

**COMMENTS OF THE ABA SECTIONS ON THE
EUROPEAN COMMISSION'S CONSULTATION DOCUMENT
BEST PRACTICES ON THE CONDUCT OF PROCEEDINGS CONCERNING ARTICLES 101 AND 102 TFEU**

	Best Practices Text	Comments
1	<p>The principal purpose of these Best Practices is to provide guidance for stakeholders and other interested parties on the day-to-day conduct of proceedings before the European Commission ("Commission") concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") in accordance with Regulation 1/2003 and its Implementing Regulation. In this regard, the Best Practices seek to increase understanding of the investigation process and thereby to further enhance the efficiency of investigations and to ensure a high degree of transparency and predictability of the process. The Best Practices cover the main proceedings concerning alleged infringements of Articles 101 and 102 TFEU.</p>	
2	<p>Infringement proceedings against Member States based on Article 106 TFEU in conjunction with Articles 101/102 TFEU fall outside the scope of the Best Practices. These Best Practices neither apply to proceedings under the EC Merger Regulation nor to State aid proceedings.</p>	
3	<p>Cartels, as defined in the Leniency Notice, may also be subject to the specific procedures for leniency and settlement procedures. These specific procedures are not covered by the Best Practices. Moreover, the specificities of the conduct of cartel proceedings require a number of special provisions, in order, notably, not to interfere with possible leniency applications. These special provisions are indicated where applicable.</p>	<p>This exclusion significantly reduces the number of Article 101 cases to which the Best Practices apply.</p> <p>The Sections recommend that cartel cases be brought within the scope of the Best Practices, as much as possible. There may be limited modifications necessary to accommodate the specificity of leniency and settlement procedures but transparency, predictability and procedural fairness are at least as important in those proceedings as in other general</p>

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		proceedings. For example, the provisions relating to staff taking notes of meetings should apply also to cartel cases and communications with leniency applicants.
4	The Best Practices are structured in the following way. Section 2 sets out the procedure followed during the investigative phase. This part is relevant for any investigation regardless of whether it leads to a prohibition decision (Article 7 of Regulation 1/2003), a commitment decision (Article 9 of Regulation 1/2003) or a rejection of complaint (Article 7 of the Implementing Regulation). Section 3 describes the main procedural steps and rights of defence in the context of procedures leading to prohibition decisions. Section 4 describes the specificities of the commitment procedure. Section 5 covers rejection of complaints. The remaining sections are of general application: Section 6 describes the limits to use of information and Section 7 deals with the adoption, notification and publication of decisions.	
5	The Best Practices are notably built upon the experience to date of the Commission's Directorate-General for Competition ("DG Competition") in the application of Regulation 1/2003 and the Implementing Regulation. They reflect the views of DG Competition on Best Practices at the time of publication and will be applied as from the date of publication for on-going and future cases. The specificity of an individual case may however require an adaptation of, or deviation from these Best Practices, depending on the case at issue.	In the interest of transparency, it is suggested to add the following sentence at the end of this paragraph: " <i>Whenever it departs from the Best Practices in an individual case, the Commission will provide, upon request, an explanation in writing of the reasons for such departure.</i> "

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6	<p>Proceedings concerning the application of Articles 101 and 102 TFEU (hereafter generally referred as "proceedings") are in particular regulated by Regulation 1/2003 and the Implementing Regulation. The Notices on access to file and handling of complaints, as well as the Hearing Officers' Mandate, also contain numerous provisions that are relevant for the conduct of proceedings and that are not included in these Best Practices. As regards submissions of reports of economic experts and submission of quantitative data, reference is made to the Best Practices on the submission of economic evidence. The Best Practices should therefore not be taken as a full or comprehensive account of the relevant legislative, interpretative and administrative measures which govern proceedings before the Commission. The Best Practices should be read in conjunction with other such measures.</p>	
7	<p>The Best Practices do not create or alter rights or obligations as set out in the Treaty on the Functioning of the European Union, Regulation 1/2003, the Implementing Regulation as amended from time to time and as interpreted by the case-law of the Court of Justice of the European Union. The Best Practices also do not alter the Commission's interpretative notices relevant for the conduct of proceedings.</p>	
8	<p>A case concerning an alleged infringement of Article 101 or 102 TFEU may be based on a complaint by an undertaking, an individual or</p>	

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	exceptionally a Member State.	
9	<p>Information from citizens and undertakings are essential in triggering investigations before the Commission. The Commission therefore wishes to encourage citizens and undertakings to inform the Commission about suspected infringements of the competition rules.¹⁶ This can be done either by lodging a formal complaint or by simply providing market information to the Commission. Persons that are able to show a legitimate interest to be complainants, and that submit a complaint in compliance with form C, enjoy certain procedural rights. The details of the procedure to be followed are set out in the Implementing Regulation and in the Notice on the handling of complaints. Natural and legal persons, other than complainants, which show a sufficient interest to be heard also enjoy certain procedural rights in accordance with Article 13 of the Implementing Regulation.</p>	<p>The Sections consider that footnote 16 (“Or, when appropriate, the relevant national competition authority.”) may be ambiguous. It is not clear when it is “<i>appropriate</i>” that citizens should inform “<i>the relevant national competition authority</i>”, rather than the Commission of a (possible) violation of Article 101 or 102. It is also not clear which is the “relevant” national competition authority. Reference should be made to the Notice on Cooperation within the Network of Competition Authorities and to the Notice on the handling of complaints.</p>
10	<p>The Commission may also open a case on its own initiative (<i>ex officio</i>), for instance when certain facts have been brought to its attention, or further to information gathered in the context of sector enquiries, informal meetings with industry or the monitoring of markets, or on the basis of information exchanged within the European Competition Network (“ECN”). Cartel cases are often initiated on the basis of an application for leniency by one of the cartel members.</p>	

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11	<p>All cases, irrespective of their origin, are subject to an initial assessment phase. During this phase DG Competition examines whether the case merits further investigation and, if so, preliminarily defines the orientation of such investigation, in particular with regard to the parties, the markets and the conduct to be investigated. During this phase, DG Competition may make use of investigative measures such as requests for information in accordance with Article 18(2) of Regulation 1/2003.</p>	
12	<p>In practice, the system of initial assessment means that a number of cases will be discarded at a very early stage of the procedure because they are not deemed to merit further investigation. In this regard, DG Competition focuses its enforcement resources on cases in which it appears likely that an infringement could be found, in particular on cases with the most significant impact on the functioning of competition and risk of consumer harm, as well as on cases which are relevant with a view to defining EU competition policy and/or to ensuring coherent application of Articles 101 and/or 102 TFEU.</p>	<p>It may be good to mention, for consistency of explaining the allocation possibilities, that a case may be referred to one or more Member States and vice versa.</p>
13	<p>This initial assessment phase also attempts to address, at an early stage, the allocation of cases within the ECN. Regulation 1/2003 introduced the possibility of re-allocating cases to other network members if they are well placed to deal with them. Accordingly, the Commission may reallocate a case to a national competition authority and vice versa.</p>	

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14	<p>At the moment of the first investigative measure addressed to them (normally a request for information or an inspection), undertakings are informed of the fact that they are subject to a preliminary investigation as well as about the subject-matter and purpose of such investigation. In the context of requests for information, they will further be reminded of the privilege against providing self-incriminating information and that if the existence of the investigated behaviour was confirmed this might constitute an infringement of Articles 101 and 102 TFEU. At later stages, DG Competition will upon request, inform the parties subject to the preliminary investigation of the status of the case. If DG Competition at a certain stage decides not to investigate the case further (and thus not to open proceedings), DG Competition will, at its own initiative, inform the party/-ies subject to the preliminary investigation thereof.</p>	<p>The statement that “<i>At later stages, DG Competition will upon request, inform the parties subject to the preliminary investigation of the status of the case</i>” is to be welcomed. It is not clear, however, what “<i>At later stages</i>” means, and what kind of information DG Competition would be ready to provide.</p> <p>It would therefore be helpful if the Best Practices were more specific. The Commission may ask parties to spend much time and effort responding to investigative measures and both for clarity and for the avoidance of unnecessary effort it is incumbent on the Commission to give as much information as possible about status and progress of investigations. Information about whether proceedings will be opened, whether a statement of objections will be issued, the status of a ‘witness’ or a ‘defendant’, whether a case will be closed and the expected timing are examples that might be mentioned.</p> <p>It might be useful to add that if the Commission decides to proceed with the case but only with regard to certain parties, the other parties investigated will be informed that the case will be closed as to them.</p>
15	<p>In cases based on a complaint, DG Competition will endeavour to inform complainants of the action that it proposes to take on a complaint within an indicative time frame of four months from the receipt of the complaint. This is, however, subject to the circumstances of the individual case and is, in particular, dependent on whether DG Competition has received sufficient information from the complainant or third parties, notably in response to its requests for</p>	

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	information, in order for it to decide whether or not it intends to investigate its case further.	
16	The Commission will open proceedings under Article 11(6) of Regulation 1/2003 when the initial assessment phase has been concluded and it has been decided that the case merits further investigation and the scope of the investigation has been sufficiently defined.	
17	The opening of proceedings creates clarity as regards the allocation of the case within the ECN and in relation to the parties and the complainant, if applicable. It also signals a commitment on the part of the Commission to actively further investigate the case. DG Competition will thus allocate resources to the case and will endeavour to deal with the case in a timely manner.	
18	The decision to open proceedings identifies the parties subject to the proceedings and briefly describes the scope of the investigation. In particular, it sets out the behaviour constituting the alleged infringement of Articles 101 and 102 TFEU to be covered by the future investigation and normally identifies the territory(-ies) and sector(s) in which the behaviour in question takes place.	

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19	Pursuant to Article 2 of the Implementing Regulation, the Commission may make public the opening of proceedings. DG Competition's policy is to publish the opening of proceedings on its website and issue a press release, unless such publication may harm the investigation.	In order to protect the companies under investigation from undeserved reputational harm that may for instance be caused by ambiguous press releases, the Sections would recommend giving companies the opportunity to comment on the content of such announcements before their publication.
20	The parties subject to the investigation are informed in writing of the opening of proceedings before such opening is made public.	It would be useful to indicate how much advance notice the parties will receive (one week, several days?) before the opening of proceedings is made public. We understand that under current practice the Article 11(6) Decision is addressed to the parties about one week before public announcement. Also, it would be useful to clarify that the parties who have been investigated but against whom proceedings will not be opened will be likewise informed prior to the public announcement. It is not clear from the current wording if the latter category of undertakings will be informed at the same time.
21	It has to be underlined that the opening of proceedings, does not prejudice in any way the existence of an infringement. The opening of proceedings merely indicates that DG Competition will further pursue the case. This important distinction is made clear in the letter to the parties informing them of the fact that proceedings have been initiated, as well as in all public communications concerning the opening of the case.	

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22	The opening of proceedings does not limit the right of the Commission to extend the scope and/or the addressees of the investigation at a later point in time. This extension is not necessarily done by a separate decision but may also be done at the moment of adoption of the Statement of Objections.	The Sections recommend that the parties who are added to the investigation as defendants are informed as soon as possible about their status, irrespective of whether this is done by separate decision or simple letter.
23	In cartel cases, the opening of proceedings normally takes place simultaneously with the adoption of the Statement of Objections (see point 3 above).	The Sections question why the concerns that justify the formal opening of proceedings in a regular case do not apply in a cartel case. The same interest in knowing where the case is allocated in the ECN, to which sector, territory etc. it applies, is equally relevant to a cartel investigation.
24	Pursuant to Article 3(1) of Regulation 1/1958, the addressees of correspondence from the Commission are entitled to receive such correspondence in one of the languages of the Member State in which they are located.	
25	In order to avoid delays due to translation, the addressees may waive their rights to receive the text in the authentic language and to opt for another language (English for instance). Such a "language waiver" shall be signed by a representative of the addressee.	
26	As regards simple requests for information it is standard practice to send them in English and to include in the cover letter a reference to Article 3(1) of Regulation 1/1958. The addressee is also clearly	

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	informed – in the language of the addressee's location – of his/her right to obtain a translation into the language of the addressee's location, as well as his/her right to reply in that language. This practice allows for more expeditious treatment of information requests, while preserving the rights of addressees.	
27	The Statement of Objections, Preliminary Assessment and decisions pursuant to Articles 7, 9 and 23 of Regulation 1/2003 are notified in the authentic language of the addressee unless it has signed the above mentioned language waiver.	
28	As far as complainants are concerned, requests for information addressed to the complainant will be in the language of their complaint even if this is not the language of the Member State where they are located.	
29	During the oral hearing, the Hearing Officer may hear parties in person and witnesses in an EU official language other than the language of proceedings. In that case, interpretation into the language of the proceedings from another official EU language will be provided during the oral hearing.	
30	Pursuant to Article 18 of Regulation 1/2003, the Commission is empowered to require undertakings and associations of undertakings	We recommend addition of the following sentence after the last sentence: <i>"Where appropriate, the character of the request will be clarified in this</i>

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	<p>to provide it with all necessary information. Information can be requested by letter ("simple request" (Article 18(2)) or by decision (Art. 18(3)). It should be underlined that requests for information are regularly sent not only to the undertakings under investigation, but also to other undertakings or associations of undertakings which may have information relevant for the case.</p>	<p><i>regard."</i></p>
<p>31</p>	<p>Pursuant to Article 18, the Commission may require undertakings and associations of undertakings to provide all necessary information. Information is necessary, in particular, if it might enable the Commission to verify the existence of the alleged infringement referred to in the request. The Commission enjoys a wide margin of appreciation in this respect.</p>	
<p>32</p>	<p>It is DG Competition that defines the scope and the format of the request for information. In certain cases DG Competition might however discuss with the addressees the scope and the format of the request for information. This practice can be particularly useful in cases of requests including quantitative data.</p>	<p>The Sections recommend adding in a more generic way that the Commission may be amenable to have such discussions with a view to making modifications or accept limitations which may make the response more meaningful or less burdensome. We understand this is consistent with practice although it may vary from case to case. It might also be useful to add that, occasionally, such consultation may happen before sending the request for information. That is particularly so with regard to data used by the Chief Economist Office for economic modeling and the like.</p>

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33	When, in a reply to a request for information, undertakings submit irrelevant information (in particular documents which are clearly not related to the subject-matter of the investigation), DG Competition may, in order not to unnecessarily burden the often voluminous administrative file, send back such information to the addressee of the request for information. This should be done at an as early stage as possible after the answer to the request for information and a short notice reporting this fact will be put in the file.	
34	The request for information specifies what information is required and fixes the time-limit within which the information is to be provided.	
35	Addressees are given a reasonable time-limit to reply to the request, according to the length and complexity of the information request. In general, this time-limit will be at least two weeks from the receipt of the request, for a substantial request for information. However, when the scope of the request is limited, for example if it only covers a short clarification of information previously provided or information readily available to the addressee of the request, the time-limit will normally be shorter (less than one week).	
36	If it does not appear possible to reply within the time-limit, addressees may ask for an extension of this deadline. Such a request, which can also be lodged in the language of the addressee's location, should be motivated and normally be made in writing, sufficiently in advance of	

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	the expiry of the deadline. If DG Competition considers the request to be well founded, additional time (depending on the complexity of the information asked and other factors) will be granted.	
37	The cover letter also requires the addressee to indicate whether it considers that information provided in the reply is confidential. In that case, in accordance with Article 16(3) of the Implementing Regulation, the addressee must substantiate its claims and provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission.	
38	During the investigative phase, DG Competition may hold informal meetings (or conduct phone calls) with the parties subject to the proceedings, complainants, or third parties. Similarly, it will hold State of Play meetings with the parties or may hold triangular meetings as outlined in sections 2.11 or 2.12 below.	
39	When a meeting takes place at the request of the parties, complainants or third parties, as a general rule they should submit in advance an agenda of topics to be discussed at the meeting, as well as a memorandum or a presentation covering these issues in more detail. The parties, complainants or third parties are invited after	Consistent with practice in the US, such agenda could remain confidential throughout the proceedings if the undertaking so requests. That encourages full disclosure and is similar in nature to other confidential investigatory files. Statements or documents required by an Article request, such as in ¶41, should be treated differently, i.e., provided to the

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	meetings or substantive phone calls to substantiate their statements or presentations in writing.	parties through access to file.
40	A non-confidential version of any written documentation prepared by the undertakings which attended a meeting held by DG Competition, together with a brief note prepared by the services of DG Competition, will be made accessible in due time to the parties subject to the investigation, i.e. at the stage of access to file, if the case is further pursued. Subject to requests for anonymity this note will mention the undertaking(s) attending the meeting, (or participating in the phone call relating to substantive issues) and the time and topic(-s) covered by the meeting (or such a phone call)	We recommend that the words " <i>about the content of the meeting and discussions</i> " are added after the words "brief note".
41	DG Competition may, after a meeting or other informal contact with the parties, complainants or third parties, request them to provide information in writing pursuant to Article 18 of Regulation 1/2003 or invite them to make a statement pursuant to Article 19 thereof.	
42	Regulation 1/2003 and the Implementing Regulation establish a specific procedure for taking statements from persons who may be in possession of useful information concerning an alleged infringement of Articles 101 and 102 TFEU (see Article 19 of Regulation 1/2003 and Article 3 of the Implementing Regulation).	

