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## Oral Hearings and the Best Practices Guidelines

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# Oral Hearings and the Best Practices Guidelines

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## I. INTRODUCTION

On January 6, 2010, the European Commission (the “Commission”) published for consultation three “Best Practices” documents. Two of these Best Practices documents contain provisions on the Oral Hearing, namely (1) the Guidelines on the procedures of the Hearing Officers in proceedings relating to Article 101 and 102 of the TFEU (the *Hearing Officer Best Practices*) and (2) the Guidelines on conduct of procedures concerning Articles 101 and 102 (the *Investigation Best Practices*) (the Hearing Officer Best Practices and Investigation Best Practices are referred to together as the *Guidelines*).<sup>2</sup> The general aim of the *Guidelines* is to improve the transparency and predictability of Commission proceedings<sup>3</sup> and, to this end, the *Guidelines* seek inter alia to formalize and codify practices relating to Oral Hearings.<sup>4</sup>

This article examines whether the *Guidelines* satisfactorily address the most common criticisms on the Oral Hearing. In doing so, it (1) sets out some background to the Oral Hearing; (2) outlines six criticisms often leveled at the Oral Hearing process and analyses whether the *Guidelines* satisfactorily address these criticisms; and (3) makes specific recommendations on how shortcomings may be addressed.

## II. BACKGROUND

As stated in the *Guidelines*, the Oral Hearing provides the addressees of a Statement of Objections (“SO”), as well as other interested parties, with the opportunity (1) orally to express and develop their views on the Commission’s preliminary findings;<sup>5</sup> (2) to develop arguments that have already been submitted in writing;<sup>6</sup> and (3) to engage in dialogue on the merits of the case in front of a wider audience. In sum, the Oral Hearing has the objective of progressing the Commission’s investigation and trying to resolve or crystallize issues that remain unresolved (“the purpose of the hearing is best served if the addressees and third parties explain whether and to what extent they disagree with the findings or can defend or justify themselves”<sup>7</sup>).

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<sup>2</sup> The third Best Practice document concerns the submissions of economic evidence.

<sup>3</sup> See Commission Press Release IP/10/2 (<sup>3</sup> See Commission Press Release IP/10/2 (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/2&format=HTML&aged=0&language=EN&uiLanguage=en>)).

<sup>4</sup> ¶¶ 38-60 of the Hearing Officer Best Practices. The Hearing Officers have overall responsibility for the Oral Hearing, Article 12(2) of Commission Decision 462/2001/EC, ECSC of May 23, 2001, on the terms of reference of Hearing Officers in certain competition proceedings (the “Mandate”).

<sup>5</sup> ¶ 38 of the Hearing Officer Best Practices.

<sup>6</sup> ¶ 93 of the Investigation Best Practices.

<sup>7</sup> ¶ 38 of the Hearing Officer Best Practices.

From 2007 to 2009, Oral Hearings were held in 21 cartel cases, 7 abuse of dominance cases, and 8 merger cases. There are on average 12 Oral Hearings per year and around three-quarters relate to antitrust matters (the remaining quarter relate to merger proceedings). The analysis below is therefore primarily concerned with Oral Hearings in antitrust proceedings.

### III. ANALYSIS OF CRITICISMS

While the Oral Hearing has been a useful and constructive forum for debate in a number of cases, in particular in merger proceedings,<sup>8</sup> there remain widespread criticisms about the utility and functioning of Oral Hearings in antitrust investigations. The criticism that is most often leveled at the Oral Hearing is that it is a “waste of time.”<sup>9</sup> This criticism is based on a number of grounds, six of which we set out below. In each case, we examine the extent to which the *Guidelines* satisfactorily address these criticisms.

