

The European Commission's draft Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU

Observations of Van Bael & Bellis

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1. INTRODUCTION

1. Van Bael & Bellis fully supports the Commission's plans to increase the transparency, fairness and predictability of the procedures of the Hearing Officers to promote greater respect for the rights of defence in competition proceedings. Van Bael & Bellis therefore welcomes this opportunity to submit Observations on the draft Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (hereafter the "draft Guidance").

2. PROPOSALS TO HELP ENSURE THE INDEPENDENCE OF THE HEARING OFFICERS

2. As recognised at the outset of the draft Guidelines,¹ the key role of the Hearing Officers is to act "as the independent guardians of the rights of defence". This follows from the fact that one of the fundamental principles of EU law is the right of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken.² To fully preserve this right, the Commission itself has recognised that the conduct of administrative proceedings in competition cases "should therefore be entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings".³

3. Despite this recognition of the need for the Hearing Officers to be independent to fully safeguard the rights of defence, however, the Hearing Officers remain attached to the Commissioner for Competition. Although the Commission recognizes that in order to properly perform their functions the Hearing Officers should be entirely independent from DG Competition,⁴ no explanation is given to explain how Hearing Officers can act independently while they remain attached to the Commissioner responsible for Competition.

4. The independence of Hearing Officers is also called into question by the fact that all communications between the Hearing Officers, on the one hand, and the Commissioner and officials at DG Competition, on the other hand, remain shrouded in secrecy, and are not made available to the parties. Apparently this is because the communications of the Hearing Officers are regarded as "internal" to the Commission's decision making process.⁵ While this raises obvious questions about the independence of the Hearing Officers, it also severely impairs their ability to fully investigate the issues before them, as there is no outside check on the claims made by DG Competition and the Commission to the Hearing Officers. If the Hearing Officers are meant to provide a truly independent check on DG Competition and the Commission, it is unclear what interest, if any, is served by giving DG Competition and the Commission privileged and secret access to them before they take their decisions.

5. As then-Commissioner for Competition Mario Monti previously noted, the overall accountability of the Commission's decision-making process will only "substantially improve" by strengthening the independence of the Hearing Officers in competition proceedings.⁶ Van Bael & Bellis therefore urges the Commission to terminate any connection between the Hearing Officers and the Commissioner for Competition, for example, by making the Hearing Officers an internal department reporting directly to the President of the Commission (as is the case for the Legal Service).

¹ Draft Guidance, ¶ 1, emphasis added.

² Commission decision on the terms of reference of hearing officers in certain competition proceedings, O.J. 2001 L 162/21, Recital 1.

³ *Ibid.*, Recital 3, emphasis added.

⁴ Draft Guidance, ¶ 9.

⁵ See, e.g., draft Guidance, ¶ 63, which classifies the Interim Report and any additional observations as internal. Given that all other communications between the Hearing Officers, on the one hand, and the Commissioner for Competition and officials at DG Competition, on the other hand, are also not made available to the parties, it can only be assumed that the same reasoning is applied.

⁶ Comments of then-Competition Commissioner Mario Monti in Brussels, 23 May 2001, as reported in "European Commission strengthens the role of the Hearing Officer in competition proceedings", IP/01/736.

6. In addition, Van Bael & Bellis urges the Commission to further ensure the independence of the Hearing Officer and strengthen its own investigations by ensuring that all communications between the Hearing Officer, on the one hand, and the Commissioner for Competition and DG Competition, on the other hand, are included in the case file and made accessible to the parties for comment.

3. PROPOSALS TO HELP FURTHER SAFEGUARD THE RIGHTS OF DEFENCE IN COMPETITION PROCEEDINGS

7. In addition to taking measures to ensure the independence of Hearing Officers, Van Bael & Bellis also wishes to make a number of specific proposals for the draft Guidance to help further safeguard the rights of defence in competition proceedings.

