be the opportunity for an early meeting with the investigators, including senior members of the antitrust agency and senior managers of the investigation team, to discuss and clarify the matter.

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<sup>3</sup> By contrast, for example, in Korea "the level of evidence or other details are not revealed to the defendant during the investigation in principle." Submission of Korea, Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings, ¶ 27 (20 Jan. 2010). The defendant receives access to *certain* supporting documents and reference data" only when the Examination Report setting forth the statement of charges is issued. *Id.*, ¶ 29 (emphasis added).

<sup>4</sup> The parties should also be kept up to date on an ongoing basis by being informed promptly of any changes in the team membership.

- Preliminary Assessment - As soon as the investigators have completed their initial evidence gathering and assessment of the case, targeted firms should be informed of the investigators' preliminary assessment, including a description of the factual basis for the possible charges, the evidence and the economic theories and legal analysis contemplated by the investigators in support of the potential charges. The firms should also be given copies of all complaints and supporting materials and of all evidence, both inculpatory and exculpatory, with protection of legitimate business secrets being secured as described in section 2 below.
- Reaction to the Preliminary Assessment - Targeted firms should have the right to react to the preliminary assessment, to discuss the proposed charges and comment on the evidence<sup>5</sup> and the economic theories and legal analysis, including at meetings with the senior staff of the agency, as well as managers of the investigation team and with any economists and other specialists involved. The opportunity to meet and confer with the investigators should be granted sufficiently in advance of any written recommendation by the investigators to the decision-makers on proposed findings of fact and conclusions of law.
- Prior to Formal Charges - It is particularly important that after their reaction to the preliminary assessment, firms under investigation be offered a meeting with the official(s) responsible for deciding whether the investigation should proceed to the stage where formal charges will be made before that decision is taken.<sup>6</sup>

11. If the agency decides to bring formal charges against the firms under investigation, a written report (the Report) provided to the defendants should identify all charges that the agency is making against them, as well as all documents, statements and other evidence upon which the agency relies.<sup>7</sup> The Report should disclose which entities within each corporate group are charged with responsibility for the charges and the basis for such responsibility. The Report should also include and describe all of the underlying data (including the sources of such data) and the methodology used to prepare any chart, graph or other analysis relied upon in the Report. Contemporaneously with the issue of the Report, the agency should provide the defendant with copies of all of the evidence, including all potentially exculpatory evidence, subject only to the confidentiality safeguards described in section 2.

12. The agency should have the burden of proving each element of the violation charged against the defendants through the evidence relied upon in the Report.

13. The defendants should be entitled to respond in writing to the Report, to comment on the evidence and to offer their own evidence in rebuttal as well as to respond to the investigators' proposed economic theories and legal analysis. The time allowed for this written response should be fully adequate

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<sup>5</sup> The agency should have the ability to encourage - although not require - 'triangular' meetings between all parties and the agency, e.g. to deal with opposing views in respect of the evidence.

<sup>6</sup> For example, the OFT's quaintly named "Last Cigarette" meetings in merger cases.

<sup>7</sup> A failure on this front led to the dismissal of a high-profile prosecution against a United States Senator on charges of fraudulent disclosure of gifts from constituents. After a jury had found Senator Ted Stevens guilty of failing to make such disclosures, the prosecutors, on appeal, revealed that they had failed to disclose notes from an interview of a witness that adversely impacted the defendant's ability to cross-examine that witness. Based on this disclosure, the U.S. Attorney General dismissed all charges against the Senator noting that "[a]fter careful review, I have concluded that certain information should have been provided to the defense for use at trial. In light of this conclusion, and in consideration of the totality of the circumstances of this particular case, I have determined that it is in the interest of justice to dismiss the indictment and not proceed with a new trial." See, [http://media.adn.com/smedia/2009/04/01/04/Stevens\\_filing.source.prod\\_affiliate.7.pdf](http://media.adn.com/smedia/2009/04/01/04/Stevens_filing.source.prod_affiliate.7.pdf).

and should take into account, *inter alia*, the complexity of the case as illustrated by the duration of the investigation, the need for translations of the Report and of the evidence, and the quantity and complexity of the relevant evidence, including that submitted by the defendant. Businesses regularly have real practical difficulties in responding adequately to charges against them because of the inadequate time allowed by agencies for the formal response, including in cases where the investigation has taken several years, meaning that extra time is needed to investigate historic facts. A fully adequate period for response would not cause any significant delay in the overall timeframe of the investigation.

