



# 5<sup>th</sup> AEGC Capacity Building Workshop

**“Approaches, methodologies, techniques and related best/replicable practices in Investigation and Enforcement by Competition Regulatory Bodies”**



Federal Foreign Office



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# Practice of Investigation and Enforcement in the EU

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## Corpus of European Competition Law

- European Competition Law is comprised of laws
  - at the Community level
  - at the Member State level



## Community level

- Article 81 of EC Treaty (agreements) and Article 82 EC (unilateral conduct) together with Council Regulation (EC) No 1/2003;
- also Article 86 EC (public undertakings and undertaking with special or exclusive rights) Article 87 EC (state aid);
- EC Merger Regulation (Council Regulation (EC) No 139/2004)



## Member State Level

- 27 Member States
- typically national laws similar to Articles 81 and 82 EC;
- laws relating to merger control (all Member States except Luxembourg) which includes a notification system (all Member States except Luxembourg and UK).



## Scope and Purpose of Community Laws

- Community competition laws (Articles 81 and 82 and merger laws) apply only to undertakings which is defined as an entity including natural persons that engages in economic activity, regardless of its legal form or its ownership.
- The purpose of competition law at the Community level is to foster the development of a single market, common market, for the free movement of goods and services - a principal goal of the Community.



## Article 81 EC

- Article 81(1) prohibits
  - agreements between undertakings, decisions by association of undertakings and concerted practices,
  - which may affect “trade between Member States”,
  - which have as their *object* or the *effect*,
  - “the prevention, restriction or distortion of competition within the common market



## References

- Case C-209/07, *Competition Authority v Beef Industry Developments Society Limited and Barry Bros. (Carrigmore) Meats Limited*, Court of Justice, Judgment of 20 November 2008 (infringement by object compared with infringement by effect)
- Case C-08/08, *T-Mobile Netherlands and Others*, Court of , Judgment of 6 October 2009 (“concerted practices”)
- Guidelines on the effect of trade concept contained in Articles 81 and 82 of the Treaty (2004/C 101/07) (“may effect trade between Member States”)



## Efficiencies Defence (Article 81(3))

- Agreements etc. which are contrary to Article 81(1) may be saved if Article 81(3) (often referred to as the ‘efficiencies defence’) is satisfied
  - Guidelines on the application of Article 81(3) of the Treaty ((2004/C 101/08) (“Guidance on Article 81(3) EC”))



## Requirements for Article 81(3)

- To satisfy Article 81(3), defendants must show that the agreement, etc.
  - contributes to improving the production or distribution of goods or to promoting technical or economic progress,
  - while allowing consumers a fair share of the resulting benefits, and
  - does not impose restrictions which are not indispensable to the attainment of these objectives, and
  - does not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the market.



## Article 82: Unilateral Conduct

- Article 82 prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof including the following:
  - “directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions”;
  - “limiting production, markets or technical developments to prejudice of consumers”;
  - “applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,”
  - “making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.



## Article 82 (cont'd)

- The abuses covered by Article 82 include refusal to supply, exclusive dealing, tying and bundling, conditional rebates, predatory conduct, discrimination, margin squeeze and excessive pricing.
- A fundamental concept in Article 82 is the concept of dominance and the determination of the presence or absence of dominance requires defining the relevant market(s) (product and geographic dimension) in which the undertaking under examination is dominant.



## Article 82 (cont'd)

- Dominance is defined as a the possession of sufficient economic strength enjoyed by an undertaking:
  - which prevents effective competition being maintained in the relevant market;
  - which enables it to act to an appreciable extent independently of its competitors and customers and consumers.
    - *Case 27/76 United Brands v Commission* [1978] ECR 207;
    - *Case 85/76 Hoffmann-La Roche v Commission* [1979] ECR 461



## Article 82 (cont'd)

- The enforcement priorities of the Commission with respect to exclusionary conduct under Article 82 are set out in
  - “Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings” (2009/C 45/02).