#### A. Subject Matter of the Oral Hearings

As explained above, because Oral Hearings take place after positions have been adopted (the Commission in the SO and the parties in their responses to information requests and in their reply to the SO), they are often criticized as being little more than fora for reiterating written submissions. In most cases, the Commission’s presentation involves simply a summary of the SO. Similarly, presentations by addressees of the SO or interested third parties are often little more than a précis of their replies to the SO or their complaints. Such summaries do not progress the investigation any further, take up most of the available time, and, accordingly, limit the utility of the Oral Hearing.

The Hearing Officer Best Practices explain that the Oral Hearing’s purpose is best served if the SO’s addressees and third parties explain whether and to what extent they disagree with the Commission’s findings or can defend or justify themselves.<sup>10</sup> However, the Investigation Best Practices describe the Oral Hearing simply as an opportunity to develop orally arguments that have already been submitted in writing.<sup>11</sup> Accordingly, there is a significant difference between the approach of the two documents as to the purpose and utility of the Oral Hearing. The Hearing Officer Best Practices seek to address the criticism identified above. However, the Investigation Best Practices seem to prefer that Oral Hearings remain unchanged; i.e., stilted set pieces that do little more than summarize existing written documentation.

For the Oral Hearing to assist in clarifying issues that are still open for debate or to advance the investigation, it would be necessary to make changes designed to force, or at least encourage, the parties to progress the investigation instead of merely repeating their arguments. For example, the Commission could be required to identify before the hearing any aspects of its investigation that it views as unresolved or open to debate. Further, the Commission could be required to react to the replies to the SO, noting arguments that it found persuasive and those that it did not. This may encourage SO addressees to refrain from summarizing their replies and focus instead on the issues. Where these are factual in nature, this may also serve to encourage employees of the undertakings under investigation to speak directly (i.e., not through a legal representative), which may be of greater interest to the Hearing Officer and the Case Team.

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<sup>8</sup> See e.g., the Oral Hearing on *Sony/BMG*. *Sony-BMG hearings wrap up*, NEW YORK TIMES, available at [http://www.nytimes.com/2004/06/16/business/worldbusiness/16iht-sony\\_ed3.html?pagewanted=1](http://www.nytimes.com/2004/06/16/business/worldbusiness/16iht-sony_ed3.html?pagewanted=1)

<sup>9</sup> See e.g., *Procedures in Competition Cases: The Oral Hearing* – C.S. Kerse [1994] 1 ECLR, 40 (on page 41).

<sup>10</sup> ¶ 38 of the Hearing Officer Best Practices.

<sup>11</sup> ¶ 93 of the Investigation Best Practices.

### ***B. Attendance***

In the past, senior Commission officials (e.g., the Director General or Chief Economist) have not always attended the Oral Hearing, and, when they do attend, their presence has not always been continuous. The same is true of members of the Advisory Committee and of the Legal Service. As a result, the possibility for the Oral Hearing to play a significant role in the decision-making process is limited. The Commission's Case Team, which has already set out its position in the SO and whose main role in the Oral Hearing seems to be to defend it, is unlikely to change its views as a result of anything it hears in Oral Hearing (most of which it has heard before). The possibility of the Case Team being persuaded of an alternative view by their peers is undoubtedly reduced in circumstances where those peers are not present throughout the Oral Hearing. Clearly the possibility for the Oral Hearing to make a difference to the final decision would be enhanced if attendance by other individuals and institutions who participate in the Commission's decision-making process—but who are necessarily less familiar with the entire file than the Case Team—were assured.

The Commission has now confirmed in the Investigation Best Practices that it will ensure the continuous presence of senior management (i.e., Director or Deputy Director General) at Oral Hearings in antitrust cases.<sup>12</sup> Notably, however, the Commission has not confirmed the continuous presence of other necessary attendees (e.g., Legal Service or the Chief Economist). The *Guidelines* thus do not address this criticism entirely and, accordingly, the potential of the Oral Hearing remains limited.

