



## MOFCOM: Conducting a merger investigation EU Commission experience

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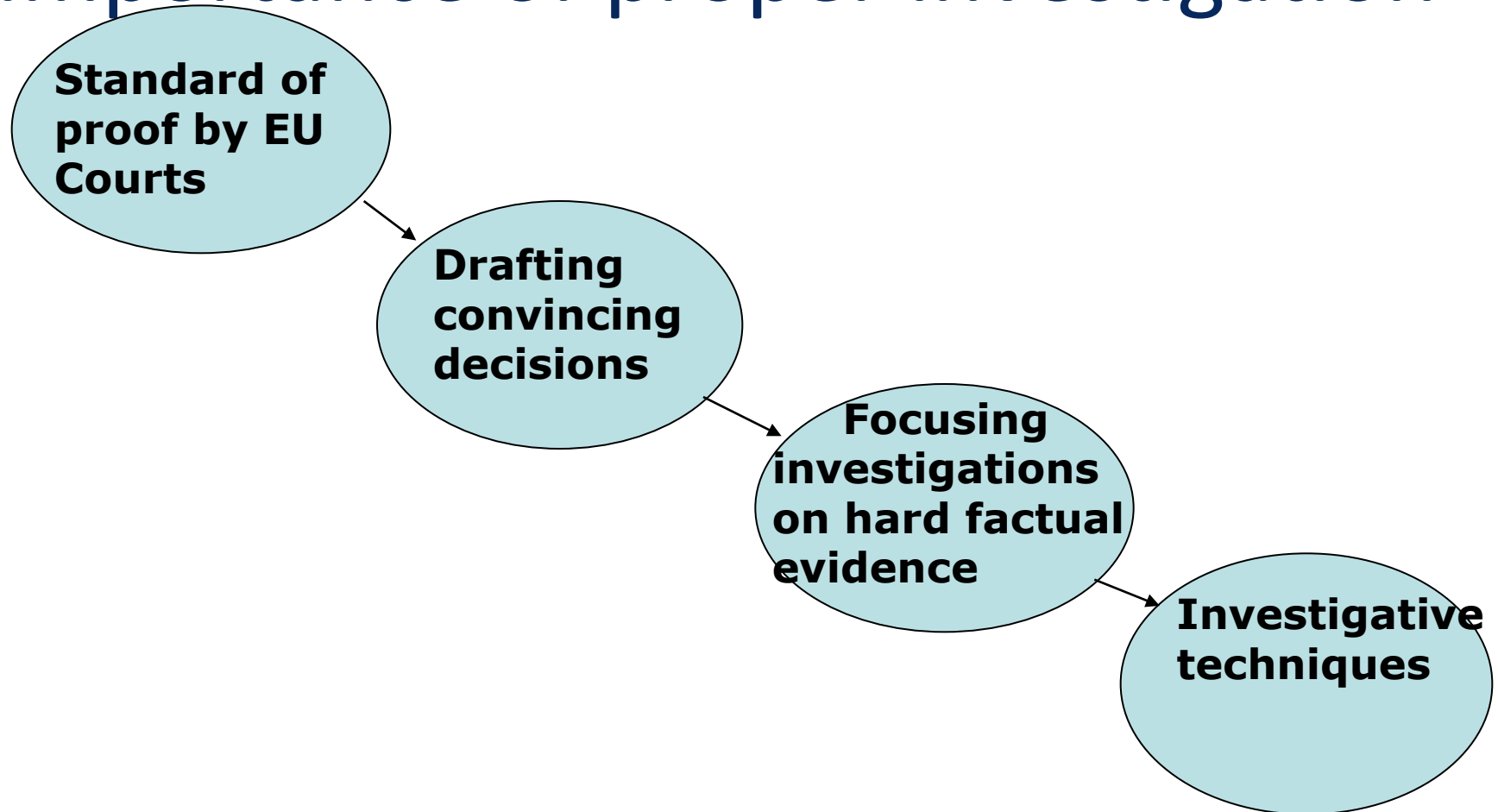


## Agenda

- Importance of proper investigation
- Identifying goal and scope of investigation
- Case team composition and planning
- Sources of evidence



## Importance of proper investigation





## Standard of proof set by EU Courts

- Test of ‘balance of probabilities’
  - Symmetrical standard for prohibitions and authorisations
  - Evidentiary requirements more stringent for
    - Vertical cases
    - Collective dominance cases
    - Conglomerate mergers
- Negative decisions:
  - It is more likely than not that the merger will lead to a Significant Impediment of Effective Competition (‘SIEC’);
- Authorisation decisions:
  - It is more likely than not that the merger will not lead to a SIEC;
  - Merger cannot be authorised just because there is insufficient evidence to prohibit the transaction!