14. Where a Report makes charges against multiple defendants or where a version of it is provided to any other party for comment, each defendant should have the right to submit comments, and to receive and respond to comments submitted by others.

15. The defendant should also be provided with full details of any proposed penalty and remedies which the investigators intend to propose to the decision-maker(s), the manner in which any penalties have been calculated, the necessity for any remedies and the facts and evidence to be relied upon to justify them. Agencies should bear the burden of proving that proposed penalties are proportionate to the seriousness of the infringement and the damage caused to consumers and the economy<sup>8</sup> and consistent with penalties imposed for other economic and corporate offences. Depending upon the structure of the agency's process, the issue of penalty and remedies may be more fairly addressed at a separate later stage, following the process regarding the existence of the violation, in which case defendants should be given a full opportunity to respond in writing and request a hearing regarding any penalty and remedies proposed at that stage. It is the practical experience of business that in many cases these issues are at least as controversial as the basic questions as to liability and extending a properly transparent process to the issue of penalties and remedies is not only crucial to basic fairness but might significantly reduce the need for and complexity of appeals.

16. As well as the opportunity to respond in writing to the charges and any proposed penalty and remedies, defendants should have the right to a hearing before the decision-maker(s) or fully empowered agents. It should be clear that merely providing a perfunctory hearing, in the absence of the minimum due process standards applicable to the investigatory stage discussed above, does not in itself constitute adequate due process.

17. The purpose of this hearing is to provide the defendant with the opportunity for a live, in-person presentation of their response to the charges, for the defendant to question the evidence and witnesses relied upon by the investigators, including any complainants and others who have provided evidence on which the agency relies, to query the investigators and bring forward witnesses for the defence, who will also be available for questioning. The hearing should provide the decision maker(s) with the opportunity to evaluate the charges, the strength of the evidence, the credibility of the witnesses and the company's defences and hence to evaluate the extent to which the investigators have discharged their burden of proving the charges.

18. The schedule for such hearings should be set after consultation with the defendant and should allow ample time sufficient for full consideration of the case, bearing in mind the complexity and volume of the issues and the evidence. Rules governing hearings should be established well in advance and rules of procedure and evidence at the hearing should be applied equally to the agency and the defendant and not be subject to change without the agreement of the defendant.

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<sup>8</sup> See for example the judgment of the Paris Court of Appeal (19 January 2010) reducing significantly the fines imposed on a number of steel companies ([www.autoritedelaconurrence.fr/doc/ca08d32\\_siderurgie.pdf](http://www.autoritedelaconurrence.fr/doc/ca08d32_siderurgie.pdf)).

19. The submission of additional evidence and arguments by the agency following the close of this hearing should be prohibited absent extraordinary circumstances. The defendant should be allowed to make supplemental submissions following the hearing in response to any new matters raised and any such supplemental submissions should be disclosed to the other parties who should be provided with a reasonable opportunity to respond.

20. Once the Report has been issued, *ex parte* contact between the agency staff presenting the case against the defendant and the decision-maker(s) and their staff should be prohibited until such time as the final decision has been rendered.<sup>9</sup>

21. It is critical to a fair process that there be a clear functional and institutional separation between the roles of those responsible for conducting the investigation and those responsible for making any enforcement decision to which such investigation may lead.

22. Many regimes entrust the investigation and decision-making function to different bodies but these functions should be separate even if they are discharged by the same agency. An agency responsible for investigation and decision-making which does not rigorously separate these two functions will inevitably be perceived to be subject to prosecutorial bias, however genuinely well-intentioned and ethical its officials may be.<sup>10</sup> Rights of appeal are not a practical substitute, so far as business is concerned, for fairness at the agency stage, given the additional time, costs, commercial and reputational damage incurred while an appeal is pursued and given the fact that evidentiary standards of review differ by jurisdiction and are not always *de novo*.

23. Agencies should make use of a 'devil's advocate' panel and explain in guidelines when and how this panel will be involved in the investigatory process. Critical documents should be made available to this panel in advance and the panel should be able to put questions to the parties too - i.e. the panel should not be a 'one-shot' cross-check, but rather a genuine internal testing of the agency's provisional thinking on an ongoing basis.

24. Decision-makers should be independent of political influence.

25. Decisions should only be addressed to defendants identified in the Report and must only rely on facts and evidence disclosed to the defendants and to which defendants have had a full opportunity to respond. Decisions should be fully reasoned and include all relevant findings of fact and conclusions of law. Any adverse decision should address all of the major defences and points raised by the defendants and should explain why they were not persuasive.<sup>11</sup> Similarly, an agency should explain the underlying reasoning for a decision not to bring formal charges following an investigation through the issuance of a closing statement or similar document.

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<sup>9</sup> The defendant's right to respond to the agency's charges has little value if the investigators can circumvent that right through *ex parte* contact with the decision makers or their advisors.

<sup>10</sup> Wils, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function" (2004) 27 *World Competition: Law and Economic Review* 202, 215. For example, in Case Number 2001 Heon-Ga 25, the Seoul High Court on its own initiative asked the Constitutional Court of Korea to rule whether the procedures of the Korean Fair Trade Commission violated due process under the Korean Constitution. While the Court held the KFTC's procedures were not unconstitutional, 4 out of the 9 judges dissented, arguing that the KFTC violated due process under the Korean Constitution by failing to segregate its investigatory and decision-making bodies; failing to provide defendants with sufficient opportunity to gather evidence and put forth a defense and failing to ensure that its Commissioners possessed sufficient expertise, qualifications and independence.

<sup>11</sup> Except where expressly agreed to by the defendant pursuant to a settlement procedure.

26. Fundamental rights of the defence require that the investigation should be carried out expeditiously<sup>12</sup> and business is interested in avoiding excessive periods of uncertainty while investigations continue, particularly where the fact of the investigation is in the public domain and the business risks reputational harm. At the same time, it is not in the interests of due process to establish unreasonably short time periods that sacrifice the time required to give proper attention to a firm's response to any allegations against it. BIAC therefore recommends that the time period for an investigation should be set by the agency at the start of the proceedings taking account of the complexity of the matters concerned, the need for translation and subject to overall maximum time limits. The investigation period should be extended only when delay is caused by the defendant's failure to deal promptly with reasonable requests from the investigators or by serious unforeseen causes.

## 2. Confidentiality

**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? 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? How is confidential information defined? What rules apply to the protection of confidential information obtained from parties by your agency? Is such information automatically considered to be confidential, or does the party have to identify it as such? If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure? 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? What the penalties for negligent/intentional violation of confidentiality rules?**

27. Throughout enforcement proceedings, a competition agency will regularly be faced with tension between the need to provide firms subject to the investigation with full details of the complaints and evidence to enable them to respond fully to the allegations on the one hand and the confidentiality required to protect legitimate business secrets of complainants and others participating in the investigation on the other hand. The agency will also need to safeguard the confidential information of firms under investigation.

28. It is important for agencies to ensure that confidentiality protection extends only to information that is legitimately in need of protection from disclosure. An agency should not redact or anonymise information on its own initiative. The agency 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 concerned. It is good practice for an agency to have in place a procedure for review and mediation of disputes concerning confidentiality. Business finds such procedures useful, even if they are informal and internal, particularly where judicial review of such procedural questions is available only after the outcome of the enforcement proceeding or is costly and time-consuming.

