

## BEST PRACTICES FOR ANTITRUST PROCEDURE

### REPORT OF THE ABA SECTION OF ANTITRUST LAW INTERNATIONAL TASK FORCE

May 22, 2015

*The views stated in this submission are presented on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.*

#### Executive Summary

The Report contains a list of best practices for antitrust procedures. It was developed by the Section of Antitrust Law in a project lasting several years as a response to recent and intensifying interest – by enforcement agencies, practitioners, academics, businesses subject to antitrust enforcement, multinational organizations and other members of the antitrust community -- in the relationship between quality of procedures employed by antitrust enforcement agencies and the credibility and effectiveness of antitrust-law enforcement, which is now found in over 130 jurisdictions worldwide.

The core of the Report is its identification of procedures best tailored to assure the accuracy, efficiency and impartiality (both real and perceived) of antitrust enforcement. The Report focuses on government proceedings that are intended to establish whether an antitrust violation has occurred, and if so, to specify and enforce an appropriate remedy. Although antitrust enforcement agencies engage in a much broader variety of activities, (competition advocacy, rulemaking, market and industry research, etc.), the “classic” and most significant activity is the government enforcement action. The Report was also intended to fill a gap due to the absence of any comprehensive past effort along these lines by any internationally recognized professional group, although international agency organizations such as the OECD Competition Committee and the International Competition Network had made similar albeit narrower efforts in the past.

Because antitrust enforcement is embedded in such an enormous variety of indigenous legal systems found in different jurisdictions, the Report identifies practices

that are sufficiently “generic” to be capable of inclusion within any basic approach to antitrust law enforcement. Thus the Report does not presume the superiority of any particular legal system – administrative or prosecutorial/judicial, adversarial or inquisitorial, whether civil-law or common-law based.

The Report divides the antitrust enforcement process into five distinct phases: (1) investigation, (2) assertion that an infringement of competition law may have occurred, (3) assessment of the contention, including the gathering, testing and presentation of evidence and the presentation of arguments based on fact, law and relevant expertise, (4) the rendition of a decision, and (5) appeal and review. The Report identified best procedural practices relevant for each of these five phases. There are also some general practices identified that should apply at all phases of an antitrust proceeding, such as the adoption of case-management practices intended to prevent undue delay.

In general the best practices identified correspond to common-sense notions of procedural fairness – disclosure of allegations and both inculpatory and exculpatory evidence to accused parties, providing the accused party of the opportunity to gather and present evidence and argument to rebut such allegations before an impartial tribunal with sufficient expertise to evaluate the case, a reasoned decision assessing all pertinent evidence and arguments, and providing a party found guilty of infringement an opportunity for review by a suitably constituted and independent tribunal.

## INTRODUCTION

Among numerous policy studies and reform efforts underway throughout the global antitrust and competition-law community (enforcement officials, private antitrust-law practitioners, antitrust economists and academics, among others), significant recent interest has focused on improving antitrust procedures. Merger review procedures were among the first areas targeted for study and for proposals regarding best or

recommended practices, but more recently interest in reform of procedures has broadened to include all the main areas of antitrust enforcement.

As new antitrust laws and agencies continue to expand globally, an increasing variety of legal methods and institutions has been applied to competition matters. This offers both opportunities and challenges: on one hand this increased diversity allows comparison of different procedures, which may help identify those rules, institutions and other mechanisms that are most conducive to impartial, efficient and accurate enforcement. On the other hand, the increasing variety of the systems encountered in antitrust enforcement creates new challenges in developing principles and approaches likely to be widely accepted and implemented.

Adopting procedures that promote the impartiality, efficiency and accuracy of antitrust decisions can help achieve basic competition goals. Procedures that allow agencies to obtain and test relevant evidence, as well as the legal and economic approaches and analyses that inform their decisions regarding infringement and remedy, can enhance significantly the overall quality of enforcement decisions. This facilitates vigorous competition within established legal constraints and ultimately enhances productivity and consumer welfare. Moreover, procedures that are – and are rightly perceived to be – fair will enhance respect for competition law and its enforcement institutions and processes among counterpart agencies, within the business community, among consumers and by the general public.

