

March 2, 2010

**COMMENTS ON THE EUROPEAN COMMISSION'S
BEST PRACTICES DOCUMENTS**

We are pleased to have the opportunity to comment on the European Commission's draft "Best Practices" documents in relation to (1) proceedings under Articles 101 and 102 (the "Investigation Best Practices"); (2) the procedures of the Hearing Officer (the "Hearing Officer Best Practices"); and (3) the submission of economic evidence (the "Economic Best Practices") (together, the "Best Practices Documents"). The European Commission's Best Practices Guidelines in relation to EU merger proceedings and State Aid have assisted undertakings and their advisors for some time, and we expect that the Best Practices Documents will have similar effect. Comments on each of the Best Practices Documents follow in turn.

I. Investigation Best Practices

We welcome the introduction of the Investigation Best Practices and, in particular, the formalisation of some previously *ad hoc* antitrust investigation practices (*e.g.*, the possibility to discuss the scope of information requests with the Case Team (¶ 32); the practice of affording executive officers the opportunity to meet with the Director General of DG COMP or the Commissioner to discuss investigations (¶ 64); and the practice of ensuring the continuous presence of the senior staff in oral hearings (¶ 94)). We also welcome the Commission's willingness to have regular "state of play" meetings with parties under investigation prior to the issuance of a statement of objection (¶ 57, 61-63).

Information requests. Given that European Commission ("Commission") information requests have tended to become more technical, detailed and onerous over time, we welcome the Commission's attempts in the Best Practices to make the procedure more efficient. As stated above, we welcome, in particular, the Commission's willingness to discuss the scope and format of information requests (¶ 32) and hope that these discussions will be conducted in a pragmatic and flexible way. In this regard, we recommend that the Best Practices recognise expressly that information requests are often costly and burdensome (*see* ¶ 49 and ¶ 52 of the Economic Best Practices). We also recommend that the Commission give further thought to the following:

- First, we have reservations about the "at least two week" timeline envisaged for substantial information requests (¶ 35). Given that substantial Commission information requests are typically detailed and complex, we would expect the minimum timeline to be longer (at least three weeks). Undertakings should not be unduly or unfairly rushed into responding, in particular because they are exposed to liability if responses are incorrect or misleading (*see* Article 18 of Regulation 1/2003).
- Second, we recommend that the Investigation Best Practices recognise expressly that the Commission will as a rule discuss substantial information requests in *draft* form so that the time available for responding is not unfairly eroded by the

time required to discuss the scope of requests (undertakings should not be required to embark on significant and/or onerous work whilst the scope of an information request is not clear).

- Third, we recommend that the Investigation Best Practices note explicitly that discussions on the scope and format of requests (¶ 32) are intended to elicit ways in which responsive information may be provided to the Commission in a proportionate and non-burdensome way.
- Fourth, we recommend that the Investigation Best Practices note explicitly in ¶ 32 that the Commission (1) intends to adopt a pragmatic approach to extensions to deadlines where appropriate (in particular, for substantial requests), and (2) will be open to allowing the parties to submit “staggered responses” (*i.e.*, responses to certain parts of the request in the first instance and responses to more complex or burdensome requests at a later date).

LPP. Pending the resolution of outstanding LPP issues in the *AKZO* case, we consider that the Commission should refrain altogether from commenting on the application of LPP in the Investigation Best Practices. If the Commission considers it essential to comment on the application of LPP, we recommend that it confine itself only to those points that are uncontroversial. In addition, we recommend that the Commission confirm that it will submit any disputes as to the application of LPP to the Hearing Officer in the first instance (the Hearing Officers have an excellent record of resolving debates on confidentiality and are well placed to deal with these disputes fairly and efficiently).

Updates. We welcome the Commission’s willingness to update the parties on the progress of investigations (¶ 14). However, we recommend that the timing of these updates be more systematic and regularised (*i.e.*, not simply “[a]t later stages”). Undertakings should not be left wondering about the status or timeline of an investigation. Given that it is well placed to do so, we recommend that the Commission adopt a best practice of providing periodic (*e.g.*, quarterly) updates on the status of an investigation. Such updates should be given to all parties under investigation, including at the preliminary stages (*i.e.*, before the commencement of the formal investigation).

Complainants / third-parties. The Investigation Best Practices envisage inconsistent treatment of complainants and other interested third parties. For example, the Commission envisages sending non-confidential versions of the parties’ written replies to the Statement of Objections (“**SO**”) to complainants or third parties in appropriate cases (¶ 89), but it expressly excludes the possibility of offering them state-of-play meetings (¶ 55).¹ Given that the Commission benefits from comments made by complainants and other third parties, we would recommend that the Investigation Best Practices adopt a more harmonized approach and allow for state-of-play meetings also with complainants and other interested parties in appropriate cases.