A. Departures from the draft Guidance

8. Van Bael & Bellis acknowledges that it is not possible for the Commission to anticipate and foresee all the situations that may arise in the future in the context of the Hearing Officers' procedures.⁷ However, Van Bael & Bellis believes that, in the interest of predictability, any deviation from the provisions set out in the Guidance should be supported by clear reasons in the Final Report. Van Bael & Bellis therefore recommends that the draft Guidance be amended to clarify this point.

B. The obligation to raise an issue before the Hearing Officers as a condition for challenging a Commission legal act before the European courts

9. The draft Guidance indicates that failure to bring a dispute with DG Competition before the Hearing Officers can be taken as acceptance of the position expressed by DG Competition. The draft Guidance adds that this "may result in the Commission bringing attention to this fact if a party subsequently raises the procedural matter before the European courts".⁸

10. Van Bael & Bellis believes that the current text of the draft Guidance could be misinterpreted. In particular, this text could give the impression that issues over which the Hearing Officers have competence must be raised with them directly, or else the parties will risk their right to bring such issues before the European courts. Since there is no basis for this view in the Treaty on the Functioning of the European Union⁹ or in case-law,¹⁰ Van Bael & Bellis recommends that, in the interests of transparency, the Commission rewrite this provision so as to exclude this possible interpretation.

C. Deadlines to Reply to a Statement of Objections and "Letters of Facts"

11. In responding to requests for an extension of time to reply to a Statement of Objections, the draft Guidance indicates that the Hearing Officer "may" consider "any obstacles caused by the Commission" in permitting the addressee of the Statement of Objections to reply within the deadline set by DG Competition.¹¹ It is unclear why this provision should include any discretionary element. There is no reason why the addressee of the Statement of Objections should bear any responsibility

⁷ Draft Guidance, ¶ 2.

⁸ *Ibid.*, ¶¶ 8 and 14.

⁹ See, e.g., Article 263 TFEU.

¹⁰ Case T-44/00, *Mannesmannröhren-Werke v. Commission*, [2004] ECR II-2223 (paras 51 *et seq.*), cited in the draft Guidance, concerned the rejection of an argument that the Hearing Officers had failed to assess whether certain communications between the Commission and the EFTA Surveillance Authority were internal documents. The General Court (ex-Court of First Instance) concluded that the Hearing Officers did not have a general obligation to assess whether all documents in the file are internal documents, but instead have such an obligation only following a specific request by the interested party.

¹¹ *Ibid.*, ¶ 26.

for failing to meet a deadline set by DG Competition when such obstacles prevent that undertaking from meeting any deadline, whether set by DG Competition or the Hearing Officers.

12. In the experience of Van Bael & Bellis, such obstacles often include a failure on the part of DG Competition to compile a complete and accurate file, and provide immediate access to this file to an addressee of the Statement of Objections in a timely fashion. Requiring an addressee of a Statement of Objections to meet a deadline on the basis of an incomplete record clearly violates the principle of equality of arms, which, as the draft Guidance itself notes, “presupposes ‘...that the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission...’”¹²

13. Given the Commission’s obligation to examine the facts carefully and impartially when investigating complaints,¹³ it should be presumed that the Commission will already have in its possession a complete case file at the time it issues a Statement of Objections. Yet this is not always the case, and it is only after examining thousands of pages that the addressee of the Statement of Objections will be able identify situations where the Commission has inexplicably refused to add certain documents to its file, or failed to follow-up with third parties to ensure that they provide non-confidential submissions on a timely basis.

14. Accordingly, Van Bael & Bellis recommends that the draft Guidance is changed to reflect the fact that, when setting deadlines to respond to a Statement of Objections, the Hearing Officers must take account of obstacles caused by the Commission. Moreover, particularly with respect to problems relating to poor handling of the file, Van Bael & Bellis recommends that the draft Guidance is changed to reflect that addressees of a Statement of Objections must be given sufficient time to assess the file in its entirety before they can be expected to even begin commenting on the nature of the infringement. In this regard, Van Bael & Bellis notes that time to review the file in its entirety is essential because, as the General Court has noted, “the evidence of participation in a cartel must be assessed in its entirety, taking into account all relevant circumstances of fact”.¹⁴

15. The same rules should also apply to so-called Supplementary Statements of Objections or “Letters of Facts”. Where the Commission amends its preliminary assessment or the evidentiary basis thereof, deadlines must be set so as to ensure that undertakings are able to assess the file in its entirety before proceeding to draft a response.¹⁵ Again, the Commission should not be allowed to benefit from any obstacles it creates in this regard.

D. Admission of third parties to the procedure

16. In general, Van Bael & Bellis welcomes the implicit recognition in the draft Guidelines of the fact that the involvement of numerous third parties can negatively impact on the efficiency of the

¹² *Ibid.*, fn.9, citing Case T-30/97, *Solvay SA v. Commission*, [1995] ECR II-1775 (para. 83).

¹³ See, *inter alia*, Case T-24/90, *Automec v. Commission* [1992] ECR II-2223 (para. 79).

¹⁴ See, e.g., Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré SA and Others v. Commission*, [2007] ECR II-947 (para. 155) This is not to say that the deadline can only begin running once complete access has been given (cf. draft Guidance, ¶ 27), but rather that the deadline must be extended where there is insufficient time to assess the file in its entirety before proceeding to draft a response.

¹⁵ The draft Guidance also state that the Hearing Officer may decide, “in exceptional circumstances”, to suspend the running of a deadline where an access dispute is unresolved, if it becomes evident that the addressee would not be in a position to reply within the deadline imposed, and “an extension would not be an adequate solution at that point in time” (¶ 28). The meaning of this provision is unclear. In the interests of predictability, Van Bael & Bellis therefore recommends that the Commission explain those situations where extensions would not be an adequate solution, and what circumstances will be deemed “exceptional” enough to justify the suspension of a deadline.

proceedings.¹⁶ For this reason, Van Bael & Bellis welcomes the statement that in cases where a particular association has been admitted, individual members seeking to be granted independent third party status need to justify why their individual interest would not also be represented by any association (or associations) to which they belong that have already been admitted. Conversely, Van Bael & Bellis also recommends that the draft Guidance is modified to make it clear that associations must also be required to justify their participation where they represent very few members and those members have already been admitted in their own right.

17. Moreover, Van Bael & Bellis recommends that the subject of an investigation is given the opportunity to comment on applications for third party status. Indeed, DG Competition is given the right to offer its comments, and the principle of equality of arms would seem to require that the subject of an investigation should be given the same chance to be heard on whether an undertaking or association has a legitimate interest in participating.¹⁷ Such an approach would also ensure greater consistency with the practice of the European courts, where all parties to a dispute are given the opportunity to submit observations on applications to intervene by third parties. While there may be situations where a third party's identity cannot be revealed, details of that undertaking's activities should also be given to allow for meaningful comments (and to also allow the subject of the investigation to know how strict a test to apply to the determination of confidential information).

E. Oral Hearings

18. The right to develop arguments at an Oral Hearing belongs solely to addressees of Statements of Objections.¹⁸ There is no basis in any Regulation that would grant a similar right to complainants or interested third parties. This means that the interests of the addressees of Statements of Objections are paramount to the interests of complainants or third parties. For example, if there are scheduling conflicts between the addressee of a Statement of Objections and a third party, such conflicts must be resolved in favour of the interests of the addressee of a Statement of Objections. In addition, since this right belongs solely to the addressee of a Statement of Objection, if that undertaking declines to request an Oral Hearing, no Oral Hearing may be held in those proceedings. Van Bael & Bellis recommends that the Commission clarify these important principles in Section 6 of the draft Guidance.

i. The holding of Oral Hearings after the issuance of Supplementary Statements of Objections

19. Van Bael & Bellis submits that the draft Guidance should make it clear that the provisions set out in Section 6 apply equally to Supplementary Statements of Objections.

