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

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Executive summary

The purpose of this paper is to give an overview of the effect that the exercise of the right to be heard has in the Commission’s decision-making process in competition matters. More particularly, it analyses the influence that oral hearings and also the role the Hearing Officers can have in practical terms. In doing so, the paper is intended to shed some light on an often neglected area of the Commission’s antitrust and merger work, the visibility of which is frequently precluded by its mainly internal nature.

Introduction

The right to be heard as a fundamental right

The Commission must comply with general principles of EU law, which include inter alia the respect of the rights of defence, during its administrative proceedings (2). More specifically, the European courts have consistently held that the right to be heard, as an essential component of the rights of defence (3), arises in all proceedings initiated against a person which are liable to culminate in an adverse measure against that person (4). The right to be heard, as a consequence drawn from its fundamental nature, (5) must be guaranteed even in the absence of any specific legislation (6).

What is the content of the right to be heard? In competition proceedings it involves two dimensions: first, an obligation on the Commission to make its case known to the defendants; secondly, an obligation to grant the defendants an opportunity to submit their comments on the Commission’s objections (7).

The first dimension entails, in turn, that the defendant must have access to the Commission’s file (8). We know now that such access is not restricted to the documents on which the Commission has based its objections, but covers the entirety of the Commission’s file, other than business secrets, other confidential information and internal documents (9). This is generally known as the principle of ‘equality of arms’ which was previously enshrined in the jurisprudence of the ECHR (10). In the light of this principle, the fullest possible access to the Commission’s file may be now seen as a necessary corollary of the right to be heard.

The second dimension of the right to be heard, i.e., the possibility for the defendant to make known its own views on the Commission’s objections, does not, in principle, require that comments are submitted in any particular form, whether oral or written. The choice is left to the legislator, although

(1) The authors would like to thank Aitor Montesa Lloreda for his contribution to this article. The views expressed are personal to the authors.

(2) Cases 100 – 103/80 Musique Diffusion Française, [1983] ECR 1825, point 8 and 9, among many others.

(3) The European courts have stated that the rights of defence include, in particular (i) the right to be heard, (ii) the right of access to file and (iii) the principle of good and sound administration. See Cases T-191/98 and T-212 to 214/98 Atlantic Container Line v. Commission [2003] ECR II-3275.

(4) A person against whom proceedings which are liable to culminate in an adverse measure are initiated shall hereinafter be referred to as ‘a defendant’.


(7) This is constant since Cases 56 and 58/64 Consten and Grundig [1966] ECR 429 at para. 5. It is the basis for Articles 27(1) of Regulation 1/2003 and 11(2) of Regulation 773/2004.


for practical reasons a written contribution would appear inevitable. The law has, in this sense imposed on the Commission a formal duty to hear the defendants first in writing and then orally, if they so request.

Lastly, it seems clear that the right to be heard is just an opportunity and cannot become an obligation upon the defendants. They are entitled to waive this right if they consider this to be in their interest.

The right to be heard as a creation of the (secondary) law

The right to be heard, as a fundamental right, only concerns those natural or legal persons against whom a possible adverse measure is envisaged. However, the law has also recognized the existence of a right to be heard to other parties with a particular interest in a case. In antitrust matters, Articles 6 and 13 of Regulation 773/2004, respectively confer on complainants and interested third parties a right to be heard in writing. The latter have been also recognised a right to have certain access to the information available in a case. But the intensity of this right is very different from that of the defendants themselves. Complainants are simply entitled to a non confidential version of the Statement of Objections (\(^1\)), whereas interested third parties only enjoy an even more diluted right to be informed of the nature and subject matter of the procedure (\(^2\)).

As mentioned above, this 'softer' version of the right to be heard is not the expression of a fundamental right. It is merely drawn from the legislator's conviction that antitrust enforcement is strengthened through a close involvement of complainants and interested third parties in the proceedings (\(^3\)). It is in this context that the law provides the Commission with discretion to invite complainants and interested third parties upon request to express their view orally at the oral hearing of the defendants (\(^4\)). In other words, this right seems to be designed, to a large extent, to primarily serve the purpose of the procedure and not only the interests of the third parties concerned.

