

Joint Working Party of the Bars and Law Societies of the United Kingdom on
Competition Law (the ‘JWP’)¹

Response to the European Commission's public consultation on the (i) DG Competition best practices on the conduct of proceedings concerning Articles 101 and 102 TFEU, (ii) the DG Competition 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, and (iii) the Hearing Office guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (ex-articles 81 and 82 EC)²

1. Introduction

The UK Joint Working Party welcomes the opportunity to comment on the above three documents, published under cover of a press release dated 6 January 2010 “in order to further enhance the transparency and the predictability of Commission antitrust proceedings”. The JWP is aware that a response is also being made by the Law Society of England and Wales and the General Council of the Bar of England and Wales. This response is deliberately intended to complement rather than to duplicate that response.

In general terms, the JWP strongly welcomes the commitment of DG Competition to enhance the transparency and predictability of Commission antitrust proceedings. As has been well known for many years, there is widespread concern that the proceedings of DG Competition under Articles 101 and 102 are at best dubiously compatible with Article 6 of the European Convention on Human Rights and Fundamental Freedoms, given the lack of independence and impartiality of the decision-making process before the Commission and the fact that the General Court exercises a review jurisdiction rather than a full rehearing. The acceptance of the substantial penalties and stringent behavioural remedies imposed by the Commission pursuant to Articles 101 and 102 therefore rests to a substantial degree on practical safeguards being provided by the Commission - in addition to the intensity of review exercised by the General Court - to ensure that there are sufficient guarantees in practice of the basic right to a fair hearing guaranteed by Article 6.

¹ The members of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law comprises barristers, advocates and solicitors from all three UK jurisdictions; the membership includes both those in private practice and in-house. Its secretary is Louise Speke of the Law Society, 113 Chancery Lane, London WC2A 1PL (telephone: 020 7242 1222).

² In this Response, the JWP refers to the three papers respectively as (i) the general Best Practices document (ii) the Economics document and (iii) the Hearing Officer document.

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In this context, published guidance as to the “best practices” of DG Competition in the conduct of such proceedings is a further step in the right direction. In this response, the JWP first makes some general comments on the form and structure of the three papers and their relationship to other published legislation, notices and guidance, before making some more specific comments on the individual papers. The latter in particular are not intended to be a comprehensive commentary on the documents.

2. General comments

The first point that the JWP would make is that it would be helpful if the three papers could be more carefully integrated, with cross references as necessary, not only with one another but with the existing legislative and administrative materials.

So far as the former is concerned, there is little or no guidance in either the general Best Practices document or the Economics document as to how DG Competition will itself present economic material or how it will enable parties to Article 101 or 102 proceedings to comment on such material. Similarly, although the Hearing Officer document sets out a number of helpful issues that will be dealt with by the Hearing Officer in the context of oral hearings, the general Best Practices document makes no reference to this important aspect of the Hearing Officer’s role and, in general, gives little or no explanation of how far DG Competition will take into account of the views of the Hearing Officer during such proceedings.

These are important omissions: although the Economics paper gives helpful guidance as to the presentation of economic materials and responses to data requests from the Commission, DG Competition will of course be aware that under Articles 101 and 102 it is for the Commission to advance whatever economic case it relies on to discharge its burden of proof rather than for the parties under investigation to produce speculative justifications of their conduct in anticipation of the case that the Commission may advance. Indeed, it is clearly open to the parties, in the exercise of their rights of defence, to advance whatever legal or economic arguments they wish in response to the Commission’s case. Even in merger cases, although the parties to a merger may well advance economic arguments at the preliminary investigation stage, for which purpose the Economics papers provides helpful guidance, in “serious doubts” cases under Article 6(1)(c) of the Merger Regulation it is for the Commission to initiate proceedings and to explain its doubts, in economic as well as legal terms. It would therefore be helpful for the Commission to provide further explanations of how it views its own “best practices” in this area.

In relation to the Hearing Officer, the Hearing Officer document correctly recognises that the role of the Hearing Officer is intended to provide a degree of independence and impartiality at the initial decision-making stage before the Commission. Such a guarantee of independence is of course only of value if it is recognised by DG Competition itself, so that it would be helpful for the general Best Practices paper to make clear that this is the case.

