

**DG COMPETITION**

**Best Practices**

**on**

**the conduct of EC merger control proceedings**

**1. SCOPE AND PURPOSE OF THE BEST PRACTICES**

1. The principal aim of these Best Practices is to provide guidance for interested parties on the day-to-day conduct of EC merger control proceedings. They are intended to foster and build upon a spirit of co-operation and better understanding between DG Competition and the legal and business community. 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 review process. In particular, they aim at making the short time available in EC merger procedures as productive and efficient as possible for all parties concerned.
2. The Best Practices are built on the experience to date of DG Competition in the application of Council Regulation (EEC) No 4064/89<sup>1</sup> (the Merger Regulation) and replace the current Best Practices of 1999. They reflect the views and practice of DG Competition at the time of publication<sup>2</sup>.

The specificity of an individual case may require an adaptation of, or deviation from these Best Practices depending on the case at hand.

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<sup>1</sup> Council Regulation No 4064/89, OJ L 395, 30.12.1989 p. 1; corrigendum OJ L 257 of 21.9.1990, p. 13; Regulation as last amended by Regulation (EC) No 1310/97 (OJ L 180, 9. 7. 1997, p. 1, corrigendum OJ L 40, 13.2.1998, p. 17).

<sup>2</sup> It is to be noted that a recast Merger Regulation replacing Regulation 4064/89 will apply from 1 May 2004. The Best Practices are equally applicable under Regulation 4064/89 and will continue to be applicable, possibly with further amendments, under the recast Merger Regulation. Appropriate references to the recast Merger Regulation are made throughout the Best Practices by means of footnotes. Those references will only become applicable from 1<sup>st</sup> of May 2004.

## **2. RELATIONSHIP TO COMMUNITY LAW**

3. These Best Practices should not be taken as a full or comprehensive account of the relevant legislative, interpretative and administrative measures which govern Community merger control. They should be read in conjunction with such measures.
4. The Best Practices do not create or alter any rights or obligations as set out in the Treaty establishing the European Community, the Merger Regulation, its Implementing Regulation<sup>3</sup> as amended from time to time and as interpreted by the case-law of the Community Courts. Nor do they alter the Commission's interpretative notices. The Best Practices do not apply to proceedings under Council Regulation No 17<sup>4</sup>, to be replaced by Council Regulation No 1/2003<sup>5</sup> as of 1 May 2004, implementing Articles 81 and 82 of the Treaty.

## **3. PRE-NOTIFICATION**

### *Purpose of pre-notification contacts*

5. In DG Competition's experience the pre-notification phase of the procedure is an important part of the whole review process. As a general rule, DG Competition finds it useful to have pre-notification contacts with notifying parties even in seemingly non-problematic cases. DG Competition will therefore always give notifying parties and other involved parties the opportunity, if they so request, to discuss an intended concentration informally and in confidence prior to notification (cf. also Recital 10 Implementing Regulation).
6. Pre-notification contacts provide DG Competition and the notifying parties with the possibility, prior to notification, to discuss jurisdictional and other legal issues. They also serve to discuss issues such as the scope of the information to be submitted and to prepare for the upcoming investigation by identifying key issues and possible competition concerns (theories of harm) at an early stage.
7. Further, it is in the interests of DG Competition and the business and legal community to ensure that notification forms are complete from the outset so that declarations of incompleteness are avoided as far as possible. It is DG Competition's experience that in cases in which notifications have been declared incomplete, usually there were no or very limited pre-notification contacts. Accordingly, for this reason it is recommended that notifying parties contact DG Competition prior to notification.
8. Pre-notification discussions are held in strict confidence. The discussions are a voluntary part of the process and remain without prejudice to the handling and investigation of the case following formal notification. However, the mutual benefits

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<sup>3</sup> Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in the Merger Regulation, OJ L 61, 2.3.1998, p.1.

<sup>4</sup> OJ P 013, 21/02/1962, p. 204 – 211.

<sup>5</sup> 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, 04.01.2003, p. 1-25.

for DG Competition and the parties of a fruitful pre-notification phase can only materialise if discussions are held in an open and co-operative atmosphere, where all potential issues are addressed in a constructive way.

9. In DG Competition's experience it is generally preferable that both legal advisers and business representatives, who have a good understanding of the relevant markets, are available for pre-notification discussions with the case-team. This normally results in more informed discussions on the business rationale for the transaction and the functioning of the markets in question.

