



The Law Society
of England and Wales

European Commission consultation on: Best Practices on the conduct of proceedings concerning Article 101 and 102 TFEU; Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU; and Best Practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in merger cases

Response of the Law Society of England and Wales
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Response of the Law Society of England and Wales and the General Council of the Bar of England and Wales to the European Commission Best Practices on the conduct of proceedings concerning Article 101 and 102 TFEU; Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU; and Best Practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in merger cases.

1	General comments on procedural rights in EU antitrust proceedings	3
1.1	Introductory remarks.....	3
1.2	Procedural safeguards and protections	3
1.3	General comments on the documents.....	4
2	Detailed comments on the Best Practices on the conduct of proceedings concerning Article 101 and 102 TFEU	6
2.1	Scope and purpose of the Best Practices (section 1)	6
2.2	Initial assessment and case allocation (section 2.2).....	6
2.3	Opening of Proceedings (section 2.3)	7
2.4	Time Limits (section 2.5.2).....	8
2.5	Meetings and other Contacts (section 2.6)	9
2.6	Power to take statements (section 2.7)	9
2.7	Legal Professional Privilege (LPP) (section 2.9).....	9
2.8	Information exchange between competition authorities (section 2.10)	10
2.9	State of Play Meetings (section 2.11)	10
2.10	Triangular Meetings (section 2.12)	10
2.11	Review of key submissions (section 2.14)	11
2.12	Possible Outcomes (section 2.15)	11
2.13	Access to File (section 3.1.2).....	11
2.14	Written Reply to the Statement of Objections (section 3.1.3)	12
2.15	Rights of complainants and interested third parties (section 3.1.4) .	12
2.16	Oral Hearing (section 3.1.5).....	12
2.17	Possible outcomes of this phase (section 3.2).....	12
2.18	Submission of the commitments (section 4.3)	13
2.19	Procedure (section 5.2)	13
2.20	Limits on the use of information (section 6)	13
2.21	Adoption, Notification and Publication of Decisions (section 7)	13
2.22	Annex 1	13
3	Detailed comments on Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU	14
3.1	The Hearing Officers' Tasks	14
3.2	The Investigative Phase	14
3.3	Procedures potentially leading to a prohibition decision	14
3.4	Admission of Third Parties.....	15
3.5	Oral Hearing	15
3.6	Rejection of complaints.....	17
3.7	Final Report	17
4	Detailed comments on Best Practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in merger cases.....	18

1 General comments on procedural rights in EU antitrust proceedings

This response has been prepared by the Law Society of England and Wales (the Society), the representative body of over 130,000 solicitors in England and Wales and the General Council of the Bar of England and Wales (the Council), the professional body for barristers in England and Wales. The Society negotiates on behalf of the profession and makes representations towards regulators and government including the European Union institutions. The Council provides representation and services for the Bar in England and Wales.

1.1 Introductory remarks

- 1.1.1 The Society and the Council called in 2009 for the EU to clarify procedural safeguards in competition proceedings. As such we welcome this initiative to bring greater transparency and consistency to antitrust proceedings. It is also consistent with the better regulation agenda and will hopefully be of practical benefit to legal practitioners.
- 1.1.2 The Society and the Council wrote to Commissioner Kroes in December 2009 asking her to consult publicly on these documents and we therefore appreciate the opportunity to comment. We broadly welcome the three documents and the substance of them. We would however like to make a number of comments.
- 1.1.3 In this section, we would like to take the opportunity to make some broader comments on procedural rights. We understand that it might not be possible to address all of these in the context of the three papers published by DG Competition. Sections 2 – 4 contain detailed comments on the three papers.

1.2 Procedural safeguards and protections

- 1.2.1 While antitrust procedures might not constitute criminal proceedings, *per se*, we believe they are of a comparable nature and that the same guarantees as afforded by Article 6 of the European Convention of Human Rights should be applied. Indeed, it could be argued that the fines imposed under EU competition rules meet the definition of a criminal sanction under the Convention as set out in the 1984 ECHR case *Östürk v Germany* since they include both a general and a specific deterrent element plus have a punitive purpose. We reiterate the importance of procedural rights and the rights of the defence in the context of competition law enforcement, both by the EU institutions and the national competition authorities. With the imminent accession of the EU to the European Convention of Human Rights we think that the Commission should thoroughly examine the compliance of its competition procedures with Article 6 of the Convention and we would welcome the opportunity to comment further on this point.
- 1.2.2 In relation to the application of competition rules and procedure, decentralised enforcement is welcome. Procedures across the EU, and the protections they afford, do however vary. The rights of the defence are coming increasingly under pressure. We have concerns that when EU competition law rules are applied, particularly by some Member State authorities, the procedures followed do not always contain sufficient safeguards for the defendant.