In relation to the integration and cross-referencing of the three documents, and as a matter of practical comment, the documents are lengthy and complex and make extensive cross reference to

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other guidance documents and legislation. In their current form, that renders them very unwieldy and difficult to use, in that even elementary definitions and explanations are given by reference to other documents rather than set out in these documents themselves. In an ideal world, this would be avoided by a comprehensive codification of the various different guidance documents – the JWP recognises that this may not be a realistic possibility in the foreseeable future, but it considers that it would at the least be possible to provide hyperlinks to all the specific provisions to which cross-reference is made, so that it would be possible for any user of the documents immediately to find the relevant cross-reference.³

As a final general comment on the three papers, it would be helpful for them to be clearer as to their status. As the Commission will be aware, guidance documents of this kind are not legally binding in the sense of legislation or rulings of the General Court or Court of Justice, but they are documents that parties subject to investigation are entitled to rely on both in relation to the principle of sound administration and as a matter of legitimate expectations.⁴ Some statements in the three papers appear to cast doubt on this position, suggesting that these documents have some lower status as purely descriptive documents that could in principle at least be changed by the Commission at any time without notice.⁵ The JWP doubts that this is legally possible as a matter of EU law, but it considers in any event that such documents are of very little value unless the Commission recognises that they will be relied on by parties to Commission proceedings and that the Commission would be under an obligation to give clear notice to affected parties if it intended to act inconsistently with such guidance in an individual case. Paragraph 5 of the general Best Practices document indicates that the Commission may adapt or deviate from the guidance. Clearly, if there is regular adaption/deviation this would be likely to reduce the value of the document. While the JWP recognises there may be an occasional need for adaption of guidance documents of this kind in the light of experience, or for deviation from their terms in exceptional circumstances, the guidance should state that such occurrences are expected to be infrequent and that the Commission will give reasons for any such modification or deviation.

3. Specific comments on the general Best Practices document

As indicated above, these specific comments are not intended to be comprehensive, but the JWP comments on the following issues: publicity (paragraphs 19 and 70); time limits for handling cases (paragraph 15); requests for information (paragraphs 31-33) the conduct of interviews (paragraphs 42-45 of the document); legal professional privilege (paragraphs 47-52); state of play meetings (paragraphs 54-64); confidentiality (paragraphs 83-85); and oral hearings (paragraphs 92-94).

³ To take an obvious example, paragraph 3 of the general Best Practices document cross-refers to the Commission Notice on immunity from fines and reduction of fines in cartel cases for the definition of “cartels” used in the document – it would plainly be possible and convenient to provide a hyperlink to that definition so that a reader of the document did not have to dig out the relevant reference from a textbook or elsewhere on the Europa website.

⁴ See, e.g., Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] I-5425, para 211: “In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.”

⁵ See, e.g., paragraphs 5-7 of the general Best Practices paper.

Time limits

At paragraph 15, the Commission indicates that it will endeavour to provide a response to a complaint within four months of receipt, subject to the particular circumstances of the case. The JWP considers that it would be valuable for the Commission to give indications of this kind on a broader basis. While the Commission is not subject to any time limits in the conduct of Article 101 and 102 cases, the JWP considers that it would reflect best practice for the Commission to have self-imposed deadlines for the stages of a case. Indeed, the JWP understands that the Commission does set such deadlines internally and sometimes advises parties about them. The JWP considers that it would be a valuable discipline for the Commission, with considerable benefits in terms of transparency and legal certainty, for the Commission to commit in the guidance to providing the parties with informal deadlines for the stages of a case, and to provide reasons to the parties where the Commission subsequently needs to revise a deadline.

Publicity on opening and closing proceedings

Paragraph 19 states that the Commission may make public the opening of proceedings. The JWP considers that this is likely to be the normal practice in cases other than cartel investigations. Given the potential damage to the reputation of a company that can be caused by such publicity, the JWP considers that it would be appropriate (in cases other than cartel investigations) for the Commission to offer an additional state of play meeting before the opening of proceedings where the content of the public announcement can be discussed.

Later in the document, at paragraph 70, the Commission states that where a case is *closed* after proceedings have been opened the Commission will 'normally' announce this publicly. The JWP considers that, in the interests of fairness and transparency, the guidance should state that where the opening has been made public, the closure will also be made public. That may be the intention of the current draft in using the word "normally", but the JWP considers that it would be appropriate to make the point explicitly.

