ascola
Academic Society for Competition Law

CARS
Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
UNIWERSYTET WARSZAWSKI WYDZIAŁ ZARZĄDZANIA

9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

The role of the hearing officer in antitrust cases. A critical assessment of the new mandate and practice after 2011

Giacomo Di Federico

CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
Warsaw, 26 – 28 June 2014

ascola
Academic Society for Competition Law

CARS
Centre for Antitrust and Regulatory Studies
Centrum Studiów Antymonopolowych i Regulacyjnych
UNIWERSYTET WARSZAWSKI WYDZIAŁ ZARZĄDZANIA

9th ASCOLA Conference Warsaw 2014 on
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

The role of the hearing officer in antitrust cases. A critical assessment of the new mandate and practice after 2011

Giacomo Di Federico*

Draft working paper.
Please do not quote

CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW
Warsaw, 26–28 June 2014

* Dipartimento di Scienze Giuridiche. Universitá di Bologna.

THE ROLE OF THE HEARING OFFICER IN ANTITRUST CASES. A CRITICAL ASSESSMENT OF THE NEW MANDATE AND PRACTICE AFTER 2011

By Giacomo Di Federico

SUMMARY: 1. Preliminary remarks. – 2. The struggle between effective enforcement of competition law and the rights of defense of undertakings. – 3. Enhancing fairness through procedural adjustments. – 4. The new Mandate of the Hearing Officer, Best Practices and ManProc. – 5. The Hearing Officer(s) in action: some statistics. – 6. The role of the Hearing Officer and the need for future reforms.

1. In 1981, under some pressure from the industry, lawyers and academics, the European Commission announced the appointment of a Hearing Officer, "duly authorized to chair hearings, vested with genuine autonomy and the right of direct access to the responsible Member of the Commission".[1] This was intended to increase the objectivity of the procedure and favor better informed decisions. Just one year later, the first mandate of the Hearing Officer was adopted. Initially, the Hearing Officer was placed under the authority of the Director General for Competition and was solely responsible for the preparation and conduct of the hearing. Subsequently, in 1994, the Hearing Officer was entrusted with requests for access to file and confidential treatment of sensitive information.[2] And yet, it was only in 2001 that the Hearing Officer was attached, for administrative purposes, to the Commissioner for Competition and that his final report was made available to the parties and published on the Official Journal.[3]

As is well known, the mandate of the Hearing Officer was amended once again in 2011 as part of a broader reordering of antitrust procedures.[4] It should not be forgotten, in fact, that

[1] See *XI Report on Competition Policy* (1981), pt. 26.

[2] Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission [1994] OJ L 330/67.

[3] Decision 2001/462/EC,ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings [2001] OJ L 162/21.

[4] 2011/695/: Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L 275/29 (the New Mandate).

the Best Practices for the conduct of proceedings[5] were also adopted in October of that same year, followed, in March 2012, by the release of the Manual of Procedures.[6] The former document was issued after a public consultation conducted in 2010, with a strong participation of the legal and business community, to foster "understanding of the Commission's investigation process".[7] The latter, instead, was the result of a complaint brought before the Ombudsman by a Brussels-based lawyer who lamented the lack of clarity as to the organization of the file in antitrust cases decided under Regulation No 1/2003.[8] Following the proposal for a friendly solution, the Commission accepted to prepare a publicly available and updated version of the internal manual of procedure elaborated by the Directorate-General Competition "in order to provide greater transparency about the […] procedures in applying the competition rules".

In light of the above, the present contribution will try to assess the role of the Hearing Officer in the context of antitrust proceedings and advance some proposals to further enhance fairness, impartiality and objectivity, having due regard to the Charter of Fundamental Rights (EUCFR) and the European Convention on Human Rights (ECHR), as well as to the relevant case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

To that effect, after some brief considerations on the struggle between the effective enforcement of competition law and the rights of defense of undertakings involved in antitrust cases (Section 2), attention will be drawn to alternative procedural solutions (Section 3) and to the actual novelties included in the Terms of Reference, read jointly with the Best Practices and the Manual of Procedure (Section 4). The true impact of the Hearing Officer's renewed functions, however, must be measured against practice, which requires an evaluation of the most recent final decisions (Section 5). Lastly, based on the applicable legal framework and the gathered empirical evidence, the current state of affairs will be tested against the standard

[5] Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 308/6. Concomitantly, the Commission adopted the Best Practices for the submission of economic evidence and data in cases concerning the application of Articles 101 and 102 TFEU, accessible at http://ec.europa.eu/competition/antitrust/legislation.html.

[6] Antitrust Manual of Procedures. Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU (ManProc), accessible at http://ec.europa.eu/competition/antitrust/information_en.html.

[7] Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, pt. 1.

[8] Decision of the European Ombudsman of 26 December 2011 closing his inquiry into complaint 297/2010/(ELB)GG against the European Commission, accessible at http://www.ombudsman.europa.eu.

of fundamental rights protection imposed by Art. 6 TEU with a view to verify the viability of future reforms in this delicate and complex area of law (Section 6).

2. The need to combine an efficient and effective implementation of Arts. 101 and 102 TFEU and the adequate protection of fundamental rights has always characterized the regulation of antitrust proceedings. The tension between these two prerogatives inevitably conditions the institutional framework and the procedure. Since the adoption of Regulation No 17/62,[9] the Commission has acted as an investigator, a prosecutor and a judge. This combination of functions has long been criticized in legal literature, especially given the entity of the fines that can be (and are) imposed in cartel cases and the limited judicial review of the EU courts pursuant to Art. 263 TFEU.

The protection afforded to those allegedly in breach of Arts. 101 and 102 TFEU does not match the extensive investigative tools at the Commission's disposal, and some doubts remain as to the, *de jure* or *de facto*, compatibility with the conventional standard of certain guarantees afforded to the undertakings throughout the different phases of the decision-making process. This is particularly evident in the investigative phase.

The degree to which the commitment towards fundamental rights protection demands robust countermeasures in terms of separation of functions and procedural safeguards depends, of course, on the nature of the violation and the (quasi) criminal nature of fines imposed pursuant to Art. 23 of Regulation No 1/2003:[10] the guarantees enshrined in Art. 6 ECHR for criminal charges will not apply at their fullest extent outside the hardcore of criminal law.[11] That being said, it is assumed that the current system of public enforcement of Arts. 101 and 102 TFEU, deeply embedded in the treaties,[12] is compatible with Art. 6 ECHR and thus raises, *per se*, no serious concerns in light of the future accession to the European Convention on Human Rights (ECHR). This conclusion is supported by the ECtHR's judgment in *Menarini* judgment[13] and the *KME* ruling of the Court of Justice[14].

---

[9] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204 (*English special edition: Series I Volume 1959-1962, 87*).

[10] Council Regulation No 1/2003 of 22 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1. See also Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.

[11] *Jussila v. Finland* (Appl. No 73053/01, (2006)), para 43.

[12] Cf. Art. 105 and Arts. 263 and 264 TFEU.

[13] *Menarini v. Italy* (Appl. No 43509/08, (2009)).

[14] Case C-272/09 P *KME* [2011] nyr. See also *XLI Report on Competition Policy* (2011), p. 10.

3. The administrative character of the procedure for the application of Arts. 101 and 102 TFEU does not relieve the institutions (and the Member States when implementing EU law) from the observance of Art. 6 TEU, and most notably of the applicable Charter provisions, regardless of whether the victims are natural or legal persons. Biasness and arbitrary decision-making (real or perceived) contrast with the principle of sound administration enshrined in Art. 41 CFR and ultimately impinge on the respect of Arts. 47, 48 and 49 CFR.

But above and beyond the legality of the measures adopted by the Commission, the enforcement competition law poses a legitimacy issue: how, and to what extent, can the perceived biasness of the decision-making process be compensated without radically changing the system of control?

In this regard, a number of adjustments can be envisaged to level the playing field and enhance fairness and transparency with positive repercussions on (the volume and duration) of court litigation. To begin with, it is possible to assign the investigative and decision-making functions to different services operating within the Commission. Concurrently or alternatively to the separation of functions, the fairness of the procedure, and the legitimacy (true or perceived) of the decision-making process, can be enhanced through the provision of internal check and balances. The Hearing Officer, the Chief Competition Economist, the Peer Review Panels and the Advisory Committee are the most prominent examples in the field of antitrust law. Internal scrutiny and consultation, nevertheless, can only favor a speedy, knowledgeable confrontation between the parties and the key institutional actors if adequate (formal or informal) procedural expedients are in place, some of which can be appreciated in the Best Practices and the Manual of Procedures.

4. The new terms of reference of the Hearing Officer (TR) must be read, and assessed, in light of a number of binding and non-binding legal acts: on the one side, the implementing Regulation[15]; on the other, the Notice the rules for access to file,[16] the Best Practices, the 2010 Guidance on procedures of the Hearing Officers, and, albeit to a limited extent, the Manual of Procedures.

