CCBE COMMENTS ON COMMISSION CONSULTATION ON BEST PRACTICES IN ANTITRUST PROCEEDINGS AND SUBMISSION OF ECONOMIC EVIDENCE; HEARING OFFICERS' GUIDANCE PAPER

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CCBE comments on
Commission consultation on Best practices in antitrust proceedings and submission of economic evidence; Hearing Officers' guidance paper

The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

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GENERAL COMMENTS

On 6 January 2010, the European Commission (***Commission***) posted three documents on its website: *"Best Practices for antitrust proceedings", "Best Practices for the submission of economic evidence*" and "*Guidance on the role of the Hearing Officers in the context of antitrust proceedings"* (***Guidance***)[1]. In the press release accompanying the publication, the Commission stated that it will "*apply the texts provisionally as from today, but stakeholders are invited to submit comments on the documents within 8 weeks, thus allowing the Commission to potentially change the documents in light of the comments received from interested parties."*[2]

We regret that the Commission, contrary to its usual practice, chose to carry out a consultation on documents already in force, especially since their avowed goal is to increase the transparency and predictability of proceedings. Not only is this approach paradoxical, but it also deprives companies and their boards of directors of the opportunity to assert their views beforehand, on issues which are fundamental to the practical operation of Commission antitrust proceedings.

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.

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.

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.

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

1 See http://ec.europa.eu/competition/consultations/2010_best_practices/index.html
2 IP/10/2, 6 January 2010 – "Antitrust: improved transparency and predictability of proceedings."

a case and the publication of these documents would have presented an opportunity to address a number of outstanding questions on these procedures.

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.

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DETAILED COMMENTS ON THE BEST PRACTICES ON THE CONDUCT OF PROCEEDINGS CONCERNING ARTICLE 101 AND 102 TFEU

Scope and purpose of the Best Practices (section 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."

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.

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.

Initial assessment and case allocation (section 2.2)

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.

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.

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.

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.

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.

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.

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 it requests for information, in order for it to decide whether or not it intends to investigate its case further."*

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.

The Commission could usefully clarify what it views as constituting "sufficient information". The CCBE 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.

Opening of Proceedings (section 2.3)

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.

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.

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.

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 addresses of the investigation, and other parties to the investigation, of the decision to expand the addressees of the investigation.

Information requests (section 2.5)

To avoid a fishing expedition, an obligation for the Commission to clearly link the information request with the issue that is investigated is required.

Time Limits (section 2.5.2)

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.

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.

Paragraph 36 says that if DG Competition *"considers the request to be well founded, additional time (depending on the complexity if 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 addresses can properly assess whether or not it is worth making an application for extension of time.

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.

Meetings and other Contacts (section 2.6)

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.

The Commission could also clarify the circumstances in which notes of meetings and phone calls would be included in the file. In practice, invitations to meetings or telephone calls require at least an informed agenda in order to be useful.

Power to take statements (section 2.7)

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.

The Commission's powers to impose fines are substantially equivalent to criminal law powers (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.

Legal Professional Privilege (LPP) (section 2.9)

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.

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.

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.

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. At a minimum, one of the hearing officers (not the one assigned to the case) could if necessary read the document and reach a view. Albeit that this would not be independent, it would still be an improvement on the present position. In certain legal systems 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.

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 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.

Information exchange between competition authorities (section 2.10)

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.

State of Play Meetings (section 2.11)

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.

Triangular Meetings (section 2.12)

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.

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.

Review of key submissions (section 2.14)

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.

Possible Outcomes (section 2.15)

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.

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.

Access to File (section 3.1.2)

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.

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.[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.

3 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.

Written Reply to the Statement of Objections (section 3.1.3)

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.

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.

Rights of complainants and interested third parties (section 3.1.4)

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.

Oral Hearing (section 3.1.5)

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.

Possible outcomes of this phase (section 3.2)

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.

Submission of the commitments (section 4.3)

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.

Can the Commission please clarify what is meant by the term self-executing in paragraph 113?

