HEARING OFFICER
FOR COMPETITION PROCEEDINGS
ACTIVITY REPORT
2015

This Report is intended for information only and is not intended as an authoritative interpretation of the legal provisions involved.
1. **INTRODUCTION**

Pursuant to Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, the role of the Hearing Officer for competition proceedings ("Hearing Officer") is to safeguard the effective exercise of procedural rights throughout proceedings before the Commission for the implementation of Articles 101 and/or 102 TFEU and under Council Regulation (EC) No 139/2004. The Hearing Officer is responsible for organising and conducting oral hearings, and acts as an independent arbiter when a dispute about the effective exercise of procedural rights cannot be solved through prior contacts between the parties and the Directorate-General for Competition ("DG Competition"). In carrying out his duties, the Hearing Officer has, depending on the matters brought before him, decision-making powers, powers of recommendation or reporting powers. More information about the role and powers of the Hearing Officer as well as practical information is available at [http://ec.europa.eu/competition/hearing_officers/index_en.html](http://ec.europa.eu/competition/hearing_officers/index_en.html).

2. **OVERVIEW OF THE WORK OF THE HEARING OFFICER IN 2015**

In 2015, the Hearing Officer dealt with over 45 cases, of which 16 reached the stage of a final report. The Hearing Officer organised and conducted eight oral hearings, and subsequently issued seven interim reports. The Hearing Officer also adopted two decisions concerning extension of time limits, one decision concerning confidentiality as well as one decision concerning procedural rights of parties in the investigation phase, 13 decisions concerning access to file, and 58 decisions concerning the admission of third persons.

Around three-quarters of the Hearing Officer’s activities related to proceedings under Articles 101 and/or 102 TFEU. The bulk of the remainder concerns merger control proceedings.

Statistics concerning final and interim reports, oral hearings and formal decisions from 2012 to 2015 are provided below. These statistics do not cover observations made in accordance with Articles 3(5) and 14(2) of Decision 2011/695/EU, or recommendations with respect to legal professional privilege or the privilege against

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1 Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29 ("Decision 2011/695/EU").


3 Articles 16 and 17 of Decision 2011/695/EU. See Annex A for a list of the final reports adopted in 2015.

4 Article 14(1) of Decision 2011/695/EU. One interim report relating to an oral hearing organised in mid-December 2015 was issued in January 2016.

5 Article 9 of Decision 2011/695/EU.

6 Article 8 of Decision 2011/695/EU.

7 Article 4 of Decision 2011/695/EU.

8 Article 7 of Decision 2011/695/EU.

9 Article 5 of Decision 2011/695/EU.
Neither do they capture the matters in which an informal solution was reached.

The number of oral hearings in any given period is not necessarily reflective of the Commission’s overall activities in competition cases, as oral hearings do not take place in all cases. Whereas in Article 101 TFEU and Article 102 TFEU cases the parties involved request an oral hearing in most of the cases where a statement of objections is issued, in merger cases parties tend to opt for an oral hearing in only about half of the cases where a statement of objections has been issued.

### 3. DECISIONAL PRACTICE OF THE HEARING OFFICER IN 2015

The procedural matters frequently dealt with by the Hearing Officer in 2015 concerned admission and procedural rights of third persons in competition proceedings, access to the file, confidentiality and the right to be heard. Selected points of interest emerging from the Hearing Officer’s decisions adopted or reports published in 2015 are described below.

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10 Article 4(2)(a) and (b) of Decision 2011/695/EU.
3.1. Access to the file

Access to documents in merger proceedings before the issuing of a statement of objections

After the notification of a decision pursuant to Article 6(1)(c) of the Merger Regulation, the Commission usually provides the parties, prior to the issuing of a statement of objections, with the opportunity of reviewing and commenting on "key documents" obtained by the Commission.\(^{11}\) Such documents may include submissions of third parties and market studies. In one case during 2015, the parties were dissatisfied with the extent of the set of key documents they received. DG Competition provided access to some additional data, but did not accede in full to the parties' request for further access. For DG Competition, that request sought material going beyond the concept of "key documents" for the purposes of point 45 of the Merger Best Practices. The parties approached the Hearing Officer, expressing concerns in relation to access to documents and the procedural fairness and transparency of the process in general.

Article 4(1) of Decision 2011/695/EU does not provide a legal basis specifically empowering the Hearing Officer to intervene directly in the investigation phase of merger proceedings. Moreover, disclosures of documents prior to the statement of objections do not, strictly speaking, relate to access to the file. Full access to the Commission's file only arises if and when the Commission adopts a statement of objections.\(^{12}\) By providing access to some key documents at earlier stages of the proceedings, the Commission seeks to ensure a high degree of transparency and predictability of the review process.\(^{13}\) In the case concerned, the Hearing Officer took note of DG Competition's timely and comprehensive reply to the parties' requests for access to documents prior to the statement of objections and he concluded that, in any event, he considered that DG Competition had met the requirements of procedural fairness and transparency.

3.2. Position of interested third persons in competition proceedings

Timing of request to be recognised as interested third person in merger proceedings

In merger proceedings a request to be granted interested third person status can only be submitted and examined pursuant to Article 5(2) of Decision 2011/695/EU once the proposed concentration has been notified to the

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\(^{13}\) See paragraph 1 of the Merger Best Practices.
Commission. Third parties can learn of such notification by means of the notice published in the Official Journal of the European Union.\textsuperscript{14}

In a merger case where such a request was submitted before notification, the Hearing Officer thus pointed out that he was not yet in a position to decide on the application to be recognised as interested third person. He invited the applicant concerned to re-submit its application if and when the proposed transaction was notified to the Commission.

When that applicant applied after the notification of the proposed concentration, the Hearing Officer admitted it as an interested third person. In accordance with Article 5(4) of Decision 2011/695/EU, the Hearing Officer informs the parties to the relevant merger control proceedings of this admission if the Commission decides to initiate proceedings under Article 6(1)(c) of the Merger Regulation. Since the proposed concentration was cleared at the end of the Commission’s “first phase” investigation and no “second phase” procedure was initiated under Article 6(1)(c) of the Merger Regulation, the parties to the relevant merger control proceedings were not informed of the admission of the interested third person.

Scope of the right to be heard of interested third persons in competition proceedings

In proceedings under Articles 101 and 102 TFEU, in accordance with Article 13(1) of Regulation No 773/2004,\textsuperscript{15} interested third persons are entitled to be informed "in writing of the nature and subject matter of the procedure" and to make known their views in writing within a period set by the Commission.

In merger proceedings, Article 16(1) of the Merger Implementing Regulation similarly defines the right of interested third persons to be heard, stating "that the Commission shall inform them in writing of the nature and subject matter of the procedure and shall set a time limit within which they may make known their views".

In the course of 2015, decisions of the Hearing Officer clarified the scope of the Commission's obligation to inform recognised interested third persons of the nature and subject matter of the procedure in both merger proceedings and proceedings under Articles 101 and 102 TFEU.

This issue arose when interested third persons argued in a request to the Hearing Officer under Article 7(2)(d) of Decision 2011/695/EU that they had reason to believe that they had not been duly informed of the nature and subject matter of a procedure in accordance with Article 13(1) of Regulation No 773/2004 or Article 16(1) of the Merger Implementing Regulation.

\textsuperscript{14} See Article 4(3) of the Merger Regulation and judgment in Association belge des consommateurs test-achats v Commission, T-224/10, EU:T:2011: 588, paragraph 57.

\textsuperscript{15} Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty as last amended by Commission Regulation 2015/347 ("Regulation No 773/2004").
The Hearing Officer considered that both in proceedings under Articles 101 and 102 TFEU and in merger proceedings the Commission has a degree of discretion in determining the information to be made available to interested third persons in order to guarantee that their right to be heard is effectively safeguarded.

In a decision rendered in the context of a merger case, the Hearing Officer clarified that the Commission should enable interested third parties to express their views on the proposed merger, taking into account the stage and course of the procedure.

In another decision in the context of a proceeding under Article 101 TFEU, the Hearing Officer considered that the Commission (in practice, DG Competition) enjoys considerable leeway when deciding whether or not to provide interested third persons with a non-confidential version of a statement of objections. The Hearing Officer clarified in the same decision that differences in the treatment of various interested third persons under Article 13(1) of Regulation No 773/2004 are permissible where there are objective differences between these interested third persons, for instance with respect to the contribution they can make to the Commission's understanding of the relevant facts.

3.3. Participation of complainants in proceedings under Articles 101 and 102 TFEU

In 2015 the Hearing Officer declined competence to deal with a request of a complainant to extend a deadline set by DG Competition to submit observations on a reply to a statement of objections issued in a case under Article 102 TFEU. The Hearing Officer stated that it is not foreseen under Article 6 of Regulation No 773/2004 that a complainant has a right to receive or make known its views on the written response submitted by a party concerned to a statement of objections in the case to which the complaint relates. Accordingly, Article 9(2) of Decision 2011/695/EU cannot be construed as providing a legal basis for the Hearing Officer to examine such request, whether or not DG Competition has dealt with the matter in the first instance.

3.4. Participation in oral hearings

In the context of a proceeding pursuant to the Merger Regulation, one of the involved parties added shortly before the oral hearing a number of customers to the list of participants that would attend the oral hearing on its behalf. This was not accepted by the Hearing Officer. Subsequently, some of these customers, upon their own requests, were allowed to participate in the hearing as interested third persons.