The extended influence of the Hearing Officer on the investigative phase is certainly welcome but only partly satisfactory. Should a controversy arise over documents allegedly

[15] Regulation 773/04/EC of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty

[16] Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 [2005] OJ C325/7.

covered by legal professional privilege the Hearing Officer "may formulate a reasoned recommendation to the competent member of the Commission". Moreover, when the privilege against self-incrimination is invoked with respect to a simple request for information, the Hearing Officer may make a reasoned recommendation and refer to the director for the purposes of adopting a decision pursuant to Art. 18(3) of Regulation No 1/2003. In both cases the parties are entitled to receive a copy of the reasoned recommendation.

This additional layer of administrative control could prove to be burdensome for the Hearing Officer without necessarily offering a higher standard of protection of the rights of defence. Decisions based on Articles 18(3) and 20(4) of Regulation No 1/2003 are (already) amenable to justice and it remains to be seen how frequently the undertakings will actually recur to Art. 9 TR, given the limited powers of the Hearing Officer. In addition, the fact that the Hearing Officer participates to regular encounters with the investigating team since the early stages of the procedure increases the chances that the latter might also develop a biased approach or appear less autonomous in reaching his or her conclusions. In this sense, the degree of detail of the final reports is so scarce and variable that it ultimately impinges on its reliability for future actions for annulment directed against the final decision. On the other hand, the possibility to refer to the Hearing Officer self-incrimination and legal professional privilege issues might encourage dilatory practices on the part of the undertakings.

That being said, no significant changes were made to the Hearing Officer's role in the management and handling of oral hearings and to its reporting powers. Despite the strong arguments advanced by many academics and practitioners, the interim report still remains an internal document.[17] Observations on the substance of the case (formally distinct from the interim report) are optional and unaccounted-for. In addition, it should be noted that the Hearing Officer has not been entrusted with the Commission's file. This is even more regrettable if one considers that while undertakings opposing the communication of documents they deem to be confidential may bring an appeal directly before the General Court,[18] those contesting a breach of their right to access will only be entitled to challenge the

[17] Cf. Case T-191/06 *FMC Foret* [2011] ECR II-2959, para 143.

[18] Art. 8 of the New Mandate. Case 341/12R *Evonik Degussa* [2012] nyr; Case T-462/12R *Pilkington Group Ltd* [2013] nyr. Moreover, the following actions concerning decisions adopted pursuant to Art. 8 of the New Mandate are currently pending before the General Court: Case T-334/12 *Plantavis and NEM* [2012] OJ C 311/9; Case T-465/12 *AGC Glass Europe* [2012] OJ C 379/32.

Commission's final decision.[19] The rules on accessibility (especially of internal documents) need to be revised and brought more in line with the spirit underlying the rules laid down in Regulation 1049/2001.[20] Lastly, and more generally, it should not be forgotten that the Commission is under no duty to participate in the oral hearing. And yet, it still adopts the final decision on the breach of Arts 101 and 102 TFEU, which is not necessarily compatible with the standard required by the European Court of Human Rights, namely in cartel cases.

5. For more than three decades the role of the Hearing Officer has been strengthened to meet the growing standards of protection of the rights of defence in administrative proceedings that could culminate with the imposition of sanctions. His contribution to the objectivity and fairness has been significant. As anticipated, however, the present study focuses on final decisions issued in cartel cases during the last 30 months, and most notably between the publication of the updated mandate and the Best Practices, i.e. October 20, 2011, and the end of February 2014.

Over this period a total of 11 final reports were issued, 9 of which concerned cartel cases.[21] The extension of the deadline for the reply to the statement of objections was requested, and accepted, in 4 cases.[22] With respect to the original 8 week's deadline, the Hearing officer conceded on average two additional weeks for the reply.

Additional requests for access to file have not been submitted to the Hearing Officers. When disputes over the accessibility did arise, they were solved with DG COMP. In the *TV and computer monitor tubes* case, however, Michael Albers expressed doubts as to "whether the limited access to file in this proceeding is fully compatible with EU law".

Oral hearings were organized in 3 cases, two of which involved *in camera* presentations. In one instance, the Hearing Officer asked the interested party to reiterate the non-confidential points of its presentation in the presence of all other parties.[23] New documents were allowed at the hearing and subsequently included in the Commission's file. The admissibility of

[19] Art. 7 of the New Mandate. See also Case T-219/01 *Commerzbank AG* [2003] ECR II-2843, paras 53, 58 and 63.