***Timing and extent of pre-notification contacts***

10. Pre-notification contacts should preferably be initiated at least two weeks before the expected date of notification. The extent and format of the pre-notification contacts required is, however, linked to the complexity of the individual case in question. In more complex cases a more extended pre-notification period may be appropriate and in the interest of the notifying parties. In all cases it is advisable to make contact with DG Competition as soon as possible as this will facilitate planning of the case.
11. Pre-notification contacts should be launched with a submission that allows the selection of an appropriate DG Competition case-team<sup>6</sup>. This memorandum should provide a brief background to the transaction, a brief description of the relevant sector(s) and market(s) involved and the likely impact of the transaction on competition in general terms. It should also indicate the case language. In straightforward cases, the parties may choose to submit a draft Form CO as a basis for further discussions with DG Competition.
12. After initial contacts have been made between the case-team and the notifying parties, it will be decided, whether it will suffice for DG Competition to make comments orally or in writing on the submissions made. This would typically be considered in straightforward cases. In more complex cases and cases that raise jurisdictional or other procedural issues, one or more pre-notification meetings are normally considered appropriate.
13. The first pre-notification meeting is normally held on the basis of a more substantial submission or a first draft Form CO. This allows for a more fruitful discussion about the proposed transaction in question or potential issue in point. Subsequent meetings may cover additional information submitted or outstanding issues.
14. Any submission sent to DG Competition should be provided sufficiently ahead of meetings or other contacts in order to allow for well prepared and fruitful discussions. In this regard, preparatory briefing memoranda/ draft Form COs sent in preparation of meetings should be filed in good time before the meeting (at least three working days) unless agreed otherwise with the case team. In case of voluminous submissions and in less straightforward cases, this time may need to be extended to allow DG Competition to properly prepare for the meeting.

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<sup>6</sup> Case teams for new cases are normally set up in weekly DG Competition's Merger Management Meetings.

15. Irrespective of whether pre-notification meetings have taken place or not, it is advisable that the notifying parties systematically provide a substantially complete draft Form CO before filing a formal notification. DG Competition would thereafter normally require five working days to review the draft before being asked to comment, at a meeting or on the telephone, on the adequacy of the draft. In case of voluminous submissions, this time will normally be extended.

***Information to be provided / preparation of the Form CO***

16. The format and the timing of all prenotification submissions should be decided together with the case-team. Notifying parties are advised to fully and frankly disclose information relating to all potentially affected markets and possible competition concerns, even if they may ultimately consider that they are not affected and notwithstanding that they may take a particular view in relation to, for example, the issue of market definition. This will allow for an early market testing of alternative market definitions and/or the notifying parties' position on the market/s in question. In DG Competition's experience this approach minimises surprise submissions from third parties, and may avoid requests for additional information from the notifying parties at a late stage in the procedure and possible declarations of incompleteness under Article 4(2) of the Implementing Regulation or a decision under Article 11(5) of the Merger Regulation.
17. In addition, DG Competition recommends that notifying parties should, as early as possible in pre-notification, submit internal documents such as board presentations, surveys, analyses, reports and studies discussing the proposed concentration, the economic rationale for the concentration and competitive significance or the market context in which it takes place. Such documents provide DG Competition with an early and informed view of the transaction and its potential competitive impact and can thus allow for a productive discussion and finalisation of the Form CO.
18. Where appropriate, it is also recommended that notifying parties put forward, already at the pre-notification stage, any elements demonstrating that the merger leads to efficiency gains that they would like the Commission to take into account for the purposes of its competitive assessment of the proposed transaction. Such claims are likely to require extensive analysis. It is thus in the interests of the notifying parties to present these claims as early as possible to allow sufficient time for DG Competition to appropriately consider these elements in its assessment of a proposed transaction.
19. Pre-notification discussions provide the opportunity for the Commission and the notifying parties to discuss the amount of information to be provided in a notification. The notifying parties may in pre-notification request the Commission to waive the obligation to provide certain information that is not necessary for the examination of the case. All requests to omit any part of the information specified should be discussed in detail and any waiver has to be agreed with DG Competition prior to notification<sup>7</sup>.

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<sup>7</sup> See Article 3(2) Implementing Regulation. See also Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EEC) No 4064/89, OJ C217, 29.07.2000, p. 32.

