



# International Business Transactions

Competition Law / Antitrust



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# Agenda

- 1 Introduction**
- 2 Restrictive agreements and practices**
- 3 Abuse of market power**
- 4 Merger control**



# Introduction



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# Why regulate competition?

Competition is a mechanism of the market economy which encourages undertakings to offer consumer goods and services at the most favorable terms for consumers.

Competition promotes

- efficiency, productivity
- quality, choice (wide range of products and services)
- better conditions for innovation and investors
- low prices

by requiring undertakings to act independently and subject to competition of others.

Each undertaking must be able to independently determine

- the *commercial policy* which it intends to adopt on the market and
- the *means* it intends to employ to implement this business policy

# Three pillars

1. **Anticompetitive (horizontal and vertical) agreements**: undertakings with or without market power that operate at same or vertically related level must avoid hard-core restraints, concerted actions  
(as relying on agreed course of action reduces incentives to provide new/better products/services at competitive prices and the consumers end up paying more for less quality)
2. **Abuse of dominance**: undertakings must not abuse their dominant market position in a way that affects trade
3. **Merger control**: undertakings must not implement acquisitions, mergers and joint ventures above a certain thresholds

“*Undertaking*”: any entity engaged in *economic activity*, i.e. offering goods or services, regardless of its legal status and the way it is financed (it includes companies, associations, universities etc.)

# What are the legal consequences?

- **Fines and penalties**  
(EU: up to 10% of the entire group's worldwide turnover; CH: up to 10% of the Swiss turnover on the relevant markets during last 3 years, plus amounts contingent on duration of the restrictive agreement and other aggravating factors)  
**Leniency programs:** full waiver of fine if the company is the first to submit sufficient evidence enabling the authorities to initiate a regular investigation and discover a hard-core cartel; partial reduction in case of spontaneous participation in investigation
- **Impact on agreements:** in principle, entirely null and void (or at least specific parts violating competition law)
- **Private damage actions** brought by 3<sup>rd</sup> parties (e.g. customers, other competitors)
- Individuals can be **disqualified** from holding a directorship and be subject to criminal penalties (e.g. in US, UK)
- **Reputational** damages

# Which laws apply?

## Effects Based Approach

- Most competition laws apply broadly to any anti-competitive behavior that has an effect on such country's market
- Possible exposition to jurisdiction in more than one country

An Italian sales manager of a German company that trades its products around the world enters into an illegal global agreement with a French competitor at a meeting in London. May he be subject to imprisonment in the US?

# 1. Restrictive agreements and practices



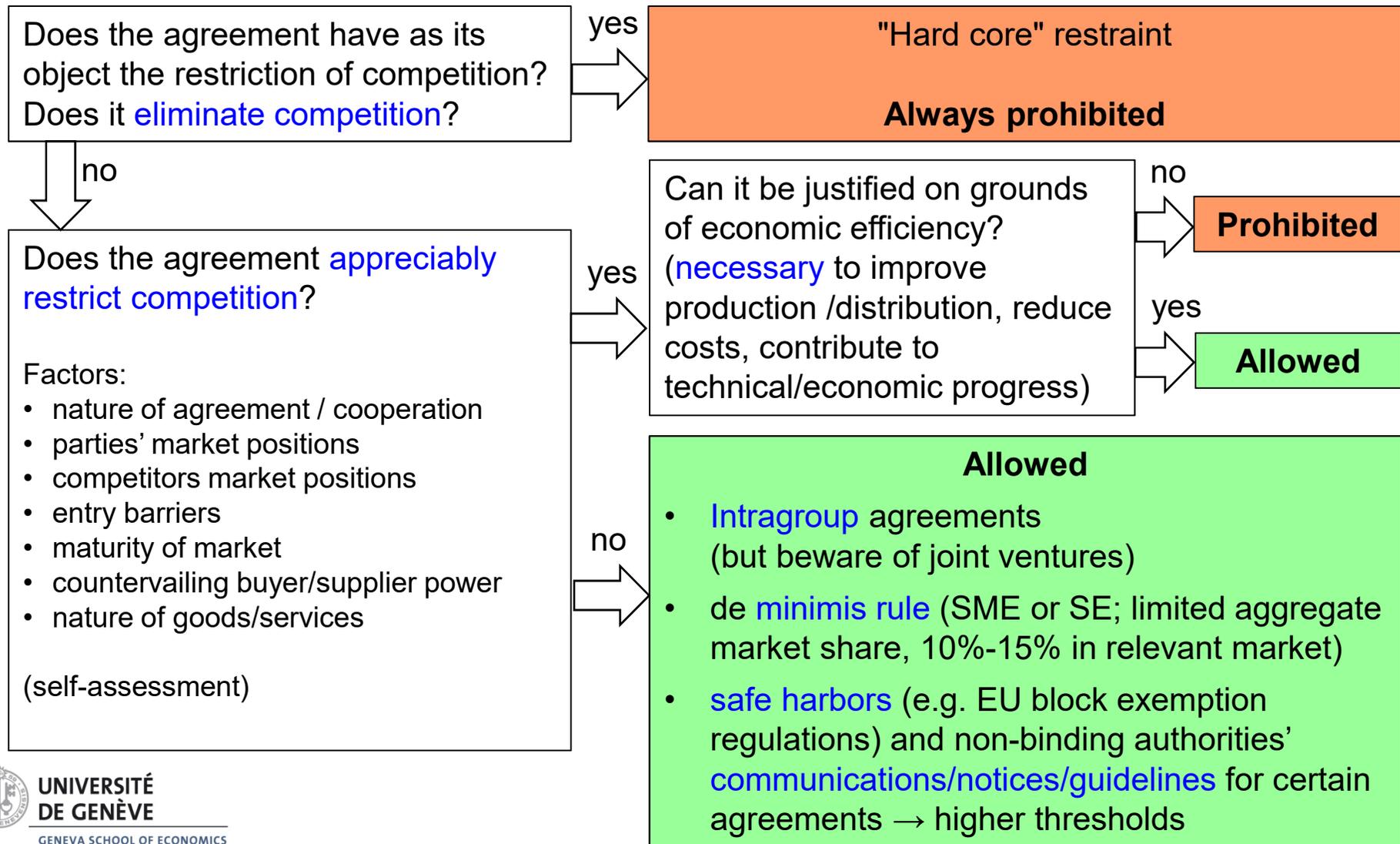
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# What is prohibited?

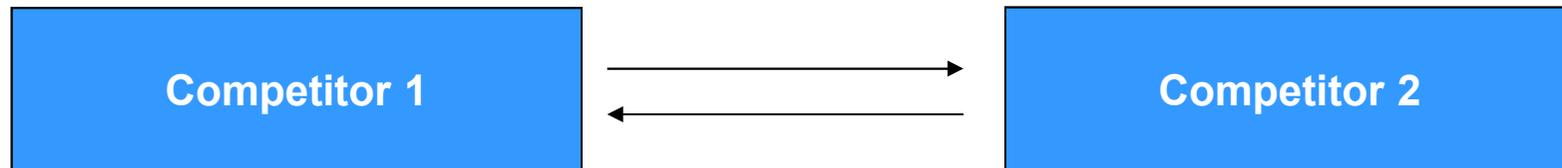
<b>Agreements</b> <ul style="list-style-type: none"> <li>• written or oral</li> <li>• binding or non-binding, incl. "gentlemen's agreements"</li> </ul>	<b>Concerted practices</b> <p>coordination among firms which, without having reached the stage of concluding a formal contract, have knowingly substituted practical cooperation for the risks of competition</p>	<b>Decisions by associations</b>
<p><b>which have as their <u>object or effect</u> the restriction of competition</b></p>		
<p>e.g. understanding to simultaneously increase their prices</p>	<p>e.g. direct or indirect contact by communicating information (like own future price increases) to a competitor with the intent of influencing its behavior too</p>	<p>e.g. decision of a trade association to fix discounts or tariffs</p>

