

**COMMENTS OF CLIFFORD CHANCE LLP ON THE EUROPEAN COMMISSION'S
GUIDANCE ON (I) BEST PRACTICES FOR THE SUBMISSION OF ECONOMIC
EVIDENCE (II) BEST PRACTICES IN ANTITRUST PROCEEDINGS AND
(III) GUIDANCE ON PROCEDURES OF THE HEARING OFFICER**

1. INTRODUCTION AND SUMMARY

- 1.1 Clifford Chance LLP welcomes the opportunity to comment on the documents published by the European Commission (the "**Commission**") setting out: (i) Best Practices for the Submission of Economic Evidence"; (ii) Best Practices in Antitrust Proceedings and (iii) Guidance on Procedures of the Hearing Officer (together, the "**Best Practices Papers**").
- 1.2 Our comments are based on the experience that lawyers in our Global Antitrust Group have gained through advising on antitrust investigations under Articles 101 and 102 of the Treaty on the Functioning of the EU ("**TFEU**") and merger clearances under the EU Merger Regulation. With offices in eleven EU countries, and having coordinated advice to clients on investigations in all major jurisdictions in the EU and worldwide, that experience is substantial and wide ranging. However, the comments in this response do not necessarily represent the views of every Clifford Chance lawyer, nor do they purport to represent the views of our clients.
- 1.3 As a preliminary point, we would have preferred to have had the opportunity to comment on these papers *before* they were put into practice. It is clear that in a number of respects they do more than simply codify the existing practice of the Commission. We therefore consider that prior consultation would have been more appropriate in this case and would have afforded the Commission the opportunity to address concerns as to the methods adopted by the Commission in its investigations.
- 1.4 As regards the content of the papers, we welcome the Commission's efforts to increase procedural transparency and efficiency, and consider that these three documents make a substantial contribution to that aim. However, we consider that in certain areas – as described in more detail below - they favour the interests of the Commission over those of the parties under investigation in ways that, in our view, either will result in greater procedural inefficiency and delay, or will undermine the fundamental rights and/or rights of the defence of those under investigation.
- 1.5 It is unfortunate, however, that the Commission did not seize this opportunity to revisit its current methods as regards its enforcement procedures. The Commission will appreciate the widespread concern in the legal and business community arising from the combination of the Commission's role as prosecutor and decision-maker, particularly when matched with the current practice of large fines and the relatively forgiving oversight afforded by the European Courts.
- 1.6 We consider this an opportunity missed for the Commission to embed assurances as to its modes of investigation and issues such as evidential standards that should be adopted and the need to give appropriate consideration to exculpatory evidence and lines of inquiry. The overarching concern is, therefore, that the Commission's

prosecutorial imperative has taken priority over the requirement of fairness. With this in mind, we must remain concerned that the "best practices" set out in the current documents address to a greater extent the form, rather than the substance, of procedural fairness. It is our hope that the recent announcement of a review of Commission procedures by Commissioner Almunia will seek to tackle these issues head-on. In that respect, while we have focused in this response on the text of the Best Practice Papers, we have been provided with a copy of the response of the International Chamber of Commerce's Commission on Competition to the Best Practices Papers, and endorse strongly the legal analysis and recommendations for reform that are contained in that paper.

- 1.7 Finally, we hope it is the intention of the Commission to follow the same approach to consolidation of the various procedural documents as it has taken in relation to the consolidated jurisdictional notice under the EU Merger Regulation. At present, for example, information on the role of the hearing officer is to be found in the hearing officer's mandate, in the guidance on procedures of the hearing officer and in the guidance on best practices in antitrust proceedings, which is likely to lead to confusion. We would advocate consolidating the relevant provisions and guidance into a single document.

2. BEST PRACTICES FOR THE SUBMISSION OF ECONOMIC EVIDENCE

- 2.1 As a general comment, we consider that this paper provides sensible guidance on the content and presentation of economic submissions, and useful clarification of DG Competition's approach towards requests for quantitative data. Of particular importance, in our view, are the opportunities for parties to liaise with the Commission in order to refine the scope of data to be provided, and to confirm how they should be presented. This helps to ensure that data requests are proportionate, not only with respect to the difficulty, time and cost involved in retrieving the data, but also with respect to the necessity of the data itself. As the General Court has noted, "*it is necessary that an obligation imposed on an undertaking to supply an item of information should not constitute a burden on that undertaking which is disproportionate to the requirements of the inquiry*".¹ This aspect of the principle of proportionality is not referred to anywhere in the paper. We consider that it should be referred to, given the threat of fines for incomplete or late supply of information.
- 2.2 In our experience, it is not uncommon for clients to expend substantial resources on collecting information that is not, in the event, considered by the Commission to be material to its final decision, or which involved a disproportionate burden on the client, given the relative unimportance of the facts that it sought to establish, its relevance to the establishment of those facts, the unlikelihood of the theory of harm that it sought to verify, or the availability of other data that would have been adequate for the desired purpose. While we recognise that the Commission has a considerable degree of discretion in determining the reasonable necessity of the data that it requests, it would contribute greatly to the efficiency of the investigative process if the Commission were prepared, routinely, to explain why it considers that the information

¹ Case T-145/06, *Omya AG v. Commission*, judgment of the General Court of 4 February 2009, paragraph 34.

requested may be necessary, and offer the parties the opportunity to correct any misunderstandings upon which it has formed that view and to submit their views on the proportionality of the data request.