- 1.2.3 We are concerned that full judicial appeal against the decisions of such national authorities is not possible in some Member States, as well as at the EU level.
- 1.2.4 We call on the Commission to consider, with the European Competition Network, the desirability of establishing key minimum procedural safeguards within the process of competition law enforcement, in order to ensure access to justice and the rights of the defence before competition enforcement authorities and courts.
- 1.2.5 Without such minimum safeguards being consistently in place throughout the EU, we would question, for instance, the wisdom of legislating to ensure the binding nature of national competition authority and court decisions in competition matters throughout the EU.
- 1.2.6 Given the multi-jurisdictional nature of antitrust enforcement, we would commend the Commission and Member States to work towards ensuring that such minimum procedural rights can be agreed globally. Such minimum procedural rights should not fail to reiterate the basic rights of the individual to silence, to not incriminate him or herself and to be allowed access to a lawyer.

1.3 General comments on the documents

- 1.3.1 The documents are drafted in a manner that is descriptive of the status quo. We understand that elements may also represent an extension of current practice. As such we consider that it would be useful to draft these documents instead in the imperative style usually associated with guidance. In other words, it would be preferable to replace the word "are" in many cases with the words "will be" thus announcing what the Commission considers should be done. They could usefully state explicitly what the Commission or parties must, should or may do. They could also usefully set some timelines for various steps of the procedure, even if these are only indicative.
- 1.3.2 For the sake of ensuring that these papers are of maximum use to practitioners, we note in various sections that, rather than referring to other documents in footnotes, certain texts could be usefully reproduced in the current papers.
- 1.3.3 It would be helpful if the text of the document made it explicit when certain aspects were not relevant to certain types of investigation or procedure.
- 1.3.4 Moreover, although the volume of information provided by the Commission is to be welcomed, it would benefit significantly from a process of consolidation. While we appreciate that the documents in question do not relate only to cartel cases, we note however the documents do not cover the process relating to immunity/leniency applications or the settlement procedure at all. Indeed other than in the relevant notices, the "procedures" for immunity/leniency and settlement are not written down as such but have been a developing practice. Both have significant implications for the procedural handling of a case and the publication of these documents would have presented an opportunity to address a number of outstanding questions on these procedures.

- 1.3.5 If these best practices are not intended to focus on cartels, then they should state this upfront. If they are supposed to cover cartels, then the leniency and settlement processes cannot be ignored. It would seem very useful for these best practices to perhaps cover (a) the guidance currently set out in the document, relating in the main to non-cartel antitrust infringements and (b) cartel guidance.

2 Detailed comments on the Best Practices on the conduct of proceedings concerning Article 101 and 102 TFEU

2.1 Scope and purpose of the Best Practices (section 1)

- 2.1.1 In paragraph 5 the Commission has stated that the Best Practices will be applied as from the date of publication for "*on-going*" cases. In a footnote the Commission explains that this means that the Best Practices will "*only apply to pending procedural steps and not those already finalised*". The way this is currently phrased means that partially completed procedural steps will have to comply with the Best Practices, which may well waste time and money on the part of parties who as a consequence have to commence a procedural step all over again. It would therefore be better for the Best Practices to "only apply to procedural steps which have not yet been commenced."
- 2.1.2 In paragraph 5 the Commission also states that "*The specificity of an individual case may however require an adaptation of, or deviation from these Best Practices, depending on the case at issue.*" It is obviously sensible that the Commission is able to adapt its procedures to ensure that the procedures used are fair and efficient in the circumstances of a particular case. However, in order to introduce a degree of procedural certainty, if the Commission does decide that it is appropriate to divert from the Best Practices it should undertake to write to the parties affected to explain exactly what approach it intends to take, how it is different from the Best Practices and why it considers it necessary to take a different approach. Otherwise the Best Practices could be too easily diverted from and they would cease to play a valuable role.
- 2.1.3 Finally in paragraph 5 it is stated that the Best Practices "*reflect the views of DG Competition on Best Practices at the time of publication....*" Obviously if the Best Practices are to be useful to parties and complainants they need to be able to rely on the Best Practices as representing the current view of DG Competition. If DG Competition substantially changes its views and moves away from or improves the procedures set out in the Best Practices, the document should be amended and this should be publicised immediately so that parties and complainants can adapt their conduct and expectations accordingly.

