TRANSPARENCY AND PROCESS: DO WE NEED A NEW MANDATE FOR THE HEARING OFFICER?

ECLF WORKING GROUP ON TRANSPARENCY AND PROCESS*

A. Introduction

The Lisbon Treaty, with the EU Charter on Fundamental Rights, puts the spotlight on the issues of due process and fairness in the Commission's antitrust procedures. Commissioner Almunia has held that he believes the Commission's administrative and procedural system to be sound, and he sees no need to undertake any radical changes:

> "companies can fully defend themselves on the Commission's concerns: they have the right to be heard both orally and in writing; they have access to the Commission's file and their procedural rights are guarded by the Hearing Officers, who report to me and the College."[1]

A key mechanism for achieving procedural equality and accountability is the Hearing Officer. In the press release announcing the consultation on the Best Practices documents and the Hearing Officer Guidance, the Commission explains that Hearing Officers are the "independent guardians of the rights of defence and other procedural rights of companies involved in competition proceedings".

However, the ECLF suggests that, in practice, the Hearing Officers currently fall short of living up to that important role and that the role envisaged under the current Mandate[2] is even more limited. With this article, we point out the main areas where updates and amendments to the role of the Hearing Officers

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1 Competition Commissioner Joaquín Almunia, speech on 9 March 2010, International Forum on EU Competition Law, "EU Antitrust Policy: The Road Ahead".

2 The current Hearing Officer Mandate is set out in SI 2001/462/EC, ECSC: Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings [2001] OJ L162/21, (henceforth referred to as the Mandate).

are required if the Hearing Officers are indeed to constitute "independent guardians" of procedural rights.

Strengthening the role of the Hearing Officers is a way of strengthening due process and fairness of the Commission's process in general—without a need to undertake "any radical changes". Our conclusion is that in order to achieve that goal the Hearing Officers need a new Mandate; a Mandate that properly reflects the function of the Office by entrusting the Hearing Officers with responsibility and real powers (Section B), ensuring the impartiality and independence of the Hearing Officers and transparency of their actions (Section C), and making the Oral Hearing a meaningful fact-finding exercise (Section D).

B. Scope of the Hearing Officer's Role

The Commission's recent "Guidance Paper on the procedures of the Hearing Officers"[3] states that the Hearing Officers are "first of all, guardians of fair proceedings before the Commission" and recognises that it is their task to "safeguard the rights of defence of undertakings".[4] This should, according to the European Court's definition of rights of defence, include the following: the protection of the right to be heard; the right of access to the file; the principle of sound administration;[5] protection against self-incrimination;[6] and the protection of legal professional privilege.[7] This definition is not, however, reflected in the current Mandate, which only provides that the role of the Hearing Officers is to "ensure that the effective exercise of the right to be heard is respected".[8]

The definition of the scope of the Hearing Officers' role contained in the current Mandate appears, therefore, to be narrower than the scope set out in the Guidance Paper. However, the Mandate is currently the only legally binding text defining the Hearing Officers' role. Consequently, the Guidance Paper cannot create additional obligations than those contained in the Mandate.[9] Therefore, in cases where the parties to a Commission procedure request the Hearing Officer's involvement in most issues that go beyond the respect of the right to be heard, such as issues of legal professional privilege, the Hearing Officer is often only

[3] Henceforth referred to as Guidance Paper.
[4] Guidance Paper, para 3.
[5] See, eg Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line v Commission* [2003] ECR II-3275.
[6] See, eg Case T-112/98 *Mannesröhrewerke AG v Commission* [2001] ECR II-729, paras 60–67.
[7] See, eg Case 155/79 *AM&S Europe v Commission* [1982] ECR 1575, para 23; see also Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2007] ECR II-3523, para 76.
[8] Art 1 of the Mandate.
[9] Guidance Paper, para 2.

entitled to present a view on a purely informal basis, and is not empowered to settle these matters with a decision that is binding for the parties.[10]