In merger proceedings, the law has reproduced the differentiation of the rights of defendants and other parties, along lines analogous to those already mentioned (\(^5\)). The Merger Regulation has however created a third and novel category, that of the 'other involved parties' that is, parties to the proposed concentration other than the notifying parties, such as the seller and the undertaking which is the target of the concentration (\(^6\)). Whereas other involved parties do not have the same right to access to the file than the notifying parties, access to the file is open to them in so far as this is necessary for the purposes of preparing their comments (\(^7\)). In addition, they have the right to be informed of the Commission objections (\(^8\)) and to be present at the oral hearing (\(^9\)). Their position is therefore much closer to that of a defendant, in terms of procedural guarantees, than to that of a complainant in antitrust matters. This view is reinforced by the Implementing Merger Regulation's recognition that, in their writing comments on the Commission objections, 'They may set out all facts and matters known to them which are relevant to their defence' (\(^10\)). By referring to the term 'defence', the Implementing Regulation seems to suggest that other involved parties may, in fact, be entitled to rights of defence and not simply procedural rights derived from the legislator's will, at least in some instances.

How is the right to be heard exercised in practice in competition proceedings?

In 2003 Statements of Objections were sent to the notifying parties in 8 merger cases. All parties replied in writing, but in two cases the parties waived their right to an oral hearing. This proportion was higher in 2004, when there were three waivers out of 7 cases in which a Statement of Objections was issued.

In Antitrust matters, 2003 was a busier year. Investigations conducted resulted in the Statements of Objections being issued in 32 cases. Only a very limited number of defendants preferred not to make use of their right to be heard in writing and this was always in the context of Statements of Objections addressed to several defendants. Nonetheless, in 10 of those cases, all the defendants waived their right to an oral hearing. In 2004 the situation was similar as to the exercise of the right to be heard in writing, but in terms of oral hearings waivers were 11, out of 28 cases in which a Statement of Objections was sent.

It can be seen therefore that defendants are surprisingly often reluctant to make use of their right to express their views at an oral hearing. There may

\(^{1}\) Art. 6(1) Regulation 773/2004.


\(^{3}\) See recitals 5, 8 and 11 of Regulation 773/2004.

\(^{4}\) See Articles 18 of Regulation 139/2004 (The Merger Regulation) and 14 to 16 of Regulation 802/2004 (The Implementing Merger Regulation).

\(^{5}\) Article 11(b) of the Implementing Merger Regulation.

\(^{6}\) Article 13(2) of the Implementing Merger Regulation.

\(^{7}\) Article 13(2) of the Implementing Merger Regulation.

\(^{8}\) Article 14(2) of the Implementing Merger Regulation.

\(^{9}\) Article 13(3) of the Implementing Merger Regulation.
be a number of different reasons for this behaviour, but two of them appear more important than others.

First, some defendants may fear that an oral hearing would be an opportunity for complainants and/or opposing third parties to present their arguments and reinforce the Commission’s views as to the objections raised. Secondly, the defendants may consider that the Commission’s position is already fixed at the time of sending the Statement of Objections and that only in exceptional circumstances that position could be modified. In that context, defendants may believe that the investment required for a good preparation of an oral hearing is not compensated by the low probability of obtaining a decision which would suit their interests better.

The second reason may seem most important if one pays attention to the answers that private practitioners, and, in general, the business community, gave to questions posed in the framework of the House of Lords enquiry of 2000 for its report named ‘Strengthening the Role of the Hearing Officer in EC Competition Cases’ (1). An analysis of those answers shows that a number of practitioners expressed great doubts as to the value of oral hearings and the possibility to reconcile evidence and put questions to the Commission (2).

