Submission
Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee
Working Party No. 3
“Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings”
16 February 2010

The Business and Industry Advisory Committee (BIAC) to the OECD welcomes the OECD Competition Committee's initiative to focus on procedural fairness and appreciates the opportunity to make these submissions to the OECD Competition Committee's Working Party No. 3 (WP3) for its Roundtable on “Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings” on 16 February 2010.

1. Introduction

1.1 In BIAC's opinion, there are certain minimum standards for procedural fairness which should be met by all civil and administrative proceedings for the enforcement of competition law, regardless of the structure of the regime under which those proceedings take place. Such minimum standards flow from fundamental rights enshrined in international treaties.¹

1.2 Procedural fairness is critical to protect the interests of firms subject to competition law enforcement proceedings who face the risk of substantial sanctions, not least being increasingly onerous financial penalties² but which may also include the prohibition of or mandated changes to business practices and transactions. Importantly, such fairness also strengthens and streamlines agency decision-making, reducing the number of appeals, and increases public confidence in agency decisions and so is of general public benefit.

1.3 The global spread of laws to protect and promote competition and the increasing internationalisation of business mean that business practices and transactions are now frequently subject to multiple competition regimes and the actions of individual competition authorities frequently impact on firms outside their jurisdiction. Convergence in implementing crucial minimum standards in this complex and interrelated environment would be of significant benefit for business and the competition agencies, as well as ultimately the consumers they all serve.

1.4 These submissions aim to identify those procedural standards which, in the experience of the business community and reflecting the interests of both firms under

¹ These submissions are not intended to set out a comprehensive survey of due process protections. For example they do not deal with the specific implications of the various international treaties and conventions enshrining fundamental rights or with other sources of legal rights of defence. Neither do they consider discrimination on the basis of the nationality of the firms involved in proceedings.
² The subject of penalties (other than procedural considerations in para 4.5) is outside the scope of this paper.
investigation and those potentially aggrieved by wrongful conduct, prove particularly vital in practice to ensuring procedural fairness and which are not currently universally adopted by competition agencies in all enforcement proceedings they conduct.

2. **Transparency**

2.1 **Transparency with respect to substantive legal standards**

The increasing number of countries which have adopted competition laws and the internationalisation of business mean that businesses increasingly need to understand the requirements of multiple sets of (not yet convergent) competition rules in order to ensure that their business practices, agreements and transactions are in full compliance.

2.2 **Access to the text of relevant laws and regulations is seldom sufficient to enable a firm to understand its obligations, to comply with them and to deal effectively and responsibly with any enforcement proceedings which may be initiated. Businesses need sufficient detail of the interpretation of the substantive rules to be able to predict how those rules will apply to contemplated business activity. If a reasonable reading of published information regarding the law and an agency’s decision-making practice would not allow a firm to understand that its conduct would violate the law, the firm should not face penalties even if the conduct is subsequently held to constitute a breach.**

2.3 **Transparency with respect to agency policies, practices and proceedings**

In addition to clear and publicly available detail of the substantive laws, business also needs to understand agency policy and practice in key areas. Agencies should consult on, and provide sufficient detail in respect of enforcement priorities to ensure that agency investigations are begun on a sound footing and are more predictable.

2.4 Business also needs to be aware of the procedures applicable when seeking approval and, eventually, when dealing with any one of a range of different enforcement proceedings.

2.5 Enforcement proceedings should follow established, published procedures to ensure fair and equal treatment of cases. The published details should include the organisation of the enforcement agency; a description of the steps involved in the process and the decision-maker(s) involved at each step; the likely timing of those steps; the operation of checks and balances within the agency process; information concerning any available settlement procedure; and mechanisms for exercising appeal rights.

2.6 **Transparency during enforcement proceedings**

During enforcement proceedings, it is essential that firms under investigation be informed of the objectives of the investigation and the specific legislative provisions under which the agency is proceeding and that they be given full information of the allegations being made including their factual, legal and economic basis, to ensure that such firms can defend themselves adequately.

2.7 Provision of this information in a timely manner, as proposed in more detail below in the stage by stage review of minimum standards of fairness for enforcement proceedings, is an essential aspect of a fair process and can also ensure that proceedings are resolved as efficiently and expeditiously as possible, which is in the interest not only of the firms

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3 Substantive guidelines issued by agencies to help explain their interpretation and enforcement of applicable laws, regulations and procedures have proven to be a valuable form of competition advocacy. Guidelines help to promote transparency and improve firms’ abilities to adhere to the law.
concerned but also of the agencies. Appropriate procedures regarding confidential information, as discussed in section 7 below are needed to ensure that the transparency required for firms to defend themselves effectively is achieved without undermining legitimate business secrets.

