Outline

- Reminder of the EU competition rules
- Enforcement and consequences of infringement
- Application of EU competition rules to trade associations
- Case law examples / updates
1. Reminder of the relevant EU Competition rules
Article 101(1) Treaty on the Functioning of the EU

Article 101(1): “The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.”
Understanding the constitutive elements

- **Agreements**: broad concept
  - Written contracts
  - Oral arrangements
  - Gentleman’s agreements / mutual understandings...

- **Associations of undertakings**: groups of undertakings in various types of organisations
  - Federations
  - Trade unions
  - Trade associations...
Understanding the constitutive elements

- **Concerted practice**: coordination falling short of a proper agreement
  - Direct/indirect contact that influences market behaviour e.g. tacitly informing each other of intended future conduct

- **Undertaking**: broad notion that goes beyond companies
  - Encompasses every entity engaged in an economic activity regardless of its legal status and the way in which it is financed
Understanding the constitutive elements

- **Object**: legal concept meaning that it is unnecessary to prove an anticompetitive effect (price fixing, market-sharing,…)

- **Effect**: need to examine the impact of the conduct on the market

- **Effect on trade**: agreements capable of constituting a threat, either direct or indirect, actual or potential to trade in the internal market
Article 101(3) TFEU – exemption

- Article 101(3) exempts restrictions from the application of Article 101(1) where four cumulative conditions are met:
  - Improve production or distribution of goods; and
  - Benefit consumers; and
  - Indispensable to the benefit; and
  - Do not eliminate competition

- Hard core cartel behaviour very unlikely to be exempted
EU powers of investigation

- EU level enforcer: European Commission (DG Competition)

- Extensive investigation powers:
  - Powers to request information
  - Dawn raids on company and private premises
  - Extraction of computer records
  - Cooperate with other authorities

- The Commission also obtains information from its leniency programme
  - In exchange for providing information about a cartel, undertakings can receive immunity from fines or fine reductions
Tough sanctions for competition law infringements

- Companies which do not respect EU competition law can be fined up to 10% of their annual worldwide turnover

Commission cartel fines 1990-2015:

<table>
<thead>
<tr>
<th>Period</th>
<th>Amount in EUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990-1994</td>
<td>344,282,550.00</td>
</tr>
<tr>
<td>1995-1999</td>
<td>270,963,500.00</td>
</tr>
<tr>
<td>2000-2004</td>
<td>3,157,348,710.00</td>
</tr>
<tr>
<td>2005-2009</td>
<td>7,928,868,156.50</td>
</tr>
<tr>
<td>2010-2014</td>
<td>8,700,344,579.00</td>
</tr>
<tr>
<td>2015 to date</td>
<td>14,960,000.00</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>20,416,767,495.50</strong></td>
</tr>
</tbody>
</table>
## Ten highest cartel fines per undertaking

<table>
<thead>
<tr>
<th>Year</th>
<th>Undertaking</th>
<th>Case</th>
<th>Amount in EUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>Saint Gobain</td>
<td>Car glass</td>
<td>715,000,000</td>
</tr>
<tr>
<td>2012</td>
<td>Philips</td>
<td>CRT</td>
<td>705,296,000</td>
</tr>
<tr>
<td>2012</td>
<td>LG Electronics</td>
<td>CRT</td>
<td>687,537</td>
</tr>
<tr>
<td>2013</td>
<td>Deutsche Bank</td>
<td>EIRD</td>
<td>456,861,000</td>
</tr>
<tr>
<td>2001</td>
<td>F. Hoffman-La Roche</td>
<td>Vitamins</td>
<td>462,000,000</td>
</tr>
<tr>
<td>2013</td>
<td>Société Générale</td>
<td>EIRD</td>
<td>445,884,000</td>
</tr>
<tr>
<td>2007</td>
<td>Siemens</td>
<td>GIS</td>
<td>396,562,500</td>
</tr>
<tr>
<td>2014</td>
<td>Schaeffler</td>
<td>Bearings</td>
<td>370,481,000</td>
</tr>
<tr>
<td>2008</td>
<td>Pilkington</td>
<td>Car glass</td>
<td>357,000,000</td>
</tr>
<tr>
<td>2009</td>
<td>EON / GDF Suez</td>
<td>Airfreight</td>
<td>310,080,000</td>
</tr>
</tbody>
</table>
Calculation of fines for trade associations

- Fines are calculated based on turnover of member companies:
  - The value of sales will generally correspond to the sum of the value of sales by its members
  - The fine shall not exceed 10% of the sum of the total turnover of each member active on the market affected by that infringement

- Fining of trade associations has been inconsistent
  - Sometimes a nominal amount, sometimes quite high
  - Significant variations between competition authorities
The Commission’s fight against cartels continues

“This is the first cartel decision adopted by the Juncker Commission since we took office more than a month ago but it’s the 10th of 2014, and there are more in the pipeline looking ahead. Looking at this record, it should be clear that no industry, markets or company is immune from our scrutiny. Given the harm cartels can do to Europe’s consumers and economy, our fight against them remains a priority.”