¹⁶ By way of analogy, it is interesting to note that the European courts have applied a "broad interpretation of the right of intervention" to trade associations, which "is intended to facilitate the assessment of the case, whilst avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure." Order of the President of the Seventh Chamber of the Court of First Instance, 20 November 2008, in Case T-167/08, *Microsoft v. Commission* (para. 41).

¹⁷ The need to respect the principle of equality of arms in these circumstances is particularly important since the European courts, when determining whether to admit a third party as an intervener in proceedings before the court, place some reliance on whether a third party has been admitted as an interested third party and played an active role in administrative proceedings. Compare Order of the President of the Court of First Instance, 26 July 2004, in Case T-201/04R *Microsoft v. Commission* (paras. 92, 94) with Order of the President of the Grand Chamber of the Court of First Instance, 28 November 2005, in Case T-201/04 *Microsoft v. Commission* (para. 35).

¹⁸ Commission Regulation (EC) No 883/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004 L123/18, Article 12.

ii. The holding of Oral Hearings after the issuance of “Letters of Facts”

20. Van Bael & Bellis submits that the draft Guidance should make it clear that the provisions set out in Section 6 apply equally to so-called “Letters of Facts”. “Letters of Facts” were apparently originally designed to simply “avoid misunderstandings as to the conclusions the Commission would draw with respect to a number of documents and evidence from the oral hearing which had been placed on the file”.¹⁹ The use of “Letters of Facts”, however, has become increasingly commonplace, and goes far beyond the limited purpose of avoiding misunderstandings as to the conclusions the Commission might draw as regards existing evidence. Instead, Letters of Facts are now routinely accompanied by new evidence and new assessments by the Commission unrelated to disclosures in Oral Hearings.²⁰

21. If the Commission deems it necessary to support the preliminary views expressed in a Statement of Objections by adducing additional facts and arguments, and these additional facts and arguments are seen as triggering the need to permit the addressee of the Statement of Objections to be heard in writing, there appears to be no justification to exclude the undertaking from also further developing its arguments at an Oral Hearing. This right should exist not only for those who have previously exercised their right to speak at an Oral Hearing, but also for those who saw no need to exercise these rights previously on the basis of the evidence and assessments as they existed at the time the Statement of Objections was issued, but take a different view on the basis of these new developments. This is particularly true if the new evidence relied on by the Commission already existed at the time the Statement of Objections was adopted, and was only belatedly relied on by the Commission after the Oral Hearing has taken place.

22. Indeed, given that evidence of participation in certain infringements requires an assessment of all the evidence in its entirety (see above at ¶ 14), the most important time for an addressee of a Statement of Objections to develop its arguments orally will be after the Commission has finally revealed all the evidence on which it intends to rely.

iii. The holding of Oral Hearings when the Commission drops objections that alter the nature of the case

23. Just as addressees of a Statement of Objections must be given the opportunity to orally address the consequences of new evidence and assessments provided by the Commission, they should also be given the opportunity to orally address the consequences of the dropping of objections. While it is certainly true that the Commission can (and should) alter its assessment and decide not to uphold certain objections, such changes can have serious consequences on the Commission’s overall theory and alter the nature of the case. In these circumstances, addressees of the Statement of Objections should be informed about such changes and given the right to explain orally the consequences of the changes in question.

iv. The submission of evidence during an Oral Hearing

24. Given that the express purpose of the Oral Hearing is to give the parties to whom the Commission has addressed a Statement of Objections the opportunity to develop their arguments orally on the allegations raised in the Statement of Objections,²¹ third parties should not be permitted to raise new evidence during the Oral Hearing. The draft Guidance should therefore be amended to

¹⁹ See Final report of the Hearing Officer in Case COMP/C-3/37.792 — Microsoft, O.J. 2007 C26/5.

²⁰ See, e.g., Final report of the Hearing Officer in Case COMP/C-3/37.792 — Microsoft, O.J. 2009 C166/16.

