EUROPEAN COMMISSION

Hearing Officer for competition proceedings

Final Report of the Hearing Officer[1]

General Electric Company/LM Wind Power Holding (Art. 14)

(COMP/M.8436)

Introduction and background

1. This report concerns a draft decision (the 'Draft Decision') pursuant to Article 14(1) of Council Regulation (EC) No 139/2004[2] ('EUMR'). The Draft Decision finds that General Electric Company ('GE') negligently submitted incorrect information in a notification (the 'Original Form CO') made pursuant to Article 4 EUMR in the context of Case M.8283 – *General Electric Company/LM Wind Power Holding* (the 'Authorisation Proceedings').

2. The Authorisation Proceedings concerned a concentration (the 'Reviewed Concentration') whereby GE acquired sole control, for the purposes of Article 3(1)(b) EUMR, over LM Wind Power Holding A/S. The Reviewed Concentration was notified on 11 January 2017 by means of the Original Form CO.

3. On 1 February 2017, the Commission Directorate-General for Competition ('DG Competition') informed GE in a meeting that the Commission would consider the possibility of opening an infringement investigation against GE for the submission of incorrect or misleading information in the Original Form CO.

4. GE withdrew the Original Form CO on 2 February 2017 and replaced it on 13 February 2017. The Commission authorised the Reviewed Concentration on 20 March 2017.

The present proceedings

5. By letter of 9 March 2017, the Commission indicated to GE that it had opened proceedings in the present case (M.8436) that might lead to the imposition of a fine pursuant to Article 14(1) EUMR for failure to submit, in the Original Form CO, information that was correct and not misleading. That letter described the documents that would be included in the investigation file for the present case.

---

1 Pursuant to Articles 16 and 17 of 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').

2 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1.

Commission européenne, DG COMP MERGER REGISTRY, 1049 Bruxelles, BELGIQUE
Europese Commissie, DG COMP MERGER REGISTRY, 1049 Brussel, BELGIË

Tel: +32 229-91111. Fax: +32 229-64301. E-mail: COMP-MERGER-REGISTRY@ec.europa.eu.

6. On 6 July 2017, the Commission issued a statement of objections addressed to GE (the 'SO'). The Commission's provisional conclusion in the SO was that GE, with respect to its offshore product development plans, 'intentionally or at least negligently supplied incorrect or misleading information in the Original Form CO'.

7. On 13 July 2017, GE obtained access to material on the Commission's investigation file in the present case that was not already in GE's possession in the context of the Authorisation Procedure.

8. The initial deadline for GE to respond in writing to the SO was 31 August 2017. DG Competition revised this deadline several times, initially to allow GE to explore with it the possibility, available in the Commission's recent decisional practice, of a procedure characterised by a reduced fine reflecting heightened cooperation.

9. Such a 'cooperation procedure' would in particular – not unlike the settlement procedure under Article 10a of Commission Regulation (EC) No 773/2004 available in cartel cases – reflect procedural efficiencies arising from a party's acknowledgement of facts and liability by way of a reduction of the fine that might otherwise be imposed by the Commission at the end of a standard procedure (here, for the application of Article 14 EUMR). To assist the party concerned in deciding in a free and informed way whether to opt for such a cooperation procedure, the Commission may disclose to that party a likely range of fines that would apply under a cooperation procedure.

10. In certain meetings in 2017, DG Competition discussed the possibility of a cooperation procedure with GE. Also in 2017, GE submitted, 'without prejudice' (to any response to the SO), draft papers setting out facts and mitigating circumstances that it considered relevant.

11. In a meeting on 7 February 2018, the Commission communicated to GE the percentage reduction for cooperation and the corresponding range of fines that were available if GE opted for a cooperation procedure. For the purposes of this meeting, the College of the Members of the European Commission (the 'College of Commissioners' or the 'College') had previously approved that reduction and that range of fines.

12. On 12 March 2018, GE declined to pursue a cooperation procedure. Proceedings accordingly continued following the standard procedure.

13. GE submitted its written response to the SO on the applicable revised deadline of 6 April 2018. This response (the 'SO Response') took issue with the Commission's provisional conclusions in the SO. It also raised two procedural objections.

Procedural objections in the SO Response

Claim of a case team conflict of interest giving rise to (the appearance of) bias

14. GE notes that essentially the same case team in DG Competition (the 'Case Team') ran (i) the Authorisation Procedure, (ii) separate but partly concurrent merger control proceedings in a case concerning the same sector as the Authorisation Procedure and (iii) the investigation leading to the SO. GE claims that this gives rise to a conflict of interest 'which creates at least the appearance of bias on the part of the Commission'. According to GE, this is because inherent in GE's case in the present proceedings is a 'criticism of the failure of the [Case Team] to make proper use of information' provided

by GE in the Authorisation Procedure and the other merger control proceedings. For GE, a decision on the merits of that criticism would 'involve that team pronouncing on the diligence and propriety of its own conduct'. GE thus expresses a 'fear that the [Case T]eam lacks impartiality, contravening the principle of good administration and detracting from the outward appearance of a fair decision-making process'. GE also states that it took the view that 'availing itself of the opportunity of an oral hearing would be an exercise in futility'.

15. As an EU institution, the Commission is subject to the principle of good administration, enshrined in Article 41 of the Charter of Fundamental Rights of the European Union (the 'Charter'). That principle entails among other things the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case.[3] The corresponding right, reaffirmed in Article 41(1) of the Charter, of every person to have his affairs treated impartially encompasses, on the one hand, subjective impartiality, in so far as no officer of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any doubt as to bias on the part of the institution concerned.[4] It follows from case law that subjective impartiality is presumed unless the contrary is proved.[5]

16. To the extent that GE suggests that the Case Team and, by extension, the Commission are subjectively biased, GE has put forward no evidence to support this suggestion. At most, in respect of the Case Team only, GE merely asserts the existence of a conflict of interest. Such an assertion is not such as to show that the Case Team or the Commission lacked objectivity in this procedure.[6] Accordingly, in line with the above-mentioned case law, it can be presumed that the present proceedings are not tainted by subjective bias. In any event, as emerges from paragraphs 17 to 21 below (particularly paragraph 21), even if GE had demonstrated subjective bias on the part of one or more members of the Case Team, that would not suffice to show that the Commission as an institution was subjectively biased, as GE appears to suggest.[7]

17. As regards GE's allegation of objective bias in the present proceedings, this overlooks (i) the fact that a final decision in these proceedings is not one of the Case Team but of the Commission as an institution, acting through the College, at the end of a procedure involving numerous actors other than the Case Team, and (ii) the associated internal checks and balances in proceedings for the application of Article 14 EUMR.

---

3 See judgments in *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, and *Teva* v *Commission*, T-679/14, EU:T:2018:919, paragraph 54.

4 See judgments in *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 155; *ICAP* v *Commission*, T-180/15, EU:T:2017:795, paragraph 272; *KF* v *SatCen* T-286/15, EU:T:2018:718, paragraph 176; *Teva* v *Commission*, T-679/14, EU:T:2018:919, paragraph 54; and *Servier* v *Commission*, T-691/14, EU:T:2018:922, paragraph 119.

5 See, to that effect, judgments in *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 54; and *IDDE* v *Parliament*, T-118/17, EU:T:2018:76, paragraph 27.

6 See, by analogy, judgments in *Volkswagen* v *Commission*, T-62/98, EU:T:2000:180, paragraph 272; *Teva* v *Commission*, T-679/14, EU:T:2018:919, paragraph 58; and *Servier* v *Commission*, T-691/14, EU:T:2018:922, paragraph 137.

7 See, by analogy, judgment in *ABB Asea Brown Boveri* v *Commission*, T-31/99, EU:T:2002:77, paragraph 104.

18. Even before a draft decision in a given case under Article 14 EUMR is deliberated upon in the College (see further paragraph 21 below), the relevant actors other than the case team dealing with the case in DG Competition include:

- the Commissioner for Competition, assisted by the members of the private office attached to that Commissioner;
- DG Competition's senior management, including the Director-General of DG Competition;
- DG Competition's relevant horizontal coordination unit;
- the Chief Economist's Team (where appropriate[8]);
- the Commission's Legal Service[9];
- 'associated services' in the Commission[10];
- the Hearing Officer[11]; and
- the Advisory Committee on concentrations[12].

