

Comments on DG Competition's Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU*

Introduction

White & Case welcomes this opportunity to comment on DG Competition's ("DG COMP") Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU (formerly Articles 81 and 82 EC).

The discussion about the role of Hearing Officers in antitrust proceedings must be understood within the wider debate about the fairness of the Commission's procedures for deciding competition cases.¹ The Commission, which is considered to be one of the world's leading competition enforcement agencies, should have procedures which are worthy of its reputation. Companies whose conduct has been the subject of Commission decisions should have no reason to doubt the fairness of its decision-making process.

Without any criticism of the talent and integrity of the officials involved, in our view, the current system suffers from some major weaknesses. The oral hearing under the current system does not perform the basic function of a hearing, which is to allow an impartial decision-maker to resolve differences between the prosecution and the defendant company. There are a number of aspects to this:

- The absence of the final decision-maker (the College of Commissioners) from the oral hearing, and the procedures prior to the hearing;
- The fact that the same team of Commission officials that investigated and prosecuted the case will also make factual determinations, draft the final decision and advise on sanctions;
- The lack of any right for companies to examine, or have examined, significant parts of the evidence against them, and in particular the testimony of leniency applicants.

As a result, the companies which are investigated, and ultimately fined, under EU competition law have expressed serious concern about the rigour and impartiality by which the facts – and ultimately their liability – are determined. Companies will often, quite reasonably, have the impression that they have been prosecuted and tried by the same people. These weaknesses not only damage the perception of the quality of decision-making in

* These comments are offered by the Brussels office of White & Case LLP in response to DG Competition's public consultation and should be used for no other purpose, either by DG Competition or by third parties. They do not represent the views of the Firm or of its clients.

¹ This subject has been evoked in a number of recent academic comments, including I. Forrester, 'Due process in EC competition cases: A distinguished institution with flawed procedures' in (2009) 34 E.L. Rev. 817; W. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR', (2010) 33 World Competition, 5; F. Castillo de la Torre, 'Evidence, Proof and Judicial Review in Cartel Cases', (2009) 32 World Competition, 505; D. Slater, S. Thomas & D. Waelbroeck, 'Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?', Global Competition Law Centre Working Paper 04/08; 'Enforcement by the Commission: The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System', report presented at the Fifth Annual Conference of the Global Competition Law Centre, 11-12 June 2009.

competition cases; they also cast doubt over the compatibility of the current system with the right to “*a fair and public hearing ... by an independent and impartial tribunal established by law*”, enshrined in Article 6 of the ECHR and Article 47(2) of the Charter of Fundamental Rights of the European Union. This is especially important given that the Commission is promoting follow-on damages actions before national courts, combined with the fact that its decisions, adopted with a significant due-process deficit, produce binding effects before such courts.²

We acknowledge that many of the inherent weaknesses of the EU decision-making process in competition cases cannot be corrected without amending Regulation 1/2003³ (and perhaps even the Treaties themselves) and that such changes lie outside the scope of the present discussion. We would nevertheless take the opportunity to strongly urge the Commission to consider such reform.

In the more immediate term, some of the perceived unfairness surrounding the oral hearing could be addressed by revising the mandate of the Hearing Officers. With a few improvements, the oral hearing could become a meaningful fact-finding exercise, with the potential to impact upon the final decision.

1. Timing of the hearing

The Commission’s current practice is to hold a hearing within approximately one month of receiving a response to the Statement of Objections. In a cartel case, this seems unrealistically quick as it gives the case team and the Hearing Officer very little time to assimilate the responses received and prepare for the oral hearing. A change of practice is therefore required to allow proper time for preparation by all parties involved in the hearing otherwise the impression may be created that the hearing is a mere formality.

2. Hearing Officer to draw conclusions on the substance of the case

Currently, there is no hearing before the final decision-maker. None of the Commissioners attend the hearing. The hearing is chaired by a Hearing Officer who decides procedural matters but has no formal role in deciding the outcome of the case or determining specific factual circumstances. Instead, the Commission officials who draft the final decision are the same officials who conducted the investigation and prepared the Statement of Objections. Even the most diligent and honest official, after having investigated a case over a number of years, and having prepared a Statement of Objections, will find it difficult to be persuaded that he or she was wrong. This creates a perception of bias, if not actual bias.⁴

Without Treaty change, the Commission, i.e. the College of Commissioners, will remain the final decision-maker in competition cases under Article 105(2) TFEU. Under the principles of institutional balance and the attribution of powers laid down in Article 5(2) TFEU, it may not delegate this power to another institution or body. The College may delegate internally

² Under Article 16 of Regulation 1/2003, national courts “cannot take decisions running counter to the decision adopted by the Commission”.

