

*Best Practices on the conduct of
proceedings concerning Articles 101 and
102 TFEU: Talking business, or real
business?*

*GCLC Lunch Talk Series,
Hilton Hotel, Brussels, 18 March 2010*


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- Part I: Business: what's in
- Part II: Real business: what's not

- Scope of the Best Practices
 - Exclusions (§§ 2-3)
 - What about Articles 8 (interim measures) and 10 (declaration of inapplicability) of Regulation 1/2003?
- Legal Status: § 7 in fine: Best Practices “do not alter the Commission’s interpretative notices relevant for the conduct of proceedings”

- Initial assessment:

- Transparency – § 14
- Reaction to complaints – § 15

- Opening of proceedings:

- Dealing with the case in a timely manner (§ 17)
- Decision to open proceedings (§ 18)
- Publicity (§§ 19-21; closing: §§ 70 & 100)
- Extension of the scope and/or addressees (§ 22)

- Languages (§§ 24-29 & 106)
- Information requests
 - Scope (§§ 31-33)
- Statements/Interviews (§§ 43-45)
- Legal Professional Privilege

● Meetings

- In general: Minutes (§§ 39-40)
- State of Play meetings (§§ 54-60)
- Triangular meetings (§§ 61-63)
- Meetings with the Commissioner or the Director General (§ 64)

● Review of key submissions

- Complaints (§ 65)
- Other key submissions (§§ 67-68)

- Right to be heard

- The S/O and fines (§ 77)
- The S/O and remedies (§ 78)
- The S/O and publicity (§ 79)

- Access to file

- Standard (§§ 80-82)
- Negotiated disclosure (§ 84)
- Data Room (§ 85)

- Written reply to the S/O
 - Access to others' replies to the S/O (§ 89)
- Supplementary S/O (§ 96)
- Letter of facts (§ 97)
- New access to file (§ 98)
- Possible outcomes of this phase (§ 100)

- Initiation of commitment discussions (§§ 104-106)
- Preliminary assessment (§§ 107-110)
- No access to file?
- Submission of the commitments (§§ 111-113)
- Market test and subsequent discussions; negative results of the test (§§ 114-118)

- Grounds for rejection (§§ 120-123)
- Procedure (§§ 124-126)

- Adoption and notification (§§ 130-133)
- Publication of decisions (§§ 134-136)


- Good codification
- Interesting novelties
- Enhanced transparency
- Plenty of good intentions... but turn them into action (scape clauses)

However, let's talk real business

- The origin of the “Best Practices” document:
 - Is “what’s not in”, in reality, what has brought about “what’s in” (Best Practices)? (Mounting pressure on DG Comp about procedures)
 - Or is it the request to have the “Manuel de Procedure” unveiled?
 - Or possibly the latest Ombudsman’s views about DG Comp procedures?
 - Or The Economist?
 - Or rather the TEU and TFEU provisions concerning the ECHR and the likely accession of the EU to the Rome Convention shortly?

- The sufficiency of the “Best Practices” document:
 - Are “Best Practices” enough?
 - Would the “Manuel de Procedures” be enough?
 - Would a EU General Code of Procedure be enough?
 - Caesar’s wife...

- The real problem: Proportionality in procedural guarantees (“parking ticket” procedure; gap bigger and bigger over time)
- The solution: Matching types of cases with types of procedure (the higher the likely punishment, the higher the procedural guarantees)

- Three basic types of cases
 - Four basic types of procedures
 - Three-step approach
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● Type 1 Cases:

- Article 7 purely declaratory decisions with cease and desist orders (including interim measures) – No (positive) injunction;
- Commitment decisions (Article 8); and
- Finding of inapplicability (Article 10)

● Type 2 Cases:

- Article 7 decisions with injunctions in the form of behavioural remedies (including interim measures);
- Fines up to a certain amount (e.g. 10M€) per company and/or infringement

● Type 3 Cases:

- Article 7 decisions with injunctions in the form of structural remedies (including interim measures);
- Fines higher than a certain amount (e.g. 10M€) per company and/or infringement

- Type 1 Procedures: Standard Administrative Procedures
- Type 2 Procedures: Enhanced Administrative Procedures (i)
 - Split investigation and adjudication by transforming the Hearing Officers into Administrative Judges (FTC-style) (final decisions adopted by the College of Commissioners).
 - Holding public hearings

- Type 3 Procedures: Enhanced Administrative Procedures (ii)
 - Type 2 procedural guarantees, with adjudication entrusted to selected Commissioners (competition Commissioner plus, e.g. two other Commissioners, in turns).
- Type 4 Procedures: Judicial Procedures
 - DG Comp transformed into pure prosecutor;
 - Adjudication entrusted to judges (Treaty adaptations needed)

● Matching Type of Case with Type of Procedure (I)

- Present situation

Case Type 1	Procedure Type 1
Case Type 2	
Case Type 3	

● Matching Type of Case with Type of Procedure (II)

● First Phase

Case Type 1	Procedure Type 1
Case Type 2	
Case Type 3	Procedure Type 2

● Matching Type of Case with Type of Procedure (III)

● Second Phase

Case Type 1	Procedure Type 1
Case Type 2	Procedure Type 2
Case Type 3	Procedure Type 3

● Matching Type of Case with Type of Procedure (IV)

● Third Phase

Case Type 1	Procedure Type 1
Case Type 2	Procedure Type 2
Case Type 3	Procedure Type 3

- Pressure is mounting
 - Man Proc and access to information
 - Ombudsman
 - Etc
- Convenience of adopting a General Code of Procedure
- Need to respect proportionality
 - ECHR Accession by EU
 - ECtHR to examine appropriateness of EU antitrust procedures
- Need to evolve towards better adapted procedural solutions

Thank you for your attention