



**DRAFT BEST PRACTICES ON THE CONDUCT OF PROCEEDINGS CONCERNING ARTICLES
101 AND 102 TFEU**

**DRAFT GUIDANCE ON PROCEDURES OF THE HEARING OFFICERS IN PROCEEDINGS
RELATING TO ARTICLES 101 AND 102 TFEU**

**DRAFT BEST PRACTICES FOR THE SUBMISSION OF ECONOMIC EVIDENCE AND DATA
COLLECTION IN CASES CONCERNING THE APPLICATION OF ARTICLES 101 AND 102
TFEU AND IN MERGER CASES**

RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION

1. INTRODUCTION AND STRUCTURE OF THIS RESPONSE

1.1 Ashurst LLP welcomes the opportunity to comment on the European Commission's ("**the Commission**") three new draft best practices papers: (i) draft best practices on the conduct of proceedings concerning Articles 101 and 102 TFEU ("**the draft procedural best practices**"); (ii) draft guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU ("**the draft Hearing Officers guidance**"); and (iii) draft best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases ("**draft best practices on economic submissions**"). We welcome the Commission's initiative to provide useful guidance on these topics.

1.2 We regularly advise clients that are parties to mergers, subject to proceedings under Articles 101 and 102 TFEU, or which are interested third parties or complainants in such cases. This response, however, is made on our own behalf, based on our experience of advising clients on these issues. We are not responding on behalf of any particular client or group of clients.

1.3 This response comments on the draft procedural best practices and the draft Hearing Officers guidance together as a number of the topics covered in each are common. This is then followed by separate comments on the draft best practices on economic submissions (the final two sections).

2. COMMENTS ON THE DRAFT PROCEDURAL BEST PRACTICES AND THE DRAFT HEARING OFFICERS GUIDANCE

Transparency and co-operation in information requests

2.1 We note the statement at paragraph 32 of the draft procedural best practices that in certain cases the Commission may discuss the format and scope of information requests that those parties are to receive. In our experience, it would greatly assist parties in replying to such requests in an efficient and timely manner if this approach were to become standard practice. Both the Commission and the parties benefit greatly from an open and transparent dialogue on the issues of scope and format of information requests. As recently proposed by the UK Office of Fair Trading in its *Transparency* consultation¹, we would suggest that the Commission issues information requests in draft for comment by the parties. There would then be an opportunity for the parties and the Commission to

¹ http://www.offt.gov.uk/shared_offt/consultations/oft1101.pdf: proposals six and seven.

engage constructively and seek to resolve at an early stage issues which could otherwise cause considerable delay and difficulty when the parties seek to respond to the request. An example would be agreeing key word searches to be used when searching through large volumes of electronically held documents. In the same vein, we would suggest that the Commission should seek to agree realistic and achievable deadlines during this discussion stage. This enables better resource allocation planning by the parties and reduces the need for extensions. Our experience suggests that the two-week "standard" deadline referred to in paragraph 35 of the draft procedural best practices will be insufficient in a large number of cases where significant volumes of documents and/or data need to be searched and reviewed for potentially responsive documents. It seems to us to be more efficient to agree a realistic deadline in advance.

Legal professional privilege (LPP)

- 2.2 As regards the procedure for handling LPP claims set out in paragraphs 47 to 51 of the draft procedural best practices, the drafting at paragraph 51 suggests that, in circumstances where the Commission's case team disputes a reasoned claim of LPP, a part wishing to assert LPP should immediately bring an action for annulment and apply for interim relief at the General Court (following a decision of the Commission rejecting the LPP claim). In our view, it would be preferable if LPP disputes are referred to the Hearing Officer for assessment with both the party concerned and the Commission's case team putting their arguments to her on an equal footing and with a requirement for the Commission's Legal Services also to deliver an opinion. Only after this would the Hearing Officer make a recommendation to the Commissioner for a decision. This would be likely to reduce the potential for costly and time-consuming litigation before the General Court.
- 2.3 We also note the suggestion in paragraph 52 of the draft procedural best practices that "unfounded" claims for LPP may be the basis for imposing a fine for obstructing the Commission's investigation under Article 23(1) of Regulation 1/2003 or be considered an aggravating factor when calculating a fine for breach of Articles 101 or 102 TFEU. We consider that this would be appropriate in extreme and rare cases only. Applying the judgments of the Court of Justice and General Court² on the issue of LPP is not an exact science and necessarily involves a degree of interpretation and the line between privileged and non-privileged material is often not clear. Accordingly, in our view, the overwhelming majority of LPP disputes would not involve behaviour which it would be appropriate to punish by way of a fine.

Confidential information

- 2.4 We note the statement at paragraph 85 of the draft procedural best practices that in cases where there is a wish to use the so-called "data room" procedure to provide disclosure of confidential information to a limited circle of advisers, the Hearing Officer may make a decision granting such access pursuant to Articles 8 and 9 of the Hearing Officer's Mandate³ in circumstances where a party does not consent to the disclosure of its confidential information in this way. We are concerned by this statement as it seems to suggest that the Hearing Officer can ignore the party's right to protection of its confidential information. We would add that Articles 8 and 9 of the Hearing Officer's Mandate do not in fact confer any such decision-making power on the Hearing Officer. In our view, Article 9 of the Mandate goes no further than to grant a decision-making power that, as a matter of fact, certain information is not confidential and may be disclosed. We do not consider Article 9 to allow the order of disclosure of material that is accepted as being confidential. As a more general point, the suggestion that the Hearing Officer may unilaterally disclose the confidential information of parties throws into serious doubt the

² For example, Case 155/79 **AM&S Europe Limited v Commission** ECR [1982] 1575; Joined Cases T-125/03 and T-253/03 **Akzo Nobel Chemicals and Akros Chemicals v Commission**, ECR [2007] II-3523

³ Commission Decision of 23 May 2001 **on the terms of reference of Hearing Officers in certain competition proceedings** OJ L 162/21

co-operation of parties in Commission proceedings and the protection of their legitimate rights. We would therefore urge the Commission to revisit the relevant statements in paragraph 85 of the draft procedural best practices.

Meetings with the Commission

- 2.5 We welcome the Commission's commitment (paragraph 40 of the draft procedural best practices) to preparing a note of any meetings or telephone calls with parties involved in a case and that the same should be made available on the case file. Subject to confidentiality and anonymity issues, and consistent with the European Ombudsman's decision in *Intel*,⁴ we would stress the importance of full and proper notes all contacts that the Commission has with parties involved in a case.
- 2.6 We are supportive of the importance placed on regular meetings with the parties during antitrust proceedings and certainly agree that it is important to give "*ample opportunity for open and frank discussions*"⁵. The regular State of Play meetings that the Commission envisages are certainly helpful in achieving this objective. We note the intention not to offer State of Play meetings to complainants and third parties. We accept this as broadly appropriate but note that the circumstances of particular cases may suggest that State of Play meetings should be available, at least to the formal complainants (if any) in that case. In this regard, we note that Regulation 773/2004 in any event guarantees the rights of complainants to be fairly heard in a number of ways, including a strong presumption that they are able to participate in the oral hearing.
- 2.7 We would urge the Commission to reconsider the position that State of Play meetings will not take place in cartel cases (paragraph 60 of the draft procedural best practices). In our view, there many important issues in cartel cases that it would be beneficial to discuss at such meetings. They might include evidential points on the nature of the alleged infringement as well as issues in relation to potential fines such as duration, mitigating factors and parent-subsidiary liability. We believe that early and frank discussion of such issues can be invaluable in creating a better understanding of the factual matrix on all sides and may, in appropriate cases, facilitate adoption of the Commission's settlement procedure.
- 2.8 We also note the Commission's suggestion that in some cases, it is helpful to arrange so-called "triangular" meetings between some or all of the parties involved in a case. If such an approach is to be considered further, we would suggest that the procedural best practices explain the safeguards the Commission will adopt to ensure that parties are heard fairly at such meetings. We appreciate that some of the benefits of such meetings can be lost if they are overly formalised, but nevertheless would suggest that some indications are given as to how the Commission will ensure that the conduct of such meetings is fair to all the parties. This further guidance should also explain how confidentiality of parties' sensitive commercial information would be preserved.

