

## **Berwin Leighton Paisner LLP**

### **Comments on Best Practices on the conduct of proceedings concerning Articles 101 & 102 TFEU (the “Best Practices”)**

#### **Overview**

We fully endorse the Commission’s decision to bring increased transparency and consistency to antitrust proceedings through the publication of a document on Best Practices and welcomes its decision to open the consultation to a wider audience.

We have a number of specific comments on the draft Best Practices document as follows (using the paragraph numbers used in the Best Practices):

#### **Para. 1 - Scope and Purpose**

We note, at footnote 14, that the Best Practices do not in any way bind national competition authorities. However, we suggest that it would aid legal certainty if the Member States were encouraged to apply the Best Practices as far as possible.

#### **Para 2.2 - Initial Assessment Phase**

We note, at para. 12, that the detailed criteria for assessing whether or not a complaint shows a sufficient “community interest” are set out in the 2005 Annual Report on Competition Policy. However, we suggest that it might also be useful for the Commission to set out official guidance on its prioritisation criteria in an annex to this Best Practices document.

At para. 14 it would seem sensible to include a time-frame within which the Commission will have informed the parties to an investigation that they are under preliminary investigation. Further, it is not clear what information will be disclosed to the parties subject to the preliminary investigation if the case is subsequently closed, i.e. whether this will consist of a simple of notification or whether a more detailed explanation will be supplied. If further statements are to be made by the Commission, it would be useful to know how these may be used by that party in administrative and/or civil proceedings.

#### **Para 2.3 - Opening of Proceedings**

We welcome the Commission’s clarification of the fact that the opening of proceedings will be published on its website/confirmed by press release and that, in cartel cases, this will be at the same time as the adoption of the Statement of Objections (SO). We also note that the Commission will publish a press release setting out the key issues in the SO shortly after it is received by addressees. We assume that the information in the press release will not go any further than that currently contained in press releases issued at the time of adoption of an SO. However, we would welcome clarification of this. A cross reference from Para. 2.3 to Para. 3.1.1.2 might also be useful here.

### **Para. 2.5.2 - Time Limits**

While we welcome the indicative time-frames given by the Commission, two weeks to respond to a “substantial request” (para. 35) seems insufficient and would almost certainly place the unnecessary burden of justifying a period of extension on the parties. We suggest that two weeks is an appropriate time-frame for short or limited requests, but not substantial ones. This provision does not seem to take account of current practice given the time required to analyse the request, discuss it with clients/case team, gather evidence and draft and finalise a response. We would suggest that a period of one month is more appropriate for substantial requests, with parties perhaps being encouraged to submit earlier if possible.

### **Para. 2.6 - Meetings and other Contacts**

At para. 40 it would be helpful to know the circumstances in which a note of a meeting or phone call will be included on the Commission’s file. We assume that this would only happen when the contact is of a substantive nature but we would welcome clarification on this point.

### **Para. 2.7 - Power to Take Statements**

We consider that individual rights to silence should also be referenced at para. 44 given the criminal sanctions operating in many Member States. It would also be useful to see a pro-forma of the procedural document referred to in this paragraph.

### **Para. 2.9 - Legal Professional Privilege (LPP)**

We note the provisions relating to LPP at paras. 48/50. However, we consider that “proving” that a particular document which is not immediately identifiable as being covered by LPP could take time, as will the process of gathering the supporting material referred to by the Commission in this paragraph. It would therefore seem inappropriate for the Commission to “immediately” read the entire document (para. 50) if such material is not readily available. We suggest that the Commission operates on the presumption that cursory looks and/or the sealed envelope procedure should be used in the absence of clear evidence that the party is trying to delay. In short, we believe that given the importance of the protection given by LPP, it should be the dominant consideration here.

### **Para. 2.11 - State of Play Meetings**

We note, from para. 60, that State of Play meetings will not be offered during cartel proceedings. However, we suggest that this section states this upfront. Further, it would be helpful if the Commission clarified, at para. 55, that complainants are able to request informal meetings at key stages of the process.

### **Para. 2.12 - Triangular Meetings**

It would appear that this section is not applicable to cartel investigations but we would welcome the Commission’s confirmation of this. It would also be helpful to understand whether it is envisaged that these meetings will become a regular part of

the Commission's practice in antitrust cases, or whether they are to be reserved for exceptional cases.

