

**HOWREY LLP'S CONTRIBUTION TO THE EUROPEAN COMMISSION'S PUBLIC CONSULTATION
ON BEST PRACTICES IN ANTITRUST PROCEEDINGS, BEST PRACTICES FOR THE
SUBMISSION OF ECONOMIC EVIDENCE AND DATA COLLECTION, AND
GUIDANCE ON PROCEDURES OF THE HEARING OFFICERS**

INTRODUCTION

1. Howrey, LLP welcomes DG COMP's resolve to instil increased transparency and predictability into its proceedings through the publication of the Best Practices in Antitrust Proceedings and the Best Practices for the Submission of Economic Evidence and Data Collection.¹ Likewise, Howrey welcomes the Guidance on the Procedures of the Hearing Officers.² We commend DG COMP's and the Hearing Officers' decision to open these draft documents to public consultation and welcome the opportunity to comment on them.
2. These Best Practice papers, together with Regulations 1/2003 and 773/2004 and the Commission Notice on handling of complaints,³ will represent the fountainhead from which DG COMP procedural rules flow. They describe how competition matters will be investigated and provide a much needed transparency boost to a system that has long been tainted, rightly or wrongly, with opacity and a certain degree of uncertainty.
3. Nevertheless, despite this positive development, a number of prominent lacunae remain. Howrey therefore encourages DG COMP to continue its open dialogue with all stakeholders to evaluate whether further changes to current procedure are needed in order to seal certain fissures identified below. Commissioner Almunia's recent pronouncement to review DG COMP's internal decision-making process to ensure that the rights of interested parties are respected is a step in the right direction,⁴ and the final versions of the Best Practices papers should, one hopes, represent a significant advancement of DG COMP's administrative management, and reflect not only prudent and economical administration, but also efficiency and effectiveness and a transparent system of sound internal controls.
4. The views contained in this paper are those of Howrey and not of its clients. The paper is non-confidential and may be published by the Commission.

BEST PRACTICES IN ANTITRUST PROCEEDINGS

Guaranteeing an objective, fair and impartial procedure for the handling of complaints

The initial assessment phase

5. Having received a complaint, DG COMP gathers information to decide what action it will take on the complaint. Typically, at this stage of the procedure, there are numerous informal exchanges of opinions and information between DG COMP and the complainant during which the latter is afforded the opportunity to substantiate its allegations and

¹ Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU ("Best Practices"); Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases ("Best Practices for the Submission of Economic Evidence and Data Collection").

² Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU ("Guidance on the Procedures of the Hearing Officers").

³ 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, Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, and Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty.

⁴ "EC's Almunia opens internal review of antitrust procedures", MLex 1 March 2010. In addition, this question may become more relevant now that following the entry into force of the Lisbon Treaty, the Fundamental Rights' Charter has the same legal value as the European Union Treaties.

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ameliorate its case in the light of the case team's initial reaction. This process, in practice, often takes many months and can take years in some cases.

6. Remarkably, the investigated undertaking has no right to be informed of the complaint at this stage. Often and laudably, DG COMP chooses to send the complaint to the undertaking at an early stage in order to gauge its views. However, occasionally DG COMP does not. DG COMP is provided with an extremely broad discretion over when to communicate a complaint and can, if it so chooses, communicate it upon initiation of proceedings, or as late as when the statement of objections is issued.
7. When the investigated undertaking is notified of a complaint at a late stage of the proceedings, the undertaking has been deprived of the opportunity to address the complaints made against it before the Commission fixes the orientation of the investigation. This is problematic from the perspective of the rights of defence. Moreover, it is a missed opportunity for the Commission to test the solidity and credibility of the information and arguments submitted by the complainant. Complainants have vested interests that are usefully tested in an adversarial process.
8. In the same vein the undertakings complained of should (subject to legitimate confidentiality claims) have access to the documents relied on by the complainant as well as to key documents (including economic and technical studies) that have subsequently been submitted. The latter documents usually elaborate the original allegations raised or contain new or transformed allegations, which may materially alter the direction of the investigation. Their existence only becomes evident to the defendant once access to the file has been granted, which often occurs many years later. Under these circumstances, the defendant is left in the invidious position of not knowing with precision which allegations have been made against it, and can only glean scraps of information from Article 18 requests for information sent by DG COMP. Lack of transparency risks giving rise to the view that the case team in charge of the investigation is unduly influenced by the complainant. Such perceptions are not in the Commission's interest.
9. This procedural lacunae needs to be bridged by the Best Practices. Procedural provisions are required whereby the case team is obligated to communicate a complaint to the accused undertaking as soon as practicable from receipt. The same principle should apply to further submissions made by the complainant.