Replying to the Statement of Objections ("SO")

- 2.9 We note the statement at paragraph 87 of the draft procedural best practices that parties will typically be given 2 months to reply to a Statement of Objections in complex cases. Our experience of acting on such cases suggests that this is not a sufficient period of time to reply properly in such cases. Within this period, parties must exercise their rights with respect to access to the file – a process which can be extremely time-consuming in cases with large volumes of documents. There is also a fairness and equality of arms issue that the Commission's investigative phase which culminates in the issuing of the SO will

⁴ Decision of the European Ombudsman of 14 July 2009 closing his inquiry into complaint 1935/2008/FOR against the European Commission available at <http://www.ombudsman.europa.eu/cases/decision.faces/en/4164/html.bookmark>

⁵ Paragraph 54 draft procedural best practices.

invariably have taken far longer than the time given to the parties to make their case in defence. Our experience suggests that 3 months is the minimum period parties should be given to respond to an SO and that longer periods are appropriate in cases involving large volumes of evidence.

The position of third parties without formal complainant status

- 2.10 We consider that both the draft procedural best practices and the draft Hearing Officers guidance should be clearer on the way in which third parties are dealt with. The draft procedural best practices appear silent on the issue of how the Commission interprets the meaning of "*sufficient interest*" in Article 13 of Regulation 773/2004 despite the existence of relevant case-law in this area.⁶ Given that the existence or not of a sufficient interest is the relevant legal test for the admission of third parties to proceedings, we consider that this is a significant omission. Paragraphs 32 to 37 of the draft Hearing Officers Guidance do discuss factors relevant to the Hearing Officer's decision whether or not to admit third parties to the proceedings but this discussion is lacking detail and does not consider how those factors link to the concept of sufficient interest and the accompanying relevant case-law to which we have already referred. A particular issue which is of increasing importance in this area on which the Commission's guidance would be very useful is whether third parties who are potential claimants in a "follow-on" action for damages can be deemed to have a sufficient interest in the proceedings on that basis.
- 2.11 As a final point, we note that paragraph 91 of the draft procedural best practices does not make it clear that the Commission may fulfil its obligation in Article 13(3) of Regulation 773/2004 to inform third parties admitted to the proceedings of the nature and subject matter of those proceedings by providing them with a non-confidential version of the Statement of Objections.⁷

3. COMMENTS ON BEST PRACTICES REGARDING THE CONTENT AND PRESENTATION OF ECONOMIC AND ECONOMETRIC ANALYSIS

- 3.1 We welcome the decision of the Commission to produce guidelines in relation to economic submissions and consider that this approach will increase clarity. We have a number of comments, however, on several of the recommendations outlined in the document as set out further below.

Applicability of guidelines to the Commission

- 3.2 At paragraph 6, the draft best practices on economic submissions indicate that "*the desire to ensure transparency and accountability that guide these best practices*" applies to all parties to a competition proceeding, including the Commission. A clearer statement that the best practices apply to the Commission as well as to the other interested parties would be preferable. It is important that the measures which are outlined in the draft best practices on economic submissions regarding the creation and communication of economic analysis apply equally to the Commission in order to give parties and their advisors the opportunity to assess and respond to the evidence in good time within the inquiry timescale.

The need for an open and continuous dialogue

- 3.3 The draft best practices on economic submissions recognise that even though an economic analysis may be imperfect in some way, this does not necessarily mean that it is of no evidentiary value. For example, paragraph 23 states:

⁶ For example, the judgments in: Case T-170/06 **Alrosa v Commission**; Joined Cases T-213/01 and T-214/01 **Österreichische Postsparkasse v Commission**; and Case T-290/94 **Kayersberg v Commission**.

⁷ See Final Reports of the Hearing Officer in **UEFA Champions League** [2003] OJ C269/22 and **Deutsche Telekom AG** [2003] OJ C288/2.

"Failure to observe and validate all key assumptions or deficiencies in the data should not prevent an economic analysis to be given weight, though caution must be exercised before relying on its conclusions."