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43	<p>The Commission may, under this procedure, interview by any means, including by telephone or electronic means, any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.</p>	
44	<p>Before taking such statements, DG Competition will inform the interviewee of the legal basis of the interview and its voluntary nature. DG Competition will further inform the interviewee of the purpose of the interview and of its intention to make a record of the interview. This will in practice be done by handing over a document to be signed by the interviewee explaining the procedure. In order to enhance the accuracy of the statements, a copy of any recording will be made available shortly thereafter to the person interviewed for approval.</p>	
45	<p>The procedure to take statements pursuant to Article 19 of Regulation 1/2003 and Article 3 of the Implementing Regulation applies only when it is specifically agreed between the interviewee and DG Competition that the conversation will be recorded as a formal interview under Article 19. It is within the discretion of DG Competition to decide when to propose interviews. A party may however also make a request to DG Competition to have its statement recorded as an interview. Such a request will in principle be accepted, subject to the needs and requirements of the proper conduct of the investigation.</p>	

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46	<p>In the context of an investigation the Commission has the power to conduct inspections at the premises of an undertaking, or in certain circumstances, also at private premises. DG Competition's practice in relation to inspections at the premises of an undertaking is currently described in an explanatory note available on its website</p>	
47	<p>According to the case-law of the European Courts, certain communications between lawyer and client may, subject to strict conditions, be protected by the legal professional privilege ("LPP") and thus be confidential with regard to the Commission, as an exception to the latter's wide powers of investigation and of examination in order to uncover infringements of Articles 101 and 102 TFEU. Communications between lawyer and client are protected by LPP provided, notably, that they are made for the purposes of the exercise of the client's rights of defence and they emanate from independent lawyers.</p>	<p>The Commission may wish to consider including in the Best Practices a list of the most common indicia of LPP in relation to documents.</p> <p>The Sections note that the Commission's approach with regard to LPP is not universally accepted, in particular with regard to treatment of in-house counsel. Although we recognise that an appeal raising fundamental questions in this respect is pending before the Court, we believe that this area of the law could benefit from review in an appropriate context, leading to possible legislative reform.</p>
48	<p>It is for the undertaking claiming the protection of LPP with regard to a given document to provide the Commission with appropriate justification and relevant material to substantiate its claims, while not being bound to disclose the contents of such document. Redacted versions removing the parts covered by LPP should be submitted. Where the Commission considers that such evidence has not been provided, it may order production of the document in question and, if necessary, impose on the undertaking fines or periodic penalty</p>	

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	payments for its refusal either to supply such additional necessary evidence or to produce the contested document.	
49	In a significant number of cases, a mere cursory look by DG Competition officials, normally during an inspection, at the general layout, heading, title or other superficial features of a document will enable them to confirm or not the accuracy of the reasons invoked by the undertaking. However, an undertaking may be entitled to refuse to allow the Commission officials to take even a cursory look, provided that it gives appropriate reasons to justify why such a cursory look would be impossible without revealing the content of the document.	The Sections submit that if a company claims LPP, it should not be required to provide justifications for non-disclosure to the Commission - even with regard to "cursory" examination. The Courts have set out an appropriate procedure to deal with disputes over the scope of LPP which involves the sealing of the document. This procedure should be followed without requiring any special justification.
50	Where, in the course of an inspection, DG Competition considers that the undertaking has provided no evidence or explanations for the purposes of proving that the document concerned is covered by LPP, has only invoked reasons that, according to the applicable case-law, are clearly unfounded to justify such protection, or bases itself on factual circumstances that are manifestly inaccurate, this will not prevent DG Competition from immediately reading the contents of the document and taking a copy of it (without using the procedure of the sealed envelope). However, where, in the course of an inspection, DG Competition considers that the material presented by the undertaking is not of such a nature as to prove that the document in question is protected by LPP under existing case-law, in particular where that undertaking refuses to give DG Competition officials a cursory look at	The Sections consider that this approach places the Commission on a potentially very slippery slope that in practice can undermine the protection afforded by LPP. It essentially relies on the exercise of good judgment by case-handlers present at an inspection. This practice should be discontinued and where a company refuses to show a document to the Commission on the basis of LPP, the sealed envelope procedure should be followed. Alternatively, a less desirable solution is for the Commission to impose upon case handlers a very high threshold for the use of this particular approach. This is especially the case where no lawyers are (yet) present at the inspection.

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	<p>a document, but it cannot be excluded that the document may be protectable, the officials may place a copy of the contested document in a sealed envelope and then remove it and bring it to DG Competition's premises, with a view to a subsequent resolution of the dispute.</p>	
51	<p>In cases where the undertaking has claimed the protection of LPP and has provided reasons in order to substantiate its claims, the Commission will not read the contents of the document before it has adopted a decision rejecting this claim and allowing the undertaking concerned to refer the matter to the General Court. Thus, the Commission will not open the sealed envelope and will not read the documents if the company brings an action for annulment and applies for interim relief until the EU Courts have decided on this application for interim measures.</p>	
52	<p>Undertakings making requests for protection under LPP merely as delaying tactics (i.e., requests that are clearly unfounded) or opposing, without objective justification, any cursory look at the documents during an investigation may be subject to fines pursuant to Article 23(1) of Regulation 1/2003. Similarly, such actions may be taken into account as aggravating circumstances when calculating any fine imposed in the context of a decision imposing a penalty under Articles 101 and/or 102 TFEU.</p>	

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53	In the context of an investigation the Commission may also exchange information with national competition authorities pursuant to Article 12 of Regulation 1/2003. The Commission's practice in relation to these exchanges is currently described in the Commission Notice on cooperation within the Network of Competition Authorities.	
54	DG Competition endeavours to give, on its own initiative or upon request, parties subject to the proceedings ample opportunity for open and frank discussions and to make their points of view known throughout the procedure.	
55	In pursuit of this goal, and in addition to the information provided in accordance to paragraph 14 above, State of Play meetings will be offered at certain stages of the procedure. The objective of the State of Play meetings, which are completely voluntary in nature, is to contribute to the quality and efficiency of the decision making process and to ensure transparency and communication between DG Competition and the parties, notably to inform them of the status of the proceedings at key points in the procedure. State of Play meetings will only be offered to the parties being investigated and not to the complainant or third parties. If several parties are investigated, State of Play meetings will be offered to each party separately.	
56	State of Play meetings may be conducted in the form of meetings at the Commission's premises, or alternatively, if appropriate, by	

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	<p>telephone or videoconference. Senior DG Competition management will normally chair the meeting.</p>	
57	<p>DG Competition will normally offer State of Play meetings at several key stages of the case. These correspond, in principle, to the following events:</p> <p>(1) Shortly after the opening of proceedings: DG Competition will inform the parties of the issues identified at this stage and of the anticipated scope of the investigation. This meeting provides the parties subject to the proceedings with an opportunity to react initially to the issues identified and may also serve to assist DG Competition in deciding on the appropriate framework for its further investigation. This meeting may also be used to discuss with the parties any relevant language waivers that may be appropriate for the conduct of the investigation. DG Competition may at this stage indicate a tentative timing for the case.</p> <p>(2) At a sufficiently advanced stage in the investigation: this meeting gives the parties subject to the proceedings an opportunity to understand DG Competition's preliminary views on the status of the case after its investigation and on the competition concerns identified. The meeting may also be used by DG Competition and by the parties to clarify certain issues and facts relevant for the outcome of the case.</p>	

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58	In case a Statement of Objections is issued, the parties will also be offered a State of Play meeting after their reply to such Statement of Objections or after the Oral Hearing, should one be held: the parties will at this meeting normally be informed of the preliminary view of DG Competition on how it intends to further pursue the case.	The Sections submit that it would be preferable for the Commission to indicate how long "after" the reply/oral hearing it will typically hold State of Play meetings.
59	Furthermore, two specific State of Play Meetings will be offered in the context of procedures leading to commitment decisions (see section 4 below).	
60	State of Play meetings do not exclude discussions between the parties and DG Competition on substance or on timing issues on other occasions throughout the procedure as appropriate. Similarly, although State of Play meetings as defined above would normally not take place in the context of cartel proceedings, meetings with senior management may also be arranged with the parties in cartel proceedings in order to, when appropriate, discuss important issues related to their case.	The Sections suggest that the Commission clarify that State of Play meetings will also be organized, as a general matter, in cartel cases, although the timing may be somewhat different. There appears to be no particular justification for denying cartel defendants the benefit of a State of Play meeting – certainly following the Hearing.
61	In addition to bilateral meetings between DG Competition and each individual party, DG Competition may exceptionally also decide to invite all parties involved to a so called "triangular" meeting if DG Competition believes it is desirable, in the interests of the fact-finding investigation, to hear the views of all the parties in a single meeting. Such a meeting could be beneficial for the investigation if, for	

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	example, two or more opposing views have been put forward as to key data or evidence.	
62	Any triangular meeting would normally take place at the initiative of the Commission and is voluntary for the parties. Triangular meetings are normally chaired by Senior DG Competition management. A triangular meeting does not replace the formal hearing.	
63	Triangular meetings, if any, should be held as early as possible during the investigatory phase (after the opening of proceedings and before any issuing of Statement of Objections) in order to enable DG Competition to reach a more informed conclusion as to issues of substance before the Commission decides whether to issue a Statement of Objections. Triangular meetings should be prepared in advance on the basis of an agenda established by DG Competition after consultation of all parties that agree to attend the meeting. The preparation of the meeting may include a mutual exchange of non-confidential submissions between the attending parties sufficiently in advance of the meeting.	
64	It is normal practice to offer executive officers of the parties subject to the proceedings an opportunity to discuss the case either with the Director-General of DG Competition, the Deputy Director-General for antitrust, or when appropriate, with the Commissioner responsible for	

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	Competition, if the parties so request.	
65	In the spirit of encouraging an open exchange of views allowing the parties to make their points in a timely manner, DG Competition will, in cases based on formal complaints, provide the parties, at the latest shortly after the opening of proceedings, with the opportunity of reviewing and commenting on a non-confidential version of the complaint. In case the complaint is rejected at an early stage without further in depth investigation (e.g. for lack of "Community interest"), DG Competition may however make an exception to this rule.	The Sections suggest that, where appropriate, as a matter of best practice, the party(ies) subject to preliminary investigations should be given the opportunity to comment upon the non-confidential version of the complaint <u>before</u> the formal opening of proceedings. These comments might show the weakness of the complaint at an early stage and ensure that DG Competition does not invest too excessive resources in pursuing aspects of the complaint that are only remotely likely to be followed through to a finding of infringement. We understand that the current formulation does not exclude this practice and that indeed such a practice has been followed from time to time, but it might be clarified that where appropriate this review will be allowed as soon as possible. That is a measure that would strongly support the efficiency objective of these Best Practices.
66	Early access to the complaint may allow the parties to provide useful information at an early stage of the procedure and facilitate the assessment of the case.	
67	DG Competition might also, in the interest of the investigation, on a case-by-case basis (both in cases based on formal complaints and ex officio cases), request the parties to comment on other key submissions made by the complainant or other parties (for example reports provided by economic experts representing one of the parties	The Sections submit that the Commission should be required to give reasons to the party investigated if it refuses to provide access to the complaint or key submissions.

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	<p>or submissions from interested third parties) or to comment on documents found in inspections. Such submissions will however only be shared with the parties at this early stage if DG Competition considers that it would facilitate the assessment of the case and would not risk unduly slowing down the investigative phase.</p>	
68	<p>The review of key submissions will not be offered in the context of cartel enforcement (see point 3 above).</p>	
69	<p>Once, through the investigation measures described above section 2.5 to 2.8, DG Competition has reached a preliminary view of the main issues raised by a case, different procedural paths may be envisaged:</p> <ul style="list-style-type: none"> • The Commission may decide to proceed towards the adoption of a Statement of Objections with a view to adopting a prohibition decision with regard to all or several of the issues identified at the opening of proceedings (see section 3 below). • The parties subject to the investigation may consider offering commitments suitable to address the competition concerns arising from the investigation, or at least show their willingness to discuss such possibility; in that case, the Commission may decide to engage in proceedings leading to a commitment decision (see section 4 below). 	

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	<ul style="list-style-type: none"> The Commission may also decide that there are no grounds to continue the proceedings and close it with regard to all or some of the parties. If the case originated via a complaint, the Commission shall, before closing the case, give the complainant the possibility to express its views (see section 5 on rejection of complaints). 	
70	<p>When closing a case after proceedings have been formally opened, DG Competition, in addition to informing the parties, will normally indicate the fact of the closure on its website and/or issue a press release stating that it has been decided not to further pursue the case. The same applies in cases where proceedings have not been formally opened but DG Competition has already made public the fact that it was investigating the case (e.g. by having publicly confirmed certain inspections). If the case is closed with regards only to certain parties subject to the investigation (notably in cartel cases) DG Competition will normally indicate the closing of the case regarding these parties in the press release issued at the time of the adoption of the final decision against the remaining parties.</p>	<p>The Sections submit that if the Commission decides not to further pursue a case whose existence was made public, it should always indicate the fact of the closure on its website and/or issue a press release – irrespective of whether or not proceedings have been formally opened.</p>
71	<p>The following sub-sections concern the procedures which may lead to a prohibition decision. An important procedural step in this regard is the adoption of a Statement of Objections. It should however be noted that the adoption of a Statement of Objections does not prejudice the final outcome of these procedures. It may well lead to the closing of the case without the adoption of a prohibition decision or a</p>	

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	commitment decision.	
72	The right of the parties to the proceedings to be heard before a final decision affecting their interests is taken is a fundamental principle of EU law. The Commission is committed to ensuring that the effective exercise of the right to be heard is respected in its proceedings.	
73	The Hearing Officers have the function of ensuring that the right to be heard is safeguarded in competition proceedings. The Hearing Officers carry out their tasks in full independence of DG Competition, and disputes arising between the latter and any party subject to the proceedings can be brought before the Hearing Officers for resolution.	
74	In addition to dispute resolution, the Hearing Officer is directly involved in certain parts of antitrust proceedings, including in particular the organisation and conduct of the oral hearing, if one is held. After the oral hearing, and taking into account the parties' written replies to the Statement of Objections, the Hearing Officer reports to the Commissioner responsible for Competition on the hearing and the conclusions to be drawn from it. Moreover, prior to a final decision being taken by the College of Commissioners, the Hearing Officer informs it whether any procedural issues of significance have arisen and, in particular, whether the right to be heard has been respected during the administrative proceedings. The final report is sent to the parties subject to the proceedings, together with the Commission's	In the interest of better protection of the right to be heard and the right to a fair proceeding, the Sections suggest that the Hearing Officer should already become actively involved at the investigation phase. The parties to the proceedings should explicitly be given the opportunity to address the Hearing Officer, for instance on timing issues, before the SO is issued.

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	final decision, and is published in the Official Journal of the European Union.	
75	Before adopting a decision adverse to the interests of the addressees, in particular, a decision finding an infringement of Article 101 and 102 TFEU and ordering its termination (Article 7 of Regulation 1/2003) and/or imposing fines (Article 23), the Commission shall give the parties subject to the proceedings the opportunity to be heard on the matters to which the Commission has objected. The Commission shall thus adopt a Statement of Objections and notify it to each of the parties subject to the proceedings.	
76	The Statement of Objections sets out the preliminary position of the Commission regarding the alleged infringement of Articles 101 and/or 102 TFEU, after its in-depth investigation. Its purpose is to inform the parties concerned of the objections raised against them with a view to enabling them to exercise their rights of defence in writing and orally (at the hearing). It thus constitutes an essential procedural safeguard which ensures that the right to be heard is observed. The undertakings concerned shall be provided with all the information they need to defend themselves effectively and to comment on the allegations made against them.	
77	The Statement of Objections shall also clearly indicate whether the Commission intends to impose fines on the undertakings at the end of	According to the case law (Case T-410/03 <i>Hoechst v. Commission</i> [2008] ECR II-881 paragraphs 420-439), the Commission fails to respect an

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	<p>the procedure (Article 23 of Regulation 1/2003). In these cases, the Statement of Objections will refer to the relevant principles laid down in the Guidelines on setting fines.⁴⁸ In the Statement of Objections the Commission shall indicate the essential facts and matters of law which may result in the imposition of a fine, such as the duration and gravity of the infringement and that the infringement was committed intentionally or by negligence. To the extent possible, the Statement of Objections will also mention the facts that may give rise to aggravating and attenuating circumstances. Although there is no legal obligation in that regard, the parties will be invited to comment on all elements of importance for any subsequent calculation of fines, should the objections be upheld, including the relevant sales figures to be taken into account.</p>	<p>undertaking's rights of defense when it establishes an aggravating circumstance as against that undertaking on the basis of elements of fact which, although mentioned at various points in its statement of objections, are, taken as a whole, insufficiently precise as to their scope and characterization, so that it is only at the decision stage that those elements are brought together into a single part and the objection becomes clearly apparent.</p> <p>Based on this case law, the Sections therefore propose that the Commission amend the fourth sentence of this paragraph as follows:</p> <p>"To the extent possible, The Statement of Objections will also mention in a sufficiently precise manner that certain the facts that may give rise to aggravating circumstances and, to the extent possible, to attenuating circumstances."</p>
78	<p>If the Commission intends to impose remedies on the parties, the Statement of Objections shall indicate the envisaged remedies that may be necessary to bring the infringement effectively to an end. The information given should be sufficiently detailed to allow the parties to defend themselves on the necessity and proportionality of the remedies. If structural remedies are envisaged, in accordance with Article 7(1) of Regulation 1/2003, the Statement of Objections shall spell out why there is no equally effective behavioural remedy or why any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy.</p>	

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79	<p>In order to enhance transparency of the proceedings, the Commission will publish a press release setting out the key issues in the Statement of Objections shortly after the Statement of Objections is received by its addressees, with the exception of settlement procedures in the context of cartels. This press release will explicitly state that the issuing of the Statement of Objections does not prejudice in any way the existence of an infringement.</p>	<p>In the interests of fairness, the Sections suggest that the Commission ensure that the publication is made only after all parties have had access to the Statement of Objections.</p>
80	<p>The addressees of the Statement of Objections are granted access to the Commission's investigation file, in accordance with Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of the Implementing Regulation, so on the basis of that evidence, they can express their views effectively on the preliminary conclusions reached by the Commission in its Statement of Objections.</p>	
81	<p>The modalities of access to the file, as well as detailed indications on the type of documents that will be accessible and confidentiality issues, are covered by a separate Notice. The Hearing Officers shall decide on disputes between the parties, the information providers and DG Competition over access to information contained in the Commission's file in accordance with this Notice. Lastly, special rules govern access to corporate statements in cartel cases and settlement procedures.</p>	

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82	<p>Efficient access to file to a large extent also depends on the cooperation of the parties and other undertakings having provided information included in the file. All undertakings providing information in the context of a particular case, and in particular the parties, have to indicate in each submission whether they consider that information provided is confidential. If information is considered to be confidential, the information provider shall, in accordance with Article 16(3) of the Implementing Regulation, substantiate its claims and to provide a non-confidential version of the information. Such a non-confidential version shall be provided in the same format as the confidential information, replacing deleted passages by summaries thereof. Unless otherwise agreed, a non-confidential version should be provided at the same time as the original submission. It should be underlined that in the case of a persistent failure to provide a non-confidential version, it may be assumed that the documents do not contain confidential information.</p>	
83	<p>Further to the possibilities contemplated in the Notice on access to the file, two additional procedural practices may be used for the purpose of alleviating the burden on the parties to redact their submissions in relation to confidential information. These procedural practices may be offered by DG Competition where it considers it to be useful, and is typically done in cases where there are a limited number of undertakings. Both procedural practices can be beneficial not only for the party being granted access to file but also for the information providers since they would not have the burden of</p>	

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	redacting their confidential material.	
84	<p>In certain cases, especially those with a very voluminous file, DG Competition might accept the use of a negotiated disclosure procedure. Under this procedure, the party being granted access to file agrees bilaterally with interested third parties to receive the entirety of the information they have provided to the Commission and is contained in the Commission's file including confidential information (instead of only being given access to the redacted version of their submissions). The party being granted access to file limits access to the information to a restricted circle of persons (to be decided on a case-by-case basis). To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, it would have to accept to exercise its rights in such a way in order to enable such negotiated access to file. Equally, information providers whose information is accessed via this procedure would have to waive their rights to confidentiality vis-à-vis the Commission to the extent necessary for the proper conduct of this procedure.</p>	<p>Similarly to the provisions of ¶85 with regard to the “data room” procedure, the Sections suggest that the Hearing Officer should also be given the ability to replace a waiver of the information owner within the context of the “negotiated disclosure.”</p>
85	<p>Access to file may also be granted through a so called "data room" procedure organised by DG Competition. Under this procedure, part of the file, also including confidential information, is gathered in a room, the data room, at the Commission's premises. Access is thereafter given to this room, to a restricted group of persons,</p>	

