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COMMENTS OF *GRIMALDI E ASSOCIATI*

ON THE

**DG COMPETITION BEST PRACTICES FOR ANTITRUST PROCEEDINGS, SUBMISSION OF
ECONOMIC EVIDENCE AND GUIDANCE ON THE ROLE OF THE HEARING OFFICERS**

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1. INTRODUCTION

Grimaldi e Associati is honoured to express its comments on the consultation package composed by the Best Practices for antitrust proceedings, the Best Practices for the submission of economic evidence (both in antitrust and merger proceedings) and the Guidance on the role of the Hearing Officers in the context of antitrust proceedings, submitted to the public on 6 January 2010 (the “Public Consultation”).

We particularly welcome the remarkable efforts made by the Directorate General for Competition (“DG Comp”) of the European Commission (the “Commission”) in providing a comprehensive overview and detailed explanations on the rules governing the mentioned proceedings, since this will indeed enhance legal certainty to the benefit of the companies under investigation and the stakeholders in general, which duly aim at complying with EU law.

The Public Consultation is particularly remarkable, in our opinion, since it confirms moreover the commitment of DG Comp in strengthening the deep and constructive dialogue with companies and stakeholders, in order to improve the procedural mechanisms which preside over the safeguarding of fundamental rights in the EU legal order.

In light of the comprehensive and detailed character of the documents involved in the Public Consultation, in the following we will provide a general remark on the need to consider the possible implications which the use of “soft law” tools may have in the EU legal order. We will furthermore focus on some selected issues emerging from the analysis of each document under consultation.

2. GENERAL REMARK: THE ROLE OF SOFT LAW IN THE EU LEGAL ORDER

2.1. Definition of “soft law”

The Public Consultation may raise a preliminary question concerning the legal value and implications towards the individuals of the legal tool chosen by DG Comp for providing its clarifications, that is the “guidelines” as source of so called “soft law”.

As it is well known, under the “soft law” category several legal tools can be included, such as recommendations and opinions (qualified as non-binding acts pursuant to Article 288 TFEU), white papers and green papers, Commission communications, guidelines, general programs, codes of conduct¹.

¹ As known, the Charter of Fundamental Rights is no longer considered as an act of soft law because, following the coming into force of the Lisbon Treaty in December 2009, it has assumed the same legal value as the European Union Treaties.

Created by the legal theory, the term “soft law” entails an act which, although not binding, may determine certain legal effects with regard to the Member States, the companies and the individuals in general.

Besides this very general definition, the legal literature on the issue argues that the soft law may be categorized according to alternative approaches which open the way to further questioning on the admissibility and possible effects of these tools in the EU legal order.

First, according to the common law and continental doctrines the function of soft law is to create an alternative measure to legislation².

Under a further approach, the soft law outlines a rule-making technique which may be – from time to time – alternative³, complementary⁴ or preparatory to the settled and formalized rule-making procedures as provided by the Treaties⁵.

According to a third approach, the soft law may entail both atypical acts (not provided in the Treaties), politically binding acts and rule-making techniques, on the assumption that in all cases the general consensus of the addressees will in practice overcome the non-binding nature of the act in question⁶. This approach underlines the fact that the soft law includes acts, principles, agreements which, although formally not binding, are considered mandatory in practice on the basis of the consensus, the convenience or the agreement between the interested parties.

2.2. The case law

The term “soft law” does not appear in the case law. In fact, the Court of Justice of the European Union has never made a thorough analysis and definition of such acts, addressing the issue only incidentally and on a case-by-case basis.

This gap may be inherent in the approach expressed especially in recent years by the Court, which is keen to review the EU acts in light of their substantial character, overcoming their formal classification and the literal wording of both Article 288 TFEU (former Article 249 TEC) and Article 263 TFEU (former Article 230 TEC)⁷.

² L. SENDEN, *Soft Law in European Community Law*, Oxford, 2004, 219 ss.

³ *E.g.* the one used for the EU employment policy.

⁴ *E.g.* the one used for the fiscal policy coordination.

⁵ D. M. TRUBEK, P. COTTRELL and M. NANCE, *“Soft law”, “Hard Law” and European Integration: Toward a Theory of Hybridity*, University of Wisconsin-Madison, 2005, 2 ss.

⁶ F. PALERMO, *La forma di stato dell’Unione europea*, Padova, 2005, 204-205.

⁷ See ECJ, judgments of 5 December 1963, joined cases 23/63, 24/63, 52/63, *Sa Usines Emile Henricot and others v. High Authority of the European Coal and Steel Community*, ECR p. 217; 16 June 1966, case 54/65, *Compagnie des forges de Chatillon v. High Authority of the European Coal and Steel Community*, ECR p. 185. On this respect, it is worth recalling the relevant case law which concerns the actions for

With particular regard to the latter provision, in applying the principle of the primacy of content on the formal qualification of the act, the Court recognises the admissibility of the action for annulment whenever the applicants demonstrate that the challenged act produces legal effects on their respect⁸. On these grounds, the Court implicitly considers the adoption of soft law acts as permitted notwithstanding the lack on this respect of expressed legal basis in the Treaties.

As obvious consequence of the case-by-case ruling, the substantial approach by the Court has led to manifold outcomes with respect to the judicial review of “soft law” acts which alternatively have been considered as deprived of any legal effects⁹ or have been annulled notwithstanding their non-binding nature¹⁰, while rarely their mandatory nature has been recognised¹¹.

2.3. Substantial approach and legal certainty: towards a fair balance

Although consistent with the *ex post* nature of the judicial review mechanism, the substantial approach followed by the Court may increase the uncertainty of the EU legal framework¹² with respect to the value of soft law, to the detriment of individuals and companies which aim at duly complying with EU law.

annulment under Article 263 TFEU (former Article 230 TEC): although explicitly providing for the action of annulment only against binding acts, such provision has been interpreted according to a substantial approach by the Court of Justice, in light the legal effects stemming from the act to be possibly annulled.

⁸ According to the settled case law, *e.g.* ECJ, 31 March 1971, case C-22/70, *Commission v. Council*, ECR p. 63, where we read that “*an action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects*”, point 42; ECJ, 9 October 1990, case C-366/88, *France v. Commission*, ECR p. I-3571, point 8.

⁹ ECJ, 26 February 1991, case C- 292/89, *The Queen v. Immigration Appeal Tribunal*, ECR p. I-745.

¹⁰ It is the case of the dispute resolution in case 22/70, the case of the code of conduct in the case C-303/1990 and the case of the Commission communication in the case C-57/95 (ECJ, 20 March 1997, *France v. Commission*, ECR p. I-1627).

¹¹ ECJ, 6 April 2000, case C-443/97, *Kingdom of Spain v. Commission*, ECR p. I-2415, point 33: in this case, the act of *soft law*, consisting of some guidelines, wasn’t annulled by the Court because it couldn’t produce legal effects in that particular situation, but it was essentially taken as a regulatory parameter of the future decisions of the Commission in these field; ECJ, 30 September 1987, case 229/86, *Brother Industries v. Commission*, ECR p. 3757: that judgment had as its object the annulment of a *memorandum* in which the Commission invited Member State to take certain behaviours. Although the Court recalls the importance of the principle of legal certainty, it admits that although the *memorandum* had not “binding force” it was still considered “source of guidance”.

¹² See Opinion of the Advocate General TESAURO in case C-325/91 (ECJ, 16 June 1993, *France v. Commission*, ECR. 1993, p. I-3283) where we read that “*the adoption of such acts, causing the disorientation of the recipients on their value, not likely to undermine the value of legal certainty that should constitute the foundation of their adoption?*”.

In such a scenario, the efforts made by DG Comp under the present Public Consultation are therefore of the utmost importance since they will contribute to filling the lack of clarity which may be perceived by the undertakings in shaping their economic and commercial decisions in compliance with the EU antitrust rules.

In order to strengthen this result and ensure the full effectiveness of the Commission guidelines, it would be however advisable to providing in each Public Consultation “soft law” document a clarification on the scope and legal implications of the guidelines under review in such a way to make clear *ex ante* (towards the undertakings and individuals) the procedural rules on which their legitimate expectations may be built for the future.

3. BEST PRACTICES IN ANTITRUST PROCEEDINGS

3.1. Introduction

The first document under consultation is represented by the *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFUE*.