The question of which persons are allowed to appear at the oral hearing on behalf of an addressee of the statement of objections in a merger procedure is governed by Article 15(4) and (5) of the Merger Implementing Regulation. These provisions do not entitle a party to bring along to the oral hearing, as part of its own delegation, representatives of other undertakings.
or entities, such as customers. Apart from members of their permanent staff and legal representatives or representatives authorised by their constitution, undertakings can only bring to the oral hearing their lawyers, as well as other qualified and duly authorised persons (such as economic Advisers) admitted by the Hearing Officer.

The hearing of third persons, including their participation in a formal oral hearing, is exclusively governed by Article 16 of the Merger Implementing Regulation. Such persons can be heard either as interested third persons pursuant to Article 18(4), second sentence, of the Merger Regulation as well as Articles 11(c) and 16(1) and (2) of the Merger Implementing Regulation, or as other third persons whom the Commission may invite pursuant to Article 16(3) of the Merger Implementing Regulation.

Addressees of the Commission's statement of objections, who, as part of their defence, wish to rely upon representations of third parties such as customers may in their written reply to those objections, propose that the Commission hear persons who may corroborate the facts set out in their reply. If the Commission accepts such a proposal, the Commission may, pursuant Article 16(3) of the Merger Implementing Regulation, invite such persons to express their views at the oral hearing.

3.5. Status of observations of the Hearing Officer made under Article 14(2) of Decision 2011/695/EU

Under Article 14(2) of Decision 2011/695/EU, the Hearing Officer may, in addition to the interim report on the respect for the effective exercise of procedural rights, make observations to the Competition Commissioner on the further progress and impartiality of competition proceedings. One of the addressees of a Commission decision imposing fines in a cartel case requested, on the basis of Article 7(2) of Regulation (EC) No 1049/2001, access to the Hearing Officer's observations made pursuant to Article 14(2) in that case.

In her decision of 30 April 2015 on behalf of the Commission pursuant to Article 4 of the Implementing Rules to Regulation No 1049/2001, the Commission's Secretary General considered that the Hearing Officer's observations under Article 14(2) of Decision 2011/695/EU are covered by a general presumption of inaccessibility, since disclosure of documents in cases regarding the application of Articles 101 TFEU and 102 TFEU would undermine the purpose of the confidentiality rules introduced by Regulation No 1/2003 and Regulation No 773/2004. It would also undermine the Commission's decision-making process, within the meaning of Article 4(2)

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16 See Article 13(3) of the Merger Implementing Regulation. See Article 10(3) of Regulation No 773/2004 with respect to proceedings pursuant to Articles 101 and 102 TFEU.

and (3) of Regulation 1049/2001, which contains exceptions to the general principle of public access to documents.18

4. **REGULATORY DEVELOPMENTS**

4.1. **Confidentiality of the oral hearing further to the amendment of Regulation No 773/2004**

Commission Regulation (EU) 2015/1348 of 3 August 2015 introduced amendments to Regulation No 773/2004.19 These amendments are designed to align the position under Regulation No 773/2004 with the provisions of the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Damages Directive").20 Among other things, a new Article 16a has been included in Regulation No 773/2004.

This new Article 16a has a direct bearing on the confidentiality of information disclosed during oral hearings which, as stipulated in Article 14(6) of Regulation No 773/2004, are not public.

It confirms that any information disclosed during an oral hearing can only be used for the purposes of judicial and/or administrative proceedings for the application of Articles 101 and 102 TFEU.21

In addition, any information prepared by other natural or legal persons specifically for the proceedings of the Commission and information drawn up by the Commission and sent to the parties in the course of its proceedings cannot be used in proceedings before national courts until the Commission has terminated its proceedings.22

These usage restrictions apply in particular to all presentations prepared for and handed out during the hearing, as well as to the recording of the oral hearing.

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19 Commission Regulation (EU) 2015/1348 of 3 August 2015 amending Regulation No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 208, 5.8.2015, p.3


21 Article 16a(1) of the Regulation No 773/2004. See also Recital 20 of Decision 2011/695/EU.

22 Article 16a(3) of the Regulation No 773/2004.
If the above usage restrictions are disregarded with the involvement of outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.  

4.2. **New guidance document: Best practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation ("the Data Room Best Practices")**

The purpose of "data room procedures" is typically to provide access under strict rules to sensitive data constituting business secrets in order to verify the Commission's methodology and conclusions drawn from the data. In June 2015, DG Competition published a new guidance document: the Data Room Best Practices.

This new guidance notes the role of the Hearing Officer in cases of persisting disagreement between DG Competition and parties or other information providers in relation to the disclosure of information. In this context, the Hearing Officer may be called upon to take decisions under Article 7 and/or Article 8 of Decision 2011/695/EU.