Nevertheless, since then, new Terms of reference of the Hearing Officers have been adopted (3), which indirectly give more importance to the oral hearing by strengthening the role of the Hearing Officers. It should be also noted that the new implementing regulations, subsequently adopted in both the antitrust and merger fields, explicitly provide for the possibility for any participant at the hearing to ask questions to any other participant (4).

The value of the oral hearing in the Commission’s procedure

An adversarial part of the procedure

It has been long said that the Commission’s procedure in competition matters has an inquisitorial character. The Commission has even been termed as being at the same time prosecutor, judge and jury. The proceedings are, to a substantial extent, carried out in writing and with little opportunity for the defendants to shape the debate in a specific direction. However, this description is nowadays too simplistic. One can today legitimately argue that there are some adversarial aspects to the Commission’s procedure.

The Commission’s procedure is divided in three stages (5). In stage I, the Commission obtains all the information available in order to set up the most accurate facts of the case. To this end, it has very wide powers of investigation (6). Stage I ends with the notification of the Commission’s competition concerns to the defendants by means of a Statement of Objections. A Statement of Objections is a procedural document, preparatory in relation to the final decision, which delimits the scope of the objections of the Commission. The Commission cannot rely in its final decision on any other objections, but can withdraw them in part or in full. The assessments set out in that document are just provisional (7).

In stage II, the Commission must give the defendants an opportunity to comment in writing on the objections raised. The defendants also have the occasion to express their views at an oral hearing. For that purpose, as explained before, complete access to file must be conducted.

In stage III the Commission may adopt a final decision, once it has fulfilled some procedural obligations that may increase the quality of such decision, such as the consultation of the Advisory Committee.

Stages I and III are directed by the Commission and the defendant has a very restricted margin of manoeuvre. It is obliged to answer when required and cannot readress the Commission’s attention to any specific point of its interest. Stage II, however, confers a substantial role on the defendant and is shaped in a more adversarial manner. The Commission is no longer the sole master of the procedure. It should take account of the factors emerging from the defendant’s answer in order either to abandon its objections, if they are proved unfounded, or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains (8). The Commission’s objections are thus reviewed in the light of the explanations provided. The defendant may also bring external opinions and experts in its support. Even though the Commission is not forced

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(2) See part 3 point 29 of the Report.
(5) These three stages, under different denominations, take place both in antitrust and merger cases.
(6) Articles 17 to 22 of Regulation 1/2003, Articles 11 to 13 of Regulation 139/2004.
to address all the arguments put forward by the defendants in its final decision, it should be receptive to those arguments and open to persuasion (1). Arguably, this openness should be showed by the inclusion in the final decision of, at least, the main arguments raised by the defendants. Finally, as it has been pointed out above, during the oral hearing the defendant may be entitled to ask questions to the Commission, when allowed by the Hearing Officers (2). The Commission’s ability to answer these questions satisfactorily may be mentioned in the Interim Report of the Hearing Officers that will be referred to below. Besides, the defendants may also put questions to the complainants and other parties present at the oral hearing and the Hearing Officers take good account of such interaction in the Interim Report.

In fact, oral hearings reinforce the quasi adversarial nature of the second stage of the procedure. It is true that there is no judge presiding over such a stage, but there are a number of persons with a special responsibility in the subsequent stage, whether consultative (such as the Member States or the Hearing Officers in some instances), or decisive (such as the influence of other involved Commission services and their Commissioners in the College), that may take good account of the result of the hearing and the interaction produced therein.

**In some cases, the oral hearing may also serve to complete the Commission’s investigation**

A Statement of Objections is, as already said, a preliminary assessment that can be radically changed or substantially adjusted. Sound administrative practice seems to require that the Commission carries out the most complete work of investigation before issuing a Statement of Objections. In this sense it would not appear appropriate that the Commission sends a Statement of Objections and organizes an oral hearing just to clarify some obscure points relating to a case under investigation. In addition, the Commission must have had substantiated sufficiently its objections against the defendant in the first place and make them understandable so that the defendant can enter a valid defence. However, should obscure points arise in the framework of a thorough investigation; the defendants’ reply may have a very important role in their clarification.

