



European Commission

# Competition

## MOFCOM: Conducting a merger investigation Information requests to notifying parties

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## Agenda

- Legal basis for information requests
- Other means to obtain information from parties
- Standard requests during the investigation
- Requests in pre-notifications
- Requests for internal documents
- Requests for economic data and evidence



## Legal basis for information requests to parties

- Art.11(2) letter = “simple request for information”
  - For parties, but also for third parties
  - Most common and important tool to verify the facts and figures provided in the Form CO and to collect new information and
  - Format unimportant (may be fax, e-mail etc.)
  - Today mostly in the form of **e-questionnaire**
- Art. 11 (3) decision = threat of fines and penalties (Art. 14, 15 ECMR) for lack of (or incomplete) response
  - For parties, but also for third parties
  - Relatively rare, used mainly if parties don't want to cooperate (usually only in the second phase)
  - May trigger “stop the clock” if parties fail to fully reply
- Safeguards: Legal professional privilege



## Other means to obtain information from the parties

- **Meetings** with parties and their experts (e.g. in IT cases)
- **Voluntary site visits** (e.g. factory site visit in Philips/Indal)
- **Surprise inspections** (e.g. Caterpillar engines case)
- **(Telephone) interviews** => agreed minutes



## How to formulate standard information request to parties

- Formulate questions as precisely as possible: ambiguous questions lead to ambiguous answers
- Use precise industry terminology: establish definitions
- Specify exact kind of data/measures/periods requested, e.g. kilotons, MWh, euros
- Be consistent in kind of data requested and in terminology
- Use closed questions where hard data required: yes/no, rankings, paired comparisons
- Use open ended questions to obtain more in-depth explanation
- Avoid biased or leading questions
- Place sensitive questions at the end
- Goal is to collect facts, not opinions!



## Requests in pre-notification period

- Use pre-notification requests to parties to get a complete notification form
- Waivers for unnecessary information (be careful)
- Crucial importance of obtaining well working contact details
  - Format: telephone, fax, personal e-mails
  - Where appropriate question the selection chosen by the parties



## Requests for internal documents

- **Internal documents = hard evidence**
  - Can hardly be contested by their authors
  - Frequently established independently of the merger control procedure
  - Generally no confidentiality issues vis-à-vis the parties => can be fully used in decisions and Court proceedings
- **“Pitfalls” of internal documents**
  - Must be interpreted in their context (not always obvious)
  - Internal documents often go both ways
  - Quantity of internal documents: risk of being “drowned” by mass of paper and of overlooking exculpatory material



## Techniques to obtain internal strategy documents

- Target specific documents
  - Ask first for agendas of decision making body within given time period
  - Request minutes of most interesting meetings/points
  - Identify and request underlying preparatory document
- ‘Remote inspection’
  - Ask for and explore organigram
  - Ask for all e-mails and internal documents send by or received by a given person during given period containing key words
  - Request documents on CD/hard drives in a searchable format (database)





## Requests for economic data and evidence from the parties

- Internal customer, price, rebates economic data is hardest form of evidence
- But careful preparation needed: anticipate issues of
  - data relevance and reliability,
  - choice of methodology,
  - interpretation of results,
  - robustness of findings
  - resources needed to explore data
- Economists on both sides need to discuss and scope exercise beforehand
- See Best practices for the submission of economic evidence:

[http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_submission\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf)