Frequently Asked Questions

Safeguarding Your Rights in US and EU Antitrust/Competition Investigations

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Introduction

The purpose of this booklet is to answer frequently asked questions about US and EU antitrust/competition investigations and their procedures. We hope you will find this introduction to the subject helpful. However, it is only an introduction to the subject. The investigation process before both the US and EU competition regulators is complex and there are many pitfalls that await the unwary.

Antitrust/competition investigations are on the increase and a greater number of companies, whether culpable or not, are being drawn into the regulators' net as more and more areas of the economy are becoming subject to rigorous antitrust/competition scrutiny.

Therefore, safeguarding your personal and your company's rights effectively in the context of antitrust investigations is of paramount importance.

One of the most important safeguards is to ensure you have experienced legal representation during the investigation process. Our dedicated competition/regulatory team has both depth of experience and depth of resources to effectively represent you and your company before the FTC and the DOJ in the US and/or the EU Commission in Brussels. Armed with an impressive track record of dealing with these types of investigations on both sides of the Atlantic, we are well placed to deliver positive client outcomes.

If you would like to know more about how we can help you and your company, please get in touch with your usual Bryan Cave contact or contact:

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Section A: US Antitrust Investigations

1. What is US antitrust law?

> *The criminal and civil penalties associated with violations of the U.S. antitrust laws are among the most severe in the world, and U.S. enforcement authorities exercise their jurisdiction broadly and vigorously.*

The Sherman Act contains the two most important antitrust laws in the U.S., and addresses conduct that is most likely to reduce competition. Section 1 prohibits any agreement, express or implied, that has the effect of unreasonably restraining competition. This includes price fixing, allocating customers/markets with competitors, and other agreements with suppliers or customers. Section 2 of the Sherman Act prohibits larger, more dominant companies from using their market position in an unfair manner to reduce competition. The most serious offenses under the Sherman Act (*e.g.*, price fixing, bid rigging) are felonies.

In addition, each state has enacted its own antitrust laws which provide the individual states with enforcement authority similar to that of the federal government. In addition to their own laws, states are permitted to bring suit under federal antitrust laws. State attorneys general frequently work together to bring claims against companies and individuals they believe have violated antitrust laws. State laws can be different and sometimes more restrictive than federal law. The overlapping of state and federal laws and law enforcement presents complex issues and needs to be taken into consideration in many circumstances.

2. Who enforces it?

2.1 Department of Justice

The Department of Justice Antitrust Division ("DOJ") may bring civil or criminal cases against individuals or companies it believes have violated the antitrust laws. The DOJ litigates its matters in federal court.

2.2 Federal Trade Commission

The Federal Trade Commission ("FTC") may bring civil enforcement actions against individuals or companies it believes have violated the antitrust laws. The FTC, however, generally proceeds with administrative litigation internal to the agency, but it can seek injunctive relief in federal court in aid of its administrative jurisdiction. Its administrative decisions are subject to review in federal courts of appeals.

3. What are the consequences of breaking it?

3.1 Penalties & Remedies

(a) **Criminal Penalties:** In the U.S., an individual who violates the criminal antitrust laws may be imprisoned for up to ten years and fined up to $1 million for each violation. A company that violates the law may be fined up to $100 million; alternative U.S. sentencing laws provide for even higher fines based on the profits or damage caused by the antitrust violation.

(b) **Civil Penalties:** An individual or corporation that violates a FTC order (either a consent order or an order issued following a hearing) may be subject to a fine of $10,000 per violation.

(c) **Injunctions:** The FTC typically seeks to bind the subjects of its enforcement actions through injunctions which prohibit specific conduct and impose penalties for breach. The DOJ usually will obtain an injunction against the conduct that prompted it to bring its case against the defendant.

4. What happens if you are investigated?

4.1 FTC – Administrative Proceedings

(a) **Complaint:** If the FTC has reason to believe that a company or individual has engaged in an antitrust violation or unfair method of competition, then an administrative complaint will be filed. Prior to filing a complaint, the potential respondent is provided an opportunity to meet with the Commissioners in order to discuss why no enforcement action should be pursued. That meeting represents the final opportunity for the potential respondent to avoid becoming a defendant in litigation.

(b) **Pre-hearing Procedures:** A respondent's answer to the complaint is due 14 days after service of the complaint – in federal court a defendant typically receives 21 days. Following the filing of the answer, the parties confer to set a discovery plan and address other prehearing issues. A prehearing conference is then held 10 days after the filing of the answer.

(c) **Hearing/Trial:** The hearing before an Administrative Law Judge ("ALJ") proceeds much like a bench trial in court, witnesses are called, evidence is presented, the ALJ makes rulings on admissibility, and opening and closing statements are delivered. Within 21 days after the hearing, both parties file with the ALJ proposed findings of fact, conclusions of law, and a rule or order along with briefs in support of these filings.

(d) **Initial Decision and Final Commission Decision:** Following the hearing and post hearing filings the ALJ will render an initial decision which includes decisions of law and findings of fact. If neither party appeals the ALJ's initial decision, then it becomes the decision of the FTC.

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4.2 DOJ Proceedings in Federal Court

(a) **Civil Proceedings:** Complaints are the initial pleading in civil enforcement actions. They specify the grounds for proceeding and lay out the government's positions. The filing of a complaint marks the formal shift from investigation to enforcement.

(b) **Criminal Proceedings:** Indictments are formal charges issued by grand juries that accuse an individual or entity of committing a serious crime, *i.e.,* a felony. The United States Constitution requires the issuance of an indictment by a grand jury in order to charge an individual with a felony.

(c) **Trial:** An antitrust trial, aside from the added complexity associated with antitrust issues, is no different from a procedural standpoint than any other civil or criminal trial. However, the added complexity of the antitrust issues means that clear and careful trial preparation is especially important. Trial counsel familiar with the antitrust laws is important to an effective defense.

5. How do I deal with information requests/ subpoenas?

5.1 Voluntary Information Requests

Voluntary information requests may be used during the initial phase of any investigation.

Typically, it is advisable for companies to comply with a voluntary request for information in an investigation if it is not the target. It creates goodwill with the enforcement agencies and reduces the likelihood of compulsory process. The agencies will talk with you to help ensure that any sensitive information will remain confidential and to limit the scope of the response if the request is unduly burdensome as drafted.

5.2 Civil Investigative Demands ("CID")

CIDs are a compulsory process used in civil investigations to obtain documents from persons (including corporations) when there is reason to believe that the person may have documentary material or information relevant to the investigation. When presented with a CID it is important to immediately involve counsel and to discuss all potential avenues for resolving your obligations including compliance and resistance.

5.3 Subpoenas

Subpoenas are issued by a grand jury during DOJ investigations into potential criminal violations of the antitrust laws. Subpoenas may require the production of documents, the giving of testimony, or, the production of exemplars (*e.g.*, a handwriting sample). When confronted with a subpoena it is critical to involve counsel immediately to discuss how to handle the subpoena. Every effort should be made to determine whether the recipient of the subpoena is the subject of the investigation or merely a source of relevant information.

5.4 Access Orders

Access orders are issued by the FTC and require the recipient to grant the Commission access to the recipient's files for examination and copying. Because access orders provide access to the same types of information that could be requested in a subpoena or CID, the use of an access order implies that the recipient is not trusted to produce evidence in its possession.

6. Can I protect any information/documents from disclosure?

6.1 Attorney/Client Privilege

Whether a document is protected by the attorney/client privilege, especially in the corporate context, is often a complex question.

Before responding to any request for information from an antitrust regulator, counsel should consider whether potential communications between the client or within the client are protected by the attorney/client privilege and whether disclosure of certain privileged material may be advisable – recognizing that disclosure waives any future claim of privilege.

Starting in 1999, the enforcement agencies have sometimes requested waivers of privilege during an investigation to show good faith, although more recently they have backed away from that tactic. Whether to waive the privilege during an investigation is a very important and complex tactical determination.

6.2 5th Amendment Privilege Against Self-Incrimination

Only individuals, *e.g.*, not corporations, partnerships, or other entities, enjoy a privilege against self-incrimination.

7. How do I negotiate a settlement or appeal a decision?

7.1 Settlements & Consent Orders

(a) **Criminal Settlements:** Only 10% of criminal antitrust cases proceed to trial – the vast majority settle. However, settlement is not cheap – fines of $500 million have been obtained by the DOJ in the past.

