



103 A Comparative Study of Competition Law

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Felice D'Acquisto currently works at Ford Italia as Director, Legal and Governmental Affairs. In this role, he is in charge of providing legal advice and oversees litigation for the Italian automotive and finance companies of the Ford Motor Company Group. His practice focuses on competition and distribution law and on Italian corporate and tax law. In recent years he has also coordinated the provision of legal services in connection with the securitization transactions carried out in Italy by FCE Bank plc (the banking arm of Ford Motor Company). Mr. D'Acquisto joined Ford in 1999 as Legal Affairs Manager for FCE Bank plc.

Prior to working for Ford, Mr. D'Acquisto worked as an associate at the law firm Brosio Casati - Allen & Overy where he was a European Union Adviser, drafted the Namibian Antitrust Law, and provided training for the Namibian Ministry of Trade and Industry. From 1994-1995, Mr. D'Acquisto worked at the European Commission in the Directorate General, Internal Market and Financial Services.

Mr. D'Acquisto is a graduate of the University of Palermo and the College of Europe of Bruges. He received his JD from the Harvard Law School.

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Overview

- **Global developments in 2004/2005**
- **Focus on EU and new Member States**



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What is competition law?

- **Competition laws typically aim to:**
 - regulate merger and acquisitions
 - prohibit cartels and anti-competitive agreements
 - prohibit monopolisation or abuse of market power (dominance)
 - some countries (e.g., FR, DE, ES, P) also aim to regulate situations of “economic dependence”

A supply and demand graph with 'Price' on the vertical axis and 'Quantity' on the horizontal axis. A downward-sloping line is labeled 'Demand' and an upward-sloping line is labeled 'Supply'. They intersect at an equilibrium point, with dashed lines indicating the corresponding price and quantity on the axes.

Global developments: new laws

- Competition laws in over 100 countries
- Recent new joiners:
 - Singapore: 2004 Act - 1 January 2005 
 - Vietnam: 2004 Law - 1 July 2005 
 - Egypt: 2005 Act - later this year 
- China: comprehensive competition law in the pipeline 

Global developments: merger control

- 60+ national merger regimes in the world
- Substantive rules are similar
- Triggering events, timing and procedure differ greatly
- Problem jurisdiction:
 - Brazil: time for final decision

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Global developments: cartel busting

















- **Increasing cooperation between regulators on cartel cases:**
 - ICN “best practice initiatives”
 - Coordination on cartel dawn raids
- **First UK/US extradition request:**
 - former CEO of Morgan Crucible
 - cartel involvement and obstruction of justice
 - High Court has ruled no bar to extradition
 - Secretary of State to make final decision



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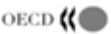


Global developments: cartel leniency

- **New leniency policies**
 - Belgium 
 - Finland 
 - Hungary 
 - Japan 
 - Luxembourg 
 - New Zealand 
 - South Africa 
 - Switzerland 
- **... in the pipeline**
 - Spain 
 - Singapore 
- **Leniency policies under review**
 - Australia 
 - EU 
 - UK 
- **Leniency policies amended**
 - US 
 - South Korea 
 - Poland 

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Global developments: enhanced cooperation

- **New bilateral “traditional” cooperation agreements:**
 - EU/South Korea MOU 
 - Canada/Japan agreement in principle 
 - US/Japan “positive comity” agreement 
- **Multilateral initiatives**
 - International Competition Network 
 - OECD Global Competition Forum 
- **“Next generation” agreements:**
 - EU25 information exchange 
 - exchange of confidential information e.g., Canada/UK cooperation arrangement 

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Focus on EU and new Member States

EC competition rules: basics

- **Article 81 EC Treaty**
prohibits restrictive agreements

- **Article 82 EC Treaty**
prohibits abuse of dominance

- **EC Merger Regulation**

- **EC State Aid Rules**

Enforcing Articles 81 & 82: who?

- **25 National Competition Authorities**
 - **frontline enforcers**
 - **apply EC and national rules using national powers and penalties**

- **European Commission**
 - **focus on hard core cartels, abuses, industry investigations and policy**
 - **applies EC rules using its specific powers and penalties**



The European Competition Network

- **26 authorities able to exchange information and work formally and informally together**
- **NCA's and courts can apply EU and national law in parallel**
- **One or more authorities can pursue investigations into the same / similar infringement**
- **Coordination to ensure consistent outcome but independent fining decisions**

How Does the System Work?