It should also be highlighted that under the current legal framework there are few opportunities for the parties to settle procedural matters that fall outside the current Mandate of the Hearing Officer other than to appeal the final decision of the Commission to the General Court. This requires the parties to undertake a lengthy and expensive procedure before their issue can be resolved. In certain cases, this could lead to even more prejudicial consequences. For example, in the event of a disagreement between the parties and the Commission on issues of legal professional privilege, the parties may already have suffered irreparable damage as a direct result of the Commission accessing and reading a document which is ultimately found to be protected by legal professional privilege.[11] The functioning of the current system undermines the ability of the Hearing Officer to perform his role properly. Moreover, all of these issues could be solved more efficiently where the Hearing Officer could settle them in the course of the Commission procedure.

1. Involvement of the Hearing Officer from the Initiation of the Commission Proceedings

The current Mandate provides that "the terms of reference of the Hearing Officer in competition proceedings should be framed in such a way as to safeguard the right to be heard throughout the whole procedure".[12] Nevertheless, the other provisions of the Mandate do not seem to entitle the Hearing Officer to settle procedural issues in the period between the first measure of investigation and the issuance of the Statement of Objections (SO).

[10] Reference to the binding nature of Hearing Officer decisions should not be understood as a proposal to make them subject per se to appeal before the General Court. It is the ECLF's view that the ability of the parties to appeal any Hearing Officer's decision before the Courts should still be governed by the principles established by the case law in a manner which ensures the effective protection of fundamental rights in the context of competition law enforcement. Thus, it is submitted that any decision by the Hearing Officer which adversely affects bringing about a distinct change in an applicant's legal position, independently of the outcome of the investigation, or which infringes an applicant's fundamental rights, should be a reviewable act for the purpose of Art 263 TFEU.

[11] In many cases, the parties will have the opportunity of resisting disclosure and could bring the matter before the ECJ. However, this is not necessarily the case and it would be preferable for parties as well as the Commission to have the Hearing Officer deal with disputes over legal professional privilege.

[12] The Mandate, Recital 8. This wording is somewhat hollow given that until the SO has been communicated to a party, and it can rely on its full rights of defence, there are no objections as such and therefore no right to be heard on these. See, eg Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*[2006] ECR I-8725, paras 47 and 50; Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, para 59; Joined Cases C-204/00 P etc *Aalborg Portland v Commission* [2004] ECR I-123, paras 66–67.

As a result, the role of the Hearing Officer in the investigative phase has so far been very limited. The Hearing Officer only occasionally examines procedural issues, usually in relation to self-incrimination or confidentiality, before an SO has been issued. Moreover, according to the Guidance Paper, even in these instances, the Hearing Officer's role is only to look into these issues and address them if they are raised in the Reply to the SO, without taking an immediate binding decision on the matter.[13]

The ECLF believes that the Hearing Officer should fully participate in the procedure from the first investigative step, which generally coincides with a surprise inspection ("dawn raid") by the Commission. This means that the Hearing Officer should be entitled to decide on all issues of procedural fairness raised by the parties in the investigative part of the procedure, including: the reasonableness of the Requests for Information issued by the Commission; the deadlines set by the Commission; issues relating to access to the file; and legal professional privilege.

2. Content of the Hearing Officer's Reports

The current Mandate provides that the Hearing Officer shall report to the Commissioner for Competition[14] on the oral hearing and the conclusions drawn from it. For this purpose, the Hearing Officer drafts an Interim Report. The Interim Report must concern procedural issues related to the respect of the right to be heard.[15] According to the Guidance Paper, the Report addresses "all procedural issues of significance relating to the fairness of the procedure, such as whether the addressees' rights of defence have been respected" as well as "observations on any other specific procedural issue brought to the attention of the Hearing Officer by any party during the procedure",[16] and in the interim report the Hearing Officer "usually also makes observations on the substance of the case".[17]

However, the Mandate only provides that the Hearing Officer must "prepare a final report in writing on the respect of the right to be heard".[18] Again, the Guidance Paper gives a wide interpretation to the scope of this provision, indicating that the Final Report should record any findings of the Hearing Officer on "whether the addressees' rights of defence and the procedural rights

[13] Guidance Paper, para 11.
[14] The Mandate provides that the Interim Report will also be given to the Director-General for Competition and the director responsible for investigating the case.
[15] Art 13 of the Mandate.
[16] Guidance Paper, para 61.
[17] *Ibid.*
[18] Art 15 of the Mandate.

of all parties have been safeguarded",[19] but does not mention that the Hearing Officer can make observations on the substance of the case.