***Completeness of the notification***

20. Given that a notification is not considered effective until the information to be submitted in Form CO is complete in all material respects, the notifying parties and their advisers should ensure that the information contained in Form CO has been carefully prepared and verified: incorrect and misleading information is considered incomplete information<sup>8</sup>. In this regard, the notifying parties should take special care that the appropriate contact details are provided for customers, suppliers and competitors. If such information is not correct or provided in full it will significantly delay the investigation and therefore may lead to a declaration of incompleteness.
21. Further, to facilitate the effective and expeditious handling of their notification, notifying parties should also endeavour to provide the contact details required in Form CO electronically, at the latest on the day of notification, using the appropriate electronic form which can be provided by the case team.
22. Provided that the notifying parties follow the above described guidance, DG Competition will in principle, be prepared to confirm informally the adequacy of a draft notification at the pre-notification stage or, if appropriate, to identify in what material respects the draft Form CO is incomplete. However it has to be recognised that it will not be possible for DG Competition to exclude the fact that it may have to declare a notification incomplete in appropriate cases after notification.
23. In the event that DG Competition discovers omissions in the Form CO after formal notification, the notifying parties may be given an opportunity to urgently put right such omissions before a declaration of incompleteness is adopted. Due to the time constraints in merger procedures, the time allowed for such rectification is normally limited to 1 or 2 days. This opportunity will not be granted, however, in cases where DG Competition finds that the omissions immediately hinder the proper investigation of the proposed transaction.

***Procedural questions and inter-agency co-operation***

24. In addition to substantive issues, the notifying parties may in the pre-notification phase seek DG Competition's opinion on procedural matters such as jurisdictional questions.
25. Informal guidance may be provided if they are directly related to an actual, planned transaction and if sufficiently detailed background information is submitted by the notifying parties to properly assess the issue in question<sup>9</sup>. Further matters for pre-notification discussions include the possibility of referrals to or from national EU jurisdictions<sup>10</sup>, parallel proceedings in other non-EU jurisdictions and the issue of

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<sup>8</sup> In addition, the Commission may impose fines on the notifying parties where they supply incorrect or misleading information in a notification under Article 14 (1)(b) Merger Regulation.

<sup>9</sup> Such informal guidance cannot be regarded as creating legitimate expectations regarding the proper interpretation of applicable jurisdictional or other rules.

<sup>10</sup> Such jurisdictional discussions will become particularly pertinent under the recast Merger Regulation, which becomes applicable from 1 May 2004. Pursuant to Articles 4(4) and 4(5) of the recast Merger Regulation, notifying parties may, before notification, request on the basis of a

waivers on information sharing with other jurisdictions. As regards transactions likely to be reviewed in more than one jurisdiction, DG Competition invites the notifying parties to discuss the timing of the case with a view to enhance efficiency of the respective investigations, to reduce burdens on the merging parties and third parties, and to increase overall transparency of the merger review process. In this regard, notifying parties should also have regard to the EU-US Best Practices on co-operation in merger investigations<sup>11</sup>.

#### **4. FACT FINDING / REQUESTS FOR INFORMATION**

26. In carrying out its duties the Commission may obtain all necessary information from relevant persons, undertakings, associations of undertakings and competent authorities of Member States (see Article 11(1) Merger Regulation). That investigation normally starts after the notification of a proposed concentration. However, DG Competition may exceptionally decide that, in the interest of its investigation, market contacts could be initiated informally prior to notification. Such pre-notification contacts/enquiries would only take place if the existence of the transaction is in the public domain and once the notifying parties have had the opportunity to express their views on such measures.
27. The Commission's investigation is mainly conducted in the form of written Requests for Information (requests pursuant to Article 11 of the Merger Regulation) to customers, suppliers, competitors and other relevant parties. Such requests may also be addressed to the notifying parties. In addition to such Article 11 requests, the views of the notifying parties, other involved parties and third parties are also sought orally.
28. In the interest of an efficient investigation, DG Competition may consult the notifying parties, other involved parties or third parties on methodological issues regarding data and information gathering in the relevant economic sector. It may also seek external economic and/or industrial expertise and launch its own economic studies.

#### **5. COMMUNICATION AND MEETINGS WITH THE NOTIFYING PARTIES, OTHER INVOLVED PARTIES AND 3<sup>RD</sup> PARTIES**

29. One of the aims of these Best Practices is to enhance transparency in the day to day handling of merger cases and in particular, to ensure good communication between DG Competition, the merging parties and third parties. In this regard, DG Competition endeavours to give all parties involved in the proceeding ample opportunity for open and frank discussions and to make their points of view known throughout the procedure.