19. The applicable system of checks and balances includes, among other things, the entitlement of an addressee of a statement of objections to develop its arguments at an oral hearing. Rather than being, as GE asserts, an 'exercise in futility', an oral hearing in the present case would have served, among other things, to rectify GE's impression

8 In the present proceedings, given their subject matter, the Chief Economist's Team was not involved.

9 The Legal Service, which is independent of DG Competition and reports directly to the President of the Commission, performs an important advisory and reviewing role, designed to ensure the legal soundness of the Commission's actions and decisions. In accordance with the Commission's internal rules and practice, the Legal Service was regularly consulted in the course of the present proceedings.

10 Depending on the subject matter involved, Directorates-General other than DG Competition are also consulted as 'associated services' in the course of drawing up a draft decision for the consideration of the College. In the present proceedings, the Directorates-General for Energy (DG Energy) and for Internal Market, Industry, Entrepreneurship and SMEs (DG Grow) have been consulted.

11 The primary role of the Hearing Officer, whom GE did not call upon in the present proceedings, is to 'safeguard the effective exercise of procedural rights throughout competition proceedings before the Commission' (see Article 1(2) of Decision 2011/695/EU). Allied with this role is an internal reporting and advisory role within the Commission. For example, the Hearing Officer may 'present any observations on any matter arising out of any competition proceeding to the competent member of the Commission' (Article 3(5) of Decision 2011/695/EU). Such observations are not necessarily limited to matters of due process. According to Article 3(7) of Decision 2011/695/EU, if an issue regarding the effective exercise of procedural rights cannot be resolved with DG Competition, it may be referred to the Hearing Officer for independent review. Where there is an oral hearing, the Hearing Officer produces an internal interim report and may in addition issue a separate internal report on 'the further progress and impartiality of proceedings' (see Article 14(1) and (2) of Decision 2011/695/EU). Pursuant to Articles 16 and 17 of Decision 2011/695/[…][*], the Hearing Officer examines, among other things, whether a draft decision before the Advisory Committee or the College deals only with objections in respect of which the party concerned has been afforded the opportunity of making known its views. In accordance with Article 3(1) of Decision 2011/695/EU, the Hearing Officer acts independently.

12 In accordance with Article 19(3) to (7) EUMR.

* Should read: "EU".

apparent from the SO Response that the course and outcome of present proceedings was being determined exclusively, or even primarily, by the Case Team. Most if not all the relevant actors mentioned above would have been represented at such a hearing.

20. That system also includes the possibility of a 'peer review' exercise within the Commission.[13] It is not DG Competition's practice to disclose the organisation of 'peer review panels' in given cases.[14] However, in the present case, it is worth revealing, exceptionally, that DG Competition organised a peer review panel in the present proceedings, in which I and the Legal Service participated. My disclosure here of the organisation of this peer review exercise is a precaution designed to avoid any semblance of the appearance, from GE's perspective, of Commission bias arising from GE's indirect criticism of the Case Team as described in paragraph 14 above.

21. At the end of a procedure for the adoption of a decision under Article 14 EUMR, the action of the Commission is governed by the principle of collegiality stemming from Article 250 TFEU.[15] That principle is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions are the subject of collective deliberation.[16] Accordingly, it can be seen from the case law that statements by a Commissioner responsible for competition matters or a member of a case team that are perceived by the party concerned as evidence of bias do not of themselves vitiate the legality of a final decision, since such a decision is not adopted by the Commissioner or official in question, but by the College.[17]

22. In the light of all the above, GE's allegations of bias are unconvincing.

23. In addition, it is noteworthy – albeit not part of the support for the above conclusion – that the fine proposed in the Draft Decision is significantly lower than the bottom end of the fining range approved by the College for a possible cooperation procedure (see paragraph 11 above).

---

13 In some cases, the Director-General of DG Competition, in agreement with the Commissioner, decides to conduct a 'peer review'. A peer review team consisting of DG Competition personnel from outside the relevant case team subjects the provisional working assessment of that case team to detailed scrutiny. Afterwards, a peer review panel chaired by a scrutiny officer is convened in order to have an open discussion within the Commission on the case. Among other things, the peer review panel can identify areas where further work is necessary, identify objections that should be dropped, or recommend that a case not be pursued further (see the text entitled 'Proceedings for the application of Articles 101 and 102 TFEU: Key actors and checks and balances' published by DG Competition in September 2011, accessed at http://ec.europa.eu/competition/antitrust/key_actors_en.pdf).

