International Chamber of Commerce
*The world business organization*

**Policy Statement**

Prepared by the ICC Commission on

**Competition**

# Recommended framework for international best practices in competition law enforcement proceedings

## Highlights

- Transparency
- Engagement
- Confidentiality
- Due process/fairness
- Non-discrimination
- Accountability
- Role of the courts

Document No. 225/666 – 8 March 2010

# Recommended framework for international best practices in competition law enforcement proceedings

## 1. Introduction

### 1.1. Preliminary statement

1.1.1 This proposal sets out a recommended framework for certain best practices to guide competition law enforcement investigations and decisions applicable to all matters, including unilateral conduct and cartels, while recognizing the need for individual competition authorities to have discretion 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.

### 1.2. Background and approach

1.2.1 The best practices proposed in this document are intended to promote the adoption of procedural safeguards, 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. ICC believes 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 pursue more effectively the policies that underlie competition laws.

1.2.2 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. 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 should be transparent so as to enable companies to conform their practices to the applicable laws in those jurisdictions in which they 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.

Many national competition authorities have published the substantive laws and regulations governing competition law enforcement and many of the procedural rules governing enforcement proceedings (including guidelines on those rules), and should continue to make such laws and rules public.

2.1.2 A firm cannot defend itself appropriately 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 ("the Respondent(s)") must take place on a continuing basis through all stages of an investigation and proceeding, consistent with the principles of engagement set forth in Paragraphs 2.2.1 – 2.2.3 below. There should be a strong presumption in favor of disclosing facts, documents, theories and legal authority to the Respondent(s) as early in the investigative process as is practicable, consistent with other national laws.

2.1.3 Upon initiation of an investigation, the competition authority should inform the Respondent(s) of the fact of the investigation and the legal authority (that is, the specific statutory and regulatory provisions) under which the agency may proceed.

2.1.4 The level of disclosure should increase over the course of the investigation, such that all complaints, documents and other evidence relating to the subject matter of the investigation, whether inculpatory or exculpatory and including information determined to be confidential, should be disclosed to the Respondent(s) prior to preparation of any written statement of the charges against the parties (such as a Statement of Objections (Europe), Examiner's Report (Korea) or Advance Notification (Japan)) (hereinafter referred to as the "Report").[1] For example, as soon as the investigators have completed their initial evidence gathering and assessment of the case, they should provide the Respondent(s) with a description of the factual basis for the charges, the evidence and the economic theories and legal analysis proposed, along with copies of the complaints, supporting materials and evidence assembled to date, both inculpatory and exculpatory. The Respondent(s) should be provided ample time to address the evidence and have the right to discuss the proposed charges, the evidence and the investigators' economic theories and legal analysis during meetings with the investigators and any economists or other specialists working with the investigators.

2.1.5 In the event the statutes or regulations of the jurisdiction preclude the disclosure of specific documents or other information to the parties under investigation during the initial stages of the proceeding, the agency should provide the Respondent(s) 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. In any event, any evidence withheld on confidentiality grounds during the initial stages of the proceeding should be disclosed to the Respondent(s) or the Respondent's counsel prior to preparation of the Report, provided the Respondent(s) give(s) the undertaking set out in Paragraph 2.3.4.

[1] *The procedures of the U.S. Federal Trade Commission enable the parties being investigated to obtain full discovery from the agency and third parties as part of an adjudicatory proceeding following issuance of an initial complaint identifying the charges against the parties, in contrast to the proceedings before other agencies, such as the European Commission and the Korean Fair Trade Commission, in which the pre-hearing briefing and hearing occur following the issuance of the Report. The discovery under the U.S. FTC procedures occurs well in advance of an evidentiary hearing and pre-hearing briefing.*

2.1.6 As discussed in Section 2.3, 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 investigations, gather the information required to make informed, objective decisions, and safeguard the ability of the parties under investigation to defend themselves.

2.1.7 In the event the relevant agency officials recommend a formal charge against the Respondent(s), the written 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. Contemporaneously with the issuance of the Report, the agency should provide the Respondent(s) with any evidence that has not previously been provided, including witness lists and 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.

2.1.8 A transcript of the hearing before the agency should be made, with a copy provided to the Respondent(s).

2.1.9 The agency also should specify and publish the procedures and criteria that are necessary for Respondent(s) 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 evaluate fully 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 Respondent(s) 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 Respondent(s) 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 explain its evolving views of the facts and claims at issue. Such consultations should be conducted with sufficient specificity to fairly advise the Respondent(s) of the subject matter of the investigation, the relevant evidence and theories and to provide such parties a genuine opportunity to respond to such concerns well before any Report is issued. The "preliminary assessment" meetings described in Paragraph 2.1.4 provide an example of such engagement.

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 Respondent(s) 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 Respondent(s) 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 themselves against the allegations asserted against them.

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 that it uses to define confidential information in a manner consistent with the laws of the jurisdiction.

2.3.3 The Respondent(s), the complainants and third parties that submit materials and information to the agency should have the ability to designate as confidential all or some of the materials submitted, with the understanding that the agency should disclose all relevant information to the Respondent(s), as set out in Paragraph 2.1.4, and will ultimately be able to rely in its decision only on information that has been disclosed to the Respondent(s). The agency should determine whether such designations comply with the agency's guidelines and the applicable law, as provided in Paragraph 2.3.2.

2.3.4 Competition authorities should have in place and should implement strict rules requiring agency personnel to protect the confidentiality of information gathered as part of investigations. Such rules should ensure that (i) information provided by the Respondent(s), the complainants or third parties that is determined by the agency to be confidential is not shared with anyone other than the Respondent(s), agency personnel working on the investigation or outside experts retained for that purpose; and (ii) the Respondent(s) 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 defence.

2.3.5 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 person who has provided the information, including those individuals that have executed the undertaking referenced in Paragraph 2.3.4. The agency should provide the Respondent(s), 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 appreciable competitive or commercial 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 The proper purpose of the agency and its staff is to act impartially and to ensure, not that it wins a case, but rather that justice shall be done. Mechanisms should be established to ensure that decision-making 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 endeavour to separate these functions organically by, for example, clearly delineating separate and independent departments to undertake each function. At a minimum such agencies should implement clear 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 Respondent(s) and the agency officials acting as decision-makers (including their staffs) should be prohibited.

2.4.4 The agency should minimize publicity regarding cases at earlier stages and should have full regard for the presumption of innocence in drafting and disseminating announcements. If the agency does make 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 conclusions regarding the merits of the complaint 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 Evidence gathered by the investigators should be recorded comprehensively and in a manner that can be made available to the parties being investigated, as discussed in Paragraphs 2.1.2 – 2.1.7 above.[2]

2.4.7 The agency should allow the parties to be represented not only by counsel licensed to practice in the agency's jurisdiction, but should also allow counsel licensed in other jurisdictions to participate in such representation before the agency, acting in conjunction with the former. The agency should allow parties (at the requesting party's expense) to use translators during any meetings with, or hearings before, the agency.

[2] *See, for example, the report of the European Ombudsman in respect of the Intel Article 102 investigation, in which 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 the meetings and telephone calls with third parties (http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark#hl8).*

2.4.8 The agency should respect the legal professional privilege of legal advice. Any disputes between the agency and a party regarding the application of the legal professional privilege, such as whether specific documents or communications are privileged, should be resolved by an independent decision-maker, such as a court or an administrative law judge.

2.4.9 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.

2.4.10 The agency should consider the evidence regarding any competition compliance programme and the genuine compliance efforts of the Respondent(s) in determining whether the conduct under investigation was knowingly, intentionally or negligently in violation of the applicable competition laws and in establishing the penalty for any such violation. In particular, in order to encourage companies to invest in compliance programmes and embed a culture of compliance, evidence of genuine compliance efforts should be taken into account as an attenuating factor is setting the level of any fine.