3. **Fairness during the investigation stage**

   **Immunity/Leniency Procedures**

3.1 BIAC supports the use of fair and reasonable programmes to grant immunity or lenient treatment ("leniency") to firms involved in competition law violations which voluntarily provide evidence to the competition agency on a timely basis.

3.2 Leniency programmes are an important basis upon which the increasing number of agencies obtain evidence of serious violations and BIAC would welcome greater consistency and convergence in the terms and application of such programmes.

3.3 To the extent that competition violations may often impact markets in more than one jurisdiction, there is also an urgent need for more coherence in the way in which leniency programmes can operate together fairly across the jurisdictions and agencies involved. There is currently scope for firms which are the first to volunteer evidence to miss out on the full rewards for their cooperation under some potentially applicable regimes and, even, for other firms to game the system. BIAC recommends that agencies operating leniency programmes should seek to introduce convergent procedures for handling multi-jurisdictional cases and should focus, as an initial step, on developing systems to ensure that a firm which is the first firm to make a full leniency application in any relevant jurisdiction, which advises agencies in other relevant jurisdictions immediately of its intention for apply for the leniency there and which completes those applications within a reasonable time should be treated as having made all such leniency applications on the date when the first application was completed.

   **Evidence gathering**

3.4 The procedures available to investigators for the gathering of evidence should be employed in a reasonable and proportionate manner, taking account of the nature of the proceedings and the burden placed upon the subjects of the investigation and other market participants involved. Companies should be given reasonable time to respond to such requests, upon consultation with the agency. General inquiries, such as market studies or sectoral inquiries, should be confined to situations where an agency can demonstrate that the inquiry is proportionate in light of the agency's evidence-based competition concerns. Where inquiries are appropriate, they should be defined clearly and as narrowly as the identified competition concerns permit. Requests for information and the format for its provisions should be designed to minimise the burden on the market participants concerned while enabling the investigators to understand the conduct or transaction under investigation and its likely impact on competition in the affected market. Invasive measures such as surveillance, on-the-spot investigations of company premises and private homes, the removal of forensic images of company data and searches should be used only in proceedings concerning serious "hard core" violations or the covert abuse of unquestionable market power, only when circumstances so require, and only upon warrant confirming the necessity of such measures. The investigating authority must also take care

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4 The scope and format of information requests should be discussed with the parties where appropriate, e.g. in sectoral inquiries or merger investigations where the timetable allows this.

5 “Hard-core” infringements generally include price fixing; output limitation; and the sharing of markets or customers between competitors.
to respect relevant data protection and privacy laws, in particular when handling electronic data. When questioning individuals in the course of investigations, great care must be taken that they are informed of their rights, in particular their right to privilege against self-incrimination.

3.5 A central principle of procedural fairness is that authorities should seek to gather evidence in order to establish an accurate factual record on the basis of which sound competition law and policy can be applied. Investigators should therefore be expressly obliged to carry out their task fairly and to take full account of the need to ascertain and record all relevant evidence, without making any distinction between evidence supporting the charges and exculpatory evidence.

3.6 Evidence should be recorded comprehensively and in a manner that can be made available to the defendant (e.g. an agenda and full record of all facts and matters discussed and provided to investigators during meetings and other discussions with complainants, witnesses and third parties should be made and kept on the investigation file).

3.7 Investigators should have the expertise and resources necessary to collect and evaluate all relevant evidence, to understand the conduct under investigation and to evaluate its impact, including appropriate legal, economic and linguistic skills and specialist support.

3.8 In considering whether conduct under investigation was knowingly, intentionally or negligently in violation of the competition laws, as well as in setting any penalty, full regard should be had to evidence of any competition compliance programme and of all actual efforts to ensure compliance implemented by the firms concerned. The existence of a well designed and implemented compliance programme should be a mitigating factor resulting in a reduction in any penalty to be imposed.

The rights of defence - legal advice

3.9 Investigators should respect the rights of every firm to seek legal advice from counsel of their choice. This should include the recognition of legally-privileged status for all advice from in-house counsel and other lawyers advising the firm, whether or not they are admitted to practice in the jurisdiction of the investigation. It should also include permitting a firm to have its counsel present at all appropriate stages in the proceedings, including at on-site inspections and during interviews of a firm’s employees and potential witnesses.

