CPI COMPETITION POLICY INTERNATIONAL

The CPI Antitrust Journal
March 2010 (1)

What (Not) to Expect From the Oral Hearing

Ulrich Soltész
Gleiss Lutz

Oral Hearings and the Best Practices Guidelines

Ulrich Soltész [1]

I. THE NEW *BEST PRACTICES* PACKAGE

In recent years, the competition law community has increasingly questioned whether the Commission's sanction system under Regulation 1/2003 is actually still in line with the rule of law and the principle of due process.[2] The massive increase in fines over the past few years has stimulated a lively debate. Critics argue, *inter alia*, that by acting as investigator, prosecutor, jury, and sentencing judge all at the same time, the Commission is denying the parties concerned the basic right to be heard by an impartial tribunal. In addition, they claim that Art. 23 of Regulation 1/2003, which forms the basis for the imposition of the fines, does not meet the overriding requirement for a "clear and unambiguous legal basis," thus violating the principle of *nulla poena sine lege certa.*

In recent years, the Commission has always been able to rely on the certainty that, ultimately, the Community courts would only exercise very limited control over its discretion in imposing fines. Lately, however, criticism has been expressed not only by the lawyers of companies which are affected by record-breaking fines, but also by former judges,[3] academics,[4] and commission officials,[5] as well as the press.[6] As a consequence, the Commission can no longer brush these legitimate doubts off by claiming they are all biased and purely self-serving.

Early this year, as a hesitant reaction to this discussion and taking the *Best Practices* in the area of merger control and state aid law as a model, the Commission adopted the *Best Practices in antitrust proceedings* and the *Hearing Officers' Guidance Paper* for public consultation, accompanied by the *Best Practices on submission of economic evidence.* The declared purpose of these papers was to increase transparency and predictability in antitrust proceedings. In his first public appearances, the new Commissioner Almunia has made it clear that the question of due process and fairness in antitrust proceedings will be one of his top priorities.

II. THE ORAL HEARING

Article 12 of the *Implementing Regulation* (EC) No. 773/2004[7] provides that "the Commission shall give the parties to whom it has addressed a statement of objections ('SO') the opportunity to develop their arguments at an oral hearing, if they so request in their written submissions."

---

[1] Dr. Ulrich Soltész, LL.M is in the Brussels office of Gleiss Lutz.

[2] *See, for example*, SCHWARZE, BECHTOLD, & BOSCH, DEFICIENCIES IN EUROPEAN COMMUNITY COMPETITION LAW (2008) and I. Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, 34 E.L. REV. 817 (2009).

[3] B. Vesterdorf, *Are fines the final answer to cartels in Europe?,* 2 CONCURRENCES 1-2 (2009).

[4] *See* Schwarze, 2 CONCURRENCES (2009).

5 *See* Wernicke , Kartellbußen ohne Maß, Frankfurter Allgemeine Zeitung (February 14, 2009). Wernicke, the co-author, was at the time legal advisor to the hearing officer.

[6] *See, for example*, THE ECONOMIST (February 18, 2010).

[7] O.J. 2004 L 123, p. 18.

By putting great emphasis on the oral hearing, the new *Best Practices* package seems to suggest that, in the Commission's view, the hearing should be one of the cornerstones of due process in a cartel investigation. According to section 3.1.5 of the *Best Practices in antitrust proceedings,* the purpose of the hearing is to "allow the parties to develop orally their arguments which have already been submitted in writing and to supplement, where appropriate, the written evidence, or to inform the Commission of other matters that may be relevant." The fact that the hearing is not public should, in the Commission's view, guarantee that all attendees can express themselves freely and without constraint.

Unfortunately, the reality does not yet match these bold statements. Under the current practice, oral hearings seem to be viewed by the Commission more as a mere formality (and possibly also as a burden) rather than an opportunity to elucidate the legal and factual background of a case. This is deplorable. Given the fact that fines imposed by the Commission are arguably of a criminal or quasi-criminal nature,[8] the process leading to their imposition should contain the same safeguards as those provided for in a criminal proceeding.

A. Prosecutorial Bias

For one thing, there is the issue of prosecutorial bias. The same case team that has initiated the investigation and opened the formal procedure in the first place now hears the parties' defense arguments (which in most cases, given time constraints, are no more than a summary of the reply to the SO). In essence, the same individuals who spent months and years excavating (alleged) smoking gun documents, talking to leniency witnesses, sending out various requests for information, quarrelling with the parties' lawyers, and, most importantly, defending "their case" internally, are now the ones who are supposed to hear the parties' oral submissions.

It goes without saying that these officials are anything but impartial. Quite understandably, any antitrust official will develop a "hunting instinct" when working on a file over a long period of time. And, obviously, years of "fruitless" investigations do not look good on a Commission official's personal track record –which could well have some impact on future promotions. It is therefore only natural, and practical experience has borne this out, that the case team will always take a less favorable attitude when the parties develop their arguments at an oral hearing. It is precisely for this reason that, in criminal cases, most judicial systems have chosen to separate the functions of the investigator (police), the prosecutor, and the judge. It will always be extremely difficult to persuade an official who has investigated a case over a lengthy period of time that his efforts were in vain.

B. The Decision Makers Do Not Attend the Hearing

What makes things worse is the fact that none of the actual decision makers, i.e. the 27 commissioners, actually attend the oral hearing. Ironically, one of the main concerns expressed very recently in the *The Economist* was that "the final decision on culpability is taken on a vote by 27 politically appointed commissioners, only one of whom may have attended the defendant's hearing."[9] This is far removed from that the actual situation. To the author's knowledge a commissioner has never personally attended a full hearing. The college of commissioners has to base its factual and legal assessment solely on the draft decision prepared by the case team, i.e. the team members' individual impressions and opinions. The decision makers therefore have to

[8] For a detailed discussion *see* Schwarze, Bechtold, & Bosch, *supra* note 2, at 23 *et seq*.
[9] *Supra* note 6.

rely on hearsay when imposing their ten-digit fines. They never participate in the investigation, do not read the files and documentary evidence, nor do they listen to the oral presentations of the undertakings involved.

This does not appear to be in line with modern legal standards. In most Member States, one of the cardinal principles in criminal proceedings is that of immediacy, which requires that a court imposing criminal sanctions should have direct contact with the offender and the evidence. Such first-hand knowledge of the case can be obtained only by direct participation in the complete hearing, and not by a quick glance at a decision drafted by some officials.

C. Who (Which Individuals) Will Hear the Arguments?

As far as the presence of "senior management" is concerned, the most parties could expect up to now would be the presence of a Director (or a Deputy Director General if they are lucky) during the opening phase of the hearing (i.e. the first hour or two). The *Best Practices* now stipulate that "the increased involvement of senior management" in the course of the hearing should be a principal goal. Paragraph 94 of the *Best Practices* states, "in view of the importance of the oral hearing, it is the practice of DG Competition to ensure continuous presence of senior management (Director or Deputy Director General) in oral hearings in antitrust cases, together with the case team of Commission officials responsible for the investigation."

Such lip-service must come as quite a surprise to most practitioners as, to date, senior management have virtually never been present for the full course of the hearing. The presence of senior personnel, as well as members of the Cabinet, should indeed be continuous and, since a Director is typically too close to an investigation team, the presence of at least a Deputy Director General would be preferable. In addition, given the enormous influence of the cabinets in the decision-making process (a fact which DG Comp officials quite frequently deplore), a logical step would be to involve the members of the cabinets who are in charge of competition issues.

Given these obvious shortcomings, one might at least expect that the text of the final decision would be drafted by the officials who actually attended the hearing, but this is not even the case in all investigations. In many cases, due to the constant reorganization and job-changing in DG Comp, the final decision is written by officials who never attended the hearing at all. Such a situation could be easily avoided. It should not be too difficult to have the same Commission official deal with a case for the entire duration of the investigation.

D. Unfortunate Timing

Yet another issue is timing. As a rule, the oral hearing takes place shortly after the parties have submitted their replies to the SO. Since most investigations involve a greater number of parties, added to the fact that the voluminous replies (sometimes more than a hundred pages with additional annexes) are often in different languages, it is unlikely that the case team will have sufficient time to scrutinize the replies before the hearing takes place. This is even more the case with the national competitions authorities ("NCAs") who attend the hearing in their capacity as members of the advisory committee and also receive the replies to the SO in many different languages, often just a few days before the hearing takes place.