It should also be noted that the commitment procedure may well benefit from triangular meetings in appropriate cases.

Procedure (section 5.2)

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.

Limits on the use of information (section 6)

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.

Adoption, Notification and Publication of Decisions (section 7)

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.

In addition, greater transparency would be welcome on this process (e.g. the process of consultation of the Hearing officer, Advisory Committee and other relevant DGs) together with an indication of the timescale of the various stages leading to the adoption and publication of a decision.

Furthermore, two weeks may well be too short to provide a non-confidential version of the Commission's decision.

Annex 1

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

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THE IMPACT OF THE "BEST PRACTICE GUIDANCE FOR THE SUBMISSION OF ECONOMIC EVIDENCE AND DATA COLLECTION" ON THE PRACTICE OF SPECIALISED AND NON-SPECIALISED EUROPEAN LAWYERS

In order to help competition lawyers in their day-to-day practice, the European Commission has released a guidance[4] which is the first official publication describing the "A-Z" of generating and presenting economic and econometric analysis in antitrust and merger cases. This guidance further explains how to reply to the Commission's request for data.

General Comments

Economic evidence has made heavy inroads in competition law enforcement and litigation in the European Union. Economic analysis supported by economic evidence has become of fundamental importance. For instance, there is an increasing use of complex econometric modeling in EU merger control proceedings which have to be dealt by lawyers.

The vast majority of economic evidence is "*explanatory*" - providing explanation and interpretation of particular economic concepts relevant to legal proceedings - and not limited to the use of "*quantitative*" economic evidence based on data collection and regression through the use of econometric techniques. Therefore, the lawyers and the economist practicing competition law have increasingly felt

4 " Best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases". ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf

the need to have some sort of guidance for the gathering of economic evidence and quantitative data or a least a code of conduct with regards to the submission of such evidences.

Such best practices already exist in some jurisdictions. The US Federal Trade Commission has released a "Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations"[5]; the UK Competition Commission has released a document entitled "Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission"[6]; and the French Autorité de la concurrence refers to this issue in its "Lignes directrices relatives au contrôle des concentrations" (pages 143-6)[7].

Until now, the European Commission expected (implicitly) from lawyers providing economic evidence in merger or antitrust cases, that economic studies should be formulated clearly, properly motivated, provide some explanations on the methods used, and be relevant and reliable. However, no official guidance existed resulting in a lack of transparency.

This brings a few comments and remarks

Overall, this guidance is welcomed by the Competition law practitioners. It is a further step in the modernisation of the rules under which the Competition directorate operates. It improves the examination of evidence.

A needed guidance for specialised and non-specialised lawyers

This guidance is important for lawyers specialised in competition law directly involved in antitrust and merger cases. It creates more transparency during the Commission's investigation and further proceedings.

In addition, this guidance is also helpful for non-specialised lawyers indirectly involved in such cases. By providing clear information on how to handle economic data, this guidance helps non-specialised lawyers to act in competition procedures in front of the European Commission. For instance, this is particularly the case when a client consults a non-specialised lawyer to answer market tests sent by the DG COMP in the context of an investigation.

Is it a "code of conduct" specially designed for economic consulting firms?

The emergence for a market for economic experts in Europe has profoundly affected the way economic expertise is integrated in legal proceedings. A myriad of consultancy firms provides micro-economic studies or other type of economic studies to support competition lawyers' work. This may be a valuable document for them especially the annex 1 which describe the structure and basic elements of sound empirical submission.

Will the guidance have for effect to inflate or to canalise the submission of economic information to the Commission?

It is noteworthy that economic evidence should be used only in a small minority of cases. Indeed, in many cases qualitative information is the most readily available information and is deemed sufficient to resolve the concerns being addressed.

We clearly acknowledge that economic evidence is increasingly important in many competition cases. However, we want to underline that the use of economic evidence as such is limited to a minority of competition cases. The use of economic evidence should not be confused with the use of economic analysis.

The latter is used widely by the European Commission - based on the Merger Guidelines - irrespective of whether or not economic evidence is used.

5 www.ftc.gov/be/bestpractices.shtm#_ftn2
6 www.competition-commission.org.uk/rep_pub/corporate_documents/corporate_policies/best_practice.pdf
7 www.autoritedelaconcurrence.fr/doc/ld_concentrations_dec09.pdf

Economic evidence consists, for instance when assessing merger control transaction, of processing or transforming the facts in such a way that it permits a better or more appropriate characterisation of the market and/or the impact of the merger. The processing of the facts might consist of some relatively simple quantitative technique such as correlation to the more complex building of a simulation mode. This debate quickly falls within the realm of the antitrust economics and becomes obscure to non economic trained minds.

In this respect, the "best practice guidance" is clearly an improvement as it frames the questions the parties are asked to answer, the use of accepted theories and models, the parties' assumptions, and whether the conclusions are supported by economic evidence.

It is clear to our mind that the guidance will have the effect to **canalize** the submission of economic information to the Commission as, by setting a clear framework, it seeks to deter unprofessional economic evidence particularly by encouraging efforts to match the economic evidence with the fact of the case.

Further, we reckon that the data room procedures are also an improvement (point 45 of the best practice guidance).

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NOTES AND COMMENTS ON THE GUIDANCE ON THE ROLE OF THE HEARING OFFICERS IN THE CONTEXT OF ANTITRUST PROCEEDINGS

General

Limited scope of the Guidance

The Guidance only applies to proceedings relating to Articles 101 and 102 TFEU. Mergers are excluded, whereas the role of the Hearing Officers is very important for businesses.

To date, there is no guidance comparable to that published on 6 January 2010 relating to the role of Hearing Officers on merger control. As argued by the CCBE in 2000 in the consultation preceding the adoption of the Hearing Officers' terms of reference, since there is no effective judicial protection in merger control cases, the Hearing Officers' role should - particularly in those cases - be extended. This would ensure that checks and balances are integrated, and contribute to a fairer procedure.

At the same time, leniency and "transaction" proceedings, where the role of the Hearing Officer was expected to be considerable (especially since parties may waive certain rights), are expressly excluded from the scope of the Guidance[8].

A Utilitarian vision of the function of the Hearing Officer

It follows from the Guidance as a whole that, as far as the role of the Hearing Officer is concerned, the Commission seems to emphasize the need to ensure the efficiency of proceedings more than their objectivity, transparency and predictability, though these characteristics should be equally essential.

Yet the goals of objectivity, transparency and predictability of the proceedings are explicitly specified in the terms of reference for Hearing Officers adopted in 2001, in the form of a Commission decision on 23 May 2001[9] (***Terms of reference).***

8 See the Commission Regulation (EC) No. 622/2008 No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases.

9 Decision No. 2001/462.

In any event, complying with and guaranteeing the right of defence should take precedence over all considerations of efficiency. Nothing should undermine this right, not even a concern for greater efficiency (from the Commission's standpoint), which appears to be the Commission's main concern.

Specific comments

Hearing Officers' tasks (par. 3 to 9)

– *A greater role when the Commission works from a presumption*

When the Commission works from a presumption, the Hearing Officer should play a greater role, particularly as regards the way the Commission deals with evidence provided by a company under investigation. This should guarantee that the Hearing Officer is actually able to verify that all the elements provided by the company are taken into account by the Commission, and that the initial presumption is therefore rebuttable.

– *On the possible lack of referral to the Hearing Officer during proceedings*

The last sentence of paragraph 8 is unacceptable[10]. Even if there is no referral to the Hearing Officer during proceedings, this cannot undermine in any way the right of defence in the context of an appeal.

Incidentally, this principle was recently reiterated by Advocate General Mazák in paragraphs 37 and 38 of his opinion of 11 February 2010 in Case C-407/08 P, *Knauf Gips KG, formerly Gebr. Knauf Westdeutsche Gipswerke KG v European Commission*:

"*37. I shall deal firstly with the claim of the Commission raised at point 34 above. The Commission argues in effect that the second and third part of the appellant's first ground of appeal are stopped as the appellant failed to exhaust all the remedies available to it concerning access to the documents in question during the administrative procedure before the Commission.*

38. I consider that that argument should be rejected. Firstly, the Commission has not established that the appellant actively misled it or failed to act in good faith with regard to the undisclosed documents in question during the administrative procedure. The mere failure of the appellant to exhaust its remedies before the Commission could not have inappropriately induced any misapprehension on the part of the Commission that the appellant would not follow up on its request of access to the documents in question before the Community courts (22)[11]. Secondly, in the absence of any legislative provision which specifically requires an interested party to exhaust the remedies available to it during the administrative procedure before the Commission, I consider that the imposition of such a requirement by the Court would inappropriately limit the rights of defence of that party and deny it full access to justice(23)[12]."

10 *Failure to bring a dispute with DG Competition before the Hearing Officers, for which they are conferred decision-making powers, can be taken as an acceptance of the position expressed by DG Competition and may result in the Commission bringing attention to this fact if a party subsequently raises the procedural matter before the European courts."*

11 *(22) See by analogy Case C-297/98 P SCA Holding v Commission [2000] ECR I-10101, paragraph 37. In addition, the Court stated in the Aalborg Portland and Others v Commission case (cited in footnote 12) at paragraphs 101 to 106, that in the context of an action brought before the Court of First Instance against the decision closing an administrative procedure, it is open to that court to order measures of organisation of procedure and to arrange full access to the file, in order to determine whether the Commission's refusal to disclose or communicate a document may be detrimental to the defence of the undertaking concerned. As that examination is limited to a judicial review of the pleas in law, it has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. It is common ground that belated disclosure of documents in the file does not put the undertaking which has brought the action against the Commission decision back into the situation it would have been in if it had been able to rely on those documents in presenting its written and oral observations to the Commission. Given both the different purpose and extent of the grant of access to the file before the Court of First Instance and the Commission, I do not consider that failure to exhaust all remedies during the administrative procedure should preclude the appellant from raising the matter of denial of access before the Community courts"*

12 *(23) See by analogy Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraph 38. In addition, in the event that an applicant's claim concerning the exculpatory nature of undisclosed documents were to prosper and it is established that that party failed to avail of a remedy during the administrative procedure to which it had effective access, the Court could consider any dilatory behaviour by that party if established when awarding the costs pursuant to Article 69(3) of the Rules of*

What applies to proceedings before the Commission applies even more so, of course, to the Hearing Officer.

In this regard, it should also be noted that in the T-44/00 *Mannesmannröhren-Werke* Judgment (mentioned by the Commission in a footnote on page 5 of the Guidance), the Court of First Instance ***(CFI)*** ruled that it is not necessary for Hearing Officers to check the internal structure of documents which the Commission refused to disclose when the company had not submitted such a request[13]. The Judgment does not say anywhere that the company has accepted the Commission's position in case of a "*failure to bring a dispute* (...) *before the hearing officer"*. Thus it is unclear how the Commission can infer a company's acceptance from the fact that there is no mandatory verification by the Hearing Officer.

The Investigative Phase (par. 10 and 11)

The investigative phase (inspections) is virtually excluded from the Guidance, because the role of Hearing Officers will essentially be limited and the right of the defence can only be fully exercised from the statement of objections. It is precisely because *"an undertaking subject to investigatory measures can rely in full on its right of defence only once a Statement of Objections has been notified to it"* that the role of Hearing Officers is crucial during the investigation. In these circumstances, it is rather unfortunate that the Commission should merely provide general remarks in two brief paragraphs on this fundamental stage of the proceedings.

The issues concerning the right of defence which may, according to the Guidance, be brought before the Hearing Officers are extremely limited. Clarification is needed from the Commission. It cannot simply indicate that the Hearing Officer "*will look into such issues at the request of an undertaking"* without further explanation, and that these questions will "*in any event*" be addressed if raised in the reply to the statement of objections (after the indictment). The role of the Hearing Officer is critical at this stage of collecting evidence or clues, and given that, in practice, there is no effective remedy (i.e. immediate remedy) against a decision allowing inspections or how they are carried out.

Moreover, in a footnote on page 6, the Commission mentions the *Dalmine* C-407/04 P Judgment in which the Court of Justice ***(ECJ)*** reiterated that the company concerned could fully exercise the right of defence only after the statement of objections. The fact that it cannot "fully" assert them earlier cannot be interpreted to mean that there is no right of defence and, by extension, a more limited role for the Hearing Officers. To the contrary: in the *Nederlandse Federative Vereniging voor of op Groothandel Elektrotechnisch Gebied* C-105/04 P Judgment (to which *Dalmine* specifically refers on this issue), the ECJ clearly stated that *"examination of any interference with the exercise of the rights of the defence must not be confined to the actual phase in which those rights are fully effective, that is to say, the second phase of the administrative procedure. The assessment of the source of any undermining of the effectiveness of the rights of the defence must extend to the entire procedure and be carried out by reference to its total duration."*[14]

It seems essential for the Hearing Officer to be able to play his or her role fully during the investigative phase, if only (i) to enable the company concerned to be informed that it is being investigated, and (ii) to avoid any loss of evidence, which is inevitable without such information (especially when the investigative stage takes several years). The Hearing Officer should be informed that an investigation and/or the intent to begin one exists, and he or she should then be able to inform the company of this fact, thus enabling it to prepare its defence. In the T-99/04 *AC-Treuhand,* Judgment, the CFI also considered the *Nederlandse Federative Vereniging voor des Groothandel Elektrotechnisch Gebied* C-105/04 P Case (see above) and clearly stated that "*those considerations apply by analogy to the question whether and, if so, to what extent the Commission is required to provide the undertaking concerned, as of the preliminary investigation stage, with certain information on the subject-matter and purpose of the investigation, which enable its defence in the inter partes stage to be effective. Even though, in formal terms, the undertaking concerned does not have the status of 'a person charged' during the preliminary investigation stage, the initiation of the investigation in its regard, by the*

Procedure of the Court of Justice which provides, inter alia, that the Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur"

13 *Mannesmannröhren-Werke, T-44/00, par. 23.*

14 *Nederlandse Federative Vereniging voor of op Groothandel Elektrotechnisch Gebied, C-105/04 P, par.50.*

adoption of a measure of inquiry concerning it, cannot generally be dissociated, in substantive terms, from the existence of suspicion, hence from an implied imputation of misconduct (...), *which justifies the adoption of that measure".*[15]

Finally, the issue of confidentiality, which is dealt with by the Commission in two sentences at the very end of paragraph 11, is absolutely crucial to an investigation. The role of Hearing Officers in this regard should be developed in (a) specific paragraph(s). On the merits, with regard to confidentiality as part of the investigative phase, a system comparable to the one provided in paragraph 19 should be established for the period after the statement of objections.

Procedures potentially leading to a prohibition decision (par. 12 to 31)

As stated above with regard to paragraph 8, the lack of referral to the Hearing Officer during proceedings should not diminish in any way the right of defence in the context of an appeal, let alone be interpreted as an acceptance by the company concerned of the Commission's position. In addition, as mentioned with respect to paragraphs 10 and 11, it is essential that the Hearing Officer be able to fully play his/her role during the investigation phase. Thus the company concerned should know who the competent Hearing Officer is at the investigation stage, and not only after the statement of objections.

Moreover, a plaintiff should also be able to consult the Hearing Officer if he or she considers that the evidence submitted was not taken into account at all, or not effectively enough, by the Commission.

Similarly, when a company asks for an extension of the deadline, for serious reasons and sufficiently in advance, the practice should be to suspend the deadline to address the issue and, if necessary, define a new "deadline". Where such a demand is sufficiently motivated and justified, the extension should be granted. In any event, the deadline suspension should not be limited to "*exceptional circumstances"* as adopted by the Commission in its Guidance – a term which is both undefined and overly restrictive.

Finally, developments in paragraphs 19 to 22 relating to confidentiality are dealt with in a vague manner. No rule is formulated clearly.

Admission of Third Parties to the Procedure (par. 32 to 37)

- *Disclosure of the identity of third parties admitted to the procedure from the statement of objections*

The Guidance states that the identity of third parties admitted to the proceedings is disclosed to the recipient of the statement of objections before the hearing at the latest. This can happen very late in the proceedings, and leave little time for the company in question to prepare.

It is unclear what objective reasons exist for not disclosing the identity of third parties from the statement of objections onwards, or when such status is actually granted. Knowing the identity of third parties admitted to the proceedings as soon as possible would allow the company to defend itself knowingly, and ensure a level playing field with the Commission.

Moreover, the exceptional circumstances in which the Hearing Officer may refuse to disclose the identity of third parties are not specified in the Guidance.

The Oral Hearing (par. 38 to 60)

- *Selection of participants in hearings*

To limit the duration of hearings and increase the effectiveness of proceedings, observers are not allowed to assist in hearings. Conversely, it is necessary for admitted parties to contribute orally to the debates.

15 *AC-Treuhand, T-99/04, par.52.*

However, in light of the objectives of speed and efficiency affirmed by the Commission, it is somewhat paradoxical to require parties to intervene on a regular basis, which may or may not be useful, while denying all access to companies which do not wish or do not consider it necessary to speak.

- *Language of the proceedings*

It is essential for the Commission to affirm the principle that oral interventions and any follow-up comments should always be possible in the language of the proceedings. This can only be inferred *a contrario* from par. 51 of the Guidance.

- *In-camera sessions*

The procedure and criteria by which the Hearing Officer determines whether the information should be disclosed or not during an *in-camera* session should be clarified.

It is unclear how, in practice, it would be possible to detract from the confidential nature of an intervention in an *in-camera* session.

Moreover, the issue of how much non-confidential information can be circulated during *in-camera* sessions should be specified.

- *Arrangements for circulating "written responses" and "written comments"*

It should be expressly provided that, if necessary, it is possible to make confidential parts of the "*written response"* circulated to other participants in the hearings.

Furthermore, *"written comments"* should also have a delivery system similar to that provided for "*written responses"*, including the possibility to make some items confidential before circulation to other participants.

Post-Oral Hearing (par. 61 to 64)

As stated above, the *Interim Report* of the Hearing Officers should not be submitted to the Commissioner responsible for competition, but to the College of Commissioners or the President of the Commission.

More generally, it is unclear why the *Interim Report* is not available to the parties. Indeed, if one follows what the Commission says about the *Interim Report* in its Guidance, this means that in practice the Hearing Officer may have identified one or more significant breaches of the right of defence,[16] and that the company in question is not informed of this fact.

Other Procedures (par. 65 to 68)

Regarding the commitment procedure of Article 9 of Regulation 1/2003, it should be noted that the "more consensual" nature of this procedure, to use the terms of the Guidance, does not affect the existence and guarantee of a company's right of defence. All the more so, since without a statement of objections it is not possible for the company to fully exercise these rights (as reiterated by the Commission in paragraph 10 of the Guidance).

At the same time, it should be noted that the commitment procedure has a consensual nature mainly for companies whose practices are under investigation. In this context, third parties may have an interest in the Hearing Officer fully exercising his/her function.

Finally, if objections are not communicated, some third parties may not have the opportunity to make their presence known to the Commission. In doing so, it is unclear whether the market test for commitments can effectively be addressed to all companies with an interest in responding.

16 See Paragraph 61: *"this [Interim] Report addresses all procedural issues of significance relating to the fairness of the procedure, such as whether the addressees' rights of defence have been respected"* (emphasis added).

Decision-making procedure (par. 69 to 75)

It seems necessary to clarify the meaning of paragraph 72. One could understand that the Hearing Officer is allowed to modify the final report in light of changes to the draft decision, whereas the opposite is clearly true.

Future revision (par.76)

As discussed above, insofar as it was considered unnecessary to hold a consultation prior to the adoption and implementation of the Guidance, it is surprising that with respect to its future revision, the Commission is satisfied with another general statement, which fails to even mention the *a posteriori* consultation..

At the very least, the Commission could have included a review clause, e.g. scheduled for the second half of 2010, to be able to adapt its Guidance to the comments received during the consultation.

Draft Terms of reference Review

The current status of Hearing Officers is based on the Terms of reference, which provide that *"administrative proceedings should be entrusted to an independent person experienced in competition matters, who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings."*

The Terms of reference aim at the founding treaties (Treaty of Rome, ECSC Treaty, Agreement on the European Economic Area) and the Rules of Procedure of the European Commission, in particular Article 20 (now 22 in the consolidated version of the text), which provide that *"the Commission may, in special cases, set up specific structures to deal with particular matters and shall determine their responsibilities and method of operation."*

Finally, Article 2 § 2 of the Terms of reference provides that *"the Hearing Officer shall be assigned, in administrative terms, to the member of the Commission in charge of competition (hereinafter "the competent member of the Commission")*. The objective is *"to ensure the independence of the Hearing Officer"* compared to the pre-existing situation (assignment to the Director General of DG IV now DG Comp)."

However, the Terms of reference, which, as indicated above, date back to 2001, have not been revised since then. Thus they do not reflect changes in European competition law since that date, and remain grounded in the former Regulation 4064/89/EEC on the control of concentrations. As part of the consultation on the Guidance, it seems therefore appropriate to suggest opening a debate on a possible review of the Terms of reference, with a view to strengthening the independence and legitimacy of Hearing Officers.

Proposal of amendment of the administrative assignment of the Hearing Officers

Assignment to the Commissioner in charge of Competition, even if this was an improvement when the Terms of reference were approved, does not ensure the desired independence of the Hearing Officer. Article 20 (now Article 22) of the Rules of Procedure of the Commission does not require this specific function to be assigned to the Commissioner in charge of Competition.

To fully and independently carry out their missions, Hearing Officers should in these conditions be assigned to the entire College of Commissioners or the President of the Commission.

As argued by the CCBE in 2000, the Hearing Officers should also report to the College of Commissioners or the President of the Commission that Hearing Officers.

Proposal of amendment of the legal basis for the Terms of reference

The Terms of reference are currently based on the Rules of Procedure of the European Commission.

It could be suggested that they should be based on a legislative act adopted by the Council, which in turn could be drafted, like Regulation 139/2004/EC on the control of concentrations, on the following legal basis:

- Article 103 TFEU, allowing the adoption of regulations and directives to implement sections 101 and 102 TFEU (former Article 81 and 82 EC); and
- Article 352 TFEU, understood as a way to include merger proceedings in the terms of reference of the Hearing Officers. This provision permits the adoption of acts which fall "*within the framework of the policies defined in the Treaties, when the Treaties have not provided the necessary powers".*

Proposal for the hearing of Hearing Officers before the European Parliament

It may be suggested that Hearing Officers should be interviewed by the European Parliament before they take office, and/or that they present an annual report of their activities. The Economic and Monetary Affairs Commission would be the Parliamentary committee responsible for competition.

Despite the European Parliament's limited expertise in competition law, a field in which it is not a co-legislator with the Council, such a hearing would serve to enhance the transparency and legitimacy of the function.

Necessary increase of personnel for Hearing Officers in number and size

At present there are only two Hearing Officers. It is inconceivable that this would be consistent with the scope of their duties and powers. The role of Hearing Officers is all the more important given that EU procedures do not require hearings before a decision-making body, as is the case, for example, in France.

As pointed out by the CCBE in 2000, for the Hearing Officers' mission to be accomplished effectively and efficiently, their number must increase. They should also have staff (e.g. junior lawyers and junior economists for the required research) to carry out their many functions, which are by no means limited to the procedures specified in the Guidance.