Transparency and engagement early in and throughout the investigation

3.10 A firm targeted by an investigation should be advised of the procedure and timing, be kept informed of its progress and be given the opportunity to discuss the case and respond to agency concerns throughout the investigatory procedure. In BIAC’s opinion, the rights of defence should be recognised in a full, on-going manner and not, as is currently the case in a number of jurisdictions, be limited to a one-off right to respond to fully developed formal charges presented at the end of the investigation, by which time investigators’ views may have become entrenched. In the practical experience of businesses involved in enforcement

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6 For example, it is noted that the DG Competition consultation document on “Best practices on the conduct of Art 101/2 TFEU proceedings” (http://ec.europa.eu/competition/consultations/2010_best_practices/index.html, paragraphs 38-45) does not fully address the criticisms of the European Ombudsman in respect of the Intel Article 102 investigation. In its decision, 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 all meetings and telephone calls with third parties where information is gathered or where important procedural issues are discussed. (http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/htmlbookmark#hl8).
proceedings, an early opportunity to comment on agency concerns can be crucially important to minimise misunderstandings and secure a fair process.

3.11 There should be a strong presumption in favour of disclosing the facts, documents, theories and legal authority to firms under investigation as early in the investigative process as is practicable. Such disclosure should take place, in any event, sufficiently in advance of the preparation of any written statement of charges so as to enable the firm(s) under investigation to address relevant evidence, facts, theories of harm, and legal authorities with the investigators prior to the finalisation of the statement of charges. Investigators should also be available to meet regularly with firms being investigated to discuss the agency’s concerns, to explain its evolving view of the facts, evidence and claims at issue and to provide the parties a genuine opportunity to respond to such concerns on an early and ongoing basis. There should be a strong presumption that an agency will agree to meetings with a party that presents an agenda of issues for discussion, and that there will be a meaningful, two-way dialogue at those meetings.

3.12 A commitment by agencies to such on-going transparency and engagement will not only allow firms a full and fair right to respond but will also help to narrow the scope of disputed issues, correct misconceptions, reduce the likelihood that the agency may be surprised by arguments made in response to its formal charges and will enable the agency to test its theories during the course of the investigation, thereby enhancing the quality of the agency’s fact-finding and its ability to allocate its resources efficiently.

3.13 In particular, BIAC recommends the following as minimum standards for transparency and engagement on a stage by stage basis during the investigation.

i. Initiation - A firm targeted by an investigation should be given written notice of it; its objective, legal basis and scope; indicative timeline of the investigative process; as well as the investigation team as soon as the implementation of appropriate confidentiality safeguards allow. There should be the opportunity for an early meeting with the investigators, including senior members of the antitrust agency and senior managers of the investigation team, to discuss and clarify the matter.

ii. Preliminary Assessment - A soon as the investigators have completed their initial evidence gathering and assessment of the case, targeted firms should be informed of the investigators’ preliminary assessment, including a description of the factual basis for the possible charges, the evidence and the economic theories and legal analysis contemplated by the investigators in support of the potential charges. The firms should also be given copies of all complaints and supporting materials and of all evidence, both inculpatory and exculpatory, subject only to protection of legitimate business secrets as described in section 7 below.

iii. Reaction to the Preliminary Assessment - Targeted firms should have the right to react to the preliminary assessment, to discuss the proposed charges and comment on the evidence and the economic theories and legal analysis, including at meetings with the senior staff of the agency, as well as managers of the investigation team.

7 By contrast, for example, in Korea “the level of evidence or other details are not revealed to the defendant during the investigation in principle.” Submission of Korea, Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings, ¶ 27 (20 Jan. 2010). The defendant receives access to certain supporting documents and reference data” only when the Examination Report setting forth the statement of charges is issued. Id., ¶ 29 (emphasis added).

8 The parties should also be kept up to date on an ongoing basis by being informed promptly of any changes in the team membership.

