Elements of European Competition Law Procedure

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UJ

ANTITRUST AND MERGERS

- Enforcement of Articles 101 and 102 TFUE (Antitrust)
- Enforcement of Merger Regulation
- Enforcer: The European Commission

ANTITRUST

Framework Legislation

- Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1/1, 4.1.2003) amended by Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ L 68/1, 6.3.2004) and Council Regulation (EC) No 1419/2006 of 25 September 2006 (OJ L 269/1 28.9.2006) – Consolidated version of 18 October 2006

Implementing Legislation /Notices/Guidelines

- Commission Regulation 773/2004/EC of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123/18, 27.4.2004) amended by Commission Regulation (EC) No 1792/2006 of 23 October 2006 (OJ L 362/1, 20.12.2006) and by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ L 171/3, 1.7.2008) - Consolidated version of 1 July 2008
- Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275/29, 20.10.2011)
- Regulation 1182/71/EEC, Euratom of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124/1, 8.6.1971)
- Regulation No 1/58/EEC, Euratom determining the languages to be used by the European Economic Community (OJ L 17, 6.10.1958, p. 385) - Consolidated version of 1 January 2007
- Notices and guidelines (on fines, leniency, co-op national courts, ECN, *de minimis*, access to the file, handling of complaints, etc.)

THE INVESTIGATIVE PHASE

Origin of cases

- a complaint by ‘undertakings’, other natural and legal persons and a Member State; either by lodging a formal complaint or by simply providing market information to the Commission
  - - legitimate interest as complainant -> procedural rights
  - - cartel cases on the basis of ‘Leniency’ application
- The Commission may also open a case on its own initiative (*ex officio*)

THE INVESTIGATIVE PHASE

- Initial assessment and case allocation:
  - does the case deserve further investigation?
  - provisional definition of its focus, in particular with regard to the parties, the markets and the conduct to be investigated
  - investigative measures (Chapter V Reg. 1/2003: a request for information (Art. 18); an inspection (Arts. 20,21); or a sector inquiry (Art. 17 – see next slide)
  - allocation of cases within the European Competition Network (ECN): Reg. 1/2003 allows to reallocate cases to other ECN members – see Notice on co-operation within the ECN

THE INVESTIGATIVE PHASE

- Opening of proceedings Art.11(6) of Reg. 1/2003: the scope of the investigation
  - Complainants will be informed->see Notice on the handling of complains
- Languages
- Investigation: investigative tools:
  - Information requests: simple request/decision-> consequences Art. 23 Reg. 1/2003
  - 'all necessary information' (see e.g. Case T-48/00 Corus UK v Commission [2004] ECR II-2325, paragraph 212)
  - self-incrimination
  - inspections Arts. 20 and 21 of Reg. 1/2003 – scope of the inspection, refusal to submit to inspection – consequences
  - Legal professional privilege (LPP)

INSPECTIONS

05.11.2008 12:30

EU-Kommission bestätigt Durchsuchung bei Zementherstellern

BRÜSSEL (Dow Jones)--Die Europäische Kommission hat Durchsuchungen bei Unternehmen aus der Zementbranche bestätigt. Am Dienstag und Mittwoch seien unangekündigt Räumlichkeiten von mehreren Gesellschaften in den Mitgliedstaaten durchsucht worden, teilte die EU-Behörde am Mittwoch mit.

EU: Durchsuchungen bei mehreren Chip-Herstellern

von Christian Kahle für WinFuture.de

Wie erst jetzt bekannt wurde führten Ermittler der EU-Kommission Ende Oktober des letzten Jahres Hausdurchsuchungen bei mehreren Unternehmen durch, die Chips für Smartcards produzieren.

12.03.2008

Europäische Kommission führt Razzia bei Flugesellschaft durch

Razzia bei E.on

17.5.2006 - 06:27 Uhr

▸ Wettbewerb

Die EU-Kommission geht scharf gegen mangelnden Wettbewerb dem Gasmarkt vor. In mehreren Ländern wurden die Büros von Energieversorgern durchsucht

POSSIBLE OUTCOMES

- ‘No grounds to continue the case’-> Rejection of complaint if necessary
- Parties investigated offer commitments
- Procedure leading to prohibition decision
- State of play meetings
  - At any stage of the procedure with the parties (2 specific meetings in the commitment procedure)
  - Triangular meetings: also with complainant(s) and third parties
  - Assessment of the submissions made
  - The Commissioner for competition matters
  - The FILE

