

Hearing Officers¹ in competition proceedings conducted by the European Commission for the implementation of Article 101 and 102 TFEU

Table of contents

- I. Introduction
- II. Origins of the establishment of the institution of the *Hearing Officer*
- III. Appointment procedure and scope of powers of the *Hearing Officer*, in the light of the decision of the President of the European Commission of 13 October 2011
- IV. Evaluation of the institution and *de lege ferenda* postulates
- V. *Hearing Officer* – the Polish perspective
- VI. Summary

Summary

The article analyzes the role played by the *Hearing Officer* in competition proceedings conducted by the European Commission to implement Article 101 and 102 TFEU. Currently, the *Hearing Officer* is a guarantor of the effective exercise of procedural rights in the course of all competition proceedings before the EC, while contributing to the objectivity, transparency and efficiency of the proceedings. The article also discusses the proposals to change the scope of the powers of the *Hearing Officer*, as reported in doctrine and literature, and refers to the possibility and legitimacy of introducing such institution into Polish competition law.

Key words: the right to be heard; hearing; Committee; hearing officer; competition law.

JEL: K21, K40

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¹ According to the official translation of the title *Hearing Officer* (HO) as hearing officer from Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Art. 81 and Art. 82 of the EC Treaty (OJ EU 2004 L 123/18); hereinafter: Regulation 773/2004. However, the concept is interpreted differently. In the Decision of the President of the European Commission of 13 October 2011 on the role and the scope of powers of the Hearing Officer in certain competition proceedings (2011/695/EU); referred to as the President’s Decision, the title Hearing Officer was translated as “an officer conducting a hearing meeting”.

In the literature on the subject, the translation “hearing officer” is also found (Cieśliński, 2007, Part VI; Wójtuk-Janusz, 2002); along with the “hearing officer” [different in Polish] (Krasnodębska-Tomkiel, 2006, p. 93).

In the article, the first of the indicated translations will be used as the dominant one.

I. Introduction

Ensuring competition rules as effective as possible, two tools must work together – private enforcement under civil law and public enforcement by competition authorities.² The axis of private competition law enforcement is civil sanctions, while public law enforcement is based on administrative or criminal sanctions. Regardless of the emphasized tendency to criminalize infringements of competition law (Jurkowska-Gomułka, 2013, p. 85; Powolny, 2020, p. 14) and the promotion of private law, the administrative and legal model of competition law implementation remains the basic one. The concentration of investigative, prosecution and adjudication functions in one body is a characteristic feature of the model.

From the institutional point of view, three main competition enforcement systems can be distinguished in the EU at the level of Member States.³ Poland represents the most common, i.e. the administrative one-tier system. The structure assuming entrusting one body with such far-reaching powers, at the same time forces the introduction of specific safeguards to preserve such basic rights as the right to be heard and the right to defend the parties to proceedings conducted by antimonopoly authorities.

According to Art. 41 sec. 2 letter a) of the Charter of Fundamental Rights of the European Union,⁴ the right of everyone to be heard, before any individual measure which would affect them adversely, is taken as part of the right to good administration, defined as the right of everyone to have their affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. Hearing also plays an important role in the pursuit of procedural fairness, it can be defined as “a set of values whose guarantee in procedural standards and actual implementation in the proceedings affects its fair course and enables its positive assessment” (Bernatt, 2011, p. 49).

One of the institutions conceived as the fuse mentioned above is the *Hearing Officer* (hereinafter: HO). It is an entity that performs functions in competition proceedings conducted by the European Commission in accordance with Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of competition rules laid down in art. 81 and 82 of the Treaty (hereinafter: Regulation 1/2003); Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Art. 81 and Art. 82 of the EC Treaty; Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)⁵ and Commission Regulation (EC) 802/2004 of 7 April 2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.⁶ Two caveats should be made in this context. Firstly,

² The preamble to Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain provisions governing the pursuit of claims for damages for infringement of the competition law of the Member States and of the European Union, covered by the provisions of national law (Official Journal EU 2014 L 349/1), point 6, sentence 1 (more in: Jurkowska-Gomułka, 2013).

³ The administrative monistic model (administrative body combines inquisitorial and judiciary functions); the administrative dualistic model (based on the division of inquisitorial and judicial functions between separate administrative bodies) and the administrative and judicial model (inquisitorial functions are assigned to the administrative body, judicial functions to the court) (ECN Working Group Cooperation Issues and Due Process Decision-Making Powers Report. 31.10.2012, pp. 5–9).

⁴ Charter of Fundamental Rights of the European Union (Official Journal UE 2012 C 326/391).

⁵ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ EU 2004 L 24/1).

⁶ Commission Regulation (EC) 802/2004 of 7 April 2004 on the implementation of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (OJ EU 2004 L 133/1). According to Art. 15 sec. 1 above of the Regulation: “Formal hearings are conducted by the Hearing Officer in complete independence”.

this article is limited to discussing the position of the *Hearing Officer* in proceedings conducted pursuant to Regulation 1/2003. Secondly, even though Regulation 1/2003 is the basis for the application of EU competition rules by the EC and national antitrust authorities of EU Member States in individual cases, the institution of the hearing officer appears only in proceedings before the European Commission, in accordance with the provisions of Regulation 773/2004. This does not change the fact that in some Member States, officials with a similar scope of powers have been constituted, following the example of the *Hearing Officer*. Bearing in mind that the United Kingdom of Great Britain and Northern Ireland is no longer a member of the EU, the procedural arbitrator at the Office of Fair Trading is an example of it⁷ (*Procedural Adjudicator*).

