Simmons & Simmons

EUROPEAN COMMISSION
BEST PRACTICES ON THE CONDUCT OF PROCEEDINGS CONCERNING ARTICLES 101 AND 102 TFEU

The Simmons & Simmons EU, Competition & Regulatory International Practice Group welcomes the opportunity to respond to the European Commission's consultation on Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU.

1. General comments

We particularly welcome the proposition that the Commission wishes to increase the transparency of its procedures, as for many clients they remain opaque. However, in one respect, clarity remains elusive: it is not always clear to what extent the best practices document is intended to apply to cartel cases. Paragraph 4 of the Best Practices states that any special provisions relating to the conduct of cartel proceedings are indicated where applicable. However, in our view, the document does not distinguish clearly between practices that apply to all proceedings, and those that apply only to potentially infringing agreements that are not in the nature of a cartel. It seems to us that some of the proposed practices simply would not work in certain cartel cases (see our comments below on section 2.6, for example). It would be helpful for the document explicitly to acknowledge that fact, and either provide a cross reference to the relevant document that deals with the point, or an explanation of what would in those circumstances be regarded as the best practice.

Following on from that, we note that information on the Commission's practices is becoming scattered across a number of disparate documents. Rather than adding a best practices statement to the raft of notices, explanatory note and so forth, already available, would the interests of transparency not be better served by the Commission issuing a consolidated notice (incorporating the access to file notice, explanatory note on inspections, etc) and locating key information in one document? We believe that it would be helpful for the Commission to do for behavioural cases what it has so successfully achieved with its *Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*.

In terms of content, our major concern, as we point out below, relates to the section on "Meetings and other contacts with the parties and third parties" (see below) in which the Commission envisages introducing a highly burdensome procedure for the parties concerned. We recognise that this may be a response to the European Ombudsman's decision in complaint 1935/2008/FOR, but have grave doubts as to whether the proposals will be workable, and in particular whether the burden of complying with the Ombudsman's directions to the Commission is not being unfairly redirected towards the defendants. Fundamentally, we suspect that neither side will be able properly to benefit from the "ample opportunity for open and frank discussions" which state of play meetings are intended to bring about and which have the potential to move the investigation to resolution more swiftly.

2. Specific comments and suggestions for amendment

2.1 Section 2.3: Opening of proceedings and 3.1.1.2 - Transparency

(Paragraphs 19 and 79). We note the distinction in practice between press releases that announce Statements of Objection (where issued to date), which do not include the names of the addressees and those that deal with the opening of proceedings, which do. Given the risk of serious reputational damage to companies under investigation for participation in a cartel (despite the fact that the press release explicitly states that the Statement of Objection does not prejudge the existence of an infringement) we would welcome a clear statement in the best practices that the Commission will continue not to name the parties in cartel cases at that stage. This might go some way to dispelling the impression that the Commission could be using the media as a weapon.

2.2 Section 2.4 - Languages

Paragraph 25 provides that *"a 'language waiver' shall be signed by a representative of the addressee*", whilst footnote 27 states that "[*i*]*t is not sufficient that the lawyer acting for the addressee signs the waiver*." We query why the Commission has become reluctant to accept a waiver signed by a properly authorised legal representative of the company, acting on behalf of the company.

In paragraph 26, the Commission explains that it is standard practice for it to dispatch simple information requests in English, and to refer to Article 3(1) of Regulation 1/1958 in the covering letter. In our view this is not acceptable. The practice breaches the terms of that Article comprehensively, and it is neither appropriate for such a practice to have become standard, nor for it to be regarded as in any sense a "best" practice. In addition, where a party does request a translation of the information request, there should be an automatic extension of the time period within which to respond to the information request. It cannot be the case that a party is penalised in terms of response time where the Commission itself has chosen not to comply with the requirements of Regulation 1/1958. Nor should it have to request an extension. The extension should at the least be equivalent to the length of time taken by the Commission to provide a translation.

2.3 Section 2.5: Information requests (Time Limits)

A deadline of "*at least two weeks*" for "*a substantial request for information*" (paragraph 35) remains in our view a time scale that is rarely to be categorised as reasonable – a substantial request for information places the recipient under a substantial burden to comply. Clients struggle to collect and deliver data in the format required. In our view, a deadline of 4-6 weeks is realistic and would obviate the need for repeated requests for extensions of time which waste time and resources on both sides.

2.4 Section 2.6: Meetings and other contacts with the parties and third parties

The Commission says that it may hold informal meetings during the investigative phase and suggests that parties should present an agenda or memo in advance of such meetings. It also states that parties are invited to set out statements or presentations in writing following meetings or substantive phone calls. We recognise that it might be helpful for Commission Officials in some circumstances to be aware ahead of time of proposed topics of discussion. We acknowledge the need to safeguard the rights of defence of relevant parties, and are aware of the criticism

expressed by the European Ombudsman on the Commission's failure to document informal meetings (somewhat unhelpfully categorised as Article 19 interviews by the Ombudsman).

However, there are a number of issues with this approach, not least the additional administrative burden of preparing these pre- and post-meeting documents, together with accompanying non-confidential versions for the file, almost all of which is intended to fall upon the parties. In our view, the increased burden of documentation is likely to prove self-defeating. Indeed in the context of some discussions, it could prove a deterrent. For example, it seems likely that the provisions in section 2.6 will discourage would-be claimants from approaching the Commission informally (having 'non-meetings' etc). We also query whether this practice might also dissuade the Commission from engaging in more informal dialogue with parties in relation to the proposed timing of a case, the proposed procedure (e.g. whether it is considering settlement or not) and other similar issues. This does this seem to sit well with the Commission's stated aim of providing opportunities for "*open and frank discussions*" (paragraph 54, Section 2.11) in the course of the investigation.

Further, the requirement to minute all communications and contacts makes more sense in relation to straightforward Article 101/102 complaints and investigations than in the context of cartel cases. The Commission has allowed statements from leniency applicants to be made orally on the Commission's premises so that they are protected from disclosure in civil litigation in order to encourage applicants to come forward with evidence. The Commission cannot (presumably) be expecting parties to minute correspondence and communications relating to evidence provided in an oral statement, as this would undermine the very purpose of the oral procedure. This section should therefore perhaps specifically clarify that this approach to setting everything out in writing would not apply in leniency cases. Indeed, in our view, there is room for the Commission to tighten its practices in relation to information provided by way of oral leniency application. It is not helpful, for example, for further information relating to issues raised in an oral corporate statement to be sought by way of information request, where it become part of the file and liable to disclosure. This undermines the very point of an oral application.

2.5 **Section 2.7 - Power to take statements**

When the Commission refers to a "recording" of an interview, does that refer to a tape recording (or rather a digital recording of the interview) only? If this is the case, how would the approval procedure be implemented, and how would the recordings be treated for purposes of access to the file? It would be helpful if the Commission were to clarify its standard approach in such circumstances.

2.6 **Section 2.11 – State of Play meetings**

In general, the Commission's guidelines with regard to State of Play meetings are welcome, However, it is not clear to us why the Commission should necessarily exclude State of Play meetings in cartel investigations, yet state in paragraph 60 that similar meetings with senior management can be arranged in cartel cases. The fact that they can be arranged underlines their usefulness. They are of particular value to both sides during the stage before the Statement of Objections. In any event, it would be helpful if the Commission set out its reasoning on distinguishing between case types in this way.

2.7 **Section 2.1.4 – Non- confidential versions of the complaint**

Increased transparency through access to a non-confidential version of the complaint seems to be a sensible development that could lead to greater efficiency, for example, more cases where commitments offered at an earlier stage etc.

2.8 **Section 2.9. – Legal Professional Privilege**

We believe that it would be helpful if the Commission made clear that "*made for the purposes of the client's rights of defence"* (paragraph 47) will be construed widely and is not limited to ongoing proceedings. This would help avoid situations in Commission dawn raids in which officials from those jurisdictions where the scope for claiming legal professional privilege is very limited take an overly narrow view of legal professional privilege coloured by national rather than European procedural law.

Furthermore, it would be helpful if the Commission made clear that the sentence "[*r*]*edacted versions removing the parts covered by legal professional privilege should be submitted*" applies only to hybrid documents where parts of the communication remain disclosable. Clearly, where a whole document is subject to legal professional privilege, it would benefit no-one to submit the heading and redact the rest.

We note the reference in footnote 37 to legal professional privilege accruing only to communications from and to lawyers entitled to practise their profession in one of the EU Member States. Whilst an accurate restatement of the law under *AM&S*, we would very much regret it if this signals that the Commission will no longer be prepared in practice to recognise as subject to legal professional privilege communications with an established member of the antitrust professional community in a recognised antitrust practice. This is the more to be regretted in a context in which links with non-EU National Competition Authorities are increasing and exchanges of information between them and the Commission are more likely.

2.9 **3.1.2. - Access to the file**

Paragraph 84, sets out the Commission's approach to negotiated disclosure The Commission's role is limited to accepting their use (at its discretion), pointing out that the person accessing the disclosure documents must accept that its rights to full access to the investigation file were being restricted, and ensuring that information providers whose information is accessed waive their rights to confidentiality vis a vis the Commission. We recognise the impetus provided by the European Ombudsman's decision in complaint 1935/2008/FOR, for the Commission to make clear that the onus in bilaterally negotiated disclosure agreements lies upon those who enter into them. As an aside, however, we note that a number of questions remain open as to how the negotiated procedure works best in practice, and some indication from the Commission on its views would not come amiss.

We have serious doubts as to feasibility of the data room procedure as described. It leaves open a range of practical issues. Depending on the size of the file it may prove very difficult to "record" all relevant information contained in the data room. In addition, if it involves the law firm sending in a team of lawyers and secretaries to dictate, retype, and then redact the confidential information or prepare a summary for the client and prepare their defence, this seems complicated and time-consuming, compared to each party redacting its own confidential information and providing a non-confidential version. It is also seems to us a riskier procedure. Legal certainty is better served by a client's lawyer, working with the client, identifying confidential information, rather than opposing lawyers trawling through unredacted materials and deciding what they regard as confidential. There is at the very least a potential conflict of interest in the procedure.

Whilst itself open to similar criticism, and hence by no means a "best practice", the procedure used in Germany by the Bundeskartellamt (FCO) at least has the merit of greater practicality: A CD-ROM or DVD containing the material on which the FCO intends to base its decision is sent to

the external lawyers of the parties. The lawyers are also put on notice that they are not to pass on confidential information of the other parties to their client. The external lawyers then go through

the file and produce a non-confidential version which is provided to their respective clients. Though equally open to abuse, in our view, this procedure would be marginally preferable to the requirement to put external lawyers and support staff into a data room on Commission premises.

Paragraph 85 states that, should either side unduly refuse to waive their right to access to file or their right to confidentiality to the extent it would be necessary to implement the data room procedure, this waiver can be replaced by a decision pursuant to Articles 8 or 9 of the Hearing Officer's Mandate. This is a draconian step which strips the defendant of fundamental rights of defence and in light of the cumbersome and unproven nature of the procedure, in our view, indefensible. Article 8 of the *Commission Decision on the terms of reference of hearing officers in certain competition proceedings* (OJ 19.6.2001, L162/210) provides for the Hearing Officer to issue a decision where a defendant complainant or third party has made a reasoned request for access to documents. Article 9 decisions ordering disclosure are issued where the Hearing officer turns down an a request for confidential treatment of information. We fail to see how there can be sufficient nexus for either of those procedures to apply in circumstances where the party concerned is being asked to waive its right to access to the file or to confidentiality. Quite what standard is to be applied to the interpretation of "unduly" is also unclear.

2.10 **3.1.3 - Written reply to the Statement of Objections**

Paragraph 89 states 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 (or specific excerpts thereof) of the (other) parties' written replies to the Statement of Objections and give them the opportunity to submit their comments*." It likewise claims discretion to do so in respect of complainants and third parties. However, it is unclear in which cases it will and in which cases it will not exercise this discretion. We believe that it would be the better practice to provide a non-confidential copy or extracts to the other parties in any event and invite their comments. At the very least, however, in the interests of transparency, it would be helpful to know the circumstances in which the Commission believes that it would be appropriate for it to exercise the discretion described here.

2.11 **3.1.5 - Oral Hearing**

Paragraph 93 provides that *"[t]he oral hearing allows the parties to develop orally their arguments which have already been submitted in writing and to supplement, where appropriate, the written evidence, or to inform the Commission of other matters that may be relevant. Indeed, the fact that the hearing is not public guarantees that all attendees can express themselves freely and without constraint.*"

If the oral hearing is supposed to allow parties to develop their arguments in this way, then the Commission should limit itself to asking for clarification about what a company has said during its oral observations. For instance, the oral hearing should not be the place for the Commission to confront one company with statements made by individuals from another company during the oral hearing: fact finding should have been done at an earlier stage. If, nevertheless, the Commission intends to use oral statements made by one company during the oral hearing as evidence against another company, the second company should be informed of the case against it and given the right to respond in writing after the oral hearing. The oral hearing should not be an opportunity for the Commission to ambush the parties. In this context we note that, given the sometimes very different interests at stake (and the right to remain silent) it is an illusion to assume that all attendees can express themselves freely and without constraint.

2.12 **7. - Adoption, notification and publication of decisions**

We believe that the addressees of a decision should receive their 'courtesy copy' well in advance of the press briefing, and in any event at least a couple of hours before the publication of the press release. It is extremely difficult for a company to respond to enquiries from journalists following the press briefing before the company has had an opportunity to digest the contents of the decision. We believe that the Commission could usefully adopt the procedure used in other EU jurisdictions, whereby the decision is released to the parties, under embargo, to enable it to prepare its own press release a public response. Given the timing of the press briefing at midday, Central European Time, the parties could be provided with a copy of the Decision three hours before, embargoed until the midday press briefing.

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