The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective
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I. Introduction

Much of the legal debate in EU circles has recently focused on due process.1 Some concerns have been voiced from outside the Commission, notably about an alleged lack of objectivity of EU competition procedure. The story is not unfamiliar: the combination of investigative, prosecutorial, and decision-making functions within the same institution would lead to a prosecutorial bias in Commission’s procedures. The detractors of the system argue that the issue is even more topical nowadays given the envisaged accession of the European Union to the European Convention of Human Rights (ECHR) and since the ‘treatisation’ of the Charter of Fundamental Rights (CFR), which proclaims inter alia the right to a fair trial and the respect of the rights of defence to anyone who has been charged.2

The purpose of this article is not to intervene in this debate, nor to examine whether EU competition procedures meet the requirements of Article 6 of the ECHR. But this debate is relevant when one examines, as we do in this article, the role of the Hearing Officers in competition proceedings.

In 2010, a survey and public consultations organized by the Commission revealed, concurrently, a misunderstanding of what Hearing Officers do, and great expectations on what they could do. For example, a survey commissioned by DG Competition on stakeholders’ perception of its activities reported a comment saying that ‘the hearing officer makes sure the coffee is served at the right time and that the interpreters aren’t too tired. They have no real role.’3 At odds with that statement were the contributions submitted by stakeholders in response to the public consultation organised at the beginning of 2010 by the Commission on DG Competition’s draft Best Practices in antitrust proceedings and on the Hearing Officers’ Guidance Paper. Several stakeholders praised the Guidance Paper for setting out clearly the role of the Hearing Officer, and called for a strengthening of such role to address some of the current concerns about due process.

In the following sections, we will, first, provide a historical perspective explaining how the Hearing Officers’ functions evolved over time. Secondly, we will provide further practical insight on their activities. In addition, in the final section, reference will be made to proposals of stakeholders expressed in the public consultation on the Guidance Paper about a possible extension of the role of Hearing Officers.

Key points

- The role of the Hearing Officers evolved over time since their creation in 1982.
- The powers of the Hearing Officers were extended in 1994 and 2001.
- Today, they are the guardians of the rights of defence, and contribute to the objectivity, transparency, and efficiency of EU competition proceedings.
- In the current debate about due process, suggestions have been made to strengthen their role further.

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2 Articles 47 and 48 of the Charter of Fundamental Rights.
II. Current state of the law: how did we get there?

The Hearing Officers are operating under terms of reference set out in a Commission Decision of 23 May 2001.4 This is the fourth generation of the Terms of Reference. The first one was adopted in 1982, then restated in 1990, and revised in 1994 and 2001. To understand better the current role of the Hearing Officers, and the possible need for a review of their Terms of Reference, a dive into history is not a futile exercise.

A. 1982: where it all began

It may sound odd nowadays, but in 1982, the competition portfolio was not enough to keep one Commissioner busy: Frans Andriessen was Commissioner responsible for Relations with the European Parliament and Competition. More familiar is the fact that the fairness of commission procedures was in question. A respected institution, the Select Committee on the European Communities of the House of Lords, issued a report on the matter,5 in which it was noted, inter alia, that ‘the opportunity for the undertaking to clear up questions of fact and law, or of economic analysis, and to explore questions arising on a Statement of Objections, is, under present practice, seriously deficient’.6 It is true that, in those ancient times, defendants did not have access to the whole of the Commission’s file, and oral hearings were generally presided over by the director in charge of the case. This certainly fuelled the concern that the Commission, in all unfairness, combined the role of the Hearing Officer was extended to cover merger cases. At the same time, the Terms of Reference of the Hearing Officer were reformulated in a Commission decision.14

The Commission heard the concerns. It provided better access to its file in competition proceedings, and created the post of Hearing Officer with the view of reinforcing the objectivity of oral hearings.8 The Twelfth Competition Report on Competition Policy set out that the Hearing Officer shall ensure that the hearing is properly conducted and thus contribute to the objectiveness of the hearing itself and of any subsequent decision.9 Two specific tasks were entrusted to him: first ensuring that the rights of defence are respected; second, that due account is taken of all relevant facts, whether favourable or unfavourable to the accused. In the next Report on Competition Policy (13th), it was noted that ‘by establishing a procedure in which the official presiding over the hearing is not the same as the official(s) in charge of the case as a whole, the impartiality of oral hearings is increased… the Hearing Officer helps to ensure… that the final decision in any given case is thus a well-balanced one which is based on all the relevant facts’.10

The success of the Hearing Officer was immediate. The next year, Parliament invited the Commission to consider extending its role to surprise inspections, confidentiality issues, and access to file as well as the role of witnesses.11 The Commission declined the invitation as regards inspections, and, as regards witnesses, noted that the Hearing Officer already had the power to decide which person could be heard at the oral hearing.12 In 1987, the first report on the Hearing Officer’s activities noted that its introduction significantly improved both the organisation and conduct of hearings, in particular by putting the focus on the key questions. According to the report, ‘gaps and errors in the presentation of the facts which the Hearing Officer has pointed out have in several cases led to the withdrawal of certain objections’.13

Also a mark of success is the fact that in 1990 the role of the Hearing Officer was extended to cover merger cases. At the same time, the Terms of Reference of the Hearing Officer were reformulated in a Commission decision.14

6 Ibid., para 18.
7 It was noted in the 1982 House of Lords Report that ‘the limits of the Court’s power to control, by way of review, the work of the Commission have to be accepted: they arise from the terms of the Treaty as interpreted by the Court. But they do strengthen the case for introducing into the Commission’s procedures the various reforms which the Committee are putting forward in this Report for consideration’ (see para. 29).
8 The intention to create the Hearing Officer was expressed first in the Xth Report on Competition Policy, para. 66.
9 XIXth Report on Competition Policy, Section 3, para. 36 and following.
10 Thirteenth Report on Competition Policy, para 75. The first terms of reference of the Hearing Officer were annexed to that same Report (Annex to the Thirteenth Report on Competition Policy, p. 273).
B. 1994: the Hearing Officer acquires adjudicatory powers

The year of 1988 saw the birth of the Court of First Instance (CFI), now the General Court. Its creation was praised in the legal community and it was anticipated that the CFI would bring about more effective judicial review of Commission decisions in antitrust. In the early 1990s, the CFI adopted a few judgments highlighting the importance of procedural rights.\(^\text{15}\) In Hercules, the General Court made it clear that the Commission had an obligation to make available to the defendants all documents, whether in their favour or otherwise, which it had obtained during the course of the investigation.\(^\text{16}\) In Cimenteries, the General Court indicated that a deficient access to the file would in certain situations lead to the illegality of the entire procedure.\(^\text{17}\) It became clear, therefore, that the respect of the rights of defence ought to be reinforced in competition proceedings. A former Hearing Officer in those times complained that much time at oral hearings was spent on discussing problems of access to the file and deadlines to reply to the Statement of Objections (SO).\(^\text{18}\) A new report of the House of Lords on enforcement of Community competition rules recommended granting the Hearing Officer interlocutory powers to resolve certain procedural disputes between DG Competition and the parties.\(^\text{19}\)

Following these suggestions, the Commission announced, in its 1993 Report on Competition Policy, a revision of the Terms of Reference of the Hearing Officers for 1994. The main novelty was the attribution of decision-making powers to the Hearing Officer for deadlines to respond to a Statement of Objections, disputes on access to file, and issues related to business secrets. It was thought, in particular, that the objectivity of the proceedings would be better served if decisions as regards access to file and deadlines were taken by an official independent from the team investigating the case. The Terms of Reference were also extended to cover the admission of third parties to the proceedings, that is deciding whether they have a sufficient interest to be heard. The extension of the Terms of Reference of the Hearing Officers was praised, although some commentators noted that more was still to be done to ensure the objectivity of Commission proceedings. Of particular concern was the fact that the Hearing Officer’s report could only be communicated to the outside world upon recommendation of the Hearing Officer and in agreement with the Commissioner, which was generally not done.\(^\text{20}\)

C. 1999–2001: the age of independence

On the eve of the new century, two main developments triggered the need to strengthen the role of the Hearing Officer in competition proceedings. First, the Commission was at the time preparing a major overhaul of its antitrust procedural framework (what became Regulation (EC) No 1/2003), which would see the Commission focus on more serious antitrust violations. More litigation was expected, and presumably more disputes of a procedural nature. Secondly, the years 1999–2001 witnessed a boom in merger control and a growing trend in cases where phase II proceedings were initiated. The handling of cases by the then Merger Task Force (MTF) was discussed, in particular as regards commitments. Of particular concern was the procedural position of merging parties because of time constraints: a new report of the Select Committee of the House of Lords noted in this regard that the ‘dice are loaded in the Commission’s favour’.\(^\text{21}\) The report concluded that ‘the Hearing Officer should have greater oversight of DG Competition’s procedures and handling of merger cases, particularly in relation to the negotiation of remedies and commitments’.\(^\text{22}\) The Lords also called for a greater independence of the Hearing Officer from DG Competition.

The Terms of Reference were reformed by the decision of the Commission of 23 May 2001. A few


\(^{16}\) See Hercules (n 15) para. 54.

\(^{17}\) See Cimenteries (n 15) para. 47: ‘if, for the sake of argument, the Court were to recognize, in proceedings against a decision bringing the procedure to a close, that a right of full access to the file existed and had been infringed, and were therefore to annul the Commission’s final decision for infringement of the rights of the defence, the entire procedure would be vitiated by illegality.’ This was applied by the General Court in the Solvay case, in which the Court annulled the Commission decision as regards the applicant in light of the Commission’s failure to give access to certain documents (T-30/91, Solvay v Commission [1995] ECR II-1775, paras 98–99).


\(^{21}\) The House of Lords Select Committee on the European Union, 19th Report, Strengthening the Role of the Hearing Officer in EC Competition Cases, 21 November 2000, HL Paper 125 (the ‘2000 House of Lords Report’), para. 64.

\(^{22}\) See the 2000 House of Lords Report (n 21) para. 79.
remarkable changes were introduced. First, the independence of the Hearing Officers was reinforced by removing the link to DG Competition. Administratively, the Hearing Officers became attached to the Commissioner for Competition. However, one should not be mistaken about such an attachment: the Hearing Officers carry out their task in full independence, and do not take instructions on individual cases from the Commissioner. The link is purely administrative. Secondly, to increase transparency and accountability, the new Terms of Reference provided that the Final Report of the Hearing Officers should be disclosed to the parties and published with the final decision,23 following in that the recommendation of the 2000 House of Lords Report.24 Thirdly, two new tasks were entrusted to the Hearing Officers: the control in merger and antitrust proceedings of the objectivity of the market testing of commitments proposed by the parties;25 and the granting and denying of confidentiality claims when decisions are published in the Official Journal of the EU.26

D. Conclusion

We hope this historical review will have shed some light on the role of the Hearing Officer, which evolved, inter alia, in response to concerns about the objectivity and transparency of proceedings (1982), changing case law and a growing awareness of procedural issues (1994), or the regulatory and business environment (2001). The purpose of his function is now to contribute to the objectivity, transparency, and efficiency of proceedings,27 using a mix of competences made of decision-making powers, advice to the Commissioner, and reporting to the Commission and the public. In the following section, we will examine what this means in practice for undertakings involved in competition proceedings.

III. Practical considerations: do’s and don’ts of the Hearing Officers

The primary task of the Hearing Officer is to ensure that the right to be heard has been respected in competition proceedings. The right to be heard applies to the parties subject to the proceedings, as well as to other parties, such as complainants and interested third parties, albeit in a different way (see Subsection D below). As regards parties subject to the proceedings, the right to be heard, now guaranteed by the Charter of Fundamental Rights,28 requires that they be afforded the opportunity to make known their views on the truth and relevance of the facts and matters alleged and the documents used by the Commission to support a claim that there has been a breach of competition law.29 In practice, such opportunity is given in writing (response to the statement of objections (SO)) and orally (oral hearing). Below we will examine the means available to the Hearing Officers to ensure respect for the right to be heard.

A. When does the Hearing Officer intervene?

The Hearing Officer’s responsibilities typically start with the notification by the Commission of a Statement of Objections to the potential infringer (antitrust) or notifying party (merger control). Shortly after receiving the SO, the addresses are informed of the Hearing Officer and his team dealing with the case. This is when the critical phase as regards the exercise of the rights of defence begins. Indeed, in the Court’s words, an undertaking subject to investigatory measures can rely in full on its rights of defence only once a Statement of Objections has been notified to it, as it is not until then that an undertaking has been formally informed of any objections against them relating to an infringement of the competition rules.30 This is when defendants will exercise their right of access to the file, as well as right to be heard both in writing (SO replies) and orally (at the hearing).

That said, sometimes parties contact the Hearing Officers when issues related to the rights of defence arise pre-SO, for example in relation to requests for information or documents seized during inspection. However, the Hearing Officers do not have any formal powers as regards such matters unlike, for example, an administrative law judge at the US Federal Trade Commission (FTC), who can adopt an order protecting the defendants against an excessive discovery request by the FTC.31 In our proceedings, the Hearing Officers can

23 Articles 15 and 16 of the Terms of Reference (n 4).
24 The authors indicated the Commission’s failure to follow the recommendation of the 1993 House of Lords Report (n 19) to make the Hearing Officer’s report public was the starting point of the inquiry (point 59).
25 Article 14 of the Terms of Reference. (n 4)
26 Article 9(3) of the Terms of Reference (n 4).
27 Recital 3 of the Terms of Reference (n 4).
28 Article 47 of the Charter of Fundamental Rights.
31 See FTC Rule 3.31(d) (16 C.F.R. § 3.31(d)).
offer little more than to mediate a dispute arising between a party and DG Competition. This can, however, sometimes prove useful to avoid discussions becoming too acrimonious between the case team and parties.

The Hearing Officers have also sometimes been contacted pre-SO by parties claiming that DG Competition failed to inform them of their procedural status. Again, the Hearing Officers do not have formal powers to intervene, although they may draw in the final report conclusions on such an issue. For example, in the Heat Stabiliser case, the Final Report stated that the Commission committed a procedural irregularity by not duly informing AC Treuhand of its procedural status. However, such irregularity was not found to have led to a breach of AC Treuhand’s rights of defence.

B. The Hearing Officers’ decision-making powers in the written phase of the procedure

Two main issues may arise that would potentially impair the parties’ opportunity to make known their views in writing: first, they may not be given enough time to adequately prepare their reply to the SO. Secondly, they may not be given proper access to the file.

1. Disputes on deadlines

The Hearing Officer is competent to adjudicate on disputes concerning deadlines to respond to an SO or a letter of facts. Deadlines are important because the Commission is not obliged to take into account written submissions after the expiry of the deadline.

Typically, when receiving a request for an extension, the Hearing Officer will take into account the size and complexity of the file, whether a party has had prior knowledge of information and any objective obstacle faced to provide comments by the deadline.

The decision of the Hearing Officer will be binding on both the requesting party and DG Competition, and will not be susceptible of an appeal to the General Court. The decision may only be reviewed by the courts in the context of an appeal against the final Commission decision.

In antitrust and cartel proceedings, appeals by the parties to the Hearing Officers concerning deadlines are very frequent. Over recent years, case files have grown significantly, in particular in cartel cases because of the success of the Leniency Notice. Leniency applicants very often submit large sets of documents, sometimes of more than 100,000 pages, and oral statements which, transcribed, can amount to a few thousand pages. Furthermore, it is not infrequent nowadays for cases to have a worldwide dimension, which means that some documents may be in non-EU languages, for example Asian languages, which may require additional preparation for the parties if they are not familiar with such languages. Against this background, the minimum four week deadline set out in Regulation (EC) No 773/2004, and the usual deadline granted by DG Competition (two months) may not always be appropriate. This is particularly true for addressees of an SO that are not leniency applicants (or cooperating with the Commission), as they generally will not have contributed to the incriminating evidence and sometimes will largely ignore what the case is about until they receive the Statement of Objections.

Decisions on deadlines are by far the most commonly adopted type of decisions; there are generally between 50 and 100 annually.

2. Disputes on access to file and confidentiality

2.1 The right of access to the file. The right of access to the file is a corollary of the principle of respect of the rights of defence. It is also enshrined in the Charter of Fundamental rights (Article 47). It means that the Commission must give the undertakings concerned the opportunity to examine all the documents in the investigation file which may be relevant for their defence, except for documents containing business secrets, internal notes, and other confidential information.

Access to the entire file was introduced in EU competition proceedings in 1982 on the Commission’s initiative. This was a radical change from the previous...
practice of giving access only to incriminating documents. The Commission went beyond the case law, which had endorsed the previous practice, to enhance the respect of the rights of defence. The General Court later made this practice binding on the Commission.\textsuperscript{41} In 1982, however, only a list of the documents in the file was provided. Access to the file improved over time until it reached the current level, where the addressees of a Statement of Objections generally receive a DVD containing all the documents in the Commission’s file, except for oral statements,\textsuperscript{42} internal documents, and documents over which confidentiality has been claimed.

Since 1994, the Hearing Officers have been vested with the power to adjudicate on access to file issues. Parties unsatisfied with how access to the file has been granted can lodge a reasoned request to DG Competition to obtain further access. In case of disagreement with DG Competition, the requesting party may refer the matter to the Hearing Officer. We examine below the main issues which may arise in relation to access to the file.

2.2 Typology of access to file requests. The Commission typically receives requests for further access to the file in the following situations:

- Requests for access to documents on which confidentiality has been claimed, and which are therefore partially or fully redacted;
- Requests for documents which are not part of the file, but which an addressee of a Statement of Objections wishes to have incorporated in the file;
- Requests for documents which the Commission receives after it had already given access to the file to the addressees of an SO.

2.2.1 Access to file versus confidentiality. Any undertaking submitting information to the Commission may claim confidentiality on all or part of the information submitted. Confidentiality claims must be reasoned, and can be made for business secrets and other confidential information, the disclosure of which would significantly harm the interests of the information provider.\textsuperscript{43} Undertakings subject to the proceedings do not have access to this information, but may nevertheless seek access to it, hoping that it contains information relevant for their defence. In such situations, the Hearing Officer must arbitrate between the rights of defence and confidentiality.

Confidentiality claims are not always founded. In fact, many requests received by the Hearing Officer typically end with the information provider ultimately agreeing to disclose the information following the intervention of the Hearing Officer. This represents a significant number of requests, typically several per case, which raise the question of whether the procedure for access to files is still appropriate (see Section 2.2.4 below).

In other cases, confidentiality claims may be justified, but the confidential information may nevertheless be very important for the exercise of the rights of defence, for example if it has a significant exculpatory value for the defendants. The ECJ has recognized that the safeguards of the rights of defence may require that confidential information be disclosed to the undertakings subject to the investigation.\textsuperscript{44} The issue is one of balancing two legitimate interests, both of which are referred to in Article 47 of the CFR: ‘the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy’. In carrying out this balancing exercise, the Hearing Officer will generally consider the relevance of the information in determining whether or not an infringement has been committed (and its probative value), whether the information is indispensable, the degree of sensitivity involved, and the seriousness of the alleged infringement.\textsuperscript{45}

After balancing the two interests, the Hearing Officer may still find that disclosure of the confidential information is not necessary to safeguard the parties’ rights of defence, and reject the request in a so-called ‘Article 8 decision’.\textsuperscript{46} If access to the information is not granted to the requesting party, this does not mean, however, that no information at all is provided. The Commission may ask the information provider to provide a non-confidential version and a concise description of

\textsuperscript{41} Case T-7/89, SA Hercules Chemicals NV v Commission, [1991] ECR II-1711, para 54: ‘It follows that the Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved.’

\textsuperscript{42} Oral statements are, however, accessible at the Commission’s premises.

\textsuperscript{43} For more detail on what constitute business secrets and other confidential information, we refer to the 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, OJ C 325, 22.12.2005, 7–15.

\textsuperscript{44} Case T-198/03, Bank Austria Creditanstalt AG v Commission [2006] ECR II-p. 1429, para. 29–31.


\textsuperscript{46} By reference to Article 8 of the Terms of Reference (n 4).
each piece of deleted information.\(^{47}\) In the *General Electric* case, the General Court endorsed the practice consisting, in certain cases, in providing the merging parties with only a summary of the confidential information.\(^{48}\) Appeal of an Article 8 decision is not possible, and such a decision of the Hearing Officer may only be challenged in the context of an appeal against the final decision of the Commission. This is essentially justified by the fact that the Hearing Officer’s decision is only preparatory, and that the interests of the requesting party are only affected to the extent that the Commission would adopt a final adverse decision.\(^{49}\)

Alternatively, the Hearing Officer can come to the conclusion that the requested information, despite its confidential nature, must be disclosed to safeguard the defendant’s rights of defence. In such a case, the Hearing Office will notify the information provider of the intended disclosure in a so-called pre-article 9 letter.\(^{50}\) Very often, the procedure will stop at this stage, with the information provider reconsidering its confidentiality claims. In fact, during the period 2007–2009, nine pre-article 9 letters were sent, and no so-called ‘Article 9 decision’ was adopted. Only in 2006 did the Hearing Officer take Article 9 decisions in four cases, addressed to a total of 90 undertakings, ordering the disclosure to certain parties involved in the proceedings of information on which confidentiality had been claimed. These statistics show that the intervention of the Hearing Officer often allows for a consensual conclusion to be found.

When the Hearing Officers adopt an Article 9 decision ordering the disclosure of the requested information, the information provider has a direct right to appeal to the General Court, since its interests may be harmed by the disclosure.\(^{51}\)

In recent years, a hybrid form of access to file has occasionally been used to find the right balance between the need to grant access to file and legitimate concerns for confidentiality, namely by way of a data room or the use of non-disclosure agreements. While data rooms may be ordered by the hearing officer, non-disclosure agreements are more typically used in situations where all parties agree to this form of disclosure. Data rooms have become more frequent in merger proceedings. Their main purpose in these cases was to allow the economic experts of the parties to verify the data and methodology used by the Commission to conduct certain quantitative studies. Although most data room procedures were carried out with the consent of the information provider, they may also be ordered by the Hearing Officer. For example, in two antitrust cases (later closed), the Hearing Officer adopted decisions based on Article 9 of the Mandate ordering the disclosure of certain information provided by third parties, despite the fact that such information was likely to be covered by business secrecy. The Hearing Officer considered that the information was necessary for the defendants to exercise their rights of defence. However, the information was disclosed, under certain strict conditions, only to external advisors of the requesting party via a data room at the Commission’s premises. The advisors could not take copies of documents. They could only prepare a report, both in confidential and non-confidential versions. It was verified that the non-confidential version, transmitted to the defendants, did not contain any of the confidential information.

Non-disclosure agreements have also been used to accommodate the rights of the defence and legitimate claims for confidentiality. For example, in the *Intel* case, bilateral agreements were concluded between Intel and certain original equipment manufacturers (OEMs), according to which the documents submitted by the OEMs in the case were made accessible to Intel and/or their outside counsel under certain conditions.\(^{52}\) Intel agreed in particular to only have access to the file under the conditions set out in the bilateral agreement, that is partially to waive vis-à-vis the Commission its right to access to file, to the extent the access it had received from the OEMs would limit its access rights under Regulation (EC) No 773/2004. Each OEM concerned also waived its right to the protection of business secrets and other confidential information with regard to the information exchanged bilaterally under the agreements with Intel.

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47 This is mandatory in antitrust cases; see Article 16(3) of Regulation (EC) No 773/2004.
49 Case T-216/01 R, Reisebank AG v Commission, para. 46: ‘It follows from all the foregoing considerations that, even though they may constitute an infringement of the rights of defence, Commission measures refusing access to the file produce in principle only limited effects, characteristic of a preparatory measure forming part of a preliminary administrative procedure (judgment in Cimenteries CBR, paragraph 42). Only measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment.’
50 By reference to Article 9 of the Terms of Reference (n 4).
2.2.2 Requests for documents not in the Commission’s file. It sometimes happens that the addressee of a Statement of Objections complains that the file is incomplete and requests that the Commission obtains from third parties additional documents. Upon refusal by DG Competition, such matters are occasionally referred to the Hearing Officer. However, the Hearing Officers have limited powers to deal with them. The current Terms of Reference only allow the Hearing Officer to consider requests for access to documents in the Commission’s possession, and not access to documents which are held by a third party or a foreign authority and which are not part of the file.

The most recent example is the *Intel* case, in which Intel asked the Commission to obtain from AMD a list of 81 categories of documents relating to private litigation between Intel and AMD before a federal court in the USA, as well as internal AMD documents. According to Intel these documents were likely to be exculpatory. Upon rejection of the request from DG Competition, Intel referred the matter to the Hearing Officer arguing that the file was manifestly incomplete and that its rights of defence had therefore been compromised. The Hearing Officer found that such issue was not whether full access to file had been granted, but rather whether the file was complete or not. In light of the fact that neither the current Terms of Reference nor the case law of EU courts empowered the Hearing Officer to order measures to complete an allegedly incomplete file, the Hearing Officer considered that she was not competent to address Intel’s request.\(^{53}\)

In the same case, Intel complained that it did not get access to documents concerning a meeting between the Commission and an OEM. The Hearing Officer investigated the issue and decided that an internal note found at DG Competition on this meeting should be put in the file. Simultaneously, the Hearing Officer decided that this note was internal in character,\(^ {54}\) and therefore did not have to be disclosed to Intel. The Hearing Officer also considered that whether or not objective minutes or a proper transcript should have been established of this meeting was a matter of good administration and hence not an issue to be examined in a final report by the Hearing Officer. Intel also referred the matter to the Ombudsman, who found that by failing to make an adequate written note of said meeting the Commission infringed principles of good administration.\(^ {55}\)

2.2.3 Request for documents after access to the file has been granted. It is not uncommon, particularly in cartel cases, that following an oral hearing, DG Competition receives a request for access to documents submitted by one undertaking in its response to the SO, i.e. after access to the file has been granted to all addressees of the SO. This arises typically because parties to a case only become aware of the oral hearing of the defence of the other parties. At this occasion, some parties may consider that some documents or statements submitted by other parties could be useful to their own defence, and request access to such material. For example, in the *Gas Insulated Switchgear (GIS)* case, following the hearing, the Commission made available to the parties several submissions, including a leniency application made by one party in the context of its reply to the SO and additional information submitted to the Commission after the hearing by two leniency applicants. In view of these submissions, several parties then asked for full access to other parties’ replies to the SO. This was refused by the Hearing Officer. However, following the intervention of the Hearing Officer, DG Competition wrote to the parties to identify those parts of such replies which contained corroborating or incriminating elements and to explain how it intended to use such information in any final decision.\(^ {56}\)

In such cases, the approach generally followed by the Hearing Officer is to establish whether the documents or statements submitted to the Commission after access to the file has been granted indeed contain any new information for the requesting party, and if so, to determine whether the non-disclosure of the information would be able to influence, to the detriment of the requesting party, the course of the procedure and the content of the Commission’s decision.\(^ {57}\) Further, the Hearing Officers are vigilant as regards the disclosure of documents on which the Commission intends solely to rely to support certain objections. Failure to disclose such documents may indeed result in a breach of the rights of defence.\(^ {58}\)

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2.2.4 Could the procedure for access to the file be improved? As an aside on this issue, we would like to offer some thoughts on whether the procedure for granting access to the file could be improved. It seems to us that the current system is sub-optimal because the right incentives are not necessarily present for the various parties involved to maximise the efficiency of the process, leading, in our view, to an excessive number of disputes. First, the information providers have more incentive to claim confidentiality over, than to disclose, all their information; and very often they make broad, unsubstantiated, confidentiality claims, either intentionally or by ignorance of the intended use of the documents. Secondly, preparing access to the file is a significant burden on the case teams of DG Competition, despite the Commission's investment in electronic tools facilitating the exercise. To carefully review confidentiality claims, notably where the case file is very voluminous, and to convince the often numerous information providers that their concerns about disclosure are unfounded, is demanding and time consuming. Last, and most importantly, addressees of a Statement of Objections, who see chunks of the file that have been redacted, must decide whether or not to request further access to the file without knowing the exact content of the redacted documents. They are asked to trust that the summary (when there is one) prepared by the information provider is fair, even in cases where the information provider is the same one bringing up accusations against them (complainants; leniency applicants). Confirmation by the Commission of the accuracy of the summaries does not necessarily provide comfort to defendants who often see the Commission as their prosecutor. Because defendants do not know what is included in the non-accessible documents, they will typically want to see everything to be sure that nothing of relevance escapes them. Recourse to the Hearing Officer of course helps to resolve these disputes, but a significant amount of them arises simply as a result of this asymmetry of information, and could easily have been avoided if the undertakings concerned knew about the irrelevance of the information. These ‘unnecessary’ disputes are not only costly in terms of public resources, but they may also regretfully divert attention from more fundamental issues that a case may raise.

One possible solution to solving this problem would be to design a procedure under which the defendants would be granted access to all documents but under strict conditions of confidentiality. Only the external lawyers of the defendants would be given access to every document under a strict confidentiality obligation. They could then request full disclosure of only those documents which they considered useful for the defence, and the Hearing Officer would arbitrate any dispute with the information provider on the confidentiality of such documents. Under this new system, the problematic asymmetry of information identified above would be removed, and the issue would only be that of ensuring the respect of the obligations undertaken by the external lawyers. Surely, that task is not insurmountable. A useful source of inspiration can be found in the rules of the US Federal Trade Commission, in particular regarding protective orders.

C. Powers of the Hearing Officers in the oral phase of the procedure

Addressees of a Statement of Objections have a right to be heard at a formal oral hearing. Since 1982, the Hearing Officer is responsible for the planning, organisation, and conduct of such oral hearings. Since 2001, the Hearing Officers also have the power to authorize parties to submit post-hearing briefs on matters which still require clarification after the hearing.

In preparation of an oral hearing, the Hearing Officer may take the following steps:

- ask questions to the parties to clarify certain issues raised in the written SO replies or ask them to focus on certain key areas of disputes;
- hold pre-hearing meetings with parties and/or DG Competition to prepare for the hearing;
- admit, at the hearing, those persons whom a party proposes to bring in support of its claim;
- determine the agenda of the hearing in agreement with the parties and DG Competition.

The extent to which these steps are taken varies depending on the types of case involved. In merger cases, the timing of proceedings limits the time available for preparation of the hearing. The notifying party is generally granted tight deadlines to respond to the...
Commission but 'not hearings are' and regularly makes use of this possibility. All participants, notably DG Competition and the issues as much as possible. Questions may be asked by significant time for questions, so as to clarify disputed years, the Hearing Officers' practice has been to allocate well as time for question-and-answer sessions. In recent in the presence of others, it is difficult to deny that oral hearings—meaning that the defendants are heard in of complainants and interested third parties at oral hearings. This would help limiting situations in which the notifying party has to 'choose' between starting to negotiate commitments with DG Competition or having a formal hearing (which are generally more litigious and therefore not an appropriate forum to discuss commitments).

The Hearing Officer chairs the oral hearing 'in full independence,' allocates speaking time to parties, as well as time for question-and-answer sessions. In recent years, the Hearing Officers' practice has been to allocate significant time for questions, so as to clarify disputed issues as much as possible. Questions may be asked by all participants, notably DG Competition and the parties. The Hearing Officer may also ask questions, and regularly makes use of this possibility.

In 2000, the House of Lords report noted that oral hearings are 'not ... an adversarial process like a trial' but 'much more a presentation by the parties to the Commission.' However, with the frequent admission of complainants and interested third parties at oral hearings—meaning that the defendants are heard in the presence of others—it is difficult to deny that oral hearings have acquired a certain adversarial character. It is nowadays not infrequent that defendants and complainants engage in vigorous discussions at oral hearings, or that the Commission probes the parties' position in a series of questions (typically DG Competition will be the first to be given the opportunity to ask questions of the parties). In some cases, certain parties bring natural persons who have specific knowledge of the facts at stake to make statements, and participants have the opportunity to ask questions. However, we remain far from examination and cross-examination of witnesses encountered in other forums, notably trials, not least because statements by individuals at oral hearings under the current EU procedural framework raise many issues.

The first one is undoubtedly the lack of procedural framework for the testimony of natural persons. Under Article 19 of Regulation 1/2003, the Commission may take voluntary statements, but does not have compulsory powers to convocate anyone to testify. Thus, while addressees of an SO can propose that the Commission hears persons who may corroborate the facts set out in their SO reply, the Commission or the Hearing Officer cannot summon anyone, including a potentially exculpatory witness identified by the defendants. In the French Beef case, one party asked the Hearing Officer to summon several persons to the hearing, in particular the French Minister for Agriculture. The Hearing Office rejected the request, as the competition rules do not provide for the Commission to summon witnesses to be heard at a hearing. All the Hearing Officers can do is to explore with the parties who should be heard at the oral hearing, without however any possibility to secure participation if it is not voluntary. In addition, even where the Hearing Officer invites a person to attend the hearing, such person is under no obligation to speak or answer questions at the hearing. Finally, there are currently no specific provisions in the applicable regulations sanctioning the submission of misleading or incorrect information in an oral statement made at the hearing. We recognise the existence of other factors which may incentivise a person giving an oral statement to tell the truth, such as the risk of being contradicted at the hearing by other persons (reputational risk), or the fact that the Commission may subsequently probe the oral statement by way of a formal request for information. In addition, a recent judgment from the General Court suggests that the

63 See the 2000 House of Lords Report (n 21).
64 Except for those parts of their presentations which take place in camera.
65 On this issue, see also Serge Durande and Karen Williams, 'The practical impact of the exercise of the right to be heard: a special focus on the effect of oral hearings and the role of the Hearing Officers' (2005) Competition Policy Newsletter 24.
66 Article 19 of Regulation (EC) No 1/2003 provides that 'the Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject-matter of an investigation.'
70 Article 23 of Regulation 1/2003, sanctioning the provision of misleading information, does not apply to statements taken under Article 19, in contrast to incorrect or misleading answers given in the context of an inspection (Article 23(1)(d)) which may result in a penalty being imposed on the undertaking concerned (but not on the individual(s) who provided such incorrect or misleading answer).
71 Contrary to oral statements, the provision of incorrect or misleading information in response to a written request for information from the
Commission could retain the provision of incorrect information, e.g. at the oral hearing, as aggravating circumstance against the company and increase the fine accordingly. However, it remains to be seen if oral statements of natural persons, while in our view potentially useful, will take a more prominent place at oral hearings in the future, absent a change in the procedural framework.

