

# Managing Competition Risk & Compliance

## Key EC Reforms and The Expected Impact on Regulatory Enforcement

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Nicolas Petit, University of Liege (Ulg)

[Nicolas.petit@ulg.c.be](mailto:Nicolas.petit@ulg.c.be)

# Purpose of the Presentation

- What is, and what will be, the focus of EC regulatory enforcement in the coming year?

# A Static Overview

- Technology: *E-Books* (closed), *Google*, *Samsung*, *Motorola*
- Pharma: *Lundbeck* (closed), *Servier*, *J&J*
- Financial Markets: *CDS*, *Markit-ISDA*, *Euribor-Libor*
- Transport: *Oneworld* (closed), *Star Alliance* (closed), *Skyteam + Code sharing agreements*
- Energy: *Gazprom*
- And a string of legislative proposals

# A Dynamic Overview

*“Antitrust desk-cleaning”?*



# Desk Cleaning Rule 1 – Fold as Many Restrictions as Possible in “*Object*” Box (1)

- Classic cases
  - *Siemens/Areva JV* (post JV NCO)
  - *Star Alliance*
- New cases also “*fit*” the object box
  - *Lundbeck* (reason is expiry of limitation period)
  - *E-Books*
  - *Servier?*
  - *J&J?*

## Desk Cleaning Rule 1 – Fold as Many Restrictions as Possible in “*Object*” Box (2)

- A. Italianer, Fordham 2013, “*restrictions by object are serious – but not necessarily obvious*”
- Murky, unhelpful case-law supportive of this approach
  - *Pierre Fabre Dermo-Cosmétique* (C-439/09)
  - *Allianz Hungary* (C-32/11)
  - *Dole Foods* (T-588/08)

# Desk Cleaning Rule 2 – Don't Bother with (due) Process, Go Fast

- Promote (request?) Article 9 commitments, even in non clear-cut abuse cases (*e.g.* energy)
  - *Google*
    - Second round of commitments
    - ETA: first half 2014
  - *Samsung* (commitments currently market tested)
  - *SkyTeam* (DDG C. Madero: “*we are open to the possibility of a commitment decision*”)
  - Article 9 in financial market cases, unlikely but?
- Advertise Cartel Settlements
  - Recent speeches attempt to “*sell*” the 10% settlement rebate
  - Subtle invitation to suspected banks in financial markets (DDG C. Madero: “*The Commission's antitrust enforcement **strongly focuses** on the financial sector*”)

## Desk Cleaning Rule 2 – Don't Bother with (due) Process, Go Fast

- Friendly case-law, yet does not always work:
  - *Rio Tinto Alcan*: 7 years (more than *MSFT I!*) for a case involving a standard practice in a simple duopoly market
  - *Motorola*: hardliner, awaiting resolution of the preliminary reference in *Huawei/ZTE* (CJEU, C-170/13)?
- Settlements are not an “*easy*” sell: only 7 out of approx. 25 cartel decisions since June 2008

# Desk Cleaning Rule 3 – Leave a Skeleton or Two in the Closet (1)

- EUMR Review
  - Expand EUMR to non-controlling minority shareholdings (aka “*structural links*”)
    - Alleged “*gap*” in the EUMR (e.g., *RyanAir/Air Lingus* saga)
    - Insufficient coverage of Article 101 and 102 TFEU in relation to purchases on stock exchanges
  - Contentious legislative issue:
    - Business community is divided: red tape (if *ex ante* notification or information procedure) v legal uncertainty (if *ex post* selective system)
    - Loss of jurisdiction by some MS?
  - Additional Administrative Burden for COMP
    - Merger practitioners criticize in private the fact that DG COMP merger teams are often very inexperienced
    - Understaffing problem?

## Desk Cleaning Rule 3 – Leave a Skeleton or Two in the Closet (2)

- *Gazprom* investigation
  - Suspected abuses in the upstream supply of gas in Central and Eastern Europe
  - Unfairly high prices to customers, when compared to costs or to a competitive benchmark
  - Sustained through territorial restrictions and other exclusionary tactics
  - Commission is drafting a SO...
  - Big political showdown for Almunia's successor

# Desk Cleaning Rule 4 – Refer Work to Colleagues (1)

- June 2013, Commission sends a Proposal for a Directive on Antitrust Damages to the **EU Parliament** and **Council**
- Proposal aims to ensure full compensation and better articulate public and private enforcement
- Main principles:
  - Rule of disclosure (article 5) , but prohibited for (a) leniency corporate statements; and (b) settlement submissions (article 6);
  - Sanctions for failure to disclose or destruction of evidence (article 8);
  - Binding effects of national agency decisions (article 9);
  - Rules on limitation periods (at least 5 years, article 10), joint and several liability (article 11 with exception for immunity recipient);
  - Presumption that cartels cause harm (article 16)

# Desk Cleaning Rule 4 – Refer Work to Colleagues (2)

- Commission also adopts a non-binding Recommendation on Collective Redress. This text exhorts MS:
  - to designate representative bodies
  - to adopt rules on dissemination of information about collective procedures
  - to regulate third party funding
  - to follow opt-in system
  - to prohibit contingency fees and punitive damages,
- Commission will draw up a report in 2015 to assess whether any EU governments have responded to its policy recommendations. Then, in 2017, there will be a decision on whether “*any further action, including legislative measures, is needed.*”
- 16 EU countries have legislation allowing group actions

# Desk Cleaning Rule 4 – Refer Work to Colleagues (3)

- The EP (Schwab's Report):
  - Extends protection against disclosure to all oral and written statements and their annexes
  - Offers CAs and whistleblowers the ability to appear in court when sensitive information is at stake
  - Yet, because of case-law, absolute ban on disclosure cannot be applied => disclosure should be possible when "*indispensable for supporting their claim*" and where evidence cannot be accessed elsewhere; requests should be as precise as possible (no fishing expedition)
  - Binding effect of NCA decisions across countries, unless "*obvious errors*"
  - 3 years minimum limitation period after final cartel decision
  - Leniency applicant should also be jointly liable
  - Delete presumption that cartels cause harm

## Desk Cleaning Rule 4 – Refer Work to Colleagues (4)

- The Council
  - Unlike in Draft Directive, not all immunity evidence shall be protected
  - Protection for “*internal documents of CA*”, “*literal quotations*” of the whistleblower, and correspondence amongst agencies, etc.
  - Reduction from 5 to 3 years for minimum limitation period for bringing actions
  - Cartel decisions in one EU state would be “*irrefutable*” before the courts of another country.

## Desk Cleaning Rule 4 – Refer Work to Colleagues (5)

- Disagreement within EP: Consumer-affairs committee (wants collective actions in Directive, O. Schmidt)
- EP Position due on March 11, 2014
- Commissioner said in Vilnius on 3 October that the draft was making “*significant progress*”
- Aim is Spring 2014

# Desk Cleaning Rule 5 – Make (inexpensive) Presents while Cleaning

- An incomplete move on efficiency
  - *UPS/TNT*: recognition of efficiencies with respect to air transportation ... but insufficient to outweigh the price increases caused by the lessening of competition
  - *Star Alliance*: recognition of efficiencies ... but level insufficient to outweigh the likely significant negative effects resulting from the elimination of competition between LH and CO on the Frankfurt-New York premium market
    - In market efficiencies
    - And “out of market” efficiencies on beyond and behind routes (related routes+common customers)!
- Failing firm defense
  - M.6796, *Olympic/Agean Airlines*
  - M.6360, *Nynas/Shell/Harburg Refinery*

# Desk Cleaning Rule 6 – Hide the Remnant

- MIA
  - Secondary market cases, fallout of General Court annulment in *CEAHR v Commission* (T-427/08)
  - Vertical restraints
- “*Hunt for Red October*”
  - Review of TTBER => A remarkably silent process
  - Review of *De Minimis* notice following *Expedia* (ongoing)?



# Alternative Forecasts

- Harder? Fines not as big as under Kroes (approx. €10 Billion)
- Better? No sign of a better or worse rate of judicial annulment
- Stronger? Less prohibition decisions than before
  - *e.g.*, in merger cases, headcount of prohibited mergers for Almunia currently lurks at 5, where Van Miert and Monti respectively had shot down 9 and 8 mergers

# Faster?

- Recent enforcement policy just reflects what Almunia's "*touch*" on competition policy
- Since his entry in office, Almunia is secretly worried about the slow pace of antitrust enforcement
- During his tenure, Almunia has sought to activate swifter enforcement mechanisms
- This has given rise to a distinct enforcement paradigm, where Article 9 proceedings have become the conventional way to solve antitrust concerns
- This is especially true on "*fast moving markets*" (*i.e.* high tech markets) which arguably require fast moving competition authorities

# Empirical Verification (art 102 cases)

## Standard Art 7 Procedure

- *Intel*, 9 years following complaint
- *Microsoft*, 6 years following complaint
- *Astra Zeneca*, 7 years following complaints
- *Tomra*, 6 years since complaints
- *GVG/FS*, 4 years following complaint
- *Wanadoo*, 4 years following investigation
- *Telefonica*, 4 years following complaint
- *Telekomunikacja Polska*, 3 years following investigation
- *Clearstream*, 3 years following investigation

## Latest Art 9 Cases

- *CEZ* (3y and 3m)
  - Formal inv: 24.11.2009
  - Commitments: 10.04.2013
- *ENI* (3y and 4m)
  - Formal inv: 10.05.2007
  - Commitments: 29.09.2010
- *S&P* (2y and 11m)
  - Formal inv: 12.01.2009
  - Commitments: 15.11.2011
- *IBM* (1y and 5m)
  - Formal inv: 26.07.2010
  - Commitments: 14.12.2011
- *Thomson/Reuters* (3y and 2m)
  - Formal inv: 30.10.2009
  - Commitments: 20.12.2012
- *Rio Tinto* (4y and 11m)
  - Formal inv: 20.02.2008
  - Commitments: 20.01.2013

## Empirical Verification (2)

- Two things stand out:
  - Article 9 decisions can be adopted in 3-4 years, so can Article 7 decisions 😊
  - Cases with formal complainants are much longer than cases without
- Google is already an “*old*” case
  - Complaint (Feb. 2011)
  - US proceedings went much faster
- Pharma cases are all old cases, dating back to sector inquiry => settlements as “*exit route*”

# Softer?

- Fact that commitments are voluntary does not mean that the Commission is softer
- Commitments may be disproportionate: Commission just verifies that the parties did not submit a less restrictive alternative (*Alrosa* accommodation)
- Compliance with commitments matters (*Microsoft IE Compliance Case*, €561,000,000 fine)
- Decisions insulated from judicial review
- DDG C. Madero: « *trustees as standard practice in article 9 commitments* »