

E.C.L.R. 2012, 33(6), 286-293

**European Competition Law Review**

2012

The hearing officer's extended mandate: whose special friend in the conduct of EU competition proceedings?

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**Subject:** Competition law

**Other Related Subject:** European Union

**Keywords:** Competition law; Competition procedure; EU law; Enforcement; European Commission; Hearing officers; Separation of powers

**Legislation:** Decision 2011/695 on the function and terms of reference of the hearing officer in competition proceedings

**\*286** Introduction

The European Commission vehemently embraces the promotion of a fair, impartial, transparent and objective EU competition law enforcement procedure.<sup>1</sup> With a view to supporting its fair procedure aspirations, the Commission established the office of the hearing officer, an independent internal watchdog in proceedings leading to a competition law decision.<sup>2</sup> From its inception, the hearing officer has played a pivotal and increasingly important role in ensuring the procedural rights of private parties in the public enforcement of EU competition law.<sup>3</sup>

The Commission President's Decision 2011/695 of October 13, 2011<sup>4</sup> extended the hearing officer's mandate to particular procedural rights disputes in the earliest stages of Commission investigations. This contribution analyses and frames the newly extended powers of the hearing officer in the overall public enforcement system at the EU level. It subsequently identifies the hearing officer as a special *amicus Commissionis*, whose new mandate fosters a gradual functional separation of investigative, prosecutorial and adjudicative powers growing into the organisational framework of EU competition law enforcement.

The hearing officer's mandate prior to the 2011 Decision

The office of the hearing officer had originally been created to enable the right to be heard in competition proceedings. The right to be heard has long been recognised as a fundamental principle in EU law.<sup>5</sup> Early regulations already referred to the right to be heard in Commission competition proceedings.<sup>6</sup> The formal original establishment of the hearing officer in 1982 resulted from a non-published delegation from the European Commissioner responsible for competition to a high-ranking civil servant in the Directorate-General for Competition (then DG IV, now DG Comp) to chair meetings and organise hearings convening both prosecution and defence.<sup>7</sup>

The Commission only adopted a first formal and binding mandate in 1994.<sup>8</sup> According to that mandate, the hearing officer convened a hearing, prepared documents for that hearing and oversaw the follow-up and transcription of hearings.<sup>9</sup> In addition, he was able to adopt decisions on the rights of the defence in competition proceedings. This resulted in the hearing officer deciding on the necessity of a hearing or of an oral hearing for undertakings involved

or third parties, on the extension of time limits for responding to a statement of objectives, on the access to additional documents and on the scope of disclosure.<sup>10</sup> In so doing, the hearing officer ensured that the case law of the Court of Justice on the right to be heard and on the access to documents was guaranteed before a Commission decision would be adopted.<sup>11</sup> A report compiled by the hearing officer in each case was to be reported to the Director General for Competition.<sup>12</sup>

The hearing officer's mandate had been reviewed in 2001. The 2001 Decision predominantly emphasised the need for independence and integrity required to maintain the objectivity, transparency and efficiency of competition proceedings. It therefore stated that the hearing officer was to be attached, for administrative purposes, to the member of the Commission with special responsibility for competition<sup>13</sup> and thus could no longer directly belong to the Directorate-General responsible for the investigation and prosecution of competition law infringements. The director responsible for investigating \*287 a particular case was nevertheless obliged to inform the now-independent hearing officer about the development of the procedure up to the stage of the draft decision to be submitted to the competent Commission Member.<sup>14</sup> The role of the hearing officer in organising, convening and supervising hearings remained virtually unaltered compared to the 1994 mandate. The hearing officer now prepared an interim and a final report. The latter presented a response to the draft infringement decision crafted by DG Comp. The final report had to consider whether the draft decision only dealt with objections in respect of which the parties had been afforded the opportunity of making their views known.<sup>15</sup> It was directly to be transmitted to the competent member of the Commission and to be attached to the draft Decision. It was also to be published in the *Official Journal*.<sup>16</sup>

The world has changed since 2001. Not only did criticism on the monolithic enforcement structure--the European Commission as investigator, prosecutor and judge<sup>17</sup>--continue to remain a focus of scholarly debate, the modernisation movement and the ensuing decentralised application resulting from Regulation 1/2003<sup>18</sup> resulted in a multitude of national competition authorities being obliged to apply EU competition law and to guarantee due process in that regard.<sup>19</sup> Since the Commission continues to occupy a primary role in the decentralised system<sup>20</sup> and since the Court of Justice has been willing directly to scrutinise due process requirements at the national levels based on a binding Charter of Fundamental Rights,<sup>21</sup> the Commission somehow had to set a "due process" example. The Commission therefore adopted a 2011 package of non-binding best practices in relation to competition proceedings.<sup>22</sup> A reconsideration and extension of the hearing officer's role also formed part of that new package and resulted in a binding Decision establishing new terms of reference. In particular, the earlier and broader involvement of the hearing officer in the investigative stage preceding a Commission statement of objections was considered necessary.<sup>23</sup>

#### Decision 2011/695

The 2011 Decision applies to Commission investigations related to TFEU arts 101 and 102 and to the merger control regulation.<sup>24</sup> Its application also extends to cases in which the Commission does not aim to adopt a formal decision, but has been willing accept commitments or open settlement discussions.<sup>25</sup> The new Decision reflects four essential pillars, commented on below. First, it establishes the subsidiary role of the hearing officer as an overseer of DG Comp. Secondly, the new framework grants the officer novel extensive powers in the investigative phase. Thirdly, the Decision confirms the hearing officer's decisive role in maintaining access to documents and the ensuing opportunity to respond to the Commission's statement of objectives. Fourthly, it reaffirms the hearing officer's task of conducting hearings but also places this task in the perspective of the officer's supervisory role in the overall enforcement process.

*A subsidiary overseer*

Decision 2011/695 confirms the hearing officer's independence from DG Comp. Hearing officers remain directly attached to the member of the Commission with special responsibility for competition.<sup>26</sup> They shall have access to any files relating to the competition proceedings and shall be kept informed about the procedure by the director responsible for investigating the case.<sup>27</sup> They shall have a support staff at their disposal.<sup>28</sup> In their reports and recommendations, hearing officers have to take account of the need for effective application of competition rules in accordance with legislation in force and principles laid down by the Court of Justice.<sup>29</sup>

The hearing officer's operational independence is most clear from art.3(5) of the Decision, which states that:

“[T]he Hearing Officer may present observations on any matter arising out of any Commission competition proceeding to the competent Member of the Commission.”

\*288 That provision could be read to include a general *ex officio* power to adopt recommendations and to address or highlight potential issues related to competition procedure to the Commissioner, even to the extent that the hearing officer does not have to intervene in the investigative phase or in the context of a hearing. In so doing, the Decision directly considers the hearing officer's role one of supporting the Commission, independent from necessities of a concrete issue of procedure related to a particular case. Article 14(2) also confirms this independent role. It holds that:

“[I]n addition to, and separately from, the [interim] report drawn in relation to the hearing, the hearing officer may make observations on the further progress and impartiality of the proceedings.”

These observations may relate to the need for further information, the withdrawal of certain objections, the formulation of further objections or suggestions for further investigative measures.<sup>30</sup> The hearing officer thus presents itself as a particular, independent overseer of the Directorate-General Competition's investigation practices. In so doing, the hearing officer forms the procedural eyes and ears of the Commission during particular investigations, with a view to allow the Commission to adopt a procedurally correct decision on the basis of the draft provided by its prosecuting Directorate-General.<sup>31</sup>

The *overseer* metaphor is confirmed by the Decision's preamble but has also been subject to a caveat. The preamble states that the hearing officer should operate as an independent arbiter who seeks to resolve issues affecting the effective exercise of the procedural rights of those concerned, but only where such issues could not be resolved through prior contacts with the Commission services responsible for the conduct of competition proceedings, which must respect these procedural rights.<sup>32</sup> In so stating, the Decision recognises the subsidiary nature of the hearing officer's intervention. Article 3(7) confirms this approach. According to that provision, any procedural issue shall first be raised with the Directorate-General for Competition. If the issue is not resolved, it may be referred to the hearing officer for independent *review*.<sup>33</sup> The hearing officer should therefore only engage upon its overseeing role when an informal solution appears impossible. Only when DG Comp fails to comply with the procedural rights framework, the hearing officer can provide a more authoritative view of the matter.

*Procedural rights protection in the investigative stage*

A major innovation of the 2011 Decision constitutes the official extension of the hearing officer's decision making role into the investigative stage of Commission proceedings. It is well-known that a Commission investigation is often initiated following a complaint, inspections or other investigative measures. These measures ultimately result in

a statement of objections addressed to the parties involved.<sup>34</sup> In the course of the investigative measures however, fundamental procedural rights could already be at stake. The new mandate distinguishes four claims related to procedural rights that could warrant hearing officer intervention at this stage. Overall however, the hearing officer's real decision making power in the investigative stage remains rather limited.

First, the hearing officer may be asked to examine whether or not a document required by the Commission is protected by legal professional privilege. The principle of legal professional privilege in client--attorney relationships has long been recognised in EU competition law<sup>35</sup> and has resulted in particular safeguards for maintaining that privilege.<sup>36</sup> To the extent that it is argued that particular documents are covered by legal professional privilege, a three-step procedure will be initiated, leaving it to the hearing officer to provide his opinion in that regard. First, the undertaking making the claim has to consent to the hearing officer viewing the information claimed to be covered by legal professional privilege as well as particular related documents. Secondly, based upon that analysis, the hearing officer shall subsequently communicate his view on the matter to the director responsible for the investigation and additionally take appropriate steps to promote a mutually acceptable resolution. Thirdly, where no resolution can be reached, the hearing officer may formulate a reasoned recommendation on the scope of legal privilege to the competent member of the Commission.<sup>37</sup> Overall, the hearing officer's role is merely supplementary. He cannot as such decide on the scope of legal professional privilege. The Decision's reference to a recommendation indicates the non-binding characteristics of the hearing officer's conclusion. Rather, his role is to provide a *second opinion* and to avoid the Commission to adopt a decision on the basis of documents covered by legal professional privilege that might have supported the DG Comp civil servants' claims. In so recommending, the hearing officer de facto persuades DG Comp investigators to accept its stance on \*289 legal professional privilege, since the Commission itself will otherwise take stock of that recommendation and incorporate it in its final decision.

Secondly, in cases where the Commission procured a request for information to undertakings, the latter may refuse to reply when the privilege against non-incrimination would be violated.<sup>38</sup> The hearing officer is in that context called upon to make a reasoned recommendation as to whether the privilege applies to the circumstances at hand and to inform the responsible director of its recommendation in that respect. In so doing, he may consider whether undertakings make clearly unfounded claims for protection merely as a delaying tactic.<sup>39</sup>

Thirdly, the hearing officer may decide to extend time limits imposed on undertakings in order for them to reply to a Commission information request. Where an addressee of an information request considers the time limit to be too short, it may, before the expiry of the original time limit, refer the case to the hearing officer, who may then *decide* on whether a time limit extension should be granted. The hearing officer shall make the final determination in that regard, taking account of the length and complexity of the request for information and the requirements of the investigation.<sup>40</sup> The mandate's reference to *decision* in lieu of recommendation highlights that the hearing officer's decision is supposed to be binding on DG Comp, which will have to comply with the extension, although no formal sanction for refusal to comply has been inscribed in the Decision. The courts have accepted the reviewable nature of such a reasoned decision,<sup>41</sup> for it expresses the definitive position of the Commission on the matter.<sup>42</sup>

Fourthly and more generally, undertakings have the right to be informed of their procedural status, i.e. their being subject to a DG Comp investigation and, if so, the subject matter and the purpose of it.<sup>43</sup> To the extent that DG Comp does not properly inform the undertaking, it can refer the case to the hearing officer, who will take a decision ordering DG Comp to inform the undertaking at hand. The hearing officer in that regard appears to be able to decide what should be understood by properly or adequately informed.

*Access to information and the right to respond*

As mentioned above, the investigative stage can be followed by a Commission statement of competition objections which is subsequently sent to the parties involved. At that time, the parties are granted the opportunity to respond to the Commission's queries and concerns.<sup>44</sup> Access to the file and sufficient response time are crucial in order not to render the right to respond nugatory. The 2011 Decision therefore confirms the hearing officer's central role in determining and upholding the scope of the access to the Commission file by undertakings.<sup>45</sup>

Involved parties, i.e. addressees of a statement of objections and complainants<sup>46</sup> have a right to access their file.<sup>47</sup> Where a party involved has exercised its right and has reason to believe the Commission has in its possession documents which have not been disclosed to it, it may make a reasoned request to the hearing officer for access to these documents. These requests can also be made by involved parties in relation to objections addressed to notifying merger parties and in the light of obtaining information regarding the potential initiation of settlement procedures.<sup>48</sup> A request is nevertheless subject to two conditions. First, the parties have to try to obtain the document directly from the Commission. Secondly, the request must demonstrate that those documents are necessary for the proper exercise of the right to be heard. The hearing officer will decide on the scope of that necessity. The hearing officer will take a *reasoned decision* on the request before him.<sup>49</sup>

Access to the file is not only open to the parties directly addressed in the Commission statement of objections or complainants (the parties involved). Third parties may also require access to particular documents when they are sufficiently interested.<sup>50</sup> The hearing officer shall decide on whether a person shows sufficient interest in the investigation or case at hand. To claim sufficient interest, that person has to be sufficiently affected by the conduct which is the subject of the competition proceedings or, in merger proceedings, have a special interest in the outcome of the proceedings through its membership of the management or employee representation in the undertaking concerned.<sup>51</sup> To the extent that the hearing officer considers that an applicant does not show sufficient interest to be heard in the \*290 proceedings, he shall inform the applicant and grant the latter an opportunity to make his views known within a predetermined time limit. If analysis of the written submission does not lead to a different assessment, the hearing officer shall, by means of a reasoned decision, reject the application to be heard.<sup>52</sup> Although "other third parties", i.e. non-sufficiently interested persons, can also be heard, the Commission directly.

Third persons and parties involved can also intervene whenever the Commission intends to disclose information that may constitute a business secret or any other confidential information connected to that person. In that case, DG Comp shall notify the undertaking or person concerned and allow it to submit written comments on the Commission's intention. It may also refer the case to the hearing officer, who will ultimately consider the confidentiality of the information. The hearing officer has been granted significant discretion in that regard. He can decide that the information does constitute a business secret and impede its disclosure, but can also decide that there is an overriding interest in its disclosure, despite its confidentiality.<sup>53</sup> At the same time, the hearing officer may also decide that parts of the file which are indispensable for the exercise of the party's rights of defence will be made accessible in a restricted manner.<sup>54</sup> The modalities of that restriction are left to the hearing officer.

The right of access to the file would not amount to much avail should parties not be able to use their access rights to respond effectively to the Commission's objectives. The hearing officer has therefore also been granted the power to extend time limits imposed by DG Comp in cases where the director responsible is unwilling to do so and the hearing officer considers an extension necessary to enable the right to be heard.<sup>55</sup> The hearing officer may also suspend time periods in which a response is due in instances where access to file disputes have not yet been resolved.<sup>56</sup>

### *Organisation and conduct of hearings*

The parties involved have a right to an oral hearing,<sup>57</sup> which shall be conducted by the hearing officer.<sup>58</sup> Other interested parties recognised as such can also be afforded the opportunity to express their views at the oral hearing, should they have requested so in writing at the time of their application to be heard.<sup>59</sup>

The stage of oral hearing has not been subject to significant modifications compared to the earlier mandates. The hearing officer is still responsible for the preparation of the hearing, which is not open to the public.<sup>60</sup> The preparation stage potentially includes the drawing up of a list of questions, the request for parties to submit a prior written notification containing the essential contents of their intended statements, the holding of preparatory meetings with the persons invited and the setting of time limits to provide a list of participants on their behalf.<sup>61</sup>

The date, duration and place of the hearing is determined by the hearing officer, following consultation with the director responsible for the investigation. Every person shall be heard in the presence of all other persons invited to attend. The hearing officer will preside the hearing in full independence and will ensure that the oral hearing contributes to the objectivity of the decision taken subsequently. From that perspective, the hearing officer has significant “presidential” discretion. He shall decide whether and to what extent questions may be asked and responses have to be provided. In exceptional circumstances, he may even allow a reply to be given in writing within a specific time limit. He may also allow the submission of further written comments after the oral hearing.<sup>62</sup> The hearing officer can also decide to hear persons separately in a closed session, having regard to their legitimate interest in the protection of business secrets. Information disclosed during the oral hearing should not be used for a purpose other than judicial and/or administrative proceedings for the application of arts 101 and 102 of the Treaty<sup>63</sup> or the merger control regulation.

The hearing constitutes a basis for an interim report to the competent member of the Commission, in which the hearing officer draws preliminary conclusions regarding the effective exercise of procedural rights as described above.<sup>64</sup> That report continues to remain unavailable for private parties to the proceedings under the new mandate.<sup>65</sup> Only the Director General, the director responsible, other competent Commission services, i.e. the Legal Service, and the Commissioner will be forwarded a copy.<sup>66</sup>

#### **\*291** The hearing officer as a special amicus Commissionis

The 2011 hearing officer's new mandate confirms and extends the hearing officer's discretionary powers in the determination of procedural rights enjoyed by private parties, especially in relation to the access to files and to the extension of time limits. Decisions of the hearing officer could therefore substantially alter the procedural position of the parties and determine the scope of substantive law defences brought forward. The potentially intrusive legal consequences of these decisions would seem to warrant a judicial body adopting them. The hearing officer is no judge, but an agent of the Commission's general interest role. At the same time however, the hearing officer's agency role is special since they arrange for an additional buffer ensuring compliance with the Court's case law and enabling procedural features for private parties in all stages of the procedure. From that perspective, he is a friend of the Commission adopting an infringement decision.

#### *An amicus*

It should be clear that the role of the hearing officer has never been perceived to be judicial.<sup>67</sup> That was especially the case under the previous two mandates, where the hearing officer mainly conducted the hearing and did not have direct



interventionist powers in the investigation phases preceding the statement of objections. Emphasis on his independence from the Commission and the ensuing delegation of powers of guaranteeing a fair hearing rather presented the hearing officer as a friend of the Commission, comparable to the *amicus curiae* or friend of the court concept that is also known in EU competition law.<sup>68</sup> According to the US Supreme Court procedural rules, an amicus brings a matter before the Court to instruct it on a point of law not covered by the parties. Amici should be distinguished from interveners because they do not join pending litigation but rather present an additional perspective to the Court, without becoming a party to that dispute.<sup>69</sup> The hearing officer also brings a matter to the attention of the Commissioner responsible for competition, without joining the concrete DG Comp investigation and ultimate Commission decision making stage. Unlike the DG Comp representatives, the hearing officer is not a party, but instructs the competition Commissioner and ultimately, the College of Commission Members, on procedural issues when deciding a case. In so doing, it instructs the Commission on a point of law--procedural rights--not covered by the substantive focus of DG Comp investigations.

The hearing officer's final report, based on the draft decision submitted to the Advisory Committee,<sup>70</sup> resembles an amicus brief in that regard, aimed at instructing the Commission. The final report provides a summary on the effective exercise of procedural rights and considers whether the draft decision prepared by DG Comp deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.<sup>71</sup> It will be forwarded to the Director General for Competition, to the Director responsible for the investigation and to the Commission adopting a decision.<sup>72</sup> It shall also take subsequent amendments to the draft decision into account.<sup>73</sup>

#### *A Commission amicus*

An amicus curiae in court proceedings presents an additional perspective to the judges deciding the case and remains outside the dispute in that regard. The hearing officer also remains outside the actual dispute but the perspective he brings requires participation to the proceedings beyond the role ordinarily attributed to an amicus. In overseeing the conduct of the hearing, the hearing officer not only draws up a report on the functioning of the hearing but also acts as a referee or an "arbiter" in ensuring the effective protection of procedural rights.<sup>74</sup> In so doing, the hearing officer does not adopt binding final decisions, but acts as a referee to ensure a fairly conduct procedure before the Commission adopts a substantive decision in the case at hand.

At the same time, the hearing officer is not providing expert advice to a judicial body. It rather provides quasi-judicial advice--advice on the application of procedural rights--to an administrative body, of which the he is an agent. The officer is appointed in accordance with the staff regulations<sup>75</sup> and is attached to the Competition Commissioner. The office thus functions as an administrative department that nevertheless remains independent from the Directorate-General responsible for actual enforcement initiatives. It would also appear that it cannot receive instructions related to an individual case from the Commissioner. The general instructions and delegations attributed to it are therefore determined in a binding legal instrument precisely to create an environment of legal certainty.

The hearing officer's role in the Commission would therefore not seem to conform to the classical amicus curiae perspective. The hearing officer remains a part of \*292 the Commission,<sup>76</sup> at heart a political body guaranteeing the general interest of the European Union. The hearing officer's role comprises the effectuation of that general interest, translated into particular procedural rights. The hearing officer rather functions as a de facto administrative law judge, without however being attributed that particular quality.

#### *A special Commission amicus*

The hearing officer ensures the ex ante application of the Court's case law on procedural rights. In ensuring the procedural rights of parties, the hearing officer somehow acts as, and presents the perspective of, the Court of Justice when dealing with and deciding on procedural issues. In so doing, the hearing officer provides a preliminary evaluation on the application of fundamental procedural principles and is able to report irregularities in order to remedy them before the Commission adopts a formal substantive decision. Its specific amicus role therefore comprises ensuring the application of the case law to the procedural issues of the matter at hand.

At the same time however, the hearing officer remains a Commission official subject to judicial review. His decisions are attributable to the Commission member responsible for competition and cannot as such be considered direct judicial pronouncements. It has therefore been well-established that hearing officer decisions are only amenable to judicial review prior to the judicial review of the final Commission decision to the extent that they distinctively affect the legal position of a person.<sup>77</sup> In most instances, hearing officer decisions on the scope of procedural rules have always constituted preparatory acts that are not as such amenable to judicial review.<sup>78</sup> The new mandate does not expressly modify that stance. In cases where the hearing officer refuses to extend time limits for preparing a response, resulting in a private party's foreclosure of presenting its views properly. To the extent--and that case is probably in the extreme--that a party is completely unable to present its point of view, a refusal to extend time limits could be interpreted as a decision affecting the legal position of a particular undertaking or individual. Similarly, a decision not to allow a third party to participate in a hearing or to be involved in a procedural setting could in particular circumstances constitute a final decision amenable to judicial review.<sup>79</sup> In those instances, an action would not formally be lodged against the hearing officer, but against the Commission for not taking stock of a private party's concerns. From the perspective of the Commission, most hearing officer decisions and recommendations therefore by nature comprise preparatory measures to a Commission decision. The hearing officer *facilitates* the avoidance of procedural rights scrutiny in judicial disputes and as such presents a special Commission amicus rather than an independent quasi-judicial decision maker. The extension of hearing officer scrutiny in the investigative phase confirms that approach.

#### Conclusion: Towards an institutionally separated approach in EU competition law procedure?

The extended hearing officer mandate presents a partial remedy to fundamental flaws that have long reflected the Commission structure of decision making.<sup>80</sup> As the Commission acts as a monolithic investigator, prosecutor and judge in a single competition law case, numerous calls have been made to create a more transparent and detached framework in the light of particular national competition law models, where investigation, prosecution and judgment are in one way or another separated.<sup>81</sup> The Commission's structure of competition law enforcement has responded to that call by means of the inauguration of some separations or Chinese walls between the prosecuting and investigating DG Comp, the adjudicative Commission and a hearing officer functioning as a central overseer of procedural rights.<sup>82</sup>

The new hearing officer mandate showcases that the institutional approach towards functionally separated Commission subunits responsible for different aspects of competition law enforcement continues to be the preferred pathway of procedural reform. It should nevertheless be clear that the hearing officer's mandate highlights the limits of that approach. Although the Commission delegates increasingly more important procedural tasks to the hearing officer, the Commission remains the general overseer and continues to determine competition policy and its enforcement.

The particular qualification as special amicus therefore expresses the limits of truly independent hearing officer decision making. In entrusting more responsibilities to the hearing officer, it should therefore not be neglected that the latter merely acts as a Commission amicus or overseer of procedure and not as a first instance judge. Its decision making powers should indeed be welcomed, but also be put in perspective. In the current institutional setup, the hearing officer will never be, and should never become, a truly independent procedural judge. He should rather provide the Commission with guidance on the application of procedural rights in particular cases with a view to avert the Commission from



adopting decisions \*293 that would ultimately be annulled by the Court on procedural grounds. The mandate therefore contributes to the maintenance of a particular due process playing field in EU competition law enforcement, tailored to the particular needs of the European Union's enforcement framework.

