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## Oral Hearings: Making the Case Come Alive

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### I. INTRODUCTION

It is an uphill struggle to get parties to exercise their right to an oral hearing, even though hearings provide a unique opportunity from a communications point of view. These hearings are designed to favor the parties, providing a stage to transform voluminous, dry legal submissions and economic evidence into a dramatic rendering of facts and evidence that can change the course of a case.

It is important to prepare carefully to take advantage of this opportunity, and we have helped many firms do just that. Firms preparing for an oral hearing should note the following points: Only by communicating well can you change minds; be aware that you are speaking to an audience that includes not only the hearing officer and case team but also representatives of Member States; choose your speakers carefully; the hearing structure provides time for you to present third parties, and your presentation will be far more powerful if you find customers or other allies to tell your story for you.

Take as an example a cartel exemption for marine insurance, which P&I Clubs sought in 1998.<sup>2</sup> The application provided little threat that a reader perusing it would lose sleep. But during the oral hearing we brought in people whose personal experience showed the wisdom of such an exemption. The testimony of the parties themselves was not the key in this case. Instead, the room was silent as victims from the Estonia disaster, which occurred in the Baltic on Wednesday, September 28, 1994, with the loss of 852 lives, bore witness to the usefulness of the insurance exemption mechanism under investigation. Their testimony illustrated a technique central to good public affairs and communications: Get others to make your case and validate your arguments.

Fast forward to another oral hearing, at the end of 2009. Oracle Corporation had applied to acquire Sun Microsystems.<sup>3</sup> Washington had already approved the deal. The danger of transatlantic divergence in a merger case was in the air for the first time in eight years. The tense situation attracted the top brass at the EU's Competition Directorate General to the hearing room. The case team said Oracle threatened to snuff out nascent competition from a free, open source database called MySQL. Oracle and Sun said that was not true. The parties had no difficulty bringing in an army of customers who told the same story as Oracle and Sun. It was a turning point in perceptions and soon thereafter the then-Competition Commissioner Neelie Kroes expressed confidence that the transaction would win approval. The parties were able to effect a change in perceptions because they—and in particular their allies—were able to make their case to an audience outside the confines of the case team.

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<sup>1</sup> Chairman and Senior Media Advisor, respectively, of FIPRA International.

<sup>2</sup> Cases No IV/D-1/30.373 — P & I Clubs, IGA and No IV/D-1/37.143 — P & I Clubs, Pooling Agreement

<sup>3</sup> Case COMP/M.5529 — Oracle/Sun Microsystems

The tight deadlines in merger cases can give extra weight to spoken testimony because the case team has insufficient time for a lengthy review of defense materials. An undertaking often delivers its written reply to a Statement of Objections just a day or two before the hearing. The hearing can be the first opportunity for the case team to focus on the arguments of the parties involved.

## II. CHOICE OF SPEAKERS

As a rule of thumb the parties choose a chief executive or high ranking company officer to speak, both as a matter of courtesy to the Commission and to demonstrate to the Commission that they take the hearing seriously. Many CEOs are persuasive and charismatic, but not all. More important than offering the presence of a CEO is to put forth a good advocate—someone who can occupy the stage with enthusiasm and credibility. In fact, firms should use their best speakers throughout the hearing, who can be assisted by lawyers, economists, and strategic public affairs advisers.

The statements each person makes at an oral hearing are recorded and—once confidential business secrets are redacted—become available. The most memorable and best-presented parts are the ones that most likely will be listened to again.

The importance of communications also extends to the role of language differences and interpreters. Language differences are a part of the European Union. Speakers in the Parliament, the courts, the press room, and meetings depend on interpreters to reach their audience. This is equally true in an oral hearing where some representatives of the competent authorities from member states will form opinions based on what they hear from an interpreter over their headphones.

Before the hearing begins, speakers should give the interpreters a glossary of specialized terms or jargon that they will be using. Speakers should also give the interpreters copies of the extracts and quotations that they will be reading. Speakers must remember to be very careful to speak slowly, especially when reading excerpts, or their message will never get through.

## III. HEARING PROCEDURE

Although there is no set form of procedure laid down in the Regulations, the procedures at the oral hearing by now are fairly routine. As we describe these procedures below, we offer a few tips gained from years of attending hearings and, even more, attending the practice sessions or dry runs.

- a) Commission presentation: The Hearing Officer presiding over the hearing opens the hearing and invites a case officer to briefly summarize the facts and principal arguments of the Commission. The Commission summary is not subject to questions from other parties present and is merely an outline of the case from the Commission's point of view. Although a party may take the opportunity during his own oral presentation to put forward corrections to any factual inaccuracies he considers the Commission's presentation may contain, or to counter any of the presented Commission's arguments, the oral hearing is not an opportunity for a party to cross examine or question the Commission on the factual, legal, or other bases of the Statement of Objections or the case officer's summary.
- b) Parties' presentation: The parties then have a chance to speak and their presentation usually takes up the bulk of the time. This is the moment for them to clarify matters left

unsettled in the written procedure, and to emphasize the main lines of their case. As the undertakings' written defense may be wide-ranging and deal with any or all of the factual, legal, and economic points raised by the Statement of Objections, so the oral presentation may be similarly wide-ranging. The parties are not restricted to points that have been made previously in the Reply to the Statement of Objections. An oral presentation which merely reproduces the reply may have little purpose or effect.