The role of the HO in proceedings conducted by the EC was essentially described in Art. 1 sec. 2 of the President's decision on terms of reference. Structurally, he is an official guaranteeing the effective exercise of procedural rights⁸ in the course of the entire competition proceedings before the European Commission in order to implement Art. 101 and 102 of the Treaty and on the basis of Regulation (EC) 139/2004. At the same time, such an approach to the role does not in any way change the responsibility of the European Commission (Directorate General for Competition) for observing the procedural rights of entities participating in the proceedings. This is confirmed by the wording of point 8 of the preamble to the above-mentioned of the Decision, it specifies that the Hearing Officer is to "act as an independent arbitrator who seeks to resolve issues affecting the effective exercise of the procedural rights of interested parties, other parties involved, complainants or interested third parties **where the issues could not be resolved through prior contacts between the Commission services responsible for conducting competition proceedings, as are bound to respect them**".

At the same time, it should be noted that the position of *Hearing Officer* is inherently related to the right to be heard (the right to be heard). In proceedings before the European Commission, the right to be heard is exercised through a written response to the allegations made by the European Commission and through an oral hearing.⁹ Its time frame is determined by the submission of objections by the EC (Statement of Objections) – the beginning and the issuance of the decision – the end. The President's decision on terms of reference in recital 19) summarizes the purpose of the hearing as follows:

"The oral hearing allows the parties to whom the Commission has addressed objections,¹⁰ and other parties involved, continue to exercise their right to be heard by developing their arguments orally before the Commission, which should be represented by the Director-General for Competition, and other services whose work contributes to the further preparation of the decision to be taken by Commission. It should provide an additional opportunity to ensure

⁷ Opinion of Advocate General Maciej Szpunar presented on 21 July 2016, case C-162/15 P.

⁸ According to Recital 2 of the President's The scope of powers decision: The Commission has the duty to conduct competition proceedings in a fair, impartial and objective manner and to "ensure that the procedural rights of stakeholders are respected" as set out in Council Regulation (EC) 1/ 2003 (...), Council Regulation (EC) 139/2004 (...), Commission Regulation (EC) 773/2004 (...) and Commission Regulation (EC) 802/2004 (...), as well as the relevant case law of the Court justice. According to point 37) of Regulation 1/2003: The Regulation respects the fundamental rights and recognizes the principles recognized in particular in the Charter of Fundamental Rights of the European Union; and thus also the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁹ Chapter V. Exercising the right to be heard of Regulation 773/2004.

¹⁰ The official translation of the President's the scope of powers decision is a statement of objections. In this publication, the translation of the above will be used from Regulation 773/2004 as a statement of objections.

that all relevant facts, whether favourable or unfavourable to the parties concerned, including factual elements related to the gravity and duration of the alleged infringement, are clarified as fully as possible (...)."

II. Origins of the establishment of the institution of the *Hearing Officer*

The proposal to appoint a Hearing Officer was first put forward in the 11th EC Report on Competition Policy in 1981. It concerned only proceedings in the field of competition-restricting agreements and abuse of a dominant position. The European Commission, emphasizing the fact that the essential part of the procedure is in writing, which corresponds to the complicated nature of the cases examined, noted that oral hearings are a convenient instrument for clarifying issues that have not been settled during the written part of the procedure. However, it noted some shortcomings in the conduct of oral hearings and recommended measures to strengthen objectivity. According to the official justification, it was crucial to commission a newly appointed hearing officer with real autonomy to chair hearings. However, the *IBM v EC* case concerning the abuse of a dominant position was the real impetus to change the way the hearings were conducted.¹¹ Tensions between IBM and European Commission staff over the matter were widely reported by the press, commenting that the EC had in fact made up its mind; by implication, an oral hearing is devoid of practical significance. Therefore, expecting that the planned hearing could become a place of acute conflict, it was decided to entrust it to an external person, the former director of the Competition DG.¹² The latter, being both a personable and firm person, efficiently redirected the interrogation to an exchange of substantive arguments, not of a personal nature (Forrester, 2009, p. 834). The solution found under the pressure of the moment brought results. It was therefore decided to institutionalize them by entrusting the permanent conduct and organization of oral hearings to an official appointed for the purpose. Hence the name *Hearing Officer*. As an alternative, the introduction of administrative law judges on the American model was analysed, but this idea was not recommended.¹³

Ultimately, the Commission created the Hearing Officer post of with effect from 1 September 1982, assigning them the main task of ensuring that hearings were properly conducted, which should translate into their objective conduct and the impartiality of the subsequent decision, whatever that may be.¹⁴

¹¹ *International Business Machines Corporation v Commission of the European Communities* C 60/81. Retrieved from: <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=60/81&td=ALL> (29.03.2022).

¹² The literature on the subject also indicates different, not necessarily mutually exclusive, reasons why the European Commission decided to create the HO position. It is alleged that the appointment of the HO was a direct response of the Commission to the outcome of the proceedings on the annulment of the Commission's decision in the *85/76 Hoffman – Le Roche v. Commission* case (Kowalik-Bańczyk, 2012, p. 220). Undoubtedly, the aforementioned judgment contributed to the recognition of the right to be heard as a fundamental principle of EU law in cases where sanctions are imposed. The Court pointed out that "the observance of the right to be heard in all proceedings in which sanctions, in particular fines or financial penalties, may be imposed, is a fundamental principle of Community law and should be guaranteed even if the proceedings concerned are of an administrative nature". Another inspiration could be the 1982 Report of the Select Committee on European Communities of the House of Lords, it suggested appointing an Independent Person to conduct oral hearings, the so-called fresh look at the subsequent case, it was supposed to counteract the alleged lack of objectivity of the proceedings pending before the European Commission (Albers & Jourdan, 2011, p. 186).

¹³ European Commission. (2011). Eleventh report on competition policy : published in conjunction with the "Fifteenth General Report on the Activities of the European Communities in 1981", Publications Office, p. 31. The first Report was drawn up by the Commission in 1972, following the resolution of the European Parliament of 7 June 1971, in which the EP asked the EC to submit annual reports on the development of competition policy – First Report on Competition Policy of 1971. Retrieved from: <https://op.europa.eu/en/publication-detail/-/publication/418817dc-c69b-42b1-a787-013fd545017d/language-en/format-PDF/source-253800913> (25.03.2022).