2.2 Initial assessment and case allocation (section 2.2)

- 2.2.1 It would be helpful to include in this document guidance on the Commission's prioritisation criteria, rather than making reference in paragraph 12 to detailed criteria for assessing whether or not a complaint shows a sufficient "Community interest" that are set out in the 2005 Annual Report on Competition Policy.
- 2.2.2 In relation to paragraph 13, we consider that it would be useful for the Commission to explain how it applies the criteria for allocation in practice, as well as related matters, such as any recourse that concerned parties might have.
- 2.2.3 At paragraph 14 it would seem sensible to include a long-stop date by which the Commission will inform parties that they are under preliminary

investigation if no investigative measures have yet been addressed to them. This is also important in relation to parties that may have been included in the investigation at a later stage.

- 2.2.4 Further, it is not clear what information will be disclosed to the parties that are subject of the preliminary investigation if the case is subsequently closed, i.e. whether this will consist of a simple notification or whether a more detailed explanation will be supplied. If further statements are to be made by the Commission, it would be useful to know how these may be used by that party in administrative and/or civil proceedings.
- 2.2.5 An additional point is that there should be a long-stop date within which the Commission should finally decide whether or not to continue investigating a case. Otherwise the investigation could theoretically be kept open indefinitely leaving the parties in an uncertain state of affairs and requiring the maintenance of records by the parties under investigation for excessively long periods.
- 2.2.6 In paragraph 15 it is unclear whether DG Competition will either inform the complainant, within four months of receiving the complaint, of the action it proposes to take or inform the complainant of the action it will take in the first four months running from the date it received the complainant's complaint. It would be helpful if this could be clarified.
- 2.2.7 In paragraph 15 it says that whether or not DG Competition will inform the complainant of the actions it proposes to take in relation to a complaint depends on *"the circumstances of the individual case and is, in particular, dependant on whether DG Competition has received sufficient information from the complainant or third parties, notably in response to its requests for information, in order for it to decide whether or not it intends to investigate its case further."*
- 2.2.8 If DG Competition does feel that it has insufficient information to decide whether or not to investigate the matter further it would be helpful if it informed the complainant of this so that it would know why it had not received any information about the proposed action that DG Competition was planning to take. It might also encourage the complainant to supply additional information that may enable DG Competition to decide whether or not to investigate the matter further.
- 2.2.9 The Commission could usefully clarify what it views as constituting "sufficient information". The Society would also appreciate some clarification on the circumstances in which complaints are withdrawn by complainants rather than being rejected by the Commission. Clearly there are legal implications that stem from the way in which such matters are closed.

2.3 Opening of Proceedings (section 2.3)

- 2.3.1 Paragraph 19 states that the Commission may make public the opening of proceedings, unless this may harm the investigations. It would be useful if the Commission could clarify this latter point. We would ask that some indication or examples be given of the potential harms that may be caused and how they are assessed.

- 2.3.2 We welcome however the Commission's clarification of the fact that the opening of proceedings will be published on its website/confirmed by press release and that, in cartel cases, this will be at the same time as the adoption of the Statement of Objections (SO). We also note that the Commission will publish a press release setting out the key issues in the SO shortly after it is received by addressees. We assume that the information in the press release will not go any further than that currently contained in press releases issued at the time of adoption of an SO. However, we would welcome clarification of this.
- 2.3.3 In paragraph 20 it states that "*The parties subject to the investigation are informed in writing of the opening of proceedings before such opening is made public.*" Although it may merely be a translation issue, the use of the word 'are' rather than the words 'will be' in this sentence means that it appears to convey what the common practice of the Commission is rather than being a specific commitment that the Commission will give parties prior notice before it is announced to the public. It would therefore be preferable if the word 'are' was replaced with the words 'will be' in that sentence to show that this is what the Commission thinks should be done.
- 2.3.4 In paragraph 22 it is indicated that in some situations the Commission may make a separate decision to extend the scope and/or the addressees of the investigation after the proceedings have been opened but before the SOs are adopted. Where this is the case the Commission should:
- i) inform the parties to the investigation that a decision has been taken to extend the scope of the investigation; and/or
 - ii) inform the individuals who have become addressees of the investigation, and other parties to the investigation, of the decision to expand the addressees of the investigation.

