

# The Role of Oral Hearings in EU Antitrust Proceedings

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January 1, 2012

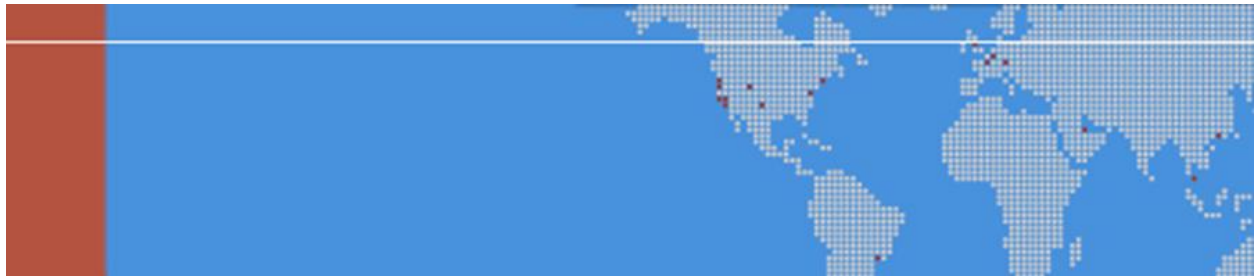
## INTRODUCTION

The Oral Hearing, as well as the role of the Hearing Officer, in European Commission (the “Commission”) antitrust proceedings has assumed ever greater significance over the years. Indeed, the relative importance of the Hearing Officer is reflected in the fact that, since 30 October 2001, there have been two appointees to perform the role.<sup>1</sup> Given the relatively few checks and balances otherwise available in EU antitrust investigations, increasing the importance of both the Hearing and Hearing Officer is intended to inject greater transparency and procedural fairness into proceedings. This note outlines the role and purpose of Oral Hearings in EU antitrust proceedings, the format followed in the hearings, and the role and mandate of the Hearing Officer. We take into account the Commission’s publication on 20 October 2011 of its *Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”)*<sup>2</sup> in the context of the broader applicable legal framework that governs EU antitrust investigations.<sup>3</sup>

## THE HEARING OFFICER

The two Hearing Officers have recently seen their roles extended to the point where they are now responsible for the safeguarding the procedural rights of the parties during the entirety of EU antitrust proceedings (as opposed to merely at this stage of the Oral Hearing). Their expanded role now includes the following duties:

- Resolving disputes surrounding legal privilege claims in relation to any document.
- Ensuring that complete access to the file is granted (including those situations where it is alleged that the Commission has not provided access to certain documents). Similarly, the Hearing Officer can intervene if the Commission has not made available a non-confidential



version of the Statement of Objections (“SO”) or has not given access to documents considered necessary to safeguard a complainant’s rights.

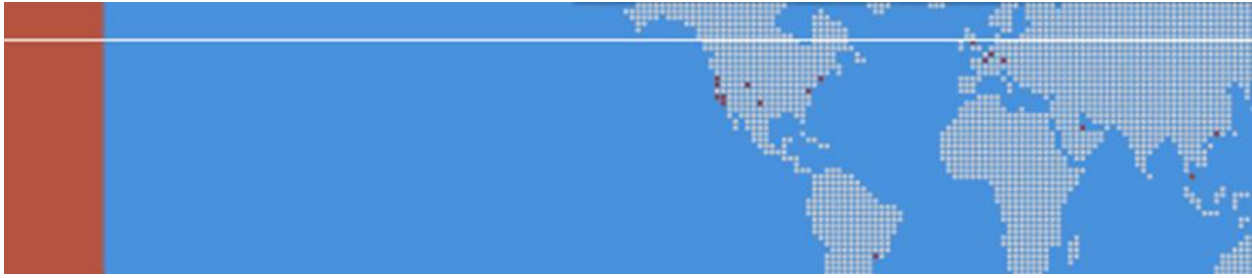
- Deciding if interested third parties have been sufficiently informed of their rights to introduce their views in writing within a prescribed deadline.
- Where an affected party objects to the disclosure by the Commission of a document on which confidentiality is claimed, deciding if the rules on confidentiality apply or an overriding interest exists in support of disclosing the document.
- Allowing restricted access by the affected parties to certain parts of the file that are covered by confidentiality.<sup>4</sup>
- Extending the deadline provided to reply to an SO, upon reasoned request of the affected parties and after having been denied an extension by the responsible Director at DG Competition. Organizing and conducting the Oral Hearing (*i.e.*, the traditional role of the Hearing Officer).
- Contributing to the objectivity of the Oral Hearing and any decision taken subsequently, including the impact assessment of any commitments proposed by the parties.

Given that the Hearing Officer is part of the Commission, the decisions are subject to review by the EU Courts. The Hearing Officer’s decisions are directly appealable when they immediately and irreversibly affect the position of the parties such as to justify the admissibility of an action for annulment<sup>5</sup> before completion of the administrative procedure. Where these conditions are not fulfilled, any decisions adopted by the Hearing Officer may be challenged together with the final decision adopted by the Commission.<sup>6</sup>

## **THE ORAL HEARING**

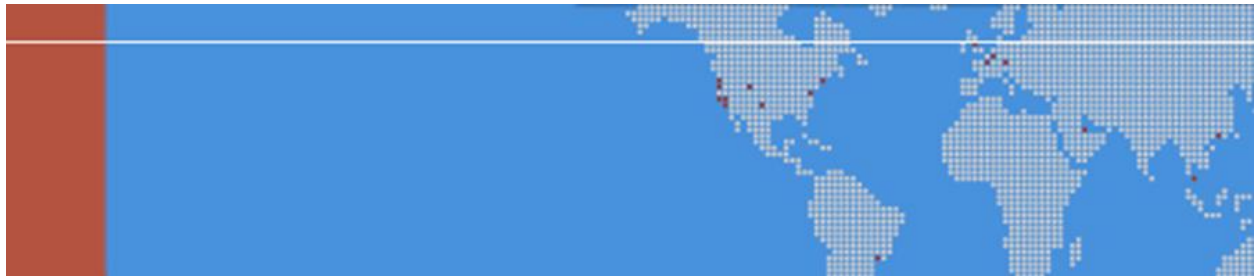
### **Principles Governing the Oral Hearing**

1. The Oral Hearing is the stage of an antitrust proceeding where parties either alleged to have infringed the antitrust rules or involved in a proposed merger in a Phase II review procedure are given the opportunity to present their views. The participants includes the Commission case-team responsible for the investigation and associated Commission services, representatives of the Members States, and other third parties that are considered to have a sufficient interest in the outcome of the proceedings.
2. The Oral Hearing is held after the addressees of the SO have submitted their replies and before the Commission adopts a decision. It usually takes place at the request of the addressee(s) of the SO, although in certain circumstances it is possible that the Commission



can exercise its discretion and permit an Oral Hearing to be convened upon the request of third parties with an interest in the proceedings.<sup>7</sup> It is conducted by the Hearing Officer, who acts with full independence and contributes to the objectivity of the Oral Hearing and the subsequent decision.

3. The Oral Hearing has two purposes.<sup>8</sup> *First*, it provides an opportunity to verify the accuracy of the preliminary findings of fact and law and the relevance and proportionality of the envisaged sanctions and remedies set forth in the SO. Participants should ensure that all relevant facts are clarified as much as possible, whether favourable or unfavourable, including every aspect of the investigation. However, the introduction of new pieces of evidence is subject to the prior approval of the Hearing Officer. *Second*, it contributes to a ‘balancing’ of the procedure by allowing respondents to present their arguments orally on important issues and to rebut allegations in a more adversarial environment. Unless there is a need to eliminate misunderstandings or to reveal the existence of bias within the Commission case team, the Oral Hearing should not be used as the occasion to merely repeat the same arguments already submitted in writing.
4. The Oral Hearing is an adversarial process that includes consideration of high-level legal and economic issues. The main actors in the case (company representatives and their external legal counsel, the responsible DG Competition case team, the representatives of the Chief Economist’s team from the Commission and the Commission’s Legal Service) are expected to attend the Oral Hearing. In addition, third parties are entitled to attend in limited circumstances, namely:
  - *In merger cases*: (i) Parties to the proposed concentration other than the notifying parties (*e.g.*, the seller, or the target); (ii) third persons (including customers, suppliers and competitors) who demonstrate a sufficient interest (active participation throughout the prior phases might be crucial to prove the existence of such an ‘interest’); and (iii) parties affected by a decision of the Commission adopted pursuant to the *EU Merger Regulation* in which fines or periodic penalty payments have been imposed.<sup>9</sup>
  - *In antitrust/cartel cases*: Parties demonstrating a legitimate interest that have filed a complaint before the Commission.<sup>10</sup>
  - *In all cases*: Representatives of the National Competition Authorities of the EU Member States are be entitled to attend the Oral Hearing.
5. Oral Hearings are not open to the public. Despite the Commission’s emphasis on transparency in antitrust proceedings, the Commission also seeks to guarantee that participants can express themselves freely. To safeguard the parties’ confidential information or other legitimate interests, certain presentations may be made in closed sessions.<sup>11</sup> Furthermore, any information disclosed during the Oral Hearing shall only be used for the purposes of the administrative proceedings at hand and in future judicial proceedings that

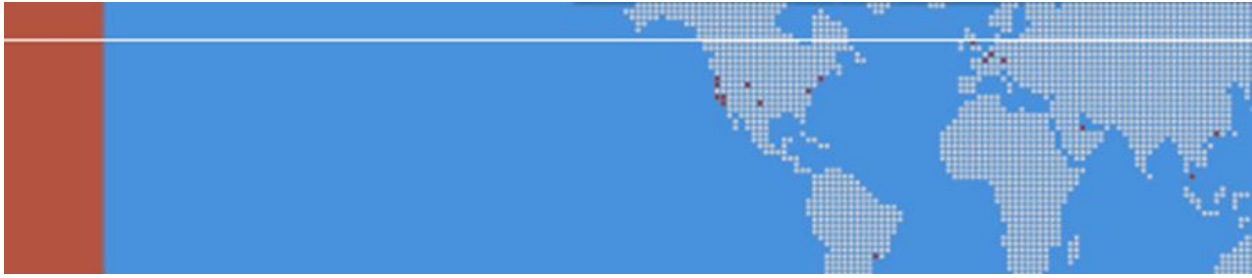


might follow from such proceedings, and shall not be disclosed or used for any other purpose by any participant.

## **Preparatory Steps**

The Hearing Officer is responsible for the preparation of the Oral Hearing, including the performance of the following tasks:

- Setting the date, duration and place of the Oral Hearing.
- Deciding, in response to a reasoned request, if third parties other than those specified above shall attend the Oral Hearing and be heard.
- Addressing to the persons invited to the Oral Hearing a list of questions seeking their views on the case and requesting the attendees to deliver a written document outlining their intended statements.
- Confirming that every participant has expressed their views in writing to clarify the subject matter in dispute and to focus the attendees on the key areas of debate, while providing special consideration to the facts and arguments raised by the addressees(s) of the SO.
- Requesting from the attendees a list of their representatives and external legal counsel accompanying them and the official EU language that will be used in their presentation. (If a language other than that of the proceedings is used, simultaneous translation facilities will be provided.)
- Deciding whether new documents should be admitted during the Hearing and which persons (*e.g.*, experts) should be invited and heard upon a party's request.<sup>12</sup> However, the Hearing Officer cannot summon the invited persons attend the Oral Hearing, nor can they be compelled or have penalties imposed upon them if they fail to appear. A list of all attendees will be made available to every participant.
- Organizing a preparatory meeting with the parties and the Commission services to facilitate the organization of the Oral Hearing.
- The preparatory steps are carefully orchestrated, given that the Oral Hearing is very highly structured, formal, and limited in time (usually one day in merger cases, one to two days in infringement cases and typically longer only in cartel investigations involving multiple parties).



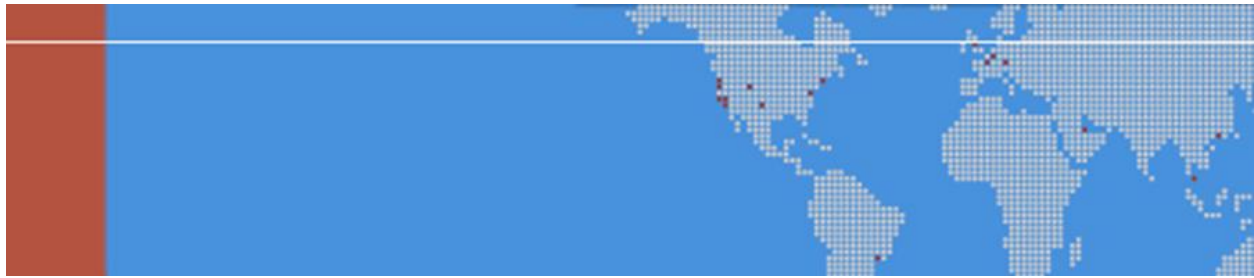
## **The Course of the Oral Hearing**

There are a number of formal steps taken in the conduct of an Oral Hearing. For example:

