



EUROPEAN COMMISSION

Competition DG

Director General

19 DEC. 2008 D*11949

Brussels,
COMP/A4/ D(2008)

TO BE SENT BY E-MAIL

Subject: Working Arrangements for the Antitrust Advisory Committee



Dear Colleagues,

I am pleased to be able to inform you that final agreement has been reached on the Working Arrangements for the functioning of the Advisory Committee on Restrictive Practices and Dominant Positions. The definitive text is attached.

As was foreseen, the Working Arrangements will enter into practice next year, meaning that they will apply to all cases in which Statements of Objections are issued after 1st January 2009.

We are now taking the necessary steps to implement the Working Arrangements on our side and look forward to working closely with you to ensure the optimal functioning of the Antitrust Advisory Committee.

Yours sincerely,



Philip LOWE

Annex: Working Arrangements for the functioning of the Advisory Committee on Restrictive Practices and Dominant Positions

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11. Office: J-70-COMP-Grefte Antitrust. Telephone: direct line (32-2) 2955894. Fax: (32-2) 2950128.

E-mail: COMP-GREFFE-ANTITRUST@cec.eu.int

Working Arrangements

for the functioning of the
Advisory Committee on Restrictive Practices and Dominant Positions

I. Introduction

1. According to Article 14(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 (“Regulation 1/2003”), the Commission is required to consult the Advisory Committee on Restrictive Practices and Dominant Positions (the “Advisory Committee”) prior to the taking of a decision under Articles 7, 8, 9, 10, 23, 24(2) and 29(1) of the Regulation. According to Article 17(2), Article 14 applies *mutatis mutandis* where the Commission conducts a sector inquiry. The Advisory Committee is moreover consulted on draft Commission regulations as provided for in the relevant Council Regulations.¹ Section 4 of the Commission Notice on cooperation within the Network of Competition Authorities (2004/C101/03) (“Network Notice”) further describes the role and functioning of the Advisory Committee under Regulation 1/2003. Within this legal framework, the working modalities of the Advisory Committee have developed in practice over time.
2. The present Working Arrangements relate only to consultations of the Advisory Committee concerning decisions which are covered by Article 14(1) of Regulation 1/2003. It is their object to contribute to the optimal functioning of the Advisory Committee. The consultation of the Advisory Committee at a meeting or through a written procedure entails a degree of preparatory work on the part of the representatives of the Member States attending the Advisory Committee so that they have full knowledge of the main points of facts and law of the preliminary draft decision on which they are consulted. In particular, Article 14(3) of Commission Regulation (EC) No. 773/2004 (“Regulation 773/2004”) provides that national competition authorities (“NCAs”) are invited to oral hearings when they are requested to be held by the parties to the case. By participating in the oral hearing, NCAs can develop a better understanding of the case in the event the Commission later convenes an Advisory Committee meeting to consult on a preliminary draft decision.
3. The consultation of the Advisory Committee provides an opportunity for the Commission to discuss its draft decisions with experts from the competition authorities of the Member States in a confidential and dedicated forum, before these decisions are adopted. It is therefore in the common interest of the Commission and the NCAs to ensure that the consultation of the Advisory Committee can take place in the best possible circumstances. To this end, the members of the Advisory Committee shall receive, and have access to, the most important and other existing documents necessary for the assessment of a case, in accordance with Articles 11(2) and 14(3) of Regulation 1/2003.

¹ Cf. Article 33 of Regulation 1/2003, Council Regulation 19/65, Council Regulation 2821/71, Council Regulation 3976/87 and Council Regulation 479/92.

4. The consultation of the Advisory Committee can take place in written or oral form. Either way, the purpose of the consultation remains the same, namely to invite the Advisory Committee to give an opinion on a preliminary draft decision to be adopted by the Commission. This opinion is also an opportunity for the Advisory Committee to contribute to improving the quality of the decisions adopted by the Commission. To this end, members of the Advisory Committee should strive to give focused and substantiated advice.
5. The Commission and the members of the Advisory Committee will, in keeping with their obligation of professional secrecy set out in Article 28 of Regulation 1/2003, not disclose any information of the kind covered by this obligation which they have acquired or exchanged via the preparation of, and the deliberations in, the Advisory Committee. Nor should they reveal the opinion of the Advisory Committee prior to its publication, if any, or any information concerning the deliberations which led to the formulation of the opinion.