Hearing Officers. We recommend that the Investigation Best Practices recognise the possibility of involving a Hearing Officer at early stages (*i.e.*, prior to the SO) in relation to certain matters. Input from a Hearing Officer, even if informal, may act as an additional safeguard and help resolve process issues that frequently lead to disagreement (*e.g.*, the application of LPP).

¹ The Hearing Officer Best Practices state that complainants will not be offered access to the Commission’s case file (¶ 16).

Transfers to national competition authorities. The Investigation Best Practices envisage the possibility of re-allocating cases to other members of the European Competition Network if they are well placed to deal with such cases. Accordingly, the Commission may reallocate a case to a national competition authority (“NCA”) and *vice versa* (¶ 13). We recommend that the Investigation Best Practices recognise expressly in ¶ 13 that a transfer may be an act with legal effects (*e.g.*, because the parties' procedural rights before the NCA may be different to those before the Commission).

Documents submitted after the SO. The Investigation Best Practices do not seem to allow SO addressees to see documents submitted *after* the issuance of the SO. So that such parties may properly exercise their rights of defence, we recommend that they have the express right to review documents added to DG COMP's files *after* the SO has been issued.

Separation of investigative / decision-making functions. We are aware that a number of commentators propose wide-reaching changes to the Commission's decision-making process (in particular so as to make it compliant with the European Convention on Human Rights). We do not propose to address this debate in detail here. However, because the Commission's roles as prosecutor, judge, and jury are widely viewed by critics as prejudicing the impartiality of the investigation, we respectfully suggest that one way in which this concern could be addressed would be to separate investigative functions (to be carried out by the Case Team) from decision-making functions (to be carried out by other officials of the Commission outside the Case Team). The separation of these functions would seem to provide an additional safeguard to the process and help allay some of the concerns that currently subsist. Further, we note that the Commission has commenced an internal review of antitrust procedures (announced on March 1, 2010). We would naturally be happy to comment on these procedures if they were published for public consultation.

We make specific observations on the text of the Investigation Best Practices in [Annex 1](#).

II. Hearing Officer Best Practices

Substantive comments. We welcome the introduction of the Hearing Officer Best Practices and, in particular, confirmation that the Hearing Officer may comment on substantive issues (¶ 7, 62, and 63). We understand from the text of the Hearing Officer Best Practices that the Hearing Officer is free to comment on any matter of substance, including the level of any fine, and recommend that the wording of paragraphs 7, 62, and 63 be amended to reflect this. We also recommend that the Hearing Officer Best Practices (and if necessary the Hearing Officer's mandate) be amended to (1) make the Interim Report public, and (2) to allow Hearing Officers to make substantive comments also in the Final Report.

Oral Hearing. We welcome the recognition in ¶ 57 of the Hearing Officer Best Practices that parties may question the Commission's staff, as well as representatives of the other parties under investigation. Subject to exceptions (*e.g.*, for confidentiality), we would encourage the Hearing Officers to allow as much interactive discourse and debate as possible. We consider that intense questioning of, in particular, the Commission's case team may assist in the “establishment of the truth” (*cf.* ¶ 42) and procedural fairness. In this regard, we would recommend that the Hearing Officer Best Practices clarify expressly that questioning of the Commission officials will be endorsed.

Disputes. We also welcome the formalisation of the Hearing Officer's role in resolving disputes that may arise in relation to redactions for confidentiality in the final

decision (¶ 75). We believe that the Hearing Officer could play a useful role in resolving comparable disputes at other stages of the proceedings. For example, the Hearing Officer could be involved in issues such as the application of LPP. The Hearing Officer has an excellent record in resolving disputes in relation to confidentiality and seems therefore to be well placed to comment on such procedural issues.

We make specific observations on the text of the Hearing Officer Best Practices in Annex 2.

III. Economic Best Practices

Given the increased importance of economics in investigations under Articles 101/102, we welcome the introduction of the Economic Best Practices. We consider that the Economic Best Practices outline a number of important safeguards designed to improve the probative value of economic analyses, in particular by setting a high standards for the submission of economic evidence. We hope that the same standard will be applied to the Commission's own economic analysis (*e.g.*, we expect the Commission's data room to be organised in such a way as to enable parties to replicate results easily and accurately).