### ***C. Timing of Oral Hearings***

The Oral Hearing takes place after the Commission has adopted a SO. By this time, the Commission has typically (1) conducted an extensive fact-finding exercise, often including both unannounced investigations and multiple information requests; (2) announced the opening of a formal investigation; (3) spoken with representatives of the parties under investigation and, in some cases, the representatives of interested third parties; (4) written and issued a SO; and (5) reviewed the replies to the SO and any third-party comments. Accordingly, by the time the Oral Hearing takes place, the Case Team has adopted a position and sees its role in the Oral Hearing as defending its case from attack by the addressees. The willingness of the Case Team to engage in constructive dialogue at this stage of proceedings is therefore perhaps more limited than it might have been prior to the SO. A criticism of the Oral Hearing is that it comes too late to be conducive to open-minded dialogue and conversation with the Case Team.<sup>13</sup>

By allowing for State of Play meetings to take place prior to the SO (i.e., at a sufficiently advanced stage of the preliminary investigation and shortly after the opening of proceedings)<sup>14</sup> and foreseeing the possibility of triangular meetings (i.e., meetings between defendants, complainants, and the Commission),<sup>15</sup> the Investigation Best Practices have, to some extent, addressed the criticism identified above. The parties under investigation now should have the opportunity to engage in constructive and interactive dialogue with the Case Team before the Commission has entrenched its position in the SO. That being said, and although the practical

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<sup>12</sup> ¶ 94 of the Investigation Best Practices.

<sup>13</sup> See in this regard, Themistoklis Giannakopoulos, *The right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping and State Aid Community Procedures*, 24(4) KLUWER L. INT'L 17 (2001).

<sup>14</sup> ¶ 57 of the Investigation Best Practices.

<sup>15</sup> ¶¶ 61-63 of the Investigation Best Practices.

effects remain to be seen, it may be that increased use of State of Play meetings prior to the SO further diminishes the utility of post-SO Oral Hearings.

#### ***D. Questions and Discussions***

Oral Hearings are often criticized for leaving insufficient scope for interactive and analytical dialogue. Most of the available time at Oral Hearings is often spent on presentations (which are of questionable value, as discussed above) and, accordingly, questions and discussion are often left until the end of the sessions, notwithstanding that this interaction may be the most valuable part of the hearing.

The *Guidelines* confirm that the Hearing Officer will foresee time for questions and discussions during Oral Hearings.<sup>16</sup> However, the *Guidelines* also seem to foresee questions and discussions taking place at the end of the hearing and only if there is time.<sup>17</sup> The *Guidelines* thus touch on an important criticism of the Oral Hearing process but, by relegating this part of the hearing to the end (if time allows), they do not satisfactorily address this criticism. The *Guidelines* should make clear that the Hearing Officer will ensure sufficient time for this purpose.

In addition, the *Guidelines* state that the Hearing Officer “may allow” questions on any of the issues raised by a written or oral submission to be addressed “to any participant by a participant.”<sup>18</sup> The *Guidelines* thus do not provide parties with assurance that the Oral Hearing is likely to fulfill its promise. Parties should be ensured an appropriate opportunity to ask questions of other parties, in particular the Commission’s Case Team.

#### ***E. “Cross-examination”***

Oral Hearings have been criticized for allowing insufficient opportunity to test or examine the evidentiary basis underpinning the SO, i.e., to function as an effective tool for the “establishment of truth.”<sup>19</sup> In the current Oral Hearing format, neither the Hearing Officers nor the Commission has the right to summon witnesses to attend. Nor do parties have the right to question or cross-examine any witnesses that do attend. Because one of the pre-requisites of a fair hearing under the European Convention on Human Rights is that parties have the right to examine and cross-examine witnesses, Oral Hearings are often criticized as not being fair.<sup>20</sup>

As currently drafted, the *Guidelines* do not propose to change the status quo in any way. That the opportunity has not been taken to rectify this flaw and improve the utility of the Oral Hearing as a means of “establishing the truth,” is regrettable. Although the Commission is not currently empowered to summon witnesses, this issue is not insurmountable. It could, for example, be addressed through the use of national laws; representatives of the Member States attend Oral Hearings and some have the power to compel interviews (e.g., the United Kingdom).<sup>21</sup> Alternatively, witness attendance could be linked to the Commission’s leniency

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<sup>16</sup> ¶ 56 of the Hearing Officer Best Practices.