²¹ Commission Regulation (EC) No 883/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, O.J. 2004 L123/18, Article 12.

state this clearly.²² If a third party has evidence of relevance to the proceedings, it should submit such evidence to the Commission at an early stage to allow the Commission to assess its reliability, and if necessary incorporate such evidence in its Statement of Objections. If such evidence has not been provided to the Commission, the evidence cannot have any relevance to the Oral Hearing, which is limited to preserving the undertaking's right to respond orally to allegations raised by the Commission in the Statement of Objections.

25. The draft Guidance suggests that new documents may be submitted at the Oral Hearing with the prior authorization of the Hearing Officer.²³ As stated above, however, neither the Commission (¶ 21) nor third parties (¶ 24) should be permitted to submit new evidence at the Oral Hearing. The draft Guidance should be changed to reflect this fact.

v. The order of presentations during Oral Hearings

26. Van Bael & Bellis recommends that the Commission expand on its description of the order of presentations in Oral Hearings. In particular, Van Bael & Bellis recommends that the Commission amend the draft Guidance so as to cover the order of closing remarks. Given that the Commission has the first word during an Oral Hearing, and given that the purpose of the Oral Hearing is to give the addressee of a Statement of Objections the opportunity to develop its arguments orally, it also would seem sensible to change the current practice and give the last word to the addressees.

vi. Questions and discussion

27. Van Bael & Bellis recommends that the draft Guidance is changed so as to expressly recognize that time will purposefully be set aside to allow questions put to the Commission and to third parties,²⁴ just as time is purposefully set aside to allow questions to be put to the addressees of a Statement of Objections. The setting aside of a dedicated amount of time can help encourage the addressees of a Statement of Objections, which can help these undertakings better understand the Commission's theories (thereby obviating the need to correct any misunderstandings in a subsequent "Letter of Facts", as discussed above at ¶ 20).

vii. Transcript of the hearing

28. To help further protect the procedural rights of parties in competition cases, in 1998 the Commission adopted new rules that replaced the written minutes of the Oral Hearing with a tape recording.²⁵ Although this has proven to be a step in the right direction, Van Bael & Bellis is aware of situations in which the Commission has questioned the accuracy of transcriptions of its statements offered to the European courts as evidence by the parties. To avoid the possibility of confusion, Van Bael & Bellis recommends that the Commission consider giving the Hearing Officer the responsibility of ensuring that an accurate, official transcript is made of the hearing.

²² The draft Guidance could perhaps be interpreted as allowing third parties who apply to participate in the oral hearing to raise new evidence. See draft Guidance, ¶ 43 ("The Hearing Officer normally also asks for information on the applicant's intended presentation, such as ... the evidence upon which the applicant intends to rely.").

²³ Draft Guidance, ¶ 45.

²⁴ The possibility that addressees of a Statement of Objections could ask such questions has been recognized previously by the Hearing Officers. See S. Durande and K. Williams, "Oral hearings and the role of the Hearing Officers", 2005 Competition Policy Newsletter 2, p. 25. The draft Guidance recognizes this point in principle (¶ 57), but appears to subject this possibility to the discretion of the Hearing Officer. There appears to be no reason to treat questions put by the Commission and questions put by the addressee of a Statement of Objections differently.

²⁵ See "Commission simplifies the legislative framework for examining competition cases", IP/98/1177.

4. CONCLUSION

29. Although Van Bael & Bellis welcomes the Commission's attempt to increase the transparency of the procedures of the Hearing Officers, Van Bael & Bellis considers that further progress could be made, namely in relation to the independence and neutrality of the Hearing Officers and the publicity of their communications with DG Competition and the Commission, and with respect to ensuring that the rights of addressees of a Statement of Objections are given the opportunity to comment on all aspects of the Commission's case, both in writing and orally. Such issues go beyond the protection of rights of defence as they also help ensure that the Commission considers all relevant facts and arguments when carrying out its investigations.