Information requests. Given that Commission information requests (in particular those that request quantitative data) have tended to become more technical, detailed and onerous over time, we welcome the Commission's attempts in the Economic Best Practices to make the procedure more efficient (see, *e.g.*, ¶ 52). As noted above in relation to the Investigation Best Practices, however, we are concerned to ensure that: (1) the timeline envisaged for data collection and processing is appropriate (taking into account that data may not be readily available or easy to collate); and (2) the Commission intends to adopt a pragmatic approach to extensions to deadlines where appropriate (in particular, for substantial requests). Further, we recommend that Commission's standard practice should be to issue information requests in draft form for all substantial data requests, so as to permit the parties to resolve any ambiguities with the Commission case team in an efficient manner.

We make specific observations on the text of the Economic Best Practices in Annex 3.

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Investigation Best Practices

Para. Nr.	Text	Comment
Para. 3.	<p>Cartels, as defined in the Leniency Notice, may also be subject to the specific procedures for leniency and settlement procedures. These specific procedures are not covered by the Investigation Best Practices. Moreover, the specificities of the conduct of cartel proceedings require a number of special provisions, in order, notably, not to interfere with possible leniency applications. These special provisions are indicated where applicable.</p>	<p>We understand this exclusion to mean that the Investigation Best Practices will not be applied to cartel cases insofar as there is a conflict between the Investigation Best Practices and the leniency or settlement notices. If this is indeed the intention, we would recommend that this be made explicit in the Investigation Best Practices.</p>
Para. 5.	<p>The Investigation Best Practices are notably built upon the experience to date of the Commission's Directorate-General for Competition ("<u>DG Competition</u>" or "<u>DG COMP</u>") in the application of Regulation 1/2003 and the Implementing Regulation. They reflect the views of DG Competition on Investigation Best Practices at the time of publication and will be applied as from the date of publication for on-going and future cases. The specificity of an individual case may however require an adaptation of, or deviation from these Investigation Best Practices, depending on the case at issue.</p>	<p>We respectfully recommend that the Investigation Best Practices note that the Commission will inform parties under investigation of any intention to deviate or adapt from the Investigation Best Practices in specific cases and gives reasons for doing so.</p>
Para. 14.	<p>At the moment of the first investigative measure addressed to them (normally a request for information or an inspection), undertakings are informed of the fact that they are subject to a preliminary investigation as well as about the subject-matter and purpose of such investigation. In the context of requests for information, they will further be reminded of the privilege against providing self-incriminating information and that if the existence of the investigated behaviour was confirmed this might constitute an infringement of Articles 101 and 102 TFEU. At later stages, DG Competition will upon request, inform the parties subject to the preliminary investigation of the status of the case. If DG Competition at a certain stage decides not to investigate the case further (and thus not to open proceedings), DG Competition will, at its own initiative, inform the party/-ies subject to the preliminary investigation thereof.</p>	<p>We suggest that the Investigation Best Practices note as follows:</p> <p>“The Commission will try to be as complete and precise as possible in responses to such requests (taking into account confidentiality and other appropriate and relevant factors).”</p> <p>Precise/complete explanations enable undertakings to conduct their internal investigations quickly and effectively. This practice can be expected to shorten the overall timetable of investigations.</p> <p>As explained above, we recommend that these updates be more systematic and regularised (<i>i.e.</i>, not simply “[a]t later stages”). Undertakings should not be left wondering about the status or timeline of an investigation. Given that it is well placed to do so, we recommend that the Commission adopt a best practice of providing periodic (<i>e.g.</i>, quarterly) updates on the status of its investigations. Such updates should be given to all parties under investigation and should also be provided at the preliminary stages (<i>i.e.</i>, before the commencement of the formal investigation).</p>