Requests for information

The JWP considers that this section of the document could helpfully be expanded to deal in more detail with requests for electronic information, which is an increasingly important source of information in any substantial enquiry. It would be valuable for the Commission to explain the procedures that it intends to follow in seeking such information, for example the use of search terms to keep such enquiries within manageable bounds.

Conduct of interviews

Given the severe financial consequences for companies and the potential exposure to criminal sanctions, including imprisonment, for individuals found to have been implicated in infringements of competition law, the JWP considers that these paragraphs need to be substantially strengthened to confirm that the Commission recognises the need for individuals to be given clear explanations of their procedural rights, and in particular the right to silence and the privilege against incrimination.

Legal professional privilege

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The Commission will be well aware of the long-running difference of view between the Commission and the UK legal profession as to the scope of legal professional privilege, particularly in respect of in-house lawyers. The view of the JWP is that such privilege should be based on the professional obligations of the legal advisor rather than his or her employment status but this issue is subject to the further guidance of the Court of Justice in the pending *Akzo Nobel* case. More generally, this section of the document will clearly need to be reconsidered in the light of the judgment in that case.

By way of further general comment, the JWP considers that the tone of paragraph 52 of the document is inappropriately threatening and is out of place in a document relating to DG Competition best practices – the JWP considers that it would be a wholly exceptional case where it would be appropriate for a fine to be imposed on an undertaking on the basis that an unfounded claim for legal professional privilege had caused delay in an investigation or where the making of such a claim could constitute an aggravating factor for the purposes of a final fining decision.

State of play meetings

The JWP welcomes this explanation of the use of such meetings as a way of promoting the efficient management of Article 101 and Article 102 proceedings. However, the JWP questions whether there is any reason why such meetings could not be offered to complainants or third parties, as indicated at paragraph 55 of the document. If the reason for such meetings related to protection of the rights of defence, then the JWP can see that this would not apply to the position of complainants or third parties. However, the stated objective of such meetings is “to contribute to the quality and efficiency of the decision making process and to ensure transparency and communication between DG Competition and the parties”. For that purpose, it seems to the JWP that there may well be cases where meetings with complainants or third parties (for example, the individual members of a collective selling or purchasing organisation that is under investigation) would be of value to the Commission in reaching a clear understanding of the issues in a case.

A further point made at paragraph 60 of the document is that such meetings “would normally not take place in the context of cartel proceedings” – although the JWP can see that this might be appropriate where the Commission is actively investigating a secret cartel, where quasi-criminal procedures may be required, the definition of cartels used in the document is not limited to such cases and the JWP considers that such meetings may have a useful role to play in relation to this wider category of “cartels”, particularly once proceedings have been initiated and where the Commission is satisfied that the behaviour under investigation has ceased.

Confidentiality

Paragraphs 83-85 of the document set out two “additional procedural practices” that may be used in relation to confidential information, so-called “negotiated disclosure” and “data room” procedures. The former bears some resemblance to the “confidentiality club” procedure that is frequently used in UK domestic litigation, both in the High Court and before the Competition Appeal Tribunal, to enable the professional advisors (normally legal, economic or accountancy advisors) and, on occasion, a carefully prescribed category of client representatives, to have access to confidential information. Such procedures are normally undertaken on the basis of formal undertakings to the relevant court or tribunal to ensure that the information is not communicated to persons outside the “club” or used for any purpose outside the scope of the litigation.

The JWP considers that the Commission could usefully adopt a similar procedure in complex cases, which would have advantages over the procedures described in paragraphs 84 and 85 – in particular, the “data

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room” procedure is likely to be quite cumbersome for professional advisors who may wish to have access to complex data and to manipulate such data in order to develop their economic or financial case or to analyse the case advanced by the Commission on the basis of such data.

Oral hearings

Finally, as indicated above, the JWP considers that the very short section on “oral hearings” at paragraphs 92-94 of the document, which is little more than a description of such hearings, should at the least be cross-referenced to the much more detailed discussion in the Hearing Officer paper. The JWP considers that the oral hearing can be a very important element in the rights of the defence of addressees of a statement of objection and can equally be a very important opportunity for a complainant to make its concerns known. Although paragraph 94 of the current draft recognises the “importance of the oral hearing”, it provides no other guidance as to the best practices of the Commission other than a list of the attendees at such hearings.