II. The preparatory framework

6. In conformity with Article 11(2) of Regulation 1/2003, the Commission should deliver to the NCAs a copy of:
 - i. the statement of objections in all available languages following its notification to the parties concerned;
 - ii. the written submissions of the parties concerned in reply to the statement of objections received by the Commission pursuant to Article 10 of Regulation 773/2004;
 - iii. the preliminary assessment made pursuant to Article 9 of Regulation 1/2003;
 - iv. the observations made by interested third parties pursuant to a publication by the Commission under Article 27(4) of Regulation 1/2003; and
 - v. the other documents that fall within the scope of the "most important documents" referred to in Article 11(2).
7. The above-mentioned documents should be delivered forthwith to the NCAs following the notification or receipt of the document, as the case may be.
8. In addition to the documents listed above in paragraph 6 and in accordance with Article 11(2) of Regulation 1/2003, each NCA can request the Commission to provide it with a copy of other existing documents necessary for the assessment of a case², including in particular:
 - i. the written submissions of the complainant received by the Commission pursuant to Article 6 of Regulation 773/2004; and
 - ii. the written submissions of other persons received by the Commission pursuant to Article 13 of Regulation 773/2004.

² The safeguards set out in point 35 of the Commission Notice on immunity from fines and reduction of fines in cartel cases (2006/C 298/11) and point 37 of the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) 1/2003 in cartel cases (2008/C 167/01) regarding corporate statements and settlement submissions shall be effectively respected.

9. The Commission's case team should be available for oral discussions with NCA representatives, as appropriate. The contact details of one or several members of the Commission's case team will be communicated to the NCAs following the appointment of the rapporteur³ in a case. The Commission should maintain and, upon request, provide an up-to-date list of open Commission cases in which a statement of objections has been sent, together with the contact persons on the Commission's case team and the rapporteur acting on the case (if already nominated).
10. Where deemed useful conference calls / videoconferences open to all members of the Advisory Committee can be used as a complementary discussion tool, provided that confidentiality is effectively guaranteed.

III. The Oral hearing

11. Under Article 12 of Regulation 773/2004, the Commission shall hold an oral hearing if a party concerned so requests in its written submissions.
12. The participation of the NCAs in the oral hearing of a case, if any, is useful for the efficient functioning of any subsequent meeting of the Advisory Committee convened to consider a preliminary draft decision on the case.

IV. The Advisory Committee Meeting

I. Preparation

13. The Commission, as Chair of the Advisory Committee, invites NCAs to a meeting of the Advisory Committee. In accordance with Article 14(3) of Regulation 1/2003 this meeting should, in principle, not be held earlier than 14 days after dispatch of the documents listed therein. An agenda should be sent with the invitation.
14. In setting the date for a meeting, the Commission should take into account the possible convenience or inconvenience of holding a meeting on a particular day, for example by grouping together similar or related issues in the same or adjacent meetings, or so as to facilitate the attendance of members at other meetings organised by the Commission in Brussels.
15. With the invitation to attend a meeting of the Advisory Committee, the Commission should transmit to the members of the Advisory Committee:
 - i. the summary of the case;
 - ii. an indication of the most important documents and copies thereof, if they have not already been transmitted;
 - iii. a copy of the preliminary draft decision in the authentic languages of the case and the Commission's working languages as they become available.

³ See paragraph 28 et seq. on the rapporteur.