## Relationship with Member States

- The relationship between Community laws and national competition laws are governed principally by Regulation 1/2003 (“Reg. 1/2003”).
- Also, Member States through their national competition authorities (“NCAs”) and national courts may apply Articles 81 and 82 (Articles 5 and 6, Reg. 1/2003). This is a system of parallel competences.
- NCAs have virtually the same powers as the Commission in applying Articles 81 and 82 (Article 5, Reg. 1/2003).



## Relationship with Member States (cont'd)

- Where a NCA or national courts applies national competition laws to conduct which falls within Articles 81 or 82, Member States must also apply Articles 81 or 82, as the case maybe (Article 3(1), Reg. 1/2003).
- Where an agreement, etc follows within Article 81, national competition laws may not prohibit conduct which does not infringe Article 81 (Article 3(2), Reg. 1/2003).
- Member States may have laws relating to unilateral conduct which are more onerous than Article 82 (Article 3(2), Reg. 1/2003).



## Cooperation between Commission and NCAs

- Cooperation among the network of competition authorities in the EU is governed principally by Reg. 1/2003 and Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03) (“ECN Notice”).
- With respect to enforcement of Articles 81 and 82, the European Competition Network provides a framework for consultation, exchange of information and assistance between the Commission and NCAs and between NCAs with the aim of consistent and uniform application of Articles 81 and 82.
- The ECN Notice, section 2 sets out the principles of case allocation within a system of parallel competences of the Commission and NCAs where enforcement proceedings under Articles 81 or 82 may be taken by a single NCA with possibly assistance of other NCAs and Commission, several NCAs acting in parallel, or the Commission.



## Cooperation (cont'd)

- NCAs and the Commission may exchange information including confidential information for the purpose of applying Articles 81 and 82 subject to certain restrictions concerning enforcement proceedings against natural persons (Article 12, Reg. 1/2003).
- NCAs and the Commission may request the assistance of members of the ECN in the conduct of inspections and other fact-finding measures (Articles 20, 21 and 22, Reg. 1/2003).



## Relationship between Commission and National Enforcement of Articles 81 and 82

- If the Commission conduct proceedings under Articles 81 or 82, a NCA may not do so about the same matter and the Commission may take over a case initiated by a NCA (Article 11(6), Reg. 1/2003).
- NCAs and national courts cannot make decisions under Articles 81 or 82 which run “counter” to a decision adopted by the Commission (Article 16, Reg. 1/2003).
- NCAs before make a decision finding an infringement, accepting commitments or withdrawing the benefit of a block exemption in respect of Articles 81 or 82 must provide 30 days advance notice to the Commission (Article 11, Reg. 1/2003).



## Relationship on Enforcement (cont'd)

- Before the Commission adopts a decision relating to Articles 81 or 82, it consults with the Member States by convening a meeting of the Advisory Committee on Restrictive Practices and Dominant Positions which comprises the NCAs of Member States (Article 14, Reg. 1/2003).



## Cooperation on other matters

- Through the Advisory Committee on Restrictive Practices and Dominant Positions and various ECN fora, the Commission may consult NCAs and other representatives of Member States about policy matters such as guidelines on procedural and substantive matters in the application of Articles 81 and 82 and developments in various sectors in the economy.
- Generally, much of the consultation within the ECN is informal.



## Conduct of an Investigation by the Commission

- The conduct of proceedings are governed by Reg. 1/2003 and Commission Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (“Regulation on Conduct of Proceedings”).
- The Commission, through its Directorate General for Competition (“DG Competition” or “DG COMP”), may initiate an investigation,
  - based on a complaint (Article 7, Regulation on Conduct of Proceedings and Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty (2004/C101/05); or
  - at its own initiative.



## Initiating (cont'd)

- Given the large number of potential cases to investigate, the threshold question for the Commission is whether there is a 'Community interest' in the case.
- Decisions of the Commission to not investigate a case may be challenged before the Community courts.



## Conduct of an investigation: Investigative Measures

- The Commission may use one or more of the following investigative measures:
  - make a request for information, by simple request or by decision, of undertakings or association of undertakings to provide “all necessary information” (Article 18, Reg. 1/2003);
  - conduct an inspection of business premises and other premises including private homes (Articles 20 and 21, Reg. 1/2003);
  - conduct interviews of any natural or legal persons (Article 19, Reg. 1/2003).



