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Oral Hearings—Neither a Trial Nor a State of Play Meeting

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I. INTRODUCTION

Oral hearings have always been one of the more prominent features of the European Commission's procedure in competition cases, although these proceedings are predominantly written rather than oral in nature. This prominence is somewhat surprising given that hearings are merely an option for defendants,² organized only at the request of the company which the Commission alleges to be in potential violation of EU competition law.

In practice, oral hearings are requested in around 75 percent of all cases for which a statement of objections ("SO")³ has been issued. Broken down by category, oral hearings are held in 90 percent of all cartel cases, 80 percent of all other antitrust cases (Art.101 and 102 TFEU violations), and only 50 percent of all merger cases. In the years 2004-2009, there have been, on average, 12 hearings per year, of which 50 percent have been cartel hearings, 30 percent other antitrust hearings, and 20 percent merger hearings. Recently, the trend for oral hearings to take place in only one out of two merger cases has not continued; hearings have been held in all proceedings with a statement of objections in the last two years, while there were none in 2007.

From the perspective of a defendant the attractiveness of an oral hearing hinges upon a variety of aspects. Considerations such as the nature of the objections, whether it is likely to be a multi-party meeting (including complainants or other hostile third parties), and the evidentiary situation are probably some of the more important aspects influencing the decision whether or not to request a hearing. Time may also play a role in merger cases.

Another important aspect is how the hearing is conducted. Oral hearings have been a constant feature of the Commission's competition proceedings since the first procedural regulation for the application of the competition rules was adopted in 1963.⁴ Much has changed since then, not the least because of the introduction of a Hearing Officer in 1982. Today oral hearings are meetings, very often of several parties, under the chairmanship of an independent Hearing Officer, where the merits of preliminary findings of the Directorate-General for Competition (DG Competition) adopted by the Commission, are discussed in a formal setting. A hearing is neither a trial nor a state of play meeting. A hearing is a hearing. It functions as a check and balance within the administrative procedure before the authority takes a final decision on a case.

¹ Michael Albers is a Competition Hearing Officer of the European Commission; Karen Williams served until recently as a Competition Hearing Officer. Opinions expressed are personal.

² We use here the term defendant for the sake of simplicity. In the language of the law they are called "undertakings which are the subject of the proceedings conducted by the Commission" or "undertakings concerned."

³ In merger cases: statement pursuant to Art. 18 Council Regulation (EC) No 139/2004, OJ L 24, 29.1.2003.

⁴ See Art. 7 Commission Regulation (EC) No 99/63, OJ 127, 20.8.1963, p.2268.

II. ORAL HEARINGS AS A CHECK AND BALANCE

Checks and balances are very important in view of the complexity of competition cases and the powers which the Commission possesses as an enforcement agency.

The purpose of the Commission's administrative procedure is to establish whether a competition rule has been violated and, if so, what needs to be done to protect or restore competition. For certain infringements it has also to be determined whether a fine is imposed. Establishing infringements requires, to a certain extent, value judgments for which significant legal, economic, and technical expertise is necessary.

Another aspect of this administrative procedure is the investigative, prosecutorial, and adjudicative powers of the Commission. It has discretion whether to launch an investigation, how to conduct it, i.e. which investigative tools are to be applied, which evidence it uses, and whether a case is developed on the basis of established administrative practice and jurisprudence or new theories of law. Moreover, the Commission decision establishing the infringement and imposing the sanction or remedy or both takes immediate effect.

Commission decisions are, of course, subject to judicial review upon the appeal of the addressee or, potentially, by other interested parties such as the complainants. Actions have, however, no suspensive effect unless the President of the General Court orders interim measures, on request. Although, on the substance of the case, European Courts do not carry out a re-examination of the whole case and review the legality of the Commission's decision on the basis of the applicant's pleas, in practice, the degree of control can be extensive, as demonstrated by the extensive reasoning of the judgments when compared to other courts. Moreover, the EU courts have full jurisdiction on the fines and may thus modify them directly, either downwards or upwards, without sending the case back to the Commission⁵. It remains that checks and balances that take place already during the administrative procedure are useful not only to assess the reality of the facts and the soundness of the competition concerns but also to ensure the efficiency, objectivity, and effectiveness of proceedings.

Oral hearings form a part of the administrative procedure. They are organized during the *inter partes* phase, after the Commission has arrived at the intermediate result that a specific conduct or transaction raises competition concerns. The fundamental objective of this phase is to hear the potential infringer(s). Companies have a fundamental right not only that the Commission lays out its objections in writing but also that it allows them to respond to the objections in writing and, if they so request, orally. Complainants and other third parties formally admitted to the procedure may also be permitted to participate and express their views. Following the oral hearing, the Hearing Officer drafts a report with the conclusions he or she draws from it for the Commissioner responsible for competition. The results of the oral hearing are then discussed internally, within the Commission. In the event that the case proceeds to a draft decision this is discussed with the Advisory Committee and then presented to the College of Commissioners which takes a final decision on the outcome.

⁵ B. Vesterdorf, *Judicial Review in EC Competition Law: Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement*, (1) COMPETITION POL'Y INT'L 3 (2005).

III. ORAL HEARINGS AS A CHECK

A proper oral hearing provides, first, a check on the preliminary findings, envisaged sanctions, and remedies as laid out in the statement of objections. Similar to the preceding written response to the objections, the hearing gives the defendant(s) an opportunity to present their point of view and to introduce counter-arguments and counter-evidence. If complainants and other third parties are participating in the proceeding, they usually also contribute and provide their own perspective on the case.

An oral hearing may well be the last occasion to have the Commission's full attention and influence the orientation of the proceeding. It would therefore seem advisable not to use hearings merely as the occasion to repeat the same arguments already submitted in writing. Oral hearings are probably most effective where the representatives of the parties and the Directorate-General for Competition enter into a discussion about the facts, the evidence, and the legal assessment before the expert audience of the Hearing Officer, other Commission services—normally including the Legal Service—and members of national competition authorities. The aim of such exchange of views is twofold:

- It assists in eliminating misunderstandings and misinterpretations, irrelevant facts, and erroneous legal qualifications as well as unsuitable remedies. It also reveals gaps in the investigation, lacunae in the legal analysis, and mistakes in the definition of the remedy. The result may well be a greater convergence on the reading of the facts, a more focused and accurate assessment of the competition issue the case raises, as well as a better-designed remedy.
- It also helps to reveal prejudice and avoid bias on all sides.⁶

Oral hearings allow for an exchange of views which written submissions can hardly match. They constitute a unique forum for immediate and direct debate and create incentives, primarily for the parties, to make the other participants reflect or even be convinced of its point of view.

It could be argued that it is paradoxical to conduct a hearing in a context where one side enjoys investigatory and decision-making powers. However, the Commission's mission is to discover the reality of facts for the purpose of making its assessment. It is, therefore, in its own interest that the facts are tested, the evidence probed, and the legal analysis challenged. The creation of Hearing Officers certainly promotes and reinforces this objective. Their task is to organize the event, to ensure that it contributes to objectivity, and that due account is taken of all the relevant facts, whether favorable or unfavorable, to the parties concerned.⁷ Hearing Officers chair the meeting "in full independence."⁸ This not only means independence from DG Competition but also, since they do not participate in the investigation or take any decision regarding the outcome of the case, that they have no interest in the outcome.

In some oral hearings a debate already takes place following questions raised by participants. Certain types of cases probably lend themselves more easily to such debate, while some effort may be necessary in other cases. It would seem, however, to be in the interest of the

⁶ E. Paulis, *Checks and Balances in the EU Antitrust Enforcement System*, FORDHAM CORP. LAW INST. 385, 387, 398 (2002).

⁷ Art. 5 Commission Decision on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001.

⁸ Art. 14 Commission Regulation (EC) No 773/2004, OJ L 171, 1.7.2008.

further development of competition law proceedings to have such debates on a more regular basis, thereby complementing and completing the hearing process.

IV. ORAL HEARINGS AS A BALANCE

Second, a hearing may function as a balance. It opens up the possibility for defendants and potentially other parties to introduce, complement, or defend evidence with oral presentations. Certain evidence can exclusively or best be presented orally to underpin, defend, or rebut a particular position. This is particularly important for defendants who wish to deliver exonerating evidence or rebut incriminating evidence and intend to produce for that purpose(s) witness testimony and expert statements. Even for a procedure heavily reliant on documentary evidence and written exchanges, oral interventions and testimony may prove to be essential. Such presentations may give insight into the credibility of the authors of contemporaneous documentary evidence, the interpretation of written text, as well as the background to certain conduct, strategy, or transactions. Hearings can thus contribute to reducing certain risks. They lower the risk that intuition or assumptions substitute for actual evidence. Furthermore, they minimize the risk that the Commission does not take into full account all relevant facts or misinterprets evidence decisive for the final outcome.

The balance function of oral hearings has not yet received much attention. It may, however, gain importance in the near future. Oral interpretations and presentations may increasingly be used to complement exonerating documentary evidence or rebut incriminating oral statements. Potential causes for such use of hearings are the growing significance of oral statements for leniency applications and the more frequent use of surveys of market participants as well as economic experts. Another possible reason for a shift towards a more oral procedure is the investigative tool the Commission introduced in 2004 to interview natural and legal persons on a suspected infringement of Art. 101 or 102 TFEU.⁹

A precondition for oral hearings to function as a check and balance is that there exists a set of rules which allows best use to be made of them.

V. RULES FOR ORAL HEARINGS

Secondary EU law governs the organization of hearings and the conduct of participants at the meeting. Of particular importance in this respect is the Mandate of the Hearing Officers.¹⁰ Certain customary practices have also evolved over the years. Applied together they create, in principle, workable conditions for a focused contradictory debate as well as the introduction and consideration of oral explanations, statements, or evidence.

The following rules and principles would seem to be of particular relevance for the optimal functioning of hearings as a check and balance.

⁹ Art. 19 Council Regulation (EC) No 1/2003, OJ L 1, 4.1.2003.

¹⁰ The term "Mandate" refers to the Commission Decision on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001.

A. Completion of written exchange

Oral hearings only take place after the exchange of written arguments between the Commission and the defendant. If a complainant or other third parties are involved, their written comments should also have been received and sent on to the defendant(s).¹¹ A proper clarification of the positions in writing is necessary to know what is disputed, also in terms of evidence. The written exchange prepares the ground for the introduction of additional or complementary evidence by the defendant¹² and a focused debate on the merits of the case as well as the announced sanction and remedy.

B. Representation at Hearings

An important pre-requisite for the oral hearing to function as a check and balance is that all parties and sides are appropriately represented. Only then can it be expected that opposing views are expressed and controversially discussed. The Hearing Officer normally invites all parties who have requested to attend in their written comments. He or she is also entitled to invite other parties who may be able to make a contribution at the hearing.¹³ In most cases all parties that are essential for a successful hearing request attendance on their own initiative. Most oral hearings are multi-party events. In cartel cases the multi-party dimension is the fact that there are multiple addressees to the Commission's statement of objections. In other cases, there may be one or more addressees, plus complainants and other interested third parties that have been admitted to the procedure by the Hearing Officer.

In principle, EU law obliges each party to send a corporate representative or member of staff and not only an outside legal counsel.¹⁴ A hearing loses much of its potential value if all essential parties are present but some of them are represented by persons with only second-hand knowledge of the facts of the competition case. Parties are therefore expected to have, in their team, employees with sufficient factual, economic, and technical expertise of the subject matter likely to be discussed. Parties, in particular defendants, very often are also represented by members of their board or even their chief executive officer.