(b) **Amnesty:** The DOJ has a policy of providing amnesty to the first company that comes forward, reveals antitrust violations, fully cooperates with the DOJ investigation, and meets a set of six criteria established by DOJ. Even if the DOJ was aware of the antitrust violations and had begun an investigation, a company may still be able to obtain some measure of leniency. Amnesty is also available for companies that are not first to the DOJ. A company under these circumstances may not receive full amnesty but may receive a reduced fine if they are able to offer the DOJ additional worthwhile information.

(c) **Consent Orders:** A consent order is essentially a settlement agreement between the enforcement agency and the defendant in civil litigation (both judicial and administrative). Consent orders typically enjoin a respondent from engaging in certain acts or practices and usually include a suite of provisions designed to allow the agency to monitor compliance with the order, *e.g.*, regular reporting requirements.

7.2 Rights of Appeal

Both judgments and final orders may be appealed.

A judgment issued by a federal district court may be appealed to the U.S. Court of Appeals in the circuit where the district court is located. A final order of the FTC may be appealed to a U.S. Court of Appeals typically in the United States Court of Appeals for the District of Columbia Circuit or the Circuit where the defendant resides. This provides the company with a chance to select a forum it believes will be most favorable to its position.

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8. Top tips for dealing with investigations

8.1 Tips For Dealing with Antitrust Investigators During the Investigation Phase

(a) Involve counsel as soon as any request for information is received regardless of the form that request takes, *e.g.*, voluntary request or subpoena.

(b) Discuss all potentially relevant information with counsel; let counsel make decisions about what is or is not responsive.

(c) Counsel should open a dialog with the investigators early in the process.

(d) Do not be afraid to ask the agency for a narrowing of the request. One area to discuss in particular is limitations on retrieval of electronically stored information.

8.2 Tips for Dealing with Antitrust Regulators During the Settlement Process

(a) When considering whether to accept a consent order, the duration of the order should be carefully scrutinized. Consent orders may have a duration as short as five years or as long as twenty. In the latter case, most individuals involved with the investigation, defense, and negotiation of the consent order will be gone before the order expires. Consequently, care should be taken to institutionalize compliance in day-to-day business activities over an extended period of time.

(b) FTC consent orders generally follow a settled pattern limiting the ability of a respondent to negotiate a favorable resolution. That said, experienced counsel know where the FTC has flexibility and may be able to obtain better terms by focusing on those areas of flexibility rather than fighting over terms the FTC is unlikely to modify.

(c) A settlement agreement with a regulator is often the beginning of legal battles over alleged antitrust violations – not the end. Follow-on civil suits are likely. Any negotiations with DOJ or the FTC about settlement should be mindful of the hidden costs of these follow-on actions.

Section B: EU Competition Investigations

1. What is EU competition law?

> *The central objective of EU competition law is to ensure all businesses compete fairly on their individual merits.*

The EU competition rules are found in Articles 101 & 102 of the TFEU. The EU rules apply if there is an appreciable effect on competition and trade between EU Member States.

There are two main prohibitions. The first is Article 101(1) TFEU which prohibits agreements between two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition in the EU. This catches price fixing, allocating markets and customers between competitors as well as a number of restrictive vertical agreements between suppliers and customers.

The second main prohibition is Article 102 TFEU which prohibits any abuse by a company in a dominant position within the EU or a substantial part of it. Such abuse may include predatory or discriminatory pricing, margin squeeze, refusal to supply, tying and bundling or fidelity and loyalty rebates.

2. Who enforces it?

2.1 European Commission

The EU Commission is tasked with principally enforcing the EU competition rules. The Competition Directorate General of the European Commission headed by the Competition Commissioner (usually a politician from an EU Member State appointed by their country to the Commission) referred to commonly as DGComp. This is the investigating and enforcement arm of the Commission charged with investigating breaches of the competition rules and taking any necessary enforcement action. It does so either on its own initiative or as a result of complaints made by third parties. It has considerable powers to order the production of documents and information, undertake inspections of premises and ultimately to accept commitments, impose fines or otherwise sanction offenders. In addition the national competition authorities of each EU Member States have the power to enforce the provisions of the EU competition rules concurrently with the EU Commission. To ensure that the most appropriate regulator has jurisdiction over a particular case the EU Commission and the Member States liaise with each other under the auspices of the European Competition Network. The EU Commission normally takes jurisdiction of cases where the infringements in question are of a serious nature, are of an European wide nature or involve novel or complex breaches of the rules.