Accordingly, the Commission may use the oral hearing to shed light on some points of law or fact on which it has not yet reached a clear understanding. In this context, the possibility for the Hearing Officers to accept fresh documents from the defendants at the hearing, which takes place from time to time, is of particular importance (3). Also interventions by third parties are often helpful, whether they confront or support the defendants’ position.

As a result, whilst oral hearings are normally hallmarked by their purpose to ensure the respect of the rights of defence, they may also involve investigative aspects, at least up to a point. There are sometimes delicate balances to achieve in this respect.

In view of the potentially high value of oral hearings for the Commission’s correct understanding of the case, the Commission may be willing to hold such a hearing even when the defendants have waived this right. It is clear that defendants cannot be forced to attend, but nothing in the law or the courts’ judgments seems to prevent the Commission from organizing a meeting with complainants, interested third parties, other involved parties in merger proceedings, representatives of the Member States and other involved Commission services, to which the parties would be invited. This meeting may have a restricted value in relation to that of an oral hearing of the parties, but could provide the Commission with fresh arguments and some interaction. Third parties may have, for instance, opposing views to those expressed by the defendants in writing. They can also contradict each other or the Commission. The strength of their arguments may be a good test for the Commission’s objections. Persons involved in the decision making process may find it useful to take strong arguments as a reference. Finally, these opinions may enhance the correct understanding of the issues raised by the case.

**Oral hearings may sensitise participants on the main issues of dispute**

Oral hearings provide defendants with the widest possible audience they can reach in the Commission’s proceedings. An oral hearing, run by a Hearing Officer, is usually held in the presence of the case team, the responsible Director, a member (at least) of the Commission’s Legal Service, members of other associated Commission services and a number of representatives of National Competition Authorities (4). All these persons have a

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(1) As suggested by AG Slynn in Case 86/82 Hasselblad, [1984] ECR 883.
(2) Articles 14(7) of Regulation 773/2004 and 15(7) of Regulation 802/2004. The Hearing Officer does not oppose to these questions in any oral hearing, provided they are not unduly put in an aggressive fashion.
(3) Article 12(3) of the Mandate.
(4) Member States representatives are also present at the Advisory Committee.
particular role in the subsequent stage. They are consulted at the time of adopting a final decision. Their views and, eventually, criticisms, may be taken into account by the Commission.

In this context, the importance that oral hearings may have cannot be underestimated. Well shaped questions to the Commission raise quite often a number of points of interest which receive careful reflection during the decision-making stage. The strength of the Commission’s case is tested and the really significant issues are more easily identified than in the written comments. It is not too bold to argue that oral hearings circumscribe the genuine object of the debate.

Practical effect of oral Hearings in the Commission’s decision making

As one might expect, oral hearings only rarely reverse completely the orientation of the case. Should this be normal practice, one could legitimately criticise the weakness of the Commission’s reasoning in its Statement of Objections. However, experience shows that, in a number of instances, the orientations of cases have been altered quite dramatically subsequent to the explanations given in oral hearings, even leading the Commission to drop entirely its objections, i.e. to abandon the case.

Oral hearings more often adjust some particular points of importance to the defendants. Following oral hearings, the objections addressed to a number of defendants have been dropped in several cases in the last years, while objections against other defendants in the same proceedings have been retained. Oral hearings have also helped to establish correctly the duration of the infringement in antitrust cases, to modify the scope of the infringements found, or to appreciate in a more correct manner the role that aggravating or mitigating circumstances should play in the subsequent stage in determining the level of fines. They have also had an important impact on the Commission perception as to the sufficiency of commitments proposed by the notifying parties in merger proceedings.