The Best Practices restate the Commission’s experience in antitrust proceedings amending on certain aspects the relevant rules of procedure. In particular, amendments to the current procedure will include:

1. the earlier opening of the formal proceedings (*i.e.* as soon as the initial assessment has been concluded);
2. the offering of State of Play meetings to the parties at key points of the proceedings;
3. the disclosure of key submissions, giving early access to the complaint;
4. the public announcing of the opening and closure of procedures, as well as when Statement of Objections have been sent;
5. the provision of guidance on commitment procedures.

The amendments adopted by the Commission in the Best Practices will increase the quality of the investigation. For instance, we note that the State of play meetings will indeed be an opportunity for the parties involved to be informed on the steps taken by the Commission. On this respect the experience in the merger cases had showed that meetings between the Commission and the parties involved could bring better results in the cases.

Moreover, the clarifications given by the Commission with respect to two new procedures for access to file, namely the “negotiated disclosure procedure” and the “data room” procedure will without any doubt contribute to enhancing the quality of the investigations procedures, as the Parties will have the opportunity to express their views already in the investigative phase.

3.2. Remarks

The Best Practices succeed in realising the DG Comp's aims under several aspects. On this respect, for instance, we welcome the introduction of State of Play meetings¹³ which represent an opportunity for the parties involved to be informed on the steps taken by the Commission. The experience in merger cases had showed that the meetings between the Commission and the parties involved could bring better results in the definition of the cases reducing the duration of the investigative procedures.

We also welcome the clarifications given by the Commission with respect to two new procedures for access to file, namely the "negotiated disclosure procedure" and the "data room" procedure¹⁴.

Notwithstanding similar procedural improvements, the analysis of the Best Practices raises a general question on the enhancement of the due process and procedural fairness to be desired in EU antitrust cases.

Indeed, as it is generally accepted that penalties imposed for violations of the EC antitrust rules are of a criminal nature within the meaning of the European Convention on Human Rights (ECHR), we believe that certain due process requirements must be met before such penalties are imposed, namely - *inter alia* - the right to a public hearing before an independent and impartial tribunal at first instance with the opportunity to give evidence in one's own defence, hear the evidence against one, examine and cross-examine the witnesses.

On this respect *Grimaldi e Associati* shares the concerns of outstanding European practitioners and members of the Academia according to which the antitrust proceeding is currently not balanced as, in particular, the European Commission accumulates investigational, prosecutorial and adjudicative powers within such a proceeding and has the power to impose high penalties¹⁵. Moreover, due to the technical character of its evaluations, the Commission decisions are not subject to a full judicial scrutiny by the European Courts which therefore would not be able to compensate for the failings of the administrative procedure before the Commission. Finally, in order to assess the procedural burden faced by the undertakings, it should be recalled that the proceedings brought before the Courts have no automatic suspensory effect with regard to the contested decisions.

This general remark may be completed by some specific comments which are provided in the following with regard to selected procedural issues.

¹³ See *Best Practices on the conduct of proceedings*, para. 2.11.

¹⁴ *Ibidem*, para. 3.1.2.

¹⁵ See. D. SLATER, S. THOMAS, D. WAELBROECK, *Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: no Need for Reform?*, in *European Competition Journal*, April 2009, pages. 97-143. In 2008 the European Commission has imposed a fine of € 1,400 million in the Car glass case.

a. Opening of proceedings

At point 23 of the Best Practices it is stated that, in cartel proceedings, the opening takes place simultaneously with the adoption of the Statement of Objections.

This implies that while the Commission has the opportunity to investigate for a long period of time, the undertakings involved have only “indirect” information on the ongoing investigation and are given the opportunity to participate to the antitrust proceeding once the Commission has already reached its preliminary conclusions in the Statement of Objections, and is probably reluctant to modify them in the light of the arguments submitted by the parties in the further course of the proceeding.

The respect of the principle of “equality of the arms” and of the parties’ rights of defence requires instead that certain of those rights are respected as soon as the preliminary investigation has begun, in particular as far as cartel proceedings are concerned, since they are considered equivalent to “criminal charges”¹⁶.

b. Time limits

The addressees of requests of information from the Commission are given a time-limit of at least two weeks to reply to such requests.

The Commission defines this time-limit according to the length and complexity of the information request. However, if the Commission believes the scope of the request is limited, normally gives a shorter time-limit (less than one week).

The addressees may ask for an extension of this deadline and DG Comp grants additional time if it considers the request to be well founded.