## Statement of Objections (“SO”)

- The Commission following an investigation may issue a SO setting the allegations of an infringement of Articles 81 and 82 and the factual basis thereof. An SO may be hundreds of pages.
- The addressee of the SO has a right to submit a written response.
- Third parties may be asked to provide comments based on a non-confidential version of the SO.



## Rights of Defence

- The addressee of the SO has a general right to make known its views: Article 11, Regulation on Conduct of Proceedings.
- In addition to responding to the SO, the addressee has the following rights:
  - access to the file: Article 15, Regulation on Conduct of Proceedings and Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004;



## Rights of Defence (cont'd)

- right to have an oral hearing to present its views: Articles 13 and 14, Regulation on Conduct of Proceedings and Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (C(2001) 1461);
- right to request protection of its business secrets and other confidential information: Article 16, Regulation on Conduct of Proceedings.



## Draft Decision and Consultation with Advisory Committee

- Before adopting a decision with respect to, *inter alia*, finding an infringement and imposing a penalty, the Commission is required to obtain the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions: Article 14, Reg. 1/2003.



## Decisions on Infringements and Fines

- The Commission has broad remedial powers including requiring the infringing conduct to be brought to an end and imposing fines.
- The Commission has issued guidelines on fines: Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).
- The Commission may impose substantial fines, for example,
  - under Article 81: total fine of EUR 1.38 billion against four companies in Car Glass Cartel (12 November 2008);
  - under Article 82: fine of EUR 1.06 billion in Intel case (13 May 2009)



## Decisions (cont'd)

- Decisions on infringements and fines with reasons are published: Article 30, Reg. 1/2003.



## Settlements

- The Commission may settle an investigation accepting commitments: Article 9, Reg. 1/2003.
- There are specific provisions dealing with settlement of cartel investigations: Commission Regulation (EC) No 773/2004 of 7 April 2004 as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008



## Court Review of Decisions

- Decisions of the Commission may be reviewed by the Community courts under Article 230 EC. The review of an infringement decision is not a full review but more limited whereby deference is given to the expertise of the Commission.
- For fining decisions, the Community courts have an unlimited right to review them: Article 31, Reg. 1/2003.



## Block Exemptions

- Certain agreements that are contrary to Article 81(1) may be 'beneficial' having regard to Article 81(3).
- The Commission may by decision, adopt 'block exemption' regulations for certain categories of agreements and concerted practices that would exempt such categories from the application Article 81 without having to review every agreement that falls within the categories:
  - Council Regulation N° 19/65/EEC of 2 March 1965 on application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices, as amended by Council Regulation (EC) No 1215/1999 of 10 June 1999



## Block Exemptions (cont'd)

- The Commission have adopted block exemptions with respect to:
  - vertical agreements including motor vehicles,
  - specialisation agreements,
  - research and development agreements,
  - technology transfer agreements,
  - industry sectors or agriculture, insurance, transportation.



## Leniency

- To aid the detection and investigation of cartels, which are by their nature secret, the Commission has a leniency programme providing for self-reporting by businesses of their involvement in an illegal cartel.
- The leniency programme provides for full leniency as well as for reduction of fines: Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11)
- In September 2006, the Commission together with Member States adopted a ECN Model Leniency Programme to:
  - to enhance the effective of leniency programmes;
  - to lessen burden of making leniency applications in multiple jurisdictions.



## Leniency (cont'd)

- The ECN Model Leniency Programme is regarded as a success:
  - ECN Model Leniency Programme: Report on the Assessment of the State of Convergence, 13 October 2009



## Guidelines and Guidance

- The Commission has adopted guidelines and guidance with respect to the application of Articles 81 and 82 to provide assistance to businesses and their advisors.
- Guidance/guidelines have been issued in the following areas:
  - market definition,
  - agreements which do not have appreciable effect ('de minimis'),
  - effect of trade concept,
  - application of Article 81(3),
  - enforcement priorities on application of Article 82 on abusive exclusionary conduct



## Private Actions

- The European Court of Justice has declared that persons injured by conduct contrary to Articles 81 and 82 have a right of private for damages before national courts:
  - Case C-453/99, *Courage and Crehan*, [2001] ECR I-267
  - Case C-295-298/04, *Manfredi*, [2006] ECR I-6619
- In 2005 the Commission launched a consultation about the lack of success of private actions for damages in the courts of the Member States and the action that can be taken at the Community level to address this.



