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Is it a Hearing if Nobody is Listening?

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There are many criticisms of the oral hearing process. Indeed, there is a general growing tide of criticism of the manner in which competition law offenses in the European Union are investigated and prosecuted. It was partly in response to such concerns that on January 6, 2010 the European Commission published 3 papers setting out best practices in antitrust proceedings, best practices on submission of economic evidence, and a hearing officers' guidance paper. The Commission publication of that guidance included an invitation to submit comments by March 3, and it is understood that the response has been high. However, it was questionable from the outset whether such comments would necessarily lead to any changes. Indeed the process of preparing the package of guidelines took place with some secrecy and there was, regrettably, little appetite to take notice of any external views. Nevertheless those views are being expressed and it is debatable how much longer they can continue to be ignored.

I have been interested for some time in improving the oral hearing process and, indeed, had suggested to the *CPI Antitrust Chronicle* that we run this issue before we learned of the new best practice proposals. I contributed to a number of responses on the hearing officer paper, and in doing so ended up with a laundry list, not so much of criticisms but of suggestions for changes that could usefully be made to the conduct of the oral hearings. I have listed some of them below. However I would like to initially focus on one improvement that I have long believed would deal, at a stroke, with many of the deficiencies of the hearing process. My suggestion would be that it should be possible, even if not imposed on every occasion, for the oral hearing to be public.

I have in the past, in two specific cases, asked for my client's hearing to be public. The reaction was always entertaining. But every Commission official resisted the request. In the end I did not bring the point to a conclusion because, in the first case (an Article 102 investigation), the Commission ultimately withdrew its charges and we settled, whereas in the second, a merger case, I advised my client to dispense with the hearing and focus on the issues, and the transaction was then cleared at the end of phase 2 without conditions.

When I did raise the prospect of a public hearing with officials, the first reaction was to point me to what is now Article 14(6) of Regulation 773 of 2004. That states, in the English language version, that "oral hearings shall not be public." I countered that all this was intended to mean was that they would not, as a matter of course, be public and, moreover, that it must be clear that the provision was intended for the protection of the addressee of the Statement of Objections. It seemed to me to follow, if it was a part of the rights of defense, that where the addressee did not feel the need for such protection he should be able to waive it. Moreover, some of the other language versions of that provision were even less categorical as to whether they were laying down a binding rule or merely indicating what would be the default position.

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When seeking a more substantive reason for refusing a public hearing, the ground most often advanced was confidentiality. But, as I pointed out, whether it is a merger or antitrust hearing, the reality is that those who would have the most to gain from exploiting any revealed business secrets are normally at the hearing anyway, either as complainants or as co-conspirators. And there is already the possibility of parts of the hearing being in camera to deal with such confidential elements although, in my experience, that possibility is little used or represents only a small part of the time within the hearing. The reality is that parties do not use the hearing to present business secrets, other than in cartel hearings when they seek a short private session to explain exactly how a large fine would tip them into bankruptcy. Rather, they use the hearing to attack the construction of the Commission's case and the credibility of other witnesses. These are matters in which there would be a legitimate public interest.

Increasingly, the sanctity of the oral hearing is, in any event, a myth. The Brussels press corps know when it is taking place. They are outside at the start and end of each day, receive selective briefings from various parties, and run stories about who is perceived to have had a good or bad day. Even when this "leaking" is most blatant there seems to be no sanction open to the Hearing Officer to prevent it. Far better that the journalists could be admitted, hear the entire debate, and then exercise their own judgment for the benefit of their readers as to whether a case has been proven. Those press reports, in turn, could provide another reference point for the decision-makers, to supplement the briefings they will receive from the case team and the Hearing Officer.

A final argument against supposed confidentiality is that the most damaging "findings" will most likely find their way into the published infringement decision and will, years later, be appealed in a public hearing in Luxembourg. We therefore find ourselves forced to question whose interests are really being protected by the insistence on conducting the administrative hearing behind closed doors. What became clear to me was that DG Competition was unreceptive to the idea of having hearings attended by journalists and having the standard and presentation of the case opened to public scrutiny. That made me even more convinced that there was merit in pushing the point. In the first case I even asked the case team what they would do if I were to appoint named journalists as members of my defense team or bring them in as witnesses.

I would admit that in raising this possibility I was to some extent just trying to exert additional pressure on what I perceived to be a weak case. But I continue to feel that the argument for public hearings has real merit. One of the major problems with the current administrative procedure, generally, is that it is too closed. Because the case team mainly has to convince itself and then its own hierarchy of the validity of the case, it can happen that cases end in an infringement decision when a more objective review of the evidence might have led to a different outcome.