1. The structure of the Oral Hearing may vary slightly depending on the particular case, although it usually consists of the following stages:
  - Introduction of the Oral Hearing by the Hearing Officer and introduction of the attendees.
  - Presentation of the facts and arguments surrounding the case by the Commission case team responsible for the investigation.
  - Presentation of the facts and arguments by the opposing parties.
  - Allegations and comments of third parties relating to the statements made in the course of the Oral Hearing.
2. Every person is heard in the presence of all other participants to the Oral Hearing, unless they are exempted by the Hearing Officer to preserve that party's legitimate interests.
3. Questions may be asked at any time and addressed to any participant at the Oral Hearing, upon the authorization of the Hearing Officer;<sup>13</sup> Typically, however, this happens at the end of each presentation. On occasion, a question cannot be answered in whole or in part at the Oral Hearing, and the Hearing Officer may allow the reply to be provided in writing as soon as possible after the Hearing.<sup>14</sup> The written reply is distributed to all the participants at the Oral Hearing other than those to whom the reply would result in breaching the party's rights of defence or confidentiality claims.
4. The consequences of providing incorrect, incomplete or misleading information or answers during the Oral Hearing are not provided under EU law. However, there is a legal obligation to provide correct and truthful replies. Furthermore, given the presence of experts in the case who can rebut false assertions and the risk that the Commission will send a follow-on request for information, it would be ill-advised to provide less than truthful and correct answers.

## **Following the Oral Hearing**

1. Given the need to ensure that the right to be heard has been respected, the Hearing Officer may afford the parties concerned and other interested parties the opportunity to submit further written comments after the Oral Hearing within a specific deadline. However, the Commission is not obliged to take into account written comments received after that deadline.<sup>15</sup>



2. The Hearing Officer submits his conclusions to the Commissioner for Competition immediately following the Oral Hearing. These conclusions include his views on the respect for procedural rights throughout the case and his conclusions from the Oral Hearing on the substantive issues raised by any party. The Hearing Officer may also propose that the case be reviewed by an internal scrutiny panel. The future orientation of the case will be based on the conclusions drafted by the Hearing Officer and by the case team.
3. After the Oral Hearing, the Commission case team and the affected parties may participate in one last “state of play” meeting, where the remaining allegations or remedies should be set forth and any issues affecting key aspects of the case should be clarified.<sup>16</sup>

Finally, the Hearing Officer will submit his Final Report certifying that due process was respected. In the event that the Commission proceeds to the drafting of a decision (which is always the case in mergers, regardless of the result), he may also make observations to the Director General for Competition and the responsible unit of the Legal Service to ensure that all relevant facts and elements raised during the Oral Hearing are addressed in the decision.

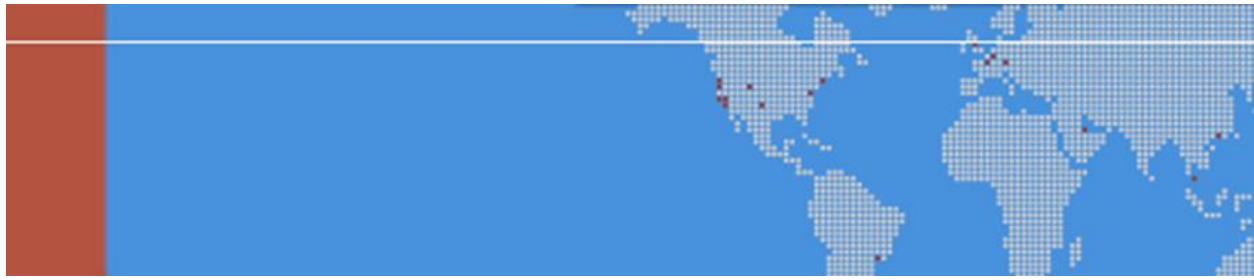
## CONCLUSION

Until relatively recently, the conventional wisdom among the EU antitrust bar was that Oral Hearings were little more than an exercise, where the Commission’s case team outlined its case to a wider audience involving the National Competition Authorities. As a result, some respondents sought to avoid Oral Hearings in certain types of proceedings, especially where the timetable was tight (*e.g.*, merger reviews) or where they feared the Oral Hearing would backfire and become a platform for complainants.

There is now sufficient practical evidence that the nature of Oral Hearings is changing, and a strong performance at the Hearing can play a material role in the outcome of the proceedings. This shift has gone hand in hand with the much expanded role of the Hearing Officer at the Oral Hearing, coupled with the fact that the Hearing Officer has been firmly installed as the key Commission official responsible for ensuring that the rights of the defence are upheld. In the face of an increasingly watchful General Court with respect to the rights of the defence<sup>17</sup> and the increased prominence of the role of the Ombudsman<sup>18</sup> in antitrust proceedings, the role of the Hearing Officer is likely to increase over time.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the above developments. Please contact the Gibson Dunn lawyer with whom you