# When is it prohibited, when allowed?

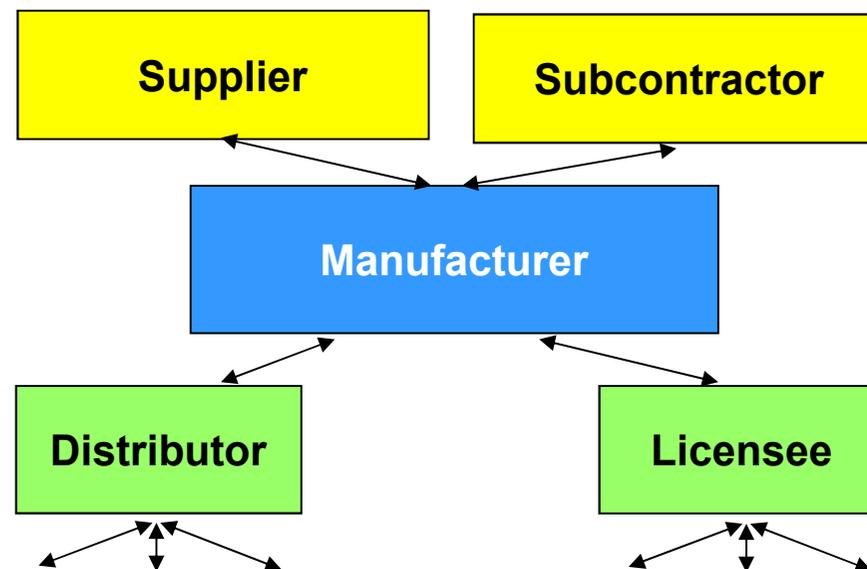


# Horizontal and vertical restraints

- **Horizontal** restraints (between actual or potential competitors)



- **Vertical** restraints (between firms at different market levels)



# Hard core horizontal restraints

## Price fixing

- 👉 Do not agree on **prices** (fix, minimum, maximum prices; elements of prices; price increases; rebates, discounts) and other price related conditions.
- 👉 Do not **coordinate the bidding process** with other bidders and do not agree in advance who submits the winning bid on a contract (e.g. no bid suppression, no “courtesy” bidding with unacceptable bids, no bid rotations schemes).
- 👉 Do not exchange individualized **information on costs, intended prices, quantities**. This reduces uncertainty of market behavior and may bring to fix similar prices.

## Market allocation

- 👉 Do not share or allocate **markets** (territory, customer, product, supply source).

# Hard core horizontal restraints

## Quota restrictions

- 🚫 Do not agree on restrictions in **production, procurement or supply volumes**.
- 🚫 Do not agree on restrictions on the parties' ability to **carry out R&D or to continue to use their technology for further R&D**.

## Boycotts

- 🚫 Do not agree not to supply **certain** customers or not to purchase from certain suppliers, or supply or purchase only subject to certain mutually agreed conditions.

# Sharing of information

Sharing of market information is allowed only under certain conditions, i.e. when the parameters of the exchange are carefully constructed, e.g.

- **aggregated** (not specific company related) data
- **historical** (not current or expected) data
- **not strategic** data

so that it is not possible to draw conclusions regarding cost structure or future behaviour of competitors.

# Exercise: Business Concept



Manufacturer A presents his new business concept to the board of the trade association where competitors are also members: Strengthening qualified specialist retail with specific commitments re warehousing, minimum net order value, boosting advisory skills with trainings, discount on trade prices etc.

Within a few months B and C, two (of four) competitors, implement the same concept

The three competitors' ideas conceptually **mirror each other** and were implemented **within a few months** of one another **under identical condition**:

- coordinated conduct between competitors
- conditions cartel (subject to a fine)

# Exercise: Participation to association



A trade association invites its members to a meeting on energy efficiency, technology downtime and utilization rates. Under which conditions would you participate?

Participation is allowed if

- there is an **agenda** for the meeting on legitimate matters;
- the meeting will be attended by **relevant representatives** (e.g. invitation to production managers and not sales directors);
- an **approval** is provided before attending the meeting (or a lawyer is present);
- the association carries out formal **minutes**;
- the data exchanged are aggregated and historic **and no prohibited matters** are discussed, otherwise you shall request to stop the discussion and to put the end on records, or leave the meeting and ensure that your leaving is put on records.



# Exercise: Benchmarking survey



A major consultancy firm is carrying out a benchmarking survey, collecting data from certain competitors about production costs of the respective facilities. The benchmarking survey shall identify best practices, efficiencies and costs savings compared to industry peers. Under which conditions would you participate?

Participation is allowed if

- it is carried out by an **independent third party** not linked to any competitors;
- the information exchanged is **aggregated** (not company specific) and **historic** (generally 12 months old);
- there is a **sufficient number of participants** in the report (no identification possible)
- reports are circulated **without comments or recommendations**.