Under Article 8(4) of Decision 2011/695/EU, the Hearing Officer may decide that confidential information in the Commission’s file may be made accessible to parties in a restricted manner. The Hearing Officer may thus decide that a data room procedure should be used in those limited cases where access to certain confidential information is indispensable for a party's rights of defence and where the Hearing Officer considers that, on balance, the conflict between respect for confidentiality and rights of defence is best solved in this way. The Hearing Officer will not take such decisions if he considers that the data room is not appropriate and that access to the information should be given in a different form.

5. **JURISPRUDENTIAL DEVELOPMENTS CONCERNING THE HEARING OFFICER**

5.1. **Publication of decisions – competence of the Hearing Officer under Article 8 of Decision 2011/695/EU.**

In its judgment in *Evonik Degussa v Commission*, the General Court ruled that the Hearing Officer was correct, in the case at hand, to decline competence to answer objections based on the principles of legitimate expectations and equal treatment that sought to prevent the publication of certain parts of a Commission cartel decision. In the General Court’s view, these principles are not as such specifically intended to protect the confidentiality of information or documents against disclosure to the public. They thus fall outside the task entrusted to the Hearing Officer under Article 8 of Decision 2011/695/EU. At the time of drawing up this report, the

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25 See paragraphs 31 to 44, in particular paragraph 43.
General Court’s judgment is under appeal before the Court of Justice (Case C-162/15 P).

The General Court confirmed this position regarding the delimitation of the Hearing Officer's competence in the judgment in AGC Glass Europe and others v Commission²⁶ where the applicants had invoked similar arguments.

In the judgment in Pilkington Group v Commission, the General Court ruled, among other things, that the Hearing Officer cannot reject a confidentiality request already accepted by DG Competition.²⁷

### 5.2. The oral hearing

In his Opinion in SKW Stahl–Metallurgie v Commission, Advocate General Wahl took the view that an oral hearing during the administrative phase of competition proceedings is not a fundamental right.²⁸

This does not alter the fact that observance of the rights of defence is a fundamental principle of EU law which must be complied with, even in administrative proceedings.²⁹

It should be noted that the entitlement to an oral hearing is laid down in Regulation No 773/2004. It can be seen from Article 12 of that Regulation that the oral hearing is designed to allow addressees of statements of objections “the opportunity to develop” the arguments made in their written submissions.

In the same Opinion, Advocate General Wahl took the view that granting an in camera hearing is at the Hearing Officer's discretion.³⁰ He added in this respect that the procedure before the Commission seems to reflect an unwritten principle that the power to decide whether an oral hearing ought to be held in camera belongs to the impartial body conducting the hearing (to be exercised of its own motion or following a request).³¹

Regarding the organisation of an additional oral hearing, as requested by one of the parties before the Commission, the Advocate General considered, as did the General Court, that the proper conduct of the administrative procedure in competition matters requires the adoption of a decision within

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²⁶ Judgment in AGC Glass Europe and others v Commission, T-465/12, EU:T:2015:505, paragraph 59. This judgment is also under appeal at the time of writing (Case C-157/15 P).
³⁰ Ibidem at paragraphs 51–68.
³¹ Ibidem at paragraph 59.
reasonable time, and that accordingly there is no right to an additional oral hearing.\textsuperscript{32}

Advocate General Wahl also notes that the right to heard is intended to give undertakings the opportunity of being heard, not necessarily of being heard at the time of their best convenience.\textsuperscript{33}

In its judgment in \textit{Emesa-Trefileria SA v. Commission},\textsuperscript{34} the General Court confirmed earlier judgments dealing with the question as to whether the presence of Commissioners was required at the oral hearing. The General Court confirmed in this judgment that there was nothing to prevent the members of the Commission who were responsible for taking a decision imposing fines from being informed about the outcome of the hearing by such persons as the Commission has appointed to conduct it.\textsuperscript{35}

\begin{flushleft}
\textsuperscript{33} Ibidem at paragraph 71.
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Annex A

FINAL REPORTS ADOPTED IN 2015
— In chronological order —

<table>
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<th>Adoption Date</th>
<th>Type of Procedure</th>
<th>Article 101 TFEU and/or Article 102 TFEU</th>
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<td>31/01/2015</td>
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<td>AT.39964</td>
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<td>M.7265</td>
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<td>DEMB/Mondelez/Charger Opco</td>
<td>M.7292</td>
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<tr>
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<td>M.7421</td>
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Regulation No 139/2004

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<td>19/10/2015</td>
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<td>AT.39639</td>
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<td>2/12/2015</td>
<td>BEH Electricity</td>
<td>AT.39767</td>
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<td>25/06/2015 M.7429 – Siemens/Dresser Rand</td>
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<td>6/07/2015 M.7408 – Cargill/ADM Chocolate Business</td>
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<td>1/09/2015 M.7278 – General Electric/Alstom</td>
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<td>18/12/2015 M.7630 – FedEx/TNT Express</td>
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