Margerthe Vestager, Commissioner for Competition
11 December 2014
Statement regarding the fining decision imposed on members of the paper envelope cartel
Criminal liability?

- The Commission does not have the power to impose prison sentences or fines on individual employees / company officers.

- National laws within some EU Member States do provide for criminal sanctions:
  - E.g. Denmark, Estonia, France, Germany, Greece, Ireland, Malta, The Netherlands, Romania, Slovak Republic, Spain, United Kingdom and Norway.

- And other kinds of personal sanctions:
  - E.g. Director disqualification in the UK.
Private damages claims – increasingly common

- Almost inevitable that undertakings against whom the Commission has taken an infringement decision will be sued by private parties

- EU right to compensation, but claims must be lodged before the Member States’ national courts

- UK is currently the most popular jurisdiction
  - Adoption of EU Damages Directive may increase claims elsewhere
  - Member States need to implement it by 27 December 2016
  - Includes a range of measures to facilitate claims
2. Application of EU Competition rules to Trade Associations
Positive teamwork vs prohibited teamwork

Give me one good reason we shouldn’t promote teamwork.

The government calls it “antitrust.”
Many functions do not breach EU competition law

- Examples of legitimate objectives include:
  - Collective lobbying
  - Conducting research / acting as an expert in its field
  - Disseminating information on developments and statistics
  - Common training programmes
  - Discussing new legislation

- These functions constitute permitted activities
  - They do not restrict the commercial freedom of members of the trade association
  - They do not foreclose the opportunities of non-members in relation to any relevant market
Other functions can give rise to competition concerns

- Article 101(1) expressly recognises that trade associations may infringe competition law:
  - “Decisions by associations of undertakings”

- Areas that are prone to competition scrutiny:
  - Membership rules
  - Recommendations
  - Market information systems (sharing of data)
Membership of a trade association

- Trade associations can breach Article 101 by excluding competition from non-members by failing to have membership criteria which are:
  - Clear
  - Precise
  - Objective
  - Legitimate

- **Minimum capital requirements**: unlikely to infringe Article 101, provided they do not go beyond what is necessary to ensure members are reliable

- **Approval of existing members**: possibly infringes Article 101, especially where membership is essential to participate in that industry (e.g. access to a particular selling forum)
Example of an infringement involving membership criteria

- **Cauliflower case:**
  - Membership of a federation was a pre-condition to gaining access to an auction centre in France
  - The admission of new members to the federation was subject to approval by a majority of the board of directors
  - Commission held that this prevented new dealers from obtaining access, as the majority of the existing dealers were unlikely to vote in favour of admitting new members
Recommendations

- Trade associations may issue recommendations to their members, however, they should not:
  - Make recommendations on competitively sensitive topics

- Recommendations that could infringe competition law include:
  - minimum price tariffs for association members
  - adherence to certain production or output levels
  - requirements to deal with certain suppliers only
Example of a recommendation found to infringe competition law

- The Association of Belgian architects (Commission Decision 24 June 2004)
  - The association had established recommended minimum tariffs for architects
  - Architects’ fees were calculated as a percentage of the value of the works completed and applied to all architectural services

- Found to infringe competition law:
  - “Recommended prices can mislead consumers as to what is a reasonable price for the service they are receiving and as to whether this recommended price is negotiable.” – Mario Monti
National competition authorities have also punished trade associations for anticompetitive recommendations.

<table>
<thead>
<tr>
<th>National Competition Authority</th>
<th>Sector</th>
<th>Amount of Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>Hairdressing</td>
<td>EUR 33,000</td>
</tr>
<tr>
<td>Spain</td>
<td>Food</td>
<td>EUR 15,000 to EUR 500,000</td>
</tr>
<tr>
<td>Denmark</td>
<td>Undertakers</td>
<td>DKK 400,000</td>
</tr>
</tbody>
</table>
Market information systems

- Trade associations may organise the gathering and sharing of sector information through information systems.

- However, the general rule is that they should not:
  - reduce or remove the degree of uncertainty as to the operation of the market in question with the result that competition between undertakings is restricted.

- A trade association should not circulate information such as:
  - capacity utilisation, production and deliveries, bookings, prices, costs, stocks, customer relations, market shares where the exchange is of current data on an individual company basis.
Legitimate sharing of statistical data

- By contrast, trade associations can disseminate aggregated data in certain circumstances:
  - Individual members should not be identifiable: aggregation should involve at least 3 members, but more may be required depending on the market and the size of the undertakings involved
  - Data should be given to an independent party or the trade association and not be collated by one of the members
- Historical information generally does not infringe EU competition rules
The role of “facilitator”

- Trade associations are not legally responsible for the infringements of their members when the association is not involved in the anticompetitive conduct.

- However, the Commission has held organisations liable by virtue of their role as “facilitators” for the infringement.