¹⁴ European Commission. (2011). Twelfth report on competition policy: published in conjunction with the "Sixteenth General Report on the Activities of the European Communities in 1982", Publications Office. [12th European Commission Report on Competition Policy of 1982], p. 41.

In addition, to inform interested parties in detail about the exact scope of duties and responsibilities, the European Commission, upon the appointment of the *Hearing Officer*, developed the Terms of reference of the Hearing Officer, published as an attachment to the Commission's Report on competition policy dated 1983.¹⁵ She further stressed that it was the *Hearing Officer's* duty to ensure that the rights of the defence were respected not only during the actual hearing, but also at the stage preceding and following it. Since 1990, the Hearing Officer has also acted in merger control proceedings. It was accompanied by the EC's decision of 23 November 1990 on the implementation of hearings in connection with the procedures for applying Art. 85 and 86 of the EEC Treaty and Art. 65 and 66 of the ECSC Treaty, annexed to the 1990 Commission Report on Competition Policy.¹⁶ The content of the above-mentioned decision was actually a literal repetition of the 1982 Terms of Reference.

In the following years, the position of the HO was subjected to further research. For example, the aftermath of the conference on procedural rights organized by the European Commission in September 1993 included recommendations to further extend the scope of its competences (including decisions on extending the deadline for responding to the statement of objections or access to relevant files, documents and information).¹⁷ The directives were implemented in the 1994¹⁸ decision of the European Commission extending the scope of powers towards ensuring adequate protection of the rights of participants in the proceedings, e.g. to allow a party which has received a statement of objections and has reason to believe that the Commission is in possession of documents which have not been disclosed to it and which are necessary for the proper exercise of the right to be heard, to request access to the documents; and introducing the possibility of requesting an extension of the deadline for responding to the documents specified in Art. 4 sec. 3 of the above decision.

Further developments towards HO's continued independence were brought about by the Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings.¹⁹ This time, not only were tasks referred to, but it was also decided to make an administrative reshuffle by assigning them to the Member of the Commission responsible for competition instead of the Directorate-General for Competition. To increase the transparency of the appointment procedure, it was decided to publish information on the nomination in the Official Journal of the European Communities. Moreover, it was considered sensible to embed the HO more firmly in the decision-making process by requiring the director responsible for the

¹⁵ European Commission. (1996). Thirteenth Report on Competition Policy, Publications Office [13th EC Report on Competition Policy of 1983], pp. 64–65. Retrieved from: <https://op.europa.eu/en/publication-detail/-/publication/161bd425-29e6-4ac0-9b3d-0766ecdda8cd> (24/03/2022). Administratively, the HO was assigned to the General Directorate for Competition. Should the HO be unable to fulfill their function, the Director-General, acting in consultation with him, will designate another official of the same rank, but not involved in the specific case, to exercise the HO's powers. The Hearing Officer was also required to ensure that all relevant facts, whether favorable or unfavorable to the parties involved, were duly taken into account when drafting the Commission's competition decision. Much space in the Powers of the Hearing Officer is devoted to the organization of the hearing itself and its conduct. After the hearing, the HO submitted a report to the Director General for Competition, in which, in the context of recommendations as to the further course of the proceedings, they could indicate the need to obtain additional information, withdraw certain allegations, or, on the contrary, provide additional.

¹⁶ European Commission. (1991). XXth Report on Competition Policy, Publications Office [XX EC Report on Competition Policy 1990], p. 71. Retrieved from: <https://op.europa.eu/en/publication-detail/-/publication/d15a0d3f-4d8d-4ca2-9ccc-c1e5854b73a9/> language-en (March 24, 2022).

¹⁷ European Commission. (1995). Directorate-General for Competition, Secretariat-General, XXIIIrd Report on competition policy 1993, Publications Office [XXIII European Commission Report on Competition Policy of 1993], pp. 116–118. Retrieved from: <https://op.europa.eu/en/publication-detail/-/publication/7db4a243-39f3-4ba4-a5b7-1cb48f8ca6d3> (March 24, 2022).

¹⁸ Commission Dec. of 12 December 1994 on the scope of powers of hearing officers in competition proceedings before the Commission (Journal of Laws 1994 L 330/67).

¹⁹ Commission Dec. of 23 May 2001 on the scope of powers of hearing officers in certain competition proceedings (Official Journal EU 2001 L 162/21). Critical remarks, see Flatters, 2010.

investigation of the case to keep him informed of developments up to the draft decision stage, coupled with the right to comment on any point, resulting from any EC competition proceedings, to an authorized member of the European Commission.²⁰

III. Appointment procedure and scope of powers of the *Hearing Officer*, in the light of the decision of the President of the European Commission of 13 October 2011

Currently, the procedure for appointing and the scope of powers of the Hearing Officer are regulated by the decision of the President of the European Commission of 13 October 2011.

The Commission sets out quite general requirements for potential candidates for the position of the *Hearing Officer*, but attention is drawn to the order in which they are listed. The HO may be an independent person with experience in competition issues and having the professional ethics necessary to contribute to the objectivity, transparency and efficiency of the proceedings (point 3 of the preamble to the above-mentioned decision). The Hearing Officer is appointed by the EC in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union. An additional requirement – not provided for in the employment rules – is the publication of information about their appointment in the Official Journal of the European Union, it was initiated by the Commission's decision in 2001. The hearing officer remains assigned to the member of the European Commission responsible for competition. It should be clearly emphasized that this is only an administrative assignment and in no way means that the Competition Commissioner may issue binding instructions to the HO in matters in which they are involved. The possibility of addressing them with disputes arising between the said Directorate and a party to the proceedings in order to resolve is also one of the manifestations of its full independence from the Competition DG.²¹

The powers assigned to the *Hearing Officer* in the Chairman's Terms of Reference decision can be divided into four categories (Wils, 2012, pp. 8–28).