- 2.3 Our specific comments on the text of the paper are as follows.
- 2.4 Footnote 1 (page 3): It is suggested in this footnote that infringements "by object" do not require any substantive economic analysis because empirical evidence has shown that they generally lead to serious anti-competitive effects. However, this statement does not take into consideration the importance of establishing whether there was, in fact, an impact on the relevant market which should be a relevant factor in calculation of fines and in relation to defending follow-on damages claims. In addition, even if economic evidence were not considered appropriate to infringements "by object" (e.g. minimum RPM), it is always open to the parties to argue that conduct caught by Art 101(1) meets the criteria for exemption under Art 101(3), and economic evidence will often be relevant to an assessment under Art 101(3). We therefore submit that economic analysis *is* relevant to "by object" cases.
- 2.5 Paragraph 8: In circumstances where "the specificity of an individual case or particular circumstances [requires] an adaptation of, or deviation from these Best Practices", we suggest that the paper should make it clear that DG Competition will inform the parties in advance of its intention to deviate from the best practices and of its reasons for such deviation. If the Commission can depart from established best practice without justification, the paper's contribution to legal and procedural certainty will be considerably diminished.
- 2.6 Paragraphs 52-54: Paragraph 52 indicates that the Commission will be open to discussing the scope and presentation of data with the parties in advance of a data request, where appropriate. As noted above, we consider the possibilities that are discussed in the paper for such consultation are important for the avoidance of unnecessary and/or disproportionate work and delay in the preparation of submissions. Accordingly, we submit that the Commission should be amenable to *any* request of the parties for such a discussion, unless this would prejudice the Commission's investigation. In particular – and in keeping with statements in paragraphs 70-73 of the paper – if prior consultation regarding the scope of a data request is not possible, the parties should be offered the possibility to discuss these issues after they have received the request.
- 2.7 Clifford Chance has been involved in at least one case in which the case team has refused to ask third parties questions that the party under investigation believed would yield exculpatory evidence.² Given that such refusals give rise to a clear risk that the Commission would be found on appeal to have failed to fulfil its obligation to examine the case with diligence and impartiality,³ we consider that the Commission

² We note that similar issues also arose in the *Intel* case, but at a much later stage of the investigation. See the Final report of the Hearing Officer in Case COMP/C-3/37.990 — *Intel*, OJ 2009 C227/7.

³ See, for example, the comments of the President of the General Court in Case T-457/08 R, *Intel Corp v. Commission*, paragraph 63.

should take this opportunity to set out the criteria and considerations it will take into account when deciding whether to accede to a request to ask a third party for particular information or documents that are believed to be exculpatory. We have also been involved in cases in which the questions that were put to third parties were leading, and appeared to have been designed to elicit information that was incriminating to the parties while at the same time minimising the possibilities for respondents to provide information of an exculpatory nature. Consequently, we submit that due process requires the parties under investigation to be given the opportunity to review and comment on a draft of third party questionnaires before they are sent out.

- 2.8 Paragraph 57: We welcome the recognition that the difficulty and cost of retrieving data should be taken into account by the Commission on a case-by-case basis when settling deadlines. Again, in the interests of efficiency, we submit that in such cases deadlines should be set in consultation with the relevant parties, wherever possible. In our experience, a deadline that is determined in advance through informal discussions with the parties is both more likely to be met, and more likely to yield good information in response, than one imposed unilaterally by the Commission (even if the latter is based on prior discussions regarding general availability of data). Informal prior discussion of relevant timing considerations is quicker and more efficient than the formal process for requesting an extension of a deadline that has already been set, which means that parties are more able to focus their resources on gathering the relevant data.
- 2.9 Moreover, it would be helpful to clarify the reference to Commission information requests not being limited to "data that is readily available to the parties". As noted below (comment on paragraph 61), an information request cannot compel the parties to purchase or otherwise provide data that is not within their possession/control (even if not in a readily-accessible format for purposes of the information request). It would also be helpful to acknowledge, in this regard, that the Commission will always consider the proportionality of any information requests where data is not readily available, and consider whether the submission of alternative information would satisfy the Commission's requirements. (This also applies to the reference to "data that is readily available to the parties" in paragraph 70.) See further our comments in paragraph 2.1 above.
- 2.10 Paragraph 61: Given the extremely large scope of data requests that are often sent out in antitrust and merger control investigations, the unqualified statement regarding the Commission's power to impose fines for any intentional or negligent supply of incorrect, misleading or late information seems to us excessive. We suggest that it would be appropriate to clarify that the Commission would only consider imposing fines if the relevant omission or failure is significant, and if the relevant information is ultimately material to the Commission's final decision. In addition, this paragraph should, in our view, explain that an undertaking will not be found to have submitted incomplete information in respect of requested data that was not in its possession at the time of the request. Undertakings may choose to purchase data from third party

aggregators, or to commission market research surveys in order to assist the Commission with its investigation, but an information request cannot compel them to do so.

- 2.11 Paragraph 65: Given the threat of fines for the supply of incorrect data, and the fact that responding to a data request can involve the collation of thousands or even millions of data items, we suggest that the Commission offers parties the opportunity to confirm in advance the consistency checks that will be deemed by the Commission to be sufficient in respect of the requested data.
- 2.12 Paragraph 74: This paragraph states that reductions in the scope of data requests will only be accepted if they do not "risk harming the investigation and may trigger, particularly in merger cases, a reduction in the deadline for response initially anticipated". This seems to us to be an unreasonable fetter on the Commission's discretion. For example, it may also be appropriate to accept reductions in the scope of a data request if it becomes clear that the data initially requested was unnecessary or disproportionate (see our comments in paragraph 2.1 above), or if it would allow the parties to meet the initially anticipated deadline, in circumstances where they would not otherwise have been able to do so.