The Guidance Paper, therefore, arguably defines the function and contents of the Hearing Officer's Reports more widely than the Mandate. However, as indicated above, the Guidance Paper can only serve as an interpretation of the content of the Mandate and cannot establish any additional, legally binding rights and obligations. Consequently, the current legal framework does not seem to provide any legal obligation on the Hearing Officer to extensively address procedural issues in its Reports, or to give his opinion on issues of substance.

The ECLF believes that the Mandate should establish a legal obligation on the Hearing Officer to address all issues of procedural fairness, including all issues brought to his attention by the parties, in his Reports. Furthermore, given that the Hearing Officer presides over the oral hearing, it is appropriate that his Reports contain comments on the substantive issues and sanctions: the power to make such observation should be made more explicit in a revised Mandate.

3. Accessibility of the Interim Report

An issue for discussion is whether the Interim Report should be made available to the parties before the final decision is adopted and published. Currently, that report is circulated internally within the Commission, but is not published or circulated to the parties.

The ECLF recognises that there is scope for debate over how to treat the Interim Report. On the one hand, there is an argument that its very confidentiality makes it more effective as a means for the Hearing Officer to express reservations which might benefit the parties. On the other hand, there is understandable concern at an inherent conflict between such confidentiality and the emphasis on due process, as well as a concern that its confidentiality may mean that the Interim Report makes little impact on the case team and that it might not reach the senior management. One suggestion would be to make the Interim Report available to the parties before the final decision is adopted and published. While the publication (or at least dissemination) of the Interim Report would not (and, indeed, could not) bind the Commission in its decision making, it would give the Interim Report more importance, in that any decision which departed from the conclusions of the Hearing Officer would have to be justified (or risk challenge before the General Court). It would, in effect, add a further layer of accountability to the process.

In addition, the ECLF suggests that parties should be able to submit written comments or documents on any issues raised by the Interim Report prior to the adoption of a final decision, although we recognise that such comments would need to be provided within a very short deadline.

[19] Guidance Paper, para 70.

4. Responsibility of the Hearing Officer

It should be established very clearly that it is the Hearing Officer's responsibility to guarantee that appropriate procedural safeguards are put in place effectively throughout the procedure. This implies that the Hearing Officer should be regularly informed of the activities and the decisions of the case team, and should be in charge of addressing, even unilaterally and upon his own initiative, potential procedural mistakes. For example, the Hearing Officer should ensure that all parties involved in the proceedings are provided with adequate access to the Commission's file on a timely basis.

The ECLF therefore maintains that the new Mandate should establish in a clear manner that it is the Hearing Officer's responsibility to ensure that all the procedural safeguards are respected during the proceedings of the Commission, and that the highest degree of transparency is guaranteed. (The scope of the Hearing Officer's powers is discussed below.)

5. Powers of the Hearing Officer

In order to ensure that the role of the Hearing Officer is carried out properly, it is essential that the new Mandate grants the Hearing Officer broader competencies and stronger powers. In particular, ECLF considers that the Hearing Officer should:

1. be entitled to decide on every procedural issue raised by the parties in the investigative part of the procedure, including: the reasonableness of the Commission's requests for information, the deadlines set by the Commission, issues related to access to the file, and legal professional privilege;
2. have powers to conduct rigorous fact-finding during the Oral Hearing (including through facilitating cross-examination of witnesses of fact and expert witnesses where relevant); and
3. be under a legal obligation to (a) address in the Reports all issues of procedural fairness (including all issues brought to the Hearing Officer's attention by the parties) and (b) provide an opinion on substantive issues and sanctions.