Procedure leading to a prohibition decision

- Right to be heard
  - Statement of objections (SO)/supplementary SO
  - Purpose and content
    'It is settled case-law that the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that basis that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them properly to defend themselves, before the Commission adopts a final decision.' (Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I-1307, paragraph 42, and Case T-352/94 Mo och Domsjö v Commission [1998] ECR II-1989, paragraph 63)"
    - Remedies
    - Fines
    - Letter(s) of facts

Procedure leading to a prohibition decision

- Access to the file
- Hearing Officer (Decision 2011/695/EU; see slide #5)
- Written reply to the SO/supplementary SO/letter of facts
- Administrative hearing: oral presentations

POSSIBLE OUTCOMES

- Dropping the case
- Objections are substantiated:
  - Commitment procedure (see next slide)
  - Prohibition decision
    - Participation of the national competition authorities (NCAs) - Advisory Committee
    - Decision taken by the College of Commissioners (no empowerment)
    - Information of the addresses
    - Publication in the OJ – now in the electronic version!
    - Settlement decisions
- Rejection of complaint

Commitment procedures

- Art 9 Reg. 1/2003
  - Not by cartels which fall under the Leniency Notice
  - Does not make any finding on the existence of an infringement: only commitments made binding
  - Conclusion that there are no longer any grounds for action
- Initiation of the discussions
- Preliminary assessment (PA)
  - Summary of the main facts of the case
  - Basis to formulate the commitments
  - SO always fulfils the requirements of PA
- Submission of commitments
- Market test of commitments

Rejection of Complaints

- Grounds for rejection
  - Insufficient grounds for acting: lack of EU interest
  - Lack of substantiation
  - NCA is dealing or has dealt with the same case
- The procedure
  - Information of the complainant, if no withdrawal ->
  - Formal letter informing of the preliminary conclusion
  - Reply to the letter
  - Formal decision rejecting the complaint
  - Rights of the complainant

Aspects of Fining policy

- Guidelines on the method of setting fines (2006)
  - Basic amount of the fine:
    - value of sales (affected directly or indirectly) in the last business year of the infringement – see point 18 Guidelines– relevant in 'stay away' from the EEA market cartels
    - Proportion of the value of sales depending on the degree of gravity of the infringement
      - Case-by-case assessment
      - Generally up to 30% of value of sales – point 22 Guidelines
    - Amount determined on the basis of value of sales multiplied by the number of years of participation in the infringement
    - Additional amount 15-25% - point 25 Guidelines

Aspects of Fining policy

- Adjustments to the basic amount
  - Aggravating circumstances
    - Recidivism; Refusal to cooperate; leader/instigator
  - Mitigating circumstances
    - E.g. termination of the infringement upon Commission's intervention (not for cartels); co-op outside the Leniency Notice; prove of actual avoidance to apply anti-competitive agreement; negligence
  - Increase for deterrence
  - 10% cap
  - Leniency
  - Ability to pay
- Possibility to impose a symbolic fine

Leniency Notice

- Rationale of the Leniency Policy
- For cartels only
- Self-serving?
- Requirements to qualify for immunity from fines
- Reduction of a fine

The legality of the Procedure

- Old debate
- Rule of law in competition law: debate focuses on fundamental rights
- Rule of law influences many issues:
  - The scope of the substantive rule: more economics?
  - Fines: e.g. legal certainty, production of bank guarantee in lieu of payment, etc.
  - Investigation: inspections, self-incrimination, right to be assisted by lawyer, LPP, etc.
- Factors possibly explaining on-going debate:
  - Increase in fines?
  - Low 'success rate' before EU Courts?

Respect of “due process” at present

- Rights of defence: right to be heard, access to the file, right to appeal against decisions
- Corollaries of rights of defence: Legal professional privilege, right not to incriminate oneself
- Third party rights: participation rights, rights of complainants
- Legality of the system confirmed endless times by EU Courts; some judgments led to changes in procedure (access to file, self-incrimination, etc)

Sources of procedural rights & guarantees after the Lisbon Treaty

1) Charter of Fundamental Rights of EU (CFREU)

2) European Convention on Human rights (ECHR)

3) general principles of EU law

4) regulations and decisions

5) Commission statements and practice

TEU

- Article 6(1) of the Treaty on European Union (TEU), as amended by the Lisbon Treaty:

  ‘The Union recognises the rights, freedoms and principles set out in the CFREU (…) which shall have the same legal value as the Treaties.’

CFREU does not create new rights

- Preamble: Charter ‘reaffirms […] the rights as they result, in particular, from the constitutional traditions […] common to the Member States, the ECHR, […] and the case-law of the Court of Justice of the EU and of the European Court of Human Rights.’

