



Session II – Evidence and investigative tools in merger investigations

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Sophie Moonen
European Commission, DG Competition

The views expressed are personal to the speaker

Overview

- *Goals of investigation*
- *Scope of investigation*
- *Types of evidence*
- *Sources of evidence*
- *Investigatives tools*
 - *Parties' submissions*
 - *Requests for information*
 - *Phone interviews*
 - *Site visits/inspections*
 - *Internal documents*
 - *Quantitative analysis*
- *Confidentiality practices*

Goals of the investigation

- *Get a feeling" of **how the market works***
 - Which products / services are affected by the transaction?
 - What is the role of the parties in the market?
 - Who are the main customers/competitors?
 - What are the drivers for competition (e.g. innovation, quality, etc.)?
- *Assess **competitive impact of the merger***
- *Collect evidence to **substantiate decisions***
- *Collect information for **remedies discussions***

Scope of the investigation

*The scope of investigation (i.e. how much information, how many addressees, which investigative tools) depends on the **type of case**:*

- **Simplified cases → no real investigation**
 - Double-check the submissions of the parties
- **“Normal” Phase I cases → investigation to confirm absence of competition problems**
 - Short questionnaires / calls with selected market players
- **“Difficult” Phase I / Phase II cases → In-depth investigation to assess the impact of transaction and prepare for remedies**
 - Detailed questionnaire and calls with large sample of customers / competitors, internal documents, site visits, quantitative analysis, etc.

Sources of evidence

- *Parties*
- *Competitors*
- *Customers*
- *End customers*
- *Industry regulators (e.g. telecoms or energy) or other third parties (e.g., European Space Agency, airport authority)*
- *Industry experts (e.g., doctors)*
- *Industry publications*
- *Previous Commission decisions or decisions of national competition authorities*



Investigative tools

- *Form CO and submissions from the parties*
- *Article 11 requests for information*
- *Meetings and phone interviews with market participants*
- *Site visits, inspections*
- *Internal documents from parties and third parties*
- *Economic evidence – quantitative analysis (Chief Economist Team)*
- *Public sources of information: industry reports, market studies, internet, etc.*
- *Customer surveys*
- *Contacts with other competition authorities, industry regulators (e.g. telecoms, energy) or other agencies*



Parties' submissions

- **Starting point** for (almost) every market investigation
- Parties' submissions include:
 - Form CO
 - Response to Art. 11 RFIs
 - Remedies submissions
- Present the **parties' views** of the market
- Must be read **carefully** and **taken into account** for final decision
- Information provided by parties must generally **be double-checked with market participants**



Requests for information

- **Article 11(2) letter** (*simple request for information*)
 - Typical tool to collect information and verify the facts and figures provided in the Form CO
 - Fines for incorrect or misleading response
 - May be sent by fax, e-mail, e-questionnaire
 - E-Questionnaire is the standard Commission's application to send simple requests for information to market players; multiple advantages (easy to fill-in for respondents, huge number of responses can be processed and exported (statistics), tracking of response status, easy management of access to file)
- **Article 11(3) decision**
 - Rarely used, mainly if the parties do not want to cooperate (usually only in Phase II) or for obtaining information from third party that is essential to the case
 - Fines for incorrect, misleading or incomplete response, or for lack of response
 - May trigger a “stop-the-clock” if the parties fail to fully reply

Requests for information

- *Ideally, requests for information sent out on day 1*
 - Typical deadline: 5 working days...but extensions are common
 - Case team needs to know if problems on days 10-12 (state-of-play meeting on ~day 15)
- *Ensure a satisfactory response rate*
 - Track response status
 - Chase companies who have not responded (especially key players)
 - Commission cannot fine companies if they do not respond to a simple request for information; the Commission may issue a formal RFI if appropriate

Phone interviews

- *Can be crucial for the investigation*
- *Usually conducted after notification in Phase I or Phase II to:*
 - **Better understand market dynamics**
 - **Expand on issues raised in written replies**
 - **Market test remedies**
- *Interviews in pre-notification useful to identify competition concerns early in complex cases and prepare better/more targeted questionnaires*
- *Based on a list of questions/topics for discussion, sometimes sent in advance*
- *Agreed minutes (also non-confidential version)*

Site visits/inspections

- *Usually in pre-notification or start of Phase II*
- *Normally at parties' production site*
- *To confirm parties' arguments (e.g. supply-side substitutability)*
- *To speak with business people*
- *To prepare for remedies discussions*

- *Inspections exceptionally used in mergers*



Internal documents

- *Very important sources of evidence*
- *Views of business people on market developments and competitors*
- *Normally requested from the parties, rarely third parties*
- *Types of internal documents:*
 - Management meeting minutes and e-mails
 - Strategic presentations to board of directors
 - Business plans
 - Etc.



What can internal documents tell us?

- Transaction rationale
- Parties's view on the product and geographic market definition, product segments, etc.
- Competitive assessment:
 - Competitive landscape: Who do the parties see as close/closest competitor? Who is the market leader in terms of technology, product offering, etc.? What are the technical capabilities of the parties and competitors? Role of imports?
 - How do the parties see the market dynamics: who is expected to grow? who is pricing aggressively?
 - Investment plans, R&D/new products
 - Evidence of countervailing factors (buyer power, entry, failing firm defence, efficiencies, etc.)
 - Possible remedies (sometimes discussed; useful information for remedies discussions such as cost structure of plants)

How to process internal documents?

- *Ask for internal docs prepared before the transaction*
 - E.g. internal docs going back to 2-3 years before announcement of transaction
- *Ask for companies' organigrammes to identify relevant people*
- *Target the document request: clear time period, the kind of documents, prepared by whom and for whom, possibly using keywords (if not using keywords, ask parties to submit methodology for identifying responsive documents (e.g. keywords used, number of hits))*
- *Review can be time-consuming, so internal document review should start before notification or early in Phase II*
- *IT tool (e-discovery) to search and review large volumes of documents*
 - "Smart search" - List of search terms
 - Tools to share results of document review

Quantitative analysis

- *Economic and econometric analysis can constitute strong piece of evidence if:*
 - Analysis is sufficiently robust; and
 - Results are consistent with qualitative findings of market investigation
- *CET involved at an early stage to identify which type of analysis can be appropriate*
 - *Discussions with parties/third parties to understand whether data required for the analysis is available*
- *Quantitative analysis can be burdensome and should be therefore used only in complex cases*
- *Examples:*
 - Price correlation analysis (market definition)
 - Merger simulation models (competitive assessment)
 - Bidding analysis (closeness of competition in competitive assessment)

Confidentiality practices

- *Rights of defence: Commission cannot rely on information that has not been made accessible*
- *Right of access to file for the notifying party (but not to own documents of the notifying party)*
 - Preparation of access to file starts early (request non-confidential versions of third parties' reply to requests for information; minutes of interview; submissions; etc.)
 - Quality of the non-confidential versions
 - Access to file granted after adoption of statement of objections and on a rolling basis
- *Data rooms arrangements for confidential data and internal documents of third parties*