

MLex Ab Extra:

A new mandate – or how to improve the role of the Hearing Officers

Axel Schulz and Pascal Berghe of White & Case suggest changes to improve the usefulness of the Mandate of the Hearing Officers



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A NEW MANDATE – OR HOW TO IMPROVE THE ROLE OF THE HEARING OFFICERS

Axel Schulz and **Pascal Berghe**¹ suggest changes to the Mandate of the Hearing Officers, which could improve the usefulness and impact of the institution

1 Introduction

Shortly after his appointment, Competition Commissioner Joaquín Almunia stated that: “companies can fully defend themselves on the commission’s concerns: they have the right to be heard both orally and in writing; they have access to the commission’s file and their procedural rights are guarded by the Hearing Officers, who report to me and the College.”²

It is certainly true that companies accused of a competition-law infringement have the right to express their views on the accusation. The interesting question is, however, whether anybody is sufficiently listening. We submit that the current Mandate³ of the Hearing Officer does not guarantee this crucial reverse side of the right to be heard. A few changes to the Mandate could greatly improve the usefulness and impact of the institution of the Hearing Officer.⁴

In particular, we propose that (i) the relevance of the hearing should be reinforced; (ii) the report of the Hearing Officers should address the substance of the case and be made public; the Hearing Officers should have the competence to get involved before the issuance of a Statement of Objections upon request by one party; and (iv) the Hearing Officers’ independence from DG Competition should be enhanced (this is not an exhaustive list). None of these reforms would require any Treaty revision.

2 Improving the oral hearing

Organising and presiding over the hearing is at the core of the Hearing Officer’s Mandate. Moreover, the right to be heard is a fundamental right embodied in Article 41(2) of the Charter of Fundamental Rights. The hearing is thus an important step in the procedure.⁵ However, in our experience this important step appears so often to be limited to merely a formal necessity, with low expectations that the hearing will change any minds. The Hearing Officers have already taken the commendable initiative to identify for each hearing a few key points and to ask

the parties to focus on them during their presentations at the hearing. They have also expanded the time allotted to Q&As and started to direct the debate focusing on the controversial points, i.e. where different parties have adopted opposing views, where potential flaws in the commission’s theory have been raised or where written arguments are unclear or self-contradictory.

Such measures should indeed contribute to improve the relevance of having hearings, but are not enough on their own. We believe that a hearing will become meaningful only if the case as presented by DG Comp is at stake.

First of all, it has become practice in cartel cases to hold the hearing around a month after the responses to the Statement of Objections were submitted. While a speedy process is certainly commendable, it seems hard to imagine that the various stakeholders at the hearing, the case-team, the Hearing Officer, the Legal Service and other DGs and representatives of national competition authorities would have sufficient time to examine the SO responses of numerous companies and consult the underlying evidence in the file. Against this backdrop, the recommendation should be to focus on the most controversial issues during the hearing presentation, instead of merely repeating all arguments raised in the written submissions.⁶ This, of course, would require that the Hearing Officer allows adequate time between the responses to the SO and the hearing.

Next, the Hearing Officers should be empowered to require the presence of specified witnesses at the hearing. This would be especially important in cartel cases where the commission heavily relies on leniency statements to find an infringement and prove the guilt of other companies, as is often the case. Unfortunately, none of the companies accused of wrongdoing by witnesses of leniency applicants has the opportunity to cross-examine these witnesses.

While leniency applicants are under a duty of continuous cooperation with the commission, this duty is so far discharged

by a leniency applicant's external counsel making a short statement of guilt during the hearing. This is not satisfactory, as it constitutes no more than hearsay and does not provide any opportunity for cross-examination. Although the Hearing Officers have no power to force an individual to come to the hearing, the duty of co-operation of leniency applicants should include the obligation to bring key witnesses to the hearing (an obligation to bring all witnesses would risk unduly extending the duration of hearings). Non-compliance could potentially lead to the leniency benefit being withdrawn or reduced. What is there to lose by such an approach? At best, the leniency witnesses confirm their story in a credible way and thus strengthen the commission's case, or they do not, in which case there should be no public interest in concluding a weak case.

More generally as regards live witnesses testifying at a hearing, a list of such witnesses and the scope of their testimony should be determined in advance with the Hearing Officer and would, preferably, be communicated to the other parties (witnesses should enhance fact-finding and transparency, not result in an ambush). At the hearing, witnesses could either read a statement or answer targeted questions by the legal counsel of the party bringing the witness. As the hearing is a hearing and not a trial,⁷ we believe that witnesses should be cross-examined only by the Hearing Officer while the other parties could only suggest questions to the Hearing Officer. This would make it easier for businesspeople unaccustomed to a trial situation to testify at a commission hearing. In this context, there is a need for the elaboration of a set of rules regulating the hearing, which would then be enforced by the Hearing Officers. We do not favour the adoption of US-style trial rules (it is a hearing, not a trial) but would recommend enacting rules notably regarding the submission of new evidence at the hearing or the appearance of witnesses. One could also envisage sharing a non-confidential version of all the responses to the SO among the SO addressees, which would make the hearing more meaningful and interactive.

Finally, there ought to be a serious debate whether the interim report issued by the Hearing Officer should be transmitted to the companies concerned. While this is the case for the final report, which is however limited to observations on the right to be heard, the interim report goes only to the commission. Thus it is even more regrettable that the interim report potentially addresses both procedural issues as well as the substance of the case. Although the Hearing Officer is not a judge who makes factual and legal determinations, the issuance of an expanded report on procedure and substance after the hearing would be a step in enhancing the companies' rights of defence (see next section).

3 Bolstering the Hearing Officers' report

After the hearing, the Hearing Officers report to the Competition Commissioner, with DG Competition being copied. This interim report discusses the respect of the right to be heard and possibly any point of substance the Hearing Officers choose to address. Then, they prepare on the basis of the draft decision a second report limited to the respect of the right of defence. Only this second report is rendered public.

We submit that the Hearing Officers should be under an obligation to address the substance of the case (instead of having that faculty) and their report should be made public, at least to the companies concerned. The current Mandate already provides that the Hearing Officers should ensure that all relevant facts are taken into account.⁸ This aspect of the Hearing Officer's mission should be strengthened.

The main criticism of the current procedure before the commission is that severe fines are imposed by an administrative body that combines the roles of investigator, prosecutor and decision-maker. A first, albeit imperfect, remedy could be easily adopted: the interim report of the Hearing Officers could cover both procedural and substantive aspects of the case, and should be made available to the parties, before and at least at the time of adoption of the decision. The College of Commissioners would not be bound by the report. However, the report would obviously carry some authority, akin to opinions of Advocates General. It could well influence the General Court if an appeal against the decision is lodged.

At the very least, the final decision would have to address the points raised by the Hearing Officer, or face annulment due to insufficient reasoning. This solution has the advantage of avoiding any question of delegation of powers and reducing the need for reorganisation.

We note the argument that the Hearing Officers would retain more freedom if their reports remain internal, by being able to influence the outcome of the case behind the scene. In essence, accepting that reasoning would reduce the Hearing Officers to being advisers in charge of quality control within the commission – alongside other internal mechanisms such as the Legal Service, peer review system or dedicated Units. However, we consider that the Hearing Officer's function is fundamentally different. Instead of being an internal quality-control mechanism, the Hearing Officers constitute the expression of the right to be heard of the parties and guarantee their respect. Their authority (and influence) should not come from their direct access to the Competition Commissioner,

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but rather from their expertise, objectivity and independence from DG Competition. On that basis, there is no reason not to publish the Hearing Officer's report.

4 Extending the role of Hearing Officers before the notification of the Statement of Objections

The Hearing Officers have competence to deal with procedural disputes linked to the right to be heard (but should not be limited to this, as outlined above). However, they only rarely intervene before the notification of the Statement of Objections. We believe there is room for a more active role of the Hearing Officers during the investigation, from the first investigative act to the issuance of the SO.