The post-initiation of proceedings stage

10. The current structure of DG COMP combines investigatory, prosecutorial and decision-making functions.⁵ Significantly, by the time the statement of objections is communicated to the parties (and only at that stage do accused parties enjoy their full rights of defence) the case team will already have formed a view on the case. This structure inevitably undermines the objectivity of the decision-making process which may regrettably change from what it is supposed to be, namely an impartial investigation, into a prosecution. However diligent and well intentioned officials are prosecutorial bias can and does occur, leading to occasions where case team officials may seek to minimise the value of evidence and arguments submitted by defendants to support a perhaps pre-determined view of the case. Therefore, the fundamental principles of impartiality, fairness, and due process call for a structural change to the way in which DG COMP handles its cases. We believe that the present consultation is an appropriate moment for DG COMP to engage on this issue.
11. We propose the establishment of two separate teams, in separate directorates and fully independent from each other. The first team would investigate the case and issue an internal "investigative report" setting out its factual and legal findings, and proposing further steps to be undertaken. The second team would provide a "fresh pair of eyes" and decide whether the case is sufficiently strong to take forward. If it decides to proceed, the second

⁵ Unlike the procedures of a number of national competition authorities (e.g. Belgium).

team would draft the statement of objections and continue with the administrative procedure thereafter. If it does not, it would send the case back to the first team for further clarification or investigation or recommend that the case be dropped.⁶ Alternatively, and at a minimum, systematic use of peer review panels should be undertaken at key points of the investigation to reinforce internal scrutiny of the case team's conclusions. As is currently the case where such panels are used, it should be composed of experienced officials who provide a second opinion that is independent from the position of the case team and identifies the strengths and weaknesses of the case.

Balancing flexibility against respect for rights of defence

- 12. While we understand that DG COMP's proceedings can be cumbersome and thus appreciate the need for a certain degree of flexibility, such flexibility must not compromise the investigated parties' rights of defence. We highlight certain issues below.

Access to file

Confidentiality

- 13. Access to file is a fundamental aspect of a defendant party's rights of defence. It is therefore crucial to strike a careful balance between the right to have ones business secrets protected and the right for defendants to have access to relevant evidence to properly assess the allegations with which they are faced. Evidence providers are often tempted to submit overly broad confidentiality claims. These claims, when accepted by DG COMP, may inappropriately limit defendants' access to exculpatory evidence or ability to provide alternative explanations for evidence used against them (in particular in Article 102 TFEU cases). To prevent such behaviour, DG COMP should carefully assess confidentiality claims and, where appropriate, reject them or require clearer verification.
- 14. At present, it seems that case teams do not engage in this (unpopular) exercise until after the issuance of a statement of objections and the undertaking being investigated has raised concerns as regards confidentiality claims made. And, even then, a case team may not concede that confidentiality has been wrongly claimed and the issue has to be decided on appeal to the Hearing Officer. This wastes much time and resource at a crucial and time constrained stage of the investigation, namely the reply to the statement of objections.