2.4 Time Limits (section 2.5.2)

- 2.4.1 The time-limits also set out in paragraph 35 seem to be unrealistically short, in particular if the addressee needs to seek any legal advice about what needs to be done to comply with the information request. It would be better if the first sentence of the paragraph read "Addressees will be given a reasonable time-limit..." rather than "Addressees are given a reasonable time-limit" for the reasons provided above (see paragraph 1.3.1). The two-week limit seems too short, even as a minimum, for "substantial requests" to be answered. This is particularly so if the addressee of the request then has to justify any extension. A general rule of one month would seem to be more realistic. We would also query whether the time limit in paragraph 35 reflects current practice.
- 2.4.2 Paragraph 36 provides that addressees may ask for an extension of time to comply with the information request. The Commission should clarify whether such requests need to take a particular form (letter) or whether email would suffice.
- 2.4.3 Paragraph 36 says that if DG Competition "*considers the request to be well founded, additional time (depending on the complexity of the information asked for and other factors) will be granted.*" It should be explained what other factors will be taken into account, or at least the sort of other factors that will be taken into account, so that addressees can properly assess whether or not it is worth making an application for extension of time.

2.4.4 As we note above, these documents could more usefully constitute "guidance" and as such should set down timescales for all stages in an investigation, based on current practice, even if these are purely indicative or aspirational.

2.5 Meetings and other Contacts (section 2.6)

2.5.1 This section indicates that various notes or written submissions will be made to substantiate oral or informal contacts with the Commission. If such documents are to be produced by parties to the case, as opposed to the Commission's services, we are concerned about the extent to which such documents could be subject to disclosure or discovery in civil litigation.

2.5.2 The Commission could also clarify the circumstances in which notes of meetings and phone calls would be included in the file.

2.6 Power to take statements (section 2.7)

2.6.1 In relation to the taking of statements, we are concerned by the apparent lack of emphasis on the rights of interviewees. Despite the Commission noting that such interviews may be conducted on a voluntary basis, considerable pressure may be placed on the individual concerned by both the Commission and the companies involved. In particular, telephone interviews conducted without any prior warning might lead to prejudicial discussions which may not produce the best evidence.

2.6.2 The Commission's powers to impose fines are substantially equivalent to criminal law powers (see comment made above under section 1.2.1) (including undertakings suffering penalties and the possibility of transfer of the file or information to a national body as set out in paragraph 53) and the information gained may be used in criminal prosecutions in Member States (with custodial and non-custodial sentences). Interviewees should therefore be cautioned and informed of the right to silence and of their right to consult a lawyer. Non-cooperation would be viewed as an aggravating factor in cartel cases under EU competition law and this puts additional pressure on interviewees to allow an interview to go ahead. Simply informing interviewees of the purpose of the interview and conveying that the interview is voluntary appears to be an insufficient safeguard. The Commission should publish a template of the document mentioned.

2.7 Legal Professional Privilege (LPP) (section 2.9)

2.7.1 We remain concerned by the manner in which EU competition law has developed in relation to legal professional privilege. The Commission's approach to LPP is a highly sceptical one. It should be noted by the Commission that LPP is an important protection provided to individuals to ensure they can obtain legal advice.

2.7.2 It follows from *Akzo Nobel* at first instance (which the Commission did not appeal) that the Commission should not read a document where a claim to LPP is maintained, however bad the claim: the right course then is to resort to the sealed envelope and issue a decision requiring the document to be produced. The party then has to apply to the General Court for interim relief to suspend that decision, which will immediately flush out unmeritorious

claims. Thus if it is contentious whether a particular document is covered by LPP DG Competition should not read the document. Rather the disputed document should be placed in a sealed envelope until the matter is resolved.

- 2.7.3 We acknowledge however that deciding whether a particular document is covered by LPP during an investigation can take time. The protection given by LPP should be the dominant consideration during the investigation. It should not be regarded simply as a nuisance or a means by which parties hide evidence.
- 2.7.4 The Commission might also wish to consider using an "independent" arbiter. For instance in criminal proceedings in the UK, independent counsel, who has no dealings or connection with the case, would generally be appointed to try to agree issues of LPP without the need to go to court. A suggestion might be that one of the hearing officers (not the one assigned to the case) could if necessary read the document and reach a view. Again this is analogous to the procedure known to certain legal systems where a judge, who is not the trial judge, may look at documents to see if they are privileged or, for example, part of without prejudice correspondence. Where agreement cannot be reached the individual or entity can make an application to General Court in the normal manner.
- 2.7.5 Claims for LPP which are ultimately not substantiated should not result in a fine being imposed, or be taken into account as an aggravating factor, unless there is evidence to prove that the claim to LPP was without merit and was a deliberate attempt to delay or hinder the proceedings by abuse of LPP. It may not always be clear whether LPP applies to a particular document and parties should not feel compelled to disclose a document they genuinely think may be covered by LPP for fear of a sanction being imposed. A party should be free to rely on this fundamental protection where it thinks it may have reasonable grounds for doing so and it should not be penalised for trying to exercise this right.