2.2 Court of Justice of the European Union (CJEU)

The CJEU is the final arbiter of questions of EU law. It is based in Luxembourg and consists of two Court Divisions; the Court of Justice and the General Court. The Court of Justice hears appeals on points of law against judgments and orders of the General Court. The other role of the Court is to give preliminary rulings on EU law referred to it by the national courts of the Member States. The General Court is a court of first instance. This Court hears all first instance appeals by parties against the procedural or substantive aspects of the Commission's competition decisions. The General Court has the power to annul a Commission Decision in its entirety or strike down part of it. It also has the power to reduce, annul or increase any fines imposed.

The EU Commission can fine parties to an anti-competitive agreement or an abusive practice up to 10% of their group's worldwide turnover.

3. What are the consequences of breaking it?

The sanctions for breach of Articles 101 &102 TFEU are as follows:

3.1 **Fines:** The EU Commission can fine parties to an anti-competitive agreement or an abusive practice up to 10% of their group's worldwide turnover. There are special rules relating to the assessment of the level of the fine which take into account the duration of the infringement, the benefit derived from the offending conduct and whether the company has previously engaged in such conduct.

It is important to note that parent companies can be held liable for the infringements of their subsidiaries. This can also extend to the liability of investment firms for their portfolio companies.

3.2 **Behavioural remedies:** The EU Commission can also impose behavioural remedies which can be either negative or positive. The Commission can demand the party or parties cease to carry out certain behaviour. Alternatively, it can impose positive measures such as ordering the parties to specifically carry out an action. An example of a positive behavioural remedy would be ordering a dominant party to supply a distributor when it has previously ceased to do so.

3.3 **Structural remedies:** In cases where behavioural remedies may not be adequate, the Commission can order a restructuring of a certain company or market. An example of a structural remedy would be ordering a company to divest part of its business.

4. What happens if you are investigated?

4.1 Powers of Investigation

> *The Commission has the power to obtain all necessary information from individuals and companies. The Commission can make inquiries of complainants or competitors of the parties to an agreement or a practice in order to get a better picture of the goods or services in question.*

This power can be used at any stage in the Commission's procedure and is not limited to the preliminary fact finding stage.

4.2 Issue of Statement of Objections

The Commission outlines its competition law concerns to the accused in either its Statement of Objections ("SO") which is a formal charge sheet, or in a less formal letter which details the alleged competition law infringements. The letter procedure is usually used when the Commission does not intend to fine the parties but is taking objection to the conduct concerned. The Commission in the SO or its letter will give the accused a timeframe for which to respond of normally around two months. If the accused wants to settle the case it might at this stage offer commitments to appease the Commission and end the investigation.

4.3 Reply to the SO

The accused's response to the SO is very important as it could either prejudice their defence or alternatively appease the Commission and end the investigation or an aspect of it. Parties should ensure that they adhere strictly to deadline in their submission of their reply to the SO.

4.4 Access to Commission's File

The Commission is legally bound to grant access to its prosecutorial file to the parties accused. However, there are certain documents in the file to which the accused have no legal entitlement to. These are:

(a) **Business secrets:** These are the business secrets of any other companies named in the file. This is a wide category and extends from financial information to sales strategy.

(b) **Internal Commission documents and correspondence with other public authorities:** These are not generally disclosable except in exceptional circumstances where defendants accuse the Commission of a misuse of powers.

The right of the accused to gain access to the file begins as soon as the Statement of Objections is sent. The time limit for the accused to ask for access is usually very short giving the parties only a matter of days to request evidence that the Commission has on file against them.

Parties are therefore advised to move quickly to gain access in these situations. Crucially, corporate statements (being admissions of guilt by other parties) made under the Leniency Notice are not accessible as part of the general file and must be applied for separately. They are seldom released.

4.5 Right of Parties to be Heard/Oral Hearings

An oral hearing may be requested by both the parties accused. This request for the oral hearing should be done by the parties before the expiry of the deadline in their reply to the SO.

The hearing is not a trial but is part of a fact finding process for both the parties and the Commission. It also gives the parties a chance to fairly put forward their case orally before the Hearing Officer. The Hearing Officer produces a report containing a summary of the proceedings and their views become part of the case file.

5. How do I deal with information requests/ subpoenas?

There are two types of request; simple Requests for Information or Decisions requiring Information.

5.1 Requests for Information

Although there is no legal obligation for a company to comply with a simple request for information, there are penalties for supplying intentionally or negligently incorrect or misleading information if an undertaking decides to respond. Fines can extend to 1% of the total Group turnover in the preceding business year of the undertaking in question.

5.2 Decision requiring Information

The Commission can require undertakings and associations of undertakings to supply information by formal Decision. Penalties for non-compliance include:

(a) Fines up to 1% of an company's group turnover for non-compliance or providing incorrect or incomplete or misleading information, or

(b) periodic penalty payments up to 5% of the average daily turnover in the preceding business year of the company in question. This penalty is imposed on a daily basis for the non-provision of information.

6. Handling inspections/dawn raids

6.1 Inspections

An important weapon in the Commission's armoury is the ability to undertake inspections of business premises as well as other premises including an individual's home. Inspections can be carried out by agreement or unannounced.

Unannounced inspections are commonly referred to as "dawn raids".

The EU Commission can:

(a) Enter premises;

(b) examine books and other records including electronically stored data;

(c) take or obtain copies or extracts from them;

(d) seal premises, books or records to the extent necessary for the inspection. This can be important if the inspection goes into a second day and there is a possibility of evidence being interfered with overnight; and

(e) ask for explanations of facts or documents and to record the answers.

The Commission does not have an obligation to attempt a voluntary inspection prior to a mandatory inspection.

During both voluntary and mandatory inspections, companies have an active duty to assist the Commission officials in the investigation in finding the information they want It is not sufficient to grant them unlimited access to all filing cabinets or the IT system. The Commission's recent practice has been to regard a lack of cooperation as an aggravating factor when it comes to determining the level of the fine.

During a mandatory inspection, the Commission usually waits for the attendance of lawyers or at least for the undertaking to take advice before proceeding with the inspection. However, it will only wait for a short time for lawyers to attend. The Commission officials will come armed with a Commission Decision which will explain the penalties for non-compliance and the fact the Decision can be reviewed by the General Court.

6.2 Power to take Statements

The EU Commission has the power to take statements by interview. The person concerned must consent to the interview and there are no restrictions as to the persons who may be interviewed. Former employees who could be a very good source of information can be interviewed. The interview may concern any information relating to the subject matter of the investigation.

7. Can I protect any information/documents from disclosure?

7.1 Legal Privilege

Certain documents uncovered during an inspection or coming within the scope of an information request may be subject to legal professional privilege and exempt from disclosure to the Commission. Crucially, certain correspondence between a client and an independent lawyer qualified in the EEA is legally privileged whereas correspondence between a client and an in house lawyer or with a lawyer in a third country was not.

Privilege extends to correspondence which contains legal advice about the subject matter of the investigation, whether it was produced after or prior to the initiation of any proceedings by the Commission. Correspondence between external lawyers and a lawyer acting for a third party does not enjoy privilege.

7.2 Privilege against Self Incrimination

There is a limited privilege against self-incrimination under EU law. This entitles companies to refuse to answer questions that would require them to admit to the very infringement the Commission is seeking to establish. However this privilege does not entitle them to refuse to hand over documents to the Commission which might serve to establish an infringement by the company concerned.

8. How do I negotiate a settlement or appeal a decision?

8.1 Settlements

(a) **Leniency Procedure:** The leniency procedure is essentially the procedure by which the Commission acknowledges a company's cooperation when they whistleblow their own cartel activity and come forward voluntarily. Public resources can only go so far in the detection of cartels and so rewarding whistleblowers with 100% immunity from fines has proved a highly successful programme in the EU. However, the successful leniency applicant is granted no immunity from civil actions for damages by victims of the cartel.

The Commission's leniency system does not confer leniency from national competition authorities. Therefore, those seeking protection and the disclosure of their wrongdoing will often do so both to the Commission but also to national competition authorities in the relevant member states affected.