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	<p>normally the external counsel or the economic advisers of the party, under the supervision of a Commission official. The external counsel may record information contained in the data room but may not disclose any confidential information to their client. To the extent that this type of access to file would amount to a restriction of a party's right to have full access to the investigation file, it would have to accept to exercise its rights in such a way in order to enable the use of such a data room procedure. Equally, information providers whose information is accessed via this procedure would have to waive their rights to confidentiality vis-à-vis the Commission to the extent necessary for the proper conduct of this procedure. Should either side unduly refuse to waive their right to access to file or their right to confidentiality to the extent it would be necessary to implement the data room procedure, this waiver can be replaced by a decision pursuant to Articles 8 or 9 of the Hearing Officer's Mandate.</p>	
86	<p>Pursuant to Article 27(1) of Regulation 1/2003, the Commission shall give the addressees of a Statement of Objections the opportunity of being heard on matters on which the Commission has taken objection. The written reply gives the parties subject to the proceedings the opportunity to set out all facts known to them which are relevant to their defence against the objections raised by the Commission.</p>	
87	<p>The time-limit for the reply to the Statement of Objections will take into</p>	

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	<p>account both the time required for the preparation of the submission and the urgency of the case. The addressee/-s of the Statement of Objections have the right to a minimum period of four weeks to reply in writing. A longer period than the minimum foreseen by the Implementing Regulation (normally, a period of two months inclusive) will be granted where the circumstances of the case so require, in particular in complex cases, in cases with a voluminous file or where holiday periods affect the ability of a party subject to the proceedings to reply.</p>	
88	<p>An addressee of a Statement of Objections may, within the original time-limit, seek an extension of the deadline to reply by means of a reasoned request to the Hearing Officer.</p>	
89	<p>The Commission may, in the interests of fair and effective enforcement, give one or more of the parties a copy of the non-confidential version (or specific excerpts thereof) of the (other) parties' written replies to the Statement of Objections and give them the opportunity to submit their comments. The Commission may also decide to do so in appropriate cases with respect to complainants and third parties which have a sufficient interest to be heard.</p>	<p>The Sections understand that currently DG Competition's practice is, almost systematically, <u>not</u> to disclose the non-confidential version of the parties' written replies to the Statement of Objections to the other parties. The statement that this disclosure may be "<i>in the interests of fair and effective enforcement</i>" is therefore an interesting development. It remains unclear, however, in what circumstance DG Competition will exercise this discretion. The Sections therefore submit that more clarification about its future practice in this respect would be welcomed. We consider that as a matter of principle each party should be entitled to obtain a non-confidential version of the other parties' written replies to the Statement of Objections. The Commission therefore should commit to granting access</p>

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		<p>to the other parties' written replies unless particular circumstances make this inappropriate, in which case the Commission should be prepared to give reasons. This paragraph should also clarify that, when the written replies to the Statement of Objections contain statements or evidence that may be exculpatory for other parties to the proceedings, the Commission must disclose such statements or evidence to these parties. Similarly, if the Commission intends to use in its final decision one party's statements or evidence contained in its written reply to the Statement of Objections against other parties, it should be required to disclose these statements or evidence to these parties by means of a letter of facts or, if appropriate, by issuing a supplementary Statement of Objections.</p>
90	<p>Complainants are closely associated with the proceedings. Pursuant to Article 6(1) of the Implementing Regulation, they are entitled to receive a non-confidential version of the Statement of Objections and DG Competition shall set a time-limit in which the complainant may make its views known in writing.</p>	<p>The Commission should state a deadline within which the Commission will provide a non-confidential version of the Statement of Objections to the complainant (or at least a provisional version).</p>
91	<p>Upon application the Commission shall also hear other natural or legal persons, which can demonstrate a sufficient interest in the outcome of the procedure in accordance with Article 13 of the Implementing Regulation. The decision on the right of such parties to be heard is taken by the Hearing Officer. Should such third persons be admitted to the proceedings, they shall be informed in writing of the nature and subject matter of the procedure and a time-limit shall</p>	

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	be set in which they may make their views known in writing.	
92	The parties to which a Statement of Objections has been addressed may, in their written reply, and within the same time-limit, request an oral hearing.	
93	The oral hearing allows the parties to develop orally their arguments which have already been submitted in writing and to supplement, where appropriate, the written evidence, or to inform the Commission of other matters that may be relevant. Indeed, the fact that the hearing is not public guarantees that all attendees can express themselves freely and without constraint.	
94	In view of the importance of the oral hearing, it is the practice of DG Competition to ensure continuous presence of senior management (<i>Director or Deputy Director General</i>) in oral hearings in antitrust cases, together with the case team of Commission officials responsible for the investigation. The competition authorities of the Member States, the Chief Economist's team, and associated Commission services, including the Legal Service, are also invited to attend by the Hearing Officer.	
95	If, after the Statement of Objections has been issued, new evidence is identified which the Commission intends to rely upon, the	

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	undertakings in question shall be given an opportunity to present their observations on these new aspects.	
96	If the new evidence justifies the issuance of additional objections or the intrinsic nature of the infringement with which an undertaking is charged is modified, the Commission shall notify this to the parties in a supplementary Statement of Objections. Before doing so, a State of Play meeting will normally be offered to the parties. The rules on setting the deadline for reply to a Statement of Objections apply (see above), although a shorter deadline will typically be set in this context.	More guidance about the meaning of the expression “additional objections” would be particularly useful. For instance, would it include an aggravating circumstance not identified as such in the Statement of Objections, or the finding that the infringement lasted longer than originally contended in the Statement of Objection? It seems clear that they should be so considered, but the Best Practices seem potentially ambiguous about the notion of “objection” In this context. The case law, for instance, has confirmed that an aggravating circumstance is an objection. See Case T-410/03 <i>Hoechst v. Commission</i> [2008] ECR II-881 paragraphs 424, where the General Court stated: “ <i>It was only at the stage of the Decision that those elements were brought together in a single part and that <u>the objection</u> that Hoechst was a leader was clearly apparent</i> ” (emphasis added).
97	If, however, the new evidence only corroborates the objections already raised against the undertakings in the Statement of Objections and provided DG Competition intends to rely on this new evidence, it will bring it to the attention of the parties concerned by a simple letter (“letter of facts”). ⁵⁴ The letter of facts gives undertakings the possibility to take position on the new evidence within a fixed deadline and this position will be recorded in writing. A request for an extension of this deadline may be made to the Hearing Officer, by	If in the reply to the Statement of Objections or during the oral hearing a company succeeds in substantially rebutting the evidence put forward by the Commission in the Statement of Objections, the Sections submit that it would not be satisfactory if the Commission could adopt a decision relying on completely new evidence without issuing a supplementary Statement of Objections. The Commission should therefore issue a supplementary Statement of Objections as soon as the evidence is wholly or substantially replaced

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	<p>means of a reasoned request.</p> <p>⁵⁴ When the Commission merely communicates to a party a non confidential version (or specific excerpts thereof) of the other parties' written replies to the Statement of Objections and gives it the opportunity to submit their comments (see paragraph 89 above), this does not constitute a letter of facts.</p>	<p>irrespective of whether additional objections are raised or the intrinsic nature of the infringement is modified.</p> <p>It is proposed to modify footnote 54 as follows:</p> <ul style="list-style-type: none"> - Delete the word "merely", - Add at the end of the footnote: "<i>unless the Commission intends to rely on these written replies to corroborate its objections</i>".
98	<p>The procedural rights which are triggered by the sending of the initial Statement of Objections apply mutatis mutandis in case a Supplementary Statement of Objections is issued, including the right of the parties to request an oral hearing. Access to the evidence gathered after the initial Statement of Objections up to the date of the Supplementary Statement of Objections will also be provided. In case a letter of facts is issued, access will in general be granted to evidence gathered after the Statement of Objections up to the date of the said letter of facts. However, in cases where the Commission only intends to rely upon specific evidence that concerns one or a limited number of parties and/or isolated issues (in particular those regarding the determination of the amount of the fine or issues of parental liability), access will be provided only to the parties directly concerned and to the evidence upon which the Commission intends to rely.</p>	
99	<p>If, having regard to the parties' replies given in writing and/or at the oral hearing and on the basis of a thorough assessment of all</p>	

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	information obtained up to this stage the objections are substantiated, the Commission will proceed towards adopting a prohibition decision.	
100	If, however, the objections at this stage are not substantiated, the Commission will close the case. In this case, the information measures described above in paragraph 62 would also apply. The Commission could also decide to withdraw certain objections and to continue towards a prohibition decision for the remaining part.	The intended cross-reference seems to be ¶70 rather than ¶62.
101	Article 9 of Regulation 1/2003 introduces the possibility for undertakings to submit voluntarily commitments that are intended to address the competition concerns identified by the Commission. If the Commission accepts these commitments ⁵⁶ , it may adopt a decision which makes them binding on the parties subject to the proceedings. Commitment decisions are not appropriate in cases where the Commission intends to impose a fine.	Footnote 56 states that “ <i>the Commission has discretion as to whether it accepts the commitments offered by the parties.</i> ” However, once the Commission agrees to enter into commitments discussions and issues a preliminary assessment, its discretion becomes subject to judicial review. Therefore, if the Commission - following the issuance of the preliminary assessment - rejects the commitments offered by the parties, it should provide adequate reasons for this rejection in its final (prohibition) decision.
102	The main difference between a prohibition decision pursuant to Article 7 and a commitment decision pursuant to Article 9 of Regulation 1/2003 is that the former contains a finding of an infringement while the latter makes the commitments binding without concluding on whether there was or is still an infringement. A commitment decision concludes that there are no longer grounds for action by the Commission. Moreover, commitments are offered by undertakings on	

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	a voluntary basis. By contrast, in Article 7 prohibition proceedings, the Commission imposes remedies (and/or fines) on undertakings.	
103	The main advantages of commitment decisions are a swifter change on the market to the benefit of consumers as well as lower administrative costs for the Commission. For the parties subject to the proceedings, faster proceedings and the absence of a finding of an infringement may be attractive.	
104	Undertakings may contact DG Competition at any point in time to explore its readiness to dispose of the case by means of a commitment decision. DG Competition encourages undertakings to signal at the earliest possible stage their interest in discussing commitments.	
105	A State of Play meeting will be offered to the parties at that moment. DG Competition will indicate to the undertaking the timeframe within which the discussions on potential commitments should be concluded and will present to them the preliminary competition concerns arising from the investigation.	
106	That meeting and the following steps of the procedure may be conducted in an agreed language on the basis of a " <i>language waiver</i> " by which the parties accept to receive and submit documents in a	

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	language other than the language of the country in which they are located (see above section 2.4.).	
107	Once DG Competition is convinced of the genuine willingness of the undertakings to propose commitments effectively suited to address the competition concerns, a Preliminary Assessment will be issued. Pursuant to Article 9 of Regulation 1/2003 the Commission summarises in the Preliminary Assessment the main facts of the case and identifies the competition concerns that would warrant a decision requiring that the infringement is brought to an end.	
108	The Preliminary Assessment will serve as a basis for the parties to formulate appropriate commitments addressing the competition concerns expressed by the Commission, or to define previously discussed commitments better.	
109	In case a Statement of Objections was sent to the parties, it is not excluded that commitments may still be accepted. In these circumstances, a Statement of Objections fulfils the requirements of a Preliminary Assessment, as it contains a summary of the main facts as well as an assessment of the competition concerns identified.	
110	The Commission and the undertaking(s) concerned may decide at any moment during the commitment discussions to discontinue the	

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	negotiations. The Commission will then normally continue formal proceedings pursuant to Article 7 of Regulation 1/2003.	
111	After receiving the Preliminary Assessment, the parties will have normally one month to formally submit their commitments	
112	The parties can offer commitments of a behavioural or structural nature. They should address the competition concerns identified. Commitments which are not related and do not remedy these concerns will not be accepted by the Commission.	
113	Commitments shall be unambiguous and self-executing. If need be, a trustee can be appointed to assist the Commission in their implementation (monitoring and/or divestiture trustee). Furthermore, when commitments cannot be implemented without the agreement of third parties (e.g. pre-emption right of an undertaking that would not be a suitable buyer under the commitments), the undertaking should submit evidence of such agreement by the third party.	
114	In accordance with Article 27(4) of Regulation 1/2003 the Commission shall market test the commitments before making them binding by decision. It shall publish in the Official Journal of the EU a notice ("market test notice") containing a concise summary of the case and the main content of the commitments, respecting the obligations	

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	<p>under professional secrecy. It will also publish on the website of DG Competition the full text of the commitments in the authentic language. The undertaking submitting the commitment is encouraged to also provide DG Competition with a translation of the full text of the commitments in English. If provided in a timely manner, such translation will, for convenience, be published together with the version in the authentic language. In case of differences between the text in the authentic language and the translation, the version in the authentic language prevails. In order to enhance transparency of the process, the Commission will also publish a press release setting out the key issues of the case and the proposed commitments. Without prejudice to the results of the market test, the Commission will not proceed with the publication of the market test notice, if it is not convinced that the commitments offered <i>prima facie</i> address the competition concerns identified.</p>	
115	<p>Interested third parties are invited to submit their observations within a fixed time-limit. This shall not be less than one month in accordance with Article 27(4) of Regulation 1/2003.</p>	
116	<p>DG Competition may also actively promote the market test, i.e. send the market test document to third parties which can potentially be concerned by the outcome of the case (e.g. consumer associations). DG Competition will also inform in writing the complainant of the market test and invite it to submit comments.</p>	

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117	After receipt of the replies to the market test, a State of Play meeting will be organised with the parties. It will inform the parties orally or in writing of the substance of the replies.	
118	Where the market test reveals that competition concerns identified by the Commission have not been addressed or that changes in the text of the commitments are necessary to make them effective, this will, to the extent that such results may justify considering that the commitments are insufficient, be brought to the attention of the undertakings offering the commitments. If the problems can be addressed and if the undertaking is willing to do so, an amended version of the commitments shall be submitted. Otherwise, the Commission will revert to the Article 7 procedure.	
119	As described above, formal complaints are an important tool to trigger cases and shall be duly examined by the Commission. If however, after appropriate assessment of the factual and legal circumstances of the individual case, the Commission comes to the conclusion that a complaint will not be further pursued, it may be rejected according to the grounds and procedure set out below.	
120	Complaints can be rejected for a number of different reasons, such as lack of "Community interest", lack of competence or lack of an infringement.	

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121	<p>Rejections for lack of "Community interest" concern in particular complaints where, given the limited likelihood of establishing the proof of the alleged infringements and the substantial investigatory resources which the Commission would have to invest in order to obtain the evidence for their existence, allocating the resources necessary to further investigate the case would be disproportionate, in light of its expected limited impact on the functioning of the internal market and/or the possibility to have recourse to other means (e.g. national courts).</p>	
122	<p>The Commission may also reject complaints for lack of substantiation (when the complainant fails to submit a minimum of prima facie evidence necessary to substantiate an infringement of Articles 101 and/or 102 TFEU) or on substantive grounds (in the absence of an infringement). It may also be rejected for lack of competence as the alleged infringement is unlikely to have any effect on trade between Member States.</p>	
123	<p>If a national competition authority is dealing or has already dealt with the same case, the Commission shall inform the complainant accordingly. In such a situation, the complainant may withdraw the complaint. If the complainant upholds the complaint, the Commission may reject it by decision pursuant to Article 13 of Regulation 1/2003 and in accordance with Article 9 of the Implementing Regulation. If a national court is dealing or has already dealt with the same case, the</p>	

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	Commission may reject the complaint for lack of "Community interest".	
124	If the Commission, after careful examination of the case, comes to the conclusion not to pursue the case for any of the reasons mentioned above, it will first inform the complainant in a meeting or by phone that it has come to the preliminary view that either (i) the case lacks "community interest", (ii) the complaint has not been adequately substantiated or (iii) after a thorough consideration the Commission concludes that there is no evidence of an infringement. The complainant may then withdraw the complaint. Otherwise, the Commission shall inform the complainant by a formal letter that there are insufficient grounds for acting and set a time-limit for written observations. The time-limit shall be at least four weeks. Where appropriate and upon reasoned request made before the expiry of the original time-limit, the time-limit may be extended. In this context, the complainant has also the right to request access to the documents on which the Commission bases its provisional assessment.	
125	If the complainant does not react to the above mentioned letter of the Commission within the set time-limit, the complaint shall be deemed to have been withdrawn pursuant to Article 7(3) of the Implementing Regulation. The complainant shall be informed accordingly.	

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126	If the submissions of the complainant in response to the above mentioned letter of the Commission, does not lead to a different assessment of the complaint, the Commission shall reject the complaint by formal decision pursuant to Article 7(2) of the Implementing Regulation.	
127	Information exchanged in the course of these procedures, in particular in the context of access to file and review of key submissions, is granted by the Commission on the condition that it shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 TFEU.	
128	At all stages of the proceedings, the Commission will respect genuine and justified requests from complainants or from information providers regarding the confidential nature of their submissions or contacts with the Commission, including, in some cases, the fact of their identity, in order to protect their legitimate interests (in particular in case of fears of retaliation) and to avoid discouraging them from coming forward to the Commission.	
129	Commission officials and the members of the Advisory Committee are bound by the obligation of professional secrecy set out in Article 28 of Regulation 1/2003. They are therefore prohibited from disclosing any information of the kind covered by this obligation which they have acquired or exchanged in the context of the investigation and the	

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	preparation of, and the deliberations in, the Advisory Committee. As regards the Advisory Committee, its members also may not reveal the opinion of the Advisory Committee prior to its publication, if any, or any information concerning the deliberations which led to the formulation of the opinion.	
130	All final decisions pursuant to Article 7, Article 9 and Article 23 of Regulation 1/2003 are adopted by the Commission, upon proposal of the Commissioner responsible for competition policy.	
131	Immediately after the decision has been adopted, the parties shall be informed of the decision. DG Competition endeavours to send a courtesy copy of the working document to the parties. A certified copy of the full text of the decision as well as a copy of the final report of the Hearing Officer shall then be notified to the parties by express courier service.	
132	A press-release will be published after the adoption of the decision by the Commission. The press-release describes the scope of the case and the nature of the infringement. It also indicates (if appropriate) the amount of fines for each undertaking concerned and/or the remedies or commitments accepted.	

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133	A non-confidential version of the decision will be sent to the complainant.	
134	The summary of the decision, the Hearing Officer Report as well as the Opinion of the Advisory Committee shall be published shortly after the adoption of the decision in the Official Journal of the European Union in all official languages.	
135	In addition to the requirements set out in Article 30(1) of Regulation 1/2003, DG Competition will also endeavour to publish a non-confidential version of the decision in the authentic languages as soon as possible on its website. For that purpose, the addressees of the decision will normally be asked to provide the Commission with a non-confidential version of the decision within two weeks together with their approval of the summary. Should disputes arise regarding the extraction of business secrets, a provisional full version of the decision excluding the accepted extracted information as well as the disputed information could be made available on DG Competition's website in any of the official languages in expectation of a final settlement regarding the disputed parts.	We recommend that the Commission adopt a consistent practice of informing the parties before the decision is made available on the web (either in definitive or provisional form). This would support the goal of transparency.
136	In the interest of transparency, the Commission intends to make public on its website its decisions rejecting complaints (pursuant to Article 7 of the Implementing Regulation) which are of general	

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	interest.	
137	<p>These Best Practices may be revised to reflect changes to legislative, interpretative and administrative measures or due to case law of the EU Courts, which govern EU competition law or any experience gained in applying such framework. The Commission further intends to engage, on a regular basis, in a dialogue with the business and legal community and other stakeholders on the experience gained through the application of Regulation 1/2003 and its Implementing Regulation in general, and these Best Practices in particular.</p>	

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1	SCOPE AND PURPOSE	
1	<p>Economic analysis plays a central role in competition enforcement. Economics as a discipline provides a framework to think about the way in which each particular market operates and how competitive interactions take place. This framework further allows formulating the possible consequences of the practices under review, whether a merger, an agreement between firms, or single firm conduct. It also provides tools to identify the direction and magnitude of these effects empirically, if appropriate and relevant. In a number of cases, economic analysis may involve the production, handling and assessment of voluminous sets of quantitative data, including, when appropriate, the development of econometric models.¹</p>	<p>The Sections strongly support the Commission's position that economic evidence has a central role in competition enforcement. In addition to the aspects noted in the Best Practices, economics also helps to provide some structure and discipline to the necessarily speculative task of defining a "but-for" world, a step that is often critical to the assessment of competitive effects by both the parties and the Commission.</p> <p>However, the Sections have concerns about the conclusions to be drawn if the Commission rejects an economic study that reaches a conclusion as being unreliable. The Sections submit that rejection of one hypothesis does not by itself prove that the opposite conclusion is correct, and they encourage the Commission to recognize this fact explicitly in the Best Practices.</p> <p>For example, if the Commission rejects a study using a model showing that a concentration would not raise prices, such rejection cannot support any conclusions regarding whether the merger would increase prices. In such cases, the evidentiary burden remains on the Commission to present evidence to</p>

¹ Infringements "by object" do not require any substantive economic analysis because empirical evidence has shown that they generally lead to serious anti-competitive effects. However, the investigation of potential infringements "by effect" often requires a complex economic assessment by the Commission.

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		support the latter conclusion.
2	Economic analysis needs to be framed in such a way that the Commission can evaluate its relevance and significance. Furthermore, as an administrative authority the Commission is required to take a decision within an appropriate or sometimes a statutory time limit. It is therefore necessary to: (i) ensure that economic analysis meets certain minimum standards at the outset, (ii) facilitate the efficient gathering and exchange of facts and evidence, in particular any underlying quantitative data, and (iii) use in an efficient way reliable and relevant evidence obtained during the administrative procedure, whether quantitative or qualitative.	The Sections recognize the time and resource constraints that apply both to the Commission's services and to the parties in a competition proceeding. This will usually prevent economic study and analysis from achieving the same degree of analytical rigor demanded of articles in scholarly journals on similar subjects. The Sections suggest, however, that both the Commission and the affected parties should recognize this reality and not place excessive reliance upon inferences that have not been tested rigorously.
3	In order to determine the relevance and significance of an economic analysis for a particular case, it is first necessary to assess its intrinsic quality from a technical perspective, i.e. whether it has been generated and presented to adequate standards. This involves, in particular, an evaluation of whether the hypothesis to be tested is formulated without ambiguity and clearly related to facts, whether the assumptions of the economic model are consistent with the institutional features and other relevant facts of the industry, whether economic models are well established in the relevant literature, whether the empirical methods and the data are appropriate, whether the results are properly interpreted and robust and whether	See comment to ¶2.

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	counterarguments have been given adequate consideration.	

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4	Second, one must assess the congruence and consistency of the economic analysis with other pieces of quantitative and qualitative evidence (such as customer responses, or documentary evidence).	The Sections note that an assessment of congruence and consistency is required with respect to all aspects of the economic analysis, including the hypothesis to be tested, the assumptions underlying the model used for that test, the conclusions drawn from the economic analysis, and the weight given to potential counterarguments.
5	<p>The present document formulates best practices concerning the generation as well as the presentation of relevant economic and empirical evidence that may be taken account in the assessment of a competition case. These best practices are organised along two themes.</p> <p>i) First of all, it provides recommendations regarding the content and presentation of economic or econometric analysis. This is meant to facilitate its assessment and the replication of any empirical results by DG Competition and/or other parties.</p> <p>ii) Second, the document provides guidance to respond to Commission requests for quantitative data² to ensure that timely and relevant input for the investigation can be provided.</p>	In light of the central role of economics (see comment to ¶1), and the confirmation in ¶6 below that these Best Practices are intended to govern DG Competition, the Sections recommend adding recognition and specification of a third theme: “iii) Third, it is meant to guide the content and presentation of any analysis conducted by the Commission.”

² Quantitative data means, generally, observations or measurements, expressed as numbers. For the purposes of these Best Practices, this concept is used to refer to large sets of quantitative data submitted and/or obtained for the purposes of the conduct of an assessment of an economic (and often econometric) nature.

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6	<p>The desire to ensure transparency and accountability that guide these best practices apply to all parties involved in proceedings concerning the application of Articles 101 and 102 TFEU³ and mergers⁴, that is the parties to the case and interested third parties (including complainants), as well as DG Competition.</p>	<p>The Sections strongly support the Commission's recognition that the Best Practice should apply equally to DG Competition. However, the Best Practices are silent on the specific obligations to which DG Competition and/or the Chief Economist Team subject themselves.</p> <p>This is particularly important since, unlike the parties to the case and third parties, the Commission's economic analysis is not subject to independent rigorous scrutiny. While it is true that the parties have access to a data room, such access has severe limitations.</p> <ul style="list-style-type: none"> • First, the parties have access only at the end of the process (i.e. following the Statement of Objections). This issue is becoming more important as the Commission increasingly conducts its own economic analysis internally. • Second, the authors of the Commission's studies evaluate the impact of any errors in the Commission's economic analysis and criticisms regarding its approach. The Sections submit that this does not assure effective scrutiny. This is because the Chief Economist Team cannot credibly be seen as an effective internal check

³ Proceedings before the European Commission concerning Articles 101 and 102 TFEU, in accordance with Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p.1, as amended).

⁴ Proceedings under the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ L 24, 29.1.2004, p. 1).

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		<p style="text-align: center;">and balance on the case team but instead should be seen as an integral part of that case team.</p> <p>For these reasons, the Sections emphasize that it is important – in terms of improving transparency and making the administrative proceedings more fair and effective – that the Commission provides more transparency on the type of analysis it is conducting, setting out the hypothesis to be tested and the general approach. Additionally, the process is the more transparent and effective the earlier the Commission's analysis is made available to the parties.</p> <p>In addition, the Sections recommend that the Commission commit to the following:</p> <ul style="list-style-type: none"> • With regard to the parties' submissions, the Commission should undertake to replicate the results presented and to confirm within a reasonably brief time (e.g. two weeks) that the results have or have not been confirmed. The Commission ought at the same time to indicate issues or potential issues with the parties' approach whether regarding the theory, choice of empirical methods and/or data. Ideally, the Commission would indicate how it considers these issues might affect the results presented. • When requesting data, the Commission should clearly explain the reasons for asking for data. The Sections

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		<p>recognize that in some instances, particularly at the outset of the investigation, the request may be of a general nature to allow the case team to understand the competitive dynamics of the industry. However, later in the process, the Commission ought to be able to identify in a clear and explicit manner (in a fashion similar to the request set out at ¶¶16 and 18) what hypothesis is to be tested. The Commission should be required to report on its findings from using the requested data to test that hypothesis.</p>
7	<p>These Best Practices do not create or alter rights or obligations as set out in the Treaty on the Functioning of the European Union and in secondary law, as amended from time to time and as interpreted by the case-law of the Courts of the European Union. The Best Practices also do not alter the Commission's interpretative notices and established decisional practice.</p>	
8	<p>The principles contained here may be further developed and refined by DG Competition in individual cases when appropriate in light of future developments. The specificity of an individual case or particular circumstances may require an adaptation of, or deviation from, these Best Practices</p>	<p>The Sections note that data availability may determine processes and standards, and they recommend including, in the second sentence, data availability as an instance that may require deviation from the Best Practice: “The specificity of an individual case, the availability of appropriate data, or particular circumstances may ...”</p>

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2	BEST PRACTICES REGARDING THE CONTENT AND PRESENTATION OF ECONOMIC AND ECONOMETRIC SUBMISSIONS	
9	Economic reasoning is employed in competition cases notably in order to develop in a consistent manner or, conversely, to rebut because of its inconsistency, the economic evidence and arguments in a given case.	
10	Any economic model which explicitly or implicitly supports a theoretical claim must rely on assumptions that are consistent with the facts of the industry under consideration. These assumptions should be carefully laid out and the sensitivity of its predictions to changes to the assumptions should be made explicit. While it is not necessary for economic submissions to actually formalize verbal arguments in a model, this will sometimes be helpful to clearly spell out the assumptions underlying an argument, to check its logic consistency, to assess effects of a high degree of complexity, or to use the model as the theoretical basis for an empirical estimation. ⁵	The Sections note that economic models generally are based upon implicit as well as explicit assumptions. To the extent possible, these implicit assumptions should also be stated clearly .

⁵ If an economic submission is well-reasoned, then the fact that a particular argument is "theoretical" or "general" is often a strength rather than a weakness of the submission. This is the case when one has deduced a general conclusion (which holds irrespective of the precise magnitudes of the parameters of the analysis) from a set of assumptions that are considered consistent with the facts of the case. For instance, an economic submission may try to substantiate that irrespective of the size or existence of efficiencies, a particular conduct cannot possibly harm consumers.

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11	An economic analysis may support an assessment of the anticompetitive or pro-competitive effects of a merger. Such analysis usually involves a comparison of the actual or likely future situation in the relevant market with the absence of the proposed merger.	
12	By their very nature, economic models and arguments are based on simplifications of reality. It is therefore normally not sufficient to disprove a particular argument or model, to point out that it is "based on seemingly unrealistic assumptions". It is also necessary to explicitly identify which aspects of reality should be better reflected in the model or argumentation, and to indicate why this would alter the conclusions.	
13	In many cases, economic theory is used to develop a testable hypothesis that is later checked against the data. In that case, the economic analysis makes predictions about reality that can be tested by observations and potentially rejected or verified. Thus, whenever feasible, an economic model should be accompanied by an appropriate empirical model - i.e. a model which is capable of testing the relevant hypotheses given the data available.	The Sections suggest that the words “provided with a quantum of empirical support” be substituted for the words “and verified” in the second sentence. Statistical analysis can lend support to hypotheses but cannot, standing alone, verify them.
14	Very often simple but well focused measurement of economic variables (prices, cost, margins, capacity constraints, R&D intensity)	

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	<p>will provide important insights into the significance of particular factors. Occasionally, more advanced statistical and econometric techniques may provide more useful evidence.⁶ In any case, otherwise valid economic analysis may not always produce unambiguous results when applied to the facts of a competition case. Contradictions may result from differences in the data, differences in the approach to economic modeling or in the assumptions used to interpret the data or differences in the empirical techniques and methodologies.</p>	
15	<p>The following sections provide practical advice on the generation and communication of economic and econometric analyses. The goal of these recommendations is to ensure that every economic or econometric analysis submitted for consideration in a case states fully the economic reasoning and the observations on which it relies as well as to explain the relevance of its findings for the case at hand and the robustness of the results. This should allow DG Competition and all interested parties to scrutinise the economic evidence submitted during the proceedings so as to avoid that empirical results that are not robust be disguised as such and key assumptions in theoretical reasoning be presented as innocuous.</p>	

⁶ For instance, an econometric analysis of the extent to which prices of an undertaking have been affected by the observed entry of a competitor may provide evidence of the competitive constraint exercised by that entrant. In turn this could provide insights with respect to the likely degree of harm, that would result if an incumbent dominant undertaking were to engage in practices resulting in anticompetitive foreclosure in that or related markets.

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2.1	Formulating the relevant question	
16	The first step in any economic analysis, theoretical or empirical, should be the formulation of a question that is relevant to the case at hand.	
17	The question of interest must be: (a) precisely formulated so that its answer can be interpreted without ambiguity, (b) properly motivated taking into account the nature of the competition case, the institutional features of the markets under consideration and the relevant economic theory. ⁷	
18	An economic or econometric report should explicitly formulate not only the hypothesis to be tested (the "null hypothesis" ⁸) but also the	The report should also clearly articulate what findings would be in support of the null hypothesis and what findings would not

⁷ Occasionally the parties might submit a literature survey or review regarding an economic question of particular relevance for the case. A literature review may be useful when it is accompanied by an explanation on the merits and shortcomings, of the existing studies and explains how the party's own reasoning or analysis relates to past research, academic or otherwise.

⁸ The null hypothesis is generally that which is presumed to be true initially. A null hypothesis is a hypothesis set up to be nullified or refuted in order to support an alternative hypothesis.

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	alternative hypothesis (or hypotheses) under consideration, so that rejection of the null hypothesis can be properly interpreted ⁹ .	<p>be.</p> <p>Additionally, the Sections note that footnote 8 needs to be amended. The null hypothesis may not necessarily be presumed to be true initially. Often, economist studies presume the alternative hypothesis to be true and seek to rule out the null hypothesis, which is believed to be false. The research objective is frequently to show support for the alternative hypothesis. Footnote 8 could read: “The null hypothesis is a baseline hypothesis against which an alternative hypothesis may be tested. It can be a hypothesis set up to be nullified or refuted in order to support an alternative hypothesis. Support for one theory is shown by lack of support for its converse.”</p>
19	One should explicitly discuss the link between the hypothesis being tested and any economic theory regarding the competitive effects under assessment to which it relates. Often, the empirical exercise being carried out will shed only indirect evidence on the economic	

⁹ For example, consider an empirical project aimed at testing whether certain conduct would lead to higher prices. One could define as the null hypothesis that prices did not increase in which case a rejection of the null hypothesis would imply that the agreement had a positive price impact. Alternatively, one could have defined as the null hypothesis that prices did not change as a result of the agreement. A rejection of the null hypothesis in that case would be harder to interpret: did prices rise or fall as a result of the exclusive relationship between buyer and seller?

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	theory under assessment. This evidence is nonetheless useful but should be properly qualified ¹⁰ .	
2.2	Data relevance and reliability	
20	The intrinsic quality of an economic theory depends on the extent to which the underlying assumptions match the corresponding economic[ally meaningful] facts. Likewise, empirical analysis depends	The Sections suggest rephrasing the second sentence of ¶20 as follows: “Likewise, empirical analysis depends on the relevance and the reliability of the underlying data, and often on the

¹⁰ For example, the analysis of scanner data (retail prices and quantities) may provide valuable evidence in the context of a merger between producers of fast moving consumption goods, even when the direct impact of the transaction would be felt at the wholesale level and not at the consumer level.

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	on the relevance and the reliability of the underlying data.	sample size when econometric analysis is possible.”
21	First, it is necessary to identify the relevant facts to validate the theoretical assumptions and employ data which is appropriate to respond to the empirical question under investigation. ¹¹	The Sections submit that footnote 11 should be deleted, as it suggests that an analysis of list prices is always invalid where discounts are important, which is not the case. For example, if qualitative evidence (documents, testimony) indicates that discounts are important but constant (e.g., large customers receive 30% off list prices, mid-size customers receive 20% off list prices, and small customers receive 10% off list prices), but quantitative data on prices actually paid by consumers are unavailable, one could still analyze list prices and show that those increased following an agreement among undertakings.
22	Second, not all facts can be observed or measured with high accuracy and most datasets are incomplete or otherwise imperfect. Hence, parties and/or DG Competition should become familiar with the facts and data and acknowledge its limitations explicitly. As regards quantitative data, for example, this requires (i) a thorough inspection of the data, including summary statistics and graphs, and (ii) a sufficient understanding of how the data were gathered, the sample selection process, the measurement of the variables and whether they bear a close relationship with their theoretical	In paragraph 22, the Best Practice asks the parties to acknowledge the limitations of any empirical study. However, the Sections note that the parties will understandably be reluctant to do so if, as past experience may suggest, minor limitations may result in an economic submission being challenged or discounted. This obstacle could be overcome somewhat if the Commission committed itself to not only identifying potential concerns but

¹¹ For example when discounts are important, the analysis of the price impact of a merger, agreement or practice must focus on prices paid by consumers rather than on list prices.

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	<p>counterparts. Quantitative data may contain anomalies because of miscoding or other errors, which should be discussed with the data providers to decide how to best adjust the data to address these problems.</p>	<p>also to explaining how that identified potential flaw (in either the modeling approach and/or data) would likely affect the results. For example, if the Commission suggests that a model is flawed because it has not corrected for heteroskedastic errors in econometric estimates then it ought to demonstrate how correcting for heteroskedastic errors affects the results, rather than rely on the possibility that the results would be significantly different. Similarly, it is not sufficient to suggest that high price correlations might be driven by common costs. Rather, the Commission should identify what those common costs might be, and undertake the analysis to see whether controlling for such common costs significantly alters the results.</p> <p>Finally, the Sections recommend that any adjustments to the data, as deemed necessary by the Commission, should be fully identified and explained in the report.</p>
23	<p>Failure to observe and validate all key assumptions or deficiencies in the data should not prevent an economic analysis to be given weight, though caution must be exercised before relying on its conclusions.¹² Furthermore, statistical techniques have been developed to deal with measurement errors, missing observations and sample selection problems. While these techniques may not be able to improve the</p>	<p>The Sections recommend rephrasing the second sentence of ¶23 as follows: “Furthermore, statistical techniques ..., they may help to deal with some of its imperfections and should therefore be applied whenever appropriate.”</p>

¹² For example, assumptions regarding firms' expectations regarding the identity of the market leader may be inferred indirectly through observation of which firm first announces its future prices.

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	data, they may help to deal with some of its imperfections.	
2.3	Choice of empirical methodology	
24	The choice of methodology to empirically test a hypothesis or to validate the predictions of an economic model should be properly motivated, and its pros and cons should be made explicit, including potential identification problems. ¹³	The Sections note that there is a potential confusion in this paragraph (“identification problems”), if read in conjunction with footnote 13. The Sections understand that the text in ¶24 refers to identification problems that arise when a model is not properly specified, and is not necessarily referring to a distinction between estimating a variable through inference from a sample and identifying a variable by taking its measurement from the population. The Sections recommend deleting footnote 13, which seeks to provide a definition and does not provide guidance.
25	Identification can be understood as clarifying the basis upon which one theory can be preferred to another. Similarly, the term can be used to refer to any situation where an econometric model will invariably have more than one set of parameters which generate the same distribution of observations.	

¹³ Problems of inference can be separated into statistical and identification problems. Studies of identification seek to characterize the conclusions that could be drawn if one could use the sampling process to obtain an unlimited number of observations. Studies of statistical inference seek to characterize the generally weaker conclusions that can be drawn from a finite number of observations.

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26	It is necessary to motivate how the chosen methodology exploits the variation in the data, to at least partially discriminate between the tested (or null) hypothesis and the alternative hypotheses. At the very least, an economic model or argument must generate predictions that are consistent with a significant number of relevant observed facts.	
27	The choice of methodology should seek consistency with (a) the dataset and its potential limitations, (b) the features of the market under investigation, and (c) the economic issues under consideration — i.e., it should be designed to test the hypothesis of interest and formulated under the relevant question (see also section 2.1 above).	
28	<p>If statistical and/or econometric methods are used, a number of further methodological choices need to be made and justified, regarding, inter-alia:</p> <p>i) specification (what is the range of sensible general forms for the relationship under evaluation, including the relevant variables, the way they could interact, and the nature of errors or uncertainty).</p> <p>ii) observation (how well do the measurements approximate the variables they are intended to represent).</p> <p>iii) estimation (what do the data in the sample suggest as to the range of plausible relationships among variables).</p>	<p>The Sections recommend adding a fourth bullet: “iv) predictive value (does the dataset cover enough observations, either across relevant units, over time, or both, to provide reasonably robust predictions).”</p>

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29	Statistical techniques and tests should be based, to the extent possible, on generally accepted methods. In many circumstances standard econometric models and statistical tools may have to be adapted to the peculiarities of the case. In those cases, one should motivate the changes, describe the modified technique or model, and document the likely biases, if any, that the new method is likely to introduce.	
30	In general, it is recommended to follow a “bottom-up” approach. In the context of multiple regression analysis, this would mean estimating simple models first and then engage in more refined estimation exercises if necessary in order to avoid bias. ¹⁴	The Sections recommend deletion of footnote 14, as it suggests it is sound practice to present the results of models that were determined to be inappropriate for a given situation.
31	Finally, alternative methodologies should also be discussed. If possible, given time and data constraints, conducting multiple empirical analyses relying on different methodologies would help determine whether the conclusions of the empirical investigation are robust to different tests or models (see also section 2.5 below).	
2.4	Reporting and interpreting the results	

¹⁴ For example, it is sound practice to estimate an Ordinary Least Squares (OLS) regression first and then, to the extent endogeneity is thought to be a problem, move on to an instrumental variable (IV) estimation.

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32	Parties should explain the details of their models, and share any documentation needed to allow timely replication (e.g. the programming code used to run the analysis). It is critical to take the reader through the reasoning or where necessary the various mathematical steps that build the economic or econometric model ¹⁵ . Reports which do not allow for replication and in particular those that do not include the code and data in electronic form will receive less consideration and are consequently unlikely to be given much weight.	The Sections note that under ¶6, supra, this obligation to share data and programming code should be extended to the Commission, so that when the Commission presents evidence against a party, that party could replicate and extend its analysis as part of its rebuttal.
33	Commonly, results from economic analysis and statistical information are presented in tables. Although it is not necessary to comment on or restate every piece of information that a table contains an interpretation of the data in it must be provided.	
34	The results of the empirical analyses should be reported in the standard format found in academic papers. For example, when reporting multiple regression results, one should report on the statistical significance ¹⁶ of the parameter estimates by following the convention of reporting coefficients, p-values, standard errors and the size of the sample. In the description of the results the emphasis	The Sections recommend amending this paragraph as follows: “The results of the empirical analyses should be reported in the standard format found in academic papers. For example, when reporting multiple regression results, one should report on the statistical significance of the parameter estimates by following

¹⁵ Any mathematical notation should either (a) follow the standard notation in the literature or (b) be very self-explanatory.

¹⁶ A statistically significant result is one that is unlikely to have occurred by chance. In hypothesis testing, the significance level is the criterion used for rejecting the null hypothesis. The p-value is the probability of obtaining a test statistic at least as extreme as the one that was actually observed, assuming that the null hypothesis is true. If the obtained p-value is smaller than or equal to the significance level, then the null hypothesis is rejected and the outcome is said to be statistically significant.

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	<p>should be on statistically significant findings to the 5% level (i.e. p-value<0.05). However findings significant around the 10% level should not be ignored, in particular where the coefficient of interest is economically significant and the sample size is small. Detailed information should also be provided on all other specification tests and statistical diagnoses (see also section 2.5 on robustness).</p>	<p>the convention of reporting coefficients, and a generally acceptable statistic for evaluating the significance of each coefficient (e.g., p-values or standard errors) ... However findings significant around the 10% level should not be ignored, in particular where the coefficient of interest is economically significant and the sample size is small, or when data problems, such as some variables being measured imprecisely, make inference more difficult. Detailed information should also be provided on all other specification tests and statistical diagnoses (see also section 2.5 on robustness)."</p>
35	<p>An empirical submission should not only discuss the statistical significance of the results but also their practical relevance. In general, with very large samples coefficients may be statistically significant even if they are of trivial magnitude.¹⁷ This creates the potentially misleading impression that certain variables are important. Therefore, the magnitude of the coefficients must always be examined and discussed. This requires interpreting the results in connection with the hypothesis that is being tested, so as to draw implications for the case under investigation.</p>	<p>The Sections are concerned that footnote 17 may be read as giving support to implications that are not correct, and recommend amending the footnote accordingly. A failure to reject the null hypothesis does not imply that it is accepted as true. Moreover, if it cannot be stated that the coefficient in question is statistically different from zero, the variable cannot have economic significance in the context of econometric analysis.</p>

¹⁷ Statistical significance is determined, in part, by the number of observations in the data set. The more observations used to calculate the regression coefficients, the smaller the standard error of each coefficient. A smaller standard error reflects less random variability in the estimated coefficient (or estimate). Other things being equal, the statistical significance of a regression coefficient increases as the sample size increases. If the data set is sufficiently large, results that are economically significant are often also statistically significant. However, when the sample size is small it is not uncommon to obtain results that are economically significant but statistically insignificant.

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36	The results of any statistical or econometric analysis should also be assessed with respect to the relevant economic theory. ¹⁸ When discussing the results of a multiple regression analysis, this requirement includes assessing not only the coefficient(s) of direct interest, but also the coefficients of all other explanatory variables, as they often provide a signal on the reliability of the analysis. For example, a finding that the sign of a particular coefficient is counter to what would be expected by economic theory ¹⁹ may be an indication of an omitted-variable problem ²⁰ , a selection bias ²¹ , or some other identification problem. ²²	
2.5	Robustness	
37	Economic and econometric analysis should always be accompanied by a thorough robustness analysis, except where its absence is appropriately justified.	

¹⁸ For example, econometric estimates of the elasticity of demand for a given product implying an upward sloping demand curve should be discarded in almost all cases, unless the product in question can be shown to be a Giffen good—i.e., a product for which a rise in price of this product makes people buy even more of the product.

¹⁹ For example, a study showing that an increase in the marginal costs of production of a given good is associated with lower prices for that product should, ceteris paribus, be discarded automatically.

²⁰ That is, when a relevant explanatory variable, which is correlated with the dependent variable has been omitted from the analysis, so that the coefficients of some or all other explanatory variables suffer from a bias of a priori unknown sign or magnitude.

²¹ The bias that arises when the selection process influences the availability of data in a way that is related to the dependent variable.

²² See note 13 supra.

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38	38. First, it is necessary to check whether empirical results are sensitive to changes in (a) the data, (b) the choice of empirical method, and (c) the precise modelling assumptions ²³ . Similarly an economic model should generally be accompanied by a sensitivity analysis with respect to the key variables, to the extent only the plausible but not the exact value of each variable can be determined. All results from the sensitivity analysis conducted should also be reported and not only those that support the argument.	The Sections submit that robustness testing may also involve specification tests, such as those for autocorrelation, serial correlation, and multicollinearity, and qualitative checks may be appropriate as well. For instance, robustness testing might include considering alternative data sources for key variables, including additional variables in the model, and considering different ranges for categorical variables.
39	It is also necessary to assess and test to the extent possible whether the results of the analysis can be generalised. ²⁴	The Sections note that paragraph 39 should begin with “Where appropriate”, as it suggests a generality that is not necessarily supported by the facts of a case.
40	Finally, an economic or econometric analysis should explicitly discuss whether the theory or technique has been generally accepted in the scientific community and discuss its known or potential rate of error when applied. Importantly, the model needs to be consistent and reasonably predict observed past outcomes and behaviour. Moreover,	The Sections understand that, if empirical methods employed diverge from generally known and accepted methods, as may be required when the case leads the scientific literature, the model extensions should also be explained. This explanation should include the scientific literature out of which the model was

²³ For example, in a multiple regression analysis, one should indicate whether the results are severely affected by how the variables were defined, by the set of explanatory variables incorporated to the analysis, or the functional form.

²⁴ For example, if the elasticity of demand for a given product has been estimated for a given country, where data is available, but the case at hand would require estimates of the elasticity of demand for various countries, one should consider whether or not, and under which assumptions, her results for one country apply to the others. Similarly, if an economic model assumes that firms make take-it-or-leave-it offers when interacting with intermediate buyers with certain characteristics, it may be necessary to assess whether such assumption extends to all types of intermediate buyers.

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	it is expected to compare the predictions of the economic model or the results of the empirical work in question with previous analysis and results. Congruent and convergent results strongly suggest the validity of the analysis under submission, whereas discrepancies should be carefully explained.	developed and details of why such extensions or modifications of the generally accepted methods were deemed necessary.
2.6	Further recommendations	
41	The credibility of an economic submission is enhanced when the limitations with regards to accuracy or explanatory power of the underlying data and methodology are explicitly acknowledged. In this regard it is often advisable to address rather than minimize uncertainty.	See comment to ¶22.
42	The parties rely sometimes on data that they do not have the means to audit and verify. Hence, they should be careful not to misleadingly present economic opinions as statements of fact. The sources of information should be carefully acknowledged, and the facts properly documented and described without ambiguity. This applies whether the economic or econometric analysis is a stand alone report or part of a broader submission.	

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43	<p>It is advisable that the parties consult DG Competition regarding the types of empirical analyses that they consider useful in testing the anticompetitive and/or efficiencies theories. In particular, the parties can suggest potential analyses which may be easier for DG Competition to conduct, given its access to data from third parties. DG Competition, in turn, may propose analyses it believes might be useful for the parties to conduct.</p>	
44	<p>Where economic submissions rely on quantitative data the parties should provide the data and codes timely, in an appropriate format and in accordance with the criteria laid down in section 3 of this document. In particular, the absence of all the necessary elements needed for replication and assessment of an economic submission can constitute grounds for not taking it further into consideration.</p>	
45	<p>When granting access to the file, DG Competition shall provide upon request the data and codes underlying its final economic analysis or, to the extent that they have been made available to the Commission, that of third parties on which it intends to rely or take into account. Where necessary to protect the confidentiality of other parties' data, access to the data and codes will be granted only at DG Competition premises in a so-called data room procedure²⁵, subject to strict</p>	

²⁵ See DG Competition Best Practices on the conduct of proceedings concerning Articles 101 and 102, paragraph 85.

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	confidentiality obligations and secure procedures. ²⁶ Third parties or complainants are equally expected to submit all the underlying data used in the analysis. They are also expected to authorise DG Competition, where appropriate, to offer data room access to the parties upon request.	
3	BEST PRACTICES ON RESPONDING TO REQUESTS FOR QUANTITATIVE DATA	
46	Pursuant to Article 18 of Regulation 1/2003 and Article 11 of the Merger Regulation, the Commission is empowered, in order to carry out its duties, to require undertakings and associations of undertakings to provide it with all necessary information. It is the Commission that defines the scope and the format of requests for information.	
47	Most competition investigations involve (1) collecting data, (2) analyzing data, and (3) drawing inferences from data. This document provides guidance to respond to a request for quantitative data. ²⁷	

²⁶ Similarly, DG Competition will endeavour to organise access to a data room, normally to the parties' economic advisors and external counsel, if necessary to ensure their rights of defence are fully respected.

²⁷ For statistical purposes, "quantitative data" means a series of observations or measurements, expressed as numbers. A statistic may refer to a particular numerical value, derived from the data. For example, an HHI measure and a correlation coefficient are statistics.

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	However, many of the principles here identified apply, more generally, to responses to any request for economic information, quantitative or qualitative.	
48	Quantitative data may help DG Competition to conduct statistical analysis to define markets, establish a counterfactual, assess the potential anti-competitive effects of a notified merger, validate efficiency claims or predict the impact of remedies. In order to do that DG Competition needs to get accurate data, with sufficient time to analyze it.	
49	DG Competition is aware of the costs that its procedures may impose on undertakings. One of the objectives of this section is, therefore, to provide recommendations to reduce the burden on the involved parties and DG Competition posed by the production and processing of quantitative data, while at the same time ensuring and enhancing the effectiveness of DG Competition's substantive review.	
50	These best practices are intended as general guidance and do not supersede any specific instructions in any data request issued by DG Competition in specific cases.	

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51	The primary objective of a Data Request is to obtain accurate information concerning quantitative variables such as prices, turnover, capacity and entry or exit decisions within the possible relevant markets over a reasonable period. Quantitative data may be necessary to understand current market conditions and competitive dynamics. In some cases, reliable quantitative data may allow to conduct statistical or econometric analysis to be submitted as evidence in an antitrust or merger investigation.	
52	DG Competition will endeavour to ask for the adequate amount of data required to carry out the required analyses. DG Competition is mindful of time constraints and must balance the usefulness of each request against the opportunity cost of the time the request will consume as a proportion of the time left before any legal or procedural deadline. In appropriate cases, DG Competition may discuss in advance with the addressees or other affected parties the scope and the format of the data request.	The Sections submit that, in the first sentence, “adequate” should be replaced by “least” to better reflect the Commission’s intentions.
53	DG Competition will carefully consider what is the proper sample to characterize a population. Inferences from the part to the whole are justified only when the sample is representative. ²⁸	

²⁸ For example, in certain circumstances it may be appropriate to limit the data request to a certain representative subset of the involved firms' customers, or to a particular geographic market which stands out for a valid given reason.

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54	54. A further issue that may influence the scope of the data request is whether third party data will be necessary and available to conduct any meaningful analysis.	
3.2	Common elements of a Data Request	
55	Examples of data necessary for a competition investigation include data on costs, output, sales, prices, capacity, product characteristics, delivery flows, customer characteristics, tender details, entry barriers, business strategies, and market shares of the parties involved and of the other participants in the relevant market.	The Sections submit that the Best Practice should use the term “turnover” (see ¶51) here instead of “sales.”
56	The source of the information can be the parties involved in the procedure, third parties, trade associations, trade press, independent consultants, survey information or government sources.	
57	Data may be costly to collect or hardly accessible in the relevant time frame. Often, however, requests for quantitative data in merger proceedings seek data that is readily available to the involved parties. Readily available data refers to data that is routinely collected and maintained for a reasonable period as part of the firm's normal business operations, for example to inform business strategy or for	

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	<p>internal reporting. Readily available data also includes data that is regularly purchased from third parties, such as scanner data or survey data.²⁹ In any event, in its investigations, the Commission is not limited to request only data that is readily available to the parties (see point 74 below). Deadlines for submitting data which is difficult or costly to retrieve will be decided by the Commission on a case-by-case basis.</p>	
58	<p>A Data Request often includes the following sections, but each request will be tailored to the specific information needs and circumstances of the case:</p> <ul style="list-style-type: none"> (i) a glossary of terms, in particular key variables; (ii) a list of the variables; (iii) for each variable: the units of measurement; the level of aggregation over time (e.g. monthly); the time range (e.g. the last three fiscal years) and the geographic scope (e.g. countries, regions or cities); (iv) the preferred electronic format (stata file, excel file, etc); (v) suggestions or specific requests on data formatting, variable 	

²⁹ Where econometric analyses are to be conducted, the sample needs to be of sufficient size for meaningful inference. For instance, in the absence of cross-section variability, requests would generally cover at least a three year period of monthly observations.

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	<p style="text-align: center;">classification and tests to detect data inconsistencies; (vi) deadline for compliance with the request.</p>	
59	<p>In some instances, particularly where data is requested from different parties, DG Competition may provide a template to ensure all submissions are compatible and can be efficiently combined with minimal risk of error.</p>	
3.3	Main criteria to consider when responding to a Data Request	
60	<p>Responses to a Data Request must be: (i) complete, (ii) correct, and (iii) timely.</p>	
61	<p>The Commission may impose on undertakings and associations of undertakings fines where, intentionally or negligently, they supply incorrect or misleading information or when, in response to a request made by decision, they supply incomplete information or do not supply information within the required time-limit.³⁰ Furthermore, in merger cases, the relevant time limits for initiating proceedings and for the adoption of decisions may exceptionally be suspended where,</p>	

³⁰ Article 23(1)(a) and (b) of Regulation 1/2003 and Article 14(1)(a), (b) and (c) of the Merger Regulation.

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	owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision or to order an inspection. ³¹	
3.3.1	<i>Completeness</i>	
62	The parties should provide all data requested, in any of the stated formats and follow indications regarding presentation and consistency checks. Subsidiary data that is necessary to construct or to understand any variable requested should also be provided, except when adequately justified and with prior approval by DG Competition.	
63	<p>It is strongly encouraged that problems of missing data are flagged to DG Competition well in advance of the deadline for compliance with the data request to allow, if appropriate, for either a modification of the request or an extension of the deadline. Any data missing from the original data request must be adequately justified. In any event, a response to a data request may not be considered complete unless accompanied by a memo:</p> <p>(i) describing the data compilation process: from raw data through aggregation and merging operations to the final database</p>	With regard to ¶(iv) below, the Commission may wish to clarify whether it is referring to changes over time, or to changes between sources of data.

³¹ Article 10(4) of the Merger Regulation, but see also Article 8(6) thereof.

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	<p>submitted. How was the sample selected and was it necessary to eliminate certain kinds of observations;</p> <p>(ii) identifying all relevant sources;</p> <p>(iii) labelling and thoroughly describing all variables;</p> <p>(iv) reporting on the reasons for potential measurement error such as missing information or any changes in the collection process;</p> <p>(v) describing any assumptions and estimations used to fill incomplete data; and</p> <p>(vi) reporting on consistency checking and all data cleaning operations.</p>	
3.3.2	<i>Correctness</i>	
64	<p>It is up to interested parties to ensure the correctness of the data submitted. Tests for accuracy of all variables should always be undertaken and reported.³²</p>	<p>Negative sales volumes can be due to returns of expired units, and zero transaction prices can be due to shipping of free samples to the customer. These are perfectly accurate data and do not reflect any errors. Accordingly, the Sections suggest that the Commission consider deleting footnote 32, or at least qualifying the footnote appropriately.</p>

³² For example, negative sales volumes or zero transaction prices are normally inaccurate and are often indicative of data extraction errors, systematic measurement errors or inadequate accounting of rebates or taxes.

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	Best Practice Submissions Text	Comments
65	<p>In order to detect incorrectness in data it will be expected that consistency checks are performed and documented prior to submission. In particular:</p> <ul style="list-style-type: none"> i) Responses to the data request should be consistent with responses provided to other requests for information (e.g. turnover, market shares, etc); ii) Individual values within a variable must be consistent with the economic reality³³; iii) when aggregation of raw data is necessary, one needs to ensure the aggregation algorithm is sensible and applied consistently; iv) coherence between different variables is necessary³⁴; v) over time consistency across and within variables must also be ensured. 	
3.3.3	<i>Timely submission</i>	
66	Deadlines for responses to data requests must be strictly respected.	

³³ For example, transaction prices (net of discounts) should generally be positive, missing or unexpected values (i.e. sales not in line with historical levels) should be checked.

³⁴ For example, shipments of one product must be related to shipments of any by-products. Also, charged prices should generally remain above transportation costs (i.e. ex-works negative prices cast doubts on either the correctness of the charged price and/or the transportation cost).

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	Best Practice Submissions Text	Comments
	Where parties plan to submit data in connection with an empirical analysis conducted at their own initiative, it is useful to warn in advance DG Competition of the planned timing and scope of such a submission. Results that the parties intend to rely upon or discuss in a meeting with DG Competition should be submitted, including data and code to facilitate replication, at least 2 working days before the said meeting.	
3.4	Other Recommendations	
67	This section sets down further recommended best practices concerning responses to a data request.	
3.4.1	<i>Cooperation in good-faith</i>	
68	Data production is an area where cooperation between the parties and DG Competition is especially important. The parties will need to explain clearly the complexities that can be associated with requests that DG Competition may regard as simple. ³⁵ DG Competition endeavours to define its requests as specifically and quickly as	

³⁵ Why, for example, it may be difficult, impossible or useless to simply “turn over” a “database,” or the burdens and costs associated with providing data in the precise manner DG Competition seeks.

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	possible so the parties can understand what is being sought and why. This dialogue may help both sides deal more efficiently with data issues. In any event, it is for DG Competition to decide the scope, format and timing of the data request.	
69	It is important to emphasise in that regard that the integrity and efficiency of the process are undermined if, <i>inter alia</i> , the parties make representations about what data exist without reasonably diligent efforts to confirm their accuracy, if they ignore a carefully drafted and limited data request and produce large amounts of data points disregarding the submission format, scope, or data processing requirements, if they use non-obvious “definitions” of common terms in construing requests, or if they make unilateral and undisclosed inferences about what DG Competition is effectively seeking.	
3.4.2	<i>Early consultation with DG Competition to inform about what type of data available.</i>	
70	In some cases, the burden of compliance with data requests may be significantly reduced if the parties inform DG Competition at the earliest opportunity on the availability of quantitative data. Early consultation allows to determine not only what data are available and their suitability, but also in what form they can be provided, thereby	

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	making it easier and faster for the parties to provide the data, in the event DG Competition makes a data request. However, the Commission is not limited to request only data that are readily available to the parties.	
71	To make these early discussions fruitful, parties must be prepared to thoroughly explain their information management systems and should be prepared to discuss certain issues such as: every field of information captured, how the underlying data are collected and formatted, the frequency of collection, what software is used, the size of the data set, what reports are routinely generated from that database, etc. It is recommended that the involved firms provide any written documentation and/or training materials to DG Competition in advance of any discussion. It is also generally useful that parties create a diagram to show how the relevant data are distributed throughout the organization. In any event, as a general rule, parties should provide relevant documents to support their contentions concerning the availability, scope and production time of quantitative data.	
72	Preliminary meetings or telephone conversations with those responsible for data collection or analysis in the firms are often quite useful. Parties should make such personnel available as early as possible. These discussions should involve descriptions of the type of	

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	electronic (or other) data that the parties maintain (both in the ordinary course of business and what is archived, and in what form).	
73	In the case of mergers, pre-notification discussions should routinely deal with data issues. Although, DG Competition will endeavour to identify all issues that may require a data request as soon as possible, certain issues may not be identified until later in the proceedings.	
3.4.3	<i>Consultation on a Draft Data Requests and data samples</i>	
74	When appropriate and useful, DG Competition will send a “draft” data request for quantitative data in order to facilitate a better identification of the format, and to allow for basic consistency checks (see section 3.3.2). The purpose of the draft data request is to invite parties to propose any modifications that could alleviate the compliance burden while producing the necessary information. Any reduction on the scope of the data request can only be accepted if it does not risk harming the investigation and may trigger, particularly in merger cases, a reduction in the deadline for response initially anticipated.	With regard to the last sentence, the Sections recommend replacing “a reduction in the deadline” by “shorter deadlines.”
75	In this connection, providing samples of the data is generally very helpful as it helps DG Competition to determine what data are	

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	available and would be useful. As a result, on the basis of the sample it may be possible to draft a more focused data request, limiting the eventual burden on the parties.	
3.4.4	<i>Transparency regarding data collection, formatting and submission</i>	
76	A transparent process allows for all parties involved to be aware of any incidences during the data collection process and thus react more rapidly and effectively.	The Sections suggest clarification of the intended meaning of the phrase “incidences during the data collection process.”
77	<p>The parties must take care that quantitative data are submitted in a format that minimises the time and manipulation required to process the data for analysis. Parties should always be able to answer all the following questions:</p> <ul style="list-style-type: none"> i) How applicable is the data to the analyses under consideration; ii) How reliable or “clean” is the data; iii) Is it enough to conduct a meaningful analysis; iv) What institutional factors specific to the industry setting and/or company may impact the proper interpretation of the data. 	

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78	78. The involved parties must draw DG Competition's attention early on to any limitations in the data. They should make clear how raw data has been compiled and what steps have been taken to ensure its reliability. ³⁶	
79	The involved parties are also strongly encouraged to conduct their own descriptive analysis to detect data problems before submitting the data to DG Competition. Also DG Competition may sometimes welcome efforts by the involved parties to deal with any remaining data imperfections using statistical analysis. In some cases statistics allows in various ways to average out errors in measurement and yield statistically sound estimates. All such statistical analysis should be adequately reported. In any event, raw data should be provided wherever possible because the aggregation and cleaning of data may have a significant impact on the outcome of statistical or econometric analysis. Also parties should provide the program files that manipulate, clean and complete the raw data in preparation for the analysis.	
3.4.5	<i>Direct access</i>	

³⁶ For example, if the raw data are based on a sample of individual customer accounts, an explanation of how these accounts have been chosen and why they are representative of all customers should also be provided.

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80	<p>In some instances, DG Competition will accept that as part of its response to a Data Request the involved parties provide direct electronic access to the underlying data. This alternative can provide an inexpensive and fast way to provide access to large amounts of data. Limited direct access can also provide a means to assess the value of certain corporate information.</p>	
81	<p>The terms and conditions for direct access can be discussed in advance, addressing issues such as the availability of technical assistance, the ability to print or otherwise retrieve the data, the number of log-ins the company should provide, assurances that the activities of the services of DG Competition will not be tracked, that underlying data will not be removed without agreement of DG Competition and, most importantly, continued access throughout the entire course of the investigation. In limited instances, when providing direct access to corporate resources is unworkable, DG Competition may submit a set of queries to the firm so that reports can be generated.</p>	

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	ANNEX 1 STRUCTURE AND BASIC ELEMENTS OF A SOUND EMPIRICAL SUBMISSION	
	<p>This Annex briefly describes how to structure an empirical submission in a competition or merger case according with the principles set out in the preceding sections (esp. section 2 above). A sound economic or econometric submission should contain the following sections and elements:</p>	
A.	The relevant question	
	<ul style="list-style-type: none"> - The research question must be (i) formulated unambiguously and (ii) properly motivated, taking into account both the nature of the competition issue, the institutional features of the markets and industries under consideration, and the relevant economic theory. - The hypothesis to be tested (or null hypothesis) must be clearly spelled out as well as the alternative hypothesis or hypotheses under consideration. 	
B.	The data	

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	<ul style="list-style-type: none"> - A clear description of data sources must be provided as well as hard copies of the databases employed in the analysis. Normally, an accompanying memo would describe how previous intermediate data sets and programs were employed to create the final dataset as well as the software code employed to generate the final dataset. All efforts made to correct for anomalies in the data should be clearly explained. - One should also report how the data were gathered, the sample selection process, the measurement of the variables and whether they match with their theoretical counterparts, etc. - In addition, the data should be thoroughly described. This includes reporting the sample time frame and the statistical population under consideration, the units of observation, a clear definition of each variable, any data cleaning procedures, etc. This information should be accompanied by descriptive statistics (including means, standard errors, maximums, minimums, correlations, and histograms, residual plots, etc) of all relevant variables. 	
C.	Methodology	
	<ul style="list-style-type: none"> - The choice of empirical methodology should be properly motivated. One should discuss their methodological choices in 	

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	<p>light of (a) their data limitations, (b) the features of the market under investigation, and (c) the economic issues under consideration (the relevant question).</p> <ul style="list-style-type: none"> - Alternative methodologies should also be discussed and if possible, given time and data constraints, employed to verify the robustness of the results to the choice of model. An economic model or argument must generate predictions that are consistent with a significant number of relevant observed facts. 	
D.	Results and implications	
	<ul style="list-style-type: none"> - Parties should explain the details of their models, and share any documentation needed to allow timely replication (e.g. the programming code used to run the analysis). - The results of the empirical analyses should be reported in the standard format found in academic papers. For example, when reporting multiple regression results, one should report both the estimated coefficients and their standard errors for all relevant variables. They should also provide detailed information on all other specification tests and statistical diagnoses. - One should discuss not only the statistical significance of their results but also their practical relevance. This requires interpreting 	<p>Please refer to the comment on ¶6. The Sections suggest that the first bullet should begin “Parties and the Commission, should ...”</p>

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	<p>the results in connection with the hypothesis that is being tested, so as to draw implications for the case under investigation. The results of the statistical and econometric analyses should also be assessed with respect to the relevant economic theory.</p>	
E.	Robustness tests	
	<ul style="list-style-type: none"> - All empirical work should be accompanied by a thorough robustness analysis that (i) checks whether the empirical results are sensitive to changes in the data, the choice of empirical method, and the precise modelling assumptions; (ii) tests whether the results of the analysis can be generalised; and (iii) compares the results of the empirical work in question with previous results in the relevant literature. - An economic model should generally be accompanied by a sensitivity analysis with respect to the key variables, to the extent only the plausible but not the exact value of each variable can be determined. All results from the sensitivity analysis conducted should also be reported and not only those that support the argument. 	

**COMMENTS OF THE ABA SECTIONS ON THE
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GUIDANCE ON THE ROLE OF THE HEARING OFFICERS IN THE CONTEXT OF ANTITRUST PROCEEDINGS**

	Guidance	Comments
1	<p>The objective of this Guidance is to provide guidance for interested parties on the contribution of the Hearing Officers to the Commission's main proceedings relating to Articles 101 and 102 TFEU (ex- articles 81 and 82 EC).¹ In this regard, the Guidance seeks to increase understanding of the role of the Hearing Officers as the independent guardians of the rights of defence, and thereby to ensure a high degree of transparency, fairness and predictability in our procedures</p>	
2	<p>This Guidance is intended to be of general application to issues that fall within the Hearing Officers' competence. Nevertheless, if the particular circumstances of a case so require, the Hearing Officers reserve the right to deviate and exercise their discretion in relation to any of the issues addressed by this Guidance. It is built upon the experience of the Hearing Officers in the application of relevant legislation, in particular their terms of reference ("<i>Mandate</i>"), and jurisprudence and does not create any additional rights or obligations</p>	<p>The Sections would welcome some additional indications as to what "particular circumstances" might entail and how the Hearing Officer might "deviate" in such circumstances.</p>
	<p>THE HEARING OFFICERS' TASKS</p>	
3		

	Guidance	Comments
	<p>The Commission has to conduct its competition proceedings fairly and objectively while respecting the parties' procedural rights. The Hearing Officers are, first of all, guardians of fair proceedings before the Commission. They safeguard the rights of defence of undertakings subject to proceedings relating to Articles 101 and 102 (ex- articles 81 and 82) as well as the procedural rights of complainants and all other parties to the proceedings.</p>	
4	<p>Rights of defence relate mainly to questions concerning the truth and relevance of the facts and matters alleged and the documents used by the Commission to support a claim that there has been an infringement of competition law. Examples of rights of defence are the right to be informed about one's procedural status and the right to be heard by the Commission. The procedural rights of all other parties to a Commission procedure are in essence participation rights, the most important right being the right to be heard by the Commission.</p>	
5	<p>The observation of procedural rights falls in the first place within the responsibility of DG Competition. Should, however, a disagreement arise between DG Competition and a party to the procedure, it may be referred to the Hearing Officers for independent review. To this effect, specific decision-making powers relating to the extension of deadlines, access to file and protection of confidentiality are conferred to the Hearing Officers by the Mandate. Disputes can thus be resolved effectively and efficiently while the procedure is on-going, without</p>	<p>The reference to “European courts” should be clarified to reflect whether it is meant to include both EU and national courts.</p> <p>The Sections also believe this paragraph should be clarified to address what would be the outcome or the impact on the case where a party successfully challenges a decision by the Hearing Officer. In particular, how can that judgment be enforced and what right does the judgment give the party vis-a-vis the Hearing Officer’s decision and/or</p>

	Guidance	Comments
	<p>parties having to wait for the adoption of a Commission decision before addressing any disputes, for the first time, in litigation before the European courts. Depending on the nature of the decisions taken by the Hearing Officers, they can be challenged separately before the European courts or in the context of an application for annulment lodged against a final decision.</p>	<p>the Commission's initial measure?</p>
6	<p>In addition to their dispute resolution competencies, the Hearing Officers are directly involved in specific parts of the procedure in competition cases. In particular, the Hearing Officers decide on the admission of third parties to the procedure and to oral hearings. They are also responsible for all matters relating to the organisation and conduct of oral hearings and report directly on these hearings to the Commissioner responsible for competition on the conclusions they draw from them. In addition, at the end of the procedure the Hearing Officers report to the College of Commissioners and, ultimately to the addressee of the decision and the public on whether procedural safeguards and the right to be heard have been respected throughout the proceedings.</p>	<p>The Sections believe there is a need for strict timetables. Too often parties are admitted to the hearing at a very advanced date, depriving other hearing participants any meaningful opportunity to prepare to rebut evidence offered by such parties. Greater precision and consistency would also be desirable with regard to who may be admitted.</p>
7	<p>Whilst the Hearing Officers oversee procedural matters, have decision-making powers and adjudicate disputes in this respect, they may also make observations on substantive issues to the Commissioner. They usually submit such observations, if any, when reporting to the Commissioner on the oral hearing (see point 62 below). More generally, they may throughout the proceedings make</p>	<p>The Sections welcome the Hearing Officer's willingness to comment on substantive issues. We consider that such comments should also deal with the amount of any fine. However, because the views of the Hearing Officer on substance are not at present included in the Final Report, we assume that the current intention is not to employ the additional safeguard that this may provide. We consider that the</p>

	Guidance	Comments
	<p>observations to the Commissioner on any matter arising from the proceedings.</p>	<p>additional safeguard is useful and would encourage the Commission to reconsider whether the comments of the Hearing Officer are to be included in the Final Report.</p> <p>The Commission may wish to consider that the Hearing Officer could be <u>obliged</u> to provide observations on the substantive issues to the Commissioner. A more far-reaching proposal might be to require that the report of the Hearing Officer should set out details of the presentation and arguments that were provided during the oral hearing.</p>
8	<p>In fulfilling their functions, the Hearing Officers will apply the procedures as laid down in the <i>Mandate</i>. They carry out specific tasks primarily at the request of parties, but may also do so on an <i>ex officio</i> basis. The Hearing Officers do not, however, monitor the handling of competition cases by DG Competition, nor are they responsible for ensuring the respect of the principle of sound administration. Conversely, when parties are concerned about an issue relating to the fairness of the procedure, such as the right to be heard, that has not been resolved by DG Competition, they are encouraged to make contact with the Hearing Officers at any stage of a competition proceeding. 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.</p>	<p>The Sections question whether the assumption of acceptance which may arise if a party fails to bring a dispute to the Hearing Officer is in conformity with the Hearing Officer's role as a guardian of fair proceedings, or whether that assumption is reasonable so long as the Hearing Officer is under the authority of the Competition Commissioner. In case a party fails to bring a matter to the Hearing Officer during the procedure before DG Competition but raises it later on before European courts, the Hearing Officer could be asked to make an observation or submit an opinion.</p>

	Guidance	Comments
9	In order to perform their functions properly the Hearing Officers are entirely independent from DG Competition. They are appointed by the College of Commissioners. They are attached, for administrative purposes, to the Commissioner responsible for competition. Currently, two Hearing Officers are appointed. They carry out their functions on an individual basis.	The Sections support the independence of the Hearing Officers. At an appropriate time and in an appropriate context, the Commission may wish to seek and to consider the views of parties who interact with the Commission in competition cases regarding any additional steps that might be taken in order to reinforce and assure such independence.
10	The Hearing Officers play a limited role during the investigation phase of proceedings relating to Articles 101 and 102 TFEU (ex-articles 81 and 82), <i>i.e.</i> the period between the first measure of investigation and notification of the Statement of Objections. This flows from the fact that an undertaking subject to investigatory measures can rely in full on its rights of defence only once a Statement of Objections has been notified to it, as it is not until then that an undertaking has been formally informed of any objections against them relating to an infringement of the competition rules.	This phase can cause uncertainty for parties who are under investigation given the time between initiation of the Commission's investigation and the issuance of a statement of objections. This period can, in certain circumstances, be investigated by the courts (see Case C-105/04P <i>Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission</i> 21 September 2006, paragraphs 50 – 52) and so, while the rights of defence (of which the Hearing Officer is the guardian) do not commence until the notification of the statement of objections, it would make sense (and avoid many later disputes) for the Hearing Officer to be more involved prior to the statement of objections.
11	Notwithstanding the above, some issues are occasionally brought before the Hearing Officers during the investigation stage of the proceedings. Examples of rights of defence issues during the investigation phase that may arise include the undertaking's right (i) to be informed of the purpose and subject-matter of the investigation, (ii) not to self-incriminate itself, and (iii) to be represented by a lawyer. In addition, confidentiality issues may sometimes require the intervention	The Sections strongly support the notion of expanding the role of the Hearing Officer beginning from the first measures taken to initiate an investigation in order to safeguard the rights of the party being investigated..

	Guidance	Comments
	of the Hearing Officer prior to the notification of a Statement of Objections. The Hearing Officer will look into such issues at the request of an undertaking and will, in any event, address them if raised in the reply to the Statement of Objections.	
	PROCEDURES POTENTIALLY LEADING TO A PROHIBITION DECISION	
12	12. An undertaking has the right to rely in full on its rights of defence once a Statement of Objections has been notified to it. The addressee of the Statement of Objections will be informed by the Hearing Office of the Hearing Officer dealing with its case, after DG Competition has informed the Hearing Office of the notification of the Statement of Objections. The following issues are regularly brought before the Hearing Officers during this <i>inter-partes</i> phase of the proceedings.	
13	In order to ensure the equality of arms, the addressee acquires the right to request access the Commission file as soon as a Statement of Objections is notified to it.	
14	The principles and practice in this regard are primarily laid down in the Notice on Access to File. Where an undertaking that is an addressee of a Statement of Objections is of the view that the access to file	The Sections question whether the assumption of acceptance that may arise if a party fails to bring a dispute to the Hearing Officer is in conformity with the Hearing Officer's role as a guardian of fair

	Guidance	Comments
	accorded to it is insufficient to allow it to properly exercise its rights of defence, it should therefore address its concerns to DG Competition in the first place. Thereafter, if the addressee is still not satisfied with the access that has been granted, it may submit a reasoned request in writing to the Hearing Officer. Failure to do so can be taken as an acceptance of the position expressed by DG Competition.	proceedings or whether that assumption is reasonable so long as the Hearing Officer is under the authority of the Competition Commissioner. See comments to ¶8, above.
15	The Hearing Officer will decide either that full or partial access be provided to certain documents, or give a reasoned decision why access should not be granted. All efforts should be made by addressees to raise access to file issues as soon as possible.	
16	Contrary to an addressee of a Statement of Objections complainants or other third parties admitted to the proceedings do not have a right to access the Commission's investigation file.	While the Sections recognise there are different views on this subject, they consider that the better view is that a complainant should also have access to non-confidential documents. This seems to accord best with the Commission's duty of impartiality.
17	A complainant has the right to be provided with a non-confidential version of the Statement of Objections and be afforded an opportunity to make its views known in writing. If, however, the complainant considers that it has not been put in a position to submit any meaningful comments, it may address its concerns to the Hearing Officer.	The Commission might provide guidance concerning the specific measures the Hearing Officer may take to address the concerns of a complainant who considers that it has not been provided sufficient information by DG Competition in order to make meaningful comments. The need for timely access to relevant, non-confidential information is a critical one, and the Hearing Officer should be provided the discretion to ensure that parties to obtain timely and

	Guidance	Comments
		meaningful access to all such relevant material.
18	An interested third party has the right to be informed of the nature and subject matter of the proceedings and, similarly to a complainant, be afforded the opportunity to make its views known in writing. In this respect it should be noted that it falls on DG Competition to determine the means by which a third party will be informed. Should however, a third party consider that the information is insufficient to allow it to effectively make known its views, it may address its concerns to the Hearing Officer.	The Sections suggest that additional guidance on the specific steps the Hearing Officer might take in this regard would be of considerable utility.
19	In the event that a dispute arises between an addressee of a Statement of Objections or information provider and DG Competition as to whether a piece of information is confidential or not, the dispute may be brought by the addressee or provider before the Hearing Officer for determination. Prior to disclosing information for which confidentiality has been claimed the Hearing Officer will activate the procedure commonly referred to as the "AKZO procedure", in application of Article 9 of the Mandate.	The Sections suggest that the case team should inform the Hearing Officer automatically of all such disputes and should inform the parties at the same time. It should not always fall on the party to "complain" and thereby face the risk of adverse action based on the assertion of confidentiality concerns.
20	Claims of confidentiality, as well as requests for disclosure of the information, presented to the Hearing Officer cannot be couched in general terms. The provider of the information must detail what documents (or parts thereof) are nonaccessible, together with reasons justifying such confidentiality. Similarly, the addressee of a Statement of Objections must specify the documents to which access is	The Hearing Officer should review all excluded documents and determine whether the categorisation is reasonable without need for a party to petition.

	Guidance	Comments
	requested and explain why further disclosure is necessary for its defence.	
21	Any general requests that are not detailed in this way will be rejected by the Hearing Officer as unsubstantiated.	
22	<p>The Hearing Officer will carry out an independent review of the documents concerned, and consider the arguments of the parties and those of DG Competition to firstly, determine whether the information is confidential <i>per se</i>. If the Hearing Officer comes to the conclusion that the confidentiality claim is merited, it will, secondly, carry out a balancing test whereby the legitimate interests of an undertaking to have its confidential information protected will be weighed against the addressee's interest to be effectively heard on the information in question. If, following the balancing test, the Hearing Officer reaches the preliminary conclusion that the information must be fully or partially disclosed, the information provider will be informed of the preliminary conclusion and the reasons for it (often referred to as a "<i>pre-Article 9 letter</i>"). The information provider will be granted a deadline within which it can make known its views on the Hearing Officer's preliminary position. On the other hand, should the Hearing Officer find that the confidentiality claim is justified and that the information cannot be disclosed, the requesting party will be informed thereof. In practice, many confidentiality disputes are resolved at this stage of the procedure.</p>	<p>The criteria for <i>per se</i> confidentiality should be explained. Undertakings should be allowed to know in advance the circumstances in which a confidentiality claim may be made.</p>

	Guidance	Comments
23	<p>If, after receiving the pre-Article 9 letter, the information provider continues to object to disclosure, and should the Hearing Officer, having considered the arguments, maintain that the information should be disclosed, a reasoned decision under Article 9 of the Mandate will normally be issued (an "<i>Article 9 decision</i>"). An Article 9 decision will specify the date on which the information will be disclosed, which cannot occur less than one week from the date of notification of the decision.</p>	
24	<p>An undertaking, which has provided the information in question, is entitled to challenge an Article 9 decision immediately to the General Court of the European Union ("the General Court"). It will however be requested to inform the Hearing Officer by a specified date whether it intends to lodge an application for annulment before the General Court and whether or not interim measures will be requested. If the information provider makes known its intention to challenge the decision and to request interim measures, the disputed information will not be disclosed until the President of the General Court has issued an order ruling on the application for the interim measure.</p>	<p>The Sections suggest that the Hearing Officer should support the interim measures application, speed being of the essence. As a rule of thumb, requests for extension should be treated more favourably where the Commission has had a lengthy investigation phase. Further guidance here would be useful.</p>
25	<p>Any request for an extension of the time-limit to reply to a Statement of Objections should be made as soon as possible, at the latest before the expiry of the deadline set by DG Competition. The request should detail both the reasons and time required to submit a reply.</p>	
26	<p>The Hearing Officer will determine whether and to what extent</p>	<p>The Commission should consider allowing the parties to receive the</p>

	Guidance	Comments
	<p>additional time is needed to allow the addressee of the Statement of Objections to fully express its views and exercise its procedural rights effectively, after having received comments from DG Competition. In doing so, the Hearing Officer will also bear in mind the need for an efficient procedure. In assessing whether an extension should be granted, the Hearing Officer may consider, <i>inter alia</i>, the following elements, depending on the particular circumstances of the case, a. any obstacles caused by the Commission faced by the addressee of the Statement of Objections in providing its observations within the deadline set by DG Competition, e.g. the impact of any access to file disputes on the time needed by the addressee to reply to the objections; and/or b. any other objective obstacles faced by the requesting addressee in providing its observations within the deadline set by DG Competition.</p>	<p>comments submitted by DG Competition to the Hearing Officer. A meeting or conference call involving the Hearing Officer, the Commission and all parties involved could prove useful.</p>
27	<p>It should be noted that deadlines will normally start running when access to the main documents in the file has been granted, which would allow the addressee to start analyzing the objections raised against it. The fact that access to the entire file has not, in the addressee's view, been granted does not have the automatic consequence that a deadline set by DG Competition has not started running.</p>	<p>Given (1) that the parties and the Commission may have different views as to what constitutes a "main document"; and (2) that it cannot be determined whether a document is a "main document" until the party under investigation has had the opportunity to review it, the Sections suggest that deadlines should not start to run until the party under investigation has been granted access to substantially the whole file after the file has been placed in a state where such party will be able to assess the Commission's claims and evidence.</p>
28	<p>In exceptional circumstances, the Hearing Officer may however decide to suspend the running of a deadline until an access dispute</p>	<p>In these circumstances it would appear more appropriate for the</p>

	Guidance	Comments
	has been resolved, if it becomes evident that the addressee would not be in a position to reply within the deadline granted to it and an extension would not be an adequate solution at that point in time.	Hearing Officer to suspend the running of the deadline automatically.
29	Where a supplementary Statement of Objections or a Letter of Facts has been notified to an addressee it falls, in the first place, on DG Competition to set the time period within the addressee may submit its comments. Any request for extension of that time period should be addressed to the Hearing Officer, who will examine it in light of the principles described above.	The Sects suggest that the Hearing Officer should insist at the outset that the period is reasonable in all circumstances. The Commission should consider whether the case team should be required to secure prior approval from the Hearing Officer so that the applicable time periods may be worked out in consultation with the parties, rather than having the time periods fixed by the Commission and requiring respondents to challenge the Commission's determination in order to secure any extension.
30	The time periods for a complainant and other admitted third parties to submit comments will be set by DG Competition. A request for an extension of that time period should be addressed to the Hearing Officer and be made as soon as possible, at the latest before the expiry of the deadline set by DG Competition.	
31	When assessing an extension request from a complainant and/or a third party the Hearing Officer will apply the general principles described above for an addressee of a Statement of Objections, where applicable.	
	ADMISSION OF THIRD PARTIES TO THE PROCEDURE	

	Guidance	Comments
32	<p>The Hearing Officer has the responsibility to admit natural or legal persons with a sufficient interest to proceedings before the Commission. Applications for admission must be reasoned, clearly explaining the applicant's interest in the outcome of the proceedings. An application may be submitted to the Hearing Officers throughout the administrative proceedings. Potential interested third parties are encouraged to submit formal applications around the time a Statement of Objections is issued in order to make the most effective use of their procedural rights.</p>	<p>It might be helpful to spell out some consistent criteria for admission, and perhaps to have a general application form. At present admission to proceedings is highly unpredictable. For example, admissibility often appears to depend significantly on the size of room allocated for the hearing -- a factor that bears little relation to the interests of affected parties.</p>
33	<p>In assessing a request for third party status, the Hearing Officer will take into consideration in particular the contribution the party has made or is likely to make to establish the truth and relevance of the facts and circumstances pertinent to the proceedings, as opposed to an exclusively private interest, which would normally not be considered as sufficient. If necessary, the Hearing Officer may request any further information from the party in order to assess the application to be admitted to the proceedings.</p>	<p>Other parties could be allowed to express observations to assist in the assessment (see comment on paragraph 35 below).</p>
34	<p>In assessing an application by an association to be admitted to the proceedings, the Hearing Officer may consider, <i>inter alia</i>, the following elements, depending on the particular circumstances of the case:</p>	

	Guidance	Comments
	<p>a. the object of the association (notably whether its object includes the protection of the interests of its members);</p> <p>b. whether the case raises questions of principle that are likely to affect the common interest of the association's members (or the association itself);</p> <p>c. whether the mission of the association is sufficiently closely connected to the subject matter of the case.</p> <p>In general terms, the fact that the Hearing Officer has admitted an association cannot be relied upon in support of an application to intervene by its individual members. On the contrary, in cases where a particular association has been admitted, individual members seeking to be granted third party status independently of the association should explain and justify why their individual interest would not be sufficiently represented in the proceedings by the association in question and it would thus not serve the interest in efficient proceedings to only admit the association.</p>	
35	<p>The Hearing Officer will decide on a request for third party status, after having requested comments from DG Competition.</p>	<p>More guidance is needed as to the nature of the assessment the Hearing Officer should perform after receiving the comments from DG Competition. In the interests of transparency and predictability for third parties and other parties, suggestions of the types of comments that will be provided and the assessment that the Hearing Officer will make of these comments when taking its decision should be provided.</p>

	Guidance	Comments
36	<p>If admitted, DG Competition will subsequently inform the interested third party of the nature and subject matter of the proceedings and provide a time-limit within which the party may submit written comments. Contrary to complainants, who are entitled to a non-confidential version of the Statement of Objections, it falls on DG Competition to determine the means by which a third party will be informed (see however points 17 and 18 above).</p>	<p>The Sections submit that the Commission should consider assigning a more decisive role in this process to the Hearing Officer.</p>
37	<p>The addressee(s) of a Statement of Objections will be informed of the identities of admitted third parties at the latest before the Oral Hearing. Only in exceptional circumstances may the Hearing Officer agree not to divulge an admitted third party's identity.</p>	<p>The Sections submit that the principle of “equality of arms” requires that addressees be informed of the identities of admitted third parties at the time they are admitted. Specifically, to provide such notice “at the latest before the oral hearing” -- i.e., as late as the start of the oral hearing -- is seriously inadequate, as it offers inadequate protection of the rights of the parties. The Sections suggest that the Commission consider adopting a requirement to “close” the procedure, in particular admission to the oral hearing, no later than five working days before the hearing so as to prevent “ambush” by third parties. The same should apply, absent exceptional circumstances, to disclosure of the identities of those who propose to appear as “witnesses” for any party. It is common to hear of experiences in which the identity of a person appearing at the hearing is revealed only on the day the hearing commences. This allows parties no real opportunity to verify the witness’s credentials or to research, for example, prior statements on subjects likely to be at issue during the hearing, upon which the witness might be questioned.</p>

	Guidance	Comments
	THE ORAL HEARING	
38	<p>38. The Oral Hearing provides addressees of the Statement of Objections as well as all other parties to the proceeding with the opportunity to orally express and develop their view as to the preliminary findings of the Commission. The purpose of the hearing is best served if the addressees and third parties explain whether and to what extent they disagree with the findings or can defend or justify themselves.</p> <p>These explanations may be supported by facts and evidence, including witness and/or expert testimony. The hearing also allows the Commission services to explain further the contested findings supported by facts and evidence, as contained in the Statement of Objections.</p>	<p>The exact nature of the oral hearing is not clear from the guidance. In particular, on the one hand, the guidance states that the hearing is to “orally express and develop their view as to the preliminary findings of the Commission” (which indicates a seminar-type arrangement), whereas, on the other hand, the oral hearing is to allow for addressees to “defend or justify themselves” and for the Commission “to explain further the contested findings” (which indicates a more adversarial proceeding). The guidance should make it clear how the two interact. As it is more desirable for the Commission to take decisions that are well reasoned and responsive to the counter-arguments raised by the addressees and other side during the oral hearing (with the aim of achieving a sound and well-supported decision, which ultimately will be more likely to be upheld by the courts) it would make sense for the oral hearing to involve more questions and answers.</p> <p><i>“The hearing also allows the Commission services to explain further the contested findings supported by facts and evidence, as contained in the Statement of Objections”.</i> It is unclear as to whether this means that the Commission will respond to the contested findings as outlined in the responses of the parties to the Statement of Objections or that the Commission will respond to the issues put forward by the parties in the oral hearing. If this relates to the former, i.e. the presentation from the Commission in the oral hearing, then this may not be</p>

	Guidance	Comments
		<p>sufficient insofar as the Commission may not provide a response to the issues raised in the oral hearing. The Sections suggest that the Commission may wish to consider whether the addressees (and the parties) should have the opportunity to question the Commission on its evidence and findings.</p> <p>The Sections also respectfully suggest that the parties have somewhat greater input into the setting of the time and duration of the hearing, The availability of key personnel and the time needed for presentations by the addressee and other parties should be taken into account.</p>
39	An addressee has a right to request an Oral Hearing within the time-limit for submitting its written comments to the Statement of Objections. On receiving a request it is for the Hearing Officer to determine where and when the hearing will take place. The Hearing Officer is not obliged to grant a request for an Oral Hearing if the request is not made within the deadline for receiving the comments. It is a matter of discretion for the Hearing Officer.	The Sections submit that the discretionary elements of this process should be removed. There should be a clear rule that parties must request a hearing within a specified time following issuance of the statement of objections. The tactical complexity of the current situation is inappropriate for an administrative process that is aimed at discovering the facts.
40	The Hearing Officer decides who will be invited to attend the Oral Hearing. With the exception of the competition authorities of the Member States, invited parties are expected to orally contribute to the hearing. Accordingly, observers will, as a general rule, not be invited.	See Comment to ¶42
41	Parties other than the addressee of the Statement of Objections may	See Comment to ¶42

	Guidance	Comments
	attend only if their request to do so has been accepted by the Hearing Officer in advance of the hearing. Complainants and interested third parties admitted to the proceedings do not automatically have the right to attend an Oral Hearing.	
42	As a general principle, applicants should be capable of contributing to the establishment of the truth and relevance of the facts and circumstances likely to be the focus of the hearing. Parties admitted to an Oral Hearing contribute to its purpose notably by means of an oral presentation. For reasons of effectiveness and efficiency it may be necessary to limit the number of participants. In this case the Hearing Officer may have to restrict admission, while ensuring that all views of the matter are fairly and sufficiently represented.	¶¶40-42 raise a fundamental issue. The Sections suggest that there should be clear rules on who has a right to attend the Oral Hearing. The Sections' experience is that parties will sometimes decline to request an Oral Hearing because of legitimate concern, based on some experience, that it will be turned into an unmanageable proceeding exploited by interested third parties in order to make unverifiable and self-serving claims. As a rule, the hearing should not be open to those who have not previously made clear written submissions of their views and credentials. Such verification would be facilitated to a great extent if it could be established earlier in the process whether an Oral Hearing is to take place.
43	Where necessary, the Hearing Officer may request further information from the applicant in order to assess its interest in the outcome of the proceedings or clarify issues and facts, in particular where the applicant has not, <i>prima facie</i> , satisfied the Hearing Officer of its contribution to the Oral Hearing. The Hearing Officer normally also asks for information on the applicant's intended presentation, such as an outline of the presentation, the length of time required, the proposed speakers and the evidence upon which the applicant intends	

	Guidance	Comments
	to rely.	
44	<p>Those invited to attend the Oral Hearing shall either appear in person, or be represented by persons duly authorised. These persons may be assisted by a lawyer.</p> <p>Whenever possible, undertakings should also be represented by a person from among their permanent staff and/or by persons that possess expertise of the relevant markets and industry, including, as the case may be, persons with direct knowledge of the facts.¹⁸ All representatives, agents and participants must be authorised to participate in advance by the Hearing Officer.</p>	
45	<p>The Hearing Officer will determine the date, the duration and the location of the Oral Hearing. The Oral Hearing will normally not take place before the written exchange of views has been concluded between all parties admitted to the Oral Hearing, and all parties have had sufficient time to review the written comments, where such exchange of views has been made available by DG Competition.</p> <p>New documents may not be submitted at the Oral Hearing without the prior authorization of the Hearing Officer.</p>	<p>This is another area where it might be useful to expand the role of the Hearing Officer. It may also be appropriate to provide for an exchange of views as a matter of right, rather than at the discretion of DG Competition.</p> <p>Please refer also to the comment on ¶38. In cases involving many parties and a lengthy Statement of Objections, an abbreviated hearing (one or two days) may be insufficient</p> <p>It might also be stipulated that the exchange of written views must be concluded before the Oral Hearing so as to ensure that the hearing will have maximum effect.</p> <p>The Sections also suggest that any “evidence”, whether in</p>

	Guidance	Comments
		documentary or other form, must be exchanged among all parties at least several business days before the hearing.
46	The Hearing Officer will also take all necessary preparatory steps to ensure the effectiveness and efficiency of the Oral Hearing. Such preparatory steps may include inviting specific persons to attend who are directly involved in the case, possess expertise of the relevant markets and industry or are able to contribute in any other useful way to clarify the issues a case raises. They may also include asking parties and/or a party in advance to address particular issues during the Oral Hearing, or present their views at the hearing on questions prepared in advance by the Hearing Officer. The Hearing Officer may invite parties and/or persons for a meeting to properly prepare the Oral Hearing. Parties are encouraged to discuss issues that the hearing should focus on by means of preparatory meetings where necessary.	The Commission should consider clarifying whether all parties invited to the Oral Hearing have a right to attend the preparatory meetings. It may also serve the interest of fair defense if responsible and senior DG Competition officials attend preparatory meetings as a matter of routine practice. Moreover, the parties should also be allowed to have input as to who will attend the hearing.
47	Prior to the Oral Hearing, parties will receive an information memorandum from the Hearing Office detailing what documents and the number of copies of documents they need to bring with them to the Oral Hearing ²⁰ and other more detailed information relating to the organisation of the hearing.	Although it may seem a minor point, it ought to be possible to have centralised copying. It appears that some parties deliberately withhold copies until late in the proceedings. A more consistent approach is needed.
48	For reasons of transparency the Hearing Office will publish the dates of future Oral Hearings on its web-site, when these have been finalised and the parties to the case have been duly informed thereof.	The Sections support the practice of publishing the hearing dates.

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	Such publication will be purely for information purposes only. The Oral Hearing itself is, however, not public.	
49	A provisional list of participants, together with the provisional agenda, will be distributed by the Hearing Office to all invited parties wherever possible at the latest three working days before the Oral Hearing. Only those persons admitted by the Hearing Officer will be allowed entry into the hearing room.	The Sections suggest that his requirement should be observed strictly. See also the comments on ¶¶35-42 and ¶45.
50	The agenda will be determined by the Hearing Officer, taking into account the number of attendees, the estimated amount of time required by the speakers and the complexity of the case. For reasons of procedural efficiency, the Hearing Officer will ensure that the timing of the agenda is adhered to as strictly as possible.	The Sections consider that strict adherence to the provisional timetable is important. Last minute switches are not uncommon and present huge challenges in particular for the travel plans of senior executives. More advance planning and an earlier fixing of the timetable would be of significant assistance.
51	Participants may request to be heard in an EU official language other than the language of proceedings. In such a case, interpretation into the language of the proceedings from this language, if it is another official EU language, will be provided as long as sufficient advance notice of such a language requirement is given to the Hearing Officer.	
52	Presentations will be given at the Oral Hearing by (i) the Commission, (ii) the addressees of the Statement of Objections, and (iii) third parties. As mentioned above (para. 43), the Hearing Officer may request the Commission, addressees and the third parties to provide	

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	an outline of their presentations in advance of the hearing (point 43 above).	
53	In order to protect their business secrets and any other confidential information, addressees and third parties invited to the Oral Hearing may request to give any sensitive parts of their presentation in a closed <i>in camera</i> session. Such requests must be made to the Hearing Officer in advance of the Oral Hearing, and must be duly motivated so as to allow a proper assessment of the need for an <i>in camera</i> session.	
54	In order to prevent the potential abuse by parties of <i>in camera</i> sessions, the Hearing Officer retains the right to reconsider the confidential nature of the information presented while the <i>in camera</i> session is in progress and determine at any time that the nature of the information is not as such to justify an <i>in camera</i> session and may duly terminate it, if considered necessary.	
55	Where an <i>in camera</i> session is permitted, the participants excluded from the session may only be advised of the subject matter of the presentation given. The party should be ready to give a summary (non-confidential) presentation either before or after the <i>in camera</i> session.	The provision of a non-confidential summary is a helpful practice. The Sections' experience is that this summary is not always provided.
56	So as to ensure the maximum effectiveness and efficiency, and where necessary to ensure that all relevant facts - whether favourable or unfavourable to the parties concerned, and including the factual	Ideally a substantial portion of the hearing should be devoted to the exchange of views, rather than to set-piece presentations that merely

	Guidance	Comments
	elements relating to the gravity and duration of the alleged infringement - are clarified as much as possible, the Hearing Officer will foresee time for questions and discussion during the hearing.	summarise earlier submissions.
57	The Hearing Officer may allow questions on any of the issues raised by a written or oral submission to be addressed to any participant by any participant. In principle, questions asked should be answered during the Oral Hearing. In the event that they cannot be answered in whole or in part, the Hearing Officer may allow a party to submit its reply in writing within a given deadline. Any such written response will, in principle, be distributed to all participants at the Oral Hearing.	<p>The Sections understand this to mean that participants may question Commission officials. However, we would suggest that it might be helpful to make this more explicit in the Guidance:</p> <ol style="list-style-type: none"> 1. "<i>May allow questions</i>" should be altered to "will allow". Parties should have a right to question the other participants' evidence. There should be time allocated for questioning on issues raised, rather than presenting this only as a possibility. 2. It should be clarified that the parties are able to put questions to the Commission, i.e. they should be given the opportunity to cross examine the Commission's evidence. <p>In reality it is not possible to prevent a party from submitting further comments to the case team, so the Commission should consider whether it would be preferable to acknowledge the practice and have a specific procedure with established deadlines.</p>
58	The Oral Hearing is not public and any information, discussions, presentations and documents disclosed during it may only be used for the purposes of judicial and/or administrative proceedings for the application of Articles 81 and 82 EC. They must not be disclosed or	The Commission may wish to provide additional guidance regarding the mechanisms by which these requirements are intended to be enforced, including a specification of any remedies that are available

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	used for any other purpose by any participant at the hearing, even after the case is closed by the Commission. This use restriction also applies to the recording of the Oral Hearing (section 6.5.6 below), as well as any visual presentations, where appropriate.	in case information from the Oral Hearing is nevertheless leaked.
59	In exceptional circumstances the Hearing Officer may permit a party to submit written comments or documents on the merits of the case, within a deadline set after the end of the Oral Hearing. This will usually only be permitted where an issue is raised during the Oral Hearing that requires further elaboration.	<p>It appears to the Sections that the high threshold of “exceptional circumstances” is not consistent with the Mandate (Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings). Article 12(4) says that the Hearing Officer may afford the submission of written comments after the oral hearing “where appropriate”. “Exceptional circumstances” is clearly a higher threshold.</p> <p>As indicated in response to ¶57, in reality it is not possible to prevent a party submitting further comments to the case team, so the Commission may wish to consider whether it would be preferable to acknowledge the practice and to have a specific procedure with established deadlines.</p>
60	The Oral Hearing will be recorded, and for reasons of confidentiality any <i>in camera</i> sessions will be recorded separately. If requested, the recording will be made available to the parties who participated as soon as possible after the hearing has finished.	

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61	After the Oral Hearing, the Hearing Officer reports on the written and oral procedure to date to the Commissioner responsible for competition (<i>Interim Report</i>). In particular, this 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. It may also make observations on any other specific procedural issues brought to the attention of the Hearing Officer by any party during the procedure.	The confidentiality of the Interim Report seems troubling. Transparency suggests that the purpose of the Interim Report should be explained and that the Interim Report itself should be made available to all parties.
62	In addition to the report on the procedural aspects of the case, the Hearing Officer usually also makes observations on the substance of the case to the Commissioner. Such observations focus on the Commission's findings contested by the parties, which are liable to have decisive importance for the outcome of the proceedings and may relate to the withdrawal of certain objections, the formulation of further objections or, in any other way, make suggestions as to the further progress of the proceedings.	The Sections welcome this positive reference to the Hearing Officer's observations on the substance of the case. The opportunity for expression of views by a participant in the process who is not completely aligned with either the Commission or the parties is likely to be a positive contribution.
63	The Interim Report and any additional observations are internal to the Commission's decision-making process and are therefore not accessible to the parties to the proceedings.	The Commission may wish to consider whether the Interim Report should be made available to the parties in the interest of transparency.
64	Any issue with regard to the rights of defence in the context of a Supplementary Statement of Objections or a Letter of Facts that is not resolved with DG Competition may be addressed to the Hearing	

	Guidance	Comments
	Officer.	
	OTHER PROCEDURES	
65	Where the Commission considers that there are insufficient grounds for pursuing a complaint it will inform the complainant thereof in writing and set a time-limit within which the complainant may submit its comments in writing. If the complainant considers that the time-period granted is insufficient, a reasoned request for an extension of the deadline may be submitted to the Hearing Officer.	The Commission may wish to consider whether it would be preferable that the Hearing Officer set the applicable time limits, taking into account what is reasonable in all the circumstances, including the time that the Commission has itself taken to reach its decision.
66	A complainant that has been informed of the Commission's provisional intention to reject the complaint is entitled, upon request, to access the documents in the Commission's investigation file on which the Commission has based its preliminary assessment. If the complainant considers that the documents to which access has been granted are insufficient to allow it to effectively exercise the right to be heard, and has reason to believe that the Commission has in its possession more documents that have not been disclosed, a reasoned request for additional access can be submitted to the Hearing Officer. Such a request may not be couched in general terms (see above p.20).	It may be difficult for complainants to know precisely what documents the Commission has in its possession. The Sections recommend that complainants should be allowed to provide a reasonable description of the documents required and/or that there be a general form for making such a request. The Commission may also wish to consider whether as a matter of routine a member of the Hearing Officers' staff should review the file and verify that the Commission is providing appropriate disclosure. Without some such safeguard it may be impractical to expect affected parties to vindicate their interests.
67	In proceedings where the Commission intends to issue a commitment decision in application of Article 9 of Regulation No. 1/2003, the	

	Guidance	Comments
	Hearing Officer, as in proceedings leading to the adoption of a prohibition decision, will safeguard the respect of an undertaking's rights of defence. If a commitment decision is adopted on the basis of a Preliminary Assessment not taking the form of a Statement of Objections, the undertaking's rights of defence are normally exercised in a less extensive manner than when such a decision is adopted after a Statement of Objections. This reflects the more consensual nature of such commitment procedures.	
68	In cases where the Commission adopts a commitment Decision, the Hearing officer will produce a Final Report (see Section 9.1 below) taking into account, in particular, that the undertaking concerned has been put in a position to propose adequate commitments, or to modify them following a market test, to meet the competition concerns expressed by the Commission.	
69	Following the Oral Hearing the Hearing Officer is kept informed on the further progress of the proceedings by DG Competition and, where appropriate, participates directly in the Commission's further deliberations up to the stage of the draft Decision to be submitted to the College of Commissioners for adoption.	The Sections recommend that further guidance should be provided as to what principles or rules will govern this direct participation by the Hearing officer in DG Competition deliberations. There should be safeguards to ensure that the Hearing Officer's independence is not compromised by such participation.
70	A draft Decision will be scrutinized by the Hearing Officer with a view	It is important that the Hearing Officer be given a reasonable period to

	Guidance	Comments
	to determining whether the addressees' rights of defence and the procedural rights of all parties to the proceedings have been safeguarded. Any findings in this regard will be recorded by the Hearing Officer in a Final Report. The Hearing Officer will also consider the extent to which the draft decision deviates in any material respects from the Statement of Objections.	review the draft before issuing the Decision. See also our similar comment on ¶71 with regard to National Competition Authorities..
71	A draft of the Final Report is provided to the Advisory Committee, so as to allow it to take the Hearing Officer's views into account in its assessment of the case.	<p>The Commission may wish to consider whether this Final Report should be required to identify any deviations from the Statement of Objections, and possibly provide reasons as to why the Commission changed its views from SO to draft decision, and/or provide for the Hearing Officer's opinion on such deviation, or lack of change despite evidence provided.</p> <p>In accord with earlier positive comments on enhancing the role of the Hearing Officer with regard to the substance of the case, we encourage the Commission to welcome the Hearing Officer's expression of views on the substance of the draft Decision in the Final Report.</p> <p>See our comment under paragraph 70 that the Hearing Officer must be afforded sufficient time and information to review the draft Decision. The same comment is appropriate with regard to the time afforded to the NCA's to review the Final Report.</p>
72	After the Advisory Committee the Hearing Officer's Report will be finalized and submitted, together with the draft Decision, to the	

	Guidance	Comments
	College of Commissioners to ensure that, when it reaches a decision on the case, it has been fully appraised of all relevant information as regards the course of the procedure and the procedural rights of all parties to the proceedings. The Hearing Officer may amend the Final Report in the light of any amendments to the draft Decision up to the time the Decision is adopted by the Commission.	
73	Subsequently, the Final Report is sent to the addressees together with the Commission's Decision.	
74	The Hearing Officer's Final Report, together with a summary of the Commission's Decision, is published in the Official Journal of the European Union. The Final Report is also made available on the Hearing Officers' web-site and on DG Competition's web-site to accompany the summary of the Decision and subsequently the non-confidential version of the Decision.	The Commission may wish to consider whether it would help prevent unnecessary delay to permit the Hearing Officer to become involved in ensuring prompt publication of decisions.
75	The Hearing Officer will decide on any disputes between a natural or legal person referred to in a Decision and DG Competition which concern the protection of personal and/or confidential information that may arise during the publication process of the non-confidential version of the Decision. The procedure applying to these disputes is the same as in the <i>inter-partes</i> phase (cf. section 4.1.2 above).	

	Guidance	Comments
76	This Guidance may be revised as and when required to reflect changes to legislation and/or administrative practice and the interpretation of those by the European courts.	

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
TO THE EUROPEAN COMMISSION
REGARDING CONSULTATION DOCUMENTS ON
IMPROVED TRANSPARENCY AND PREDICTABILITY IN COMPETITION PROCEEDINGS**

**Best Practices for Antitrust Proceedings,
Best Practices for the Submission of Economic Evidence
(Both in Antitrust and Merger Proceedings) and
Guidance on the Role of the Hearing Officers in the Context of Antitrust Proceedings**

March 3, 2010

The views expressed herein are presented jointly on behalf of these Sections only. These Comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

INTRODUCTION

The Section of Antitrust Law and the Section of International Law of the American Bar Association (collectively, “Sections”) submit the following comments in response to the public consultation commenced on 6 January 2010 by the European Commission (Commission) in connection with procedures, submission of economic evidence, and guidance on the role of the Hearing Officers in competition proceedings, as described in the three Consultation Documents issued simultaneously with the public notice of the consultation. The Commission indicated that the Consultation Documents will be applied provisionally as from that date, and that it would consider adjustments to those documents based on views submitted by interested parties.¹

In announcing the consultation, Commissioner Kroes commented, “The Commission has consistently given high priority to due process and fairness in antitrust proceedings. These three documents provide companies with further certainty and transparency about the relationship between them and the Commission during an antitrust case. I warmly invite all stakeholders to provide us with their comments on how to yet further improve our practices.” The Sections strongly support the Commission’s commitment to due process and fairness in antitrust proceedings. They also note the extensive detail and high degree of care evident in the Consultation Documents, which could serve as a positive model for similar initiatives by other competition agencies. The Commission has undertaken a series of useful amendments to its practices, as described in the Consultation Documents, in order to clarify and enhance the predictability of the obligations of parties to the Commission’s competition proceedings, as well as the Commission’s reciprocal responsibilities in the conduct of its proceedings. While the Sections present a number of comments intended to suggest further improvements, in general they strongly support the numerous positive and helpful contributions of the Consultation Documents.

¹ See, Commission Press Release, “Antitrust: improved transparency and predictability of proceedings”, 6 January 2010, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&guiLanguage=en> (visited 8 February 2010).

The membership of the Sections includes over 33,000 lawyers, economists and other professionals from over forty-five countries, although most are based in the United States. The Sections hope and intend that these comments will assist the Commission in evaluating and amending, as appropriate, the practices described in the Consultation Documents. These comments were drafted from the perspective of the Sections and are grounded on the historical development of the U.S. antitrust law insofar as this development has involved extensive experience with similar issues. However, these comments also draw heavily upon the experience of members of the Sections who practice competition law in the EU, either as the primary focus of their practice or as part of a competition practice transcending particular jurisdictions.

While the Sections limit their comments to the Consultation Documents, we believe that the Commission should at an appropriate time solicit comment on certain more fundamental issues that underlie the procedures employed for resolution of competition cases before the Commission. A large number of commentators have applauded the protections afforded European citizens by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“Convention”) that ensure fair treatment and due process by government instrumentalities. Indeed this year the Franklin D. Roosevelt Four Freedoms Award was bestowed on the European Court of Human Rights *inter alia* for its enforcement of the right to a fair trial. While the Sections do not take a view as to application of the Convention to the decision-making process in EU competition cases, we do note the importance of due process by independent and impartial decision-makers in cases brought by government instrumentalities generally. As indicated above, in launching this consultation Commissioner Kroes noted the importance of both due process and fairness in proceedings brought under EU competition law.

The procedural fairness of the Commission’s decision-making process in competition cases has not been free from criticism. That the investigations, decisions to initiate proceedings and findings of liability are all made by the same entity, *i.e.*, the Commission, is an often cited example. The institutional limitations on the opportunity of undertakings to test allegations of fact is another. The degree of deference accorded to the Commission by the EU courts and the deliberate pace of appellate proceedings have also evoked concerns. As a final example, the Commission's views on Legal Professional Privilege in competition proceedings have stimulated some controversy. While the Sections do not address those issues here, we do respectfully suggest that at an appropriate time the Commission should solicit public comments on and undertake an examination of each of these issues in terms of their ultimate effect on the fairness, accuracy and efficiency with which its competition cases are brought and decided.

The comments of the Sections are provided paragraph-by-paragraph according to the numbering scheme adopted in each of the three Consultation Documents. The Sections would be pleased to explain or expand upon their comments in greater detail, or to assist the Commission in any other appropriate way.