## Private Actions (cont'd)

- Following a public consultation on a Green Paper published in December 2005 (COMP(2005) 672 final), the Commission released in April 2008 “White Paper on Damages actions for breach of the EC antitrust rules” (COM(2008) 165 final) proposing concrete measures to make private enforcement systems more effective in Member States.
- The White Paper proposes measures to provide for
  - representative actions and opt-in collective actions;
  - access to evidence through disclosure *inter partes*;
  - binding effect of decisions of NCAs of Member States;



## Private Actions (cont'd)

- limitation on the requirement to prove fault if there is an infringement;
- guidance on the calculation of damages;
- dealing with the passing-on defence with respect to overcharges;
- limitation periods to commence an action;
- modification of cost rules used by national courts; and
- protection of corporate statements made in applications for leniency.



## Private Actions (cont'd)

- In the United Kingdom and Germany, in particular, there are a large number of private actions for damages for breach of national and EC competition laws.



## EC Merger Regulation: Overview

- At the Community level, the EC Merger Regulation (Council Regulation (EC) No 139/2004 (“ECMR”) provides for a system of a review of certain transactions (‘concentrations’) that must be notified to the Commission before they can be completed. The original merger regulation was adopted in 1989: Council Regulation (EEC) No 4064/89.
- The term ‘concentration’ is defined in terms of change of control arising from (Article 3, ECMR):
  - a merger of two or more independent undertakings;
  - an acquisition of direct or indirect control including by purchase of securities or assets or by contract; or
  - a creation of a full function joint venture.



## Overview (cont'd)

- The concept of control is focused on “the possibility of exercising decisive influence on an undertaking” (Article 3(2), ECMR). Therefore, control is *de jure* or *de facto*.
- The assessment standard is the test of whether the concentration would or would not
  - “significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position” (“SIEC”)(Article 2, ECMR)
  - SIEC standard considered similar to substantial lessening of competition standard (“SLC”)



## Overview (cont'd)

- At the Member State level, 26 of 27 Member States (exception being Luxembourg) have national merger control laws. Of these 26 Member States, 25 (exception being the United Kingdom) the national merger control laws contain provisions for the mandatory notification of certain transactions.
- With the exception of the United Kingdom, the jurisdiction to conduct a review of a transaction depends on whether the transaction is notifiable.



## Jurisdiction

- The EU merger review system is founded on the basis of notification, that is, a merger may be reviewed only if it is notifiable.
- Concentrations of a community dimension are notifiable.
- A concentration has a community dimension if one of two sets of conditions are satisfied.



## Jurisdiction (cont'd)

- Notifiable if, pursuant to Article 1(2), ECMR:
  - combined aggregate worldwide turnover of all undertakings is more than EUR 5 billion;
  - aggregate Community-wide turnover of each of at least two of the undertakings is more than EUR 250 million
  - **unless** each of the undertakings achieves more than two-thirds of its aggregate Community-wide turnover within one Member State.



## Jurisdiction (cont'd)

- Or, notifiable if, pursuant to Article 1(2), ECMR:
  - combined aggregate worldwide turnover of all undertakings is more than EUR 5 billion;
  - aggregate Community-wide turnover of each of at least two of the undertakings is more than EUR 250 million
  - **unless** each of the undertakings achieves more than two-thirds of its aggregate Community-wide turnover within one Member State.



## Case Allocation between Commission and NCAs

- Member States do not have any obligation
  - to adopt merger laws (26 of 27 Member States have),
  - to adopt a notification system as part of its national laws (25 of 26 Member States have),
  - to adopt national laws that are similar to the EC Merger Regulation (many Member States have).
- The Commission has sole jurisdiction to apply EU merger rules in ECMR (Article 21(2)).
- Generally, a Member State may not apply its national merger review laws to mergers with a 'community dimension' (Article 21(3)).