<sup>17</sup> ¶ 57 of the Hearing Officer Best Practices. Note that the Hearing Officer Best Practices foresee questions in writing where there is insufficient time.

<sup>18</sup> ¶ 57 of the Hearing Officer Best Practices.

<sup>19</sup> Cf. ¶ 41 of the Hearing Officer Best Practices.

<sup>20</sup> See *Isgro v. Italy*, Judgment of February 19, 2001, Series A, Number 104. See also *Due Process in EU antitrust proceedings* – ICC Working Document on DG COMP’s best practice documents.

<sup>21</sup> See ¶ 3.2 of the OFT’s guidance entitled “*Powers for investigating criminal cartels*.” Note also that Article 4 TEU obliges Member States to “facilitate the achievement of the Union’s tasks.” This obligation has been interpreted widely by the Court of Justice and may be applied in this regard.

regime (e.g., failure to present a witness for cross-examination during the questions and discussions session of an oral hearing might have implications on any leniency reduction). Each of these solutions has flaws (e.g., not all parties will necessarily be leniency applicants) and they are therefore not proposed as a panacea. Given its potential usefulness, however, we consider that the *Guidelines* should explore more fully the means of ensuring the attendance of witnesses at Oral Hearings and ways in which the participation of witnesses may add to the discussion (i.e., not just contribute to set pieces).

#### ***F. Substantive Comments of the Hearing Officer***

A common criticism of the Oral Hearing is that the Hearing Officer's opinion on the substantive issues (i.e., the Interim Report) is not made public.<sup>22</sup> There is no reason of principle why the Interim Report cannot be made public and, indeed, it would serve to make the process more transparent. Publishing the Hearing Officer's Interim Report and allowing substantive comments to be made in the public Final Report<sup>23</sup> would raise the awareness of the Hearing Officer's role and add an important safeguard to the process. Importantly, it would also demonstrate to addressees of the SO that appropriate points were taken into account and not simply falling on deaf ears. Crucially, this would help to show that not only is justice being done; it is also "seen to be done."<sup>24</sup>

Regrettably, the *Guidelines* fall short of addressing this criticism and fail in this respect to meet the stated objective of increasing the transparency of the process.

### **IV. SPECIFIC RECOMMENDATIONS**

Although the *Guidelines* address some prevalent criticisms of the Oral Hearing (most notably through the use of State of Play meetings prior to the SO), they are still lacking in some key respects. To improve the utility, functionality, and perception of the Oral Hearing, we recommend that the Commission confirm that:

1. The Case Team will, at the Oral Hearing, provide its initial reaction to the replies to the SO (i.e., which aspects of the replies were persuasive and which were not) and set out those aspects of the investigation that it views as unresolved and open to debate;
2. The Chief Economist and Legal Service will be continuously present for the entirety of Oral Hearings;
3. The Hearing Officer will ensure sufficient time for questions and discussions; if necessary, by reducing the length of time allowed for presentations; and
4. The Hearing Officer's Interim Report will be made public and the Final Report will include any substantive comments that the Hearing Officer wishes to make (in order that the Hearing Officer is able to comment sensibly on the substantive issues, we note that it may be necessary to increase the size of its team, which is currently woefully understaffed).

In addition, we recommend that further consideration be given as to how witnesses may be summoned to attend and in turn cross-examined.

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<sup>22</sup> ¶¶ 7, 62, and 63 of the Hearing Officer Best Practices.

<sup>23</sup> Such comments should summarize any substantive comments made in the Interim Report.

<sup>24</sup> *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.