Pursuant to Article 27(1) of Regulation No. 1/2003¹⁷, the Commission gives the addressees of a Statement of Objections the opportunity of being heard on matters on which the Commission has taken objection. The time-limit for the reply to the Statement of Objections will take into account both the time required for the preparation of the submission and the urgency of the case.

The addressees of the Statement of Objections have the right to a minimum period of four weeks to reply in writing, but a longer period than the minimum foreseen by the Implementing Regulation (normally, a period of two months) can be granted if the Commission so decides.

¹⁶ See GC: “*not only must the right of defence be observed in procedures that may lead to imposition of penalties but it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures that may be decisive in establishing the unlawful nature of conduct engaged in by undertakings*” (GC, 20 April 1999, *Polypropylen*, Case T-305/94, ECR II-931, point 264).

¹⁷ *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* in OJ L 1 of 4 January 2003, p. 1.

It is respectfully submitted that the time limits set by the Commission to respond to requests for information may be not sufficient in length and do not adequately consider the difficulties that the undertakings encounter in collecting the data required by the Commission.

As to the time-limit for the reply to the Statement of Objections set to the parties (up to two months), it is respectfully submitted that such a time-limit is extremely short and unbalanced if compared to the time elapsed during the Commission's investigations and drafting of the Statement of Objections, while the parties shall review possibly thousands of documents and draft their defence in a much shorter delay.

In light of such consideration, it could be therefore strongly doubted that such inadequate delay ensures the right to a proper defence of the parties.

c. Legal professional privilege

Legal professional privilege ("LPP") protects confidential communications between lawyer and client, provided that they are made for the purposes of the exercise of the client's rights of defence and they emanate from independent lawyers.

However, if in the course of an inspection officials of DG Comp consider that the undertaking has provided no evidence or explanations for the purposes of proving that the document concerned is covered by LPP, they can read the contents of the document and take a copy of it. Alternatively, they may also place a copy of the contested document in a sealed envelope and then remove it and bring it to DG Comp's premises, in view of a subsequent resolution of the dispute on the actual scope of LLP.

On this respect it is respectfully submitted that the Commission should clarify better when the Commission officials can have a cursory look to the documents found in the premises of the undertaking, despite its claims that the documents are covered by LLP.

In addition, the Commission should seriously reconsider its position with respect to documents drafted by in-house lawyers, which are not covered by the LLP. It is indeed respectfully submitted that such documents in some cases, such as when they are drafted within the context of compliance programs, are necessary in order to ensure a sound communication between an undertaking and independent lawyers, who are supposed to carry complex legal assessments and need to be lead by legal experts with a deep knowledge of the market/s on which the undertaking is active. Such programs require indeed the preliminary work of an in-house lawyer who should feel free to carry on his preliminary assessment and collection of relevant information, not worrying that the Commission could use such assessments against his employer.

d. Commitments

Pursuant to Article 9 of Regulation No. 1/2003 the undertakings can submit at any time voluntarily commitments that are intended to address the competition concerns identified by the

Commission, and if the Commission accepts these commitments it may adopt a decision which makes them binding on the parties subject to the proceedings.

Pursuant to recital 13 of Regulation No. 1/2003, commitment decisions are not appropriate in cases where the Commission intends to impose a fine. Pursuant to Article 27(4) of Regulation No. 1/2003 the Commission shall market test the commitments before making them binding by decision, provided it considers that the commitments address its competitions concerns.

Commitment procedures are a very effective tool of antitrust enforcement, as they allow the Commission to close less relevant cases and to concentrate resources on serious antitrust infringements.

On this respect we believe that the Commission in its Best Practices should clarify in further detail which antitrust cases can be closed with the adoption of a commitment decision, and which are the criteria that the Commission is adopting and will adopt in order to ensure that the commitments imposed on an undertaking involved in an antitrust proceeding are proportionate to the addressed competition concerns.

With regard to this issue, in other words, we would like to ask the Commission to clarify which measures it intends to adopt in order to avoid that commitment procedures become a tool to implement Commission competition policies objectives ceasing to represent a mere enforcement tool (as instead we believe they should be intended).

4. BEST PRACTICE FOR SUBMISSION OF ECONOMIC EVIDENCE

4.1. Introduction

We welcome the initiative of the Commission of publishing the second document under consultation that is the *Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 and in merger cases.*

The Best Practices are of particular importance as economic analysis plays a crucial role in competition enforcement.