"Negotiated Disclosure" and "Data Room" procedures

- 15. This section of the Best Practices suffers from a general lack of clarity. Additionally, it is not clear how often these procedures are used in practice and what DG COMP expects to achieve from their use. While we recognise the potential efficiency gains, we have concerns over the adequacy of procedural safeguards for parties, in particular with regard to the potential disclosure of truly confidential information.
- 16. We encourage DG COMP to clarify the scope of application of these procedures,⁷ and explicitly provide for sanctions in the event confidential information is not kept within the "restricted circle" of persons entitled to have access to the relevant information.

Letters of facts

- 17. A letter of facts should be used only to communicate new facts and the supporting evidence that "flesh out" allegations *already* made against a party in a statement of objections; it is not an appropriate means to communicate new allegations to a party. We therefore regret

⁶ Although a similar system existed in the past but was abandoned for lack of efficiency, the question could be raised as to whether cases have not become more complex and would therefore benefit more from a second review than in the past.

⁷ Especially in the case of "negotiated disclosure" as in cartel cases procedural efficiencies would only be generated if all parties subscribe to the procedure.

the apparent tendency within DG COMP to stretch the concept of “letter of facts” beyond its appropriate (and limited) scope and use it to communicate to a party what amounts to entirely new or materially different allegations. In so doing, DG COMP denies recipients of letters of facts procedural safeguards that are fundamental to their rights of defence (e.g., a right to a further oral hearing, a statutory minimum time-limit for a response, and fresh access to file). If DG COMP wishes to make fresh allegations or make substantial adjustments to its case, a (supplementary) statement of objections is required. We encourage DG COMP to clarify this section and provide boundaries restricting its use to its intended limited purpose.

Informal and triangular meetings

Informal contacts

18. The criteria that DG COMP uses to choose whether a meeting will be “formal” or “informal” are not clear. Also, the Best Practices do not adequately describe the probative value that DG COMP intends to attach to any note drafted during or after an informal meeting, and whether it could be included in the case file as an internal or accessible document. Both complainant and defendant should have equivalent access to these documents. Further clarity on this aspect of the Best Practices would be welcome.

Triangular meetings

19. To date, we are not aware of any so-called triangular meetings having taken place in the context of antitrust proceedings. In light of the lack of established practice in this regard, DG COMP should clarify the added value that it expects such meetings to provide.

Legal professional privilege

20. Legal professional privilege is of crucial importance in antitrust procedure. Addressing this issue in the Best Practices has the potential to enhance legal certainty, and is therefore welcomed by Howrey. We are however disappointed that DG COMP continues to refuse to recognise legal professional privilege for in-house counsel. It is clear in-house lawyers are best placed to encourage compliance with the law from their vantage point within the company. There are therefore good policy grounds to extend legal professional privilege to in-house lawyers, in particular those that are members of a law society or bar and are therefore bound by codes of ethics and subject to disciplinary actions. Extending legal professional privilege to such in-house advisors would, in fact, be consistent with the position the Commission took before the Court in *AM&S*.⁸ In that case the Commission, together with Advocate General Slynn, supported the position that in-house lawyers subject to rules of professional discipline and ethics should be afforded the same treatment as private practice lawyers.
21. We are also concerned that the Best Practices fail to make any reference to the treatment of legal professional privilege for independent counsel who are not members of a bar of an EU Member State. In the context of an international investigation covering multiple jurisdictions, it will be necessary to consult lawyers qualified in non-EU countries. The Commission cannot ignore the principles of international comity in such cases. We encourage DG COMP to provide guidance on whether it intends to acknowledge legal professional privilege in relation to these lawyers and, if so, on what basis. For example, does DG COMP intend to apply: (i) the same rules as those applicable to lawyers that are members of a bar in an EU Member State; or (ii) the rules of the jurisdiction in which the lawyer in question is practising?

⁸ Case 155/79 *AM&S Europe Limited v Commission*, ECR [1982] 1575.

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22. We therefore strongly suggest that DG COMP reconsiders the question of legal professional privilege. It should clarify its position, even whilst awaiting judgment in *Akzo*,⁹ especially as antitrust investigations often involve multiple jurisdictions, making a coherent approach in terms of legal representation generally desirable for both investigated parties and the various competition authorities.