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

- 3.1 Our overall view on the paper on Best Practices in Article 101/102 Proceedings is that it is a useful clarification and summary of the Commission's practice and procedure, but that in certain areas it favours the interests of the Commission over those of the parties under investigation in ways that, in our view, either will result in greater procedural inefficiency and delay, or will undermine the procedural rights of those under investigation. In particular, the robustness of the document would be substantially improved if it contained a greater emphasis on the parties' rights of defence, (in accordance with the European Convention on Human Rights ("ECHR") and the Charter of Fundamental Human Rights), and elaborated on the internal mechanisms within DG Competition that serve those purposes.
- 3.2 In that respect, one comment which applies to the entire paper is that it makes no reference to the Commission's duty to investigate cases in a fair and impartial manner.⁴ While we recognise that these issues have been examined many times previously, it remains the case that the Commission's role as investigator, prosecutor and, ultimately, first instance judge of Article 101 and 102 infringements necessitates the use of rigorous institutional checks and balances. Otherwise, it can become rapidly difficult for the parties under investigation to avoid the impression that the case team has already made up its mind, is cooperating closely with complainants to "build the case" against the undertaking in question, and/or is reluctant to drop a case on which it has expended so much time and resources. In the absence of more far

⁴ For example, the paper makes no reference to the *Code of good administrative behaviour for staff of the European Commission* (OJ 2000 L267/63), which imposes a duty on Commission staff to, among other things, act impartially and objectively.

reaching and effective reforms (see paragraph 1.6 above), mechanisms such as the use of internal peer review panels at an appropriate stage of the investigation and the involvement of the Commission's legal services in assessing the robustness of the Commission's case can make important contributions in this respect, and should be described in the paper as part of the Commission's best procedural practice. In that respect, as emphasised at paragraph 1.5 above, we consider this an opportunity missed by the Commission and consider that, on the whole, the Best Practices Papers give priority to the form, rather than substance, of procedural fairness.

- 3.3 In this context, we consider that fairness dictates that "best practices" should require the Commission to adopt transparent, stringent and indeed, onerous, protocols relating to its evidential standards and processes. In particular, in circumstances where the Commission is deploying fines of incredible proportions, it is incumbent on its investigators to ensure that the factual bases of its decisions are robust. Too often, our experience is that the Commission works towards achieving a credible story and marginalises evidence of an exculpatory nature and leaves lines of obvious enquiry unexplored. The case law of the European Courts is such that it is forgiving on these frailties of investigative process and we consider that the Commission should take it upon itself to self-regulate in this regard. It is our hope that the recent announcement by Commissioner Almunia to revisit the Commission's investigative procedures will result in this outcome.
- 3.4 Our specific comments on the text of the paper are as follows.
- 3.5 Paragraph 3: The paper states that it does not cover the Commission's leniency and settlement procedures. However, it makes a number of points that should be of general application to *any* Commission investigation under Arts 101 and 102 (e.g. provisions relating to the very early stages of the Commission's investigation, provisions relating to languages, information requests, meetings (in general), legal professional privilege, etc.) and those provisions should apply regardless of whether a party has applied for leniency or is engaged in the settlement procedure. It would be helpful if the paper were amended to make clear that certain provisions are of general application and will apply in all Art 101 and 102 investigations.
- 3.6 Paragraph 5: This paragraph indicates that DG Competition may deviate from its stated best practices. Our comments in respect of paragraph 8 of the paper on best practices for the submission of economic evidence (see paragraph 2.5 above of this response) apply equally to this statement.
- 3.7 Paragraph 14: We welcome the innovation of explaining the privilege against self incrimination in the context of information requests. Given the impending accession of the EU to the ECHR, the Commission should take this opportunity to ensure that such explanations are consistent with the case law of both:
- 3.7.1 the Court of Justice of the EU and, in particular, the statements of the General Court in *Tokai Carbon v. Commission* indicating that the right not to answer questions that require an admission of participation in an infringement of EU

competition rules can in certain circumstances extend to requests for pre-existing documents⁵; and

- 3.7.2 the European Court of Human Rights and, in particular, *Saunders v United Kingdom*⁶ and *J.B. v Switzerland*.⁷
- 3.8 We also welcome the provision for the Commission to inform the parties subject to the preliminary investigation of the status of the case. However, we consider the Commission should undertake to do this in *all* Art 101 and 102 investigations (i.e. including cartel investigations), and where requested by the parties should do so prior to sending a Statement of Objections ("SO"). See further our comments on State of Play / Triangular meetings below.
- 3.9 Paragraphs 20 and 21: We agree that the opening of proceedings must not be misunderstood as indicating that an infringement has taken place. However, the Commission should recognise that such misunderstandings can arise easily, and that inferences may be drawn (on the assumption that "there's no smoke without fire"), no matter what caveats are included in its public statements. The most appropriate way to mitigate this risk is to refrain from naming the parties under investigation, or confirming any speculation in the press as to their identity. While we understand this to be the Commission's general practice, it would be helpful if this were included in its Best Practices. If the Commission considers that it must identify those under investigation, it should, in our view allow the parties: (i) the opportunity to comment on the Commission's draft press release, to ensure that it is not inadvertently misleading; and (ii) sufficient time to prepare their response to the initiation of proceedings and any subsequent queries from customers. See also our comments in 3.24 below regarding publicity surrounding the sending of an SO.
- 3.10 In addition, the Commission's current practice appears to be to open proceedings before the parties have responded to the Commission's questions, and without first giving the parties the opportunity to comment on the allegations that are being investigated. While we recognise that an early initiation of proceedings may be attractive to the Commission because it precludes national authorities from deciding on the subject matter, that does not, in our view, justify taking this formal step before the parties under investigation have had the opportunity to respond to the allegations against them. We consider that before the Commission opens proceedings, it should at least meet with the relevant parties to explain why it intends to do so, and to give them the opportunity to correct any misunderstandings that may have arisen on the part of the case team.
- 3.11 Paragraphs 24-29: It would be helpful if the Commission would set out, in the section relating to languages, what its policy is towards the submission of documents which are not in one of the official EU languages. Where the Commission sends information