As the latest development in a process that began several years ago, the ABA Section of Antitrust Law's International Task Force has developed this proposal for best practices for antitrust procedure. This proposal is intended to stimulate and contribute to ongoing global dialogue on this fundamental subject, adding the perspective of the world's oldest and largest association of antitrust professionals to current efforts to improve antitrust procedures. This proposal has been formulated based only on the anticipated ability of these practices to contribute to the impartiality, efficiency and accuracy of antitrust decisions. No specific system of enforcement – adversarial or inquisitorial,

common-law or civil-law, judicial or administrative – has been assumed superior in its relevant capabilities.

The best practices listed below are considered relevant to the conduct of any antitrust proceeding, defined as a process for determining whether one or more specific individuals or business organizations have infringed applicable competition-law standards, and to prescribe and enforce a remedy for such infringement. Antitrust enforcement involves many activities that do not fall into this category: competition advocacy, general market or industry studies (other than those that can lead to the imposition of remedies for identified anticompetitive practices), or *amicus* participation in judicial proceedings between private parties, just to name some of the most obvious. Such activities were not considered as part of the subject matter of this report, although they can each be vital to the broader success of a competition-law enforcement system.

The Report also does not address any but the most fundamental principles that govern the conduct of public officials and private parties engaged in the antitrust enforcement process. Thus, for example, aside from the most elementary protections against corrupt influence of the decision making process, rules of conduct for public officials or private parties are not included although they are obviously essential to sound antitrust enforcement. This report presupposes that such individuals and entities are subject to their own professional, legal, and other disciplines that assure orderly engagement with antitrust enforcement processes. Such practices may facilitate dialogue and compliance with applicable procedural rules, and are also likely to enhance efficient and accurate enforcement.

The proposed best practices have been divided into six specific categories, five of which correspond to conceptually distinct stages of an antitrust proceeding as it is defined in this proposal: (1) Investigation, (2) Asserting Contentions of Infringement, (3) Assessing Contentions of Infringement, (4) First-Instance Decision and (5) Review. We conclude with a brief list of best practices applicable at all stages of an antitrust proceeding.

## **ANTITRUST PROCEDURES – BEST PRACTICES**

### **I. INVESTIGATION**

- A. In conducting investigations and seeking evidence, officials should make every reasonable effort to define clearly the specific potential legal, factual and economic contentions being considered.
- B. Officials should adopt management practices designed to help ensure that the expected costs and other burdens of investigation – including those imposed upon targets and others who provide information or otherwise cooperate with the investigation – are proportionate to the expected value of the evidence sought. The expected significance of the potential competitive harm also should be considered in making this assessment.
- C. At key points in a pending investigation (or periodically) officials should specifically reassess the potential contentions and tailor the investigation accordingly.
- D. Officials should strive for balance, pursuing and considering both exculpatory and inculpatory evidence and analysis.
  - 1. Officials should not limit pursuit or consideration of exculpatory evidence to that provided by targets' counsel. Officials should pursue and consider potentially exculpatory evidence from third parties, especially when such evidence may not otherwise be available to targets or their counsel.
- E. At key points in a pending investigation (or periodically) officials should disclose (subject to limitations reasonably reflecting and tailored to any

legitimate concerns such as the preservation of evidence of covert criminal behavior or maintaining confidentiality of business secrets) all potential contentions of infringement and (in reasonable detail) the underlying evidence, analysis and argumentation relevant to the defense, to targets and their counsel, and provide reasonable opportunities for and carefully consider all responses to such disclosures (including submissions as to facts, economic analysis, legal analysis, policy, and other forms of argumentation). Targets and counsel for targets should have reasonable opportunities to present such responses in face-to-face meetings with officials conducting the investigation and with officials managing the investigation. Subject to the foregoing, officials should maintain the confidentiality of evidence and all other aspects of the investigation (including its existence).

- F. Officials should apply credible objective checks and balances to the process of investigation to ensure adherence to the foregoing practices.
  - 1. It is important for officials to establish management practices that limit susceptibility of their processes to confirmation bias and other institutional characteristics that may allow or even encourage officials to broaden or persist with investigations beyond the point that disinterested analysis would consider well supported. Periodic review of investigations by retained experts with the ability and incentives to provide objective independent views may be one such practice; others might include the development of specialized offices or other units (a staff including experts in competition economics, law, and/or the particular sector involved) internal to the investigating institution or to another institution, subject to safeguards for their objectivity, independence and candor.