First, he is directly involved in the conduct of the proceedings. Therefore, it organizes and conducts an oral hearing and decides whether third parties are to be heard.²² In the part concerning the duties, to ensure proper preparation of the hearing, but at the same time to emphasize the importance of the oral part of the procedure, and thus the dialogue between the participants of the whole process, the hearing officer may, after consulting the responsible director, conduct a meeting with persons invited to the hearing and (where appropriate) with the Commission services in order to prepare for the oral hearing itself.²³

²⁰ More on the evolution of Hearing Officer powers see: Albers & Jourdan (2011, pp. 185–188).

²¹ Commission Notice on Best Practices for the Conduct of Art. 101 and 102 TFEU (Journal of Laws UE 2011 C 308/61), point 79, sentence 2.

²² Article 13 par. 1 of Regulation 773/2004: "If natural or legal persons other than those referred to in Art. 5 and 11, request to be heard and show sufficient interest, the Commission will inform them in writing of the nature and subject matter of the procedure and set a time limit within which they may submit their views in writing. Article 5 par. 1, first sentence, of the President's decision on the scope of powers: "Requests to be heard from persons other than those referred to in Art. 5 and 11 of Regulation (EC) No 773/2004 (...) shall be submitted in accordance with Art. 13 sec. 1 of Regulation (EC) 773/2004 (...). Article 5 par. 2 first sentence of the above decision: The Hearing Officer shall decide whether third parties are to be heard, after consultation with the accountable director." In points 12 and 13 of the President's decision concerning the case, certain premises were introduced which the HO should follow when making the decision in question. Thus, consumer associations that request a hearing should generally be regarded as having a sufficient interest where the proceeding concerns products or services used by the final consumer or products or services which are a direct input into such products or services. In addition, the HO should always be guided by the contribution that the persons can make to the clarification of the relevant facts of the case.

²³ See also regulations concerning *State of Play meetings*: Pursuant to points 2.9.60 and 2.9.61 first to third sentences of the Commission Notice on Best Practices for Conducting Proceedings in connection with Art. 101 and 102 of the TFEU: "Throughout the procedure, the Competition DG shall endeavor to enable, on its own initiative or upon request, the parties concerned to the proceedings to participate in an open and frank discussion and

Secondly, litigants may submit issues relating to the effective exercise of their procedural rights to the Hearing Officer for independent consideration. This is a broad category of rights. It is therefore reasonable to distinguish three subcategories in it in the form of powers: decision-making, reporting and issuing recommendations. Within the first of the sub-categories, the HO makes decisions on: extending the deadlines set for responding to the decision to provide the necessary information;²⁴ being notified by the Directorate-General for Competition of undertakings or associations of undertakings about their status in the proceedings²⁵ access to files, documents and information;²⁶ extending the deadline for replying to the statement of objections²⁷ and objections to the disclosure of information that may constitute trade secrets or other confidential corporate information.²⁸

In turn, the subcategory of reporting rights is described in Art. 15 of the President's Terms of Reference Decision and deals with situations where (in order to ensure the effective exercise of procedural rights) parties to proceedings who offer commitments to address the concerns raised by the Commission in its preliminary assessment under Art. 9 of Regulation 1/2003 and parties to proceedings in cartel cases that engage in settlement discussions pursuant to Art. 10a of Regulation (EC) 773/2004 may refer to the Hearing Officer at any stage of their respective procedure. Recommendations issued by the official concern the assessment of the application of the freedom from self-incrimination²⁹ and legal professional secrecy.³⁰

to present their views. It also takes into account the progress of the explanatory proceedings. For this reason, at certain stages of the procedure, the Commission proposes state of play meetings. Such meetings, in which the parties participate entirely on a voluntary basis, can contribute to improving the quality and efficiency of the decision-making process, ensuring its transparency and effective communication between the Competition DG and the parties. First of all, they serve to inform the parties about the progress of the proceedings at key moments of the procedure."

²⁴ Art. 4 section 2 letter c) of the Dec. of the Chairman regarding the scope of powers: when the addressee of the decision requesting information pursuant to Art. 18 section 3 of Regulation (EC) 1/2003 considers that the time-limit for reply is too short, it may refer the matter to the hearing officer within a reasonable time before the expiry of the time-limit originally set. The hearing officer shall decide whether an extension is appropriate, taking into account the length and complexity of the request for information and the requirements of the investigation.

²⁵ Art. 4 section 2 letter d) of the Dec. of the Chairman regarding the scope of powers: enterprises and associations of enterprises covered by one of the Commission's explanatory (investigative) activities (...) have the right to information about their status in the ongoing proceedings (...). If such an undertaking or association of undertakings considers that it has not received adequate information from the Directorate-General for Competition about its status in an ongoing investigation, it may refer the matter to the hearing officer for resolution. The hearing officer decides that the Directorate-General for Competition will inform the undertaking or association of undertakings that have made the request of their status in the proceedings. (...).

²⁶ Article 7 par. 1 of the Dec. of the Chairman on the scope of powers: If a party who has exercised their right of access to the file has reason to believe that the Commission is in possession of documents which have not been disclosed to that party and that the documents are necessary for the proper exercise of the right to be heard, they may make a reasoned request for access to the documents from the Hearing Officer, subject to the provisions of Article 3 sec. 7.

²⁷ Article 9 par. 1 of the Dec. of the Chairman on the scope of powers: If the addressee of the Statement of Objections considers that the time limit for replying to the Statement of Objections is too short, it may ask for an extension by submitting a reasoned request to the responsible director (...). If the request is rejected or the requesting addressee of the Statement of Objections does not agree with the period for which the time limit has been extended, it may refer the matter to the Hearing Officer before the expiry of the original time limit. After hearing the Director Responsible, the Hearing Officer shall decide whether an extension of the time limit is necessary to allow the addressee of the Statement of Objections to effectively exercise its right to be heard, while bearing in mind the need to avoid undue delay in the proceedings (...).

²⁸ Article 8 par. 2 of the Dec. of the Chairman on the scope of powers: If the company or person concerned objects to the disclosure of the information concerned, they may refer the matter to the Hearing Officer. If the Hearing Officer considers that information may be disclosed because it is not a trade secret or other type of confidential information, or because there is an overriding interest in disclosure, this shall be stated in a reasoned decision and communicated to the company or person concerned (...). On the basis of art. 8, the judgment of the Court of Justice of 14 March 2017, C-162/15 P, was issued, strengthening the position of the *Hearing Officer* in the proceedings, in which the Court found that: Art. 8 of the Dec. of the President of the European Commission 2011/695/EU (...) aims to implement, at the procedural level, the protection offered by Union law to information retrieved by the Commission in the course of proceedings in competition cases. This protection should be understood as covering all reasons that may justify protecting the confidentiality of the information in question. This means that the protection of information in proceedings before the EC can be based on all EU law norms, and not only on the provisions dedicated to the protection of information; in particular, protection may be based on the principles of legitimate expectations and equality.

²⁹ Article 4 par. 2 letter b) of the Dec. of the Chairman on the scope of powers: when the addressee of the request for information, pursuant to Article 18 section 2 of Regulation (EC) 1/2003, refuses to answer a question contained in such a summons, invoking freedom from self-incrimination as defined in the case-law of the Court of Justice, they may refer the matter to the Hearing Officer in due time after receiving the summons. Where appropriate, bearing in mind the need to avoid undue delay in the proceedings, the Hearing Officer may make a reasoned recommendation as to whether the freedom from self-incrimination applies (...). Point 10 of the preamble to the above Decision clarifies that, when considering cases of claiming freedom from self-incrimination, the Hearing Officer may consider whether a company is making manifestly unfounded claims for protection simply to buy time.

³⁰ Article 4 par. 2 letter a) of the Dec. of the Chairman on the scope of powers: a company or association of companies may ask the Hearing Officer to investigate claims that a document requested by the Commission in the exercise of powers (...) that has not been provided to the Commission is allegedly

Thirdly, in the case of respecting procedural rights in the course of the proceedings, the *Hearing Officer* (as a guarantor of their effective exercise) is not limited by the initiative of the participants in the proceedings, in the meaning that they should make an ongoing assessment of the observance of the rights, regardless of the activity or even lack thereof on the part of the participants proceedings. This is reflected in the reporting obligations of the Hearing Officer. In the course of the proceedings, they submit two types of reports: interim and final. Interim reports contain the HO's conclusions on the Oral Hearing (if any) and on the effective exercise of procedural rights. Crucially, however, the interim report is not accessible to the parties (Article 14(1), first sentence, of the Dec. of the Chairman on the scope of powers). In the final report, the HO assesses the observance of the effective exercise of procedural rights at each stage of the proceedings (Article 16(1), first sentence, of the above-mentioned decision). Due to the fact that the decision issued by the Commission may be based only on allegations on which the parties have been able to comment (Article 27(3) second sentence of Regulation 1/2003), and the draft decision is not presented to the parties before its adoption, it is logical, and at the same time it becomes necessary for the *Hearing Officer* to determine in the final report whether the draft decision concerns only objections to which the parties had the opportunity to present their positions (Article 16(1) second sentence of the above-mentioned decision). The real significance of the final report is, however, diminished by the legal nature attributed to the document. It is regarded as “only an internal document of the Commission, the purpose of which is not to supplement or correct the arguments of undertakings and which therefore does not contain any decisive aspect which the Community judicature would have to take into account in exercising its review”.³¹

Finally, the *Hearing Officer* also has some advisory powers in that they may comment on any matter arising from any European Commission competition procedure to the relevant member of the Commission (Article 3(5) of the Dec. of the Chairman on the scope of powers) and as a supplement to the interim report, it may submit separate comments on the further progress and impartiality of the proceedings (Article 14(2) of the above-mentioned decision).

IV. Evaluation of the institution and *de lege ferenda* postulates

Regardless of the fact that in a relatively short time the scope of powers of the Hearing Officer has been significantly expanded, as was dictated primarily by the EC's desire to increase the objectivity of conducted antitrust proceedings, the discussion as to its role and usefulness is still ongoing. The transition from the stage where they were merely conducting and organizing not too many hearings, to the stage where they became in essence a guardian of procedural rights, still does not exhaust the full potential of the function. The prevailing belief is that the HO institution – if modified – still has a chance for development, increase in importance, to the benefit of all interested parties.

In the considerations on the subject, various, often contradictory, proposals are put forward, but they focus more on the position of the hearing officer in proceedings concerning competition-restricting practices, leaving the concentration proceedings outside the scope of deliberation.

protected by the confidentiality of exchanges information between the lawyer and client. the Hearing Officer may make a reasoned recommendation to the relevant member of the Commission without disclosing the content of the document which may be confidential (...).

³¹ Judg. of September 30, 2009 in case T 161/05 *Hoechst GmbH v. EC*. Retrieved from: <https://curia.europa.eu/juris/document/document.jsf?jsessionid=1B4977F9A2294B6511BF5BA3912C1C7A?text=&docid=78349&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=5259731> (28.03.2022).

One thing seems pretty obvious. When analysing the powers of the *Hearing Officer* presented in a framework, the conclusion that the current name of the position is inappropriate seems self-imposing. As a result of the gradual extension of their tasks and responsibilities, the current nomenclature only partly corresponds to what the HO does. A more appropriate term would be, for example, the Procedural Rights Officer or the Procedural Rights Guardian.

As regards the procedure for appointing and dismissing the *Hearing Officer*, it is postulated that the European Parliament should be able to hear them before taking up the function. Admittedly, in terms of competition policy, the role of the EP basically comes down to controlling the executive bodies, but this would increase the transparency of the nomination process. On the other hand, assigning the President of the European Commission directly to them would emphasize their independence. The insufficient number of the officials is also raised – there are now two, which seems to be a completely inadequate number in proportion to the tasks dedicated to them (CCBE, 2000, pp. 16–17). Eliminating the problem does not even require a change in the legal status since Art. 1 sec. 1 of the Dec. of the Chairman on the scope of powers provides that one or more Hearing Officers are to be appointed for competition proceedings. Moreover, it is indicated that the grounds for dismissal of the Hearing Officer should be regulated in such a way that the removal is only possible for serious misconduct (CCBE, 2000, p. 4).

The discourse also revolves around a broader issue, i.e. who should a *Hearing Officer* be? The view is presented that the legal position of the *Hearing Officer* should be brought closer to that of the *hearing examiner* (after changes, *administrative law judge*) in proceedings before the Federal Trade Commission, i.e. a person who contributes to the determination of the facts and sometimes the legal status, while maintaining has decision-making powers under the FTC. The authors of this view stipulate that their intention is not to undermine or change the administrative model of proceedings before the European Commission. They do, however, share the view that relatively minor changes to the HO's mandate and scope of powers would transform the oral hearing into a mechanism for better factual and legal findings (Calvani & Leahy, 2018, pp. 213–230). A much more far-reaching suggestion, already entering the model of competition law enforcement at the EU level, is the establishment of a competition authority independent of the EC, modeled on the European Anti-Fraud Office (OLAF), it replaced the Anti-Fraud Coordination Unit (UCLAF), which is a subsidiary towards the EC and assessed as unable to perform the functions assigned to it in an effective manner. The newly created Competition Authority would focus its activities on establishing the facts, and its role would end when the allegations are presented. Then the case would be referred to a *hearing officer* or a *hearing tribunal*, i.e. an individual or a group of people not involved in the investigative stage, who are representatives of the judiciary, the world of science or law practitioners. The person holding the function of HO seems to be an ideal candidate for the position in this new structure. (Forrester, 2009, pp. 841–842). In particular, broadening the powers of the Hearing Officer should be supported to make them responsible not so much for the exercise of the right to be heard, but rather for the right of defence, including resolving any disputes concerning procedural rights in the course of the proceedings. In addition, the *Hearing Officer* should already be involved in the case from the investigative stage, for example from the moment of carrying out the inspection at the company's premises, and in certain circumstances also at other premises, including private premises. It remains an open question to make them

responsible for the ongoing determination of whether the documents seized during the activities in question are not protected by secrecy or go beyond the scope of the case (Albers & Jourdan, 2011, p. 199).

As far as the course of the hearing itself is concerned, it is emphasized that there is still much to be done in terms of making the *Hearing Officer* an active party during hearings. First of all, they should be given the right to cross-examine witnesses so that they can form an opinion on any disputed fact or provision of law. If the circumstances of a particular case require so, the organization of the interview should also be more flexible. It should not necessarily focus on the presentation of speeches prepared by the parties, which can be partly replaced by hearings of the parties, experts and other persons as to the circumstances helpful to make the necessary findings (Calvani & Leahy, 2018, p. 228). The hearing would be more valuable if the *Hearing Officer* had a real mandate to conduct cross-examination of both parties and members of the DG case team (Calzado & De Stefano, 2012, pp. 5–6). There are also critical comments regarding the hearing itself, which, unlike the hearing, is not held in public, which is supposed to guarantee all its participants the opportunity to freely express their opinions.³²

It is also possible to consider a change in the meaning attributed to the final report prepared by the hearing officer, or whether its obligatory part should not include (apart from those concerning the respect for procedural rights) also conclusions on the merits of the case. Without changing the legal nature of the document, it would be important to include findings as to the existing potential exculpatory evidence and the manner in which the EC addressed it (Calvani & Leahy, 2018, p. 228). It is a good idea to introduce an obligation for the *Hearing Officer* to submit a report on the activities of the European Commission or its President (CCBE, 2000, p. 4).

V. *Hearing Officer* – the Polish perspective

Polish antitrust law does not know the institution of the hearing officer. The right to be heard is exercised, inter alia, by: by means of a hearing, which is not obligatory in the course of the proceedings. The legislator decided to leave this fundamental issue to the discretion of the antimonopoly authority. The sphere of the recognition is wide, because in the Office of Competition and Consumer Protection³³ the only indication allowing to identify situations in which a hearing would be expected is the wording of Art. 60 sec. 3 of the Office of Competition and Consumer Protection, which allows the competition authority to summon to a hearing and question the parties, witnesses and seek expert opinions. Therefore, if in the case it is necessary to hear the parties, witnesses or seek the opinion of experts, the hearing should take place. This is surprising because the usefulness of the hearing to clarify the circumstances of the case is not a controversial fact, especially taking into account how complex antitrust cases can be. Personal contact of the person who decides and the person involved in the case allows for easier identification of disputed

³² Commission Notice on Best Practices for the Conduct of Art. 101 and 102 TFEU (Journal of Laws UE 2011 C 308/61), point 107, sentence 3. In this context, the relationship between the so-called closed-door hearing, understood as a meeting between the party and the decision-making body without the other parties present, the granting of which at the party's request remains the discretion of the hearing officer (as opposed to a hearing which is not open to the public) and the rights of the defence. More on this topic in the Opinion of Advocate General Nils Wahl presented on 3 September 2015 in case C-154/14 P and judgment of the Court of Justice of 16 June 2016 in case C-154/14 P. Retrieved from: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=180323&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=1386407> (31.07.2022).

³³ Act of 16 February 2007 on competition and consumer protection (i.e. Journal of Laws 2021, item 275).

areas and possible (mutual) conviction as to the other party's argument, which may significantly contribute to shortening the proceedings.