⁵ Case T-236/01, *Tokai Carbon v. Commission*, judgment of the General Court of 29 April 2004.

⁶ App. No 19187/91, judgment of 17 December 1996 (Reports of Judgments and Decisions 1996-VI).

⁷ App. No 31827/96, judgment of 3 May 2001 (Reports of Judgments and Decisions 2001-III)

requests to European-based subsidiaries of non-EU undertakings, and the documents that are responsive to the requests are in a non-EU language, it is frequently necessary to liaise with the Commission on a case-by-case to ascertain which documents (or parts of documents) will need to be translated in order to satisfy the request. The Commission should also acknowledge in the paper that, for European-based subsidiaries faced with the need to translate large volumes of material, it will (i) consider carefully the proportionality of the request, and (ii) set the time-limit for responding to the request to take account of the additional work faced by the undertaking relative to other parties who may not be faced with such translation requirements.

- 3.12 Footnote 27, paragraph 25: It should be sufficient for a party's lawyers (provided they have the usual authorisation to act, by way of Power of Attorney) to sign language waivers for their clients.
- 3.13 Paragraphs 31 to 36: See our comments above on the paper on best practices for submission of economic evidence (and, in particular, paragraph 2.7 above). While we recognise that the two week timeframe referred to in this paragraph for "substantial" requests is expressed as a minimum, we are concerned that it might become a de facto standard deadline. In our experience, two weeks is almost always too little time to prepare a complete and accurate response to a substantial data request. In addition, a maximum one week deadline for the provision of "readily available" information will usually be unrealistic, particularly if a large volume of data is requested.
- 3.14 Paragraph 40: Paragraph 40 of the paper provides for a brief, non-confidential, note of meetings with DG Competition to be placed on the file. While we understand that the note of a meeting that is prepared by DG Competition is intended to describe the topics discussed at the meeting in only the briefest of terms (i.e. to indicate to third parties the general purpose and content of the meeting), that does not eliminate the risk of disclosure of confidential material of undertakings that attended the meeting, if it is placed on the file. Consequently, we consider that those undertakings should have the opportunity to review the note for confidential information and to request appropriate redactions, before it is placed on the file.
- 3.15 In addition, we consider that as a matter of best practice a detailed note of *all* meetings between DG Competition and a party to the proceedings should be drawn up and agreed by both sides. This should form part of the 'confidential' file accessible to the party to the proceedings who attended the meeting, and would serve to avoid any confusion as to what was discussed and agreed at the meeting. We would suggest that the note should be drawn up by DG Competition and sent to the party for their comments; in the event of disagreement, the party's objections (and, where applicable, alternative version of events) should be placed on the file alongside the meeting note prepared by DG Competition.

3.16 Paragraph 50: While this paragraph largely reproduces the statements of the General Court in *Akzo*⁸ regarding the sealed envelope procedure, it deviates in a few important respects:

3.16.1 First, where an undertaking considers that a cursory look at a document is impossible without revealing its privileged content, and gives the Commission officials appropriate reasons for its view, it *is* entitled (not "may be" entitled) to refuse to allow the Commission to take such a cursory look.

3.16.2 Second, it is indicated that in order for the sealed envelope procedure to be applied, the undertaking under investigation must provide "evidence or explanations *for the purpose of proving that the document concerned is covered by LPP*" (emphasis added) and that if it does not, the Commission will immediately read the contents of the document. However, if the party concerned cannot even offer the Commission a cursory glance at the document without revealing privileged content, we do not see what other proof it could provide of its privileged nature. Indeed, the General Court in *Akzo* was quite clear that "where the Commission is not satisfied with the material and explanations provided by the representatives of the undertaking for the purposes of proving that the document concerned is covered by LPP, the Commission *must not read the contents of the document before it has adopted a decision* allowing the undertaking concerned to refer the matter to the [General Court], and, if appropriate, to make an application for interim relief"⁹ (emphasis added). In line with the statements of the General Court, paragraph 50 of this paper should explain that the sealed envelope procedure will be available to the parties wherever they can give "appropriate reasons" for their view that a cursory look is impossible without revealing the privileged contents of the document, without adding additional requirements to prove that privilege applies.¹⁰ To this end, the paragraph should also state that officials *must* (not "may") place a copy of the contested document in a sealed envelope.