[20] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.

[21] The other two, regarded the abuse of dominance in the world-wide market for consolidated real-time datafeeds (COMP/39654, *Reuters Instrument Codes*) and the concerted practices in the sale of e-books to consumers (COMP/39847), respectively.

[22] COMP 39/462, *Freight Forwarding*; COMP 39.452, *Mounting for windows and window doors*; COMP/39437, *TV and computer monitor tubes*.; COMP 39.839, *Telefónica/Portugal Telecom.*

[23] COMP/39.437, *TV and computer monitor tubes*.

statements by other interested persons was also recognized: "to listen to individuals close to the facts of the case as a part of the presentation of a party would seem to be part and parcel of the right to be heard orally". However, according to Michael Albers, a transparent and fair procedure demands that "in the future all names of persons which a party brings to a hearing in order to corroborate certain facts set out in its written submission […] are disclosed before participant convene for the hearing".[24] The oral hearing was also the occasion to claim further access to the file and the Hearing Officers did decide to make use of the power to instruct the parties to focus on certain elements under Art. 11 of the TR.[25]

By contrast, no use was made of the new recommendation powers under Art. 9 of the TR, either because the issue was solved informally between the competent services of the Commission and the parties or because no significant issues arose during the course of the procedure.

Finally, it should be underlined that in 4 cases the Hearing Officers reported that the Commission decided to drop charges against some undertakings or reduced the duration of the infringement indicated in the statement of objections.[26] However, the reasons that led the prosecuting institution to change its initial position are not always clear.

6. It is now time to draw some tentative conclusions from the above and to put forward some proposals for reform in the near future.

The expectations of the industry, the international law firms and the academic world, the prioritization of hardcore restrictions, the modernization process, the adoption of the Charter and, more recently, the upgrading of fundamental rights following the entry into force of the Lisbon Treaty all played their part in the process of enhancing procedural guarantees in antitrust proceedings. Besides the need to comply with the ECHR in light of the imminent accession, the current state of affairs must be assessed taking in due consideration that the implicit exhortation to exploit the potential of Art. 52(3) CFR addressed to the Member States in *McB*[27] and *DEB*[28] is fully applicable to the EU institutions, the European Commission being no exception.

---

[24] *Ibid*.

[25] COMP/39.437, *TV and computer monitor tubes*.

[26] COMP 39/462, *Freight Forwarding*; COMP 39.452, *Mounting for windows and window doors*; COMP/38695, *Sodium Chlorate*; COMP/39.437, *TV and computer monitor tubes*.

[27] Case C-400/10 PPU *McB* [2010] ECR I-8965, para 53.

[28] Case C-279/09 *DEB* [2010] ECR I-13849, para 35.

With specific reference to the Hearing Officer, it seems that a step-by-step approach has prevailed. No major reform has tackled the essence of the problem: the Hearing Officer is still part of the Commission's staff and has very circumscribed decision-making powers. In this regard, a number of adjustments can be envisaged. Firstly, it is suggested that a dedicated committee - similar to the one provided for in Art. 255 TFEU - comprising antitrust experts, perhaps academics, and former Hearing Officers could be set up. The Hearing Officer and its staff should be attached to the Legal Service, acting as a safeguard *vis à vis* excessive court litigation. Secondly, in order to appease the criticism concerning the fact that the final decision is formally adopted by the twenty-eight commissioners, the involvement of the Director General and the Commissioner with special responsibility for competition should always be guaranteed. This might require some amendments to the current procedure and certainly represent a burden on the administration. However, speediness and efficiency are no excuse for unduly scarifying the rights of defense. This is particularly so in cartel cases. Thirdly, Art. 7 decisions should be challengeable before the EU courts. Fourthly, the qualification of internal documents within the meaning of the 2005 Notice on access to file should be left to the Hearing Officer.[29] Fifthly, the interim report should be obligatory and made public (save for confidential data). The final report, instead, should be more detailed and the Commission should be required to punctually justify departure from the findings of the Hearing Officer. More generally, the discretion of the Hearing Officer in organizing and conducting the hearings should be reduced.[30] To this effect, the adoption of a proper code of procedure, including deontological rules, would certainly contribute to transparency and fairness.

[29] This, of course, would entail an amendment to the 2005 Notice.

[30] For instance, the grounds for admitting third parties to the hearing should be clarified.