The parties also use this time to present their witnesses. Parties do not speak on oath, nor is there any requirement that parties can only speak as to the facts of which they have first-hand knowledge. The real value of expert witnesses, affected consumers, and other speakers is their ability to respond to any questions put by members of the Commission after they have had the time to consider the witnesses' evidence. It is best to try and make the actual business people attend and not their representatives or superiors.

- c) The parties may then be subject to questioning from:
- Representatives of the competent authorities of the Member States. These representatives may not have had the opportunity to see all the documents in their language and, as noted above, may be listening to the oral presentations in translation over headphones. They may ask questions in their own language, requiring interpretation in both directions. Just as the Hearing Officer is not the judge, the Member States are not members of the jury.
  - Intervening parties.
  - Other Commission Services.
  - DG Competition.
  - The Hearing Officer.

The greatest care should be taken when replying to all questions. Replies underline the honesty and candor of the respondent and, on occasion, may take the Commission as much by surprise as the question did the respondent. If the question cannot be properly answered straight away the undertaking should give a qualified reply and ask if it can supply a fuller answer in writing to all present within a reasonable period of time—but keep this response rare as it can look cagey.

- d) After the parties finish their presentation, interveners are heard for a much shorter period of time. A great communicator can have a huge effect even in a short space of time. After the hearing in the Intel case<sup>4</sup> on March 11-12, 2008, the Commissioner sent for the interventions of BEUC (the European consumers' umbrella organization), which presented briefly at the end of the hearing as a third party. The impact of that presentation was to recast the case by bringing to life the impact on consumers. The fact that the German, Dutch, French, and Spanish consumer organizations all attended the hearing to support BEUC—which is made up of 43 consumer groups from 31 countries—made it all the more pertinent.

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<sup>4</sup> Case COMP/37.990 - Intel

- e) Before closing the oral hearing the Hearing Officer invites the party to whom the Statement of Objections has been addressed to make any final or concluding remarks or observations. So the addressee has the last word.

The oral hearing is not usually a lengthy affair, normally two full days are scheduled but in most cases it takes just one full day, 0900 – 1630.<sup>5</sup> Whatever the length of the hearing, it is vital that the parties are properly prepared and, in particular, that questions of fact are made and answered as clearly as possible.

#### IV. ADVISORY COMMITTEES

An important group of players in the oral hearing room is the Member State competition authorities who sit on either the Advisory Committee on Mergers or the Advisory Committee on Restrictive Practices and Monopolies.

In our view, these Committees represent the conscience of the Commission. Though their formal Opinion rarely, if ever, opposes the views of the Commission, they can have a strong effect on a case from a communications point of view. Each member of this committee communicates with the case team. In a case with European Economic Area (EEA)<sup>6</sup> relevance, the EFTA Surveillance Authority's (ESA) involvement introduces a body with equal standing to that of DG Competition, a fact that is rarely brought into play.

Those on the Advisory Committee's staff see all of the principal documents in the case—which is why the summaries are so important. Not being on the actual case team the Advisory Committee's staff will often only read the summary and work off impressions gained at the oral hearing—and then talk among themselves and with the Commission—an action that can be encouraged by the parties.

One of the states will be a “rapporteur” and will summarize the case for the whole Committee. Often these people are dismissed too easily by the parties and their advisers, who are under enormous time pressure and focus only on the all-important case team at the Commission. However the competition policy community is small and when a case breaks new ground word and chit-chat in the house spreads quickly. In the somewhat famous Omya/Huber<sup>7</sup> case, which suffered no less than 8 suspensions,<sup>8</sup> the committee was reputed to have taken the Commission to task following the hearing on May 18, 2006.

Just like trials, hearing presentations are a form of competitive theater. They are the opportunity to bring your case alive, adding a dimension that cannot be portrayed in written documents alone. It is worth the parties' time to invoke their right to a hearing, to make sure they are carefully and properly prepared, and to find witnesses, consumers, and other third parties who will back their story. The parties need to take into account all of their different audiences, because some of the listeners will form their opinions in large part based on summaries and the oral hearing. Plan accordingly.

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<sup>5</sup> Big cases may take longer. The longest case that the authors are aware of lasted a full week (IBM case). There have also been cases with more than one hearing, but all this is rare.

<sup>6</sup> The EEA comprises the EU Member States together with Norway, Lichtenstein and Iceland.

<sup>7</sup> Case COMP/M. 3796 – Omya/Huber

<sup>8</sup> Only the Oracle-Peoplesoft review was longer and that was suspended while the EU Commission awaited the outcome of a U.S. court case.