We submit that undertakings should have the possibility of referring any procedural dispute to the Hearing Officer – whether before or after the issuance of an SO. The Guidance Paper acknowledges that, during the investigative phase, issues may arise regarding the right to be informed of the purpose and subject matter of the investigation, the right not to incriminate oneself, to be represented by a lawyer or regarding confidentiality and legal privilege.⁹

More generally, the Hearing Officers should be involved in any conflict regarding simple requests for information and inspections pursuant to mere written authorisation. The General Court alone could review the legality of Article 18(3) decisions requiring the production of information or Article 20(4) decisions ordering an inspection.¹⁰ However, most of the requests for information are not formal decisions. Since they are not binding, an appeal would be inadmissible at that stage. In these circumstances, it would be useful to have an independent body who could adjudicate immediately on the matter (e.g. scope of the inspection, proportionality of the request or deadline to reply). Undertakings would thus have

the choice between submitting to the commission's demands, waiting for the commission to adopt a formal decision, or applying to the Hearing Officer.

As suggested elsewhere, the Hearing Officers could also control the legality of draft decisions ordering an inspection.¹¹ Their approval would be required or, alternatively, they would write a report which would become a formal condition of the legality of the inspection decision. Such a system would in effect amount to a sort of "European warrant" and partly respond to the absence of any *ex ante* judicial review of dawn raids conducted by the commission, which has raised concerns in the past. The Hearing Officers could also be more involved in disputes regarding the implementation of the inspection decisions. This could include determining which documents are covered by the scope of the investigation and which are protected by legal professional privilege. Such a role would require, however, that their independence from DG Competition is substantially strengthened.

5 Reinforcing the independence of the Hearing Officers

We believe that in order to fulfill their roles adequately, in particular if the hearings and final reports should become more meaningful as proposed above, the status and independence of the Hearing Officers needs to be enhanced.

First, the current Mandate does not appropriately guarantee this independence. The requirement of full independence of the Hearing Officers should be embodied in the operative part of the Mandate, instead of being mentioned in passing in the recitals, as is currently the case. The wording could be similar to the requirements applicable to Judges of the European Courts, Advocates General and the European Ombudsman. After all, it is not plausible that the Hearing Officers, who have an

Footnotes

- 1 Local Partner and Associate at White & Case LLP, Brussels. The opinions expressed in this article are entirely personal. The authors have participated in a number of hearings; most recently they were part of the team representing Toshiba Corporation in the Commission's CRT investigation.
- 2 Speech on 9 March 2010, International Forum on EU Competition Law, "EU Antitrust Policy: the road ahead".
- 3 Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, [2001] OJ L 162/21 ("Mandate").
- 4 The "Guidance Paper on the procedures of the hearing Officer", published earlier this year, is certainly an interesting document. However, it is not legally binding.
- 5 M. Albers and K. Williams, "Oral hearings – Neither a trial nor a state of play meeting", CPI, March 2010; S. Durande and K.

Williams, "The practical impact of the exercise of the right to be heard: A special focus on the effect of Oral Hearings and the role of the Hearing Officers", [2005] (2) Competition Policy Newsletter 22.

- 6 M. Albers and K. Williams, cited above.

- 7 M. Albers and K. Williams, cited above.

- 8 Mandate, article 5.

- 9 Guidance Paper, paras. 10-11.

- 10 Any action for annulment not introduced within two months and ten days would be inadmissible. Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij a.o. v Commission*, [1999] ECR II-931, paras. 441-442.

- 11 P. Berghe and A. Dawes, "Little Pig, Little Pig, Let Me Come In: An Evaluation of the European Commission's Powers of Inspection in Competition Cases", (2009) 30 ECLR 407, at 423.

important role in the adoption of competition decision with an impact valued at hundreds of millions of euros, should be less independent than the European Ombudsman.