The practical impact of the role of the Hearing Officers in the Commission’s decision making

A number of dispositions of their mandate give the Hearing Officers a real ability to influence the decision making process

Whilst the Hearing Officers have decisive power in some purely procedural matters (time limits to reply to a Statement of Objections, access to file, protection of legitimate confidentiality claims and admission of third parties), where their assessment is only subject to the review of the European Courts, they cannot impose any view on the Commission as to the other procedural guarantees of the defendants or the substance of any given case. Nevertheless, there is a significant distinction to be made here. Concerning procedure, the Hearing Officers must submit a report to the College, on the basis of the draft decision to be presented to the Advisory Committee, on the respect of the right to be heard. This report will consider, in particular, whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, including all questions relating to access to file. Where appropriate, it will also deal with the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in relation to any proceeding initiated by the Commission. The report is sent to the competent member of the Commission, the Director-General for Competition and the Director responsible, and also to the NCAs. As an additional guarantee, that report is communicated, together with the decision, to the addressees. It is, finally, published in the Official Journal.

In this context, it is of course difficult to see how the Commission could attach to one of its decisions a negative final report of a Hearing Officer stating that the procedure followed was not correct and had led to a violation of the right to be heard. As a result, procedural shortcomings have to be corrected in the course of the investigations, before the final report of the Hearing Officer is attached to the draft decision of the College.

In matters other than the right to be heard, the Hearing Officers have a more complex role to play. Under their terms of reference, they are allowed

(1) Inter alia, Articles 8 to 10 of the Mandate.
(2) In general, the decisions of the Hearing Officers have a preparatory character in relation to the Commission’s final decision. The European Courts have clarified in a number of instances that ‘only measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment’ (See Cases T-10,11,12 & 15/92 Cimenteries [1992] ECR II-2667) Accordingly the decisions of the Hearing Officers can only be challenged together with the final decision. As the only exception to this rule, the ECJ has stated that decisions concerning the disclosure of information which has been claimed to be confidential are definitive in nature and can be the object of an independent appeal (See Case 53/85 Akzo [1986] ECR 1965).
(3) Articles 14 and 15 of the Mandate. When appropriate, it is also sent to the EFTA Surveillance Authority.
(4) Article 16 of the Mandate. Hereinafter that formal report will be referred to as the ‘final report’.
to present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission (1). In addition, they are obliged to seek to ensure that in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements related to the gravity of any infringement and to contribute to the objectivity of this decision (2). They are finally authorized to make observations on the progress of the proceedings further to the oral hearing, relating, among other things, to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

From the wide numbers of ‘musts’ and ‘mays’ above, it can be inferred that the Hearing Officers have an obligation to use their best efforts to ensure that the best possible decision is taken. The fulfilment of this duty is especially important where an alternative decision could cause any prejudice to the defendants. However the Hearing Officers are not an Advocate General. Their opinions are not compulsory and are not published. This may be seen as a shortcoming of the Hearing Officers’ role, but conversely, one may also argue that the absence of publicity enhances their freedom to express internally their views and the fact that their opinions on these grounds are not required, reinforces their moral authority in the cases where they decide to take position.

What is beyond any doubt is that the Hearing Officers have no more ammunition than the strength of their arguments when it comes to the substance of the case. Neither the Commissioner nor the Directorate General are, by any means, bound to follow those arguments. However, the Hearing Officers’ opinion is likely to be carefully taken into consideration for a number of reasons, particularly in the framework of the current reinforcement of the Commission’s checks and balances through the appointment of a Chief Economist and the introduction of scrutiny panels.

First, the Hearing Officers have no responsibility for the investigation of the case. They are, therefore, a fresh pair of eyes in the proceeding which may alleviate its otherwise mainly inquisitorial nature. Second, the Hearing Officers have access to and frequent contact with all the parties involved in each case: the case team, defendants, complainants and other persons concerned. Such wide and frequent access confers upon them a privileged central and impartial position with full knowledge of the positions of the parties. Third, the Hearing Officers preside over the oral hearing, where they can test the strength of all parties’ arguments and may also address questions in order to clarify certain points, which they normally do. And fourth, the Hearing Officers may select the issues, other than those related to the right to be heard, that they wish to rise. They can therefore focus on the matters which, for their gravity or novelty, have retained their attention and require in their view more direct action.