9 The agency should have the ability to encourage - although not require - ‘triangular’ meetings between all parties and the agency, e.g. to deal with opposing views in respect of the evidence.
team and with any economists and other specialists involved. The opportunity to meet and confer with the investigators should be granted sufficiently in advance of any written recommendation by the investigators to the decision-makers on proposed findings of fact and conclusions of law.

iv. Prior to Formal Charges - It is particularly important that after their reaction to the preliminary assessment, firms under investigation be offered a meeting with the official(s) responsible for deciding whether the investigation should proceed to the stage where formal charges will be made before that decision is taken.10

4. Formal charges and the right to respond

4.1 If the agency decides to bring formal charges against the firms under investigation, a written report (the Report) provided to the defendants should identify all charges that the agency is making against them, as well as all documents, statements and other evidence upon which the agency relies. The Report should disclose which entities within each corporate group are charged with responsibility for the charges and the basis for such responsibility. The Report should also include and describe all of the underlying data (including the sources of such data) and the methodology used to prepare any chart, graph or other analysis relied upon in the Report. Contemporaneously with the issue of the Report, the agency should provide the defendant with copies of all of the evidence, including all potentially exculpatory evidence, subject only to the confidentiality safeguards described in section 7.

4.2 The agency should have the burden of proving each element of the violation charged against the defendants through the evidence relied upon in the Report.

4.3 The defendant should be entitled to respond in writing to the Report charges against them, to comment on the evidence and to offer their own evidence in rebuttal as well as to respond to the investigators' proposed economic theories and legal analysis. The time allowed for this written response should be fully adequate and should take into account, inter alia, the complexity of the case as illustrated by the duration of the investigation, the need for translations of the Report and of the evidence, and the quantity and complexity of the relevant evidence. Businesses regularly have real practical difficulties in responding adequately to charges against them because of the inadequate time allowed by agencies for the formal response, including in cases where the investigation has taken several years, meaning that extra time is needed to investigate historic facts, where a fully adequate period for response would not cause any significant delay in the overall timeframe of the investigation.

4.4 Where a Report makes charges against multiple defendants or where a version of it is provided to any other party for comment, each defendant should have the right to receive and submit comments on a non-confidential version of any response or comments submitted by others.

4.5 The defendant should also be provided with full details of any proposed penalty and remedies which the investigators intend to propose to the decision-maker(s), the manner in which any penalties have been calculated, the necessity for any remedies and the facts and evidence to be relied upon to justify them. Agencies should bear the burden of proving that proposed penalties are proportionate to the seriousness of the infringement and the damage caused to consumers and the economy11 and consistent with penalties imposed for other

10 For example, the OFT’s quaintly named “Last Cigarette” meetings in merger cases.

11 See for example the judgment of the Paris Court of Appeal (19 January 2010) reducing significantly the fines imposed on a number of steel companies (www.autoritedelaconcurrence.fr/doc/ca08d32_siderurgie.pdf).
economic and corporate offences. Depending upon the structure of the agency’s process, the issue of penalty and remedies may be more fairly addressed at a separate later stage, following the process regarding the existence of the violation, in which case defendants should be given a full opportunity to respond in writing and request a hearing regarding any penalty and remedies proposed at that stage. It is the practical experience of business that in many cases these issues are at least as controversial as the basic questions as to liability and extending a properly transparent process to the issue of penalties and remedies is not only crucial to basic fairness but might significantly reduce the need for and complexity of appeals.

5. **A fair hearing**

5.1 As well as the opportunity to respond in writing to the charges and any proposed penalty and remedies, defendants should have the right to a hearing before the decision-maker(s) or agents having the power to represent them. It should be clear that merely providing such a hearing, in the absence of the minimum due process standards applicable to the investigatory stage discussed above, does not in itself constitute adequate due process.

5.2 The purpose of this hearing is to provide the defendant with the opportunity for a live, in-person presentation of their response to the charges, for the defendant to question the evidence and witnesses relied upon by the investigators, including any complainants and others who have provided evidence on which the agency relies, to question the investigators and bring forward witnesses for the 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, the credibility of the witnesses and the company's defences and hence to evaluate the extent to which the investigators have discharged their burden of proving the charges.

5.3 The schedule for such hearings should be set after consultation with the defendant and should allow ample time sufficient for full consideration of the case, bearing in mind the complexity and volume of the issues and the evidence. Rules governing hearings should be established well in advance and rules of procedure and evidence at the hearing should be applied equally to the agency and the defendant.

5.4 The submission of additional evidence and arguments by the agency following the close of this hearing should be prohibited absent extraordinary circumstances. The defendant should be allowed to make supplemental submissions following the hearing in response to any new matters raised and any such supplemental submissions should be disclosed to the other parties who should be provided with a reasonable opportunity to respond.