16. In accordance with Article 15(2) of Commission Decision 2001/462/EC, the Commission shall communicate the Hearing Officer's final report to the NCAs. This should be done as soon as it is available.
17. At the latest upon receipt of the invitation to the Advisory Committee meeting, each NCA should provide the Commission with the name and contact details of the person who is the representative of the NCA for the purposes of this meeting. Any changes should be notified promptly to the Commission.
18. The Commission should maintain and, upon request, provide an up-to-date list containing the names and contact details of the NCA representatives participating in the Advisory Committee meeting (to the extent known). This list should also contain the person acting as rapporteur and the contact persons on the Commission's case team.
19. Where the Commission postpones a meeting upon request of an Advisory Committee member according to Article 14 (3), 2nd sentence of Regulation 1/2003, the Commission should inform the Advisory Committee about the reason for such postponement.

2. *Holding of the meeting(s)*

20. Each NCA should make its best efforts to attend Advisory Committee meetings. If it is unable to attend, a NCA can submit any observations, comments or questions for the attention of the case-team and the rapporteur before the meeting, as early as is practicable.
21. Only the observations and comments made by members present at the meeting shall be taken into account in the opinion of the Advisory Committee.
22. The Commission, as Chair, should determine the general structure of, and format for, the discussion to take place in the meeting. Having regard to the nature of the case, it may wish to strive for a balance between a formal "tour de table" format, which encourages active contribution from all NCAs, and a more informal format. The Commission may discuss with the rapporteur in advance of the meeting how it should best be conducted.
23. The Commission and the NCAs undertake to ensure that the confidentiality of their exchanges of views, in particular about the level of fines in the Advisory Committee is effectively preserved, by using all appropriate practical means.
24. With respect to a consultation on a decision on fixing the level of a fine, the Commission should distribute at the meeting a table outlining how the proposed fine was calculated by making exact reference to each relevant provision of the Commission's guidelines on fines. Upon request, the Chair may allow members of the Advisory Committee additional time within the meeting to consider the explanation given by the Commission. To preserve confidentiality, the table shall be collected at the end of the meeting and no photocopies or other copies which could allow prima facie identification of their content should be made by those present at the meeting

3. *Opinion*

25. Without prejudice to every member's right to request a reasoned opinion (last sentence of Article 14(3) of Regulation 1/2003), the opinion is normally delivered in standard format by the Advisory Committee, assisted by the rapporteur. The Advisory Committee may deliver a reasoned opinion in appropriate cases and recommend its publication.
26. The opinion of the Advisory Committee must be delivered before the conclusion of the meeting.
27. If the Commission adopts a decision, it should communicate to the Advisory Committee in an appropriate way any significant changes that have been made and the manner in which the opinion of the Advisory Committee was taken into account.

V. The rapporteur

1. *Role*

28. A representative of a NCA acts as a rapporteur for each case in which the Commission issues a statement of objections.
29. The rapporteur acts as a facilitator of the preparatory work and the discussions in the Advisory Committee and accordingly shall exercise his/her task in a strictly objective way at all times following his/her appointment. When informing NCAs about a case, the rapporteur should ensure that he/she is aware of all the relevant aspects of the case. To this end, the rapporteur and the Commission's case team should always closely cooperate, in particular when using the practices set out in paragraphs 44 and 45.
30. The identity of the rapporteur should only be disclosed to the members of the Advisory Committee and the Commission.
31. Any communications made by the rapporteur shall endeavour to inform the NCAs of the crucial aspects raised by the case without suggesting or advocating an opinion on the merits of the Commission's or the parties' arguments. Any notes prepared by the rapporteur shall contain a disclaimer displayed prominently providing that it is prepared solely as a means to facilitate debate on the case and that it does not reflect the position of the Commission, the Commission's services or any NCA. Any such note must remain confidential, shall be marked as such and shall only be circulated to the members of the Advisory Committee and the European Commission's case team by secure means.
32. The work undertaken by the rapporteur does not replace or preclude any activity that NCAs may wish to undertake in a case such as having direct contacts with the Commission's services.