# Precautionary measures

- ☺ **Written communication with competitors must be carefully drafted**: state clearly the licit purpose of the document, avoid ambiguous statements and do not make reference to prices or other commercially sensitive information.
- ☺ **Internal communications** about competitors' pricing, production, strategy etc. may unnecessarily raise suspicion: **draft carefully!**
- ☺ Always take **precautionary measures** when meeting competitors: Avoid and terminate discussions on prohibited topics; Prepare minutes and draft carefully.
- ☺ Rise your prices with **sufficient time lag** from the competitors; Do not identically emulate market behavior of competitors.
- ☺ When buying from or selling products to a competitor: ensure that it is a **real deal** and **limit discussions** to the specific deal.
- ☺ Monitor **trade press, websites and public information**. Do not contact competitors to verify and do not use your customers/suppliers as a communication channel. **Record** and state source and date you obtain information.

# Other horizontal restraints

Other forms of cooperation between competitors may be pro-competitive and produce useful efficiencies, but can also restrain competition, e.g. research and development, production, purchasing, commercialization, marketing, distribution, standardization or swap (cross supplies) agreements

Check whether the cooperation

- ☞ **restricts competition** (see relevant factors above),
- ☞ is **exempt** under
  - the de minimis rules,
  - a specific safe harbor (e.g. EU block exemption regulations) or
  - other non-binding rules (e.g. authorities notices and guidelines), and, if not,
- ☞ is **necessary** to lead to efficiencies

# Example: R&D cooperation in the EU

## I. Exemption under R&D block exemption?

1. Parties' (as competitors) combined **market share: max 25%**
2. Agreement on joint R&D, paid-for R&D; joint exploitation; combinations thereof
3. **Conditions** for exemption, e.g.
  - Full access to final results of joint R&D for R&D and exploitation
  - Reasonable compensation for access allowed
  - In case of joint R&D, each party has access to any pre-existing knowhow of other parties, if this is indispensable for results' exploitation (reasonable price allowed)
  - Joint exploitation concerns only results (a) that are protected by IPR / constitute knowhow and (b) that are indispensable for manufacture/application of contract results
4. **No hardcore** restrictions (otherwise contract is void)
5. Duration: for R&D stage and 7 years after results are first put on the market (in case of joint exploitation); later only if max. combined market share 25%

## II. Assessment according to horizontal guidelines (restrictive by object / effect?)

## III. Assessment of exemption on grounds of economic efficiency

# Hard core and other prohibited vertical restraints

The scope of rules on vertical restraint varies from one jurisdiction to another. In general, in CH and EU the following restraints are

Prohibited	Generally allowed
Fixing resale prices or conditions / Minimum resale price imposition	(a) maximum resale prices and (b) non-binding price recommendations but without pressure or incentives to enforce recommendation
Restrictions on where or to whom a buyer can resell	Exception: Restricting active sales into exclusive territories or to customer groups reserved to the supplier or allocated by the supplier to another distributor/licensee, provided that passive sales (incl. sales through websites) are not restricted

# Hard core and other prohibited vertical restraints

Prohibited	Generally allowed
<p>Restrictions on members of selective distribution system</p> <p>(a) to sell the end users</p> <p>(b) to cross-supply other members of the system</p>	<p>(a) Restricting direct sales to end-users by wholesalers</p> <p>(b) Restricting sales to unauthorized distributors by the members of a selective distribution system</p>
<p>Restrictions preventing suppliers from selling components or spare parts to customers (end-users and independent repairers) other than the certain distributors</p>	

# Hard core and other prohibited vertical restraints

Prohibited	Generally allowed
Non-competition covenants to buyer/distributor/licensee for longer than 5 years and/or beyond the duration of the agreement	Post contractual non-compete obligations relating to goods or services that <ul style="list-style-type: none"><li>(a) relate to competing goods/services</li><li>(b) are limited to the premises and land from which the buyer has operated during the contract period</li><li>(c) are indispensable to protect know-how transferred by the supplier to the buyer</li><li>(d) do not continue for more than 1 year after termination of the vertical agreement</li></ul>