#### **Para. 2.14 - Review of Key Submissions**

We are concerned by the potential time-frame for allowing parties to a proceeding to review and comment on a non-confidential copy of the complaint. If this does not take place until after the opening of proceedings, and the length of the investigation stage has been particularly protracted, then a significant amount of time could elapse before a party sees a copy of the complaint against it. Perhaps the Commission could consider inserting a realistic time-frame here.

#### **Para. 2.15 - Possible Outcomes**

We would welcome clarification at para. 70 as to what happens when the Commission decides to close its case against certain parties to a proceeding but does not publish this fact until the time of its final decision (which could be after some months/years have elapsed).

#### **Para. 3.1.2. - Access to File**

With reference to para. 82, we believe that it is important that the Commission ensures that it applies equal rules to each company regarding the level of detail required to establish that information should be considered confidential. We suggest that it would be helpful to set out what categories of information could be excluded with appropriate examples. (There could be a perceived risk that the Commission will accept more significant redactions towards the end of the initial assessment phase than it would have done at the beginning in the interests of moving towards an SO.)

We welcome the access to file provisions contained in para. 84 but we would appreciate a fuller explanation of how the access will be policed since it is not clear, for example, how the provision relating to a "restricted circle of persons" will be either defined or enforced.

#### **Para. 3.1.3 Written Reply to the Statement of Objections**

Since this document is based on current Commission practices, we suggest that it would be useful to give a broader indication in this paragraph of the average amount of time given by the Commission for a written response to the SO..

#### **Para. 7 - Adoption, Notification and Publication of Decisions**

It would be useful to have an indication of current practice as regards length of time between publication of the summary of the decision/Hearing Officer Report and the adoption of the decision in the OJ.

We note that, at para. 135, the Commission stipulates it will publish a non-confidential document on its website as soon as possible and welcome the suggested

time-frames for addressees to provide their approval of the summary. However, we suggest that the timing of the publication of the final decision is also accelerated in order to facilitate private damages actions.

### **Annex**

It would be extremely useful if the Commission could consider including, as an annex, approximate time periods for the main investigative stages of antitrust proceedings based on current practice. .

**Berwin Leighton Paisner LLP**  
**Comments on Guidance on Procedures of the Hearing Officers (the “Guidance Paper”)**

**Overview**

While we welcome the Guidance Paper’s codification of the current practices of the Hearing Officers, we would hope that this would not prevent the role of the Hearing Officer being expanded over time.

We have a number of specific comments on the Guidance Paper as follows (using the paragraph numbers used in the Guidance Paper):

**Para. 4.1.2 - Complainants**

We note that, at para. 17, a complainant has the right to be provided with a non-confidential version of the SO. It might be useful for the Guidance Paper to clarify whether provision for this will be made automatically or whether the onus will be on the complainant to remain in touch with the case team and request a copy of the SO at the appropriate time.

**Para. 5 - Admission of Third Parties**

We welcome the fact that, at para. 32, potential interested third parties will be entitled to make formal applications around the time the SO is adopted. However, it would be useful to know whether this means that the Commission is obliged to inform potential interested parties of the timing of the adoption of the SO.

**Para. 6 - Oral Hearing**

We suggest that para. 38 takes account of the fact that the hearing is also generally used by parties as an opportunity to put forward their *own* position and, in the case of immunity/leniency applicants, explain why the infringing behaviour will not be repeated. We do not believe that the hearing is seen solely as an opportunity to rebut/comment on the findings of the Commission, although this opportunity is of course fundamental to each party’s rights of defence.

**Para. 6.4 - Publication of Dates of Hearings**

We welcome the fact that, at para. 48, dates of future hearings will be published on the Hearing Office website as we are not aware that this has previously been done on a consistent basis.

**Para. 6.5.2 - In Camera Sessions**

We note that, at para. 55, excluded participants will be made aware of the subject matter of the discussion. We would hope that this information would be sufficiently non-specific in circumstances where there are confidentiality issues at stake. For

example, companies may not wish to make it known that they are discussing a potential inability to pay the fine.

**Para. 6.5.4 - Limits on Disclosure**

Reference is made at para. 58 to Articles 81 and 82 rather than 101 and 102.