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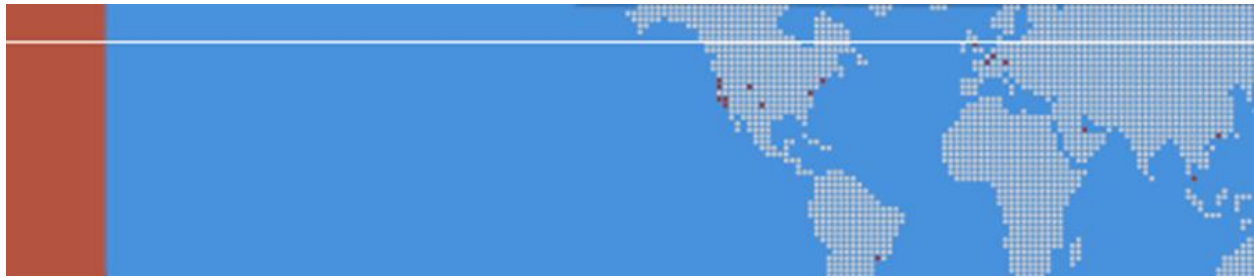
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### **End Notes**

- <sup>1</sup> As at 1 January 2012, the presiding Hearing Officers are Dr. Wouter Wils and Dr. Michael Albers.
- <sup>2</sup> Commission Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, O.J. C 308, 20.10.2011, pp. 6-32; available at: [http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_proceedings\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_proceedings_en.pdf)
- <sup>3</sup> Amongst others: the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; the Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the “EU Merger Regulation”); the Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004; the Decision C (2011) 5742 of the President of the Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings; and the Guidance on procedures of the Hearing Officer of 6 January 2010.
- <sup>4</sup> For example, given that the Commission has increasingly based its decisions on economic evidence provided by consultancy firms, trade associations or competitors in the market undergoing the assessment, the affected parties (through their economists) should be entitled to access such economic data under restricted conditions (e.g., review in the Commission’s premises, impossibility of copying the data, etc.) and verify the Commission’s market reconstructions and conclusions.
- <sup>5</sup> For example, a decision declaring public a document on which confidentiality was claimed by a party (see Judgment of the European Court of Justice in *Akzo Chemie v. Commission* (Case 53/85, Rec. 1986, p. 1965).
- <sup>6</sup> S. Durande, K. 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”, ‘Competition Policy Newsletter’, No 2, 2005.
- <sup>7</sup> If it is, however, convened at the request of parties other than the defendant or notifying merger parties, there is no obligation upon the defendant or the notifying merger parties to attend the Oral Hearing. Of course, the failure to so attend would be a risky strategy if one wishes to put into effect a credible defence.



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- <sup>8</sup> M. Albers, K. Williams, “*Oral Hearings - neither a trial nor a state of play meeting*”, 'Competition Policy International', March 2010.
- <sup>9</sup> See Article 11 of Regulation No 802/2004 implementing the *EU Merger Regulation*.
- <sup>10</sup> See Articles 5 and 11 of Regulation No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (now articles 101 and 102 *TFEU*).
- <sup>11</sup> See Article 13 of Decision C (2011) 5742. For example, where the acquiring company in a merger wishes to present to the Hearing Officer and the Commission evidence on the efficiencies that would result from a notified transaction, potential competitors (*e.g.*, complainants, the selling company, *etc.*) shall be excluded from such closed sessions.
- <sup>12</sup> As such, there are no “independent” experts to guide the Hearing Officer.
- <sup>13</sup> See Article 14(7) of Regulation No 773/2004.
- <sup>14</sup> See Article 12(3) of Decision C (2011) 5742.
- <sup>15</sup> See Article 12(4) of Decision C (2011) 5742.
- <sup>16</sup> Para. 65 of the Notice on Best Practices of 20 October 2010 only suggests the convening of such meetings in cartel cases, with a similar proposal possibly being included in the analogous document for mergers that is currently undergoing a consultation process (See [http://ec.europa.eu/competition/consultations/2011\\_merger\\_best\\_practices/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_merger_best_practices/index_en.html)).
- <sup>17</sup> For example, see Judgments of the European Court of Justice in cases *Limburgse Vinyl Maatschappij et al. v. Commission* (C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Rec. 2002, p. I-8375), *Aalborg Portland e.a. v. Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Rec. 2004 p. I-123), and more recently *Solvay SA v. Commission* (C-109/10 P and C-110/10 P, NYP).
- <sup>18</sup> Most conspicuously, in the case involving the Complaint lodged by Intel against the Commission (complaint No 1935/2008/FOR).