

# Breakout Session 7

*“Achieving procedural fairness/due process in cartel investigations whilst maintaining efficiency and effectiveness”*

ICN Cartel Workshop in Madrid

3-5 October 2016

# Topics for discussion

- 1. **Rights of defence during dawn-raids/inspections (including LPP) – *Atsushi Yamada***
- 2. **The right against self-incrimination during cartel investigations - *Yüksel Kaya***
- 3. **Raising objections and granting access to file to investigated parties – *Pia Ödqvist***
- 4. **Due process issues relating to leniency and settlements – *Sofia Vasileiou***
- 5. **Right to a fair trial & judicial review – *Anne-Sophie Delhaise***

## Topic 1: Rights of defence during dawn-raids/inspections (fairness/due process v. efficiency/effectiveness)

- Dawn-raids/inspections
  - Should an attorney be able to be present during dawn-raids?
  - To what extent could an attorney be involved during dawn-raids?
  - How should LPP (Legal Professional Privilege) be respected during a dawn raid?
- More broadly, how about during interviews? (presence, involvement, LPP)
- In jurisdictions where right to counsel and/or LPP does not exist, what considerations are given in terms of procedural fairness/rights of defence?
- Current situation in Japan:
  - “Guidelines on Administrative Investigation Procedures under the Antimonopoly Act” introduced in Dec. 2015. Clarifies the standard steps and key points to note in investigation procedures. Addressed to officials, but to enhance transparency and to achieve smooth implementation the Guidelines were made public.
  - No LPP and limited right to counsel

## Topic 2: Right/privilege against self-incrimination

- Absolute right to silence?
  - Can the competition agency compel an undertaking subject to an investigation to answer questions leading to admission of infringement of competition rules?
    - » Did you meet with competitors B and C to fix prices?
    - » What was the purpose/object of the meeting held with your competitors B and C?
  - Can the competition agency compel an undertaking subject to an investigation to comply with a request for the following information/documents?
    - » Invitations, dates, places, agendas, lists of participants, handwritten notes, minutes concerning the relevant cartel meetings
      - \* requests for factual information, pre-existing documents

## Topic 3: Raising objections and granting access to file to investigated parties - Questions to discuss

- Access to file
  - Does the parties' right to access documents in the file affect the investigation in any way – positively/negatively? And if so, how?
  - When are there exceptions from the parties' right to access to the file - confidentiality?
- Raising objections
  - To what extent should the undertakings under investigation be able to raise objections during the investigation ?
  - Examples of when and how the undertakings under investigation have the possibility to raise objections.
- Are there benefits of transparency during an investigation? Can transparency during investigations contribute to effective and efficient investigations and/or to legitimacy of agency decisions? If so, how?

## Topic 4: Due process issues relating to leniency and settlements - Questions to discuss

- Leniency: tool to detect cartels & gather evidence
  - Voluntary nature & strict confidentiality requirements (protection of leniency statements)
  - Factors for assessing the probative value of leniency statements
  - Challenging the content of leniency statements & the assessment of the Commission
- EU-Settlement system: procedural efficiency tool to punish and deter cartels
  - Voluntary nature & strict confidentiality requirements (protection of settlement submissions)
  - Bilateral rounds of discussions
  - Access to evidence
  - Communication of fines' ranges
  - Non-discrimination & equal treatment - hybrid settlement

## Topic 5: Judicial review - Questions to discuss

- **Type of decisions subject to judicial review**
  - Exclusively decisions on the merits ? Are decisions concerning inspections or business secrets also subject to judicial review ?
  
- **Extent of legal review**
  
- **Proceedings before the reviewing judges**
  - Can the competition agency be a party ?
  - Do third parties have a right to intervene ?
  
- **Delays for review**



International  
Competition  
Network

Thank you for your attention