2. *Appointment*

33. In order to allow NCAs to plan the allocation of their resources, the Commission should appoint the NCA responsible for nominating the rapporteur not later than 45 days following the notification of the statement of objections to the parties concerned.
34. The appointment should be made in accordance with the list of European Presidencies, as follows:
- 1) Conseil de la concurrence (FR) or Direction générale de la concurrence de la consommation et de la répression des fraudes (FR)
 - 2) Úřad pro ochranu hospodářské soutěže (CZ)
 - 3) Konkurrensverket (SE)
 - 4) Comision Nacional de la Competencia (ES)
 - 5) Service de la concurrence (BE)
 - 6) Gazdasági Versenyhivatal (HU)
 - 7) Urząd Ochrony Konkurencji i Konsumentów (PL)
 - 8) Konkurrencestyrelsen (DK)
 - 9) Commission for the protection of competition (CY)
 - 10) An tÚdarás Iomaíochta (IE)
 - 11) Konkurencijos Taryba (LT)
 - 12) Επιτροπή Ανταγωνισμού (EL)
 - 13) Autorità garante della concorrenza e del mercato (IT)
 - 14) Konkurences Padome (LV)
 - 15) Conseil de la concurrence (LU)
 - 16) Nederlandse Mededingingsautoriteit (NL)
 - 17) Protimonopolný úrad (SK)
 - 18) Office of Fair Competition (MT)
 - 19) Office of Fair Trading (UK)
 - 20) Konkurentsiseadus (EE)
 - 21) Комисия за защита на конкуренцията (BG)
 - 22) Bundeswettbewerbsbehörde (AT)
 - 23) Consiliul Concurenței (RO)
 - 24) Kilpailuvirasto (FI)
 - 25) Bundeskartellamt (DE)
 - 26) Autoridade da Concorrência (PT)
 - 27) Urad RS za varstvo konkurence (SI)
35. Exceptionally, the Commission, with the consent of the NCA concerned, may decide to invert the order provided for in paragraph 34 (“swap” between two NCAs) with a view to support the perception of the rapporteur's strict objectivity.
36. If a NCA declines to be appointed or fails to respond to the Commission within 10 days following notification of the request to act as rapporteur, the next NCA on the list provided for in paragraph 34 should be asked to nominate a representative from its authority to act as rapporteur, until a rapporteur is actually appointed.
37. Upon acceptance of the appointment, a NCA should advise the Commission of the name and contact details of the person acting as rapporteur within 14 days.

38. Where necessary, the rapporteur's NCA can replace its representative acting as rapporteur. Where this is done, the Commission should immediately be provided with the contact details of the new representative. To ensure continuity, the rapporteur should not be changed within 30 days prior to the meeting of the Advisory Committee, unless justified by objective reasons.
39. The Commission should promptly advise the nomination and any later changes of the rapporteur to the NCAs.

3. *Relationship with the Commission*

40. The Commission and the rapporteur should agree on the modalities of their cooperation, such as the frequency and means by which the rapporteur is kept informed about the status of the case by the Commission's case team and the way in which the rapporteur informs the Commission's case team about how he/she will strive to enhance the NCAs understanding of the case.
41. In addition to the documents transmitted to all NCAs, the Commission should make available to the rapporteur the existing list of documents prepared for access to file and provide him / her with any further documents from the file he / she may request in accordance with the second sentence of Article 11(2) of Regulation 1/2003.⁴

4. *Enhancing NCAs' understanding of the case*

42. The rapporteur may wish to inform NCAs of significant procedural steps in the administrative proceedings and / or update NCAs about any procedural or substantive aspect of the case at any moment during the preparatory process. The nature, frequency and extent of this reporting will depend on the case.
43. Given his/her knowledge of the case at hand, the rapporteur may suggest the use of the written procedure to consult the Advisory Committee (see paragraph 46).

Recommended practices

44. It is recommended that the rapporteur, in order to facilitate the consultation of the Advisory Committee, employs the following practices:
 - i. Not later than 5 days prior to the Advisory Committee meeting, the rapporteur should circulate a list of key questions (to be answered with "yes", "no" or "abstention") in addition to asking:
 - whether there is overall agreement with the preliminary draft decision,
 - whether there are observations or any points which the Commission is asked to take into account, and
 - whether the Committee should recommend the publication of the opinion.