- Article 52 CFREU + Explanations

Charter and ECHR

- Art. 52(3) CFREU + Explanations + C-279/09 DEB:
  - meaning and scope of Charter rights correspond to rights guaranteed by ECHR are to be determined by reference to European Convention on Human Rights (ECHR) and case-law of ECtHR
- E.g. Art. 7 CFREU ('respect for private and family life') has same meaning/scope as Art. 8 ECHR; Art. 47 CFREU ('right to an effective remedy and to a fair trial') based on Art. 13 ECHR; Art. 48 CFREU ('presumption of innocence and right of defence') has same meaning/scope as Art 6(2) and (3) ECHR

ECHR

- already before Lisbon Treaty:
  - general principles of EU law
- Main provisions of the ECHR relevant to EU antitrust enforcement:
  - Art. 6 (right to a fair trial)
  - Art. 7 (no punishment without law)
  - Art. 8 (right to respect for private life)
  - Art. 13 (right to an effective remedy)
  - Art 4 of Protocol No 7 to the ECHR (right not to be tried or punished twice)
- after Lisbon Treaty:
  - reaffirmed in Charter
  - EU accession to ECHR

ECtHR case-law

- Bosphorus v Ireland (2005): the ECtHR considering in general the protection of fundamental rights by EU law:

  ‘*The protection of fundamental rights by [EU] law can be considered to be […] “equivalent” [“comparable”] to that of the Convention system*’ (paras 165 and 155)

O'Halloran v *U.K.* (2007):

- '*While the right to a fair trial under Article 6 [ECHR] is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case*' (para 53)
- Relevant in context of EU antitrust procedure is the distinction:
  - Hard core of criminal law (see case *Jussila v Finland*)
  - Other areas - only criminal in the wider sense – see Opinion AG Ruiz-Jarabo Colomer in C-338/00 *P VW v Commission*
  - Distinction natural persons/companies

Jussila v *Finland* (2006)

- Distinction between '*hard core of criminal law*' and '*cases not belonging to the traditional categories of the criminal law*', e.g. competition law:

- criminal-head guarantees do '*not necessarily apply with their full stringency* ' e.g. first-instance decision by administrative body combining investigation and decision-making, provided that possibility of appeal before judicial body with full jurisdiction

- i.e., if 'non-core' criminal, decisions must be subject to 'full jurisdiction', i.e. '*power to quash in all respects, on questions of fact and law, the challenged decision*.'

The Commission tries to meet the criticism: the Best Practices

- Set of 3 documents published on 6.1.2010:
  - *Best Practices for antitrust proceedings,*
  - *Best Practices for the submission of economic evidence and*
  - *Hearing Officer's Guidance Paper*