Time-limits for written reply to the statement of objections

23. The basic four week minimum period to submit written replies to statements of objections is far too short for a party to exercise its rights of defence effectively given the wide variety of tasks that have to be conducted in addition to preparing the reply to the statement of objections itself, including reviewing the case file for the first time, checking confidentiality claims, raising issues with the case team, the almost inevitable appeals to the Hearing Officer, the review of all the documents submitted to the Commission by complainants and interested third parties, as well as often complex economic reports. We therefore welcome DG COMP's recognition at paragraph 87 that a longer period may be required. However, we are concerned that a longer period will only be granted "where the circumstances of the case so require" and that this longer period will "normally" be just two months.
24. Four weeks is of course a minimum legal requirement: it is not, and should not however be viewed as the default time-frame for written replies. Similarly, two months should not become a *de facto* maximum time-limit as even this is often inadequate in complex antitrust cases. We suggest that the wording of paragraph 87 be revised to clarify this.

Additional clarity: the case of the specific procedures

25. In their current format, the Best Practices do not apply to aspects of cartel proceedings covered by the Leniency and Settlement Notices.¹⁰ We understand that the procedural specificities associated with these notices prohibit the application of general antitrust principles. However, further transparency and predictability for both leniency and settlement procedures would enhance the efficacy of cartel proceedings, benefitting both DG COMP and parties. We therefore encourage DG COMP to provide similar guidance in respect of these procedures. This guidance could take the form of a separate document or preferably be addressed in the current Best Practices.

BEST PRACTICES FOR THE SUBMISSION OF ECONOMIC EVIDENCE AND DATA

26. DG COMP's Best Practices for the Submission of Economic Evidence and Data successfully guides parties through the main issues related to the generation and presentation of economic and empirical evidence that may be taken into account in the assessment of a competition case. The document provides a useful insight into the information DG COMP wishes to obtain from the explanations accompanying submitted data. We therefore welcome this document as a useful resource. We do, however, wish to make a few observations.
27. DG COMP should correct footnote 1 which states 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*". Infringements by object are considered by DG COMP to be restrictions that have by their very nature the potential of restricting competition, and do not therefore require any evidence of their *effect* on the market.

⁹ Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, ECR [2007] II-3523, currently under appeal (Case C-550/07 P, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*) ("*Akzo*").

¹⁰ Best Practices, para 3. Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17; Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases [2009] OJ L171/3; Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C167/1.

However, it cannot automatically be assumed that infringements by object “*generally*” lead to a “*serious anti-competitive effect*”.

28. A further clarification point relates to the response to a data request. DG COMP indicates that responses “*must be (i) complete; (ii) correct, and (iii) timely*”.¹¹ Whilst this statement appears innocuous, it in fact imposes a high standard, in particular in comparison to the later explanations provided under Section 3.4 (“Other Recommendations”). For example, paragraph 65 (which deals with the “correctness” requirement) indicates that “*individual values within a variable must be consistent with the economic reality*” and that “*coherence between different variables is necessary*”. While the data submitted should of course aim to comply with these standards, in practice, data is rarely “perfect” and it may not always be possible to satisfy such exacting requirements. DG COMP recognises this issue in paragraphs 77 and 78 (in Section 3.4), where it indicates, for example, that parties should draw DG COMP’s attention as early as possible to the limitations in the data and explain how steps have been taken to ensure reliability. This latter standard is more realistic. DG COMP should therefore modify paragraph 60 to indicate that responses to a data request “*should be*” complete, correct and timely.