⁴ The safeguards set out in point 35 of the Commission Notice on immunity from fines and reduction of fines in cartel cases (2006/C 298/11) and point 37 of the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) 1/2003 in cartel cases (2008/C 167/01) shall be effectively respected.

In addition, a limited number of case-specific issues could be included, inviting the Advisory Committee to consider certain relevant aspects of the case in assessing the draft decision.

The above questions should be made available in a Commission working language.

- ii. Following the opening of the (first) meeting the rapporteur should, as agreed with the chairperson, and in consultation with the Commission's case team:
 - present an introduction to the case, with the assistance of the case-team where appropriate, as requested by the rapporteur;
 - briefly describe the main issues in the case;
 - present a list of key questions (see paragraph (i) above);
 - present additional questions and comments, as he/she deems appropriate.

Optional practices

45. Without prejudice to paragraphs 42, 43 and 44, the rapporteur may furthermore choose to make use of the following practices. These practices are merely optional and their use is left to the rapporteur's discretion. The rapporteur may choose from these practices as he/she deems appropriate, taking into account the complexity of the case and the novelty of the issues raised. The rapporteur may also consider consulting with other NCAs when assessing the importance and implications of the case.

- i. At any stage during the preparatory phase, the rapporteur may, in the appropriate case:
 - prepare and circulate a short note to the members of the Advisory Committee and the Commission's case team highlighting crucial aspects raised by the case to help NCAs develop a better understanding of the case and to prepare for the oral hearing or the meeting of the Advisory Committee as the case may be;
 - ask the Commission to convene a briefing session for the NCAs, in particular, if a suitable opportunity arises, e.g. adjacent to another meeting which is organised by the European Commission or by telephone conference or videoconference.
- ii. Not later than 5 days prior to the meeting of the Advisory Committee, the rapporteur may:
 - collect questions and written comments from NCAs and forward them to the Commission's case team and the NCAs;
 - ask NCAs if they wish to issue a reasoned opinion and inform the Commission's case team and the members of the Advisory Committee of the results of that inquiry.

VI. The written procedure

1. Deciding whether to propose the written procedure

46. The Commission shall assess whether or not to propose to NCAs a written procedure, taking account of the likely efficiency gains for both NCAs and the Commission, having regard to the nature of the case, the type of draft decision being considered and the likely nature of the comments if a meeting were held. The Commission should consult the rapporteur before making such a proposal to the Advisory Committee.

2. Launching the written procedure

47. The launching of the consultation under a written procedure is done by a notice from the Commission to the Advisory Committee, within the deadline prescribed in Article 14(4) of Regulation 1/2003 and together with the documents set out in Article 14(3) of Regulation 1/2003. The timely transmission of the relevant documents is vital for the written procedure to be effective as means of consultation of the Advisory Committee.
48. If the rapporteur or any Advisory Committee member considers that a case where the Commission has proposed an oral procedure would be suitable for a written procedure, he / she may communicate his / her opinion to the Commission. The Commission can follow up this suggestion by a notice to all Advisory Committee members, proposing that the consultation should take place by way of a written procedure.
49. The notice initiating the written procedure should contain the following:
- i. the date by which members should indicate whether they request a meeting of the Advisory Committee (“procedural veto”); although this deadline is not preclusive, it is in the common interest to exercise procedural vetoes as early as possible, desirably within 7 days following the dispatch of the relevant documents as laid down in paragraph 47;
 - ii. the date by which members should submit their observations if the written procedure is maintained, observing the deadlines laid down in Article 14(4) of Regulation 1/2003;
 - iii. a proposed date for a meeting of the Advisory Committee in the event a member of the Advisory Committee requests a meeting pursuant to Article 14(4) of Regulation 1/2003.
50. Pursuant to Article 14(4) of Regulation 1/2003, the Commission may set shorter deadlines than those provided in Article 14(3) and (4). This should be done only in exceptional circumstances. Members should endeavour to indicate to the Commission as early as possible and in principle within four working days following the dispatch of the notice if they object to the shorter deadline. In case of an objection, the deadlines foreseen in Article 14(3) and (4) of Regulation 1/2003 would apply, counting from the dispatch of the documents.