Para. Nr.	Text	Comment
Para. 20.	The parties subject to the investigation are informed in writing of the opening of proceedings before such opening is made public.	We consider that the parties should have reasonable notice (<i>i.e.</i> , at least two business days) so that they have time to prepare press releases and have them approved by senior business people. The Commission should commit also to inform those parties that have been investigated but are not to be subject to formal proceedings.
Para. 31.	Pursuant to Article 18, the Commission may require undertakings and associations of undertakings to provide all necessary information. Information is necessary, in particular, if it might enable the Commission to verify the existence of the alleged infringement referred to in the request. The Commission enjoys a wide margin of appreciation in this respect.	We recommend that the Investigation Best Practices note expressly that the Commission's wide powers must always be exercised subject to the principle of proportionality.
Para. 32.	It is DG Competition that defines the scope and the format of the request for information. In certain cases, DG Competition might however discuss with the addressees the scope and the format of the request for information. This practice can be particularly useful in cases of requests including quantitative data.	<p>We welcome the formalisation of the possibility to discuss the scope of requests with the Case Team. This represents a useful and constructive way to minimise delays and to improve the chances that the Commission receives responsive information. We suggest that the wording be revised to reflect the following:</p> <ul style="list-style-type: none"> • It should also be possible to discuss the scope of “<i>draft</i>” requests for information (<i>i.e.</i>, before the formal deadline has begun to run); • The Commission will adopt a flexible approach in relation to modifications or possible limitations (<i>cf.</i> the approach taken by the U.S. Department of Justice); and • These discussions are intended to elicit ways in which information may be provided to the Commission in a proportionate and non-burdensome way.
Para. 35.	Addressees are given a reasonable time-limit to reply to the request, according to the length and complexity of the information request. In general, this time-limit will be at least two weeks from the receipt of the request, for a substantial request for information. However, when the scope of the request is limited, for example if it only covers a short clarification of information previously provided or information readily available to the addressee of the request, the time-limit will normally be shorter (less than one week).	Commission information requests have tended to become more technical, detailed, and burdensome over time and often involve a number of different jurisdictions. Undertakings need to conduct their own investigations thoroughly in order ensure that their response is complete and not misleading. Such investigations often involve multiple database searches in a number of different jurisdictions. The time involved in conducting such investigations should not be underestimated, in particular where the information is not centrally located, readily available, or easy to collate. Given that undertakings are exposed to liability if their responses are incorrect or misleading (<i>see</i> Article 18 of Regulation 1/2003), it is important that they are not unduly or unfairly rushed into responding.

Para. Nr.	Text	Comment
		<p>Recognising that the Commission wishes to avoid undue delay to its investigations, we respectfully suggest that the Investigation Best Practices expressly recognise that:</p> <ul style="list-style-type: none"> • The Commission intends to adopt a pragmatic approach to extensions where appropriate (in particular, for substantial requests); and • The Commission may allow parties to submit “staggered responses” (<i>i.e.</i>, responses to certain parts of the request in the first instance and responses to more complex or burdensome parts at a later date).
Para. 37.	<p>The cover letter also requires the addressee to indicate whether it considers that information provided in the reply is confidential. In that case, in accordance with Article 16(3) of the Implementing Regulation, the addressee must substantiate its claims and provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission.</p>	<p>Although timely access to the file is important, we submit that undertakings should not be required to submit a non-confidential version simultaneously. Depending on the deadline set by the Commission, all available time may be required in order to prepare the confidential version. As such, it is usually reasonable for the non-confidential version (which may require separate consideration of different issues by different individuals within the undertaking) to be submitted shortly thereafter. This is especially so if the deadline set for the response is tight.</p>
Para. 40.	<p>A non-confidential version of any written documentation prepared by the undertakings which attended a meeting held by DG Competition, together with a brief note prepared by the services of DG Competition, will be made accessible in due time to the parties subject to the investigation, <i>i.e.</i> at the stage of access to file, if the case is further pursued. Subject to requests for anonymity, this note will mention the undertaking(s) attending the meeting, (or participating in the phone call relating to substantive issues) and the time and topic(-s) covered by the meeting (or such a phone call).</p>	<p>We agree with the Commission that it is good administrative practice to keep a record of every meeting (<i>cf.</i> the Ombudsman’s report on Article 19 interviews). Accordingly, we recommend that the Commission confirm that DG COMP will prepare notes of all meetings and conference calls and respectfully suggest that this be made explicit in the Investigation Best Practices.</p>
Footnote 37.	<p><i>AM&S</i>, paragraphs 21, 22 and 27. According to the case-law, the substantive scope of the protection of LPP covers also, further to written communications with an independent lawyer made for the purposes of the exercise of the client’s rights of defence, (i) internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice (<i>Hilti</i>, paragraphs 13, 16 to 18) and (ii) preparatory documents prepared by the client, even if not exchanged with a lawyer or not created for the purpose of being sent physically to a lawyer, provided that they were drawn up exclusively for the purpose</p>	<p>Pending the resolution of outstanding questions concerning LPP in the <i>AKZO</i> case, we consider that the Commission should refrain entirely from commenting on the application of LPP in the Investigation Best Practices. If the Commission considers it essential to do so, we recommend that it confine itself only to those points that are uncontroversial. We also recommend that the Commission confirm that it will submit disputes as to the application of LPP to the Hearing Officer in the first instance.</p>