Many addressees complain that the entire hearing process, and not just the oral hearing, is a dialogue of the deaf. That reality is most stark in an oral hearing where the decision-makers are not present—though we might see that change if the hearings were open. Another frequent complaint is that the Statement of Objections ("SO") should only express the preliminary views of the Commission and the hearing, therefore, is meant to come at a point when minds are not yet set. Yet, very often the officials running the case make clear by their body language that they have reached firm views that will not be swayed by any presentations. On the other hand, if the case team were obliged to explain its case at greater length and face testing questions before a

sceptical press, I am convinced it would not only improve the quality of the work-product but might lead to some healthy reflection on the strength of the case.

Ultimately it probably has to be left to the addressees to decide, first, whether they want an oral hearing at all and, second, whether it should be public. Throwing the hearing open would undoubtedly have an impact on other practical aspects such as scheduling and duration. They would certainly require more preparation. It is likely, also, that making the hearings public would lead to pressure to address many of the other failings of oral hearings, such as the fact that they are dominated by too many set piece presentations, that there is insufficient testing of the Commission case, or there may be no real opportunity to cross-examine.

We might also anticipate that the presence of the press could encourage the Member States to take the hearings more seriously, to engage more, and to ask more questions. In sum, it is possible that making hearings public could inject some real life into the oral hearing and persuade parties that it is worth considering a request for an oral hearing. Too often we see hearings declined by parties because they are perceived to be a time-wasting distraction from the serious business of answering the SO and lobbying behind the scenes those who might be receptive to argument.

It would be good to have a test case. We probably need an addressee who feels it has nothing to lose, but they do come along from time to time. When that does happen, I hope that the Hearing Officer, exercising real independence in the interests only of ensuring a fair and productive hearing, will grant the request.

While we await that development, there are a few other lesser improvements that could also be made in relation to the oral hearing.

First, we need some clear rules on fundamental elements such as when the hearing is to take place and how long is needed. At present far too much is left to the discretion of the Hearing Officer and it puts an intolerable strain on all concerned. There should be a mechanism for fixing the date early and it should be clear (far clearer than it is at present) that the date will be fixed primarily in the interests of the addressees. The same goes for duration. There will be cases that need longer time than is currently allotted, particularly if more cross-questioning is to be allowed. More facilities may be needed: It is not acceptable that the date of something apparently so important should be determined by the availability of an adequate room in Brussels. Neither should the addressees be able to delay confirming the final date solely in order to cause maximum inconvenience to third parties.

Once the hearing date is fixed there needs to be a deadline for determining who else can be admitted, and what qualifies them to be admitted. At present we see very late entries from companies and individuals who, until that point, had played no active role and had submitted no papers. The addressees are often prejudiced by late recruitment of hostile third parties, against whose often unsubstantiated claims they have little chance to prepare, making this issue one of the reasons why oral hearings are declined. In principle, no parties should be admitted who have not participated earlier in the process with written materials to which the addressees have had access.

We also see participating companies bringing forward individuals as witnesses even though their names were withheld until the morning of the hearing, making it impossible to check whether they are qualified to speak on these matters or whether they might, in the past, have published contradictory views that could also have enlightened the hearing. These games

and ambushes are practised by both addressees and third parties, and they could be prevented with some clear rules and firm policing.

There should be a preparatory meeting attended by representatives of those who will participate in the oral hearing, to take place at least a week beforehand. That could thrash out details like the running order and timing. The guidance paper refers to the Hearing Officer being able to invite persons to such a meeting but, in my experience, this does not always happen (certainly it did not occur in my last 3 oral hearings) and it seems too important to be left as discretionary.

Finally, the Hearing Officers need a lot more support. As I have already said, the current procedures often put them in an impossible position. Paragraph 9 of the new guidance states that the Hearing Officers are “entirely independent from DG Competition.” The reality is that this is an assertion that is not universally accepted, and is, at best, a work in progress. It seems essential that they should be put far more at arms length from DG Competition or the Competition Commissioner. Even in the new guidance notes there are too many occasions when the hearing officer is seen consulting DG Competition but not the addressees (such as on the question of whether to admit third parties).

The arguments in favor of true independence are irresistible and will no doubt eventually be conceded. In the interim, their independence claims would be bolstered by providing that the reports they prepare should form a part of the case file and be accessible to the parties. At present the Hearing Officer makes a confidential interim report to the Competition Commissioner that covers fundamental issues such as the fairness of the procedure at the oral hearing and whether the rights of defence have been respected. It is not clear what is supposed to happen if that interim report raises questions about the fair conduct of the process, but it is very troubling—given the sanctions which can be imposed at the end of a Commission investigation—that it should be thought necessary to keep that report confidential.

Which brings me to my conclusion. The entire oral hearing (and indeed the full administrative process) would benefit from a serious dose of transparency. Whoever said that “fresh air is the best antiseptic” may not have attended an oral hearing in the Borschette, but some fresh air would indeed be very welcome.