## Identification in the decision of all the evidence used

- Decision must contain all relevant evidence
- Failure to do so cannot be remedied ex-post before the courts
- Clear identification in decision of relevant evidence
  - Cite the sources of the evidence used
  - Link with the case file
  - Clerical checks of completeness and accuracy of references for SOs and Phase II decisions.



## Confidentiality of information

- Special care when drafting non confidential versions
- Requests to conceal information from public version to be balanced against the need to have coherent and understandable decision;
- Particularly important if decision is challenged by third party
- Try to obtain waivers from the parties and third parties



## Goal and scope of the investigation (1)

**Rule 1: adapt scope of investigation to complexity of the case and available resources**

**Rule 2: be flexible and change goal/scope whenever required**

- **Simplified procedure cases**

- Goal: to make sure that case is indeed simplified
  - Usually no market investigation
  - Collection of information from the parties

- **Probably unproblematic cases**

- Goal: to discard any competition concerns
  - Collection of complete information from the parties
  - Collection of information from third parties
    - Double-check parties' submissions
    - Short and focused Art.11 requests + optional phone calls to key players



## Goal and scope of the investigation (2)

- **Complex cases: complex phase I possibly with remedies + phase II**
  - **Goal: to collect evidence to be able to either prohibit or clear the case with or without remedies**
    - Look for possible in-culpatory and exculpatory evidence
    - Where appropriate investigation must prepare the negotiation of remedies





## Case team composition

- Adapt **size** of case team to complexity:
  - Two case handlers minimum
  - Big teams comprise 3 to 6 core case handlers + support from economists and co-ordination
  - Case teams should not be too large!
- Adapt **composition** to features of the case and available resources
  - mix experienced and less experienced
  - sectoral expertise
  - legal vs economic issues
  - manage rights of defence and confidentiality



## Planning of complex investigations

- **Theories of harm** as starting points
  - identify factual elements necessary to prove or disprove theory;
  - constantly go back to guidelines
- Determine **type of evidence** which will support or disprove the existence of those factual elements (e.g. hard pricing data, past natural experiments, qualitative elements, survey data)
- Determine possible **sources of evidence** (parties, third parties, publicly available information)
- Determine **method to gather the evidence** from the identified sources (request for internal documents, request for information to third parties, data request, internet search, interviews...)
- Establish an **investigative plan**; constantly **adapt** plan



## Sources of and methods to gather evidence (1)

- **Notification: Form CO**
  - Information provided by the notifying party according to structured form
  - Includes market definitions, shares, competitive assessment of the parties, internal documents, contact details
  - Refined and improved in pre-notification on the basis of questions and comments from the case team insisting on completeness
  - If incomplete, parties can be forced to re-notify (e.g. Philips/Indal)
- **Internal documents from the parties and (more rarely) third parties**
  - Business plans, strategy documents, internal reports established in ordinary course of business,
  - hard evidence which can not easily be contested
  - No confidentiality issues, if emanating from the notifying party
  - Watch out for legal privilege, mass of documents, possibly containing exculpatory documents



## Sources of and methods to gather evidence (2)

- Information requests (Article 11) to parties, third parties
  - Most common tool to gather evidence
  - Simple request vs. request by decision
  - Watch out for jargon, biased replies, confidentiality issues
- Meetings with the parties and third parties
  - Useful for complex issues (e.g. IT cases)
- (Telephone) interviews => agreed minutes
  - Useful for checking issues and obtaining quickly evidence



## Sources of and methods to gather evidence (3)

- Site visits, inspections
- Public sources of information (Reports from public authorities, Internet, library, etc)
- Contacts with other authorities (request waiver from parties)
- Econometric studies/models
- Customer surveys



## Probative value of evidence

- Factors affecting the probative value of evidence:
  - Nature of evidence: facts vs. opinions
  - Independence of the source in relation to the parties;
  - Strategic interests that the author might have in particular outcome;
  - Moment when information was given/processed (pre-merger vs. contemporaneous merger documents);
  - The objective for which the information was produced (produced in the ordinary course of business vs. produced for the merger investigation)
- In recent years shift of focus to gather more hard factual evidence, in particular from internal documents and hard economic data