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	<p>of seeking legal advice from a lawyer in exercise of the rights of the defence (<i>Akzo</i>, paragraphs 120 to 123). As for the personal scope of the protection of LPP, it only applies to the extent that the lawyer is independent (<i>i.e.</i>, not bound to his client by a relationship of employment); in-house lawyers are explicitly excluded from LPP (irrespective of their membership of a Bar or Law Society or their subjection to professional discipline and ethics or protection under national law: <i>AM&S</i>, paragraphs 21, 22, 24 and 27; <i>Akzo</i>, paragraphs 166 to 168; the <i>Akzo</i> judgment is currently under appeal with regard to the exclusion of communications with in-house lawyers from the scope of LPP). Moreover, according to the case law, protection under LPP applies only to lawyers entitled to practise their profession in one of the EU Member States, regardless of the country in which the client lives (<i>AM&S</i>, paragraphs 25 and 26). Finally, it shall be observed that the protection of LPP covers, in principle, written communications exchanged after the initiation of the administrative procedure that may lead to a decision on the application of Articles 101 and/or 102 TFEU EC or to a decision imposing a pecuniary sanction on the undertaking; this protection can also extend to earlier written communications which have a relationship to the subject-matter of that procedure (<i>AM&S</i>, paragraph 23).</p>	
Para. 50.	<p>Where, in the course of an inspection, DG Competition considers that the undertaking has provided no evidence or explanations for the purposes of proving that the document concerned is covered by LPP, has only invoked reasons that, according to the applicable case-law, are clearly unfounded to justify such protection, or bases itself on factual circumstances that are manifestly inaccurate, this will not prevent DG Competition from immediately reading the contents of the document and taking a copy of it (without using the procedure of the sealed envelope). However, where, in the course of an inspection, DG Competition considers that the material presented by the undertaking is not of such a nature as to prove that the document in question is protected by LPP under existing case-law, in particular where that undertaking refuses to give DG Competition officials a cursory look at a document, but it cannot be excluded that the document may be protectable, the officials may place a copy of the contested document in a sealed envelope and then remove it and bring it to DG Competition's premises, with a view to a subsequent resolution of the dispute.</p>	<p>We respectfully recommend that the Investigation Best Practices explicitly describe the safeguards that apply: (1) when making a copy of a document over which LPP has been claimed, (2) during transit of such a document, and (3) once such a document has been brought to Brussels.</p> <p>Recognising that frivolous attempts to assert LPP should be resisted, we would suggest that the Investigation Best Practices indicate that in cases of doubt the Commission will use the sealed envelope approach (<i>i.e.</i>, not read or copy the document). As highlighted by practice, legitimate disagreements about the application of LPP easily arise.</p>
Para. 51.	In cases where the undertaking has claimed the	Given that there is a gap between the

Para. Nr.	Text	Comment
	<p>protection of LPP and has provided reasons in order to substantiate its claims, the Commission will not read the contents of the document before it has adopted a decision rejecting this claim and allowing the undertaking concerned to refer the matter to the General Court. Thus, the Commission will not open the sealed envelope and will not read the documents if the company brings an action for annulment and applies for interim relief until the EU Courts have decided on this application for interim measures.</p>	<p>Commission's decision and the lodging of an application for annulment, we suggest that the wording be amended as follows: "Where an undertaking claims LPP over a document and has provided reasons to substantiate its claim, the Commission will not open the sealed envelope or read the document before it has adopted a decision rejecting the claim and the time limit for appeal of that decision has expired."</p>
Para. 55.	<p>In pursuit of this goal, and in addition to the information provided in accordance to paragraph 14 above, State of Play meetings will be offered at certain stages of the procedure. The objective of the State of Play meetings, which are completely voluntary in nature, is to contribute to the quality and efficiency of the decision making process and to ensure transparency and communication between DG Competition and the parties, notably to inform them of the status of the proceedings at key points in the procedure. State of Play meetings will only be offered to the parties being investigated and not to the complainant or third parties. If several parties are investigated, State of Play meetings will be offered to each party separately.</p>	<p>We consider that state-of-play meetings should be offered to complainants and third parties in appropriate circumstances in order to fulfil the Commission's duty of objectivity and impartiality.</p>
Para. 62.	<p>Any triangular meeting would normally take place at the initiative of the Commission and is voluntary for the parties. Triangular meetings are normally chaired by Senior DG Competition management. A triangular meeting does not replace the formal hearing.</p>	<p>We understand "Senior DG COMP management" to mean the Director or Deputy Director General (<i>see</i> ¶ 94). We suggest that the Investigation Best Practices confirm this expressly.</p>
Para. 64.	<p>It is normal practice to offer executive officers of the parties subject to the proceedings an opportunity to discuss the case either with the Director-General of DG Competition, the Deputy Director-General for antitrust, or when appropriate, with the Commissioner responsible for Competition, if the parties so request.</p>	<p>Given that the Commission benefits from the comments of complainants and third parties, we suggest that the Investigation Best Practices take a harmonized approach to the involvement of such parties. We understand that complainants are sometimes offered the opportunity to discuss the investigation with senior Commission officials, and we suggest that Investigation Best Practices expressly allow for this possibility.</p>
Para. 65.	<p>In the spirit of encouraging an open exchange of views allowing the parties to make their points in a timely manner, DG Competition will, in cases based on formal complaints, provide the parties, at the latest shortly after the opening of proceedings, with the opportunity of reviewing and commenting on a non-confidential version of the complaint. In case the complaint is rejected at an early stage without further in depth investigation (e.g. for lack of "Community interest"), DG Competition may however make an exception</p>	<p>We understand "at the latest shortly after the opening of proceedings" to mean that the Commission will also provide non-confidential versions of the complaint before the opening of formal proceedings. We consider that it is most efficient to provide a copy of the complaint to parties under investigation as early as possible. We would therefore recommend that the paragraph be amended as follows: "at the latest at the time of opening of proceedings, but if possible before the opening</p>