## Case Allocation (cont'd)

- Having regard to the ‘one-stop shop’ philosophy underlying the ECMR, there is a system for allocation or re-allocation of merger cases between the Commission and Member States:
  - “two-thirds rule” to deal with cases which have a clear nexus to one Member State;
  - parties may request, during the pre-notification period, to re-allocate a case to one or more Member States (Article 4(4), ECMR) or to the Commission (Article 4(5));
  - Member States may request, post-notification, the Commission to assess a case that falls below the thresholds under the ECMR (Article 22);
  - Member States may request that a case notified to the Commission be transferred in part or in whole to one or more Member States (Article 9).



## Case Allocation (cont'd)

- Reference:

- Communications from the Commission to Council: Report on the functioning of Regulation No 139/2004 (COMP(2009) 281 Final)



## Structure of Merger Review: Pre-notification and Phase I

- Prior to filing a notification, a common and frequent practice to have informal meetings between businesses with their advisors and the Commission.
- The initial phase (Phase I) starts with the filing of Form CO and runs for 25 working days (plus 10 days if remedies are offered).
- Under certain conditions, the Commission has a simplified procedure for notifications: Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2005/C 56/04).
- Parties have limited access to Commission files.



## Structure of Merger Review: Phase II

- If there are concerns, the case may be put into Phase II which lasts 90 additional days from the opening of this phase with possibility of extensions.
- Statement of Objections (“SO”) may be issued during Phase II.
- Rights of defence includes
  - review and comment on key documents;
  - full access to file except Commission internal documents and confidential documents



## Phase II (cont'd)

- Other interested parties may have non-confidential version of the SO and non-confidential version of parties' responses to SO.
- Time may be 'stopped' if requests for information are not provided within prescribed deadline: Article 10, ECMR.



## Structure of Merger Review: Rights of Defence and Third Parties

- Generally, right of parties to make known their views to the Commission and may take the form of (Article 18, ECMR):
  - written and informal oral submissions;
  - access to the file and comment on their contents;
  - respect for claims for protection of business secrets and other confidentiality information
- Third parties have a right to make their views known to the Commission (Article 18(4), ECMR)



## Structure of Merger Review: Investigative Methods

- The investigative powers include:
  - requests for information (Article 11, ECMR);
  - inspections (Articles 12 and 13, ECMR)
- For procedure infringements such as supplying incorrect or misleading information or failure to provide records, the Commission may impose fines (Article 14, ECMR).



## Investigative Methods (cont'd)

- Practically speaking, the Commission draws on a multitude of sources in reviewing a merger including:
  - information and document provided by the parties;
  - publicly available data and information;
  - industry reports;
  - customer information including testimony from interviews and/or questionnaire and surveys;
  - competitor information including testimony from interviews and/or questionnaire and surveys;
  - economic studies and reports submitted by parties or prepared by or for the Commission.



## Guidelines and Guidance

- The Commission has issued guidelines or guidance to assist businesses and their advisors including with respect to the following areas:
  - remedies (Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004);
  - ancillary restraints (Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03);
  - relevant market (Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ C372, 09.12.1997, pp. 5-13);



## Guidelines and Guidance (cont'd)

- horizontal mergers (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03);
- non-horizontal mergers (Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 265/07);
- Best Practices on the conduct of EC merger control proceedings;
- Model Text for Divestiture Commitments; and
- Model Text for Trustee Mandate.



## Decisions

- The Commission consults with the Advisory Committee on Concentrations (consisting of representatives of NCAs) before adopting most decisions including decisions declaring a concentration compatible or incompatible with the common market (Article 8(1) to (3)) and imposing fines for procedural infringements (Article 14): Article 19, ECMR
- Decisions are published (Article 20, ECMR)
- Decisions may be reviewed by the Community courts (Article 230 EC).



## General Reading References

- To follow up on the topics covered in this presentation, the following leading texts in the English language on European competition law should be consulted:
  - Bellamy and Child, *European Community Law of Competition, Sixth Edition*, Peter Roth and Vivien Rose, eds., Oxford University Press, 2009
  - Jonathan Faull and Ali Nikpay, eds., *The EC Law of Competition, Second Edition*, Oxford University Press, 2007
  - Richard Whish, *Competition Law, Sixth Edition*, Oxford University Press, 2009



# The End



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