3.16.3 Third, it is stated that Commission officials will remove the sealed envelope "and bring it to the Commission's premises". The General Court did not indicate where the disputed documents should be taken. It stated only that the procedure should enable the Commission to "retain a certain control over the documents forming the subject-matter of the investigation" while at the same time "avoiding the risk that the documents will subsequently disappear or be manipulated."¹¹ We submit that the interests of the Commission and of the parties under investigation would be more fairly balanced if documents that

⁸ Joined Cases T-125/03 and T-253/03, *Akzo Nobel v. Commission*, judgment of the General Court of 17 September 2007.

⁹ *Akzo*, cited above, paragraph 85.

¹⁰ Abuse of the sealed envelope process would be more appropriately dealt with through the imposition of fines under Article 23(1) of Regulation 1/2003, than the insistence of the Commission on reading all documents that the parties cannot prove to be covered by LPP without revealing privileged material.

¹¹ *Akzo*, cited above, paragraph 83.

may be legally privileged are placed with an independent third party and/or a Hearing Officer while the matter is adjudicated.

- 3.16.4 Fourth, we consider that it is of the utmost importance that documents upon which there is a reasonable disagreement as to their status should not be viewed by anyone within the case team until that dispute is resolved. That is standard practice in almost all other investigatory contexts and the Commission should fall into line in this regard. This is of particular importance given the finding of the President of the Court of Justice that an examination of documents by DG Competition, even a cursory one, may prejudice the parties ability to establish the requisite criterion of urgency in an application for interim measures.¹²
- 3.17 In addition, the Commission might consider giving the Hearing Officer a role in overseeing the Commission's decision as to whether to reject a claim of legal privilege for documents placed in a sealed envelope.
- 3.18 Paragraphs 54-60: We welcome the innovation of offering State of Play meetings on a more regular and consistent basis. However, we do not agree with the suggested approach of not offering such meetings in the context of cartel proceedings. We do not see why cartel proceedings are so fundamentally different that the parties should not have opportunities to discuss with the Commission the status of the case against them and to raise issues that are of particular importance.
- 3.19 In addition, the timings of State of Play meetings as currently proposed are, in our view, too late in the process, and too inflexible to allow the parties and DG Competition maximum benefit. In particular, we consider that there are, at minimum, four stages in the process at which a State of Play meeting would be appropriate (although more frequent contacts between the case team and the parties may be beneficial in many cases):
- 3.19.1 first, at an early stage in the procedure, prior to the opening of proceedings. In the context of cartel cases, in particular, a State of Play meeting "shortly after the opening of proceedings" (which, in cartel cases, usually equates to the issuance of an SO) is, in our view, often too late in the day: by the time the Commission issues a SO, it has already formed a view (albeit preliminary) of the allegations it intends to pursue. We consider that a State of Play meeting much earlier in the proceedings (e.g. shortly after an unannounced inspection or an initial information request) would be helpful both to the parties (who may, as a result of information gleaned, then elect to submit a leniency application or consider the settlement procedure) and for DG Competition, in scoping the case going forward. We also note that, in the context of the Best Practices in Merger Proceedings, provision is made for *three* State of Play meetings prior to issuance of an SO;

¹² Order of the President of the Court of 27 September 2004 in Case C-7/04 P(R), *Commission v. Akzo Nobel Chemicals Ltd and others*, paragraph 42.

- 3.19.2 second and third State of Play meetings could usefully take place: (i) before the issue of the SO; and (ii) after the response to the SO and the oral hearing; and
- 3.19.3 a fourth and final State of Play meeting, prior to the issue of a decision, would be of benefit, in particular where an offer of commitments has been made. This could be prior to the Advisory Committee meeting, as is the case for the Best Practices in Merger Proceedings.
- 3.20 The Commission might also consider implementing a greater degree of flexibility in the timing of State of Play meetings. In particular, it may be procedurally more efficient in some cases for a State of Play meeting to be held between the issue of the SO and a party's response (e.g. in order for the party to clarify any points that are unclear in the SO, or to assist the party in deciding whether to request an oral hearing). There may also be instances in which it would be useful to have a State of Play meeting after a party's response to the SO, but before it has made its decision as to whether to request an oral hearing.¹³
- 3.21 Finally, we would suggest specific amendments to the paper as currently drafted insofar as it relates to State of Play meetings. Specifically, at paragraph 55 it would be helpful to clarify whether these meetings are "voluntary in nature" for both the parties *and DG Competition*, or whether DG Competition is bound to agree to a meeting if requested at a point in the proceedings that has been recognised as appropriate for such a meeting to take place. It would also be helpful to clarify whether declining to attend a State of Play (or Triangular) meeting offered by DG Competition may be construed in any way as non-cooperation, either within the scope of the Leniency Notice or otherwise. At paragraph 55 we would also suggest mirroring the wording of the Best Practices in Merger Proceedings to clarify that State of Play meetings do not preclude other communications between the Commission and the parties. At paragraph 56 we suggest including that an agenda for such meetings should be agreed in advance, in line with the Best Practices in Merger Proceedings; and, as noted above, at paragraph 60 we would advocate allowing for State of Play meetings also in the context of cartel investigations.
- 3.22 Paragraphs 61-62: Given the current proposal not to hold State of Play meetings in cartel investigations, we assume the Commission proposes to apply this also to Triangular meetings. We do not consider that Triangular meetings would be workable in the context of cartel investigations. While State of Play meetings allow both sides the opportunity to communicate and better understand each other's position, in the context of proceedings where parties' interests are often pitted against each other, a Triangular meeting is likely to achieve little. It would be helpful if this were included in the text of paragraphs 61-62 to clarify the position – especially if the Commission does amend the Best Practices to take on board our comments regarding State of Play meetings in cartel proceedings. Moreover, the paper could usefully clarify whether a

¹³ Although in order to facilitate that possibility, the Commission would need to express a policy that in such circumstances it will not refuse a request for an oral hearing solely on the basis that the request was made after the submission of the response to the SO.

party must choose between having a State of Play meeting or a Triangular meeting at any given stage in the process – in our view that should not be the case, as having concurrent State of Play and Triangular meetings can be a useful and effective way to work through difficult and/or contentious issues.

- 3.23 Paragraph 71: While we agree that it ought to be the case that "the adoption of a Statement of Objections does not prejudice the final outcome" of the procedures, we think it is stretching the truth to state that an SO "may well lead to the closing of the case without the adoption of a prohibition decision or a commitment decision". Our brief review of cases closed since the entry into force of Regulation 1/2003 suggests this has happened only three times in that period.¹⁴ We suggest that the paper could emphasise here that the Commission's duty to consider the case impartially and fairly is in no way affected or diminished by the sending of an SO. Similarly, in paragraphs 72 to 74, we suggest that it would be appropriate in these paragraphs also to refer to DG Competition's obligations of fairness and impartiality, given that the right to be heard is of little consequence if the listener is not impartial.
- 3.24 Paragraph 79: Since the SO does not establish that there actually is an infringement, we believe that it is too soon to start naming any party by means of publication of the key issues listed in the SO. Although the Commission states that "the issuing of the Statement of Objections does not prejudice in any way the existence of an infringement", the publication of names before an infringement decision has been adopted could have a very serious effect on a parties' business, not least in terms of customer attitudes towards the allegations. The Dutch court of appeal in a 2005 judgment ruled that the Dutch Competition Authority ("NMa") had acted unlawfully by publishing the findings of its "rapport" (comparable to an SO), in a press release. The court of appeal judged that the presumption of innocence of Article 6 ECHR implies that the NMa should be cautious with respect to the statements it issues, especially in press releases, since it is generally known that such publications directed to the general public are only read superficially, risking the diminishing of important nuances.¹⁵ For the same reasons, we consider it inappropriate for the Commission to publicise key issues contained in the SO.
- 3.25 Paragraph 82: The "use it or lose it" approach to confidentiality that is set out in this paragraph is inconsistent with the Commission's duty under Article 339 TFEU not to disclose information of the kind covered by the obligation of professional secrecy. A persistent failure to provide a non-confidential version of a submission does not relieve the Commission of this duty. In such circumstances, the Commission ought to perform its own redaction of information that clearly and obviously constitutes a business secret.

¹⁴ In the *UK and German Roaming* cases (Cases COMP/38.098 and COMP/38.097), and in Case COMP/38.624 - *Deep-sea maritime transport of bulk liquids*.

¹⁵ See also the payment and apology by the UK's Office of Fair Trading to Morrisons in settlement of the defamation action brought by Morrisons in relation to both the judicial review and defamation actions launched by Morrisons following press statements relating to the issue of an SO: www.offt.gov.uk/news/press/2008/54-08.

- 3.26 Paragraph 84: It is unclear what would happen if a party states that it would rather follow a regular procedure i.e. do parties have the right to refuse a negotiated disclosure procedure? A leniency applicant, in particular, could find itself in a difficult position. We presume that if one party refuses, bilateral exchange will not be possible but clarification on this point would be welcome.
- 3.27 Paragraph 85: As part of the data room procedure, the Commission states that information (including confidential information) can be viewed by external advisors or economic advisors. The external advisor can record information but it is unclear whether this extends to taking copies. However, the external advisor "may not disclose any confidential information to their client". This suggests that it would be left at the discretion of the external advisor what information is confidential. Since the information will relate to another party's commercial interests, we do not believe that such a safeguard is sufficient as it may not always be clear to another party's advisor what information is confidential to a particular party. In addition, no mention is made of an economic advisor's permitted role in a data room. In factual cases such as Article 101 / 102 cases, external advisors should also be able to share facts with clients - a total ban on disclosure of information, for example, would obviously not work.
- 3.28 In addition, although not expressly referred to in the paper, the Commission also tends to use a data room-type situation to grant access to transcripts of oral leniency submissions, allowing parties or their lawyers to attend the Commission's premises and transcribe or dictate those transcripts, but not to make copies of them. Those attending are required to undertake not to use the resulting documents in proceedings other than the Commission's Article 101 proceedings. We urge the Commission to reconsider this procedure, which appears to be designed with a view not to limiting the parties' own access to certain confidential information (as in the case of the data room described in paragraph 85 of the paper) but rather to limit use of the information other than in the context of the Art 101 proceedings. However, as a matter of English law, for example, once the document (whether transcribed/dictated via a lawyer, or photocopied, or made available on the Access to File DVD) is in the possession of the parties (which includes their lawyers), in any subsequent litigation such as follow-on damages claims where the document is relevant it will fall within the parties' duties of standard disclosure, meaning they will be required to disclose it in that litigation. We would therefore suggest that the paper – and related notices (e.g. on access to the file) – be amended to avoid the need for this cumbersome manner in which access to leniency applicants' oral transcripts is provided.
- 3.29 Finally, the last sentence of paragraph 85 states that "should either side unduly refuse to waive their right to access to the file or their right to confidentiality to the extent it would be necessary to implement the data room procedure, this waiver can be replaced by a decision pursuant to Articles 8 or 9 of the Hearing Officer's Mandate". That cannot, in our view, be correct. The rights to access the file and to confidentiality are granted by Regulation 773/2004, and cannot be overridden by a unilateral decision under powers delegated to a hearing officer by a Commission decision. Article 15 of that Regulation is clear that the right of access to the file does not extend to business secrets and other confidential information except to the extent that disclosure and use of that information is *necessary to prove an infringement of*

Articles 101 or 102 TFEU. It does not permit the right to confidentiality to be circumscribed for reasons of administrative convenience, i.e. simply because it would make it quicker and/or less costly to prove an infringement. Consequently, it is not within the power of the Hearing Officer to conclude, under Article 9 of the Hearing Officer's Mandate, that business secrets are not protected purely because maintenance of that protection would interfere with the Commission's ability to implement a data room procedure.