³ It is submitted that the European Commission’s Report on the functioning of Regulation 1/2003 of 30 April 2009 was a missed opportunity to address criticisms about the absence of due process in competition proceedings.

⁴ F. Castillo de la Torre, member of the Legal Service of the Commission, writing in his personal capacity, has admitted that “it is undeniable that ‘prosecutorial bias’ may exist”. See ‘Evidence, Proof and Judicial Review in Cartel Cases’, *op. cit.*, at 569.

acts of administration and management, but not the adoption of decisions applying Articles 101 and 102 TFEU.⁵ Requiring the presence of the College of Commissioners at the oral hearing is perhaps unfeasible and would present other problems. A partial solution would be the attendance of the Competition Commissioner at the hearing. However, it is unlikely that the Commissioner, with all his or her other obligations, would in reality be able to devote sufficient time to resolving specific factual disputes in large and complex competition cases. In practice, he or she would be heavily dependent on the case-team whereas the situation calls for a second independent pair of eyes. As long as the decision is drafted by the case-team, the presence of one or more members of the College of Commissioners would not resolve matters.

A better solution would be to create a stronger and more visible link between the person presiding at the hearing (currently the Hearing Officer) and the making of the final decision. This person should have a formal role in deciding the substance of the case and not simply procedural matters. This would compensate, to a certain extent, for the absence of the final decision-maker at the hearing. It would also reduce the role of the case-team and the risk of prosecutorial bias tainting the decision-making. Specifically, we suggest that:

- The person presiding at the hearing, currently the Hearing Officer, after having heard the evidence of the Commission and the defendant company, would prepare a report with initial conclusions on the substance of the alleged infringement. Where there is a dispute as to facts on which liability will turn, that person would take a view on the credibility of the evidence put forward by the different parties and identify whose evidence is more convincing. To a large extent, this would be a reinforcement of the current practice whereby the Hearing Officer usually prepares an Interim Report containing observations on the substance of the case focussing on “*the Commission’s findings contested by the parties, which are liable to have decisive importance for the outcome of the proceedings and may relate to the withdrawal of certain objections, the formulation of further objections or, in any other way, make suggestions as to the further progress of the proceedings*” (paragraph 62 of the Guidance).
- However, unlike the current Interim Report, which is a purely internal document that has no formal influence on the final decision, these conclusions would be made available to the parties before the final decision is adopted and published.
- These conclusions would also provide the basis for the drafting of the final decision, introducing an element of objectivity into that process. One further possibility along these lines would be for the Hearing Officer in person to draft the decision, which would then be formally adopted by the College of Commissioners. Less radically, the Hearing Officer should have the opportunity to review and comment on the draft decision.
- The Hearing Officer would record in the Final Report whether his or her concerns were sufficiently addressed in the final decision.
- The Hearing Officer’s conclusions would not, of course, constitute a final decision; nor could they formally bind the College of Commissioners. However, any

⁵ Joined cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF AG and Others v Commission* [1992] ECR II-315, paragraph 57 and on appeal Case C-137/92 P *Commission v BASF AG and Others* [1994] ECR I-2555, paragraph 71.

significant and unexplained departure from the conclusions of the Hearing Officer would be clearly evident from the published documents, and could be invoked by a company challenging the decision before the General Court.

3. More rigorous fact-finding during the hearing

A frequent complaint by companies and their representatives is that the oral hearing does not enable a thorough and fair assessment of the facts in dispute. This is important because in competition cases, liability can turn on a number of hotly contested facts.

At present, the oral hearing takes place at a very advanced stage of a case and is simply an occasion for the parties to supplement their written submissions with oral presentations. There is thus only a limited opportunity for the parties to challenge the evidence against it, including the witnesses upon whose testimony the Commission relies. The entire process is functionally-oriented at inviting the Commission case-team to consider whether its long-held theories were mistaken. The Hearing Officer's role is confined to ensuring that the procedure goes forward smoothly rather than affirmatively seeking clarification on the contested points.

In our view, the oral hearing currently does not perform the basic function of a hearing, which is to provide a forum for a neutral decision-maker to identify the material areas of dispute and to determine these, having weighed up two contending viewpoints.