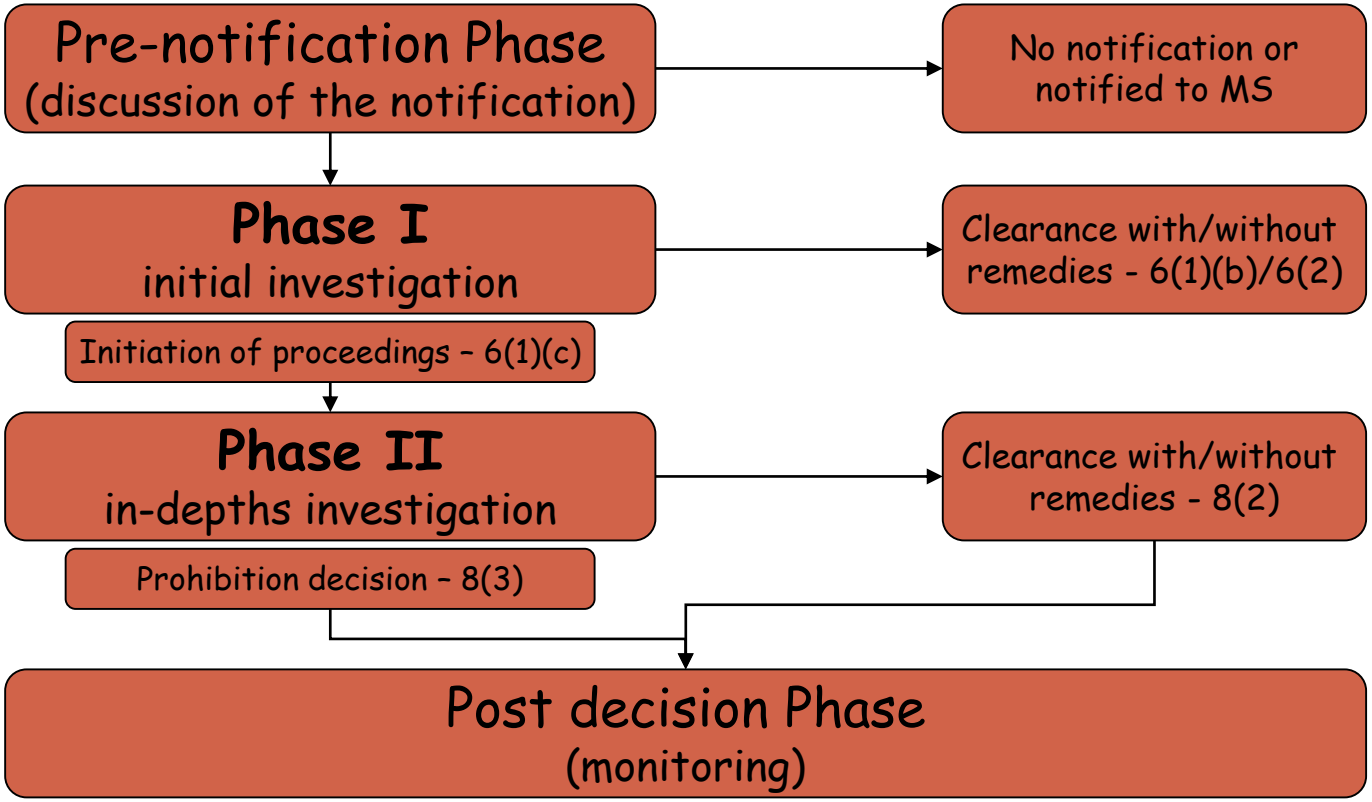
- Scope:
  - main proceedings on Art 101 and 102 TFUE
  - do not cover 106 TFUE
  - cover cartels with specific exceptions

MERGERS

LEGISLATION

- Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22
- Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004 (the 'Implementing Regulation') and its annexes (Form CO, Short Form CO and Form RS)

MERGERS


Pre-notification Phase
(discussion of the notification)
No notification or notified to MS
Phase I
initial investigation
Clearance with/without remedies - 6(1)(b)/6(2)
Initiation of proceedings – 6(1)(c)
Phase II
in-depths investigation
Clearance with/without remedies - 8(2)
Prohibition decision – 8(3)
Post decision Phase
(monitoring)

EU Merger Policy
III. Merger Practice

1. 'Phase 0': pre-notification

- Discussion of the case (jurisdiction, details of Form CO/Form RS, waivers; investigation possible – with agreement of parties)
- A case team is formed, consisting of a case manager (head of unit) and, normally, 2 to 4 case handlers
- Notification when agreement/bid concluded or intended (new Art.4)

2. 'Phase I'

- Simplified procedure? (low market shares, small joint ventures,…)
- **Market investigation – Article 11 letters**
- Remedies negotiations
- 25 working days (WD) from notification for decision-extended to 35 WD if remedies proposed within 20 WD
- **Decision:**
  - **6(1)(b): Clearance with/without commitments**
  - **6(1)(c): 'Serious doubts' remain -> initiating of proceedings**
  - **6(1)(a): (rare): no jurisdiction**

Majority of cases end in Phase I (~ 90%)

EU Merger Policy
III. Merger Practice

3. 'Phase II'

- In-depth investigation
- Questionnaires to customers, competitors, consumer associations etc. 'Art. 11 letters' to the parties; telephone interviews; sometimes: site visits
- Statement of objections
- Written reply by the notifying parties
- Oral Hearing (with third parties)
- Commitment negotiations
- Advisory Committee on Concentrations
- Final Art. 8 decision

If failure to meet deadline, merger deemed approved ('guillotine')

EU Merger Policy
III. Merger Practice

First Phase

Prenotification

Discussions on jurisdiction, Form CO shaping, start of market investigation possible

Notification

15 WD to propose referral ->+10 WD

20 WD to propose remedies ->+10 WD

Art. 6 Decision

Art. 6(1)(b) (Clearance)

Art. 6(1)(c) (Phase II)