- 3.30 Paragraph 89: This paragraph outlines that one or more of the parties may be granted a non-confidential version of the (other) parties' written replies to the SO and that they will be given the opportunity to comment on these. It is also suggested that the Commission may decide to do so with respect to complainants and third parties which have a sufficient interest to be heard. In the interests of fairness, parties who are subject to proceedings should be given the opportunity not only to see the replies, but also to comment on them (particularly if those replies contain new evidence on which the Commission intends to rely).
- 3.31 Paragraph 90: While we recognise that complainants have a legal right to receive a non-confidential version of the SO, the Commission will recognise that it is not uncommon for the content of such SOs to be leaked or otherwise made public, in part because of the lack of adverse consequences for the complainants. For that reason, it is essential that redactions extend not only to confidential information provided by the parties, but also to details of the sanctions that the Commission is considering imposing. Information relating to envisaged penalties is as commercially sensitive, and its release as commercially damaging, as the parties' proprietary business secrets. To the extent that it is necessary for third parties to comment on proposed remedies, that can happen at a later stage in the process, after the substantive issues of law and fact have been resolved.
- 3.32 Paragraphs 95-98: We have concerns regarding DG Competition's use of so called "Letters of Facts" as a way to deny the parties their right to an oral hearing and their right of access to the file. The distinction between a letter of facts and a supplementary SO is based on an overly formal and literal interpretation of Regulation 773/2004 and does not, in our view, justify the limitation of these important rights of the defence. In particular:
- 3.32.1 if DG Competition issues a poorly evidenced SO, but then after the oral hearing supplements it with large amounts of evidence (relating to the objections "already raised" in the SO) in a Letter of Facts, the parties under investigation will be unable to respond effectively to the case against them at the oral hearing. In our view, if the corroborating evidence is significant enough for the Commission to rely on, it is significant enough for the parties to have the opportunity to address it in an oral hearing;¹⁶ and

¹⁶ The same applies when the Commission sends a non confidential version of the other parties' written replies to the SO, and intends to rely on evidence in those written replies –see footnote 54 of the paper.

- 3.32.2 as regards access to the file, our concern is that the use of Letters of Facts allows the Commission a discretion to decide who will be granted access to the file, on the basis of its assessment of whether the evidence concerns a limited number of parties or isolated issues. However, it is the party under investigation, not the Commission, that is best placed to ascertain the significance of a piece of evidence for that party's defence. The approach proposed by the Commission risks resulting in exculpatory evidence being withheld, albeit inadvertently, on the basis of the Commission's assessment of its materiality or relevance to a party under investigation.
- 3.33 Paragraph 101: As we have pointed out in a previous consultation response, the statement that "[c]ommitment decisions are not appropriate in cases where the Commission intends to impose a fine" does not reflect the reality of the DG Competition's practice, notwithstanding that it is a restatement of Recital 13 of Regulation 1/2003. In order to bring its practice into line with the requirements of Article 13, the Commission should, in all non-cartel proceedings, refrain from asserting in an SO its intention to impose a fine.
- 3.34 Paragraph 111: This paragraph could usefully explain from when the one month period will run in cases where the Commission has already sent out an SO (presumably from the date on which the Commission indicates to the parties that it is convinced of their willingness to propose effective commitments, in line with paragraph 107). We would also propose including, as is the case elsewhere, that the parties may make a reasoned request to the Hearing Officer for an extension of the time-limit imposed by the Commission.
- 3.35 Paragraphs 114 and 116: In our experience, DG Competition often conducts informal market testing of commitments prior to the formal Article 27(4) procedure, or subsequent to any amendments that are made after that procedure. Any clarification provided in the best practices paper of how, when and with whom the Commission conducts such informal market testing would be useful.
- 3.36 Paragraph 124: Provision is made for the Commission to inform a complainant "in a meeting or by phone" of its decision not to pursue the complaint. We suggest that informing the complainant in writing, giving an overview of the Commission's reasons, would be more appropriate.
- 3.37 Paragraph 118: We consider there to be circumstances in which a set of commitments is amended so extensively after the Article 27(4) process that it ought to be subject to a further round of market testing. The best practices paper could usefully explain when this might occur. We suggest that the paper also makes it clear that when the Commission accepts Article 9 commitments, it will subsequently reject any previously submitted complaints associated with that procedure (on the basis that there is no longer a "Community interest" in pursuing the investigation) and that the complainants will have the rights set out in paragraph 124 to respond and to access relevant documents.