5.5 During and after the hearing, *ex parte* contact between the agency staff presenting the case against the defendant and the decision-maker(s) and their staff should be prohibited until such time as the final decision has been rendered.

6. **Fair decision making**

6.1 It is critical to a fair process that there be a clear and visible separation between the roles of those responsible for conducting the investigation and those responsible for making any enforcement decision to which such investigation may lead.

6.2 Many regimes entrust the investigation and decision-making function to different bodies but these functions should be separate even if they are discharged by the same agency. An agency responsible for investigation and decision-making which does not rigorously separate these two functions will inevitably be and be perceived to be subject to
prosecutorial bias, however genuinely well-intentioned and ethical its officials may be.\textsuperscript{12} Rights of appeal are not a practical substitute, so far as business is concerned, for fairness at the agency stage, given the additional time, costs, commercial and reputational damage incurred while an appeal is pursued.

6.3 Decision-makers should be independent of political influence.

6.4 Decisions should only be addressed to defendants identified in the Report and must only rely on facts and evidence disclosed to the defendants and to which defendants have had a full opportunity to respond. Decisions should be fully reasoned and include all relevant findings of fact and conclusions of law. Any adverse decision should address all of the major defences and points raised by the defendants and should explain why they were not persuasive.\textsuperscript{13}

7. Confidentiality

7.1 Throughout enforcement proceedings, a competition agency will regularly be faced with tension between the need to provide firms subject to the investigation with full details of the complaints and evidence to enable them to respond fully to the allegations on the one hand and the confidentiality required to protect legitimate business secrets of complainants and others participating in the investigation on the other hand. The agency will also need to safeguard the confidential information of firms under investigation.

7.2 It is important for agencies to ensure that confidentiality protection extends only to information that is legitimately in need of protection from disclosure. An agency should not redact or anonymise information on its own initiative. The agency should in its procedural rules provide clear guidelines identifying the criteria used to define confidential information in a manner consistent with the laws of the jurisdiction concerned. It is good practice for an agency to have in place a procedure for review and mediation of disputes concerning confidentiality. Business finds such procedures useful, even if they are informal and internal, particularly where judicial review of such procedural questions is available only after the outcome of the enforcement proceeding or is costly and time-consuming.

7.3 In providing access to the file, the agency should give the defendant full access to all non-confidential materials (whatever process is applied to protect confidential elements).\textsuperscript{14} Moreover, subject to confidentiality safeguards as discussed in paragraph 7.4, the defendant should also be allowed access to all confidential information. In exceptional circumstances, where there is compelling commercial sensitivity surrounding the sharing of certain

\textsuperscript{12} Wils, “The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function” (2004) 27 World Competition: Law and Economic Review 202, 215. For example, in Case Number 2001 Heon-Ga 25, the Seoul High Court on its own initiative asked the Constitutional Court of Korea to rule whether the procedures of the Korean Fair Trade Commission violated due process under the Korean Constitution. While the Court held the KFTC's procedures were not unconstitutional, 4 out of the 9 judges dissented, arguing that the KFTC violated due process under the Korean Constitution by failing to segregate its investigatory and decision-making bodies; failing to provide defendants with sufficient opportunity to gather evidence and put forth a defense and failing to ensure that its Commissioners possessed sufficient expertise, qualifications and independence.

\textsuperscript{13} Except where expressly agreed to by the defendant pursuant to a settlement procedure.

\textsuperscript{14} Procedures, such as some "data room" type arrangements or limiting access to the file as a whole to defendant's counsel, in the practical experience of business, may be unsatisfactory and deny the defendant the ability to understand in context the detail of the case against it. Business is most concerned that short-cut procedures may become the norm, e.g. DG Competition's consultation document on best practices (paragraph 85) contemplates that a defendant may not "unduly refuse" a data room procedure (under which only its external counsel will have access to the file, undermining the company's own right to access as well as its right to rely on internal counsel).
confidential information such that it would be demonstrably harmful to allow the defendant full access to it even under the safeguards described in paragraph 7.4, it may be appropriate to request that defendant(s) agree to special procedures for dealing with the exceptionally sensitive elements (without prejudice to the defendant's right to access materials).  