The national solution in this respect differs from the rules of oral hearings by the European Commission. Regulation 773/2004 provides in Art. 12 that the parties to whom a statement of objections has been addressed shall be given the opportunity by the Commission to put forward their arguments at an oral hearing if they so request in their written observations. In Polish antitrust proceedings, even a convincingly justified request for a hearing does not entail any obligations for the President of the Office of Competition and Consumer Protection. On the sidelines of the mainstream of considerations, without concluding that it is necessary to conduct an administrative hearing in the course of the proceedings in order to ensure the criminal-procedural standard of the right to defense, including the possibility of being heard (Bernatt & Turno, 2015, p. 91), one should support the change of the Office of Competition and Consumer Protection consisting in on the introduction of the obligation to hold a hearing in at least two cases: if requested by the party and – following the example of the Code of Administrative Procedure³⁴ – when there is a need to reconcile the interests of the parties.

The European Union's competition law is subject to constant changes in the direction of its further harmonization. In recent years, the trend has been emblematic of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018, which aims to empower the competition authorities of the Member States to enforce the law more effectively and ensure the proper functioning of the internal market³⁵ (hereinafter: the ECN+ Directive). The EU legislator in The secondary law act placed emphasis on strengthening the position of national competition authorities and establishing a guarantee of respect for the rights of entrepreneurs in their contacts with the national competition authority, however, maintaining the course of decentralization of the competences of the European Commission to the benefit of the Member States. Even though the deadline for the implementation of the ECN+ directive expired on February 4, 2021, Poland has still not changed its national law accordingly³⁶, thus placing itself in a fairly small group of "latecomers". The amendment to the Act on competition and consumer protection, discussed in the above circumstances, could become an opportunity for bolder, and at the same time – as it seems – necessary institutional changes. It is possible to pose a question here and in this context, whether the institution of the *Hearing Officer* is needed for the Polish antimonopoly procedure and whether it could solve at least some of the problems raised for years, identified shortcomings? To begin with, the proposal to introduce a *Hearing Officer* in Polish antimonopoly proceedings, or more broadly, to introduce a system of internal control of proceedings, has been present in the doctrine for a long time. Already after the entry into force of the Act of 15 December 2000 on competition and consumer protection³⁷ as part of the assessment of the regulation,

³⁴ Act of June 14, 1960 – Code of Administrative Procedure (i.e. Journal of Laws 2021, item 735, as amended).

³⁵ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to enforce law more effectively and ensure the proper functioning of the internal market (Official Journal of the EU.L.2019.11. 3).

³⁶ Since October 26, 2021, no new information regarding the draft amendment to the Act on competition and consumer protection implementing the ECN+ directive (list number: UC69) has appeared on the website of the Government Legislation Centre. During the meeting of September 16, 2021 of the Parliamentary Committee for European Union Affairs, the President of the Office of Competition and Consumer Protection indicated that the delays were mainly due to the lack of agreement with the Ministry of Justice and the National Prosecutor and the Ministry of the Interior and Administration regarding the correct implementation of Art. 23 sec. 2 or sec. 3 of the ECN+ Directive, but also, e.g. the need to conduct a thorough analysis and comprehensive assessment of the compliance of the currently applicable provisions with the ECN+ Directive. Full record of the meeting of the European Union Affairs Committee, p. xsp?view=2&commission=SUE (13.03.2022).

³⁷ Act of 15 December 2001 on competition and consumer protection (Journal of Laws No. 122, item 1319, as amended).

it was stated that the legislator, deciding on a one-man model of a competition protection authority,

“did not establish any auxiliary advisory body, nor did it introduce a mechanism for internal control of the course of proceedings (...). Community antimonopoly proceedings are attended by (...) the hearings ombudsman, whose task is primarily to ensure that the rights of defense are respected in the proceedings, so they are assigned the role of the subject of internal control of the manner in which the antimonopoly proceedings are conducted by the community authority” (Janusz, Sachajko & Skoczny, 2001, p. 199).

It was also pointed out that “due to the lack of legal grounds, it is not possible to create an antitrust ombudsman’s office or an antitrust advisory body independent of the President of the OCCP” (Wojtniuk-Janusz, 2002, p. 227). Subsequent postulates fall within a fairly wide spectrum: starting from general, neutral in their overtones, regarding the introduction of the *Hearing Officer* institution into Polish law, which would be a counterbalance to the very broad investigative powers of the President of the Office of Competition and Consumer Protection (Sawicki, 2021, p. 50), but at the same time, it would not be an alternative to an appeal against a request to provide all necessary information and documents directed by the President of the Office of Competition and Consumer Protection pursuant to Art. 50 of the Office of Competition and Consumer Protection, because decisions as to the legitimacy and expediency of the request would still be at the discretion of the antimonopoly authority (Kanton, 2020), and ending with more detailed ones, calling for the introduction of

“the institution of an independent employee who would consider a complaint against a decision (issued on the basis of Art. 69 sec. 1 of the Office of Competition and Consumer Protection) in the course of self-inspection; it would be a person not involved in the case who could objectively assess the standard of protection” (Affre, Kozak & Wawruch, 2018, p. 70).