- 3.38 Paragraph 131: We would advocate the Commission sending the decision to the parties' lawyers at the same time as it is sent to the parties themselves (as is the case for the SO), where the parties so request.
- 3.39 Paragraph 136: We submit that it is in the general interest that the Commission publishes *all* rejection decisions.
- 3.40 Finally, a couple of minor typographical errors: (i) in paragraph 100, the cross reference to paragraph 62 seems to be incorrect. We believe that the reference should be to paragraph 70 instead; and (ii) in footnote 70, reference should be made to Article 16 (1) of Regulation 773/2004, rather than to Regulation 1/2003.

4. THE HEARING OFFICER'S GUIDANCE PAPER

- 4.1 Paragraph 2: This paragraph indicates that the Hearing Officers may deviate from their stated guidance. Our comments in respect of paragraph 8 of the paper on best practices for the submission of economic evidence (see paragraph 2.5 above of this response) apply equally to this statement.
- 4.2 Paragraphs 8 and 14: The suggestion made in these paragraphs - that failure to bring a dispute with DG Competition before the Hearing Officers would be taken as an acceptance of the position expressed by DG Competition and that this might affect the likelihood of success of the parties' arguments on appeal - is incorrect and incompatible with the rights of defence of the parties. Moreover, it is not supported by the cited case law.¹⁷ As Advocate General Mazàk stated recently, "*the mere failure of the appellant to contest during that procedure a particular position adopted by the Commission, and more specifically in the statement of objections, cannot limit the rights of defence of the appellant before the General Court and deny it full access to justice.*"¹⁸ In our view, that principle applies as much to objections to procedural positions adopted by the Commission (and, in particular, objections that are grounded in human rights norms) as it does to substantive objections.
- 4.3 Paragraph 17 could also usefully reflect the fact that the interests of fair and effective enforcement may necessitate the provision to one or more of the parties of a copy of the non-confidential version (or specific excerpts thereof) of the (other) parties' written replies to the SO, as explained in paragraph 89 of the paper on best practices in Article 101 and 102 proceedings.

¹⁷ The paragraphs of *Mannesmannrohren-Werke v. Commission* that are referred to in footnote 5 related to the General Court's assessment of specific allegations in that case relating to breaches of the Notice on Access to the File. They do not imply that a party may be prevented from successfully pleading a breach of its rights of defence simply because it did not raise the matter with the Hearing Officer. Indeed, in *Mannesmannrohren-Werke* the General Court went on to consider (at paragraphs 55 and 56) whether the conduct of which the appellant complained had actually infringed its rights of defence, without taking into account whether that complaint had been raised during the investigation.

¹⁸ Advocate General Mazak's Opinion of 11 February 2010 in C-407/08 P *Knauf Gips* & C-413/08 *Lafarge v Commission*.

- 4.4 Paragraphs 25, 26 and 30: In relation to requests for extension to time limits, we suggest that the guidance clarifies that if the case team accepts that an extension should be granted, the Hearing Officer will always concur. That would allow for the possibility of a quick, informal resolution of the relevant issues between those who are familiar with the specific circumstances or elements of the case.
- 4.5 Paragraph 37: It would be helpful for the Commission to provide some examples of what it considers "exceptional circumstances" that justify a refusal to divulge an admitted third party's identity. In addition, we consider that the Hearing Officer should inform the addressees of an SO of the identities of the admitted parties as soon as reasonably possible after their admission (and in any event no later than three days before the oral hearing).
- 4.6 Paragraph 44: This paragraph suggests that there is an obligation on parties who are due to attend an oral hearing to appear in person or be duly represented by someone else from that undertaking. The sentence "these persons may be assisted by a lawyer" suggests that lawyers will not be permitted to attend these hearings alone, on behalf of their client. We submit that it should be open to the party concerned to make a decision about who is best placed to attend a hearing and that this should also extend to sending a lawyer on its behalf.
- 4.7 Paragraph 45: This paragraph indicates that the oral hearing will normally not take place "before the written exchange of views has been concluded". It would be helpful if the Guidance were to clarify when that will be taken to have occurred and, in particular, whether the Hearing Officer will wait until the expiry of all deadlines for parties to comment on other parties' responses to the SOs (where these have been provided in accordance with paragraph 89 of the paper on Best Practices on the Conduct of Article 101/102 Proceedings).
- 4.8 Paragraph 48: We do not believe that it is necessary for the Hearing Officer to publish the dates of future Oral Hearings on its website. Other than the participants at these Hearings (who will be informed of dates through the Commission's internal processes) it is not apparent why it is necessary to tell the public at large about the dates of these Hearings.
- 4.9 Paragraph 49: We believe that providing a list of participants to all invited parties three days before an Oral Hearing does not provide sufficient time for potential complaints to be raised and dealt with by the Commission should a party have a legitimate reason for objecting to certain invitees. We suggest that such a list be provided at least five working days beforehand. In addition, the guidance paper does not set out a procedure by which a party should raise with the Hearing Officer any objections to attendees at such hearings.
- 4.10 Paragraph 59: The Commission states that the Hearing Officer may permit a party to submit written comments or documents after an Oral Hearing. The Guidance could usefully clarify that access to these documents will also be given to other parties to the case and that these parties will be given the opportunity to comment on those documents, especially where the Commission intends to rely on any such information in its formal decision.

- 4.11 Paragraph 66: Where a complainant is given access to documents on which the Commission has based its preliminary assessment to reject a complaint, it would appear fair and reasonable to also inform the parties that have been named by the complaint that such access has been given. This would appear particularly appropriate where the documents in question are the property of, or relate to, those parties.

CLIFFORD CHANCE LLP
March 2010