

Session I – Overview of a case investigation

Enforcement priorities: industries, conduct and practices

- Does the case relate to strategic policy choices?
- Are there indications that the market is not functioning well?
- Can the conduct concerned be presumed to negatively affect competition on the market in view of the undertakings' market power?
- Can the conduct concerned be presumed to have *direct* effects on consumers due to the particular *sensitivity* of the market for them?
- Can competition law enforcement be used to address the problem? If yes, is it the most effective answer?
- Economic and/or legal precedent value of enforcement
- In the context of the EU, is the Commission or a national authority better placed to take action?

Indicators of anti-competitive conduct and practices

- 1. price related problems (e.g. significant price changes or price trends that are not connected with developments in cost and/or demand factors, high price/variable cost ratio, suspicious price differences between territories or customer groups, etc.) and/or persistence of high profits;
- 2. lack of new entry; evidence of exit; low rate in switching of supplier by customers;
- 3. degradation of product or service quality or reduced supplies (e.g. on the basis of complaints from customers, trends of quality measurements, comparison of quality measurements across comparable organisations, trends of capacity development);
- 4. lack of innovation (e.g. on the basis of historic rate of innovation).

Decision to open an investigation

- Does the 'harm' constitute a potential violation of competition law?
 - Note that not every concern with competition is a potential of competition law
- if there is no obligation to open an investigation in every case of a possible infringement, the authority then decides whether the case is of sufficient importance to warrant investigation based on the enforcement priorities of the authority

Planning an investigation

- conducting an investigation requires
 - developing a case plan on how to investigate including identifying
 - the persons from whom evidence is to be obtained
 - the types of techniques to use to obtain the evidence
 - forming a case team with the appropriate set of skills
 - legal, economic, business
 - industry knowledge or experience
 - setting timelines

Use of experts: industry knowledge, economic analysis

- Economic expertise – in-house - Chief Economist
- Scope of involvement (intensity):
 - (i) full secondment;
 - (ii) data processing and analysis,
 - (iii) review and comment of parties' economic submissions,
 - (iv) request for opinion,
 - (v) request for advice.
- Technical expertise – out-house
 - Rare event e.g. Microsoft case (very technical)
- Then what?
 - Compare complainants/defendants views
 - Rely on other Commission services' expertise

Preparing an investigative report

- at the conclusion of an investigation, the investigative report sets a reasoned analysis supporting the conclusion as to whether or not there is an infringement and if so, the appropriate sanctions
 - the evidence relied on and the evidence rejected
 - the theory of harm
 - the ‘story’ as to why there is or is not an infringement

Cooperation and assistance within the European Competition Network (ECN) with Member States' NCAs



European Competition Network:
(Commission + national competition authorities).

- Informing each other (new cases, envisaged decisions);
- Coordinating investigations;
- Helping each other (e.g. exchanging evidence);
- Discussing issues of common interest.

National competition authorities and courts have power to apply articles 101 and 102 TFEU in full.

Cooperation and assistance from foreign jurisdictions (other than EU Member States)

- What can be done:
 - Compare general case notes not including « evidence »
 - Organise simultaneous inspections
 - Exchange information from merger parties or cartel immunity applicants (with a confidentiality waiver)
 - Discuss remedies to ensure compatible outcomes
- What cannot be done:
 - Exchange confidential information (absent a waiver from the parties)
- Leniency
 - Interoperability (avoiding contradictory programmes creating a disincentive to businesses)
 - Leniency applicants are required to inform about applications in other jurisdictions
- Inspection ("dawn raids")
 - Timing is key: need for joint inspections to avoid destruction of evidence
 - No possibility to exchange confidential information prior or after dawn raid!

Resolving competition concerns without a full investigation: commitments and settlements

- various measures are available to resolving allegations of an infringement without the completion of a full investigation
 - accepting commitments without finding of liability
 - entering into a settlement with a finding of liability and a reduced level of fines (under EU practice only for some cartel cases)

Infringement decision including sanction: drafting decision and reasons

- the European Commission and the competition authorities of the 28 Member States are required by law to give reasons in support of its decisions on infringements and fines
- reasoned decisions set out
 - the findings of facts and evidence in support and the evidence rejected
 - the inferences drawn from the findings of facts
 - the theory of harm
 - the legal analysis supporting the conclusion