D. Role of the Hearing Officers vis-à-vis third parties in Commission proceedings

There are various categories of third parties in EU competition proceedings, notably complainants (in antitrust proceedings only), interested third parties, and other third parties. They enjoy various rights as regards (i) being admitted to the proceedings and given the opportunity of making their views known in writing on the proceedings, (ii) participating in the oral hearing, and (iii) receiving information on the proceedings.

1. Admission to the proceedings

Complainants are natural or legal persons who can show a legitimate interest. Once a person has been granted the status of complainant, that person is admitted to the proceedings and has the right to receive a non-confidential copy of the Statement of Objections and make known its views on it in writing. It is not for the Hearing Officer to decide on the admission of persons as complainants in the proceedings.

Interested third parties are those who can show a sufficient interest in the outcome of the proceedings. Upon application—in which they must show that they have sufficient interest—they are entitled to (i) receive information on the nature and subject matter of the proceedings and (ii) make known their views in writing within a set time limit. It was a novelty introduced by the 1994 terms of reference that the Hearing Officer would decide on whether a third party has ‘sufficient interest’ and therefore should be heard. In the 1993 Report on Competition Policy, DG Competition noted that ‘the Hearing Officer is undoubtedly in the best position to decide on [third party] requests [to be heard]’. It may be considered that the delegation of such decision-making power to the Hearing Officers, and not DG Competition, serves the objectivity of the proceedings. By entrusting the decision to a person not involved in the investigation of the case, the Commission may thereby avoid the criticism that it only hears third parties favourable to its case, and refuses to hear those which could support the defendant’s case. Further, it was considered logical in 1994 to delegate this task to the Hearing Officers given that they were already deciding on the admission of third parties at oral hearings.

The Hearing Officers regularly receive requests from persons asking to be admitted to the proceedings in competition cases as interested third parties. In 2009, 43 interested third parties were admitted to the proceedings; 18 in 2008 and 11 in 2007. These numbers vary greatly from one year to another, depending on the cases at stake. Interested third parties are particularly numerous in high profile antitrust and merger cases, and may intervene against the defendants, but also in their favour. For example, in 2009, 15 third parties were admitted to the proceedings in the second Microsoft case, either in support or against Microsoft, and 7 were admitted in the Oracle/Sun merger case. Conversely, the Hearing Officers receive less frequently third party requests to be admitted in the proceedings in cartel cases. None of the eight proceedings in which 43 third parties were admitted in 2009 concerned a cartel case. In fact, since 2007, in only three cartel proceedings did the Hearing Officers admit interested third parties.

Other third parties, that is those which are not complainants and cannot show sufficient interest in the outcome of the proceedings, may only be heard if the Commission finds it appropriate. It is not for the Hearing Officer to decide on such application of other third parties to be heard.

It should be noted that the right of third parties to be heard, as explained above, does not have the same scope as the right to be heard of parties directly concerned by the Commission’s proceedings, that is the parties accused of a violation of Article 101 or 102 TFEU, or the notifying party in a merger case. In essence, the right to be heard of the latter pertains to the rights of defence, and is a fundamental right, while

Commission can be sanctioned by a fine of up to 1% of the undertaking’s turnover (Regulation (EC) No 1/2003, Article 23.1.(a)).

72 Case T-384/06, BP and International Building Products France v Commission, not yet published.
74 Article 3(1) of Regulation No 773/2004.
75 Article 6(1) of Regulation 773/2004.
78 Case COMP/C-3/39.530—Microsoft (tying).
79 Case COMP/M.5329—Oracle / Sun Microsystems.
80 See Article 13(3) of Regulation No 773/2004, and Article 16(3) of Regulation No 802/2004.
81 See Durande and Williams, “The practical impact of the exercise of the right to be heard” (n 65) 22.
the right to be heard of interested third parties is more akin to a participation right.82

2. Participation of third parties to oral hearings

Whereas complainants and interested third parties have a right to be heard in writing, they do not likewise enjoy a right to be heard orally. Both in merger control and antitrust, the relevant regulations give the Commission discretion on whether or not to admit complainants and interested third parties at the oral hearing of the parties.83 The decision to admit such third parties to be heard at the oral hearing, taken by the Hearing Officer after consultation with the Director in charge of the case,84 is typically utilitarian: complainants and interested third parties are admitted to oral hearings where appropriate, that is if they can usefully contribute to the proceedings, notably by means of a presentation at the oral hearing or active participation to the question and answer sessions.85 The Hearing Officer’s draft Guidance Paper provides that ‘as a general rule, applicants should be capable of contributing to the establishment of the truth and relevance of the facts and circumstances likely to be the focus of the Oral Hearing’.86 Again, this is very different from the rights of the parties subject to the proceedings, both in merger and antitrust, who have a right to an oral hearing if they so request.

Cartel proceedings may present some specificity as regards the admission of third parties to oral hearings. Contrary to most antitrust and merger cases, given the secret nature of cartels, it is questionable which contribution undertakings other than cartel members can make at the oral hearing. For example, the contribution of a customer to factual disputes concerning the scope, duration, and functioning of a suspected cartel, which typically arise at cartel oral hearings, is likely to be limited. Customers normally have no knowledge of the relevant facts, and their request to attend an oral hearing is more often than not motivated by the desire to obtain information on the case for the purpose of private claims. In the presence of customers, defendants may also refrain from making certain useful observations at oral hearings, thereby potentially diminishing the efficiency of the proceedings.

3. Information given to third parties on the proceedings

As mentioned above, complainants are entitled to receive a non-confidential version of the Statement of Objections.87 By contrast, interested third parties are only entitled to receive information on the nature and subject matter of the proceedings,88 although the Commission may decide to provide them with more information (e.g., a non-confidential version of the Statement of Objections) if it considers appropriate.89 Other third parties have no specific rights to receive information on the proceedings.

Complainants and interested third parties may ask the Hearing Officer to intervene if they believe that their right to receive information has not been respected so that they cannot be properly heard.90 For example, in the Intel case, the Hearing Officer intervened to ensure that AMD, the complainant, receive a meaningful non-confidential version of the Statement of Objections.91 Interested third parties may likewise contact the Hearing Officer if they have not received information on the nature and subject matter of the proceedings, although this rarely occurs since this obligation is relatively easy to discharge for the Commission.