Para. Nr.	Text	Comment
	to this rule.	of proceedings”.
Para. 74.	<p>In addition to dispute resolution, the Hearing Officer is directly involved in certain parts of antitrust proceedings, including in particular the organisation and conduct of the oral hearing, if one is held. After the oral hearing, and taking into account the parties' written replies to the Statement of Objections, the Hearing Officer reports to the Commissioner responsible for Competition on the hearing and the conclusions to be drawn from it. Moreover, prior to a final decision being taken by the College of Commissioners, the Hearing Officer informs it whether any procedural issues of significance have arisen and, in particular, whether the right to be heard has been respected during the administrative proceedings. The final report is sent to the parties subject to the proceedings, together with the Commission's final decision, and is published in the Official Journal of the European Union.</p>	<p>We would recommend that the Investigation Best Practices recognise the possibility of involving a Hearing Officer at early stages in relation to certain matters. Input from a Hearing Officer, even if informal, may act as an additional safeguard and help resolve process issues that frequently lead to disagreement (e.g., the application of LPP).</p>
Para. 77.	<p>The Statement of Objections shall also clearly indicate whether the Commission intends to impose fines on the undertakings at the end of the procedure (Article 23 of Regulation 1/2003). In these cases, the Statement of Objections will refer to the relevant principles laid down in the Guidelines on setting fines.⁴⁸ In the Statement of Objections the Commission shall indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and that the infringement was committed intentionally or by negligence. To the extent possible, the Statement of Objections will also mention the facts that may give rise to aggravating and attenuating circumstances. Although there is no legal obligation in that regard, the parties will be invited to comment on all elements of importance for any subsequent calculation of fines, should the objections be upheld, including the relevant sales figures to be taken into account.</p>	<p>The Commission will be aware that it is required to set out in sufficient detail the manner and importance of any factors it regards as aggravating. Accordingly, we suggest that the paragraph be amended to reflect this.</p>
Para. 89.	<p>The Commission may, in the interests of fair and effective enforcement, give one or more of the parties a copy of the non-confidential version (or specific excerpts thereof) of the (other) parties' written replies to the Statement of Objections and give them the opportunity to submit their comments. The Commission may also decide to do so in appropriate cases with respect to complainants and third parties which have a sufficient interest to be heard.</p>	<p>We encourage the Commission to comment on the definition of “appropriate cases” when referring to the possibility of sharing with complainants and third parties the parties' written replies to the SO.</p>
Para. 101.	<p>Article 9 of Regulation 1/2003 introduces the possibility for undertakings to submit voluntarily commitments that are intended to address the competition concerns identified by</p>	<p>We encourage the Commission to note explicitly that, in circumstances where commitments are rejected, DG COMP will provide a full explanation of the reasons for</p>