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reasoned submission, referral of a case to or from the Commission. DG Competition will be ready to discuss with notifying parties informally the possibility of such pre-notification referrals and to guide them through the pre-notification referral process.

<sup>11</sup> [http://europa.eu.int/comm/competition/mergers/others/eu\\_us.pdf](http://europa.eu.int/comm/competition/mergers/others/eu_us.pdf)

## **5.1. State of Play meetings with notifying parties**

### *Aim and format of the State of Play meetings*

30. The objective of the State of Play meetings is to contribute to the quality and efficiency of the decision-making process and to ensure transparency and communication between DG Competition and the notifying parties. As such these meetings should provide a forum for the mutual exchange of information between DG Competition and the notifying parties at key points in the procedure. They are entirely voluntary in nature.
31. State of Play meetings may be conducted in the form of meetings at the Commission's premises, or alternatively, if appropriate, by telephone or videoconference. In order for the meetings to operate properly they should be carefully prepared on the basis of an agenda agreed in advance. Further, senior DG Competition management will normally chair the meetings.
32. The State of Play meetings will not exclude discussions and exchanges of information between the notifying parties and DG Competition at other occasions throughout the procedure as appropriate. In this regard, notifying parties are advised to inform DG Competition, as soon as possible, about any important procedural or substantive developments that may be of relevance for the assessment of the proposed transaction. Such developments may include any remedy proposals the notifying parties are offering or are considering to offer in other jurisdictions, so as to facilitate co-ordination of the timing and substance of such remedy proposals. This also concerns matters already discussed at a State of Play meeting, in respect of which the parties consider it necessary to provide additional comments.

### *Timing of the State of Play meetings*

33. Notifying parties will normally be offered the opportunity of attending a State of Play meeting at the following five different points in the Phase I and Phase II procedure:
  - a) where it appears that "serious doubts" within the meaning of Article 6(1)(c) of the Merger Regulation are likely to be present a meeting will be offered before the expiry of 3 weeks<sup>12</sup> into Phase I. In addition to informing the notifying parties of the preliminary result of the initial investigation, this meeting provides an opportunity for the notifying parties to prepare the formulation of a possible remedy proposal in Phase I before expiry of the deadline provided in Article 18 of the Implementing Regulation.
  - b) normally within 2 weeks following the adoption of the Article 6(1)(c) decision. In order to prepare for this meeting, the notifying parties should provide DG Competition with their comments on the Article 6(1)(c) decision and on any documents in the Commission's file, which they may have had the opportunity to review (see below section 7.2) by way of a written memorandum in advance of the meeting. The notifying parties should contact the case team to discuss an appropriate schedule for the filing of this memorandum.

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<sup>12</sup> Fifteen working days under the recast Merger Regulation.

The main purpose of the post Article 6(1)(c) meeting is to facilitate the notifying parties' understanding of the Commission's concerns at an early stage of the Phase II proceedings. The meeting also serves to assist DG Competition in deciding the appropriate framework for its further investigation by discussing with the notifying parties matters such as the market definition and competition concerns outlined in the Article 6(1)(c) decision. The meeting is also intended to serve as a forum for mutually informing each other of any planned economic or other studies. The approximate timetable of the Phase II procedure may also be discussed<sup>13</sup>.

- c) before the issuing of a Statement of Objections (SO). This pre-SO meeting gives the notifying parties an opportunity to understand DG Competition's preliminary view on the outcome of the Phase II investigation and to be informed of the type of objections DG Competition may set out in the SO. The meeting may also be used by DG Competition to clarify certain issues and facts before it finalises its proposal on the issuing of a SO.
- d) following the reply to the SO and the Oral Hearing. This post-SO State of Play meeting provides the notifying parties with an opportunity to understand DG Competition's position after it has considered their reply and heard them at an Oral Hearing. If DG Competition indicates that it is minded to maintain some or all of its objections, the meeting may also serve as an opportunity to discuss the scope and timing of possible remedy proposals<sup>14</sup>.
- e) before the Advisory Committee meets. The primary purpose of this meeting is to enable the notifying parties to discuss with DG Competition its views on any proposed remedies and where relevant, the results of the market testing of such remedies. It also provides the notifying parties where necessary, with the opportunity to formulate improvements to their remedies proposal<sup>15</sup>.

