COMMISSION DECISION

of 12 December 1994

on the terms of reference of hearing officers in competition procedures before the Commission

(Text with EEA relevance)

(94/810/ECSC, EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to the Treaty establishing the European Community,

Whereas the treaties establishing the Communities and the rules implementing those treaties in relation to competition matters provide for the right of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken;

Whereas the Commission must ensure that that right is guaranteed in its competition proceedings;

Whereas it is appropriate to entrust the organization and conduct of the administrative procedures designed to protect the right to be heard to an independent person experienced in competition matters, in the interest of contributing to the objectivity, transparency and effiency of the Commission's competition proceedings;

Whereas the Commission created the post of Hearing Officer for these purposes in 1982 and laid down his terms of reference;

Whereas it is necessary to adapt and consolidate those terms of reference in the light of subsequent developments in Community law,

HAS DECIDED AS FOLLOWS:

Article 1

1. The hearings provided for in the provisions implementing Articles 65 and 66 of the ECSC Treaty, Articles 85 and 86 of the EC Treaty and Council Regulation (EEC) No 4064/89 [1] shall be organized and conducted by the Hearing Officer in accordance with Articles 2 to 10 of this Decision.

2. The implementing provisions referred to in paragraph 1 are:

(a) Article 36 (1) of the ECSC Treaty;

(b) Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [2];

(c) Regulation (EEC) No 1630/69 of the Commission of 8 August 1969 on the hearings provided for in Article 26 (1) and (2) of Council Regulation (EEC) No 1017/68 of 19 July 1968 [3];

(d) Commission Regulation (EEC) No 4260/88 of 16 December 1988 on the communications, complaints and applications and the hearings provided for in Council Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 58 and 86 of the treaty to maritime transport [4];

(e) Commission Regulation (EEC) No 4261/88 of 16 December 1988 on the complaints, applications and hearings provided for in Council Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [5];

(f) Commission Regulation (EEC) No 2367/90 of 25 July 1990, on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings [6].

3. Administratively the Hearing Officer shall belong to the Directorate-General for Competition. To ensure the independence of the Hearing Officer in the performance of his duties, he has the right of direct access, as defined in Article 9, to the Memebr of the Commission with special responsibility for competition.

4. Where the Hearing Officer is unable to act, the Director-General, where appropriate after consultation of the Hearing Officer, shall designate another official, who

[1] OJ No L 395, 30. 12. 1989, p. 1 (corrected version OJ No L 257, 21. 9. 1990, p. 13).

[2] OJ No 127, 20. 8. 1963, p. 2268/63.
[3] OJ No L 209, 21. 8. 1969, p. 11.
[4] OJ No L 376, 31. 12. 1988, p. 1.
[5] OJ No L 376, 31. 12. 1988, p. 10.
[6] OJ No L 219, 14. 8. 1990, p. 5.

is least in the grade A3 and is not involved in the case in question, to carry out the duties described herein.

Article 2

1. The Hearing Officer shall ensure that the hearing is properly conducted and thus contribute to the objectivity of the hearing itself and of any decision taken subsequently. The Hearing Officer shall seek to ensure in particular that in the preparation of draft Commission decisions in competition cases due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned.

2. In performing his duties the Hearing Officer shall see to it that the rights of the defence are respected, while taking account of the need for effective application of the competition rules in accordance with the regulations in force and the principles laid down by the Court of First Instance and the Court of Justice.

Article 3

1. Decisions as to whether third parties, be they natural or legal persons, are to be heard shall be taken after consulting the Director responsible for investigating the case which is the subject of the procedure.

2. Applications to be heard on the part of third parties shall be submitted in writing, together with a written statement explaining the applicant's interest in the outcome of the procedure.

3. Where it is found that an applicant has not shown a sufficient interest to be heard, he shall be informed in writing of the reasons for such finding. A time limit shall be fixed within which he may submit any further written comments.