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The need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of EU law. This is an element of the right to good administration - contained in the Charter of Fundamental Human Rights, made binding by the Lisbon Treaty. See also *French Perfumes* (Judgment of the Paris Court of Appeals of 10 November 2009) where the decision of the Conseil de la Concurrence was quashed on account of the excessive length of the proceedings (specifically the 4.5 year delay between the act under investigation and the date on which the companies became aware of the fact that they would be required to submit a defence).

29. In providing access to the file, the agency should give the defendant access to all materials, including any information determined by the agency to be confidential (which as discussed below, may be subject to restrictions limiting the employees who may access such confidential information).<sup>13</sup> In exceptional circumstances, i.e., where there is compelling commercial sensitivity surrounding the sharing of certain confidential information such that it would be demonstrably harmful to allow a defendant's employees full access to it even under the safeguards described in paragraph 2.4, it may be appropriate to request that parties agree to special procedures for dealing with the manner in which defendant's employees are provided with access to such exceptionally sensitive elements (without prejudice to the defendant's right to access materials).<sup>14</sup>

30. It is also important that agencies have in place and implement rules requiring agency personnel to protect all information gathered as part of investigations, including the status of investigations and possible procedures, from improper disclosure and from use otherwise than for the purpose of the investigation in question. Such rules should ensure that the agency does not share information with anyone other than the parties being investigated and agency personnel working on the investigation. The rules should also provide that the firms being investigated and others participating in the investigation must not disclose such materials to anyone other than their counsel and retained experts or where required by law and must not use such materials otherwise than for purposes of the investigation in question.

31. Finally, the agency should provide the defendants, complainants and third parties with an opportunity to request that any confidential information they submitted be redacted from the public version of the decision.

### 3. Requests for information to targets of investigations

**Does your agency have procedures to review information requests with the party? Is the party informed of the theory of the case and reasons for requesting the information? Can the party ask for a reconsideration of the information requested and/or deadlines, or appeal to a reviewing office within the agency? Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?**

32. The procedures available to investigators for the gathering of evidence should be employed in a reasonable and proportionate manner, taking account of the nature of the proceedings and the burden placed upon the subjects of the investigation and other market participants involved. Companies should be given reasonable time to respond to such requests, upon consultation with the agency.

33. General inquiries, such as market studies or sectoral inquiries, should be confined to situations where an agency can demonstrate that the inquiry is necessary and proportionate in light of the agency's

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<sup>13</sup> Procedures, such as some "data room" type arrangements or limiting access to the file as a whole to defendant's counsel, in the practical experience of business, may be unsatisfactory and deny the defendant the ability to understand in context the detail of the case against it. Business is most concerned that short-cut procedures may become the norm, e.g. DG Competition's consultation document on best practices (paragraph 85) contemplates that a defendant may not "unduly refuse" a data room procedure (under which only its external counsel will have access to the file, undermining the company's own right to access as well as its right to rely on internal counsel).

<sup>14</sup> Such special procedures could include, for example a procedure pursuant to which the defendant would be given access to the confidential information on terms defined in an access agreement between the parties and the agency (whose terms would regulate *inter alia* the identity of those persons within the firms in question who may have unrestricted access and, if deemed necessary, penalties for breach of non-disclosure or use restrictions).



evidence-based competition concerns. Where inquiries are appropriate, they should be defined clearly and as narrowly as the identified competition concerns permit. Requests for information and the format for its provisions should be designed to minimise the burden on the market participants concerned<sup>15</sup> while enabling the investigators to understand the conduct or transaction under investigation and its likely impact on competition in the affected market.