25 WD

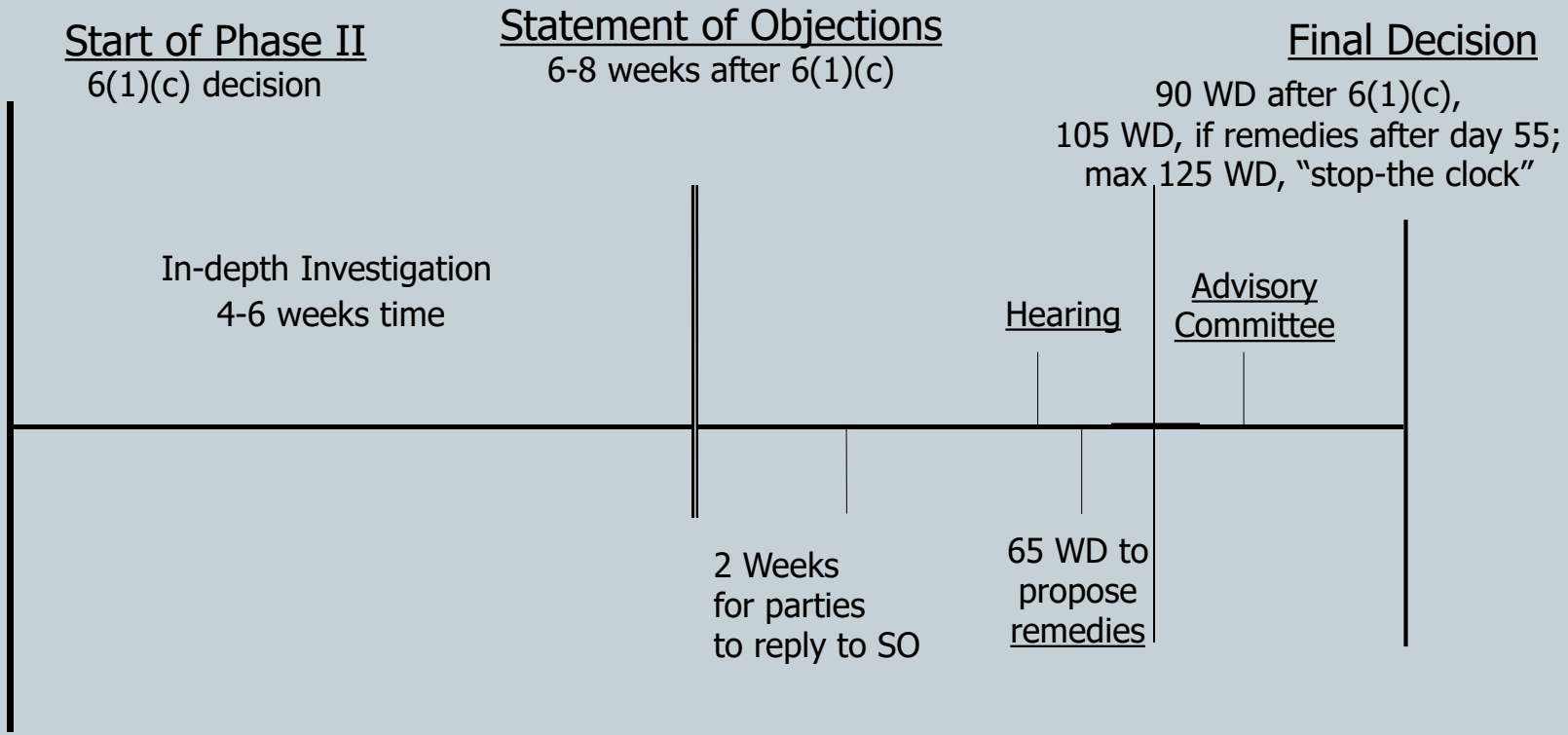
Art. 6(II) (Clearance + remedies)

Art. 9/22 (referral)

35 WD

EU Merger Policy
III. Merger Practice

Second Phase



4. Post-decision Phase

- Monitoring of implementation
  - Compliance with conditions and obligations (trustee/COM)
  - Possibility to revoke clearance decision if breach
- Judicial review ?
  - EU Gerneral Court (within 2 months)
  - Appeal on grounds of legality of decision
  - Accelerated procedure and interim relief possible

Elements of mergers procedure

- Investigative tools
  - Requests for information
  - inspections
- Statement of objections
- Function of the Hearing Officer

4. Post-decision Phase

- Importance of judicial review
  - Jurisdiction [e.g. Cemetbouw, Gencor etc.]
  - Procedure [e.g. Schneider I; Sony/BMG I/II (SO); Akzo/Nestlé/Kayserberg/Endemol (access to case file etc.)]
  - Substance: [e.g. Schneider/Airtours/Tetra I/II/Sony BMG (standard of proof; Art. 81/82 as deterrent, etc.); GE/Honeywell; Sun,...]
  - Damages: Schneider I: (+); Airtours: (-); Schneider II;