# Other vertical restraints

Check whether the cooperation

- ☞ restricts competition (see relevant factors above),
- ☞ is exempt under
  - the de minimis rules,
  - a specific safe harbor (e.g. EU block exemption regulations with higher de minimis – generally 30%) or
  - other non-binding rules (e.g. authorities notices and guidelines), and, if not,
- ☞ is necessary to lead to efficiencies, e.g.
  - to solve the free-rider problem
  - to open up/enter new markets
  - to solve the hold-up problem (to recover the client-specific investments)
  - to achieve economies of scale by concentrating the resale
  - to create brand image through uniformity and quality standardization

# Example: Single Branding

**Case description:** Buyer is obliged to concentrate its orders for a product with one supplier with non-compete (not to buy/resell/incorporate competing products) and quantity forcing (e.g. 90% of its purchases) obligations.

**Anti-competitive effects?** Reduction of interbrand competition (other suppliers cannot sell to buyer; foreclosure of competing suppliers)

**Factors of appreciable restriction?** (1) Supplier's market position, (2) Market coverage and duration of restraint, (3) Competitors' market position, (4) Entry barriers, (5) Level of trade

**Necessary to lead to efficiencies?**

- *Solving free-rider problems:* preferably through quantity-forcing than non-compete obligations
- *Solving hold-up problem related to customer-specific investments:* preferably through quantity-forcing than non-compete obligations; generally justifiable for the period of depreciation of the investments
- *Solving hold-up problem related to transfer of know-how:* non-compete obligation as only viable option, in general for the whole duration of the supply agreement

## 2. Abuse of market power



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# Dominant position / General principles

## Dominant position:

Position of economic strength to behave to an appreciable extent independently of competitors, customers and consumers in a specific market

## Factors:

Market share; entry barriers; competitors' number, quality, position; market structure

Rule of presumption: market share over 30%; Assessment on **bargaining power** in

- Relevant **product** market: if products are “reasonably interchangeable” (in terms of characteristics and purpose of use) on both demand and supply side
- Relevant **geographic** market: where there are identical or comparable competition conditions

**Prohibited:** **misusing** market position by preventing competition by others and/or exploiting customers

# Abusive conduct

- **Undercutting with dumping/predatory prices**: selling goods or services for a price that is lower than its real cost in order to obstruct the entry of the establishments to the market or to exclude them from it, or to expose them to big losses that makes it difficult for them to continue with their activities;
- **Tie-in transactions**, i.e. supply of a product is subject to the acceptance of supplementary obligations to buy other goods and/or services which have no connection with the other product;
- **Exclusive / excessive purchase commitments**, e.g. customers' obligation to purchase all requirements exclusively (or more than 80% of his total purchases of the contract goods and their substitutes on the relevant market) from seller;
- **Discount programs** e.g. fidelity rebates, target rebates, aggregated rebates on overall turnover reached with supply of different goods. Non-discriminatory quantity discounts are admissible pursuant to transparent linear quantity program;

# Abusive conduct

- **Refusal to trade** without objective justification;
- **Discrimination (price or other conditions)**, applied to equivalent transactions, thereby placing certain partners at competitive disadvantage - without objective justification (e.g. different services / different stage in the distribution channel);
- **Imposing unfair/excessive price** or other unfair trading conditions (unjustified by cost);
- **Limiting** production, markets or technical developments.



# Example: Microsoft competition case

Complains from competitors (1993 and 1998):

- Microsoft blocked competitors by licensing practices, e.g. lack of disclosure of some of the interfaces to the windows operating system and so licensing its Windows Media Player only within the Microsoft Windows platform (“tying”).

Investigation by EU authority:

- 2003: preliminary order to offer Windows’ version and information necessary for competing networking software to interact fully with Windows desktops and servers
- 2004: fine in the amount of EUR 497 million + deadlines to fulfill the 2003 order
- 2006: fine of EUR 280.5 million for not having released the specifications (and not only the source code) within the set deadline
- 2012: fine of EUR 899 million (reduced in 2012 to EUR 860 million) for failure to comply with the 2004 decision

# Exercise: Selection of service provider



Machine manufacturer A provides (after-warranty) servicing / maintenance services through external service providers authorised to this end. The number of authorized service providers is to be reduced. Only those service providers still authorized continue to be supplied with spare parts, the others are only supplied with machines but not with spare parts.