Moreover, the ECLF considers that there would be merit in clarifying further the nature of the Hearing Officer's powers and how they relate to the general powers of the Commission in relation to competition investigations. Specifically, the ECLF considers that the framework within which the Hearing Officer operates when providing advisory opinions could be clarified and reinforced by imposing (through future amendment to Regulation 1/2003[20]) a general obligation on the

[20] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition, laid down in Arts 81 and 82 of the Treaty, [2003] OJ L1/1.

Commission to "have regard" to the opinion of the Hearing Officer on procedural issues (and arguably also evidential matters addressed at the Hearing).

In addition, the ECLF has one radical proposal for consideration, given, in particular, the current debate about due process. In practice, the Hearing Officer is perceived as being strongly aligned with the Commission, weakening the Hearing Officer's authority on matters of due process. The Commission may wish to consider whether it could be advantageous to establish, at an appropriate time, the Hearing Office as an independent agency whose objective is to ensure the fairness of the Commission's procedures in competition cases, and which would exercise the powers of the Hearing Officer independently from the Commission. The ECLF considers that Treaty change is not required to establish such an agency—powers exist under Article 352(1) TFEU for this to be established by Regulation.[21]

C. Independence and Impartiality of the Hearing Officer

According to the case law of the European Court of Human Rights, not only must impartiality be achieved in substance (the subjective element), but there must be no legitimate doubt as to the impartiality of the decision maker (the objective element)—"justice must not only be done; it must also be seen to be done".[22] Strengthening the independence and impartiality of the Hearing Officer at the same time as enhancing his Mandate could materially improve the Commission's antitrust and merger procedures in this respect without major revision of Commission procedure.

In order for the Hearing Officer to evaluate objectively whether the Commission's actions comply with all the procedural and substantive safeguards, it is essential to guarantee that the Hearing Officer's activity can in no way be unduly influenced by the case team or any other Commission services. This requires rules that clearly define the role of the Hearing Officer in the context of the Commission's administrative structure. These rules must be complemented by equally efficient provisions that guarantee transparency of the administrative procedure.

The ECLF believes that the provisions contained in the Mandate and the current practice of the Hearing Officers do not ensure a sufficient level of independence, impartiality and transparency of the Hearing Officers' actions and do not adequately guarantee the parties' rights of defence.

[21] See, eg http://europa.eu/agencies/community_agencies/index_en.htm (accessed on 7 July 2010).

[22] See *Delcourt v Belgium* [1970] 1 EHRR 355, para 31; *De Cubber v Belgium* [1984] 7 EHRR 236, paras 24–26; *Hauschildt v Denmark* [1989] 12 EHRR 266, para 46; *Dubus v France* [2009] (app no 5242/04), para 53.

1. Stronger Independence Wording in the Mandate

Currently, a recital to the Mandate requires that the Hearing Officer be "an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings".[23] Surprisingly, there is no express reference to independence or impartiality in the operative part of the Mandate. The Ombudsman, in contrast, is required to "perform his duties with complete independence, in the general interest of the Communities and the citizens of the Union".[24] Judges at the Court of Justice are required to perform their duties "impartially and conscientiously".[25] Advocates general are required to act "with complete impartiality and independence".[26] The wording on independence of a revised Hearing Officer's Mandate needs to be strengthened and included in the operative part of a revised Mandate, bringing the Hearing Officer more in line with judges, advocates general and the Ombudsman.