  - **Italian Flat Glass**: Commission held a consultancy firm, together with the individual manufacturers, liable for a competition law infringement on the basis that it had actively facilitated anticompetitive conduct. Was not fined.

  - **Polypropylene**: A consultancy was used to run a complex information exchange mechanism.

  - **Organic Peroxides & Heat Stabilisers**: Swiss consultancy firm AC Treuhand found to have facilitated the manufacturers’ cartels and was fined.
The legal test for being a “facilitator”

- The test endorsed by European courts is that an organisation will be held liable for an infringement if:
  1) it has facilitated the implementation of the cartel; and
  2) it was aware that its actions would facilitate the implementation of the cartel

- Change afoot?
  - Advocate General Wahl Opinion of 21 May 2015 in *Heat Stabilisers*
  - Played consultancy role, was not active of the relevant market, and did not directly participate in the cartel
  - Accessory role? But Commission did not raise this
How can trade associations avoid being a “facilitator”?

- Take all reasonable measures to ensure compliance with competition law at all association events and meetings
  - Have a trade association representative present
  - Consider having external counsel present
  - Issue competition law compliance guidelines and/or a checklist

- Provide members and staff with clear instructions at the beginning of each event, including the topics that should not be discussed.
  - Include a reminder in any invitations circulated / refer to compliance guidelines
Poultry industry – Greek Investigation

- In June 2014, the Hellenic Competition Commission fined 13 poultry meat distributors

- The companies coordinated prices and allocated downstream customers (wholesalers, supermarkets, restaurants and butchers)

- The trade association supported and facilitated the cartel by arranging meetings and motivating members to fix prices
  - Circulated letters to members highlighting what had been agreed
  - Monitored the implementation of the collusive scheme
  - Gave its own views on level of minimum prices
Other trade associations fined recently

- 25 February 2014: Germany competition authority fined wallpaper manufacturers for agreeing price increases. A trade association was also fined for facilitating the conduct.

- 2 April 2014: German competition authority fined brewers, individuals and a regional trade association for illegal price fixing agreements for beer.

- 8 May 2015: UK competition authority fined an association of estate and rental agents, 3 of its members and a newspaper for agreeing not to advertise fees or discounts.
Extract of a sample competition compliance checklist

<table>
<thead>
<tr>
<th>DON’T</th>
<th>DO</th>
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</thead>
<tbody>
<tr>
<td>Do not discuss or exchange commercially sensitive information with</td>
<td></td>
</tr>
<tr>
<td>other companies, including for example information on:</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Oversight/supervision</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>- Have a <strong>[redacted]</strong> representative at each meeting</td>
<td></td>
</tr>
<tr>
<td>- Consult with appropriate counsel on all questions which might be</td>
<td></td>
</tr>
<tr>
<td>related to competition law</td>
<td></td>
</tr>
<tr>
<td>- Limit meeting discussions to agenda topics</td>
<td></td>
</tr>
<tr>
<td>- Provide each attendee with a copy of this checklist, and have a</td>
<td></td>
</tr>
<tr>
<td>copy available for reference at all meetings</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Prices, including:</th>
<th>Recordkeeping:</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Individual company/industry prices, raw materials or other</td>
<td>- Have an agenda and minutes which accurately reflect the</td>
</tr>
<tr>
<td>purchasing prices, price changes, price trends, price</td>
<td>matters discussed</td>
</tr>
<tr>
<td>differentials, discounts, trade margins or any other element of</td>
<td>- Ensure the review of agendas, minutes and other important</td>
</tr>
<tr>
<td>pricing, allowances, credit terms, etc.</td>
<td>documents by appropriate staff or counsel, in advance of</td>
</tr>
<tr>
<td>- Terms and conditions of purchase or sale</td>
<td>distribution</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Production, including:</td>
<td>- Fully describe the purposes, structures and authorities</td>
</tr>
<tr>
<td>- Individual company data on costs, production, capacity,</td>
<td>of the group</td>
</tr>
<tr>
<td>inventories, sales, etc.</td>
<td>---------------</td>
</tr>
<tr>
<td>- Investment levels, production planning or output levels</td>
<td>---------------</td>
</tr>
<tr>
<td>- Changes in Individual company/industry production</td>
<td>---------------</td>
</tr>
<tr>
<td>capacity or inventories, etc.</td>
<td>---------------</td>
</tr>
</tbody>
</table>

Vigilance:
Chairing trade association meetings

- Ensure that discussions stay within what is permissible
  - Request that participants stick to the agenda

- If any disallowed topics mentioned are discussed during meetings of a trade association
  - Order the discussion to stop immediately
  - Adjourn the meeting to explain the rules
  - Adjourn the topic to a subsequent meeting in order to take specific legal advice, if concern persists

- If the discussion is not stopped per your order
  - Repeat your concern
  - End the meeting and ensure that your objection and the ending of the meeting are recorded in the minutes
Conclusions

- Respecting the competition rules avoids: