



## European Commission Adopts New Antitrust Procedures Package and Modifies Hearing Officer's Mandate

October 18, 2011

On October 17, 2011, the European Commission released its Best Practices Notice for the conduct of proceedings concerning Articles 101 and 102 TFEU ("Antitrust Best Practices Notice") and Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases ("Economic Evidence Notice"). The European Commission also revised the Hearing Officer's mandate by adopting a new decision on the function and terms of reference of the hearing officer in certain competition proceedings ("Hearing Officer's Mandate Decision").

Both the Antitrust Best Practices Notice and the Economic Evidence Notice will apply to future cases but also to cases pending on the date of their release.

### THE ANTITRUST BEST PRACTICES NOTICE

The Antitrust Best Practices Notice attempts to provide more clarity on antitrust proceedings under Articles 101 and 102 TFEU with a view to increasing both the "transparency and fairness of competition proceedings" in at least four respects.<sup>1</sup>

*Statement of Objections and Possible Imposition of Fines* - The Antitrust Best Practices Notice requires that a Statement of Objections should clearly indicate, *inter alia*, whether the European Commission is contemplating imposing fines and, if so, the essential factual and legal elements supporting a fine, including factors related to calculating the fine, such as "the relevant sales figures to be taken into account and the year(s) that will be considered for the value of such sales."

*State of Play Meetings* - The Antitrust Best Practices Notice requires the European Commission to offer State of Play Meetings at different key steps of the procedure. In the context of Article 102 TFEU proceedings, State of Play Meetings should take place (i) shortly after the opening of the proceedings, (ii) at a sufficiently advanced stage in the investigation and (iii) either after the reply to a Statement of Objections or after the Oral Hearing. In the context of Article 101 TFEU proceedings, a State of Play Meeting should take place after the Oral Hearing.

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<sup>1</sup> The Antitrust Best Practices Notice does not apply to specific proceedings such as infringement proceedings against Member States under Article 106 TFEU in conjunction with either Article 101 and/or 102 TFEU, nor does it apply to proceedings conducted under the Commission Notice on Immunity from fines and reduction of fines in cartel cases.

In addition, the Antitrust Best Practices Notice also extends State of Play Meetings to complainants in the instances where the European Commission initially opened proceedings, but ultimately decided to reject the complaint. Finally, in the context of commitment decisions, two State of Play Meetings should be offered to the parties, *i.e.*, after the initiation of commitment discussions with the European Commission and after the commitments have been market tested.

*Access to “Key Submissions”* – The Parties will have access to a non-confidential version of the complaint at an early stage or, at the latest, shortly after the opening of the proceedings. In addition, parties will also have access to non-confidential versions of other “key submissions,” such as significant submissions of the complainant or interest third parties, shortly after the opening of the proceedings. Access to “key submissions” does not apply to proceedings under Article 101 TFEU.

*Publication of Rejection Complaints* – Under the Antitrust Best Practices Notice, the European Commission commits to publish *all* decisions rejecting a complaint, not only those of a “general interest.” The European Commission, however, may decide to publish either its entire decisions or summaries.

## THE HEARING OFFICER’S MANDATE DECISION

The Hearing Officer’s Mandate Decision attempts to strengthen the role of the Hearing Officer, thereby increasing the procedural rights of the parties. First, while the previous mandate decision recognized that the Hearing Officer has to be an “independent person,” the Hearing Officer’s Mandate Decision expressly recognizes, for the first time, that the Hearing Officer should also “operate as an independent arbiter.”

Second, the Hearing Officer will now be involved from the *beginning* of an investigation. Previously, the Hearing Officer became involved only *after* the issuance of a Statement of Objections. In this regard, the most fundamental and new aspects of the Hearing Officer’s Mandate Decision are as follows:

*Claims Over Legal Professional Privilege* – Parties may now submit to the Hearing Officer their claims regarding documents requested by, but withheld from, the European Commission on the basis of legal professional privilege. To do so, however, parties must consent to the Hearing Officer viewing the information claimed to be privileged, along with any other related documents that the Hearing Officer may deem necessary for its decision.

*Privilege Against Self-Incrimination* – When Parties believe that a request for information from the European Commission would violate their privilege against self incrimination, they may refer the matter to the Hearing Officer. Parties have to submit these claims in “due time” following receipt of the request for information.

*Deadlines for Replying to a Decision Formally Requesting Information* – Parties that believe that the time-limit imposed by the European Commission in a decision formally requesting information is too short may contact the Hearing Officer *before* the expiry of the initial time-limit decided by

the European Commission. The Hearing Officer will then decide whether an extension should be granted.

*Information Regarding the Procedural Status of a Company* – Companies that are subject to investigative measures adopted by the European Commission, e.g., inspections, simple requests for information or decisions formally requesting information, have the right to be informed of their procedural status. Companies believing that the European Commission did not appropriately inform them regarding their procedural status may now contact the Hearing Officer.

## THE ECONOMIC EVIDENCE NOTICE

The Economic Evidence Notice provides guidance on the submission of economic evidence in both antitrust proceedings under Articles 101 and 102 TFEU as well as in merger cases under the EU Merger Regulation. Among other things, the Economic Evidence Notice describes the standards that such analyses should observe, such as how the relevant questions should be formulated, how to check the relevance and reliability of the data submitted, the criteria for selecting the empirical methodology used in the submission and guidance on how the results should be reported and interpreted. Importantly, the Economic Evidence Notice recommends that the parties consult the European Commission at an early stage to discuss the types of empirical analyses that the parties may consider undertaking and the most suitable checks to be applied.

In addition, the Economic Evidence Notice provides guidance to respond to European Commission requests for quantitative data, either in the context of merger control or of proceedings under Articles 101 and/or 102 TFEU.

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