The JWP considers that it would be appropriate for the Commission to deal with issues such as the preparation for the hearing, the conduct of the hearing, the handling of witness evidence and the rights of complainants and interested third parties. In addition, it would be valuable for DG Competition to confirm the importance of the role of the Hearing Officer at the oral hearing (and elsewhere) and the readiness of DG Competition to cooperate with the Hearing Officer where he or she raises issues as to the fair conduct of the oral hearing.

4. Specific comments on the Economics document

The JWP notes as a general comment that it considers the Economics document to be excessively long and technical and unnecessarily didactic in tone. Moreover, the extensive use of footnotes makes the document rather unwieldy for what is supposed to be a document providing useful practical guidance. As indicated at the start of this response, the JWP considers that it would be valuable for the Commission to indicate its own “best practices” in relation to the use of economic evidence in relation to Articles 101 and 102 and under the Merger Regulation.

Although guidance as to the Commission’s preferences in relation to the presentation of economic evidence and data may be of some assistance, it is clearly for the parties to determine what legal and evidential materials they wish to submit to the Commission, including any economic analysis. In addition, the JWP doubts that it is necessary for the Commission to provide general guidance to parties as to the importance of economic evidence for competition law analysis.⁶ The JWP is also surprised by the significant reference to economic theory and the apparent emphasis placed on this. It seems to the JWP that in many cases economic theory per se will have little or no role to play, the essential questions in the case turning on the application of agreed theoretical principles to specific factual circumstances.

More specifically, the JWP would make the following points about the Economics document:

⁶In finalising the Economics document, it may be of value to the Commission to consider the approach of the UK Competition Commission to the analogous issue of the presentation of technical economic evidence in the context of UK merger control and monopoly or sectoral investigations (see http://www.competition-commission.org.uk/rep_pub/corporate_documents/corporate_policies/best_practice.pdf)

Economic and econometric submissions

The suggestion on page 1 of the document that object infringements do not require any substantive economic analysis seems to the JWP to be overstated – at least some such analysis will frequently be required in relation to alleged efficiencies, objective justification, fining decisions and assessing the damage allegedly caused by the behaviour in question.

The JWP welcomes the repeated request that any economic evidence submitted in an investigation should be presented in such a manner that it is capable of replication. Indeed, the JWP considers that the document could place greater emphasis on the crucial importance of transparency and clarity when it comes to economic evidence.

The JWP, in line with the general comments on the nature of these documents set out above, questions the meaning of paragraph 8 of the document. If the Commission can, or intends to, depart from this guidance in individual cases, in light of future developments or when the specificity of a case so requires, it should at least give some indication of what factors might lead to such a deviation and how they will be weighed by the Commission.

The JWP considers that the document does not give sufficient recognition to the fact that in many cases there will be serious problems relating to the absence or inadequacy or relevant data. Moreover, the document appears to envisage that there will be extensive submission of economic and econometric analysis, backed up by substantial references to economic theory and literature reviews. The JWP considers that this will be unrealistic in many cases, particularly under Articles 101 and 102, and that the document appears to be slightly unrealistic about what will be possible or economic in many cases.

The JWP considers that in general there is insufficient emphasis placed on the fact that much economic evidence presented to the Commission will be highly confidential or commercially sensitive and there is insufficient guidance on the manner in which such confidential information will be treated during investigations by the Commission.

While the JWP welcomes what is said about the goal of the document in paragraph 15, for the reasons outline above it is not clear to the JWP that the document achieves those goals nor that it does in fact provide useful practical advice on “the generation and communication of economic evidence and econometric analysis”. Moreover, the JWP is disappointed that the document signally fails to set out how the Commission will itself conduct economic or econometric analysis or how it will deal with such evidence that is submitted to it. As noted at the start of this response, the Economics document does not indicate any recognition that it is in general for the Commission to advance an economic case in support of its statement of objections and in “serious doubts” cases under the Merger Regulation.

Section 2.3 of the document, headed “Choice of empirical methodology”, appears intended to prescribe exactly how economic analyses should be conducted and presented – the JWP considers

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that these are matters which fall within the professional expertise and judgment of the parties' professional advisers in any given case. Likewise, the JWP does not consider that economic advisors need guidance on elementary issues such as the creation of tables (paragraph 33), the presentation of statistics (paragraph 34) and the interpretation of data by reference to the relevant hypothesis (paragraph 35).⁷

The JWP welcomes the focus on robustness at section 2.5 of the document though again it considers that no reasonably competent economic advisor would need the following explanation.