According to the Commission Best practices, an economic or econometric submission should focus on a research question formulated unambiguously and properly motivated and must clearly specify which hypothesis has been tested and considered.

The data provided must be clearly described in an accompanying memorandum, and the data provider should explain how the data were gathered. It should also clarify the theoretical foundations of the methodology adopted. In addition, motivation should be provided concerning the empirical methodology chosen and, where possible, the parties should give account of alternative methodologies.

The submitting parties are due to explain the details of their models, share any documentation needed to allow timely replication and report the results of the empirical analyses in the standard format found in academic papers. They are also required to interpret the results and assess them with respect to the relevant economic theory.

The Commission requires empirical work to be robust and complete, which *inter alia* implies that the parties should provide all the results of empirical analysis and not only those that support their thesis.

4.2. Remarks

In our opinion the Best practices duly outline the criteria which economic submissions should fulfil and explain the interaction of the competition department's case team and the Chief Economist with third parties submitting economic evidence.

Economic analysis has had deep impact on competition policy in European Union over the last decades, influencing the legal framework and case decisions and implying frequently the involvement of economists in competition investigations¹⁸.

We agree with the Commission that in order to ensure a smooth process of collection of relevant information, the latter has to be provided in standard formats and must be complete and appreciable under a robust economic framework.

However, we believe that in merger proceeding as well as in antitrust proceedings, further measures need to be adopted in order to avoid phenomena that some authors¹⁹ have qualified as the so called prosecutorial (or hindsight) bias.

As to merger proceedings, it cannot be excluded that Commission officials who wrote the Statement of Objections which led to a Phase II investigation will be reluctant to change their mind, if in the further course of the proceeding the parties provide evidence that the merger does

¹⁸ It is common ground that economic analysis has had an impact on the following areas: 1) the analysis of vertical agreements between firms has increasingly focused on effects; 2) the analysis aimed at the definition of the market has become sophisticated; 3) the notion of collective dominance has become more sophisticated as to include the theory of collusion in repeated interactions; 5) quantitative method have been developed; 6) the Commission has implemented procedures, such as the leniency programs based on economic theories.

¹⁹ W. WILS, *The combination of the investigative and prosecutorial function and adjudicative function in EC antitrust enforcement: a legal and economic analysis*, in *World Competition*, 27(2), pp. 201-24. See also K.-U. KÜHN, *Reforming European merger review: targeting problems areas in policy outcomes*, in *Journal of Industry, Competition and Trade*, 2(4), 2002, pp. 311-64; and A. BURNSIDE, *Comment: merger control green Paper: SLC*, in *Competition*, December 2001.

not bring about competitive concerns²⁰. This can imply that they will concentrate on evidence that confirms their own preliminary judgment.

On this respect we are not sure that the creation of the Chief Competition Economist alone can redress the biases induced by the inquisitorial procedure as any opinion of the Chief Competition Economist on a case is still part of the internal deliberation process within the DG Comp.

We do not deny that the creation of such Office has improved the internal debate inside the Commission at staff level, ensuring that the assessment of economic evidence is fair and open minded, and the findings are reliable. However, we believe that the Commission should clarify better the terms of such debate and measures adopted in order to ensure that the Chief Economist is not subject to any form of undue pressure, pointing out in particular to what extent his opinion is taken into account in the deliberation process.

On this respect, it is respectfully submitted that the correctness of the economic assessments carried on by the Commission would be better evaluated by a completely independent body.

Finally, we believe that more clarity on this respect could be useful also considering that, with respect to economic evaluations made by the Commission in its technical discretion, the judicial review by the European Courts is limited to verifying the respect of procedural rules, the existence of manifest errors of appraisal and misuse of powers²¹.

5. HEARING OFFICERS' GUIDANCE PAPER

5.1. Introduction

The third document under consultation is dedicated to the *Guidance on procedures of the Hearing Officers in proceeding relating to Articles 101 and 102 TFUE*.

The Guidance Paper clarifies the tasks of the Hearing Officer, explaining how they are carried out, and what are the reporting obligations and the advisory role of the Hearing Officers towards the companies that are addressees of decisions, the Competition Commissioner and the Members of the Commission.