The active participation of those persons who have or have had responsibility for the conduct or the transaction in question is likely to be more persuasive, cogent, and compelling evidence. The same is true for senior managers or employees who have direct knowledge of the facts and the relevant market. Economic experts are also a regular feature at many hearings. All attending persons should, at any rate, be prepared to answer all questions or address all issues related to the proceeding. Otherwise an important condition for a contradictory debate would not be in place.

Defendants have no right to request the presence of a particular party, company, or even individual as witness or expert. Neither does the Hearing Officer dispose of the power to summon them or impose penalties, if they do not accept their invitation. He or she can only invite such participants. Persons who are acting as experts for the Commission regularly receive an invitation.

¹¹ See Guidance Paper on procedures of the Hearing Officers pt. 45; available at http://ec.europa.eu/competition/consultations/2010_best_practices/hearing_officers.pdf.

¹² The Commission can only validly introduce new facts and evidence through another written document, i.e. either a letter of fact or a supplementary statement of objections.

¹³ Art. 13 (2-3) Regulation No 773/2004; Art. 16 (3) Commission Regulation (EC) No 802/2004, OJ L 133, 30.4.2008.

¹⁴ Art. 14 (4) Regulation No 773/2004; Art. 15 (4) Regulation No 804/2004.

Similarly, potential infringers cannot ask for the Commissioner responsible for competition, certain Commission officials, or national competition authorities to be present when they deliver their views or present their evidence at the hearing.

It has, however, become good practice that not only the case team of DG Competition, a representative of the Chief Economist Team, the responsible advisor of the Legal Service, and correspondents from other involved or interested Commission services attend. Usually a Deputy Director-General from DG Competition and often also a member of the cabinet of the Competition Commissioner listens in. Conversely, it has become rare that all 27 national competition authorities participate unless a case has a particular precedence value. All authorities from larger Member States, however, normally attend. Together with some smaller Member State authorities they ensure a representative quorum of the Advisory Committee which will be consulted on the case at a later stage of the decision-making phase.

C. Parties' Contributions

Another pre-requisite for a successful hearing is that all parties actively contribute to the meeting. Mere observers are, in principle, not admitted. It is for each party to decide which issue or contested evidence it wants to address. The purpose of the hearing as a check and balance would be best served, of course, if parties explain whether and to what extent they disagree with the findings or justify their conduct or transaction.¹⁵ They may, furthermore, use the hearing to introduce, complement, or explain documentary or oral evidence which is decisive for the outcome.

The Hearing Officer is entitled to take measures which encourage parties to focus on certain issues. He or she may provide them with a list of questions. He or she may also choose to invite them for a preparatory meeting before the actual hearing.¹⁶ The introduction of evidence which has not been previously mentioned in a written reply or comment on the statement of objections has to be signalled to the Hearing Officer.¹⁷ Consequently, Hearing Officers may indicate topics which should not be discussed, intervene when a person addresses issues which are not core to the hearing, and deny a person the right to speak to the audience.

D. Q & A

Question-and-answer sessions are important to make participants concentrate on the controversial issues and contested evidence. They are also essential for a contradictory debate and the probing of evidence. The procedural regulations of 2004 explicitly introduced the possibility for the Hearing Officer to allow parties and other participants to put questions to all other participants.¹⁸ Hearing Officers have the duty to ensure the best use of question-and-answer sessions. Questions and answers should thus be asked and expected by all participants.

It is almost common practice now that the case-team as well as the defendant enter into an exchange of questions and answers. The Hearing Officer may not only support questioning through an agenda, but, in practice, he or she may also stimulate a contradictory debate through

¹⁵ See Guidance Paper on procedures of the Hearing Officers pt. 38.

¹⁶ Art. 11 Commission Decision on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001.

¹⁷ Art. 12 Commission Decision on the terms of reference of hearing officers in certain competition proceedings, OJ L 162, 19.6.2001.