This leads to another problem: Frequently, the final decision is adopted a long time, sometimes well over a year, after the oral hearing took place, at which point the hearing is just a distant memory for most of the participants. Moreover, since members of the case team have

often left the case team by then, it can happen that the decision will be drafted by someone who did not attend the hearing and, therefore, has to rely on other people's impressions and opinions.

E. Evidence

There is another striking difference between an oral hearing as it is held in Brussels and a hearing before a national criminal court. At a Commission hearing, the parties are not able to interrogate key witnesses of the Commission. This is particularly problematic given the fact that, nowadays, the vast majority of cases are based on leniency applications in which witness statements and their credibility play a very decisive role. Why should the parties concerned not have the right to challenge the Commission's evidence, in particular if there is reason to suspect that the principal witness has a hidden agenda?

It is unfortunately not rare for key witnesses to attempt to incriminate certain parties for different reasons. In the first place, leniency applicants have a clear interest in submitting evidence that proves an infringement by their competitors, because their reward (the "leniency bonus") depends on whether or not they have created "significant added value."[10] Another not uncommon example is for witnesses who are former employees of a company under investigation to put the blame on their previous employers, in particular if they are in an ongoing conflict with them.

Since the Commission relies on witness statements to a very great extent, the parties concerned should not be denied the right to question the witness in a forum. This is required by Article 6 lit. d) ECHR which states that anyone charged with a criminal offense has the right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.[11] A cross-examination would help to elucidate the position of the Commission as well as that of the parties, which would be helpful because the Commission could then better assess whether it can rely on the evidence, for example, in a subsequent court procedure. Unfortunately the *Best Practices* package does not provide for such an option.

F. A Forum for Discussion?

There is another clear mismatch between the powers of the Commission and the parties concerned. While the Commission has the right to ask questions, the parties do not have a similar right vis-à-vis the case team. If, in the course of a hearing, the parties attempt to ask the Commission for explanations on specific points, this is usually met with a flat refusal. There is, however, no compelling reason why the Commission should not explain its position and test its reasoning out in such a forum. An open, but structured, discussion between the prosecutor and the defense is common practice in national criminal courts. It would also be perfectly possible under Regulation 1/2003 and would require no changes in the legal framework.

G. The Role of the Hearing Officer

According to Section 2 of the *Hearing Officers' Guidance Paper* the Hearing Officer is:

> responsible for all matters relating to the organisation and conduct of oral hearings and report directly on these hearings to the Commissioner responsible for competition on the conclusions they draw from them. In addition, at the end

[10] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298, p. 17.

[11] *See* Haas v Germany, ECtHR Case 73047/01 (November 17, 2005).

> of the procedure the Hearing Officers report to the College of Commissioners and, ultimately to the addressee of the decision and the public on whether procedural safeguards and the right to be heard have been respected throughout the proceedings.

The Hearing Officers "may also make observations on substantive issues to the Commissioner. They usually submit such observations, if any, when reporting to the Commissioner on the oral hearing."

This makes it clear that the Hearing Officers cannot replace an impartial judge. They have very limited functions, essentially relating to the physical conduct of the hearing, access to the file, and maintaining the confidentiality of the proceedings. Even though Hearing Officers have recently become more proactive than their predecessors and raised issues concerning the substance of the case, they cannot actually decide on it.

III. CONCLUSION

The Commission could definitely improve the status of the oral hearing. At the present stage, it appears to be doubtful whether the procedure meets the requirements set forth under Article 6 ECHR. The parties concerned can merely put forward their arguments to the case team, but not to a neutral judge. The role of the Hearing Officer is of a purely procedural nature.

Unfortunately the *Best Practices* package does not really do very much to remedy this deplorable situation. It does not go beyond some non-binding declarations of intent, while the system as such remains unchanged. Anyone hoping for substantial improvements and/or changes with regard to due process would most likely be disappointed.

In summary, then, the *Best Practices* are not the major breakthrough the competition lawyers' community had hoped for, at least as far as the oral hearing is concerned. It is a pity that the Commission has not seized this opportunity. Some fundamental improvements to the oral hearing process could have been made without any changes to the legal framework. It remains to be seen whether the new Commissioner and his new Director General will be more innovative than their predecessors in this respect. Their first public statements have certainly been encouraging.