2.4.11 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.

2.4.12 In the event the agency issues a Report alleging that the Respondent(s) 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 Respondent(s) 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.

2.4.13 The deadline for submitting the Response should be established after consultation with the Respondent(s). 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.

2.4.14 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.

2.4.15 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 rules governing such hearings should be announced well in advance of the hearing. The schedule for such hearings should be announced after consultation with the Respondents and should allow ample time that is sufficient for full consideration of the case, bearing in mind the complexity and volume of the issues and the evidence.

2.4.16 During the hearing, the agency should not be allowed to rely on theories or evidence not disclosed to the Respondents in the Report. The Respondents should have the opportunity to provide the decision maker(s) themselves with a live, in-person presentation of their response to the Report; to question the witnesses relied upon by the investigators, including any complainants and others who have provided evidence on which the investigators rely; to question the investigators and to bring forward witnesses as part of their 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 and the defences and hence to evaluate the extent to which the investigators have discharged their burden of proving the charges. 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.

2.4.17 The agency should have the initial burden of proving each element of the offences 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.

2.4.18 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.

2.4.19 The agency should provide the Respondents with full details of any proposed penalty and remedies that the investigators intend to propose, including the manner in which any penalties have been calculated, the necessity for any proposed remedies and the facts and evidence to be relied upon to justify them. Depending upon the structure of the agency's process, the proposed penalty and remedies should be addressed either during the hearing or as part of a separate later hearing. Respondents should be given a full opportunity to respond in writing to the proposed penalty and remedies and to request a hearing regarding any penalty and remedies.

2.4.20 Decision makers should be independent of political influence.

2.4.21 The agency’s deliberative process should not be 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.

2.4.22 Prior to making any press release or public statement regarding enforcement proceedings or decisions, the agency should notify the Respondents and provide an opportunity for the Respondent to review and comment on the proposed release. In cases involving multiple Respondents, any publication regarding the outcome for some Respondents only should be made with due regard for the presumption of innocence for all remaining Respondents.

2.4.23 No agency action or order should be effective until review and final action by the full agency is complete. This is not intended to impede the imposition of interim measures, if those interim measures are appropriately adopted.

## 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 defences of that party and should explain why such evidence and arguments were unpersuasive. Addressing defences 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.

## 2.7 Role of the courts

2.7.1 The courts, particularly when competition authorities are an administrative body, play or should play a significant role in safeguarding due process. 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 authority 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.

2.7.2 Defendants should be entitled to appeal any decision issued by a competition authority before a court consisting of impartial judges. Courts should have full jurisdiction, (including but not limited to reviewing the level of any penalty imposed), so that they are able to not only ensure that the defendant's rights of transparency and due process were respected by the competition authority; but also to review the evidence used to support the complaint as well as any exculpatory evidence not relied upon by the competition authority to come to its own appraisal of the facts and evidence.

2.7.3 The role of the courts should be to confirm that the burden of proof was indeed met by the competition authority. Finally, the court should review any imposed remedy, sanction, or fine to determine that it is appropriate and consistent with similar judgments and that the remedy is justified based on actual, measurable consumer harm and/or a demonstrated need for deterrence.

2.7.4 Courts should invest the necessary resources in judicial training and seek opportunities for judicial exchange to ensure that its judges are well versed in understanding the economic underpinnings at the heart of complex competition cases.

2.7.5 Finally, mechanisms should be in place to ensure that the parties concerned have a timely right of appeal.

## Conclusion

ICC believes that the foregoing best practices, if adopted, would not only ensure that companies are accorded procedural fairness, but also would more effectively promote the policies that underlie competition laws. In particular it would 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.

# The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.

International Chamber of Commerce
*The world business organization*
**Policy and Business Practices**
38 Cours Albert 1er, 75008 Paris, France
Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 28 59
E-mail icc@iccwbo.org Website www.iccwbo.org