- G. Prior to the time when any contention of infringement is asserted, each target should be provided with all evidence (regardless of whether subject to any assertion or finding of confidentiality) then known to officials and upon which they intend to rely in support of such contention. Each target should be provided with the opportunity to present a full response, including as to all matters of fact, economic and other expert analysis, legal, policy and other argumentation. Protections for material reasonably regarded as confidential should be afforded by such mechanisms as restricting access to counsel or outside counsel only, use of data rooms (physical or virtual), or disclosure pursuant to protective order. A target should be permitted to present its response through documentary submissions and through face-to-face presentation to the official(s) responsible for making any contention of infringement.
- H. The disclosure of an investigation, or the possibility of a future investigation, should ensure that targets and/or potential targets are not prejudiced or otherwise unnecessarily disadvantaged. Such disclosure should be accompanied by a clear statement that there has been no contention of infringement, and that any future such contention would be subject to assessment on the merits.

## II. **ASSERTING CONTENTIONS OF INFRINGEMENT**

- A. The official decision to make a contention of infringement should be based on a well-considered assessment, including balanced and conscientious evaluation of both exculpatory and inculpatory evidence, that the completion of proceedings (including obtaining a final determination of infringement and defining, implementing and administering a remedy) is highly likely to serve the fundamental purposes of competition law. A contention of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it.

- B. A contention of infringement, and the pursuit of remedies, should not be fashioned for any inappropriate purposes, including, for example: (1) primarily to prevail in infringement proceedings independent of any substantial competitive benefit; or (2) primarily to obtain any advantage over or concession from a target that is not directly justified by the competition law purposes of proceedings.
1. Key competition-law concepts such as “restraint of trade”, “restriction of competition”, “abuse of dominance”, “exclusionary conduct”, “substantial adverse impact on competition”, “substantial lessening of competition” and the like are inherently broad and flexible. Accordingly, assessing contentions of infringement of these laws often involves complex factual, economic and policy assessments of numerous interacting factors. Some circumstances exist in which it is possible for officials to secure a determination of infringement even where it might be questionable whether this would serve fundamental purposes of competition law. Moreover, some accused targets that may ultimately be entitled to exoneration may have powerful private reasons to avoid contesting official assertions of infringement -- to avoid the substantial expense, disruption, extended periods of legal, financial and commercial uncertainty, public opprobrium, and/or contentious relationships with a public institution associated with fully contested proceedings – leading such targets to settle quickly and/or by making concessions that exceed the relief that ultimately might be justified. This may create temptation for officials to press investigations -- consciously or unconsciously -- beyond the point that best serves fundamental purposes of competition law.
- C. No official contention of infringement should be made before providing respondents a genuine opportunity to settle the matter by consent without additional contested proceedings.



- D. The process of publicizing a contention of infringement should ensure that such publication does not prejudice or otherwise unnecessarily disadvantage respondents. Specifically, publication of any contention of infringement should be accompanied by a clear statement that such contention is subject to assessment on the merits and does not constitute a determination or finding of infringement.

### **III. ASSESSING CONTENTIONS OF INFRINGEMENT**

- A. Following a contention of infringement, officials should follow specific procedures for the assessment of such contention in accord with the following practices. No finding of infringement should be made absent compliance with such procedures.
- B. Any assessment (hereinafter “first-instance decision”) of a contention of infringement should be made by an independent official or officials, personally identified to the parties.
  - 1. “Independent” in this context means (1) having no prior role in the investigation or in formulating the contention of infringement (except as a neutral decision maker regarding interim or preliminary matters required for management of prior proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to conduct the proceeding and to make the assessment in a disinterested, efficient and accurate manner.
- C. The decision-making officials should compile a record whose contents are clearly ascertainable by respondents and any reviewing authorities (subject to proportional limitations to protect specific and reasonable confidentiality concerns). Officials should provide specific and enforceable means to exclude from the record all extraneous matter. Off-the-record

communications with decision-making officials by the parties or their counsel or other agents or representatives should be prohibited throughout proceedings.