The JWP also welcomes the suggestion at paragraph 43 of the document that DG Competition will be willing to discuss in advance with parties what economic evidence, empirical analyses etc that they are most likely to find helpful in any given case. Again, however, the Commission appears to place the onus on the parties to present economic evidence rather than accepting that it is in general for the Commission to establish its case as a matter of economic theory and evidence.

The JWP is also concerned by the suggestion in paragraph 44 that “the absence of all the necessary elements needed for replication and assessment of an economic submission can constitute grounds for not taking it further into consideration”. The JWP considers that a more proportionate response in such a situation would be to make a clear request for any information required but not provided.

While the JWP welcomes the reference to confidentiality contained in paragraph 45, it questions whether the “data room” procedure as set out will be fit for purpose in practice, but would welcome further consultation on how this might be achievable.

Requests for quantitative data

The JWP considers it unfortunate that it is not until paragraph 49 that the document acknowledges the very significant costs that can be imposed on the parties by the preparation of extensive economic data and analysis envisaged by the document. The JWP considers that this is an issue as much if not more relevant to economic and econometric submissions and that the Commission should recognise this fact in Section 2 as well as Section 3 of the Economics document. The JWP also questions whether Section 3 of the document will in fact meet the stated objective “to provide recommendations to reduce the burden on the involved parties”.

The JWP welcomes the promise at paragraph 52 that DG competition will “balance the usefulness of each [data] request against the opportunity cost of the time the request will consume as a proportion of the time left before any legal or procedural deadline”. The JWP would hope that DG Competition would balance the usefulness of any request against the time and resources necessary to meet such a request more generally and would hope that in all cases, rather than just in undefined “appropriate” cases, DG Competition would discuss in advance with parties the purpose, scope and

⁷ See also footnotes 16-18, which seem to be intended to summarise basic principles of economics and econometrics – it is hard to see how this could assist anyone who was competent to provide economic advice to the parties to a competition law investigation. The JWP considers that the intended readership of this document will understand economic and econometric theory and be well-placed to provide appropriate interpretations of any analysis they might carry out.

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format of any data request. The JWP also questions the implicit suggestion in paragraph 53 that it will be for DG Competition to choose appropriate samples – the JWP considers that it should normally be a matter either for the parties’ advisors to determine in any given case or at least for discussion and agreement between the Commission and the parties.

While the JWP is heartened by the acknowledgement in paragraph 57 that “data may be costly to collect or hardly accessible in the relevant time frame” it is somewhat concerned by the statement in the same paragraph that “the Commission is not limited to request only data that is readily available to the parties”. It appears to the JWP that the effect of this wording could be interpreted as making this issue a matter for the Commission’s unfettered discretion in which case it provides no real assistance to the parties.

The JWP considers that the suggestion at paragraph 59 of a standard format or template in multi-party cases is a good one and perhaps might be appropriately applied in all multi-party cases.

The JWP considers that it would be helpful for the Commission to confirm at paragraph 61 that it will only consider imposing fines for the provision of incomplete information or the late provision of information in accordance with the principle of proportionality, so that it will exercise its discretion to impose fines only where the behaviour at issue is particularly blameworthy.

The JWP considers that sections 3.3.1 and 3.3.2 are generally unnecessarily didactic and prescriptive and do not therefore provide particularly helpful guidance to advisers. In general, professional advisers do not find themselves in an ideal world with no constraints on the quality of data, resources or time.

The JWP again welcomes the possibility of early consultation with DG Competition on data issues described at section 3.4.2 and for consultation on draft data requests and samples at section 3.4.3.

The JWP considers that perhaps the most useful part of the document is the very helpful annex outlining the structure and basic elements of a sound empirical submission, but hopes that these are in fact guidelines and will not be treated as rigid requirements in future cases.

5. Specific comments on the Hearing Officer document

As a general comment, the JWP welcomes the indication at paragraph 1 that Hearing Officers consider themselves to be “independent guardians of the rights of the defence”. However, from this perspective, the JWP considers it slightly unfortunate that there is still not greater separation between the Hearing Officers and DG Competition.

The JWP also notes that there is a clear tension between the above objective and the objectives for Hearing Officers set out in paragraph 3 of the document, which refers both to safeguarding the rights of the defence and the procedural rights of complainants. The JWP considers that it might be clearer if responsibility for protecting the procedural rights of complainants were a matter for DG Competition itself, subject to the control of the General Court.