2.8 Information exchange between competition authorities (section 2.10)

- 2.8.1 It would be useful for the Commission to outline in more detail the extent to which information exchange with national competition authorities as well as with non-EU authorities may take place. As such, interviewees should be informed of the extent to which information may be shared with other authorities, particularly if the information may be self-incriminating.

2.9 State of Play Meetings (section 2.11)

- 2.9.1 The Commission should state at the beginning of the section (rather than the end) that such meetings do not normally take place in cartel cases. It is stated that complainants and third parties will not be offered such meetings. We consider, however, that the Commission should at least consider their requests for such meetings. Ideally, however, at the very least complainants should also be offered the opportunity of such meetings. Where meetings are held, records must of course be kept of what is said during the meetings.

2.10 Triangular Meetings (section 2.12)

- 2.10.1 The Commission should clarify the extent to which this section applies to cartel investigations. A number of questions remain unanswered in relation to

these meetings. If one of the parties refuses to attend such a meeting, will it continue to take place? What protections are in place to ensure that the non-attendance of a party will not in itself prejudice its case? Is it fair to continue to hold such a meeting in any case if one of the parties does not attend? What procedural rights will attending parties enjoy? Given that the parties cannot be compelled to attend, it is unclear what rights the Commission would consider itself bound to safeguard.

2.10.2 If, however, triangular meetings are only to be used in exceptional cases, it would be helpful for the Commission to confirm the specific circumstances which might give rise to their being proposed.

2.11 Review of key submissions (section 2.14)

2.11.1 We are also concerned that some investigations are understandably protracted. It would be helpful in such cases for the Commission to consider allowing parties to a proceeding to review and comment on a non-confidential copy of the complaint before the opening of proceedings where the investigative stage is likely to be long and complex. We would also encourage the Commission to put the non-confidential version in the language of the case on the website as soon as it is deemed non confidential.

2.12 Possible Outcomes (section 2.15)

2.12.1 The Commission is well aware of the commercial impact that an antitrust investigation of a company can have. Paragraph 70 states that the Commission will only publicise the fact that a case has been closed against certain parties at the time of its final decision. Such parties should be informed as soon as is possible without prejudicing the Commission investigation that the case against them has been closed. The Commission should also consider the extent to which parties may self-publicise this fact, rather than having to wait months or even years for the Commission to reach a final decision.

2.12.2 In paragraph 70 it says that when a case is closed DG Competition will "*normally*" publicise this fact in a press release. The use of the word 'normally' suggests that there are some cases where DG Competition may consider that such publication is not necessary. It would be helpful to have some examples of the types of cases where DG Competition would consider it unnecessary to officially publicise the closure of a case or the closing of a case in relation to particular parties.

2.13 Access to File (section 3.1.2)

2.13.1 We welcome the best practice outlined in this section. We would be grateful for further explanation of how access to the file will be policed. It is not clear, for example, how the provision relating to a "restricted circle of persons" will be either defined or enforced.

2.13.2 In order for an addressee to be able to defend itself properly at least its external legal advisers and those giving expert evidence on its behalf need to be able to see all the information that the Commission has before it and on which it will base its conclusions. There should be an expectation that the addressee, or at least its external legal advisors and experts, will be given a

proper opportunity to see all the information that relates to its case and is before the Commission.¹

2.13.3 In relation to the data room procedure, the extent and complexity of some of the confidential material provided by third parties may make it difficult for legal advisers or experts to examine the information in a Commission room during the Commission's opening hours. The Commission should consider in more detail how it can ensure that parties have sufficient access to the documents taking into account the volume and complexity of the material involved. For example, multiple entry should be allowed and should not be denied for reasons of administrative inconvenience.

2.14 Written Reply to the Statement of Objections (section 3.1.3)

2.14.1 In paragraph 89 it says that the Commission may "*in the interests of fair and effective enforcement, give one or more of the parties a copy of the non-confidential version...of the (other) parties' written replies to the Statement of Objections and given them the opportunity to submit their comments.*" This should only be done after all the parties have made their submissions or the deadline for those submissions has passed. Otherwise one party could have the advantage of seeing another party's submissions before submitting their own and could unfairly adjust their submissions accordingly. Furthermore the party, whose submissions are being commented on, should be informed that a non-confidential version of their submissions has been sent to the other party for comment and should be allowed to submit further comments of its own to the Commission. The same remarks apply to non-confidential versions of submissions being sent to complainants or third parties for their comments.

2.14.2 The guidance says that comments on submissions may be sought from complainants and third parties "*which have sufficient interest to be heard*" but the guidance does not set out any criteria for assessing whether they have a sufficient interest. It would be helpful if the Best Practice could set out how this will be determined.

2.15 Rights of complainants and interested third parties (section 3.1.4)

2.15.1 It would be useful if some indication could be given of the time limit that will usually be imposed on complainants to make submissions on the SO.

2.16 Oral Hearing (section 3.1.5)

2.16.1 The guidance does not state whether a request for an oral hearing will always be accommodated and, if not, under what circumstances it would be refused.

2.17 Possible outcomes of this phase (section 3.2)

2.17.1 Paragraph 100 says that if the objections are not substantiated, and the case is closed, the information measures described at paragraph 62 would apply. However paragraph 62 discusses when triangular meetings will normally take place. The reference to paragraph 62 appears to be a typing error.

¹ The principle of equality of arms presupposes "*...that the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission...*" Case T-30/97, *Solvay SA v Commission* [1995] ECR II-1775, para. 83.

2.18 Submission of the commitments (section 4.3)

2.18.1 Paragraph 112 states that "Commitments which are not related and do not remedy these concerns will not be accepted by the Commission." Given the potential impact on the party if their commitments are rejected, the Commission should give reasons why it has concluded that the commitments offered do not relate to and/or remedy the Commission's concerns.

2.19 Procedure (section 5.2)

2.19.1 In paragraph 126 the guidance does not actually state what happens if the submissions of the complainant do lead to a different assessment of the complaint.

2.20 Limits on the use of information (section 6)

2.20.1 The need for the Commission to respect the confidentiality of the identity of information providers and complainants, and the information they disclose, needs to be weighed against the right of the parties under investigation to defend themselves. The Commission needs to consider the arguments for and against disclosure of this type of information put forward by all the parties involved before they can reach a conclusion as to whether or not to disclose this material to those under investigation. In particular a similar approach should be adopted to that set out in paragraph 22 of the Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU.

2.21 Adoption, Notification and Publication of Decisions (section 7)

2.21.1 Again, the Commission could usefully give an indication of current practice as regards the length of time between publication of the summary of the decision/Hearing Officer Report and the adoption of the decision in the Official Journal.

2.22 Annex 1

2.22.1 There is no arrow indicating what happens if the commitments fail the market test.

3 Detailed comments on Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU

3.1 The Hearing Officers' Tasks

- 3.1.1 We have noted above our concerns relating to the extent to which individual parties' rights of defence are protected in competition proceedings. We would encourage the Commission to consider whether the hearing officers should play a greater overall role in monitoring the handling of competition cases. This would clearly require an assessment of the resources devoted to the office.
- 3.1.2 It would be helpful if it could be highlighted in paragraph 4 that one of the important rights of the defence is the right to claim Legal Professional Privilege ("LPP") in relation to documents sought during the antitrust proceedings in order to protect the parties' right to access to legal advice. Please see our comments above in relation to this.

3.2 The Investigative Phase

- 3.2.1 It would be helpful for it to be stated in paragraph 11 that one of the rights of defence during the investigative phase is the right not to disclose documents covered by LPP.

3.3 Procedures potentially leading to a prohibition decision

- 3.3.1 In paragraph 12 it says that *"The addressee of the Statement of Objections will be informed by the Hearing Office of the Hearing Officer dealing with its case, after DG Competition has informed the Hearing Office of the notification of the Statement of Objections."* As the Hearing Officer has an important, albeit less extensive role, to play during the investigative phase the parties under investigation should be informed who the Hearing Officer dealing with the case is before the Statement of Objections (SO) are issued. It would seem appropriate for the parties under investigation to be told who the Hearing Officer in the case is at the same time that they are informed that they are under investigation.

Complainants

- 3.3.2 We note that, at paragraph 17, a complainant has the right to be provided with a non-confidential version of the SO. It might be useful for the Guidance Paper to clarify whether provision for this will be made automatically or whether the onus will be on the complainant to remain in touch with the case team and request a copy of the SO at the appropriate time.

Disclosure of confidential information

- 3.3.3 Paragraph 20 says that claims of confidentiality *"cannot be couched in general terms"* and that the addressee of the SO seeking disclosure of documents must *"specify the documents to which access is requested and explain why further disclosure is necessary for its defence"*. It should be recognised, however, that the very fact that the documents have not been disclosed means that the addressee will not know exactly what information

they contain and therefore there will inevitably be a degree of generality about their disclosure request. This should not prevent disclosure of the information to the addressee where it could materially assist their case.

- 3.3.4 Paragraph 23 sets out the time between when a decision to disclose information is taken and the date on which the information will be disclosed if there is no interim application to the General Court to prevent the disclosure. The paragraph states that the disclosure *"cannot occur less than one week from the date of notification of the decision"*. However there is no explanation of what the "date of notification" means. Is it the date on which the letter notifying the information provider of the decision was sent? Is it rather the date on which such a communication could be expected to be received by the information provider (e.g. the next working day after the letter is posted, the same day if it sent by email)? Given the short time period envisaged between the decision to disclose and disclosure of that information, during which an application for an interim injunction to prevent disclosure may be made, it is important that the "date of notification" is focused on when the information provider is likely to receive the notice to allow it a reasonable amount of time to take action if necessary.

3.4 Admission of Third Parties

- 3.4.1 We welcome the fact that, at paragraph 32, potential interested third parties will be entitled to make formal applications around the time the SO is adopted. It would be useful to know whether this means that the Commission is obliged to inform potential interested parties of the timing of the adoption of the SO.
- 3.4.2 In paragraph 37 it is foreseen that in "exceptional circumstances" the Hearing Officer may agree not to divulge an admitted third party's identity. It would be helpful if examples of such circumstances could be given.

3.5 Oral Hearing

- 3.5.1 We suggest that paragraph 38 takes account of the fact that the hearing is also generally used by parties as an opportunity to put forward their own position and, in the case of immunity/leniency applicants, explain why the infringing behaviour will not be repeated. We do not believe that the hearing is seen solely as an opportunity to rebut or comment on the findings of the Commission, although this opportunity is of course fundamental to each party's rights of defence.
- 3.5.2 In paragraph 39 it says that the Hearing Officer will determine when and where an oral hearing will take place. It should be added that in making this decision the Hearing Officer will take into account the location of the parties attending the hearing and any issues of availability communicated to it by those parties.

Admission to oral hearings

- 3.5.3 Paragraph 40 says that the Hearing Officer decides who will be invited to an oral hearing and that parties invited are expected to contribute orally to the hearing. However it does not state whether there is any obligation on any of the invited parties to attend the oral hearing. It would be helpful if this was

clarified. It would also be useful if the guidance could set out the parties that will usually invited to an oral hearing.

Preparation of the oral hearing

- 3.5.4 In paragraph 46 it states:
"The Hearing Officer will also take all necessary preparatory steps to ensure the effectiveness and efficiency of the Oral Hearing. Such preparatory steps may include inviting specific persons to attend who are directly involved in the case, possess expertise of the relevant markets and industry or are able to contribute in any other useful way to clarify the issues a case raises."
- 3.5.5 It is not clear how this is different from the Hearing Officer deciding who will be invited to attend the Oral Hearing as set out in paragraph 40. It would be helpful if this could be clarified particularly as paragraph 40 indicates that the decision as to who will attend the Oral Hearing is one that the Hearing Officer will take whereas in paragraph 46 the suggestion is that it is a decision that the Hearing Officer may take.

Publication of Dates of Hearings

- 3.5.6 We welcome the fact that, at paragraph 48, dates of future hearings will be published on the Hearing Office website as we are not aware that this has previously been done on a consistent basis.

Presentations

- 3.5.7 Paragraph 52 says that:
"Presentations will be given at the Oral Hearing by (i) the Commission, (ii) the addressees of the Statement of Objections, and (iii) third parties."
- Two points arise out of this statement:
- i) Is the list supposed to indicate the order in which the different parties are likely to be heard? If so this should be made more explicit.
 - ii) This list presupposes that there will always be third parties giving oral evidence at the Oral Hearing. This may not be the case and it should be noted.

In camera sessions

- 3.5.8 Paragraph 53 states that parties may give sensitive parts of their presentation *in camera* without other parties present if the Hearing Officer considers it necessary. The paragraphs do not, however, specify the factors that the Hearing Officer will take into account when determining whether or not it is appropriate for the party to give that part of their presentation *in camera*. In particular where the confidential information has the potential to affect the position of an addressee of the Statement of Case the same balancing exercise as set out in paragraph 22 of the guidance should be required before the Hearing Officer can determine whether or not to receive the information *in camera*.
- 3.5.9 We note that, at paragraph 55, excluded participants will be made aware of the subject matter of the discussion. We would hope that this information would be sufficiently non-specific in circumstances where there are confidentiality issues at stake. For example, companies may not wish to make it known that they are discussing a potential inability to pay the fine.

- 3.5.10 Please note that reference is made at paragraph 58 to Articles 81 and 82 rather than 101 and 102.

Supplementary Statement of Objections and Letter of Facts

- 3.5.11 Is there any time limit for bringing complaints to the Hearing Officer concerning how the rights of defence have been respected in the context of a Supplementary Statement of Objections or a Letter of Facts? If so what is that time limit and what are the consequences of not bringing a complaint within that time limit? (Paragraph 64)

3.6 Rejection of complaints

- 3.6.1 In paragraph 65 it says that the complainant can apply to the Hearing Officer to extend the time in which it can object to a decision by the Commission not to pursue a complaint. However the complainant will only be able to make this application if it knows who the Hearing Officer assigned to the case is. It would therefore be sensible for the complainant to be informed of the identity of the Hearing Officer when it is informed by the Commission that it considers that there are insufficient grounds for pursuing the complaint.

3.7 Final Report

- 3.7.1 Paragraph 70 states that *"The Hearing Officer will also consider the extent to which the draft decision deviates in any material respects from the Statement of Objections"* but unlike its assessment of whether the rights of the defence have been safeguarded there is no explicit statement that findings on these matters will be recorded by the Hearing Officer in the Final Report. It would be helpful if such a statement could be made.

4 Detailed comments on Best Practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in merger cases

- 4.1.1 We note that document sets out the Best Practices for the submission of empirical analysis (most notably econometrics). In particular, we welcome the way in which Annex 1 sets out the structure and the elements of an empirical submission.
- 4.1.2 However, economic submissions increasingly make use of economic modelling (and especially merger simulation models). We do not consider that the Best Practices provide adequate guidance to the parties as to the structure and basic elements of a sound modelling analysis. The Commission should consider supplementing the document with an annex specifically detailing those elements (along the lines of Annex 1), as well as some modifications to the main text to make it more relevant to that type of analysis.
- 4.1.3 It would also be useful if the Best Practices also had annexes detailing illustrative templates of the type of data that the Commission is likely to request. This would be without prejudice to its ability to modify those templates to fit the specific circumstances of the case. These templates would be a preliminary version of the "draft data requests" discussed in paragraph 74 of the Best Practices. For instance, the Commission could detail the typical request for transaction-level sales data, which are invariably requested. Similar illustrative templates could be created for bidding data, and for scanner-level data, which are two other very common requests, especially in mergers. These templates would provide very useful guidance to the party and would save significant amounts of time.
- 4.1.4 In paragraph 45, the Best Practices state that access to the Commission's analysis and relative data will be granted in a data room procedure. The data room procedures are well suited to provide access to the file, and in particular third party comments and documents. However, those procedures often prevent the parties to assess thoroughly the Commission's analysis, as such assessment requires the parties' advisors to run several alternative models and robustness tests. This assessment is time consuming and cannot be carried out easily within the limits and constraints of a data room procedure. The Commission should consider how best to balance the need to preserve confidentiality with the parties' rights of defence. Either the Commission's analysis and relative data should be anonymised and provided to the parties outside of the data room; or the data room procedures should be designed to allow parties to run alternative analyses.
- 4.1.5 Paragraph 11 of the Best Practices outlines the counterfactual against which the effects of a merger should be assessed. It would be useful if the Best Practices also gave guidance as to the relevant counterfactual in Art. 102 and 101 (limited to restriction by effect) cases.
- 4.1.6 Paragraph 14 correctly highlights that different economic analyses may not always give unambiguous results. It would be useful if the Best Practices gave some guidance as to how best to isolate the source of the different results (e.g. data, modelling assumptions, empirical techniques) and on how to test which analysis is most appropriate to the case at hand.