

DG Competition, Units A.2, A.4 and O.2 / Hearing Officers
European Commission
Directorate-General for Competition
Antitrust Registry
B-1049 Brussels

Per email (E-mail address: COMP-best-practices@ec.europa.eu)

Brussels, 3 March 2010

Public Consultation: Hearing Officer's Guidance Paper
Your Ref.: HT. 2285

Dear Sir / Madam,

We hereby submit Bird & Bird LLP's comments on the Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (ex-articles 81 and 82 EC) ("**the Guidance Paper**").

1. INTRODUCTION

Our comments will focus on the admission of third parties to the procedure (Part 5 of the Guidance Paper) and in particular the criteria for admission set out at paragraph 33.

They will also address how the role of the Hearing Officer can be optimised by ensuring it is ranked as a high-level function, and by strengthening its independence.

2. PART 5 - THIRD PARTY STATUS

Paragraph 33 states:

"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" (our emphasis).

Though it follows on from the statement in the preceding paragraph that “[t]he Hearing Officer has the responsibility to admit natural or legal persons with a sufficient interest to proceedings before the Commission” this paragraph would appear to make the admission of third parties dependant on the value they bring to the procedure, as determined by the Hearing Officer. The extent of their interest in proceedings, which in many cases will be a private interest, would furthermore “normally not be considered as sufficient”.

Under this admission threshold, presumably third parties would still need to demonstrate an interest in the proceedings. However, in itself this would not be sufficient to determine whether they should be admitted to the procedure. Instead, the determining factor would be the Hearing Officer’s view as to whether the relevant party has made or is likely to make a contribution towards establishing the truth and relevance of the facts of the proceedings.

In our view this presents an unnecessary barrier to third party access to proceedings, and one which is not supported in law. This requirement would effectively render it harder for parties to intervene in the administrative proceedings prior to a Commission Decision being taken, than to intervene before the European Courts where a Commission Decision is contested.

Further, it appears to run counter to Commission efforts to encourage cartel victims to seek redress before national courts.

2.1 No Support in Law

Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹ states at Article 27(3), when discussing the Commission’s discretion to hear “other natural or legal persons” states that “[a]pplications to be heard on the part of on the part of such persons shall, where they show sufficient interest, be granted” (our emphasis). This right to be heard accorded to third parties whose interests may be affected by a decision is further set out at recital 32 of the preamble.

Further, Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty² states at its Article 13(1) that if natural or legal persons other than complainants and addressees of the S.O. “apply to be heard and show a sufficient interest, the Commission shall inform them in writing of the nature and subject matter of the procedure and set a time-limit within which they may make known their views in writing” (our emphasis).

The Regulations do not contemplate any additional requirements regarding the nature of third party contributions. As such, the additional requirement set out in paragraph 33 of the Guidance Paper is lacking any basis in law.

Further clarity in this regard is provided in recital 11 of the preamble to Regulation 773/2004 where it states that provision should be made for the hearing of persons who are neither complainants nor addressees of the S.O. but who can nevertheless show

¹ OJEC L1/1 of 16 December 2002.

² OJEC L123/18 of 7 April 2004.

sufficient interest. It then adds that “[w]here it considers it to be useful for the proceedings, the Commission should also be able to invite other persons to express their views in writing” (our emphasis).

The recital makes it clear that parties with sufficient interest should be granted third party status. Separately and in addition, it provides that the Commission may invite persons to provide comments where it deems this would be useful for the proceedings.

Clearly the legislative intention was not to institute an additional requirement for the admission of parties with sufficient interest. Instead, the preamble contemplates the admission of additional parties where the Commission deems it would be useful to proceedings.

The importance of the right to be heard, a fundamental principle of Community law, was acknowledged in paragraph 8 of the terms of reference of Hearing Officers in certain competition proceedings,³ which held that these “should be framed as to safeguard the right to be heard throughout the whole procedure”.

Accordingly, it would be wrong to assess the right of a party with sufficient interest to be heard on the basis of the nature of the party’s contribution to the procedure. To do so would ignore the existence of a right of its own which a party with sufficient interest has to be heard, provided that it demonstrates that its interests may be affected by a Commission Decision.