Para. Nr.	Text	Comment
	the Commission. If the Commission accepts these commitments ⁵⁶ , it may adopt a decision which makes them binding on the parties subject to the proceedings. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.	rejection in its decision.
Paras. 131-132.	<p>Immediately after the decision has been adopted, the parties shall be informed of the decision. DG Competition endeavours to send a courtesy copy of the working document to the parties. A certified copy of the full text of the decision as well as a copy of the final report of the Hearing Officer shall then be notified to the parties by express courier service.</p> <p>A press-release will be published after the adoption of the decision by the Commission. The press-release describes the scope of the case and the nature of the infringement. It also indicates (if appropriate) the amount of fines for each undertaking concerned and/or the remedies or commitments accepted.</p>	Because the level of any fine may be price sensitive information and could cause disruption to trading, we recommend that the Investigation Best Practices confirm that announcements will be made before stock exchange hours in Europe (<i>e.g.</i> , before 9am CET).

Hearing Officer Best Practices

Para. Nr.	Text	Comment
Paras. 7 and 62-63.	Whilst the Hearing Officers oversee procedural matters, have decision-making powers and adjudicate disputes in this respect, they may also make observations on substantive issues to the Commissioner. They usually submit such observations, if any, when reporting to the Commissioner on the oral hearing. More generally, they may throughout the proceedings make observations to the Commissioner on any matter arising from the proceedings.	As explained above, we welcome the confirmation that the Hearing Officer may comment on substantive issues. We understand from the text of the Hearing Officer Best Practices that the Hearing Officer is free to comment on any matter of substance including the level of any fine and recommend that the wording of paragraphs 7, 62, and 63 be amended to reflect this. We also recommend that the Hearing Officer Best Practices (and if necessary the Hearing Officer's mandate) be amended to (1) make the Interim Report public, and (2) to allow Hearing Officers to make substantive comments also in the Final Report.
Para. 16.	Contrary to an addressee of a Statement of Objections, complainants or other third parties admitted to the proceedings do not have a right to access the Commission's investigation file.	As explained above, we consider that the Commission should harmonize its treatment of complainants and third parties, in particular because the Commission considers these comments to be beneficial and because of the Commission's duty to act fairly and impartially. We suggest that the Hearing Officer Best Practices allow for the possibility of complainants and other third parties accessing non-confidential versions of the file in appropriate cases (just as they often receive a non-confidential version of the SO).
Para. 22.	The Hearing Officer will carry out an independent review of the documents concerned, and consider the arguments of the parties and those of DG Competition to firstly, determine whether the information is confidential <i>per se</i> . If the Hearing Officer comes to the conclusion that the confidentially claim is merited, it will, secondly, carry out a balancing test whereby the legitimate interests of an undertaking to have its confidential information protected will be weighed against the addressee's interest to be effectively heard on the information in question. If, following the balancing test, the Hearing Officer reaches the preliminary conclusion that the information must be fully or partially disclosed, the information provider will be informed of the preliminary conclusion and the reasons for it (often referred to as a "pre-Article 9 letter"). The information provider will be granted a deadline within which it can make known its views on the Hearing Officer's preliminary position. On the other hand, should the Hearing Officer find that the confidentiality claim is justified and that the information cannot be disclosed, the requesting party will	We suggest that the criteria for " <i>per se</i> " confidentiality be explained in the Hearing Officer Best Practices.

Para. Nr.	Text	Comment
	be informed thereof. In practice, many confidentiality disputes are resolved at this stage of the procedure.	
Para. 27.	It should be noted that deadlines will normally start running when access to the main documents in the file has been granted, which would allow the addressee to start analyzing the objections raised against it. The fact that access to the entire file has not, in the addressee's view, been granted does not have the automatic consequence that a deadline set by DG Competition has not started running.	Given that (1) the parties and the Commission may have different views as to what constitutes a "main document" and (2) it often cannot be determined whether a document is a "main document" until the party under investigation has had the opportunity to review it, we suggest that the deadline start to run after the party under investigation has been allowed to access the whole file (correctly organised).
Para. 57.	The Hearing Officer may allow questions on any of the issues raised by a written or oral submission to be addressed to any participant by any participant. In principle, questions asked should be answered during the Oral Hearing. In the event that they cannot be answered in whole or in part, the Hearing Officer may allow a party to submit its reply in writing within a given deadline. Any such written response will, in principle, be distributed to all participants at the Oral Hearing.	We welcome the formalisation of the possibility to question the Commission's staff, as well as the representatives of the other parties under investigation. Subject to exceptions (<i>e.g.</i> , for confidentiality), we would encourage the Hearing Officers to allow as much interactive discourse and debate as possible. We consider that intense questioning of, in particular, Commission officials may assist in the "establishment of the truth" (<i>cf.</i> para. 42) and procedural fairness. In this regard, we recommend that the Hearing Officer Best Practices clarify expressly that questioning of the Commission officials will be endorsed.