3. The written consultation process

51. In a consultation conducted under the written procedure, it would be sufficient for the rapporteur to submit to the Advisory Committee a simple list of key questions (that can be answered with “yes”, “no” or “abstention”) asking:
 - i. whether there is overall agreement with the preliminary draft decision,
 - ii. whether there are observations or any points which the Commission is asked to take into account, and
 - iii. whether the Committee should recommend the publication of the opinion.
52. In addition, a limited number of case-specific issues could be included, inviting the Advisory Committee to consider certain relevant aspects of the case in assessing the draft decision.
53. In addition to replying to the list of key questions, the Advisory Committee members may make any observations in writing. These observations, or at least a summary thereof, should be provided in a commonly understood and accepted language for the convenience of other Committee members. These observations should be sent to the Commission and the other Committee members in a secure way.
54. The fact that a member of the Advisory Committee has not replied to any of the questions asked should not be taken as tacit approval by the member of the draft decision. Members should use their best efforts to respond to the questions asked in order to ensure that the Commission is able to obtain meaningful conclusions from the consultation.
55. If the nature of the requests for explanations is such that an open-to-all discussion is warranted, the Commission would:
 - i. either organise a conference call/videoconference to deal with the questions and then restate the deadline for the written replies; or
 - ii. if the complexity of the issues justifies it or any member so requests, “switch” to the oral procedure by organising a meeting on the date specified in the original invitation. The consultation would then be concluded in this meeting (in which written replies already made would not be binding upon the members of the Committee).

In both cases, this will be considered the continuation of the same consultation launched according to paragraphs 47 et seq. The invitation to the conference call / videoconference or meeting would reiterate the date as set out under paragraph 49(iii), contain practical details and specify whether or not there exist any additional or modified documents.

56. At the end of the consultation process, the opinion would be drafted – normally in the standard format used for oral consultations – by the Commission's case team, in consultation with the rapporteur without delay. Members having participated in

the consultation would be invited to confirm that the draft opinion correctly reflects the result of the consultation by e-mail as rapidly as possible and in any event by a specified date (which is normally not more than three working days after the conclusion of the consultation). This would be indicated in the request to confirm. In this context, the absence of a reply would be considered as a tacit approval of the draft opinion by the members having participated in the consultation.

VII. Status

57. Regulation 1/2003 does not require the adoption of any additional procedural rules for the Advisory Committee. The present Working Arrangements have been drawn up by DG Competition of the European Commission and the NCAs in close cooperation. The practices outlined in the present Working Arrangements should be applied in a spirit of cooperation and flexibility, taking account of the importance of the case under consideration and possible resource restraints of the competent authorities of the Member States. The practices set out in the Working Arrangements do not create any rights or obligations and do not alter or replace any rights or obligations set out in the EC Treaty and Council Regulation 1/2003, and in particular Article 14 thereof, or the Commission implementing Regulation 773/2004 as interpreted by the case-law of the Community Courts. The Working Arrangements do not alter the Commission's interpretative notices and failure to comply with these arrangements in any respect is not intended to have any legal consequences for the application of Regulation 1/2003.
58. The present Working Arrangements shall apply to all Commission cases in which a statement of objections is issued after 1 January 2009.
59. With regard to cases in which a statement of objections was issued before 1 January 2009 the Commission may apply these Working Arrangements to cases in which no rapporteur has been appointed yet. In this case, the deadline for the appointment of the rapporteur set out above (see paragraph 33) does not apply, but the appointment of a rapporteur should be made as soon as possible.
60. After a trial period of two years the present Working Arrangements shall be reviewed by the European Commission's DG Competition and the competent authorities of the Member States for the purpose of deciding whether they should be revised.