## **5.2. Involvement of third parties**

- 34. According to Community merger control law, third parties considered as having a “sufficient interest” in the Commission’s procedure include customers, suppliers, competitors, members of the administration or management organs of the undertakings concerned or recognised workers’ representatives of those undertakings<sup>16</sup>. Their important role in the Commission’s procedure is stressed in particular in Article 18(4) of the Merger Regulation and Articles 16(1) and (2) of the

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<sup>13</sup> Once the recast Merger Regulation becomes applicable, this post Article 6(1)(c) State of Play meeting will also serve to discuss the possibility of any extensions to the Phase II deadline pursuant to Article 10(3) of the recast Merger Regulation.

<sup>14</sup> It is to be noted that, under the recast Merger Regulation (Article 10(3)), the submission of remedies could lead to an automatic extension of the Phase II deadline.

<sup>15</sup> Modifications to remedies are only possible under those conditions set out in Article 18 of the Implementing Regulation and point 43 of the Commission’s Notice on Remedies.

<sup>16</sup> See Article 11 of the Implementing Regulation.



Implementing Regulation. In addition, the Commission also welcomes the views of any other interested third parties including consumer organisations<sup>17</sup>.

35. The primary way for third parties to contribute to the Commission's investigation is by means of replies to requests for information (Article 11 Merger Regulation)<sup>18</sup>. However, DG Competition also welcomes any individual submission apart from direct replies to questionnaires, where third parties provide information and comments they consider relevant for the assessment of a given transaction. DG Competition may also invite third parties for meetings to discuss and clarify specific issues raised.
36. In addition, DG Competition may in the interest of the investigation in appropriate cases provide third parties that have shown a sufficient interest in the procedure with an edited version of the SO from which business secrets have been removed, in order to allow them to make their views known on the Commission's preliminary assessment. In such cases, the SO is provided under strict confidentiality obligations and restrictions of use, which the third parties have to accept prior to receipt.
37. If third parties wish to express competition concerns as regards the transaction in question or to put forward views on key market data or characteristics that deviate from the notifying parties' position, it is essential that they are communicated as early as possible to DG Competition, so that they can be considered, verified and taken into account properly. Any point raised should be substantiated and supported by examples, documents and other factual evidence. Furthermore, in accordance with Article 17(2) of the Implementing Regulation, third parties should always provide the DG Competition with a non-confidential version of their submissions at the time of filing or shortly thereafter to facilitate access to the file and other measures intended to ensure transparency for the benefit of the decision making process (see further below section 7).

### **5.3. "Triangular" and other meetings**

38. In addition to bilateral meetings between DG Competition and the notifying parties, other involved parties or third parties, DG Competition may decide to invite third parties and the notifying parties to a "triangular" meeting where DG Competition believes it is desirable, in the interests of the fact-finding investigation, to hear the views of the notifying parties and such third parties in a single forum. Such triangular meetings, which will be on a voluntary basis and which are not intended to replace the formal oral hearing, would take place in situations where two or more opposing views have been put forward as to key market data and characteristics and the effects of the concentration on competition in the markets concerned.
39. Triangular meetings should ideally be held as early in the investigation as possible in order to enable DG Competition to reach a more informed conclusion as to the

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<sup>17</sup> Article 16(3) Implementing Regulation. To this effect, DG Competition has appointed a Consumer Liaison Officer responsible for contacts with consumer organisations.

<sup>18</sup> Article 11(7) of the recast Merger Regulation expressly provides for the Commission's competence to interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.

relevant market characteristics and to clarify issues of substance before deciding on the issuing of an SO. Triangular meetings are normally chaired by senior DG Competition management. They are prepared in advance on the basis of an agenda established by DG Competition after consultation of all parties that agreed to attend the meeting. The preparation will normally include a mutual exchange of non-confidential submissions between the notifying parties and the third party in question sufficiently in advance of the meeting. The meeting will not require the disclosure of confidential information or business secrets, unless otherwise agreed by the parties.

## **6. REMEDIES DISCUSSIONS**

40. As stated above, the State of Play meetings in both Phase I and Phase II, in addition to providing a forum for discussing issues related to the investigation, also serve to discuss possible remedy proposals. Detailed guidance on the requirements for such proposals is set out in the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98<sup>19</sup> (the Remedies Notice). In particular, the Remedies Notice sets out the general principles applicable to remedies, the main types of commitments that have previously been accepted by the Commission, the specific requirements which proposals of remedies need to fulfil in both phases of the procedure, and guidance on the implementation of remedies. As regards the design of divestiture commitment proposals, the notifying parties are advised to take due account of the Commission's "Best Practice Guidelines on Divestiture Commitments"<sup>20</sup>.
41. Although it is for the notifying parties to formulate suitable remedies proposals, DG Competition will provide guidance to the parties as to the general appropriateness of their draft proposal in advance of submission. In order to allow for such discussions, a notifying party should contact DG Competition in good time before the relevant deadline in Phase I or Phase II, in order to be able to address comments DG Competition may have on the draft proposal<sup>21</sup>.