#### Footnotes

- 1 See art.47 Charter of Fundamental Rights [2010] OJ C 83/02, 389.
- 2 W. Berg and P. Ostendorf, "The reform of EU merger control: substance and impact of the proposed new procedural rules" [2003] E.C.L.R. 600.
- 3 A. Andreangeli, *EU Competition Enforcement and Human Rights* (Cheltenham: Edward Elgar, 2008), p.51.
- 4 Decision 2011/695 on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L 275/29.
- 5 See already *Sadolin & Homblad A/S v Commission of the European Communities* (17/74) [1974] E.C.R. 1063 at [15].
- 6 See art.19 of Regulation 17/62 implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204 and implementing regulations 99/63 ([1963] OJ 27/2268) and 1630/69 ([1969] OJ L 209/11).
- 7 *Twelfth Report on Competition Policy* (1983), paras 36-37 and the (informal) mandate in annexe, p.273.
- 8 For a historical overview until the 2001 mandate, see M. Albers and J. Jourdan, "The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective" [2011] 2(3) *Journal of European Competition Law & Practice* 186.
- 9 Decision 94/810/ECSC-EC on the terms of reference of Hearing Officers in competition procedures before the Commission [1994] OJ L 330/67 art.2.
- 10 Decision 94/810/ECSC-EC arts 3-7.
- 11 Decision 1994/810/ECSC-EC art.2.2.
- 12 Decision 1994/810/ECSC-EC art.8.
- 13 Decision 2001/462/EC-ECSC on the terms of reference of hearing officers in certain competition proceedings [2001] OJ L 162/21 art.2.2.
- 14 Decision 2001/462/EC-ECSC art.3.2.
- 15 Decision 2001/462/EC-ECSC art.15.
- 16 Decision 2001/462/EC-ECSC art.16.3.
- 17 See W. Wils, "The combination of the investigative and prosecutorial function and of the adjudicative function in EC antitrust enforcement. A legal and economic analysis" [2004] 27(2) *World Competition* 201.
- 18 Regulation 1/2003 [2003] OJ L1/1.
- 19 Commission Notice on co-operation within the Network of competition authorities [2004] OJ C101/43 para.4; see also W. Wils, "The EU network of competition authorities, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU" in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2002: Constructing the Network of Competition Authorities* (Oxford: Hart, 2004), pp.457-458.
- 20 See art.11(6) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, granting the Commission a right to commence proceedings to the detriment of national authorities' ongoing investigations.
- 21 In *Vlaamse Federatie van Verenigingen van Brood-en Banketbakkers, Ijsbereiders en Chocoladebewaterkers (VEBIC) VZW v Raad voor de Mededinging (C-439/08)* [2011] 4 C.M.L.R. 12, the Court held that due process required a national competition authority's participation to an appellate procedure against its own decisions, see F. Rizzuto, "The procedural implications of VEBIC" [2011] E.C.L.R. 285.
- 22 Notice on best practices in proceedings concerning articles 101 and 102 TFEU [2011] OJ C308/6 (hereafter referred to as Best Practices).
- 23 For an overview, see Albers and Jourdan, "The Role of Hearing Officers" [2011] 2(3) *Journal of European Competition Law & Practice* 186, 199.
- 24 Decision 2011/695 art.1.2.
- 25 Decision 2011/695 art.15. On the settlement procedure and the role of the hearing officer, see A. Ortega Gonzalez, "The cartel settlement procedure in practice" (2010) E.C.L.R. 174.
- 26 Decision 2011/695 art.2.2.
- 27 Decision 2011/695 art.3.4.

