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Investigative Techniques Session II

Information sources and handling the file

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The views expressed in this presentation are personal and do not necessarily reflect the official position of the European Commission

Overview over topic covered

- Sources of information in anti-monopoly investigations
- What information to collect?
- How to collect evidence?
 - Written requests for information to parties and third parties
 - Oral interviews of parties and third parties
 - Unannounced inspections to obtain documents (“dawn raids”)
- Cooperation and assistance with other authorities
- Use of surveys
- Use of experts
- State of Play meetings
- Due process – the file
 - access to file
 - preparing record of evidence for use in making merits decision

Information sources in Anti-monopoly investigations

Proactive detection activities:

- Build up sector knowledge
- Industry contact > Outreach/Advocacy/Education
- Monitoring activities > Read the (specialised) press, the internet, trade associations' studies and reports
- Other government bodies/competition authorities
- Sector inquiries

Reactive detection activities:

- Formal Complaints / Informants / Whistle-blowers
- Leniency applications

What information to collect?

Regulation 1/2003, Art 18(1):

- "...*all necessary information...*" to verify the existence of the alleged infringement
- Commission enjoys a margin of appreciation, but:
 - Principle of proportionality applies
 - Privilege against self-incrimination
 - Legal privilege
- What do to with conflicting evidence?
 - Commission must weigh all facts on the file

How to collect evidence?

Written requests for information

- Simple requests (Reg. 1/2003, Art. 18(2))
- Requests by decision (Reg. 1/2003, Art. 18(3))

Inspections

- Voluntary (Reg. 1/2003, Art. 20(2))
- Dawn raids – by decision (Reg. 1/2003, Art. 20(4))
 - Oral explanations (Reg. 1/2003, Art. 20(2)e)

Interviews (Reg. 1/2003, Art. 19)

- Oral corporate statements

Written requests for information

3 types:

- Requests for documents
- Explanatory questions
- Requests for data

What information is relevant?

Preference: Direct evidence:

- "Smoking gun": document clearly proving an infringement e.g. meeting notes with names, market shares, target prices.
- Other documents clearly pointing to an infringement
- Corporate (oral) statement

Second priority: Circumstantial evidence:

- Other documentation or oral statements corroborating an allegation of an infringement incl. dates, locations, content of and participants in meetings
- Case: *Refrigeration compressors*: "...a scheme of anti-competitive contact with the aim to limit their individual commercial conduct..." and "...exchanged sensitive commercial information on capacity, production and sales trends..."
- : *CRT Glass*: "...marketing departments check...compliance with cartel arrangements (through information obtained from ...customers)."

Evidence assessment: standard of proof

- Sufficiently precise and conclusive evidence (firm conviction)
- The body of evidence taken as a whole
- Statements: if contested; needs to be supported by other evidence
- If rely on fragmentary evidence with inferences, can be rebutted by another plausible explanation.

Written requests for information

Important points:

Cross-check with

- documents obtained from dawn raids
- documents obtained from other parties to the case
- Not always clear whether info is incorrect, incomplete or
- misleading (requirements for liability: intent, negligence)
- No need to show value of information
- No self-incriminatory questions

Oral interviews of individuals

Power to take statements during inspections (art. 20)

- Duty to answer

Interview (art. 19)

- Voluntary – no compulsion
- Requirement: link to an investigation
- In person, telephone or other electronic means
- Recorded electronically

Inspections – which locations?

Business premises (Article 20)

- Commission decision (Article 20(4))
- Simple mandate (Article 20(3))
 - companies do not have to submit to the inspection
 - It usually concerns follow-up inspections or inspections in immunity applicant's premises

Private premises (Article 21)

Reasonable suspicion of documents present in premises

Court search warrant needed

No sealing, no oral statements

Inspections - Investigative powers

- Enter any premises, land and means of transport of the company under investigation;
- Examine the books/other records related to the business, independent of the medium on which they are stored;
- Take or obtain in any form copies of or extracts from such books or records;
- Seal any business premises and books or records;
- Ask any representative or member of staff of the company for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

Inspections - Duty to cooperate / obstruction

Active cooperation required, otherwise "obstruction":

