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With European Commission regulators coming under pressure from all sides to improve procedures and tackle allegations of not respecting due process in its investigations, the function of the oral hearings held in merger and antitrust cases and the role of the Hearing Officer who presides over them are facing particular scrutiny. The hearings taking place in Brussels into competition and antitrust cases are shrouded in secrecy and, depending on who you talk to (and when you talk to them), are either a complete waste of time or a brilliant opportunity to make a case.

Leaving aside issues relating to the structure of the hearings themselves and the role of the hearing officer, the introduction of meaningful transparency into the system will lead to an immediate improvement in the process. At the same time, the amount of disinformation disseminated through off-record briefings can be substantially curtailed.

Adding that meaningful transparency to the system will require two relatively simple steps: publication of the non-confidential version of the Statement of Objections—effectively the regulator's charge sheet—and opening hearings to the press. It should also be noted that increased transparency will not only provide greater comfort for those involved in the hearings, it would also go some way to improving the advocacy of competition policy and its implementation by reducing the effect of misinformation and lobbying.

To understand why attempts to manipulate the media are widespread and often successful, it is necessary to examine the constraints the media are working under, and the editorial decision making that sets the agenda.

Most media, including the global agencies, national newspapers, and specialist publications are under intense pressure to produce exclusives that can, and do, sometimes lead to lapses in depth or precision. With headlines being written within seconds of press releases or over mobile phones from door-step briefings, time constraints mean that insufficient thought and judgement are used in assessing what information to highlight when the pressure is not to "be naked;" that is, not having a headline that a competitor has. It matters little whether the information is important, as much as whether it appears to be important. Savvy lobbyists structure press releases with this in mind, providing ready-made headlines to the "spot news" desks.

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This dumbing down of agency copy and the rush to print mean that reporters often fail to convey in appropriate detail the very issues that they are attempting to report, often because they are written for the broadest possible audience in the shortest possible time. This leaves little time for research and reflection and can often result in hurried and poorly informed reporting.

Whether in merger reviews or antitrust probes, the level of secrecy involved in these probes complicates much of the debate. The commission, possibly because it feels it isn't—or doesn't need to be—accountable to the public, sometimes confuses secrecy with confidentiality. From its Statement of Objections ("SO") to the hearings where parties put their case and answer their critics, the arguments for maintaining secrecy become less tenable. The commission may require and demand more secrecy in a merger review, subject as it is to a tight time frame and intense lobbying from governments, competitors, customers, and the companies themselves. But without any summary or explanation of the commission's decision-making process, the press are left subject to the same lobbying.

The SO exists in confidential and non-confidential forms. The commission says the SO can't be made public to protect the confidentiality both of the process and of any potentially secret business information. Yet non-confidential versions surely are stripped of such sensitive information. The commission's decision to withhold the publication of non-confidential versions of SOs leaves an imbalance of information in the market and can't help objective reporting and commentary. A non-confidential version of an SO has been redacted of business secrets. Anyone who could possibly have a direct business use for the information will no doubt be an interested third party in the proceedings, and as such will already have a copy of the SO. But other parties who may have a legal, financial, or business interest in the process are left without such information.

None of this would require any additional work by the commission. The non-confidential versions are produced already. The commission could refer all questions to the document if it was made public. Pretending the SO—or at the very least its contents—doesn't make its way into the public domain leads to an information imbalance of the commission's own making.

Just as merger cases could be open to more public disclosure, so too could antitrust cases, and the commission has recently made some positive moves in this area. The commission says that even admitting to the existence of a cartel investigation amounts to tarring the company or companies involved as guilty and could taint the process. Yet any rational observer understands that an investigation is just that.

While such statements of objections in antitrust cases rarely become public, there seems little point in keeping the basic details confidential, particularly in transatlantic cases, where the information is likely to be available through the U.S. courts sometimes months or years before a commission decision. There is a suspicion, in both merger cases and in antitrust cases, that the commission is hiding behind the veil of confidentiality to protect its own interests. By opening the documents to some public scrutiny, the commission would go far to dispel this suspicion.

The next step to making the commission's processes more transparent is to make the hearings open to the press. Journalists routinely hear complaints from both sides—from the parties involved of key officials not turning up to hearings, and from the officials of corporate bullying and attempts to mislead attendees at hearings. Such claims simply aren't verifiable without the journalist being present, although that doesn't make them either improbable or unlikely.

The argument that hearings are closed to the press to protect confidential information falls at the same hurdle outlined above for withholding publication of the SO. Competitors, especially, as well as customers and suppliers are more than likely present at the hearing. If there are significant secrets or highly confidential information to be revealed at the hearing, such discussions are already held in camera and away from all other participants. Opening hearings to the press wouldn't change that.

The presumption that hearings remain confidential because the press isn't present also tumbles under the weighty misconception that information doesn't get out. The hearing officer can issue the sternest of warnings to parties not to discuss the hearings publicly but, even when that is adhered to (which isn't often), it doesn't stop companies making comments, for example, as to what is happening in parallel processes in other jurisdictions and allowing the press to connect the dots.

Why do companies brief the media after hearings? Because they wish to impact future coverage as to the merits of the case, in particular to Member States, other regulators, and other commission officials.

With the Commission's tight deadlines, the decision to allow the press into a merger hearing should be left to the notifying party. All parties to the proceedings should be free to brief the media should they wish. As hearings are usually called by companies facing the serious risk of a veto by the Commission, there would be far fewer complaints about the legitimacy of the process if it came under independent scrutiny.

In Article 101 cases examining cartels, there could be particular concerns from the parties about potentially damaging or embarrassing information coming into the public domain. That situation however shouldn't be sufficient reason to gag the process. By default, Article 101 hearings should be open to the press.

Cases where the commission is reviewing potential abusive behavior under Article 102 should also always be open to the press. Absent the tight deadlines seen in merger cases, the hearings in these cases aren't simply between the accused and the commission. With several parties arguing for and against a case, these cases are the most prone to lobbying.

The commission will undoubtedly find this too hard to swallow. The next question is, then, for whom is the hearing held? The commission argues that hearings represent an opportunity for the parties to put their case before an impartial Hearing Officer. At the very least then, the parties asking for a hearing or agreeing to appear before one in the case of an antitrust investigation should be allowed to elect to include the press in a procedure.

Anecdotal evidence suggests that, since the advent of much broader and deeper coverage of the hearings at the European Courts in Luxembourg by the press there has been an improvement in the processes there. While the press should be cautious about exactly how much impact it has had, close observers from both the institutions and the parties before the courts have said preparations are much more thorough, questioning more detailed, and answers more to the point since media coverage has expanded. Exposing practitioners to the scrutiny of their peers can have that effect.

The role of an independent press is to shine a light on the administrative processes in Brussels. On one hand, this entails holding the officials and the institutions to account, and, in doing so, contributing to an effective and efficient administration. At the same time, the press

should be able to expertly explain and contextualize the administrations processes and decisions and to place in context information relayed by commercial interests. The results would be to improve due process, enhance competition policy advocacy, and strengthen confidence in the procedures.