## **7. PROVISION OF DOCUMENTS IN THE COMMISSION'S FILE / CONFIDENTIALITY**

### **7.1. Access to the file**

42. According to Community law, the notifying parties have upon request a right to access the Commission's file after the Commission has issued an SO (see Article 18(3) of the Merger Regulation and Article 13(3) of the Implementing Regulation).

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<sup>19</sup> OJ C 68, 02.03.2001, p. 3-11.

<sup>20</sup> Available [http://europa.eu.int/comm/competition/mergers/legislation/divestiture\\_commitments/](http://europa.eu.int/comm/competition/mergers/legislation/divestiture_commitments/) under

<sup>21</sup> It is to be noted that under the recast Merger Regulation (Articles 10(1) and (3)), the submission of remedies could lead to an automatic extension of the Phase I and II deadlines.

43. Further, the notifying parties will be given the opportunity to have access to documents received after the issuing of the SO up until the consultation of the Advisory Committee.
44. Access to the file will be provided subject to the legitimate interest of the protection of third parties' business secrets and other confidential information.

## **7.2. Review of key documents**

45. DG Competition believes in the merits of an open exchange of views with ample opportunities for the notifying parties and third parties to make their points of view known throughout the procedure. This enables DG Competition to assess the main issues arising during the investigation with as much information at its disposal as possible. In this spirit, DG Competition's objective will be to provide the notifying parties with the opportunity of reviewing and commenting on "key documents" obtained by the Commission. Such documents would comprise substantiated submissions of third parties running counter to the notifying parties' own contentions received during Phase I and thereafter<sup>22</sup>, including key submissions to which specific reference is made in the Article 6(1)(c) decision and market studies.
46. DG Competition will use its best endeavours to provide notifying parties in a timely fashion, with the opportunity to review such documents following the initiation of proceedings and thereafter on an *ad hoc* basis. DG Competition will respect justified requests by third parties for non-disclosure of their submissions prior to the issuing of the SO relating to genuine concerns regarding confidentiality, including fears of retaliation and the protection of business secrets.

## **7.3. Confidentiality Rules**

47. In accordance with Article 287 of the EC Treaty and Article 17(1) of the Implementing Regulation, the Commission will, throughout its investigation, protect confidential information and business secrets contained in submissions provided by all parties involved in EC merger proceedings. Given the short legal deadlines of EC merger procedures, parties are encouraged to clarify as soon as possible any queries related to confidentiality claims with members of the case team. Guidance on what is considered to be business secrets or other confidential information is provided in the Commission's Notice on Access to file<sup>23</sup>.

## **8. RIGHT TO BE HEARD AND OTHER PROCEDURAL RIGHTS**

48. The right of the parties concerned to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law. That right is also set

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<sup>22</sup> This would in particular include substantiated "complaints" contending that the notified transaction may give rise to competition concerns. The word "complaint" is to be understood in the non-technical sense of the term as no formal complaints procedure exists in merger cases.

<sup>23</sup> OJ C 23, 23/01/97, p. 3.

out in the Merger Regulation (Article 18) and the Implementing Regulation (Articles 14-16). These Best Practices do not alter any such rights under Community law.

49. Any issues related to the right to be heard and other procedural issues, including access to the file, time limits for replying to the SO and the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in EC merger proceedings can be raised with the Hearing Officer, in accordance with Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings<sup>24</sup>.

## **9. FUTURE REVIEW**

50. These Best Practices may be revised to reflect changes to legislative, interpretative and administrative measures or due to case law of the European Courts, which govern EC merger control or any experience gained in applying such framework. DG Competition further intends to engage, on a regular basis, in a dialogue with the business and legal community on the experience gained through the application of the Merger Regulation in general, and these Best Practices in particular.

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<sup>24</sup> Official Journal L 162, 19/06/2001 p. 21–24. The text can also be found at: <http://europa.eu.int/comm/competition/hearings/officers/>