- Examples: denying/delaying access, destroying documents, breach of seal,
- Consequences of non-cooperation:
 - i. aggravating circumstance
 - ii. separate fine: Article 23(1)(c) of Reg. 1/2003: 1% of TO
 - EPH case (COM decision of 28 March 2013)
 - » Obstruction of digital evidence gathering
 - » EUR 2,5 million fine for a refusal to submit to an inspection
- Right to consult a lawyer to get advice
- Legal privilege (only for external lawyers)

Electronic evidence (1)

Reg. 1/2003: *'any books and records related to... business, irrespective of the medium on which they are stored'*

- Trend: More electronic material than paper
- Electronic material often not fully deleted
- This requires:
 - Hardware and software / Training/specialised staff
 - Substantial budget
- Company obliged to assist on "specific tasks":
 - Block email accounts / disconnect computers
 - Remove and re-install hard drives
 - Provide 'administrator access rights'-support

Electronic evidence (2)

Documents are selected (no systematic 'imaging' of entire content)

Company receives list + copy of documents

Review done on the spot, on the basis of the content of the individual document (in the presence of company representative)

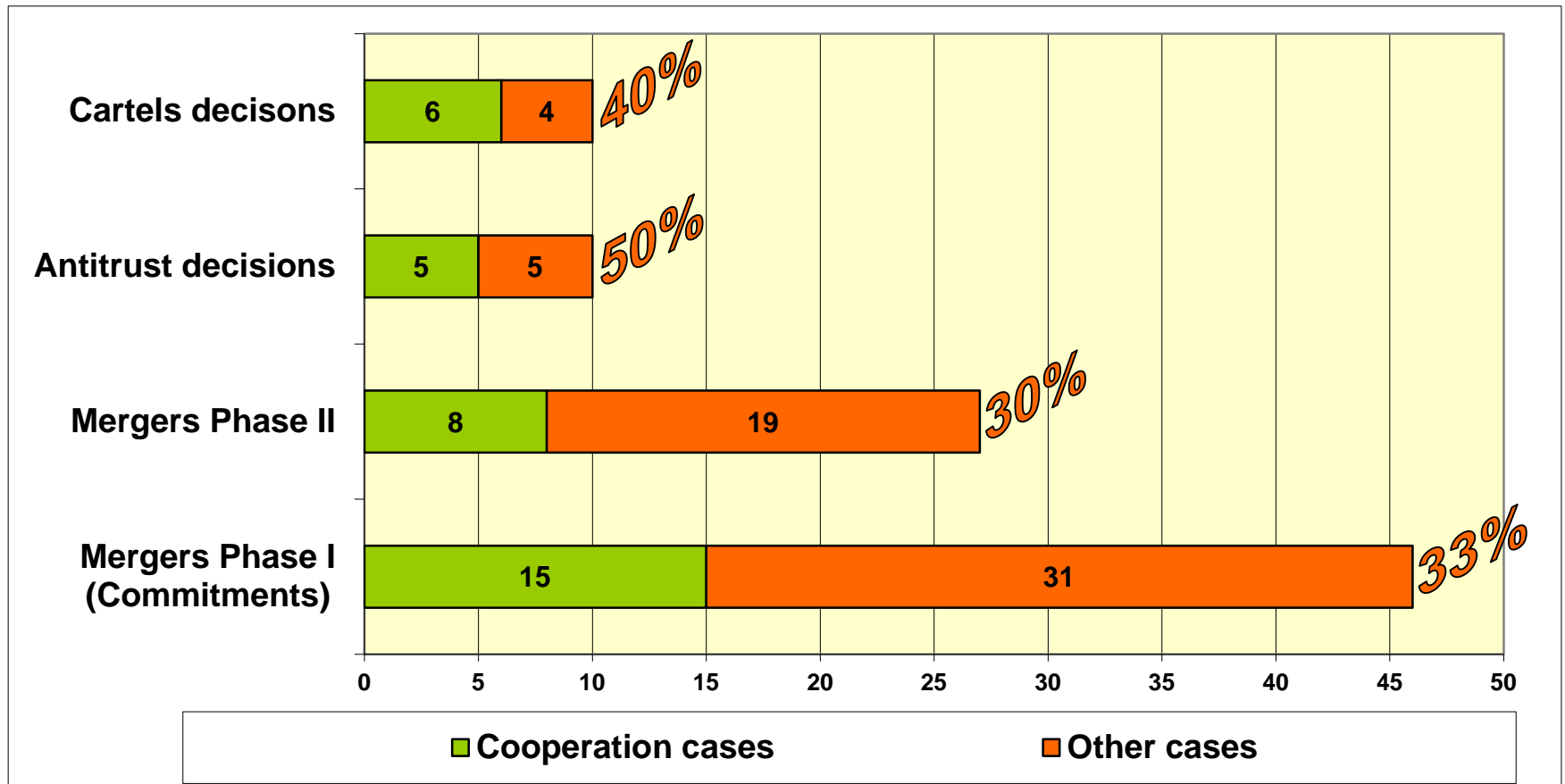
Sealed envelope (or 'continued inspection') procedure remains exceptional



