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**MEMORANDUM**

Date 3 March 2010

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The European Commission

From WilmerHale Antitrust and Competition Group

Re **Consultation concerning DG Competition:  
Best Practices on Article 101 and 102 TFEU proceedings;  
Submission of Economic Evidence and Data Collection in Article 101 and 102 TFEU  
and merger cases;  
Guidance on Procedures of the Hearing Officers in relation to Article 101 and 102  
TFEU proceedings.**

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[1] The object of this memorandum is to offer comments in response to the Commission's consultation in relation to these documents, as invited by the Commission in its Press Release of 6 January 2010, IP/10/2.

[2] At the outset, we would like to thank DG Competition for the opportunity to comment on these "Best Practices" and "Guidance". We hope that the suggestions here may be useful in any revision and/or finalisation of the documents. We also stress that the views expressed here are personal and do not necessarily reflect the views of WilmerHale, or its clients in relation to any specific issue or proceeding.

[3] This memorandum has been principally prepared by John Ratliff, Jacques Bourgeois, Frédéric Louis, Sven Völcker and Lisa Arsenidou.

## **1. General**

[4] We propose to take the three documents in turn but, before turning to specifics, it may be useful to reflect on how many different procedural documents there are now, governing various specific procedures of DG Competition (as highlighted in the various references in these documents, noting particular exclusions or scope of application of the Best Practices). It is still useful for DG Competition to develop "Best Practices" on general issues and other notices on more specific ones. However, there is now something to be said for a consolidated

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publication of all of these various documents with an overview and “route map” to what should be considered when, so that the whole picture is clearer.

[5] As far as we can see, a great deal of what is described is a confirmation of existing practice, rather than new. Again, we think that it is still a useful exercise, promoting transparency. However, we also think that it would be useful to address some of the other areas which are not dealt with in the Best Practices and, amongst those, the most pressing issue in our view is more transparency on how economic and other legal assessments are brought together in the decision-making process of the Commission, as the Commission case moves from the fact-finding in the allocated case team to the final decision-making, going up through DG Competition to the College of Commissioners.

[6] As we see it, these Best Practices also appear to be a statement of DG Competition’s preferred practice rather than binding practice since, although DG Competition says that it plans to follow these practices, there are a number of caveats in the documents, making it clear that there may often be variations according to the circumstances (see, e.g. paras 5-7). Nevertheless, we hope that we can expect the Best Practices to be generally applied, save for exceptional circumstances.

## **2. Best Practices on Article 101 and 102 TFEU proceedings**

### **2.1 What is new**

[7] The following appear to be the main new points, with our comments thereon in each case immediately after.

[8] First, a greater emphasis on the Commission deciding to open formal proceedings earlier, as soon as the initial assessment phase has been concluded, clarifying therefore which ECN competition authority will deal with the case (see, the Commission’s Press Release IP/10/2). This is welcome.

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[9] Second, statements from DG Competition that it will offer “state of play” meetings in proceedings other than cartel proceedings (i) as the Commission initiates proceedings and (ii) at a later “sufficiently advanced stage in the investigation” (see, para. 57). This is welcome, although (ii) is somewhat vague. In our view at the least it should be before the issue of the Statement of Objections in order to see if that escalation of the proceedings can be avoided.

[10] Third, DG Competition’s indication that it plans to issue press releases as it opens proceedings (see, para. 19). This is open to discussion. We appreciate that this is good for transparency. However the policy has to be carried out systematically and through purely neutral procedural statements in order to avoid unwarranted publicity and related media pressure which, in a case which is not yet decided, is not welcome.

[11] Fourth, DG Competition’s statement that English is the standard language for requests for information (see, para. 26), although confirming that the defence retains the right to obtain a translation in its own language (the language of its location) on request. This, as contrasted with the position after the initial investigation proceedings, where the language of the addressee is the language of the Statement of Objections, any preliminary assessment and the decision, unless a language waiver has been given.

[12] We comment here that, even if the use of English may be the most efficient in many cases, we agree that the cover letter explanation as to what the document is and what are the addressee’s rights must be in its language. We also think that the cover letter explanation should make it clear that there will be no adverse consequences in case the addressee opts to obtain the document in its own language, notably as regards the effective deadline for response (an extension should be given as appropriate).

[13] Fifth, DG Competition’s emphasis on the need for provision of a non-confidential version of written replies to Commission requests for information etc. (see e.g., para. 37). This is welcome.

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[14] Sixth, DG Competition's confirmation that it is normal practice to offer executive officers of companies subject to proceedings an opportunity to discuss their cases with the Director-General or Deputy Director-General, or where appropriate the Commissioner for Competition, if they so request (see, para. 64). This is welcome. Clearly, these meetings should remain open to lawyers as is current practice. We also take it that DG Competition's senior management, including the Director-General and the Deputy Director-General, will also continue to welcome meetings with companies and their legal representatives, without there always being a necessity to involve executive officers.

[15] Seventh, DG Competition's indication that parties will be provided with the opportunity to respond to non-confidential versions of any complaints made after the initiation of proceedings and may receive copies of other key submissions made by a complainant, so that the parties have an opportunity to comment on them (see, para. 65). This is welcome.

[16] However, it may be that in some cases there will be value in obtaining comments on complaints before the decision to initiate proceedings is taken. Furthermore, we take it that this best practice is not intended to be restricted to formal complaints, but will also extend to other documents received by the Commission, indicating a potential violation of Articles 101-102 TFEU. An early opportunity to comment on such material may often be practically efficient in understanding and/or resolving an issue.

[17] Eighth, DG Competition's indication that it proposes that parties should be given, in the Statement of Objections, the opportunity to comment on "all elements of importance for any subsequent calculation of fines," including the relevant sales figures to be taken into account (see, para. 77). This is welcome. Such disclosure remains a controversial area for defendants, who often consider that they are not told enough, hence the many appeals on the issue.

[18] To further improve upon the existing situation, we would also suggest that, before adopting a fining decision, the Commission should send to each defendant a letter explaining

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how a potential fine would be concretely calculated (i.e. indicating the basis for the volume of sales, how the duration will be computed, what concrete uplift factors could be applied and the mitigating and aggravating circumstances which the Commission envisages to take into account). The defendants would then have a two week deadline to submit their comments on these points. We believe that this would significantly reduce the potential for mistakes and/or misunderstandings and might avoid a number of appeals.

[19] Ninth, DG Competition's clarification as to how it sees the so-called "negotiated disclosure procedure" (see, para. 84), whereby parties are encouraged to provide access to file to a restricted circle of persons to be decided on a case-by-case basis, rather than through the creation of non-confidential summaries. Similarly, and perhaps more frequently, procedures for the disclosure of data through access to data rooms. Such access to be made available to a restricted group of persons, normally the external counsel or the economic advisers of the party under the supervision of a Commission official (see, paras. 84 and 85). This is welcome, but may merit further discussion on a case-by-case basis, since it raises delicate issues, e.g. of confidentiality and company involvement in the process.

[20] Tenth, DG Competition's statement that "[i]n view of the importance of the oral hearing, it is the practice of DG Competition to ensure continuous presence of senior management (Director or Deputy Director General) in oral hearings in anti-trust cases together with the case-team of Commission officials responsible for the investigation" (see, para. 94; emphasis added). This is very welcome, being a regular concern for defendants. We also believe that the Director for the Unit which is bringing the case and the Director of Directorate A should be present throughout the Hearing.

[21] Eleventh, DG Competition's explanations about so-called "letters of facts". In other words, the confirmation of this practice, not provided for in Regulation 1/2003 or the Implementing Regulation, of disclosing to the defence evidence revealed after the Statement of Objections and/or the Hearing, in order to give the defence an opportunity to be heard thereon through written comments (see, paras 95 to 98).

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[22] This remains controversial because, even if the Commission notes that this is only to be used in limited circumstances where the evidence only corroborates objections already raised, the practice appears to be used quite frequently and it is not clear why defendants should not have their full defence rights on that evidence also.

## 2.2 Other points which may merit further discussion

[23] These are various practices which we think should be mentioned here.

[24] First, we were a little surprised to see the way that electronic discovery is dealt with in the Best Practices, since it is such an important procedural area. In other words, to see a simple cross-reference to the Explanatory Note concerning DG Competition's view of its powers and practices in relation to searching computers for e-mails and other material, which we understand are still highly controversial (see, para. 46 and footnote 34).

[25] If these Best Practices are to be really useful as a focal document on procedural issues, in our view, that Explanatory Note should be integrated here (after para. 46) and a number of issues should be debated, to see if practical solutions can be found.

[26] For example, the idea that, if the Commission is running out of time in an investigation, it can take a copy of the whole hard disk of a computer of the investigated company (see, para. 11 of the Explanatory Note). Despite the fact that to do so (i) may disclose things which are not within the scope of the investigation; (ii) there may be privileged and confidential correspondence with external counsel therein; and (iii) that taking such a copy may be at odds with the right to the protection of personal data, pursuant to Article 8 of the Charter of Fundamental Rights (OJ, C364/1, 18 December 2000) and Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies (OJ L8/1, 12 January 2001).

[27] DG Competition states that the company concerned will then be invited to attend the opening of the sealed envelope containing the disk and the selection process in the Commission's premises (see, para. 11 of the Explanatory Note). However, one may well

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think that this removal of data should simply not happen at all, or at the very least should be supervised by the Hearing Officers so that all material that should not be included is left exclusively with the company concerned.

[28] More generally, more information as to how DG Competition procedures ensure the protection of personal data and what role the European Data Protection Supervisor plays in practice would be welcome.

[29] Second, legal professional privilege remains a hotly contested area, partly in view of DG Competition's apparent scepticism as to its abuse. In these Best Practices, we suggest that an effort be made to go beyond the legalistic approach (reflected in the heavy footnotes here) to tackle the practical issues (even if some issues in this area are currently before the European Court of Justice).

[30] It remains controversial that the Commission should investigate in-house lawyers offices (apparently often first on an inspection), undermining the whole compliance work such counsel do.

[31] It also remains controversial that the Commission should leave company premises with a sealed envelope and bring it to DG Competition's premises rather than having it conveyed directly to the Hearing Officers.

[32] Further, if there is to be a "Best Practice" about privilege, it should openly recognize that communication between a company, worried about what its legal position is and its lawyer, is a fundamental right and one of the tenets of democracy.

[33] We therefore suggest that, in the spirit of "Best Practices", DG Competition takes a broader and less legalistic view, starting from the presumption that, in principle, communications from a lawyer (at least those admitted to a Bar, even if in-house) to his client and vice-versa in relation to any issue should be privileged and that such privilege should be respected.

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[34] In this respect what many practitioners view as artificial narrowing arguments should not be pursued including, for example, (i) not recognizing genuine legal advice from external counsel in third countries, such as Switzerland or the United States to their clients; and (ii) not recognizing privilege as such if it relates to other law rather than anti-trust/competition.

[35] Clearly it is possible that there may be cases of abuse, but if there are, those are serious matters for the lawyers in question, who may put their professions at risk under their Bar rules. As a result, they should be very much the exception, rather than the rule. With respect, in any event, the rules here should be modelled with a bias to protection of this fundamental right of privileged communication. See, for example, Judge Vesterdorf when the President of the Court of First Instance in the interim order relating to Akzo, Joined Cases T-125/03 R and 253/03 R, Akzo v Commission, Order of 30 October 2003, at paras 167 and 186, where he said:

“The purpose of professional privilege is not only to protect a person's private interest in not having his rights of defence irremediably affected but also to protect the requirement that *every person must be able, without constraint, to consult a lawyer.... That requirement, which is formulated in the public interest of the proper administration of justice and respect for lawfulness, necessarily presupposes that a client has been free to consult his lawyer without fear that any confidences which he may impart may subsequently be disclosed to a third party.*” (para. 167; emphasis added; further references omitted.)

“According to settled case-law...*the rights of the defence, to which professional privilege is a necessary corollary... constitute a fundamental right.... That fundamental nature has the consequence that, in the context of the present balance of interests, given that it is established that the applicants' professional privilege and their rights of defence would be likely to sustain serious and irreparable harm should the Commission read [the documents in issue], considerations of administrative efficiency and of resource allocation, in spite of their importance, can in principle prevail over the rights of the defence only if the Commission pleads very special circumstances justifying such harm.* Otherwise, it would be possible in almost every case for the Commission to justify a serious interference with the rights of the defence by purely internal administrative considerations, which would be contrary to the fundamental nature of the rights of the defence.” (para. 186; emphasis added; further references omitted.)

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[36] Further, in cases of doubt, where verification is required, only an independent judge should decide.

[37] Third, as discussed below, we think that the Hearing Officers' roles should be expanded in these proceedings. We think that it is wrong that the Hearing Officer's functions should be presented as mainly related to the Hearing and defence rights from the Statement of Objections: The rights of the defence cannot be lost in the "initial investigative" phase then to be recovered in the phase of Hearing after the Statement of Objections. Nor is possible redress before the European Courts a sufficient substitute for an ability to have some independent officer to turn to and decide whether a certain practice is reasonable during the procedure.

[38] We therefore think that the part concerning the Hearing Officer in the Best Practices (see, paragraph 74) and the Guidance of the Hearing Officers should emphasize that the Hearing Officer has a general role over procedural issues insofar as he or she has to write a report to the Commissioner independently advising him or her as to whether the rights of the defence have been properly observed. The approach taken now is rather to emphasize that the Hearing Officer does not have a general "monitoring" role for all procedural issues, but limited powers aimed at dealing with specific issues (see para. 8 of the Guidance). We think that this belittles the wider role the Hearing Officers should play.

[39] Fourth, we think there is still scope to improve the Oral Hearing. The Hearing is the only real opportunity for a defendant to address the wider participants in the process in depth, notably senior management, the Commission's Legal Service and the representatives of the Member States. Meetings with senior management (although also very welcome) are not a substitute, for this reason. We discuss this further in our comments on the Hearing Officers' Guidance.

[40] Fifth, many counsel and defendants find it difficult to understand why, above all in cartel cases, they cannot see the replies of the other defendants (and even if such practice has been accepted before the European Courts). In particular, insofar as the Commission has

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often relied on the replies to Statements of Objections to prove facts which then may have a wider impact than just on the party which has admitted or otherwise stated them. For example, insofar as they build up a general fabric of allegation which is then used against others, or even more directly insofar as replies to Statements of Objections may specifically implicate other parties. Also, giving parties access to each other's replies to the Statement of Objections before the Hearing would allow the Hearing Officer to organise a better hearing.

[41] There is a DG Competition practice of creating summaries of the key facts/replies for the defence to allow them to comment. However, this appears to be an imperfect technique insofar as it involves a second-hand summary rather than access to the key passages in question.

[42] We understand that there may be confidentiality issues so that either waivers or non-confidential summaries (save for key inculpatory facts) may be required. That may mean that additional time is required for that process. If so, it should just be done and provided for before the Hearing. That would be a better practice than now.

[43] Finally, while the Best Practices are useful as far as they go, there should also be a section on the interaction between the case team and the economists involved in a case. It would be useful for there to be further explanations as to how the parties should be dealing with what may even appear at times to be two different teams working in parallel and how they fit together. It would also be useful to explain whether, in the event of a disagreement with the economic analysis being taken, the economic approach or methodology, the issue should be taken to the Head of Unit, or to the Chief Economist or his deputy, or both.

[44] There is also currently much uncertainty as to when DG Competition feels it appropriate to involve the Chief Economist's Team ("CET").

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### **3. Best Practices on Economic Evidence and Data Collection**

[45] Again, we would like to thank DG Competition for the opportunity to comment on this document. We are aware that it has already been the subject of dialogue between the CET and economic consultancies.

#### **3.1 General**

[46] In general, this document appears useful, although there is a fair amount of technical “jargon”, perhaps a reflection of the general issue in this area that economic questions appear to be considered to be the subject for dialogue between the Commission’s economists and external economists. Whilst this is no doubt efficient in terms of economic assessments, it is not enough in terms of overall due process, since the relevant economic conclusions also have to be fully understandable to those directly concerned, in other words, the businessmen concerned and their legal advisers.

[47] That said, even without being economists, a great deal of what is explained in these Best Practices appears to us to make evident good sense, notably insofar as the explanations set out appear directed towards achieving the best possible quality evidence on both sides.

[48] In this respect, we welcome the statement by DG Competition that it considers these Best Practices also binding on itself (see, para. 6). In practice, our experience is that, like all evidence, economic evidence is often imperfect and has to be weighed carefully according to its assets and deficits. We note that DG Competition takes the same view in these Best Practices. The idea of trying to set a targeted standard, both for DG Competition and third parties, is therefore welcome.

[49] We do not wish to overstate the issue of “jargon”, since the document is generally understandable. However, we live daily with the problem of explaining “competition law jargon” to our clients and we note that this document reflects a more severe category of “competition economics jargon”. For example, use of words which may be self-evident to economists, but may not be to businessmen, such as: stata file, endogeneity, histograms,

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regression, null hypothesis (which is explained in a footnote in the text), and institutional factors (which can be broadly understood as a reference to specific market characteristics, but appears to have a more specific meaning in the way that it is used in the text here).

[50] We think that the first priority is for an accurate and efficient assessment of economic evidence and, to that extent, clearly an economist must use the words that he or she thinks appropriate. Nevertheless, for law to work, it has to be readily understandable. It would be useful therefore, if DG Competition were to add a mini-glossary of technical terms, both here and as a standard practice in relation to economic presentations and arguments which are part of proceedings.

[51] We also wish to emphasise that, in our view, the first stage of review should be a question of looking at the observed facts in the market (which admittedly may involve establishing certain economic facts where appropriate), and then seeing if there is reason to believe that there may be a problem which needs to be checked. In practice, this may mean that in many cases there is no justification for going to an extensive economic assessment, because there is no initial reason to believe that there is a problem and that such a demanding economic or econometric inquiry is justified.

### 3.2 Specific points

[52] Turning now to more specific points: First, as regards para. 43, where DG Competition suggests that the parties should put forward what types of empirical analysis they consider useful in testing the anti-competitive and/or efficiencies theories, we would suggest that it would be better for DG Competition to give more general guidance as to what it thinks is appropriate in particular situations.

[53] Clearly, we are all looking at what has been done in the cases so far in order to think about what might be used as relevant and useful evidence in future cases. In particular, considering what role the economic analysis actually played in defining the outcome of the case.

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[54] In this context, it would be useful if the CET were to publish, for example, in the Commission's Competition Newsletter or in speeches, discussions about what sort of evidence they think is most useful in particular contexts and why. This would be overtly non-binding, but useful illustrative guidance, allowing those dealing with DG Competition to do their homework and think about what best to propose as the relevant evidence for a case.

[55] It may be that the parties will still propose other ideas in the circumstances, but in the first place a greater predictability as to "what economics may be expected when" would be helpful.

[56] Second, para. 43 is also important because it highlights the problem of access to data from third parties. This is addressed in the Best Practices concerning proceedings, insofar as there is discussion of data rooms.

[57] We would emphasize that it can be a major problem that the Commission wishes to investigate using econometric assessments involving third party data in merger cases. Mainly because in merger control this limits the ability of the parties to do an effective pre-merger notification and therefore obtain Phase 1 clearance, even in cases where that may be reasonably justified. Asking for detailed data assessments from third parties in Phase 1 is often not practical given the time constraints and it can mean that a case all too easily goes into Phase 2 even though it should not.

[58] In any event, the decision to use third party data should only be taken in cases where it is both clear that obtaining such data is crucial to the analysis and it is reasonably certain that third party data can be obtained in workable time frame. We would suggest that it is usually only when there is an active complainant that the Commission can expect to receive sufficient quality data in a timely fashion.

[59] In practice, we would suggest that the Commission be clearly willing to start the investigation process, including requests for information to third parties where these are

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deemed indispensable for the analysis, before the clock starts running with a notification and we would urge more willingness to do that.

[60] Third, at paras 49 and 52 DG Competition sets out rightly that it is important to be aware of the burden on the parties concerned, both in terms of cost and time in the collection of data. We welcome DG Competition's confirmation that it is mindful of this and the need to balance the usefulness of any such request to the overall assessment in the circumstances.

[61] Clearly, we also understand that the Commission must be able to do whatever is necessary for its inquiry. However, we urge DG Competition to be mindful that these economic data requests are now becoming frequent and can be both very time consuming and very expensive. We urge DG Competition to be particularly open to the use of less burdensome economic assessments (than, e.g. full econometrics) where appropriate, i.e. where that is more proportionate to the issue and context in question.

[62] Fourth, we would make similar remarks concerning paras 57 and 70 and the way that DG Competition underlines that even if data is not readily available the Commission may request it where the Commission thinks it appropriate. For example, we do not think it is reasonable to ask a company to convert handwritten records for some years into Excel spreadsheets with data simply so that an econometric model can be done. At least, if such a demand is to be made, it really must be essential, i.e. not avoidable through other less burdensome economic review.

[63] Fifth, we would urge DG Competition wherever possible to limit its data requests to existing data sources and to accept that it is not the parties' task to recreate and rearrange the data to solve any issues with their existing databases. CET requests for cleaning up and rearranging the data can be extremely burdensome, time consuming and expensive.

### **3.3 Other points which may merit further discussion**

[64] There are a few other related issues which it would be useful to address either in these Best Practices, or elsewhere.

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[65] The first issue is a request that DG Competition be more forthcoming about the preliminary views it is reaching with data submitted at an early stage in the proceedings. It would be useful if more feedback could occur earlier in the proceedings, so that the parties can focus on what are the relevant questions at an earlier stage. In merger cases, this process should ideally start in pre-notification.

[66] Second, we would like to come back to the idea that any dialogue between economists should not be a completely independent sub-set of the general inquiry, so that the parties feel that they are dealing with two cases and even two case teams.

[67] We understand that there may be situations in which by far the best way of proceeding is to allow for direct dialogue between economists, discussing what are the relevant economic tests based on the literature and other experience and how to resolve problems in the technical organization of econometrics.

[68] However, it is important that companies and their lawyers are not excluded from that process. In this context, we welcome, for example, the confirmation in the procedural Best Practices that external counsel generally may attend in data rooms where they or their clients wish them to do so, bound by the appropriate confidentiality undertakings.

[69] Third, again we think it should be clearer how the economist in a case team, who is a member of the CET, fits in with the process as a whole. As explained, the impression is given in some cases that the case team is doing one investigation and that the economist is doing another and, when issues arise, it is not clear whether these things should be discussed with the relevant Head of Unit or the Chief Economist or both.

[70] It would therefore be helpful, in addition to the guidance already set out in the Best Practices, if it could be stated, that in the event that the parties have concerns as to the line which an economist appears to be taking, there should be a clear standard practice that the parties can request a meeting with the Chief Economist or his Deputy, together with the Head of Unit to clarify their concerns.

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#### **4. Guidance on procedures of the Hearing Officers**

[71] Again, we welcome the opportunity to comment on the proposed Guidance on the procedures of the Hearing Officers.

[72] Both the Hearing and the role of the Hearing Officers continue to be highly topical issues amongst competition lawyers, perhaps inevitably so insofar as the safeguard of the procedural rights of the defence is a core concern to companies and their counsel.

##### **4.1 General**

[73] Again, we would like to make a few general remarks before turning to specifics. To us, a core issue is the way in which the specific role of the Hearing Officers (as spelt out in their mandate) tends to be emphasized, rather than their general residual obligation to provide an overall report to the Commissioner as to whether the procedural safeguards and the right to be heard have been respected throughout the proceedings (see para. 6 of the Guidance).

[74] We say this because, whilst it may be the practice of some counsel to raise all manner of issues with the Hearing Officers, because of this report which the Hearing Officer will write, some are more hesitant about the Hearing Officers' powers, based on the mandate, so that they think there is no point to raise some issues with the Hearing Officer at all.

[75] We think therefore that the way the Hearing Officer's role is projected is too narrow and specific and should be clearly broadened. In particular, we think that the way that such focus is given to the position after the Statement of Objections leading to the Hearing tends to give a distorted picture, because issues of protection of the rights of defence can arise at any stage in the proceedings. It is not right to be in a Hearing debating a case which has been wrongly brought with a breach of the rights of the defence in the investigative phase.

[76] We are aware that this is a broad issue, but we think the opportunity should not be missed to make this point again. We would even suggest that the title of Hearing Officer be

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abandoned and that the term “Procedural Officer” be used. It would be symbolic of the change of attitude which we think should apply in relation to the Hearing Officers’ role.

[77] To some extent and in some cases it may be possible to take procedural issues to the European Courts, either for specific interim review before the President of the General Court or insofar as these procedural issues are raised as part of general appeals. The problem is, however, that practically, that sort of challenge may often not be perceived as a realistic option to a business which is trying to resolve its issues with the Commission in a reasonable time frame. What is needed is an immediate practical and independent intervention within days, not an appeal procedure which takes months, if not years.

#### 4.2 Specifics

[78] Turning now to specifics, we note first the Guidance position expressed, for example, in paras 8 and 14 that a failure to bring a dispute with DG Competition before the Hearing Officers could be interpreted as an acceptance of the position of the Commission if a party subsequently raises the procedural matter before the European Courts.

[79] As we understand it this is new. Whilst we think that it is correct that both the Commission and the defence should consider it straightforward that procedural questions be brought before the Hearing Officers, we think it should be up to the defence whether or not they do so and certainly there should be no prejudice to the raising of a procedural point at a later stage before the courts. There may be many reasons why a company would not raise the issue, including, for example, fear of antagonising the case team at a critical moment, or more simply because it is far more focused on dealing with the substantive issues and therefore does not think of it. The case law quoted in support in paras. 8 and 14 also does not appear to have general application and, in our view, can only apply in limited circumstances.

[80] Otherwise, in our view, it would be better if the Guidance would state instead that DG Competition considers it entirely normal for a party to raise issues with the Hearing Officer wherever it appears relevant.

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[81] Second, as regards para. 10, and in line with what has been said above, we would emphasise again that we think the Hearing Officer should play a greater role in the investigation stage of the proceedings and not just be viewed as important after the issue of a Statement of Objections. Issues such as the scope of an investigation, privilege, computer investigations and delay in bringing issues to the attention of the defence are, for example, all key issues on which the Hearing Officer should be actively involved.

[82] The Hearing Officer could also intervene on issues of unduly short deadlines to reply to requests for information, or where discussions with the case team do not lead to an agreed solution as to the scope of such requests.

[83] We would also suggest that the Hearing Officer is involved in the preparation of the access to file to make sure that the case team is following proper procedures (but we do not suggest to check at this stage whether, document by document, the proper classifications are being applied).

[84] Third, as regards paras 25 to 29, dealing with the time to respond to a Statement of Objections, this is still often a difficult and controversial issue for the defence. Often, addressees are faced with a very long, complex and detailed Statement of Objections which the Commission has been preparing, based on investigations lasting several years and they are asked to answer in only a month or two. Statements of Objections may also include material which is put to the defence for the first time, notably arguments of third parties which the Commission has not brought before, but wishes to cover in the process.

[85] It is therefore extremely important that reasonable periods are allowed to respond and that a fair amount of flexibility should be present in this regard. The defence can be expected to work very intensively on the response, but in many cases the short deadlines usually imposed on the addressees are extremely challenging in view of the density of work required. Also, where the Commission takes considerable time to prepare its case equality of arms demands that addressees obtain a reasonable deadline going beyond the usual one to two months, save where exceptional market circumstances call for a more urgent treatment.

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[86] Fourth, a separate issue is access to the file (see para. 27) where it is key that complete access to the file be given and that time not run until it has been given. If material is provided late, extensions should be provided accordingly, given already the tight time-frame that is involved and the fact that the parties have not been able to review the file before the issue of the Statement of Objections (even though we and others have been arguing for that right for many years).

[87] Fifth, as regards para. 39, referring to the determination as to when a hearing will take place, we would comment that arguments of expediency related to the availability of the hearing room should not be allowed to be a ground for inhibiting the defence from taking a reasonable time in which to present their case.

[88] The defence should be asked how long they think they need and then, if there are multiple defendants, all the relevant time should be added up to provide the allocated time for the Hearing, not the other way around that a limited time be defined and then the defence should be told that it has to fit part of that.

[89] Clearly, the requested time for hearings should be reasonable and it may be that the Hearing Officer would limit it in case a request is excessive, but this should not be just because, for example, the relevant room is only available for one afternoon or one day.

[90] Sixth, we note the determination expressed in the Guidance to find ways to enhance hearing preparations so as to make sure that hearings are as efficient and useful as possible. As noted above, we believe that in cases where there are multiple defendants these should receive each other's replies to the Statement of Objections prior to the Hearing. This would enable the Hearing Officer to discuss with the parties concretely how the Hearing could be best organised.

[91] Finally, we note our understanding that the Hearing Officers already have a much broader role than before, notably insofar as, for example, they are actively engaged in settlement discussions. We think therefore that a material issue to be raised is that the

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Hearing Officers should have sufficient resources to be able to engage in the wider role which we think they should have.

[92] We urge the Commission to continue to develop the role of the “Procedural Officers” in order to ensure that the substantive issues being discussed can be addressed in the best conditions, without the distraction of material friction related to procedural issues.

[93] If DG Competition would be interested to discuss any of the points raised here further we would be happy to do so.

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