Giving an affirmative answer to the above questions, one should opt for an evolutionary solution, not a revolutionary one, i.e. for the introduction to the Office of Competition and Consumer Protection for the purposes of antimonopoly proceedings of the *Hearing Officer* institution, equipped as a rule with openly formulated advisory and opinion-making powers. The approach has two advantages. On the one hand, it creates the possibility of further development of an institution already embedded in the Polish legal order and possible corrections based on conclusions drawn from its functioning – through legislation. On the other hand, it gives the person holding the function a chance to specify in practice the content framework of the tasks assigned to them, according to their knowledge and experience, but also strength of character and personality, in the area of identified shortcomings that do not require legislative action. Undoubtedly, an outstanding specialist in the field of competition law, with professional experience in positions where independence was the main feature of employment, should be appointed to perform this function (optimally by the Prime Minister). As to the scope of powers, they should be able to take a position on all matters concerning the procedural rights of the parties involved in the proceedings, presented on an ongoing basis, in the form of opinions made available to the parties and the President of the Office of Competition and Consumer Protection. The parties and the antimonopoly authority could take

the initiative to prepare the opinion, but the *Hearing Officer* could also act on their own initiative. Their role (as rightly claimed in the doctrine) would be of particular importance in the event of a complaint against decisions made in the course of the proceedings, because the involvement of an independent official would create conditions for a real, objective and fair balancing of the interests of the complaining parties, whose presentation in the form of an opinion as part of self-control to the antimonopoly authority could contribute to improving the quality and efficiency of the proceedings. It should also be recommended to introduce an obligation for the President of the Office of Competition and Consumer Protection to refer in each decision concluding the proceedings to the HO's findings as to respecting the procedural rights of the parties contained in the submitted final report, and to equip with the possibility of requesting a hearing in the case. In addition, bearing in mind the above-mentioned objections regarding the inadequacy of the title of *Hearing Officer* in proceedings before the European Commission, when trying to find an accurate title for Polish purposes, some inspiration may be the British name of the position – *Procedural Adjudicator*, i.e. an arbitrator in procedural matters.

VI. Summary

Undoubtedly, the *Hearing Officer* is an entity that, since its establishment in 1982, has had a significant impact on objectifying EU antimonopoly proceedings before the European Commission. Attempting to summarize their role and importance, it can be said that they are currently a guardian and guarantor of the observance of procedural rights of entities participating in proceedings before the European Commission, but without any real impact on the outcome of these proceedings. Institutionally, they are something of an internal controller.

Considering, however, that more than a decade has passed since the last decision on the scope of its powers in 2011, which is sufficient time to trace the functioning of a given regulation over time, and the gravity and complexity of cases dealt with by antimonopoly authorities is constantly increasing, there seem to be convincing arguments for taking action to further strengthen its position and importance. Although there are voices that their contribution as a person who is not a specialist in the area of matters relevant to the case under consideration remains formal, not substantive (Teleki, 2021, p. 166). Practitioners' observations are even more critical: "The hearing officer made sure that the coffee was served at the right time and that the interpreters were not too tired".³⁸

Within the so-called minimum plan, one should first of all opt for the appointment of the *Hearing Officer* for a specific, rather longer than shorter, because it gives greater stability and independence, term of office. The end of the HO's term of office would be either the expiry of the term of office or resignation or dismissal, which, however, could take place exceptionally. Secondly, it should be clarified that the hearing officer guarantees the effective exercise not only of procedural rights, but also of the rights of defence throughout the competition proceedings before the EC for the purpose of implementing Art. 101 and 102 of the Treaty and on the basis of Regulation (EC) 139/2004. Thirdly, it should be competent to take a stand in any dispute concerning procedural rights arising at any stage of the proceedings. Fourthly, their basic function of the person managing the oral hearing

³⁸ DG Competition Stakeholder Survey. Stakeholder Report – Lawyers. August 2010, p. 23 (Albers & Jourdan, 2011, p. 185).

should be supplemented in an unambiguous manner with instruments making them a participant in the decision-making process, e.g. by introducing findings as to the factual and legal status of the case as obligatory elements of the final report. Taken as a whole, a change in the location of the hearing may be considered, in the sense of shifting from the stage of adversarial proceedings to the stage of preliminary investigation. The latter focuses on establishing the facts, which would increase the usefulness of the hearing itself. As the lawyers participating in the proceedings claim, there is a widespread belief that when hearings are conducted, the European Commission has formed an opinion on the case a long time ago, which deprives them – from the point of view of the parties – of their usefulness.³⁹

The “transplantation” of the function of the hearing officer to Poland could certainly not take place by simply transferring the EU regulation to Polish law. It is necessary to identify areas where the hearing officer could fill the existing gaps or shortcomings and to place them in the existing institutional structure, as well as to equip them with the scope of powers that would optimally match the duties assigned to them. The article attempts to answer the questions. Especially that the *Hearing Officer* could become a “solution” that would implement the two objectives of the ECN+ Directive – strengthening the position of the President of the Office of Competition and Consumer Protection and creating a guarantee of respecting the rights of entrepreneurs in contacts with the national competition authority.

You can also try a more holistic approach manifested in the abandonment of point-specific changes to the Office of Competition and Consumer Protection in favor of a more comprehensive amendment. It would be reasonable to combine the necessary implementation of the ECN+ Directive and the long-standing discussion on the creation of a collective competition protection authority based on the actual separation of inquisition and adjudication functions (See: Podrecki, Mroczek & Menszig-Wiese, 2019 and the literature cited there) and with the debate on the establishment and location of HO in Polish realities. Moreover, the issues are related to each other. Since the ECN+ Directive “forced” the verification of the status of the President of the Office of Competition and Consumer Protection in terms of independence, it naturally creates space for introducing an official who could become a guarantor of the effective implementation of the procedural rights of the parties, which would strengthen the position of entrepreneurs. And even if the existing model were to be retained, i.e. if there was no internal separation of the investigative, prosecution and adjudicating functions of the President of the Office of Competition and Consumer Protection, the hearing officer could become a counterbalance, an internal controller in each conducted proceeding. Anticipating a possible accusation of an unnecessary multiplication of legal entities, it can be raised as a counterargument that the 40 years of the institution’s existence in the EU field have confirmed its value. The representatives of the doctrine and practitioners of competition law not only would not like to liquidate the *Hearing Officer*, but also in their majority are in favour of further strengthening their independence and enriching their powers, which in itself is an incentive.

³⁹ DG Competition Stakeholder Survey. Lawyers Report. December 2014. Retrieved from: <https://op.europa.eu/en/publication-detail/-/publication/8690e400-108d-44b8-93dd-9671339a3c9d/language-en> s. 25.

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