14 As noted in the judgment in *Servier* v *Commission*, T-691/14, EU:T:2018:922, paragraph 138.

15 Judgment in *Servier* v *Commission*, T-691/14, EU:T:2018:922, paragraph 127.

16 See, among others, judgments in *Vlaamse Televisie* […]* v *Commission*, T-266/97, EU:T:1999:144, paragraph 49; *BASF* v *Commission*, T-15/02, EU:T:2006:74, paragraph 611; and *Imperial Chemical Industries* v *Commission*, T-66/01, EU:T:2010:255, paragraphs 175, 176 and 178.

17 See, to that effect, judgments in *Vlaamse Televisie* […]* v *Commission*, T-266/97, EU:T:1999:144, paragraph 49, and *ABB Asea Brown Boveri* v *Commission*, T-31/99, EU:T:2002:77, paragraph 104.

* Should read: "*Maatschappij*"

Claim that the College of Commissioners pre-judged this case before hearing GE

24. GE considers that it should have been given the opportunity to express its views before the College approved a range of fines for a possible cooperation procedure corresponding to a given percentage reduction of what the fine might otherwise have been (see paragraph 11 above). GE infers that, by not first hearing submissions from GE concerning, in particular, gravity and mitigating circumstances, the College 'seems to have effectively pre-judged the appropriate level of penalty'.

25. This objection overlooks the fact that the approval by the College of a range of fines was made solely for the purpose of a possible decision adopted under a cooperation procedure as outlined in paragraph 9 above. Since a decision on fines is one for the College, DG Competition could not itself indicate any such range without the approval of the College. The College's approval did not however have any bearing on the amount of fines that might be imposed under the standard procedure for the application of Article 14 EUMR.

26. GE ultimately decided to pursue that standard procedure in preference to a cooperation procedure. That meant that the fines range approved by the College no longer served any purpose. Indeed, the abandonment of the possibility of a cooperation procedure meant that matters reverted to a clean slate under the standard procedure, with liability yet to be determined.[18] GE could thus still contest the SO in full and still had the option of exercising in full those procedural rights that are triggered by the issuance of a statement of objections, in particular the right of access to the file and the right to respond to the SO in writing and in a formal oral hearing.

27. As is reflected in Article 41(2)(a) of the Charter, the right to be heard arises before any measure is taken which would adversely affect the addressee of that measure. GE was not the addressee of the approval of the College. More importantly, GE was not adversely affected by that approval. To the contrary, that approval positively affected GE in that it afforded it the option of a cooperation procedure, in addition to the normal option (which remained unaffected) of contesting the SO under the standard procedure. There was thus no need for GE to be heard before the approval by the College of a range of fines based on the hypothesis that GE would opt for decision adopted under a cooperation procedure.

28. For these reasons, GE's objection outlined in paragraph 24 above is unconvincing.

[18] See, by analogy, judgment in *Timab Industries and CFPR* v *Commission*, T-456/10, EU:T:2015:296, paragraphs 104 and 105, upheld on appeal in judgment in *Timab Industries and CFPR* v *Commission*, C-411/15 P, EU:C:2017:11, paragraphs 120 to 122.

Concluding remarks

29. Compared to the Commission's provisional conclusions in the SO, the Draft Decision does not conclude that GE 'intentionally or at least negligently' supplied incorrect or misleading information in the Original Form CO. Rather, the Draft Decision finds that GE negligently supplied incorrect information. In addition, the Draft Decision does not take into account an impact of that incorrect information on any case other than the Authorisation Proceedings. In the light of this circumstance in particular, the fine proposed in the Draft Decision is below the fining range previously approved by the College for the purpose of a possible cooperation procedure (see paragraph 11 above).

30. I have not received any request or complaint in relation this procedure. In accordance with Article 16 of Decision 2011/695/EU, I have examined whether the Draft Decision deals only with objections in respect of which GE has been afforded the opportunity of making known its views. I conclude that it does. Overall, I consider that the effective exercise of procedural rights has been respected during the present proceedings.

Brussels, 1 April 2019

Wouter WILS