Without necessarily going as far as requiring a full trial, we believe that the following improvements would make the hearing more focussed and more meaningful:

- The Hearing Officer could systematically exercise his or her discretion (referred to at paragraph 46 of the Guidance) to ask parties to address particular issues, thus directing the hearing to the material areas of dispute;
- The Hearing Officer could also consider whether particular issues could be dealt with in separate hearings, perhaps dealing first with preliminary issues that may remove the need for consideration of other issues. This would make the hearings more focussed and the whole procedure more efficient;
- The Hearing Officer could also request, either on his/her own initiative or following a request by the defendant company, the attendance of specific persons upon whose testimony the Commission relies.⁶ Sufficient notice should be given. The Hearing Officer should be prepared to draw conclusions on the credibility of his/her oral testimony, or lack thereof. Even if these requests remain voluntary, the fact that the Hearing Officer might draw adverse inferences if a witness refuses to attend without good reason will encourage the Commission to put forward such witnesses.

These changes would also reinforce the adjudicatory role of the Hearing Officer, discussed above: if this person is to have a greater role in the decision-making, he or she should also be equipped with the tools and resources necessary to determine the material facts of the case, having heard both parties on an equal footing.

⁶ A recent judgment of the Spanish Supreme Court has ruled that the refusal by a competition authority to accept the witnesses' declarations, as requested by the defendant company, amounted to an infringement of the rights of defence under Article 24.2 of the Spanish Constitution. This ruling delivered on 10 December 2009 in the SOS case (Tribunal Supremo, 10/12/2009, Rec. num. 970/2008) establishes a clear legal test for admitting evidence and is a welcome development with regard to the safeguarding of due process by national judges.

4. Independence of the Hearing Officer

The independence of the Hearing Officer is vital to the fairness and credibility of the process. At present, the Hearing Officers are directly attached to the office of the Competition Commissioner. Although their independence is not in question, it would be reinforced and made more visible if they were formally independent of DG COMP, and attached instead to the office of the Commission President or the Secretary General. In addition, one of the Hearing Officers could be appointed from outside the Commission in order to give a visible signal of neutrality and objectivity.

Going further in this direction, the task of the Hearing Officer, as proposed in this paper, could be carried out by a panel of independent antitrust experts, including present Hearing Officers, rather than one single individual. A precedent for the use of panels is the UK Competition Appeal Tribunal. Cases are heard before a Tribunal consisting of three members: the President or a member of the panel of chairmen and two ordinary members, who have expertise in law, business, accountancy, economics and other related fields.

Connected to the question of independence is the matter of resources. The Hearing Officer should have the necessary resources and sufficient, suitably qualified staff to carry out his or her tasks independently of other Commission services. It is to be expected that an expansion of the role of the Hearing Officer, as proposed in this paper, would have to be accompanied by an increase in the Hearing Officer's resources.

5. A further hearing on the factors contributing to the fine

Under the 2006 Fining Guidelines,⁷ the level of the fine is a function of a number of mitigating and aggravating factors, which themselves are dependant on a number of factual determinations, e.g. whether or not a company co-operated with or obstructed the investigation, its ability to pay the fine etc.

At present, the level of the fine, as well as the Commission's calculation and determination of which factors are relevant to the calculation of the fine, is only revealed after the punishment is imposed. While possible aggravating and mitigating factors must be referred to in the Statement of Objections and the Commission may request information from the company about its turnover for a number of recent years and the value of sales for a number of different products, the company has no opportunity to be heard on the specific application of the 2006 Fining Guidelines to its particular case.

The Commission might, for example, due to the particular circumstances of the company, decide to adopt a different reference year to calculate the basic amount of the fine or the 10% threshold. These will have important consequences for the level of the fine. However, until a final decision is published, a defendant company cannot know that the Commission was considering this and thus does not have any opportunity to make submissions responding to the Commission's specific arguments.

Equally, a company may have requested that the Commission take account of the company's inability to pay a fine, relying on paragraph 35 of the 2006 Fining Guidelines. Historically, such requests have been dismissed by the Commission in a perfunctory manner, without any

⁷ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ [2006] C 210/2.

indication in the final decision of the criteria used. A company has no opportunity to demonstrate that it meets these criteria before a neutral decision-maker.

In our view, it would therefore be appropriate to hold a separate hearing, before a neutral person such as the Hearing Officer, on the various factors relevant to the level of fines.