7.4 It is also important that agencies have in place and implement rules requiring agency personnel to protect all information gathered as part of investigations, including the status of investigations and possible procedures, from improper disclosure and from use otherwise than for the purpose of the investigation in question. Such rules should ensure that the agency does not share information with anyone other than the parties being investigated and agency personnel working on the investigation. The rules should also provide that the firms being investigated and others participating in the investigation must not disclose such materials to anyone other than their counsel and retained experts and must not use such materials otherwise than for purposes of the investigation in question, or where required by law.

7.5 Finally, the agency should provide the defendants, complainants and third parties with an opportunity to request that any confidential information they submitted be redacted from the public version of the decision.

8. Judicial review

8.1 The courts play a significant role in guaranteeing due process, particularly when competition agencies are an administrative body. 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 agency 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.

8.2 Defendants should be entitled to a timely right to appeal any decision issued by a competition authority before a court consisting of impartial judges. In the interests of certainty for business, the court must be obliged to give judgement within a reasonable time (and with appropriate rules regarding interim relief including suspension of decisions under appeal where appropriate).

8.3 Courts should have full jurisdiction, ensuring that not only the defendant's rights with respect to transparency and due process were respected by the competition authority; but that the court also reviews the law and facts relied on by the agency (as well as any exculpatory evidence not relied upon by the agency) to come to its own appraisal of the law and facts. In doing so, the role of the courts should be to confirm that the burden of proof was indeed met by the agency. Finally, the court should review any imposed penalty or remedy to determine that it is appropriate.

9. Publication of enforcement proceedings and decisions

9.1 Business needs to understand how competition law is being applied and non-confidential copies of infringement decisions should be published promptly and in full.

15 Such special procedures could include, for example: (1) arrangements for disclosure on the basis of terms negotiated by the defendant and the party concerned; or (2) a procedure pursuant to which the defendant would be given access to the confidential information on terms defined in an access agreement between the parties and the agency (whose terms would regulate inter alia the identity of those persons within the firms in question who may have unrestricted access and, if deemed necessary, penalties for breach of non-disclosure or use restrictions).

16 This should include its own assessment of whether the penalty/remedy is proportionate and consistent with other cases, as described above in paragraph 4.5.
Decisions relating or formal case closures, meaning the closure of cases which have proceeded beyond the preliminary assessment of the evidence, should also be published with sufficient detail to enable business to understand the agency’s legal analysis and enforcement approach.

9.2 In contrast, the agency should minimise 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 investigation.

9.3 In cases involving multiple defendants, when considering publication regarding the outcome for some defendants only, the agency shall have due regard to the presumption of innocence for all remaining defendants. In most cases this will require that publication be delayed until the case against all defendants is resolved.

9.4 Prior to making any press release or public statement regarding enforcement proceedings or decisions, the agency should notify the firm concerned. It is best practice to provide sight of the proposed text and an opportunity for the firm to comment on it. Business finds such openness by an agency in relation to planned publicity extremely helpful in practice to ensure an appropriate firm response to press and stakeholder enquiries and to avoid unintentional disclosure of confidential material.

10. **Length of investigation proceedings**

10.1 Fundamental rights of the defence require that the investigation should be carried out expeditiously\(^\text{17}\) and business is interested in avoiding excessive periods of uncertainty while investigations continue, particularly where the fact of the investigation is in the public domain and the business risks reputational harm. At the same time, it is not in the interests of firms under investigation for time periods be too short to allow for proper analysis and full attention to the firm’s response to any allegations against it. BIAC therefore recommends that the time period for an investigation should be set by the agency at the start of the proceedings taking account of the complexity of the matters concerned and subject to overall maximum time limits. The investigation period should be extended only when delay is caused by the defendant's failure to deal promptly with reasonable requests from the investigators or by serious unforeseen causes.

11. **Conclusions**

11.1 BIAC welcomes the opportunity for these important matters of procedural fairness to be discussed and is confident that improved enforcement procedures, as outlined in these submissions, would not only be good for business but would also strengthen agency decision-making and increase public awareness of and confidence in agency decisions, thereby promoting the public interest in sound and effective competition policy.

\(^ {17} \) The need to act within a reasonable time in conducting administrative proceedings relating to competition policy is a general principle of EU law. This is an element of the right to good administration - contained in the Charter of Fundamental Human Rights, made binding by the Lisbon Treaty. See also French Perfumes (Judgment of the Paris Court of Appeals of 10 November 2009) where the decision of the Conseil de la Concurrence was quashed on account of the excessive length of the proceedings (specifically the 4.5 year delay between the act under investigation and the date on which the companies became aware of the fact that they would be required to submit a defence).