¹⁸ Art. 14 (7) Regulation No 774/2004; Art. 15 (7) Regulation No 802/2004.

own questions. Although participants are not obliged to answer questions, it is customary that they do so. Answers are normally given immediately to allow a proper debate. If this is not possible (which should be an exception), it is custom that the answer is given later during the hearing or shortly thereafter in writing. The Hearing Officer will always fix a time limit for the answer and make it available to all participants once it has been submitted.

EU law does not sanction incorrect, incomplete, or misleading answers given at hearings, whereas such answers are sanctioned when provided in writing in response to a formal Commission request.¹⁹ This is, fortunately, a smaller problem than may first appear. The presence of other persons with market expertise and the desire to maintain credibility and reputation significantly reduces the likelihood that an attendant does not tell the truth. Moreover, parties are aware that they may always receive a formal request for information which then obliges them to provide correct, complete, and truthful replies.²⁰ Against this backdrop parties tend to answer all questions put to them orally at hearings.

There is clearly no right to a contradictory debate with another party or the case-team. Such debates always require the consent of both sides. Debates are more probable than not to take place at hearings where a defendant meets a complainant, a leniency applicant encounters a defendant who is contesting all allegations, or an acquirer is confronted with the target of a hostile take-over (in a merger case). Case-teams should also, in principle, be willing to answer questions a defendant may have. This would seem to be appropriate in particular with regard to questions concerning facts and the evidence adduced. It is certainly also welcomed, if questions on the legal assessment as outlined in the statement of objections are answered or at least a comment provided. This would not only serve the effectiveness of the hearing but also of the Commission proceeding as a whole.

E. No Public Hearings

Oral hearings are not public.²¹ They are open to all interested parties but not to all interested citizens. The Commission is not a tribunal. Its competition proceedings are of an administrative nature. Administrative proceedings are typically only open to parties with an interest and who can potentially assist the authority to establish the truth and allow it to take the right decision. The transparency of the administrative proceeding is ensured ultimately through the reasoned decision the Commission has to take which is subsequently published and can be appealed before the European courts by all affected parties.

F. At the Request of Defendants Only

Currently, oral hearings only take place at the request of the defendant. They are not compulsory because competition proceedings before the Commission are, like all administrative proceedings, primarily written proceedings. Defendants, however, enjoy the right to be fully heard in writing and orally. The usefulness of oral hearings in competition cases is beyond doubt. It has been put forward with interesting arguments that oral hearings are so useful that they should be a

¹⁹ Art. 23 (1) Regulation No 1/2003; Art. 14 (1) Council Regulation No 139/2004.

²⁰ Art. 18 Regulation No 1/2003; Art. 11 Regulation No 139/2004.

²¹ Art. 14 (6) Regulation No 773/2004; Art. 15 (6) Regulation No 804/2004.

necessary part of the Commission's competition proceedings.²² This would, however, require an amendment of the existing procedural regulations.

VI. CONCLUSION

Oral hearings in European competition proceedings have been coined, inter alia, "official lobbying exercises" (C.S. Kerse²³) and "seminars" (D. Patterson/C. Shapiro²⁴). Other, more precise, qualifications have also been found. We believe that hearings are a unique procedural institution and that they play an important role in the competition proceedings of the European Commission. Hearings are hearings. They are not a trial because their purpose is not to produce or systematically test evidence and counter-evidence. Moreover, the presiding Hearing Officer is not a judge who makes factual and legal determinations at the conclusion of a hearing. They are, on the other hand, not a state of play meeting which is normally organized in antitrust and merger but not cartel proceedings. Such meetings allow only an oral exchange at different key stages of the procedure between DG Competition and the defendant in order to ensure communication and to discuss the possible outcome of the case.

²² E.g. I. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, ELR 831 (2009).

²³ C.S. Kerse, *Procedures in EC Competition cases: The Oral Hearing*, ECLR 43 (1994).

²⁴ D. Patterson & C. Shapiro, *Trans-Atlantic Divergence in General Electric/Honeywell: Causes and Lessons*, 17 ANTITRUST 18 (2002).