- D. Counsel for respondents should be permitted to introduce all relevant evidence, argument and expert analysis on all material issues (subject to reasonable administration of proceedings – e.g., limits on merely cumulative evidence, reasonable requirements as to timeliness and/or sequence of submission).
- E. All evidence, arguments and expert analysis placed in the record should be subject to challenge on the basis of authenticity, relevance, materiality and/or other potentially significant aspects. All documentary and testimonial evidence, argument and analysis should be subject to challenge by means tailored to provide tests of credibility, completeness and weight.
  - 1. Allowing counsel for parties to challenge inculpatory or opposing testimony by live cross-examination should be permitted to the extent feasible. In legal systems that do not present this opportunity, as in some administrative, inquisitorial and/or civil-law systems, other equivalent means for testing the quality and credibility of such testimony should be made available, such as questioning of witnesses by the independent decision maker *sua sponte* or upon request of the parties.
- F. Presentation of or challenges to evidence, arguments and expert analysis should be made in the presence of the first-instance decision-making official(s).
  - 1. For reasons of efficiency, certain procedural stages may call for written submissions by counsel, such as briefing of a request for summary disposition, a request for narrowing of the issues, or upon final submission of the matter for decision. Where submissions are

made in writing, counsel for respondents should have the opportunity for oral presentation of argument before the decision maker(s).

#### **IV. FIRST-INSTANCE DECISION**

- A. Any assessment of infringement should be based only on matters of record as to which targets and their counsel have had full opportunity to respond. The assessment should be in writing, explaining reasons for the assessment of evidence on each issue and the economic, factual and legal analysis relied upon.
- B. A finding of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it. The specification of remedy should be written and should explain why each element of the remedy is required by, and tailored to, the characteristics of the infringement.

#### **V. REVIEW**

- A. First-instance decisions should be subject to review by an independent tribunal.
  - 1. “Independent” in this context means (1) having no prior role in the investigation, accusation, or first-instance proceeding (except as a neutral decision maker regarding interim or preliminary matters required for management of first-instance proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to review the first-instance decision in a disinterested, efficient and accurate manner.

2. “Tribunal” in this context means one or more named officials specifically designated to conduct the review and render decision and personally identified to counsel for the parties.
- B. Counsel for the parties should be permitted to address the tribunal directly in face-to-face proceedings and through written submissions.
1. The opportunity for face-to-face proceedings should be subject to the discretion of the independent tribunal to forego such proceedings where they are highly unlikely to affect the outcome of or basis for the decision on review, in which case the tribunal should consider the parties’ written submissions.
- C. Review should be permitted on any issue unless sound policy suggests deference to the first-instance tribunal (e.g., basic fact-finding, routine evidentiary and procedural rulings, assessments of witness credibility and the like).
1. Many basic facts are usually not appropriate for review on the merits, such as whether particular individuals participated in particular communications (cartel cases) or whether particular distributors traded in specific goods (exclusionary conduct cases). By contrast, competition proceedings frequently involve the drawing of inferences (e.g., the existence of conspiracy; whether a practice should be regarded as exclusionary) that implicate important economic and/or competition policy aspects (such as the probability and consequences of mistaken inferences) or otherwise intertwine fact, economic analysis, law and/or policy. Review should be permitted on such issues.
- D. The basis for decision should be confined to matters addressed in the record in the first-instance proceeding (subject to reasonable exceptions for post-decision changes in law or fact and incontestable public-record facts).

- E. The decision on review should be in writing and explain in detail the assessment of and conclusions upon all issues underlying the decision.

**VI. BEST PRACTICES APPLICABLE TO ALL PHASES OF ANTITRUST PROCEEDINGS**

- A. Officials involved in all steps of an antitrust proceeding should possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient and accurate fashion.
- B. All rules and practices governing proceedings – procedure, evidence, review, *etc.* – should be clearly disclosed and made publicly accessible in advance of proceedings. Any exceptions should be proportional and based on specifically identified objective and legitimate reasons.
- C. Officials should provide for an effective system to prevent unnecessary delay at any stage in proceedings.