Under the Leniency Notice, companies who have come forward may be awarded either a total immunity from fines or merely a reduction in the level of the fine. This reduction can be significant or it can be small depending on the circumstances of the application. The normal practice is for the first through the door who blew the whistle and gave up the crucial information to receive immunity whilst those who co-operated and admitted liability would likely receive just a reduction in their fines. For this reason, it may be very important that your company is the first through the door to the Commission should any cartel activity be uncovered.

(b) **Cartel Settlement Procedure:** The cartel settlement procedure is similar but separate from the leniency procedure mentioned previously. The settlement procedure was designed to encourage companies to settle ongoing cases with the Commission. This is both to benefit the Commission in that they can save resources and time when companies settle cases and admit liability but it can also be of benefit to companies when they are awarded a reduction of 10% of their fines and save on legal and appeal costs going forward.

(c) **Commitments Procedure:** The Commitments procedure is there to encourage parties to resolve cases quickly through consent in situations where the Commission does not feel it appropriate to fine parties. The accepting of the commitments by the Commission effectively closes the case.

Commitments are usually promises by the offending companies to carry out or refrain from carrying out a particular practice or behaviour. Commitments are usually used in abuse of dominance cases to secure future compliance involving cases where the nature of the abuse is novel or has not previously been considered by the Courts or the Commission.

It is worth noting that the acceptance of commitments can be hugely beneficial for the companies concerned, not only in the closing of a case and in the avoidance of fines but also because accepting commitments is not an admission of liability. As such the parties involved do not open themselves up to follow-on litigation by affected parties seeking compensation.

8.2 Rights of Appeal

Parties have a right to appeal the Commission's decisions to the General Court. It should be noted that not only has the General Court the ability to overturn the Commission's decisions but conversely it can increase a parties level of liability and even raise their fines so appeals come at a risk.

Costs for the appeals can be apportioned between the Commission and parties but most likely will be awarded against the Commission if the appeal is successful.

A compliance programme should be one which will instil a culture of compliance from Board level down throughout the whole organisation.

9. Top tips for dealing with investigations

(a) **Ensure that your company has an effective on-going holistic competition compliance programme in place:** Do not view this as "a tick the box" exercise. Instead a compliance programme should be one which will instil a culture of compliance from Board level down throughout the whole organisation. Part of the programme should be bespoke training on competition compliance targeting high risk areas such as where employees (*e.g.*, sales executives) have direct contact with customers and possibly competitors.

(b) **On sensitive issues, take advice from an external law firm with EU lawyers for that advice to be regarded as legally privileged under EU law:** Advice from the General Counsel or other in-house lawyers to the company will not be legally privileged and will be subject to disclosure to the Commission in the event of an information request or inspection.

(c) **Place external legal advice in a separate file:** This will ensure its legally privileged nature is highlighted in the event of any Commission inspection. Privileged correspondence is usually kept in the General Counsel's office or in the case of smaller companies in the office of a senior executive.

(d) **Review the scope and purpose of the Commission's investigation and understand the limits of their authority:** We recommend to cooperate wherever possible unless exceptional circumstances apply. If you do decide to reply to an information request remember to ensure your answers are accurate and do not mislead. There are penalties for providing inaccurate and misleading information even if the reply to the information request is voluntary.

(e) **In the case of an inspection provide the inspectors with a designated room and have the relevant documents brought to them:** You want to avoid them going on a fishing expedition around the building. In any event they should be accompanied at all times. It is important you take a careful note of what documents are copied and any oral explanations offered by staff in relation to certain documents.

(f) **After the inspection has concluded you should undertake a detailed debrief and ensure a comprehensive competition law audit is undertaken**.

(g) **Consider whether it is appropriate to seek leniency from the Commission and/or other relevant Member States:** Remember only the first person that approaches the Commission is entitled to full immunity from fines so it is important to act fast if a leniency application is deemed appropriate.

(h) **Start a dialogue with the EU Commission as soon as possible:** Many cases are settled informally on a without prejudice basis with a company agreeing to amend its practices except in very serious infringement cases such as cartel type behaviour. The Commission normally accepts these assurances from the company and closes its file. However, it is important such discussions take place at an early stage of the Commission's investigation before the Commission's investigation becomes too advanced.

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