GUIDANCE ON PROCEDURES OF THE HEARING OFFICERS

29. The Guidance on the Procedures of the Hearing Officers is a useful instrument as it explains in greater detail the powers and tasks entrusted to the Hearing Officers and their current practice in proceedings under Articles 101 and 102 TFEU.¹² This paper could, however, be improved by addressing the following issues.
30. Due to the considerable concerns pertaining to objectivity and impartiality arising from the case team’s combined investigating, prosecutorial and decision-making function (see above), the Hearing Officers have a valuable part to play in antitrust investigations. We therefore support a substantial expansion of the Hearing Officers’ role so as to maximise impartiality of the proceedings and respect for the parties’ rights of defence under the current structure. To achieve these goals, the Hearing Officers’ should, *inter alia*, be granted Director status (their status was downgraded under Commissioner Kroes) and be fully independent from both the Commissioner for Competition as well as DG COMP, reporting directly to the President. Their teams need to be staffed properly and a greater allocation of experienced staff provided.
31. We welcome the indications given at paragraphs 8, 10, and 11 of the draft that the Hearing Officers are willing to become involved in appropriate issues prior to the issuance of a statement of objections. Even if the Hearing Officers do not have, at this time, any clear mandate prior to the issuance of a statement of objections, they have significant moral influence, and they should have the courage to exercise it until such time as the mandate itself is changed so as to formalise their role prior to the issuance of a statement of objections. This is particularly important in the phase between the opening of proceedings and the issuance of a statement of objections in antitrust cases, which may be a considerable period of time. When the mandate was originally adopted, a statement of objections was issued at the same moment in time as proceedings were initiated (the statement of objections often was delivered as an annex to the letter initiating proceedings). Since 2007, that process has been bifurcated and the initiation of proceedings has been delinked from the issuance of a statement of objections. It is this intermediate phase of the investigation which, we believe, requires a greater degree of Hearing Officer oversight than is presently the case. We would hope that paragraphs 10 and 11 of the draft will be amended to reflect this changed procedure and make it clear that the Hearing Officers are willing to engage on issues of process and fairness during the intermediate phase.

¹¹ Best Practices for the Submission of Economic Evidence and Data Collection, para 60.

¹² Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings [2001] OJ L162/21 (“Commission Decision of 23 May 2001 on the terms of reference of hearing officers”).

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32. Parties consider oral hearings to be an important opportunity to exercise their rights of defence, investing considerable time and effort in presenting their case. Therefore, parties should have the right to be heard by the ultimate decision-makers. The Hearing Officer in charge of the oral hearing should have the power to require the presence of senior management of DG COMP. Currently, the guidelines contemplate the Director in charge of the investigation being present. However, oral hearings are often considered to be ineffectual when held before merely the relevant Director and a case team that has been charged with investigating the case (often for many years in antitrust cases) and which may sometimes be viewed as having a tendency to engage in prosecution rather than investigation.
33. It is, we suggest, essential for an agency such as the Commission which combines the investigative role with that of decision-making, to ensure that (beyond any doubt at all) that the oral hearing is both believed and seen to have value as part of the investigative process leading to the adoption of an informed and objective final decision. We recognize that it is unrealistic to expect the Commissioner to attend each and every hearing, but certainly there should be a much greater and more varied attendance at oral hearings from senior DG COMP management than has generally been the case. Therefore, and at a minimum, we recommend that the relevant Deputy-Director General should attend as well as the Director of Directorate A and the Unit charged with case coordination (currently O2 for antitrust), and in the most important cases the Director General and/or possibly the Commissioner for Competition should attend.
34. We also recommend that sufficient time be allowed for the preparation of an oral hearing in antitrust cases. Often the time allowed between the submission of the reply to the statement of objections and an oral hearing is too short and is determined more by the availability of rooms of a suitable size rather than due process concerns. Procedures should be put in place to allow the Hearing Officers to secure better suitable room availability and priority than is presently the case. Care should be taken when selecting dates for oral hearings to avoid conflicts with events that may adversely affect the ability of senior DG COMP management to attend.
35. Finally, we believe that the draft Guidance on the Procedures of the Hearing Officers should be more precise on a number of practical matters, for example the setting of deadlines for advance notice of language requirements at oral hearings or for submitting responses to questions raised during the oral hearing.¹³

¹³ See, for example, Guidance on the Procedures of the Hearing Officers, paras 51 and 57.