Principle: A qualified service provider must be supplied with spare parts.

Objective reasons for not supplying, e.g.:

- Service provider is proven to have provided bad service in the past;
- The good reputation of the machine manufacturer is endangered.

Documentation necessary! The objective reasons stated must be evidenced.

# Precautionary measures

- 👍 **Legal privilege**: it covers the seeking and providing of lawyer's legal advice and relevant correspondence (narrowly interpreted); labelled documents "legally privileged and confidential" to be filed separately.
- 👍 Be careful with your **communications** and avoid creating ambiguous documents (exaggerating company's market power or ability to control events; speculating on the company's plans or conduct; using guilty language).

# Investigations

- **Beginning of investigation:** own authority's initiative, concerned company's request, third party's complaint.
- **Opening of investigation** (with email, letter, phone call or on the spot visit) and evidence-gathering process (all parties involved must provide all requested information and documents).
- **To do's** in case of investigation on the spot: check of IDs, notification to senior management, request of warrant, request to wait for the lawyers, request to defer questions, accompany inspectors, document/make copy of what is searched, removed, copied; remember legal privilege; no alert outside the company; no modification of evidence.

# 3. Merger control



# What is subject to control?

**Purpose:** The merger control regimes aim to ensure that companies do not, through mergers or acquisitions, create monopolistic or oligopolistic market structures that significantly impede effective competition.

**Prohibition:** No *concentration* over certain *thresholds* without prior approval

- **Concentration:**
  - merger (of 2 or more previously independent undertakings)
  - acquisition (change in direct/indirect control by exercising decisive influence)
  - joint ventures (full-function)
- **Thresholds:**
  - Usually based on turnover thresholds defined on the basis of worldwide and countrywide turnovers of the undertaking concerned

# Proceedings / Notification

- Proceedings (notification and clearance) vary from one jurisdiction to another
- Multiple jurisdictions / Cooperation between authorities is limited / Parties' waiver

## Merger notification to authorities

- *Responsible*: Merging undertakings, members of JV, party acquiring control
- *Timing*: When project is well advanced (e.g. signed LOI) or binding agreement (e.g. SPA) has been signed, but always before the concentration is carried out.
- *Form*: In general to be submitted on a form issued by the authorities. A significant amount of legal and economical information shall be provided.
- *Effect*: In principle, the transaction cannot be implemented until a final decision by the authority; the notification must be complete to start the clearance process

# Proceedings / Substantive analysis

- **Pre-notification consultation** (e.g. for guidance on jurisdiction, key issues identifications, ascertaining deadlines)
- **Investigations** (preliminary and regular in-depth): Authority examines whether
  - (a) market share of each undertaking and of aggregate market share of all undertakings is below or above certain thresholds (15% - 30%) - safe harbors
  - (b) merger creates or strengthens dominant position that eliminates/significantly restricts competition (ability to increase prices, reduce production/innovation)
  - (c) merger improves competitiveness in other markets to an extent that exceeds the drawbacks of the dominant position
- Wide investigation powers, information requests, hearings, onsite inspections, ability to seal business premises and books and records
- **Publication** of essential merger elements (parties, activities, period for 3rd parties to comment, summary of decision); but no access to documents for 3rd parties

# Remedies / Decision

- **Remedies** by parties to get clearance subject to conditions
  - *structural*, e.g. divestiture of business;
  - *behavioral*, e.g. change of pricing practice, commitment to supply other market participants for a certain period at regulated conditions, suppression of exclusivity clauses, granting of access to essential facilities
- **Decision** at the end of the investigation
  - clear the merger,
  - clear it subject to conditions or obligations or
  - prohibit the merger

# Fines

- Failure to notify correctly
- Implementation before approval or after prohibition
- Failure to observe (e.g. conditions to an approval)



# Example: GE-Honeywell merger case

2000: GE and Honeywell announced their plans to merge

- US DoJ 2003: informally indicated that it would allow the merger to proceed, subject to “fix it first” remedies
- GE & Honeywell filed notification with EU commission subject to such remedies
- EU Commission found remedies commitments insufficient, and blocked the merger
- European Court of First Instance confirmed EU Commission decision: The merger would have created or strengthened dominant positions, as a result of, which effective competition would have been significantly impeded in three markets.

# Contact

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