Cooperation and assistance with other authorities: Why?

- Globalisation: relevant markets become increasingly global
- Proliferation of competition regimes: ensure effectiveness of investigative measures and enforcement decisions
- Increase interoperability of rules
- Increase predictability, legal certainty and transparency reducing firms' policy risk and administrative burden
- Case-related international cooperation is part of DG COMP's daily operations (in particular in cartel and merger cases)

Cooperation and assistance with other authorities



Cooperation and assistance with other authorities: What do we do?

"Soft/hard" Convergence of legal frameworks:

- Multilateral cooperation: ICN, UNCTAD, OECD, ASEAN etc.
- Bilateral Policy co-ordination, not case-specific

Enforcement Cooperation

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)

How does international cooperation work in the case of anti-cartel enforcement?

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 to or after dawn raid!

Use of consumer surveys

Purpose:

- Generate data on patterns of switching to inform on either market definition or closeness of substitution

Ryan Air / Aer Lingus case:

- Econometric analysis on air fares insufficient to determine competitive constraints between parties
- Multiple choice questionnaire – 2674 replies
 - DG Comp design in association with parties
 - Consultation of parties important to counter criticism
 - In-house analysis of result (Chief Economist Team)

Use of experts

- 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

Dealing with parties and third parties about status of investigation: State of Play meetings

- Objective:
 - contribute to quality and efficiency of DG Comp's decision making process
 - ensure transparency and communication between the investigated parties and DG Comp
- Timing: Key stages of investigation
 - Opening of proceedings
 - Advance preliminary concluding stage of investigation
 - After reply to Statement of Objections/Oral Hearing
- Format:
 - DG Comp senior management

Dealing with parties and third parties about status of investigation: Other meetings

Generally: Technical level meetings are possible throughout the procedure

Exceptionally triangular meetings:

- DG Comp initiative in interest of investigation to hear views on factual issues in a single meeting
- Timing: early in investigation before Statement of Objections
- Investigated parties/complainants and/or 3rd parties
- Senior DG Comp management

High level meetings:

- Director General / Commissioner
- Senior company executives

The investigation file - Due process and the parties' access to the file

Unlimited review by the European General Court:

↳ Unlimited complete judicial review (stringent and detailed) of both substantive assessment (fact & legal) and procedure

Courts impose strict observance of rights of defence of parties:

What does that mean?

- ↳ Decisions are extensively reasoned as if standard of review were simple error (and not manifest error)
- ↳ Parties have full access to all documents in the Commission's file obtained, assembled and produced during the investigation leading to **objections**
- ↳ Content of the file:
 - All documents on all forms of information support, obtained, produced and or assembled by DG COMP during the investigation that has led the Commission to raise its objections
 - Few exceptions:
 - Non case-related documents
 - Internal notes
 - Confidential documents (Commission produces non-confidential version + reason)
 - Business secrets
 - Other confidential documents

The investigation file - Due process

preparing record of evidence for use in making merits decision

Records of contacts during investigative phase:

- Minimum required: accessible brief notes of meetings/phone calls with parties/third parties (template)
- Table of brief notes of meetings and phone-calls (template)
- Minutes of meetings with parties - submitted or agreed by the parties/third parties
- Interviews – recording/transcript



Thank you for your attention!

See all EU laws, Regulations, Guidelines and Notices, decisions, press releases etc. on:

http://ec.europa.eu/competition/index_en.html