As a purely practical point, the JWP considers that it would be very helpful for the Hearing Officers’ Mandate to be annexed to the document, given the extensive reference that is made to it throughout the document.

While the JWP agrees with the statement in paragraph 4 that the most important right for third parties is to be heard by the Commission, this should not be taken to mean that rights of access such as to documents, data, statements, allegations and so forth are not equally as important, indeed that they form an integral part of the rights of defence.

The JWP would welcome clarification on the role of Hearing Officers, referred to at paragraph 7, in relation to making observations on substantive issues to the Commissioner. The JWP would also welcome further information on how these observations will be provided, to whom and what weight they will receive in any final decision making, whether in this document or in the general Best Practices document.

The JWP is somewhat surprised by the assertion, in paragraph 8, that “failure to bring a dispute with DG Competition before the Hearing Officers, for which they are conferred decision-making powers, can be taken as an acceptance of the position expressed by DG Competition”. If that is indeed the view of the Commission, then this is a very important point that must be explained in clear terms to all parties, along with the role of the Hearing Officer, as soon as they become involved in an investigation. The JWP does not in general accept that a failure to raise an issue before the Hearing Officer precludes that issue being raised on an application for annulment of a subsequent decision before the General Court.

The JWP would welcome further clarification on how proactive Hearing Officers are intended to be or will be in practice, in discharging their functions, or whether they consider their role in practice to be to provide a relatively passive mechanism for dispute resolution between DG Competition and parties to an investigation.

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The JWP considers it unfortunate that complainants and other third parties admitted to a proceeding do not have a general right of access to a non-confidential version of the file, contrary to the position set out in paragraph 16.

The JWP notes that it may be difficult for parties seeking disclosure of documents to make requests with the specificity suggested in paragraphs 20 and 21 of the document and considers it unfortunate that such a failure will apparently lead automatically to the rejection of a request for disclosure.

The JWP considers that the requesting party should be provided with the same “pre-Article 9” letter as the information provider, contrary to the procedure set out in paragraph 22, and also wonders whether reasons will be given when a Hearing Officer finds that a confidentiality claim is justified and that therefore requested information cannot be disclosed.

The JWP queries why the procedure set out in paragraph 24 is not also available for parties requesting information.

The JWP would welcome some guidance on what might constitute the “exceptional circumstances” referred to in paragraph 28.

The JWP questions the presumption referred to in paragraph 33 that in assessing a request for third party status, a Hearing Officer would not normally consider an exclusively private interest to be sufficient. The JWP considers that there should be no such blanket rule and that all requests for third party status should be considered on their merits in light of all relevant circumstances.

The JWP considers that, contrary to the position set out in paragraph 36, it would be desirable for all third parties to be given access to a non-confidential version of the Statement of Objections.

Again, the JWP would welcome clarification on what might constitute the “exceptional circumstances” referred to in paragraph 37.

The JWP expresses the hope that the deadline for requesting an oral hearing referred to in paragraph 39 will be made plain to all relevant parties to investigations. More generally, it might be useful for the document to contain an annex setting out all relevant timetables and the roles of the Hearing Officers and DG Competition.

The JWP considers that contrary to the position set out at paragraph 40, all parties who have been granted third party status should be entitled to the opportunity to attend an oral hearing, subject only to limits on the time they may have to make submissions and to confidentiality requirements. Failing this, the JWP considers that the document should set out what criteria will be applied by Hearing Officers when deciding on applications to attend an oral hearing. Similarly, the JWP considers that the document should set out in paragraph 45 what criteria will be applied by a Hearing Officer when deciding whether new documents may be admitted at an oral hearing.

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The JWP queries why the Interim Report of the Hearing Officer, referred to at section 7.1 of the document is not accessible to the parties to the proceedings and considers that at the very least reasons should be given for why this is the case.

The JWP wonders, in respect of the procedure outlined at paragraph 66, whether the Commission should not be required to indicate, in outline form, what documents it has in its possession.

Finally, the JWP again notes that the reference in paragraph 69 to the Hearing Officer participating in the Commission's deliberations up to the state of the draft Decision "where appropriate" is unfortunately vague and would welcome clarification on when DG Competition considers this will be appropriate and what factors will be taken into consideration.

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