Indeed, Article 14(1) of Regulation 773/2004 already requires that "[h]earings shall be conducted by a Hearing Officer in full independence". Similar wording could, for example, be imported into the operative section of a revised Mandate so that "full independence" and impartiality are required at all stages of the procedure, not just during the (Oral) Hearing.[27]

2. Recruitment and Career Prospects of the Hearing Officer

The post of Hearing Officer has traditionally been awarded to officials from DG COMP, but generally not to those looking to return there after leaving the post. As regards the "one-way" aspect, it is clearly appropriate that the post is not offered to individuals eager to ingratiate themselves to the hierarchy of DG COMP. However, the practice of recruiting Hearing Officers only from within DG COMP is regrettable and is not required by the current Mandate.[28] Given the nature of the Hearing Officer's role, it is appropriate that applicants are

[23] The Mandate, Recital 3.

[24] Decision of the European Parliament on the regulations and general conditions governing the performance of the Ombudsman's duties, adopted by the Parliament on 9 March 1994 ([1994] OJ L113/15) and amended by its decisions of 14 March 2002 ([2002] OJ L92/13) and 18 June 2008 ([2008] OJ L189/25) (henceforth referred to as the Ombudsman's Mandate), Art 9(1). Art 9(2) of the Ombudsman's Mandate also requires him to act impartially.

[25] Protocol 3 on the Statute of the Court of Justice of the European Union, Art 2.

[26] Protocol 3 on the Statute of the Court of Justice of the European Union, Art 49.

[27] It is, of course, necessary to consider from whom the Hearing Officer will be independent. Clearly he is independent from the parties and their advisors. As long as he remains a Commission official, however, it is not realistic to imagine that he will be independent from the Commission as such. Nevertheless, the Hearing Officer can be independent from DG COMP and other Commission services. Whilst the Hearing Officer is attached to the Competition Commissioner and formally part of his Cabinet, it is difficult to imagine that he and his staff could be independent of the Competition Commissioner, at least from an objective standpoint.

[28] The Mandate, Recital 7.

sought not only from within DG COMP (or from other Commission services) but also from outside the institution (private practice, academia, national courts, the Luxembourg or Strasbourg courts, etc).[29]

3. Hearing Officer as a Director

The Hearing Officer is not a director (his status is currently equivalent to that of Head of Unit). Re-establishing the Hearing Officer's director status[30] would not only provide the Hearing Officer with added strength in discussions with DG COMP and other Commission services, but would also attract high-calibre candidates. This would be appropriate for a Hearing Officer carrying out an enhanced role with additional resources at his disposal.

4. The status of the Hearing Officer and his advisors

There is no provision in the Hearing Officer's Mandate for advisors and assistants to the Hearing Officer(s). This is in contrast to the Ombudsman's Mandate, which provides for a secretariat and a principal officer, with the Ombudsman appointing the latter.[31] The Mandate should be revised to guarantee the Hearing Officer the staff necessary to carry out his duties effectively, and establish the Hearing Office as an organ in its own right. A revised Mandate could also provide for a principal officer appointed by the Hearing Officer. In such a scenario, it may be appropriate to have a single Hearing Officer, for whom the principal officer could stand in during any absence of the Hearing Officer. A single Hearing Officer could create hierarchical clarity and increase the prestige and influence of the position.

5. Lines of Authority

At present, for administrative purposes, the Hearing Officer is attached to the Competition Commissioner.[32] Although Commission decisions are in theory taken collectively by the College of Commissioners, in reality the Competition Commissioner is likely to have a preponderant influence and at the same time may have more of a vested interest in the outcome of the case. It would be preferable that the Hearing Officer be attached directly to the President of the Commission (as is the case for the Legal Service). Reporting to the President would enhance the Hearing Officer's independence and increase the prestige of the position.

[29] This possibility is expressly provided for at Recital 7 of the Mandate.
[30] Lost during the Commissionership of Commissioner Kroes.
[31] Ombudsman's Mandate, Art 11(1).
[32] The Mandate, Recital 6 and Art 2(2).

