

**RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON
GUIDANCE ON PROCEDURES OF THE HEARING OFFICERS IN
PROCEEDINGS RELATING TO ARTICLES 101 AND 102 TFEU**

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1. INTRODUCTION

1.1 Freshfields Bruckhaus Deringer welcomes the opportunity to respond to the European Commission's public consultation on Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (*'Guidance'*), posted on the Commission's website on 6 January 2010.

1.2 Our comments are based on our significant expertise and experience in representing our clients before the Commission in a wide range of types of cases, including the full range of proceedings based on Articles 101 and 102 TFEU.

1.3 The comments contained in this paper reflect the views of many in Freshfields Bruckhaus Deringer. They do not necessarily represent the views of every partner in the firm, nor do they represent the views of our individual clients.

2. GENERAL COMMENTS

2.1 We fully support the Hearing Officers (*HOs*) in their efforts to enhance understanding of their role in the Commission's enforcement procedures and to increase transparency and predictability in this respect. However, we have some general comments on the scope and approach of the Guidance, and some more specific suggestions, which we set out below.

More independence and broader remit for HOs

2.2 We do regret that the Guidance consists almost entirely of a description of the current practice, and does not make any mention of the clear need that exists to develop the HOs' role into something more appropriate to the current enforcement environment. In recent years dramatically bigger fines have been imposed, the risk of liability as a result of private litigation has increased, and in a number of EU jurisdictions the potential criminal law consequences of antitrust investigations have become much more serious. These developments make it imperative that procedural issues of fairness and due process that arise in antitrust proceedings be decided by a neutral body that is fully independent of the Commission – and is clearly seen to be such.

2.3 Despite the statement in *para. 9* of the Guidance that ‘*the Hearing Officers are entirely independent from DG Competition*’ we do not believe that the current institutional arrangement, under which the HOs are attached to the Competition Commissioner and work as part of DG Comp, either fully guarantees in fact, or gives the impression of, such independence and neutrality.

2.4 A specific example of the lack of apparent independence is the undefined nature of the HO’s role when he ‘*participates directly in the Commission’s further deliberations [after the oral hearing] up to the stage of the draft decision to be submitted to the College of Commissioners*’ (*para. 69*). We also question whether, in the light of the limited degree of independence referred to above, it is fair in all cases to assume acceptance by a party of a measure on the basis that the party does not raise it as an issue with the HO (*paras. 8 and 14*).

2.5 While we recognise that this Guidance is not the place to introduce such institutional change, certain other changes in approach would go some way to ensuring fuller safeguarding of parties’ rights. For example, we would favour more active involvement of the HOs in investigations, and at an earlier stage in proceedings than is currently the case. In particular the HO should be available to deal with issues arising during the investigation before a Statement of Objections (*SO*) is issued, such as claims that information requested from a party is self-incriminating or privileged. Currently, as stated in the Guidance, as a general rule they will only do so in very limited circumstances (*paras.10-11*).

Justification for departures from the Best Practices

2.6 The Guidance states that ‘*if the particular circumstances of a case so require, the Hearing Officers reserve the right to deviate*’ from the Guidance (*para. 2*). This is entirely understandable, but given that cases of such adaptation or deviation of any substance are presumably expected to be rare, we suggest that the Hearing Officers make an explicit commitment to provide, at the request of any party, reasons for such departure from their Guidance.

3. PROCEDURES POTENTIALLY LEADING TO A PROHIBITION PROCEEDING

3.1 *Para. 22* refers to the independent review by the HO of whether documents qualify as confidential and, if they do, whether or not they should be fully or partially disclosed. It would be helpful if the Guidance were to clarify the criteria by which the issue of confidentiality is decided.

3.2 *Para. 24* states ‘*It will however be requested to inform the Hearing Officer by a specified date whether it intends to lodge an application for annulment [...]*’. It is

unclear what is intended to be achieved here. For example, it is unclear what will happen if an undertaking expresses its intention to challenge the Article 9 decision, but does not in fact challenge it, or indeed if it says that it does not intend to challenge the decision, but before the deadline for doing so expires, does in fact challenge the decision. We suggest replacing ‘intends’ with ‘contemplates’, and clarifying that informing the HO is considered a courtesy and not a formal requirement.

4. ORAL HEARINGS

4.1 The HO decides who will be invited to the hearing (*para. 40*), and *para. 49* states that a provisional list of participants, together with the provisional agenda, will be circulated ‘*wherever possible*’ at the latest three working days in advance. We suggest that it be made clear that at the same time the parties will be told the identity of any witnesses. Only with such prior notice is it possible for the parties to do the necessary research and preparation for the hearing. We consider that three days should be regarded as an absolute minimum, and would prefer a minimum deadline of five days.

4.2 Similarly, the Guidance should make clear (*para. 45*) that any documentary or other evidence to be produced at the hearing be made available to all parties to the hearing at least five working days prior to the hearing, unless the HO is convinced that there are exceptional circumstances justifying later inclusion.

4.3 *Para. 57* states that the HO may allow questions on any of the issues raised by a written or oral submission to be addressed to any participant by any participant. We welcome the possibility of asking questions or discussing issues in this way. We suggest that the Best Practices state explicitly that the Hearing Officer will allow questions upon request of any party, as all those participating should by definition 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*’ (*para. 42*). Furthermore, we suggest that parties be permitted to request the HO to invite a certain party to attend the Oral Hearing, so that it may ask questions of that party.

4.4 The Guidance states that the Interim Report and any additional procedural or substantive observations made by the HO to the Commissioner are not accessible to the parties (*para. 63*). We suggest that the parties should have access to these documents, as this would contribute to transparency of the procedure and to the sense of fairness of the proceedings.

5. OTHER

Commitments and settlements procedures

5.1 A number of procedural aspects of the relatively new ‘commitments’ and ‘settlements’ processes remain unclear, and the nature of these processes mean that they tend to raise especially delicate issues of rights of defence. While clearly parties’ rights of defence may legitimately be abrogated to some extent in the interests of obtaining the benefits of a relatively swift case resolution through these procedures, the extent to which this may occur may often be disputed. This is particularly so given the dearth of European Court case law on these new procedures. It would therefore be very helpful if the Guidance provided for full involvement of HOs, and set out in some detail their role in such cases.

Judicial review

5.2 *Para. 5* of the Guidance refers to the fact that decisions taken by HOs may, depending on their nature, be challenged before the European courts. It would be useful if the Commission were to set out the possible consequences where such a challenge is successful, and in particular what impact it may have on measures and decisions taken by the Commission in the case.