- 28 Decision 2011/695 recital 7.  
29 Decision 2011/695 art.3.2.  
30 Decision 2011/695 art.14.2.  
31 Decision 2011/695 art.17.1.  
32 Decision 2011/695 recital 8.  
33 Decision 2011/695 art.3.7.  
34 Regulation 1/2003 art.27; art.18.3 of Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1. See also Best Practices para.77.  
35 See *Australian Mining & Smelting Europe Ltd v Commission of the European Communities* (155/79) [1983] Q.B. 878; [1983] 3 W.L.R. 17; [1982] E.C.R. 1575 at [18] and *Akzo Nobel Chemicals Ltd v European Commission (C-550/07 P)* [2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19.  
36 Best Practices paras 52-54.  
37 Decision 2011/695 art.4.2.a; Best Practices paras 55-58.  
38 Decision 2011/695 art.4.2.b; Best Practices para.36.  
39 Decision 2011/695 recital 10.  
40 Decision 2011/695 art.4.2.c; Best Practices para.40.  
41 See *Österreichische Postsparkasse AG v Commission of the European Communities* (T-213/01 and T-214/01) [2001] E.C.R. II-1601; [2007] 4 C.M.L.R. 14 at [71]-[72].  
42 M. Levitt, "Commission hearings and the role of the hearing officer: suggestions for reform" (1998) E.C.L.R. 407.  
43 Decision 2011/695 art.4.2.d.  
44 Best Practices para.81.  
45 For an analysis of the prior regimes, B.J. Drijber and C. D. Ehlermann, "Legal protection of enterprises: administrative procedure, in particular access to files and confidentiality" [1996] E.C.L.R. 375.  
46 Complainants are natural or legal persons who show a legitimate interest and therefore receive a non-confidential copy of the statement of objections, see art.6 of Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18.  
47 Regulation 1/2003 art.27.2 and Regulation 773/2004 arts 15 and 16.  
48 Decision 2011/695 art.7.2.a-c.  
49 Decision 2011/695 art.7.3.  
50 The General Court distinguishes three kinds of third parties, depending on their being interested in the outcome of the proceedings, see M. Kellerbauer and L. Repa, "The Court of First Instance upholds two decisions of the Hearing Officer clarifying important procedural questions in antitrust investigations" [2007] E.C.L.R. 298.  
51 Decision 2011/695 art.7.2.d.  
52 Decision 2011/695 art.7.3.  
53 Decision 2011/695 art.8.2.  
54 Decision 2011/695 art.8.4.  
55 Decision 2011/695 art.9.  
56 Decision 2011/695 recital 15.  
57 Decision 2011/695 art.6.1.  
58 Decision 2011/695 art.10.  
59 Decision 2011/695 arts 5 and 6.2.  
60 See I. Forrester, "Due process in EC competition cases: a distinguished institution with flawed procedures" [2009] 34(6) *European Law Review* 823.  
61 Decision 2011/695 art.11.  
62 Decision 2011/695 art.12.  
63 Decision 2011/695 art.13.  
64 Decision 2011/695 art.14.  
65 J. Temple Lang, "Compensation for unjustified administrative procedures in Community law" [2002] E.C.L.R. 492.  
66 Decision 2011/695 art.14.1.  
67 L. Ortiz Blanco, *EC competition procedure* (Oxford: Clarendon, 1996), p.199.  
68 According to art.15.3 of Regulation 1/2003, the Commission can make observations in front of national courts.  
69 Rules of the Supreme Court of the United States r.37, available at <http://www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf> [Accessed April 12, 2012].

- 70 See art.14 of Regulation 1/2003. The Advisory Committee comprises representatives of Member States' authorities. Their role is to provide an opinion on the Commission's draft decision and to discuss general issues of competition law.
- 71 Decision 2011/695 art.16.1.
- 72 Decision 2011/695 art.16.2. It will also be forwarded to the competent authorities of the Member States and to the EFTA Surveillance Authority.
- 73 Decision 2011/695 art.17.2.
- 74 Decision 2011/695 recital 8.
- 75 Decision 2011/695 recital 6.
- 76 M. Van der Woude, "Hearing Officers and EC antitrust procedures; the art of making subjective procedures more objective" [1996] 33 *Common Market Law Review* 546.
- 77 In accordance with *IBM Corp v Commission of the European Communities* (60/81) [1981] E.C.R. 2639; [1981] 3 C.M.L.R. 635 at [12].
- 78 On that discussion, see already Albers and Jourdan, "The Role of Hearing Officers" [2011] *Journal of European Competition Law & Practice* 186, 191. The General Court maintained that "[o]nly 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" in *Reisebank* (T-216/01 R) [2001] E.C.R. II-3481 at [46].
- 79 As acknowledged in *Österreichische Postsparkasse* [2001] E.C.R. II-1601; [2007] 4 C.M.L.R. 14 at [65] and [72].
- 80 See Forrester, "Due process in EC competition cases" [2009] 34(6) *European Law Review* 819.
- 81 For a succinct overview of national models, see Rizzuto, "The procedural implications of VEBIC" [2011] E.C.L.R. 285.
- 82 Examples of particular mechanisms are summarised in Wils, "The combination of the investigative and prosecutorial function" [2004] 27(2) *World Competition* 201, 219-220.

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