6. Access to the Interim Report

As discussed above in Section B.3, the ECLF believes that there are strong arguments in favour of the requesting party being allowed access to the Interim Report. It appears to be the only document where the Hearing Officer makes observations on the substance of the case. Under the current rules, parties are given access only to the Hearing Officer's Final Report, which is communicated to the parties together with the decision,[33] while the Interim Report remains an internal Commission document.[34]

7. Contact with Case Teams

It is standard practice for the Hearing Officer to consult with the case team when receiving a request from a party. The Hearing Officer usually asks the case team to examine the request and discusses the findings with the case team through meetings or by exchanging correspondence. The meetings are carried out informally and without the presence of the requesting party, and the correspondence exchanged between the Hearing Officer and the case team is normally qualified as internal.

The parties are thus systematically denied access to these documents. This practice might lead to the Hearing Officer simply validating the case team's assessment, instead of carrying out an independent and impartial analysis. Moreover, the case team is essentially a party to the procedure just like the requesting undertaking, and should be regarded as such by the Hearing Officer. The Hearing Officer should therefore carry out his assessment of the party's request in an independent and impartial manner, without relying on the case team's support.

The requesting party and the case team should be placed on an equal footing with respect to the Hearing Officer. Therefore, correspondence exchanged between the case team and the Hearing Officer should not be regarded as internal, and should be made accessible to the requesting party. Similarly, when setting up meetings, the Hearing Officer should convene both parties or as a minimum have an obligation to draft minutes of the meetings to be made accessible to the other party.

Clearly, both the Interim and Final Reports must be drawn up at arm's length from the case team. Any consultations that take place with the case team should be strictly limited to checking the factual accuracy of the Reports. If the Hearing Officer wishes to carry out any such consultation, he should draw up a separate "fact sheet", containing only the factual elements of the draft Report, and share

[33] Art 16(3) of the Mandate.
[34] Art 13 of the Mandate.

only this with the case team. These "fact sheets" could also be made available to the parties for the same purposes.

To sum up, this extract from the DG COMP's own report on the Energy Sector Inquiry[35] makes interesting reading in the present context:

> "The fact is that the people working for [two purportedly independent operations under common ownership] still work in one and the same building, use the same computer systems and applications and see each other in jointly used facilities, such as company restaurants. This leads to continuous regular contacts, be it personally or electronically via mailing lists, between employees of both companies, who in many cases used to be direct colleagues. These persisting links obviously facilitate a coordinated approach."

8. Involvement of Other Institutions

Under the current Mandate, there is no provision for the involvement of European institutions other than the Commission. Whilst the ECLF recognises that as long as the Hearing Officer remains a Commission *fonctionnaire* it would be problematic for the Hearing Officer to answer directly to another institution. Nevertheless, this does not prohibit the involvement of other institutions as a means of protecting the independence and impartiality of the Hearing Officer and increasing transparency. The Hearing Officer could, for example, provide an annual report to the European Parliament on the conduct of Competition proceedings by the Commission and the respect for rights of defence in proceedings, and whether he had received sufficient resources to carry out his functions effectively. He could possibly appear before the European Parliament to explain this report.[36]

D. Making the Oral Hearing more Relevant

At present, the Oral Hearing takes place at a very advanced stage of a case and is simply an opportunity for the parties to supplement their written submissions with oral presentations. This provides parties with only a limited opportunity to

[35] Energy Sector Inquiry, 10 January 2007, point 161.

[36] The Ombudsman submits an annual report on the outcome of his enquiries to the European Parliament (Ombudsman's Mandate, Art 3(8)). The European Parliament also adopts resolutions on the Commission's annual Report on Competition Policy. See, eg the European Parliament Resolution of 9 March 2010 on the Report on Competition Policy 2008, 2009/2173 (INI), available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0050+0+DOC+XML+V0//EN (accessed on 7 July 2010). As an aside, in this Resolution, the European Parliament stated at point 72 that it "[d]eplores the fact that the Commission, in its report, addresses inter-institutional cooperation with Parliament only briefly". Increased interaction between the Hearing Officer and the European Parliament clearly has the potential to improve this inter-institutional relationship.

challenge the evidence against it, including the witnesses upon whose testimony the Commission relies. The entire process is functionally oriented at inviting the Commission case-team to consider whether its long-held theories are mistaken. The Hearing Officer's role is mainly confined to ensuring that the procedure goes forward smoothly, rather than affirmatively seeking clarification on the contested points.