Both the Hearing Officers and the case team prepare their own report on the hearing. These reports are sent to the Commissioner and constitute the working basis of the meeting where the further orientation of the case is decided. This report of the Hearing Officers (3), is usually divided in two main parts. The first part deals extensively with issues related to due process. The second one starts by a summary of the main arguments of the different parties at the hearing. In some cases the Hearing Officers may also proceed to analyse their strength, with a special focus on how those arguments stood up to attack, if there was any, at the hearing. Finally, the interim report may include the Hearing Officers’ conclusions as to the substance of the case.

Often, the Hearing Officers’ conclusions are very succinct and limit themselves to confirm the Commission’s view, although it is not rare that, even in this case, they propose to investigate further some issues or include arguments or counterarguments expressed at the hearing. Nonetheless, in a number of cases, the Hearing Officers suggest important precisions. They propose adjustments in the aggravating and attenuating circumstances concerning an infringement. These adjustments may have major consequences for the final level of fine, as it has been the case in a number of instances. Finally, the Hearing Officers may even recommend radical changes in the orientation of the case.

Both the report of the case team and that of the Hearing Officers’ are presented to the Commissioner. In some cases, where no important questions have been raised, the case team's proposal as to the orientation of the case will be smoothly adopted. However, should there be any controversial point, the Commissioner would listen to the different arguments exposed and decide on the course of action.

The value that a Commissioner gives to the Hearing Officers’ opinion depends to a great extent on the nature of the issues discussed. As explained above, concerns related to due process questions,

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(1) Article 3(3) of the Mandate.
(2) Article 5 of the Mandate.
(3) Hereinafter ‘Interim Report’.
in the large sense of the term, are always taken into very careful consideration and almost in every case followed. Other kinds of arguments may or not be endorsed, but they are accorded the attention that deserves the opinion of a fresh pair of eyes, with special responsibility over the defendants’ rights of defence and direct knowledge of the case.

The Hearing Officers may also propose that the case is reviewed by an internal scrutiny panel. This has recently happened in a number of cases at or with the advice of the Hearing Officers. Possibility of panel revisions is a further guarantee of impartiality and thorough work in disputed cases. They prove that the checks and balances recently set up by the Commission can be very effective.

After the new orientations of the case are adopted or the old ones, with due adjustments, are confirmed, the Hearing Officers are called on to certify that due process was respected by means of their Final Report, which was referred to above.

**Conclusion**

*When oral hearings are held, they are an important part of the Commission’s decision-making process*

Oral hearings often confirm the orientation of the case, but they may also change, as has been previously described. But above all, they are an important reference for the several services and persons which are involved in the Commission’s decision making process, in order to decide on the merits of a given case.

In view of the importance of oral hearings, the Commission may be tempted to organise a succedaneum of them should the defendants waive their right to be heard orally. Even having a lower signification, these ‘quasi hearings’ could be a useful tool for the sake of a correct investigation and decision.

Finally, the fears that defendants may have about hearings becoming arenas for parties having views opposed to their own, is unfounded. Those parties may have equal access to the Commission by other means and the fact that such confrontation is avoided, may not help the solidness of the defendants’ position.

Oral Hearings are always an opportunity to defend the positions of the parties and, at the same time, improve the quality of the final decision.

The Hearing Officers play a complex role, although difficult to circumscribe in the Commission’s decision making process

The Hearing Officers’ natural role is to protect the requirements of due process within the Commission’s procedure. But in addition to this, they have a mandate to use their best efforts to ensure that the decision adopted is objective, built on solid proof, sound and proportional.

This second task, is only carried out where it is perceived that there is a genuine need for it. Such part of the Hearing Officer’s work can only use persuasion as a tool of influence and remains outside public scrutiny (1).

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(1) Interim reports of the Hearing Officers are internal documents, like the Legal Service’s opinions or the case teams reflections.