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CCBE RESPONSE TO THE EUROPEAN COMMISSION PUBLIC CONSULTATION ON THE REVISION OF THE 1997 NOTICE ON THE INTERNAL RULES OF PROCEDURE FOR PROCESSING REQUESTS FOR ACCESS TO THE FILE IN ANTITRUST AND MERGER CASES

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The Council of Bars and Law Societies of Europe (CCBE), which represents over 700,000 lawyers through its member Bars and Law Societies, submits its comments on the draft European Commission Notice on the rules for access to the Commission file (hereinafter referred to as “draft Notice”)¹.

Access to the file is one of the procedural safeguards granted to parties in the proceedings in antitrust and merger cases and it is essential to ensure that the Commission’s legislative procedure is fair and impartial.

The CCBE points out that it is crucial for the existing Notice² to be updated with the recent case law of the European Court of Justice, the practice developed by the Commission and above all, the modernisation of the implementing rules of Articles 81 and 82 of the EC Treaty, as well as those of the merger control.

Paragraph 18 and 42 of the draft Notice: protection of anonymity

Paragraphs 18 and 42 of the draft Notice deal with the protection of anonymity in the event that there is a risk of commercial pressure or retaliation. In order to comply with the principle of equality of arms and the rights of defence, full access to observations and evidence should in principle be given in the event that the author or source is kept confidential. These principles may also require that the identity should be disclosed.

Paragraphs 25 and 26 of the draft Notice: access to the file prior to the notification of the Commission’s statement of objections

Under paragraph 25 of the draft Notice, “*Prior to the notification of the Commission’s statement of objections, the parties have no right of access to the file*”.

The Commission decided (in antitrust proceedings as well as in proceedings under the merger regulation) to restrict the access to the file at the stage following the notification of the Commission’s objections. Such a restriction is not provided for either by Article 27(2) of Regulation 1/2003/EC or by Article 18(3) of Regulation 139/2004/EC. Therefore, it should be repealed.

Under paragraph 26, after the notification of the objections, “*Access to the file will be granted upon request and, normally, on a single occasion, following the notification of the Commission’s objections to the parties, in order to ensure the principle of equality of arms and to protect their rights of defence. As a general rule, therefore, no access will be granted to other parties’ replies to the Commission’s objections.*”

- The abovementioned paragraph introduces a new restriction on the right of access to the file in proceedings pursuant to Articles 81 and 82. Such a restriction on the right to access to the file “on a single occasion” has no legal basis. There is not a single provision in Regulation 1/2003/EC which enables the Commission to restrict the rights of parties in such a way. This also holds true for the implementing Regulation adopted by the Commission. The CCBE believes that there should be no other restriction on the right to access the file and that the

¹ Draft Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C 259 21.10.2004, p.8).

² Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 (now 81 and 82) of the ECSC Treaty and Council Regulation (EEC) No 4064/89 (OJ C 23 23.01.1997, p.3).

draft Notice should contribute to ensuring an effective exercise of that right rather than restricting its scope.

- The restriction in the last sentence of the first part of paragraph 26 should be carefully considered: the Commission cannot legitimately deny access to other parties' replies to the Commission's objections. Article 27(2) of the Regulation 1/2003/EC enumerates clearly the categories of document that the Commission has the right not to disclose. The documents mentioned in paragraph 26 of the draft Notice cannot be included in principle in one of these categories, unless they include business secrets or confidential information. However, the Commission should verify that it is so for each document.

The second part of paragraph 26 provides that, *"A party will, however, be granted access to documents received after notification of the objections at later stages of the administrative procedure, prior to the adoption of a formal decision, where such documents may constitute new evidence pertaining to the allegations against that party in the Commission's statement of objections."*

Although we can agree that the Commission has made an effort to protect the right of parties, the result does not seem, however, either consistent with the Regulation 1/2003/EC or sufficient to ensure adequately the respect of the rights of the defence.

- First of all, it should be pointed out that there is no single provision in the Community Law enabling the Commission to deny access to the file at later stages of the administrative procedure or to make it subject to existence of new documents.
- Second, it must be noted that the second part of paragraph 26 restricts access to *"new evidence pertaining to the allegations against that party"*. We consider this to be wrong as access to the file does not only concern inculcating evidence but also exculcating evidence. Indeed, access to the file is required not only to allow parties to examine the evidence against them, but also to verify that the Commission did not unduly ignore some documents (or a part of these documents) that might consist of pieces of evidence against the allegations made by the Commission. Hence, access should be given to all documents and evidence received which relate to the case up to the moment that the College of Commissioners takes a formal decision.

In the light of the comments above, the CCBE suggests that the Commission should amend or repeal paragraph 26 of the draft Notice in order to avoid any unfair restriction on the rights of parties enshrined in Article 27(2) of the Regulation 1/2003/EC.

Paragraph 46 of the draft Notice: reasoned request for more access

Paragraph 46 of the draft Notice provides that *"If a party considers that, after having obtained access to the file, it requires knowledge of specific non-accessible information for its defence, it may submit a reasoned request to that end to the Commission. If the request is not granted by the Directorate General for Competition, the party submit a reasoned request to the Hearing Officer, in accordance with the applicable terms of reference of Hearing Officers"*.

It should be made clear that the deadline to replying to a statement of objections should only start to run as from the moment that sufficient access to the file has been granted.

Paragraph 47 of the draft Notice: use of information obtained by access to the file

Paragraph 47 of the draft Notice provides that *"Access to the file in accordance with this notice is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings"*.

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The CCBE notes that Regulation 1/2003/EC does not provide for any legal basis for such a restriction on conditions of use of information obtained by access to the file. The Commission decided, however, to introduce a provision on this purpose in Article 15 of Regulation 773/2004/EC.

The CCBE believes it is possible for some documents included in the Commission file to be required to arrange for a defence (for example, in criminal or civil liability procedures). In these cases, the rights of the defence should prevail over the aim of limiting the use of documents of the Commission file to procedures under Articles 81 and 82 only.

The CCBE would like to express its serious concerns with regard to the second part of paragraph 47 setting forth: "*Should the information be used for a different purpose, with the involvement of an outside counsel, **the Commission may report the incident to the bar of that counsel, with a view to disciplinary action***".

The CCBE thinks that any question related to the conduct of lawyers in proceedings in antitrust cases should be regulated, in a coordinated way, which could give rise to a document on relations between lawyers and Commission officials in the framework of administrative procedures, such as those in competition matters. The CCBE is ready to discuss the principle, and then the content of such a document with the Commission.

Therefore, the CCBE recommends that the Commission should repeal paragraph 47 of the draft Notice.