Any revision of the Hearing Officers' Mandate must therefore seek to maximise the value of the Oral Hearing, with a view to testing the underlying factual situation and the position of all the parties, including that of the case team, with the expectation (on all sides) that it will impact upon the Commission's final decision.

1. Tighter Rules Governing the Organisation and Conduct of the Oral Hearing

(a) Timing

The Commission's current practice in antitrust cases is to hold an Oral Hearing within approximately one month of receiving a response to the SO. This seems unrealistically quick, as it gives the case team and the Hearing Officer very little time to assimilate the responses received and prepare for the Oral Hearing. A change of practice is therefore required to allow proper time for preparation by all parties involved in the Oral Hearing, otherwise the impression is created that the Oral Hearing is a mere formality. The Hearing Officer should be required to consult with all parties to determine the appropriate date for the hearing. Equality of arms would suggest that if the Commission has had several years to develop the theories underpinning its case, often with the assistance of many leniency applicants, the parties should have at least several months to respond.

A related point is access to the parties' responses to the SO. It is worth considering whether the SO responses should be circulated in advance of the Oral Hearing to allow the parties to comment upon or respond to the other parties' submissions.

(b) The Admission of "Interested Parties"

There is a need to reflect upon the conditions for the admission of interested parties to the Oral Hearing and the Hearing Officer's role in such admissions. A balance needs to be struck between the rights of the companies under investigation and those of interested parties seeking to obtain information about the alleged anti-competitive conduct. In order to avoid the situation where parties are ambushed by third parties at a Hearing, the Hearing Officer should not allow third parties to attend the Oral Hearing unless they submit a written paper

accessible to the parties to the proceedings, setting out their position at least a week in advance of the Hearing.

(c) Publicity of the Oral Hearing

There is a need to reflect upon whether the Oral Hearing should be public if the parties so request. Again, a balance needs to be struck between the rights of the companies under investigation and those of the public and media at large seeking to obtain information about the alleged anti-competitive conduct.[37] The Mandate should be revised to make explicit the possibility of public oral hearings at the request of the parties.[38]

2. More Rigorous Fact-Finding during the Oral Hearing

The Oral Hearing should be more of a Q&A where the Commission and the parties are required to answer questions on findings and facts. Without necessarily going as far as requiring a full trial, the following improvements would make the Oral Hearing more focused and more meaningful:

1. The Hearing Officer should be able to order that particular issues are dealt with in separate hearings, perhaps dealing first with preliminary issues that may remove the need for consideration of other issues. The Hearing Officer should also be able to exercise his discretion to ask parties to address particular issues. This would make the hearings more focused and the whole procedure more efficient. Such directions could be given following a pre-meeting with all the parties which would take place several weeks before the Hearing.[39]
2. The Hearing Officer should be given the power to require, either on his own initiative or following a request by a party, the attendance of specific persons upon whose testimony the Commission and/or the parties rely. Sufficient notice would have to be given. Fairness would require that the key witnesses of all the parties, including the leniency applicants, attend the Hearing. Names of the witness who will be present at the Hearing should be disclosed in advance. The Hearing Officer should be entitled to draw conclusions on the credibility of a witness's oral testimony, or lack

[37] In cases involving alleged anticompetitive unilateral conduct where the defendant undertaking requests the Oral Hearing to be public, there is no good reason why this request should be refused.

[38] The first sentence of Art 14(6) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Arts 81 and 82 of the EC Treaty should also be amended to allow expressly for the possibility of Oral Hearings being made public at the request of the parties.