E. The Hearing Officers’ reporting function

1. The Hearing Officer’s interim report

It was introduced in the 2001 Terms of Reference that after the oral hearing, the Hearing Officer would prepare a report to the Commissioner for Competition. The report primarily concerns procedural issues, and in particular addresses the question of whether the right to be heard has been satisfactorily met until that stage of the procedure.92 In addition, the Hearing Officer

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82 For a detailed discussion on the rights of third parties in competition proceedings, see Serge Durande and Aitor Montesa Lloreda, ‘Les droits des tiers dans les procédures devant la Commission européenne’ (2005) 4 Concurrences 34–44.
83 In antitrust proceedings, see Article 6(2) of Regulation No 773/2004 as regards complainants and Article 13(2) of Regulation (EC) No 773/2004 as regard interested third parties. In merger proceedings, see Article 16(2) of Regulation (EC) No 802/2004 as regards interested third parties.
84 See Article 7 of the Terms of Reference (n 4).
85 This explains the practice of carefully considering whether persons or the associations to which they adhere or both should be heard.
86 See the Hearing Officers’ Guidance Paper (n 34).
87 Article 6(1) of Regulation No 773/2004.
88 See Article 13(1) of Regulation 773/2004 and 16(1) of Regulation 802/2004.
89 See case 53/85, AKZO Chemie v Commission [1986] ECR 1965, para. 27; see also DG Competition Best Practices on the conduct of EC merger control proceedings, para. 36.
90 See Article 8 of the Terms of Reference (n 4).
92 Article 13(1) of the Terms of Reference (n 4): ‘The hearing officer shall report to the competent member of the Commission on the hearing and the conclusions he draws from it, with regard to the respect of the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing.’
may also make, when appropriate, observations on the substance of the case.\textsuperscript{93} Such observations can relate to questions of facts, for example whether due account has been taken of all relevant facts, whether favourable or unfavourable to the defendants.\textsuperscript{94} Typically, the observations will not cover the entire case, but focus instead on the points, if any, which the Hearing Officer finds potentially problematic and on which he wishes to alert the Commissioner and Director General of DG Competition. The observations may also lead the Hearing Officer to recommend maintaining, dropping, or modifying (notably limiting) objections.

The report on the hearing is addressed to the Commissioner, but also communicated to the Director General, the Director in charge of the case and, although not required by the Terms of Reference, the Legal Service of the Commission. It is not communicated to the parties. The report is usually followed by a meeting with the Commissioner, where the case team is also present, to discuss the outcome of the oral hearing and future orientation of the case.

Commission proceedings have often been criticised for the fact that the oral hearing did not take place in front of the decision maker. The interim report of the Hearing Officer is, however, one means through which the Commissioner for Competition is informed about the key issues discussed at the oral hearing, both as regards procedure and the substance of the case, if the Hearing Officer decides to make observations on the latter. In that function, the Hearing Officer participates in the checks and balances that the Commission has set in place to ensure respect for parties’ rights to be heard. To avoid the risk of a negative procedural impact, the Hearing Officer may make observations on the substance of the case which have been brought forward during the oral hearing, or on any modifications of the case which have been proposed by the parties or the Director General of DG Competition.

2. The Hearing Officer’s final report

The final report of the Hearing Officer is prepared in view of the draft final decision. The report examines primarily whether the right to be heard has been respected, and whether the final decision includes only objections on which parties have been given the opportunity of making known their views.\textsuperscript{95} Where material procedural issues have arisen in the course of the proceedings, they are addressed in the final report. In recent times, the Hearing Officers have also mentioned in the final report when objections have been dropped against certain companies or where they have been altered (e.g. when duration has been reduced).\textsuperscript{96}

The 2001 review of the Terms of Reference led to the addition of a new task for the Hearing Officer, which is to report, where appropriate, on the objectivity of any enquiry conducted by DG Competition to assess the competition impact of commitments proposed by the parties. This new task was introduced to create a more transparent system in relation to the negotiation of commitments, promoting accountability, without jeopardising the effectiveness and the speed of procedures. The Hearing Officer was requested to carry out such task in the Tetra Laval / Sidel merger case. The parties had claimed that the questionnaire used to test with the market the proposed commitments was inaccurate or misleading, and that the Commission refused access to the replies to the questionnaire. The Hearing Officer examined the outcome of the market test by DG Competition and ultimately found the claims to be unfounded.\textsuperscript{97} In practice, however, the Hearing Officer is seldom requested to investigate the objectivity of the market enquiry assessing commitments. This is probably explained by the fact that, as a general rule, DG Competition will give access to the outcome of the market test to the parties, which will therefore be able to verify on their own account whether the exercise has been conducted with objectivity. Transparency in this case seems to deliver its full benefits.

A draft final report is attached to the draft decision sent to the Advisory Committee; it may be revised in light of any modification of the draft decision after the Advisory Committee. The Final Report is attached to the draft decision which is sent to the College for approval. Finally, since 2001, it is sent to the parties with the final decision and published in the Official Journal.

The final report is an important means available to the Hearing Officers to influence the conduct of the procedure. The possibility that the Hearing Officer may not give the procedure a ‘clean bill of health’ in an individual case acts as an important safeguard of the parties’ rights to be heard. To avoid the risk of a nega-

\textsuperscript{93} Article 13(2) of the Terms of Reference (n 4): ‘In addition to the report referred to in paragraph 1, the hearing officer may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.’ While technically separate from the interim report, in practice the observations on the substance of the case are generally included in the interim report, at least in so far as they chronologically follow the oral hearing.

\textsuperscript{94} Article 5 of the Terms of Reference (n 4).

\textsuperscript{95} Article 15 of the Terms of Reference (n 4).

\textsuperscript{96} See, for example, the Final report of the Hearing Officer in Case COMP/ C.39129—Power Transformers, OF C 296, 5.12.2009, 19, which mentions that the duration has been considerably reduced in the decision compared with the Statement of Objections; see also the Final Report of the Hearing Officer in Case COMP/38.344—Pre-stressing steel, not yet published, which mentions that four parties were dropped in the final decision compared with the Statement of Objections.

\textsuperscript{97} Final Report of the Hearing Officer in case COMP/M.2416—Tetra Laval/Sidel, OF C 39 13/02/2004, 2.
tive report, much is done by Commission services before the decision to remedy any potential violation of the right to be heard, notably upon the request of the Hearing Officers. This does not mean that the Hearing Officers make no mistakes. In the Carbonless Paper case, the Court of Justice found that the rights of defence of one undertaking (Bolloré) had been breached, since it had not been heard on all objections, whereas the Hearing Officer had given a clean bill to the Commission’s final decision.  

F. Publication of Commission decisions

The publication of decisions by the Commission has occasionally led to disputes engaged by undertakings who objected to the disclosure to the public of certain information contained in the decision. Since 2001, the Terms of Reference provides that the Hearing Officer is competent to adjudicate such disputes. Noteworthy is the fact that, while Article 9 only refers to the protection of business secrets, the General Court has found that the protection extends beyond this. In the Bank Austria case, the Court found that the Hearing Officer must not merely examine whether the version of a decision intended for publication contains business secrets or other confidential information enjoying similar protection. He must also check whether that version contains other information which cannot be disclosed to the public either on the basis of rules of EU law affording such information specific protection (eg data protection rules) or because it is information of the kind covered by the obligation of professional secrecy.  