- 3.4 Whilst this is a helpful statement, the Commission should ensure that any criticisms it has relating to the accuracy of analysis undertaken by the parties are communicated clearly and promptly to the parties in order to give the parties the opportunity to address these concerns. In other words, if the Commission is inclined, on the basis of perceived inaccuracies to dismiss or place little weight on the analysis, then the parties should promptly be given the chance to address this before the Commission reaches its conclusions. In short, there is a need for open and continuous dialogue between the parties and the Commission in order to give the parties the opportunity to address the inaccuracies or to argue that the analysis still supports relevant conclusions, albeit properly qualified.
- 3.5 The draft best practices on economic submissions also indicate, at paragraph 44, that parties are obliged to provide all data and codes in order to enable the Commission to replicate and assess the economic analysis. It states "*...the absence of all the necessary elements needed for replication and assessment of an economic submission can constitute grounds for not taking it further into consideration.*" Whilst it is understood that the Commission requires this information in order to enable it to form a view as to the reliance which may be placed on the results, the Commission should be aware that this creates a risk for parties that the information will be used to discredit their analysis or that the analysis will be amended by the Commission to give different results which may be less helpful to the parties' case. Incentives to share such information would be improved, therefore, if parties could be confident that if the Commission used the data and codes in this way, the parties would have an opportunity to review the Commission's analysis and engage further with the Commission as to the merits of its analysis. As indicated above, an open and continuous dialogue is necessary to make sure that the parties are sufficiently informed and have sufficient time to influence the Commission's views in these circumstances before it reaches its final decision.

Weighing economic evidence against other evidence

- 3.6 We also consider that the draft best practices on economic submissions would benefit from a discussion as to the role of economic evidence in the wider assessment of evidence (including, potentially, internal documents, survey evidence, third party responses etc). In particular, in the event that the Commission encounters "direct" evidence which conflicts with its economic evidence it should not place undue weight on the latter simply because it is quantitative.⁸ As the Commission will be aware, Article 101 and 102 cases must be made out by strong and credible evidence, and in merger cases, the Commission is required to adduce convincing evidence which meets the requisite legal standard. It is important in this context that economic evidence is assessed carefully to ascertain what conclusions that analysis can sustain and what weight, therefore, may be placed on this evidence as compared to other "direct" evidence.

Time and cost factors

- 3.7 Whilst we are broadly supportive of the measures proposed by the Commission to enhance the credibility of economic submissions (provided, as noted above, that they are applied equally to the Commission), it has concerns that some of the proposals are not practical given considerations of timing and cost within the timescale of a Phase I merger investigation. In this regard, many of the items outlined by the Commission to help

⁸ In a speech entitled "The significance of economic evidence in competition cases" given by Peter Freeman, Chairman of the Competition Commission, on 15 October 2009, he makes this point "*decision makers may place too much weight on quantitative analysis. Analysis that provides a number (a predicted price rise, a change in HHI values) can give a spurious sense of certainty and comfort, and take on an undue prominence in cases.*"

establish the robustness of the analysis, are likely to be time-intensive and costly. Paragraph 40 for example, requires that consideration should be given to whether a theory or technique has been "*generally accepted in the scientific community*" and the predictions or results of the analysis must be compared with previous analysis or results. The Commission may wish to consider specifying what it regards as essential in establishing the robustness of an economic analysis (and without which there is a significant risk that the analysis would not be taken into consideration by the Commission) and what may be regarded as less essential such that there may be scope for undertaking a more limited analysis in the context of a Phase I investigation.

Scope

- 3.8 As regards the scope of the draft best practices on economic submissions, we note that they refer generically to "economic analysis", "economic models" and "economic submissions". There may be merit, however, in including some more specific comments as regards particular kinds of analysis. For example, it would be helpful to understand what is required by the Commission to enable it to place reliance on survey evidence submitted by the parties (in relation, for instance, to issues of sampling, the research methodology and the description of output). Equally, in the case of analyses of economic profitability which often require a combination of economic modelling and financial/accounting data, guidance may be helpful on the role of accountants in assessing the analysis, and any requirements as regards reconciling model inputs to audited financial data.