Article 4

1. Decisions whether persons are to be heard orally shall be taken after consulting the Director responsible for investigating the case which is the subject of the procedure.

2. Applications to be heard orally shall be made in the applicant's written comments on letters which the Commission has addressed to him and shall contain a reasoned statement of the applicant's interest in an oral hearing.

3. The letters referred to in paragraph 2 are those:

— communicating a statement of objections,

— inviting the written comments of a natural or legal person having shown sufficient interest to be heard as a third party,

— informing a complainant that in the Commission's view there are insufficient grounds for finding an infringement and inviting him to submit any further written comments,

— informing a natural or legal person that in the Commission's view that person has not shown sufficient interest to be heard as a third party.

4. Where it is found that the applicant has not shown a sufficient interest to be heard orally, he shall be informed in writing of the reasons for such finding. A time limit shall be fixed within which he may submit any further written comments.

Article 5

1. Where a person, an undertaking or an association of persons or undertakings who or which has received one or more of the letters listed in Article 4 (3) has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, he or it may draw attention to the matter by a reasoned request.

2. The reasoned decision on any such request shall be communicated to the person, undertaking or association that made the request and to any other person, undertaking or association concerned by the procedure.

3. Where it is intended to disclose information which may constitute a business secret of an undertaking, it shall be informed in writing of this intention and the reasons for it. A time limit shall be fixed within which the undertaking concerned may submit any written comments.

4. Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.

5. Where an undertaking or association of undertakings considers that the time limit imposed for its reply to a letter referred to in Article 4 (3) is too short, it may, within the original time limit, draw attention to the matter by a reasoned request. The applicant shall be informed in writing whether the request has been granted.

Article 6

1. Where appropriate in view of the need to ensure that the hearing is properly prepared and particularly that questions of fact are clarified as far as possible, the Hearing Officer may, after consulting the Director responsible for investigating the case, supply in advance to the firms concerned a list of the questions on which he or she wishes them to explain their point of view.

2. For this purpose, after consulting the Director responsible for investigating the case which is the subject of the hearing, the Hearing Officer may hold a meeting with the parties concerned and, where appropriate, the Commission staff, in order to prepare for the hearing itself.

3. For the same purpose the Hearing Officer may ask for prior written notification of the esential contents of the intended statement of persons whom the undertakings concerned have proposed for hearing.

Article 7

1. After consulting the Director responsible for investigating the case, the Hearing Officer shall determine the date, the duration and the place of the hearing, and, where a postponement is requested, the Hearing Officer shall decide whether or not to allow it.

2. The Hearing Officer shall be fully responsible for the conduct of the hearing.

3. In this regard, the Hearing Officer shall decide whether fresh documents should be admitted during the hearing, what persons should be heard on behalf of a party and whether the persons concerned should be heard separately or in the presence of other persons attending the hearing.

4. The Hearing Officer shall ensure that the essential content of the statement made by each person heard shall be recorded in minutes which, where appropriate, shall be read and approved by that person.

Article 8

The Hearing Officer shall report to the Director-General for Competition on the hearing and the conclusions he draws from it. The Hearing Officer may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

Article 9

In performing the duties defined in Article 2, the Hearing Officer may, if he deems it appropriate, refer his observations direct to the Member of the Commission with special responsibility for competition.

Article 10

Where appropriate, the Member of the Commission with special responsibility for competition may decide, at the Hearing Officer's request, to attach the Hearing Officer's final report to the draft decision submitted to the Commission, in order to ensure that when it reaches a decision on an individual case it is fully apprised of all relevant information.

Article 11

This Decision revokes and replaces the Commission Decisions of 8 September 1982 and 23 November 1990 on the implementation of hearings in connection with procedures for the application of Articles 65 and 66 of the ECSC Treaty and Articles 85 and 86 of the EC Treaty.

Article 12

This Decision shall enter into force on the day following its publication in the *Official Journal of the European Communities.*

Done at Brussels, 12 December 1994.

For the Commission

Karel VAN MIERT

Member of the Commission