For information to be covered by professional secrecy, it must (i) be known only to a limited number of persons; and, if disclosed, (ii) be liable to cause serious harm to the person who has provided it or to third parties; and finally (iii) the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the EU institutions take place as openly as possible. As regards the latter, the General Court found that the interest of the applicant fined for breach of competition law in not having the details of the illegal conduct being disclosed to the public did not warrant any particular protection.

In the Pergan case, the applicant sought the annulment of a decision of the Hearing Officer which had rejected its request to remove references to its name from the final decision. Pergan had been an addressee of the SO, whereas the Hearing Officer had given a clean bill to the public version of the decision. The Court upheld Pergan’s claim and found that such references were contrary to the presumption of innocence, in light of the fact that Pergan could not appeal the decision, and should therefore be confidential vis-à-vis the public. The references, however, were not considered confidential vis-à-vis the defendants, since they were necessary for the exercise of the rights of defence.

In the Aluminum Floride case, one party argued that the publication of certain parts of the Commission decision would violate the presumption of innocence, in light of the fact that an appeal was pending. The Hearing Officer rejected the request noting, first, that Commission decisions are of immediate application, and that the publication of Commission decisions in competition cases is requested by law (Regulation (EC) No 1/2003). Furthermore, the Hearing Officer referred to the principle established in Bank Austria that the interest of an undertaking which violated EU competition law not to have the decision against it published is not worthy of protection. In another case, one company requested that details about its role within the cartel be removed from the public version of the decision. The Hearing Officer found, inter alia, that the information was already publically known, and therefore could not be covered by professional secrecy;
further, as in the *Aluminium Floride* case, the Hearing Officer found no interest worthy of protection.

**IV. A need to review the Terms of Reference of the Hearing Officers?**

Recent contributions by legal practitioners have called for a review of the Terms of Reference of the Hearing Officers. The public consultation on DG Competition Best Practices on antitrust proceedings and Hearing Officer Guidance Paper has also shown a certain discontent about some aspects of antitrust proceedings, and a desire for a strengthening of the Hearing Officer’s role. While there seem to be no consensus on what the Hearing Officers should do or not do, it is nevertheless possible to identify certain common themes put forward in the debate. Stakeholders seem currently more concerned about antitrust proceedings, that is those leading to the imposition of a fine, than merger proceedings.

First, several stakeholders have advocated for an earlier and broader involvement of the hearing officers. As mentioned above, the role of the Hearing Officers really starts after the SO and continues up until the adoption of the final decision, that is when the parties are entitled to fully exercise their right to be heard. The Hearing Officers’ role pre-SO is fairly limited. Parties confronted with issues of rights of defence have sometimes no immediate remedy during the pre-SO phase. The concern expressed by stakeholders seems to be that DG Competition’s use of its investigating powers is not sufficiently checked, so that violations of the rights of defence might take place, which cannot later be remedied, for example when exculpatory evidence is no longer available, protected information has been disclosed, or information has been illegally obtained.

The suggestions put forward to address these concerns are multiple: first, it is suggested that the Hearing Officer should deal not only with the right to be heard but, more broadly, with the rights of defence or any procedural dispute (it was even suggested the name of the Hearing Officers be changed to Procedural Officers). Second, the Hearing Officers should be involved from the early stage of the investigation, for example from the time of the inspections. Some stakeholders suggested that the Hearing Officers could control the legality of inspections, and adjudicate on disputes about documents seized by inspectors, for example to determine whether certain documents are legally privileged or out of the scope of the inspections. As regards requests for information, it has been suggested that the Hearing Officers could adjudicate disputes between the parties and DG Competition as regards the proportionality of the requests, deadlines, legal privilege, or self-incrimination.

Second, several stakeholders have expressed disquiet as regards the way oral hearings are conducted and the opacity of the administrative steps that follow the hearing. Of particular concern for stakeholders seems to be the fact that the hearing does not take place before the decision-makers. It was suggested that a way to improve the objectivity and transparency of the procedure would be to enhance the role of the Hearing Officers during this phase. For example, some stakeholders have suggested that the Hearing Officers should take a greater role in the preparation of the hearing, have the power to convene certain persons at the hearing, and authorise their cross-examination. It was further suggested that the interim report of the Hearing Officers should systematically deal with substantive issues and be made available to the parties.

The Commission should not be able to depart from the report without duly justifying it. More radical was the suggestion that the Hearing Officers should ‘take over’ the case after the hearing, and prepare the draft decision to the College.

Third, several stakeholders have called for a greater independence of the Hearing Officers by removing the link with the Commissioner for Competition. Although few stakeholders expressed doubts on the actual independence of the Hearing Officers, it was suggested that the Hearing Officers be attached either to the President of the Commission, like the Legal


109 See the contribution of Wilmer Hale.

110 See contributions of Freshfields Bruckhaus Deringer LLP, Wilmer Hale, and Howrey LLP. See also ECLF Working Group on Transparency and Process (n 106).

111 See Schulz and Berghe (n 106).

112 See contributions of Clifford Chance, Ashurst, Cleary Gottlieb Steen and Hamilton.

113 See Schulz and Berghe (n 106).

114 See contributions of Baker McKenzie, Skadden Arps Slate Meagher & Flom LLP and Affiliates, and Cleary Gottlieb Steen and Hamilton.

115 See contributions of White & Case LLP, Freshfields Bruckhaus Deringer LLP, and Baker McKenzie. See also ECLF Working Group on Transparency and Process (n 106) and Schulz and Berghe (n 106).

116 See contributions of White & Case LLP. See also ECLF Working Group on Transparency and Process (n 106).

117 See contributions of White & Case LLP, Skadden Arps Slate Meagher & Flom LLP.
Service, or to the Secretariat General, so as to reinforce the perception of their independence.

We do not intend, in this article, to take sides for or against any of the above suggestions. They are all welcome and sensible contributions to a debate, which it is not unhealthy to have after almost ten years of practice under the current Terms of Reference. The latter must be seen in the wider context of competition law enforcement, which was modernised by the adoption of Regulation (EC) No 1/2003 to refocus competition law enforcement on serious violations, and led to an increase in fines and litigation. As a result, concerns about due process have grown. Today, these concerns find a new raison d’être with the treatisation of the Charter of Fundamental Rights, and the envisaged accession to the European Convention of Human Rights. While no judgment of the European Union courts has recently questioned the procedures of the Commission, the Charter of Fundamental Rights may give the courts the occasion to potentially revisit some of the judiciary’s existing case law. The right to be heard, the presumption of innocence and the respect of the rights of defence, to name only a few, have been elevated to the rank of primary law. Limitations to these rights may only be provided for by law. It would be surprising if the standard of competition law procedures, and indeed the intensity of the Court’s review, remain unchanged in this context. As in the early 1990s, there may be a need to make the Commission’s procedures even more exemplary, and perhaps the Hearing Officers have a role to play in this endeavour.

118 Articles 41 and 48 of the Charter of Fundamental Rights.
119 Article 52 of the Charter of Fundamental Rights; Knauf judgment (n 58), para. 91.

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