2.2 Counter to Commission Policy on Damages

It has been the Commission’s stated position that effective enforcement of EC Treaty competition rules prohibiting restrictive business practices and the abuse of dominant market positions (Articles 101 and 102) requires that victims of competition law infringements – be they consumers or businesses – have a right to compensation for the harm they have suffered.⁴

Access to Commission proceedings may be vital for interested third parties to bring civil law claims, notably damages claims, against those undertakings which have participated in infringements of competition law. As such, it is counter-productive to create additional hurdles to their participation in proceedings.

3. THE POSITION OF THE HEARING OFFICER

The Hearing Officer’s function has developed successfully over time, in particular since Commissioner Monti decided that it should be personally attached to the Commissioner for Competition, instead of being part of the Directorate General for Competition.

This has effectively given this position the independence which it required *vis-à-vis* the investigating body, DG Competition.

³ Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings, OJEC L162/21.

⁴ IP/08/515 Brussels, 3rd April 2008 “Antitrust: Commission presents policy paper on compensating consumer and business victims of competition breaches”.

This reform, rendered official in the Mandate on the Terms of Reference of Hearing Officers in Competition Proceedings,⁵ has been well perceived by the legal community.

It seems to Bird & Bird that, almost 10 years after this Mandate, more advantage could be taken of this often crucial position, in view of the importance of the issues at stake for the undertakings concerned.

This implies that the Hearing Officer's function should be more clearly established as a high-level one within the Institutions, and that its independence should be reinforced.

3.1 A High-Level Function

For a task as important as that of effective oversight and decision-making in crucial areas such as the right to be heard and the rights of defence in the wider sense, it seems necessary that a Hearing Officer is at the very least granted a Director ranking.

This in itself would assist in protecting the function. It is high enough to be perceived as high-level within the Institutions; and in turn also ensures the position is able to attract the best candidates.

It is in this respect regrettable, and has not been well perceived, that the Commission recently saw fit to downgrade the level of the Hearing Officer's function. Placed in an administrative function, the current position of the Hearing Officer does not transmit the right message, in particular externally, regarding the importance that the College of Commissioners attaches to this very particular task.

3.2 More Independence

In recent years, the European Commission has been widely recognised as one of the most efficient antitrust authorities in the world, if not the most efficient one.

At the same time, there has been growing consensus that, in view of the increasing impact of Commission decisions on industry, there is a particular need for the decision-making process to be exemplary.

There is a perception that the current administrative system, under which the Commission both investigates and decides, gives the Commission a discretionary power which has become disproportionately wide given the ever-increasing stakes.

Judicial redress takes place years after both the facts and the Commission Decision. This in itself is not satisfactory, and should encourage the Commission to take each and every possible step in order to improve its internal decision making process, in particular as regards the guarantee of a fair hearing.

The role of the Hearing Officer can play a pivotal role in improving this process. Only a few changes in its Mandate would be needed to ensure this is the case:

⁵ Cited *supra*, at footnote 3.

- **It should be made clear that the Hearing Officer is available for the undertakings on each and every perceived issue of due process;**
- **The Hearing Officer should not be restricted to a technical role on procedures as regards the exercise of the right to be heard;**
- **The Hearing Officer should be personally attached either to the President of the Commission, or to both the President and the Member of College in charge of Competition issues;**
- **The Hearing Officer's final report would remain the same: it would be addressed to the College, and would be limited to the respect of the right to be heard;**
- **The Hearing Officer's interim report, which is based on Article 3 of the present Mandate,⁶ should be addressed to both the President and the Commissioner for competition.** This would reinforce the function, granting it much greater weight, in particular in relation to the Directorate General for Competition. This will likely act as a powerful incentive in assisting the Directorate General to exercise control over its discretionary power, the extent of which is not always fully appreciated at the case handler or investigation level.

Under the rules of delegation applicable within the Commission, the Hearing Officer would still have to obtain the agreement of the Legal Service when coming to a decision. This in itself is a guarantee that the function would not in turn develop excessive personal powers, and would set up a more balanced system.

Above all, the Hearing Officer should be perceived both internally and externally not just as somebody in charge of procedures, in a limited technical sense, but as someone charged with guaranteeing the fairness of the investigation.

Optimising the role of the Hearing Officer is to everybody's benefit, first and foremost to that of the European Commission itself. The current Mandate thus ought to be modified in following with the suggestions set out above.

-----0-----

⁶ Cited *supra*, at footnote 3.