Economic Best Practices

Para. Nr.	Text	Comment
Footnote 1.	Infringements " <i>by object</i> " do not require any substantive economic analysis because empirical evidence has shown that they generally lead to serious anti-competitive effects. However, the investigation of potential infringements " <i>by effect</i> " often requires a complex economic assessment by the Commission	We do not agree that this is "generally" the case. The ECJ's recent decision in <i>Glaxo</i> demonstrates that the distinction between object and effect is not always clear and accordingly, it is not right for the Commission to dismiss the need for economic assessment summarily. We recommend that this footnote be deleted.
Para. 8.	The principles contained here may be further developed and refined by DG Competition in individual cases when appropriate in light of future developments. The specificity of an individual case or particular circumstances may require an adaptation of, or deviation from, these Best Practices	We welcome the Commission's willingness to approach cases in a pragmatic way. In this regard, we recommend that the Economic Best Practices note expressly that (1) flexibility is required in circumstances where data is not readily available or easy to collate, and (2) the Commission will inform parties under investigation of any intention to deviate from the Economic Best Practices in specific cases, giving reasons.
Para. 12.	By their very nature, economic models and arguments are based on simplifications of reality. It is therefore normally not sufficient to disprove a particular argument or model, to point out that it is "based on seemingly unrealistic assumptions". It is also necessary to explicitly identify which aspects of reality should be better reflected in the model or argumentation, and to indicate why this would alter the conclusions.	Correcting an unsatisfactory model might not lead to "altered" conclusions, but it might lead to a finding that no conclusion may be reached.
Para. 22.	Second, not all facts can be observed or measured with high accuracy and most datasets are incomplete or otherwise imperfect. Hence, parties and/or DG Competition should become familiar with the facts and data and acknowledge its limitations explicitly. As regards quantitative data, for example, this requires (i) a thorough inspection of the data, including summary statistics and graphs, and (ii) a sufficient understanding of how the data were gathered, the sample selection process, the measurement of the variables and whether they bear a close relationship with their theoretical counterparts. Quantitative data may contain anomalies because of miscoding or other errors, which should be discussed with the data providers to decide how to best adjust the data to address these problems.	We recommend that the Economic Best Practices specify that DG COMP or the CET will note expressly in any report or the decision how data have been adjusted and why. Further, the Commission or the CET should note how the identified potential flaw may/would affect the results of the analysis.
Para. 49.	DG Competition is aware of the costs that its procedures may impose on undertakings. One of the objectives of this section is, therefore, to provide recommendations to reduce the burden on the involved parties and DG	We welcome the Commission's express recognition that economic requests can generate significant cost and work for undertakings.

Para. Nr.	Text	Comment
	Competition posed by the production and processing of quantitative data, while at the same time ensuring and enhancing the effectiveness of DG Competition's substantive review.	
Para. 52.	DG Competition will endeavour to ask for the adequate amount of data required to carry out the required analyses. DG Competition is mindful of time constraints and must balance the usefulness of each request against the opportunity cost of the time the request will consume as a proportion of the time left before any legal or procedural deadline. In appropriate cases, DG Competition may discuss in advance with the addressees or other affected parties the scope and the format of the data request.	<p>We welcome the formalisation of the possibility to discuss the scope and format of requests with the Case Team. This represents a useful and constructive way to minimise delays and to ensure that the Commission receives responsive information. We suggest that the wording be revised to reflect the following:</p> <ul style="list-style-type: none"> • “In advance” means before the information request is issued formally (<i>i.e.</i>, before the deadline starts to run); • These discussions are intended to elicit ways in which information may be provided to the Commission in a proportionate and non-burdensome way; and • The Commission will try to adopt a flexible approach in relation to modifications or possible limitations (<i>cf.</i> the approach taken by the U.S. Department of Justice). <p>We recommend that the Commission's practice should be to issue all substantial information requests in draft form, so that any ambiguities can be resolved efficiently.</p>
Para. 63.	It is strongly encouraged that problems of missing data are flagged to DG Competition well in advance of the deadline for compliance with the data request to allow, if appropriate, for either a modification of the request or an extension of the deadline. Any data missing from the original data request must be adequately justified. In any event, a response to a data request may not be considered complete unless accompanied by a memo:	We would encourage a discussion (at an early stage) not only of "missing" data but also of data that is not easy to collate or not readily available.