Second, the Hearing Officers should report directly to the President of the commission, like the Legal Service. Currently, the Hearing Officers are functionally independent from DG Comp, but they remain administratively attached to the Competition Commissioner. Such a change to the lines of authority would mark the necessary separation between the case team and a body entrusted with the task of reviewing its work. Being attached to the President of the commission would emphasise that the Hearing Officers are an external check on DG Comp, and would strengthen their legitimacy.

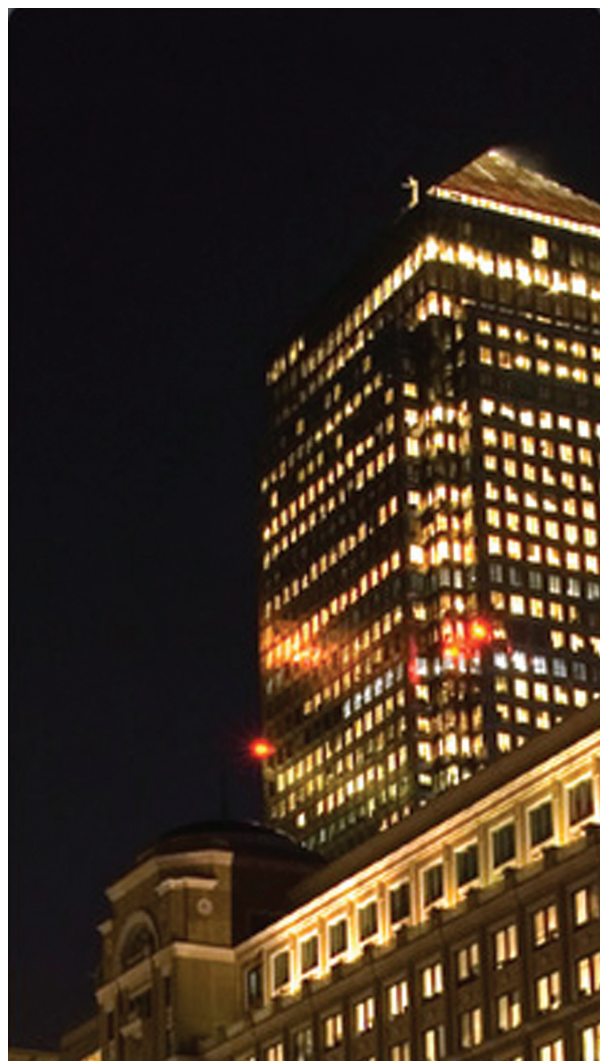
Third, the Hearing Officers should not necessarily be former officials of DG Comp. Judges from the European Courts or from Member States, senior officials from National Competition Authorities or seasoned lawyers in private practice could equally fulfill the function. Suitable candidates would need to be experienced in competition matters and have the integrity necessary to contribute to the objectivity, transparency and efficiency of the antitrust proceedings. Independence vis-à-vis the commission and the parties would be fundamental.

Fourth, the Hearing Officers should have sufficient qualified staff and adequate resources. And their own status should be sufficient to attract high-calibre candidates, in particular if the role of the Hearing Officers is to evolve as suggested, including the dealing with live witnesses and the issuance of a comprehensive final report. The rank of Director for the Hearing Officers, instead of the rank of Head of Unit, should be reinstated.

6 Conclusion

We submit it is time to update the Mandate of the Hearing Officers to reflect the more active role of the Hearing Officers and to pave the way for the future. In the long run, compliance with the requirements of the European Convention of Human Rights and the Charter of Fundamental Rights might require that the Hearing Officers become an independent administrative judge with the powers to adjudicate on both procedural and substantive issues. In the meantime, the hearings should be revamped and the status of the Hearing Officers as a body independent from DG Competition should be reinforced. They should pursue their mutation away from being mere advisers to the Competition Commissioner. The reforms suggested in this article significantly reinforce the role of the Hearing Officers and bolster the rights of defence of the parties, without requiring any Treaty change. ■

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