34. Invasive measures such as surveillance, on-the-spot investigations of company premises and private homes, the removal of forensic images of company data and searches should be used only in proceedings concerning serious "hard core"<sup>16</sup> violations, only when circumstances so require, and only upon warrant confirming the necessity of such measures. The investigating authority must also take care to respect relevant data protection and privacy laws, in particular when handling electronic data. When questioning individuals in the course of investigations, great care must be taken that they are informed of their rights, in particular their right to privilege against self-incrimination.

#### 4. Agreed resolutions of enforcement proceedings

**At what stage or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency? Are there restrictions on the types of cases that can be settled in this manner? Does your agency actively seek to settle cases?**

35. Agreed resolution policies ('settlements') should be flexible but also transparent. Agencies should make it clear in guidelines when they regard a case as being suitable for settlement. Although some cases may be more suitable for settlement (e.g. a cartel case where the core facts are not contested) than others, there is no reason for an agency to restrict itself in terms of which cases may be settled. Agencies should also have the ability to settle 'hybrid' cases - i.e. where not all of the elements of the case are agreed between the agency and the parties under investigation; or where not all of the parties are in agreement with the agency.

36. It is important to make a distinction between (i) those parties who admit the facts and provide evidence (leniency in the EU; amnesty in the US); and (ii) those parties that dispute at least some of the facts or cannot or do not wish to confirm them but, nevertheless, wish to resolve the matter speedily (whether because the party is simply not in a position to challenge the facts - e.g. due to sale or purchase of the business, the departure of implicated personnel - or prefers to limit the disruption and reputational damage of a contested case). The latter category of parties should still be able to settle the case without admission as to the facts or legal theories concerned and should not be prejudiced by the fact that they wish to challenge certain aspects of the case. The agency should ensure that the case is founded on facts which are capable of being proven.

37. In cases involving multiple defendants, when considering publication regarding the outcome for some defendants only, the agency shall have due regard to the presumption of innocence for all remaining defendants. In most cases, given the risk of irreparable reputational damage, this may require that publication be delayed until the case against all defendants is resolved.

38. Prior to making any press release or public statement regarding enforcement proceedings or decisions, the agency should notify the firm concerned. It is best practice to provide sight of the proposed

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<sup>15</sup> The scope and format of information requests should be discussed with the parties where appropriate, e.g. in sectoral inquiries or merger investigations where the timetable allows this.

<sup>16</sup> "Hard-core" infringements generally include price fixing; output limitation; and the sharing of markets or customers between competitors.

text and an opportunity for the firm to comment on it. Business finds such openness by an agency in relation to planned publicity extremely helpful in practice to ensure an appropriate firm response to press and stakeholder enquiries and to avoid unintentional disclosure of confidential material.

## 5. Judicial review and interim relief

**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? What level of deference does the judicial body grant to the agency's decision? 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? Can the judicial body grant interim relief? 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.**

39. The courts play a significant role in guaranteeing due process, particularly when competition agencies are an administrative body. It is important for the courts to ensure antitrust proceedings are conducted in a fair manner. The courts' function as a check and balance of the competition agency enhances not only the credibility of the enforcement action, but is in keeping with basic principles for fairness and rule of law that are hallmarks of a developed and accountable legal system.

40. Defendants should be entitled to a timely right to appeal any decision issued by a competition authority before a court consisting of impartial judges. In the interests of certainty for all parties and the proper administration of justice, the court must be obliged to give judgement within a reasonable time (and with appropriate rules regarding interim relief including suspension of decisions under appeal where appropriate).

41. Courts should have full jurisdiction, ensuring that not only the defendant's rights with respect to transparency and due process were respected by the competition authority; but that the court also reviews the law and facts relied on by the agency (as well as any exculpatory evidence not relied upon by the agency) to come to its own appraisal of the law and facts. In doing so, the role of the courts should be to confirm that the ultimate burden of proof was indeed met by the agency. Finally, the court should review any imposed penalty or remedy to determine that it is appropriate and proportionate.<sup>17</sup>

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<sup>17</sup> This should include its own assessment of whether the penalty/remedy is proportionate and consistent with other cases, as described above in paragraph 1.14.