[39] Indeed, there is already provision in Art 11 of the Mandate for there to be pre-Oral Hearing meetings involving both the Commission and the parties. Despite this provision, we are under the impression that such meetings do not in practice take place. They should.

thereof, and draw adverse inferences if a witness refuses to attend without good reason. Indeed, unless there is a plausible explanation justifying such an absence, failure by the leniency applicant to make key witnesses available for the oral hearing should be grounds to exclude the applicant from the leniency programme, or at the very least to limit the fine reduction that would otherwise be available.

3. Parties should be able to question the evidence put forward by the Commission and also cross-examine (under the control of the Hearing Officer) witnesses upon whose testimony the case team seeks to rely, particularly leniency applicants. The recent collapse of the BA criminal trial in the UK demonstrates the importance of proper scrutiny of statements made by leniency applicants.
4. There is a need for procedural rules to organise the Hearing. For instance, there must be clear rules regulating the production of new evidence at the Hearing and the scope of potential cross-examination of witnesses. The Hearing Officer must act as a presiding judge and ensure full compliance with these rules by all parties.
5. Recently the Hearing Officer has taken a more active role in asking questions to the parties during Oral Hearings. However, to further advance the exploration of the facts, the Hearing Officer should also be expected to ask questions to the Commission.

3. Establishing a Greater Link between the Oral Hearing and the Final Decision-making Process

This can be achieved in a number of different ways:

1. The most far-reaching option would be for the Hearing Officer to draft the final decision, covering both findings of fact and of substance, to be adopted formally by the College of Commissioners. Aside from the political desirability of the Commission being (informally) bound on matters of substance, mentioned above, the difficulty with this option would be the time it would require the Hearing Office to get to grips with the entire case, such as to be able to draft a final decision.
2. Alternatively, the Hearing Officer could prepare a report, containing findings of facts, which would be provided to the parties, and which would steer the case team when drafting the final decision. The Hearing Officer would draw in his report conclusions regarding the underlying factual situation and the position of all the parties, in light of the written submissions and the developments at the Oral Hearing. The fact that it would be provided to the parties would increase the transparency and accountability, in that any departure from the conclusions of the Hearing Officer would have to be justified (and may give the grounds for an appeal).

3. A third option, which would combine both ideas, and also take account of the iterative nature of the process, would be for the Hearing Officer to prepare a report with findings of facts, as above, and identifying areas where the facts need to be further explored, which would steer the case team in further investigations and in drafting the final decision. After the case team had drafted the decision, it would return to the Hearing Officer, who would prepare a short report on whether his findings and concerns were sufficiently taken into account. This report, which could be an improved version of the current Final Report, would be published with the final decision, making it hard for the Commission to adopt a decision which does not address the concerns of the Hearing Officer. The Hearing Officer would thus have more of an advisory function, like that of the Legal Service.

4. A Separate, Further, Hearing on the Factors Contributing to the Fine

At present, the level of the fine, as well as the Commission's calculation and determination of which factors are relevant to the calculation of the fine, is only revealed after the final decision is adopted. While possible aggravating and mitigating factors must be referred to in the SO and the Commission may request information from the company about its turnover for a number of recent years and the value of sales for a number of different products, the company has no opportunity to be heard on the specific application of the 2006 Fining Guidelines to its particular case.

The Commission might, for example, due to the particular circumstances of the company, decide to adopt a different reference year to calculate the basic amount of the fine. This would have important consequences for the level of the fine. However, until a final decision is published, a company does not know that the Commission is considering this and thus does not have any opportunity to make submissions responding to the Commission's specific arguments.

Equally, a company may have requested that the Commission take account of the company's inability to pay a fine. Historically, such requests have been dismissed by the Commission in a perfunctory manner, without any indication in the final decision of the criteria used. A company has no opportunity to demonstrate that it meets these criteria before a neutral decision maker. This is compounded by the fact that it is very difficult to subsequently obtain interim measures before the General Court suspending the obligation to pay the fine or to provide a bank guarantee.

The revised Mandate should therefore provide for the possibility for each party to request that a separate hearing be held before a neutral person, such as the Hearing Officer, on the various factors relevant to the level of its potential fine.