Confidential data

- 3.9 At paragraph 45, the draft best practices on economic submissions indicate that where the data underlying its analysis is judged to be confidential, then access to the data and codes will be granted only at Commission premises "*in a so-called data room procedure*". It is not clear to us whether this would be sufficient to allow the parties' economic advisors and external counsel fully to interrogate and assess the analysis which has been undertaken. The economic advisors may wish, for example to undertake tests and investigations using their preferred software package – it is not clear how this would be facilitated. Supporting a team in Brussels would also be costly for the parties. We suggest that this problem might better be addressed by releasing the confidential data and codes to external counsel and economic advisors only.
- 3.10 Paragraph 45 also indicates that "*third parties or complainants are...also expected to authorise DG Competition, where appropriate, to offer data room access to the parties upon request.*" The paragraph goes on to refer to the potential use of confidentiality obligations, but it is not clear the extent to which potentially confidential data provided to the Commission by the parties might be made available to third parties, albeit via a "secure" data room procedure. (Similarly, it is not clear the extent to which potentially confidential data provided by third parties might be made available to the parties.)
- 3.11 It should also be borne in mind that in certain (more concentrated) markets, certain data may be easily attributable to one supplier rather than another, even where it is aggregated and/or made available to others on a "no names" basis. Without clearer assurances on this issue there is a real risk that parties and third parties may be reluctant to volunteer data and information which may be regarded as confidential. Accordingly, it would be very helpful if this section of the guidelines were to be expanded to set out:
- (a) exactly how the Commission envisages that such a data room arrangement would operate in practice (including which parties would have access);
 - (b) the scope and nature of confidentiality obligations envisaged by the Commission; and

- (c) the types of data that would be regarded as too confidential to be shared amongst parties and third parties; and
- (d) procedures for handling data which might easily be attributed to particular suppliers.

4. **COMMENTS ON BEST PRACTICES ON RESPONDING TO REQUESTS FOR QUANTITATIVE DATA**

The need for clarity of the analysis which the Commission intends to undertake

- 4.1 The draft best practices on economic submissions also discuss responses to a data request. The document indicates that "*parties must take care that quantitative data is submitted in a format that minimises the time and manipulation required to process the data for parties.*"⁹ In particular it suggest that parties should be able to answer questions including the following "*how applicable is the data to the analysis under consideration; is it enough to conduct a meaningful analysis*". This assumes that parties have a clear understanding of the analysis which the Commission intends to perform and which has given rise to the data request, which is not always the case in practise. If parties are to be expected to provide views on whether certain data is appropriate and can be applied in a meaningful way to a particular analysis, then the Commission should provide a clear outline of the analysis in question, the economic reasoning underpinning the analysis and how this relates to the realities of the market.

Scope for parties to extend the Commission's data requests/analysis

- 4.2 Paragraph 69 indicates that the integrity and efficiency of the process are undermined where, for example, parties "*ignore a carefully drafted and limited data request and produce large amounts of data points*" disregarding, for example, the submission format or scope. Whilst, particularly in Phase I merger inquiries, efficiency is vital, the opportunity should remain for parties to supplement or extend any data request which may, in their view, be too limited to form the basis of reliable conclusions. For example, in the event that parties were requested to provide a quantitative analysis based on (say) 1,000 data points, but where extending the sample size would produce different results, we consider that the integrity of the process would be jeopardised if parties were discouraged from, or penalised for, extending the analysis in an appropriate manner. Similarly, and in the spirit of the remainder of the draft best practices on economic submissions, parties should be free, if they wish, to extend or alter model specifications in order to verify the robustness of any economic model specified by the Commission.

Direct access by the Commission to corporate data

- 4.3 Paragraph 81 describes arrangements for the Commission to have direct access to corporate data, and stipulates that assurances would be required "*that the activities of the services of DG Competition will not be tracked*". We agree that the Commission should have the right confidentially to undertake analysis internally. However, this should not prejudice the principle of transparency; any analysis upon which the Commission seeks to rely in reaching its conclusions should be made available to the parties, allowing them to seek to replicate and/or extend the analysis, and to consider further the results.

**ASHURST LLP
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⁹ Paragraph 77.