As it is well know, the Hearing Officers are meant to be the independent guardians of the rights of defence and other procedural rights of companies involved in competition proceedings. In

²⁰ W. WILS, *The combination of the investigative* (see above footnote).

²¹ ECJ, 31 March 1998, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission*, joined cases C-68/94 and C-30/95, ECR p. I-01375, points 223-4; 7 January 2004, *Aalborg Portland and others v. Commission*, ECR p. I-123, point 279.

this respect, the aim to make their role more transparent and the purpose to grant to the parties the “equality of the arms” in the procedure is more than welcome.

With regard to access to file and the disclosure of confidential information, it is important to grant to the information provider the opportunity to have an independent review on the confidentiality issues. In fact, in a dispute between the Commission and the information provider on the confidentiality of a document, the Commission may have the interest to force for a full disclosure of the information and deny the confidentiality.

The application of the “AZKO procedure” by a subject who is third in the dispute may grant to the information provider a deeper and careful analysis of his position. Moreover, the resolution of the confidentiality disputes at early stages of the procedure may permit to the parties to save time and money without having to challenge the issue in front of the General Court until an “Article 9 decision” is taken.

5.2. Remarks

A clearer definition of the role of the Hearing Officers within antitrust proceedings is welcomed by the legal community. The oral hearing often represents, for companies involved in an antitrust proceeding for an alleged infringement of competition law, the last chance to defend themselves before the Commission rules their case. A proper hearing is not only necessary to assure greater acceptance of an antitrust decision, but allows opposing positions to be directly confronted and challenged, including the possibility for cross examination and interactive changes..

However, as stated in other parts of this Paper, the fact that the Commission is exclusively responsible for all phases of the application of competition law is still perceived by the legal community and by the companies involved as entailing a lack of transparency. On this respect there is, indeed, a perception among private practitioners that it is exceptional for the Commission to change its position in favour of the defendant as a result of the oral hearing.

The above perceptions are not unfounded as within the current proceedings in EU competition cases the persons actually adjudicating the cases (the Commissioners) are not present at the hearing, and they adopt decisions on the basis of briefings from the staff of DG Competition

While confirming our general appreciation for the Guidance Paper on procedures of the Hearing Officers, we would like to point out in the following some of the specific shortcomings of the procedure for the conduct of the Hearing not addressed by the Guidance Paper.

In particular, it is submitted that since an antitrust investigation is carried out by the staff of DG Comp and the Hearing Officer is not involved until the Statement of Objections is notified, it is important that the Hearing Officer is put in the position to fully understand the case and the outcomes of both parties. In this respect, it may be useful if a written presentation could be submitted by the addressees and by the Commission in order to clarify their position. In fact, a

written presentation submitted the day of the hearing can have a limited effect on the outcome of a proceeding.

Consequently, with regard to the provision of point 47 of Guidance Paper, we suggest that the copies of documents requested *via* memorandum such as the outlines, should be submitted before the hearing, thus allowing the Hearing Officer to examine in advance the position that will be expressed by the parties at the hearing.

Finally, we would like to comment on point 59 of the Guidance Paper. On this respect, we suggest that the opportunity of submitting further written comments after the oral hearing (provided by Article 12 of the Commission decision on the terms of reference of hearing officers²²) should be generalised and not limited to the case when some particular issues are raised during the oral hearing, thus requiring further elaboration.

6. CONCLUSION

Grimaldi e Associati thanks the Commission for having opened this consultation process to discuss these important topics and welcomes the adoption of the Best practices and Guidance which confirm the Commission will to engage in a continuous dialogue with the business and legal community.

However, notwithstanding the detailed and accurate character of the proposed procedural framework, we would like finally to invite the Commission in conjunction with the other EU Institutions to explore the possibilities for a more far reaching reform of the relevant proceedings, in order to ensure their fairness and address the envisaged shortcomings.

FRANCESCO SCIAUDONE

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²² Please note that Article 12 of Commission decision on the terms of reference of hearing officers provides that, “*in view of the need to ensure the right to be heard, the Hearing Officer may, after consulting the Director responsible, afford persons, undertakings and associations of persons or undertakings the opportunity of submitting further written comments after the oral hearing*” (Commission Decision 2001/462/EC, ECSC, of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, in OJ L 162, 19 June 2001, pages 21–24).