- **May 2004** - simultaneous raids by BKA and Commission in paper sector; raids by Austrian CA on behalf of BKA
- **July 2004** - raids by BKA and others on behalf of Italian CA in baby food sector
- **Oct. 2004** - Deutsche Post: Commission investigates Art. 86(3); BKA investigates discriminatory practices and gets Commission file
- **Feb. 2005** - Commission dawn raids in glass triggered by complaint to BKA and discussions within the ECN; in 2 Member States, raids by NCA's on behalf of Commission

Commission's Increased Powers of Investigation

- **Sectoral investigations** - Commission may request copies of "all agreements, decisions and concerted practices"
- **Power to take statements with consent**
- **Increased powers of inspection** – to ask for any explanations on facts or documents; to seal business premises and records
- **Inspections of private property** if "reasonable suspicion" that records are stored there










Enforcing Articles 81 & 82: how?

Lack of one-stop-shop leniency and divergence in national rules increase compliance costs:

- **Penalties: civil or criminal? Can individuals be sanctioned? Is there a cap on corporate fines?**
- **Cartel leniency: which countries have a policy?**
- **Legal privilege: is in-house privilege recognised?**

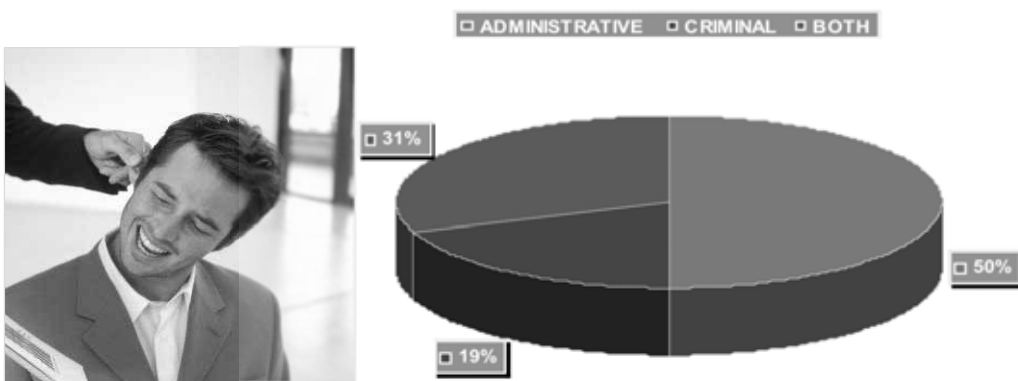
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Are penalties administrative or criminal?

	AUSTRIA	ADMINISTRATIVE (INDIVIDUALS MAY ALSO FACE CRIMINAL PENALTIES FOR BID RIGGING)
	BELGIUM	ADMINISTRATIVE
	CYPRUS	ADMINISTRATIVE
	CZECH REPUBLIC	ADMINISTRATIVE (INDIVIDUALS MAY ALSO FACE CRIMINAL PENALTIES)
	DENMARK	CRIMINAL
	ESTONIA	CRIMINAL
	FINLAND	ADMINISTRATIVE
	FRANCE	ADMINISTRATIVE (INDIVIDUALS MAY ALSO FACE CRIMINAL PENALTIES)
	GERMANY	ADMINISTRATIVE (INDIVIDUALS MAY ALSO FACE CRIMINAL PENALTIES FOR BID RIGGING)
	GREECE	BOTH
	HUNGARY	ADMINISTRATIVE
	IRELAND	CRIMINAL
	ITALY	ADMINISTRATIVE
	LATVIA	BOTH
	LITHUANIA	ADMINISTRATIVE
	LUXEMBOURG	ADMINISTRATIVE
	MALTA	CRIMINAL
	NETHERLANDS	ADMINISTRATIVE
	POLAND	ADMINISTRATIVE
	PORTUGAL	ADMINISTRATIVE
	SLOVAKIA	ADMINISTRATIVE (INDIVIDUALS MAY ALSO FACE CRIMINAL PENALTIES)
	SLOVENIA	CRIMINAL
	SPAIN	ADMINISTRATIVE
	SWEDEN	ADMINISTRATIVE
	UNITED KINGDOM	ADMINISTRATIVE (INDIVIDUALS MAY ALSO FACE CRIMINAL PENALTIES)

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Are penalties administrative or criminal?



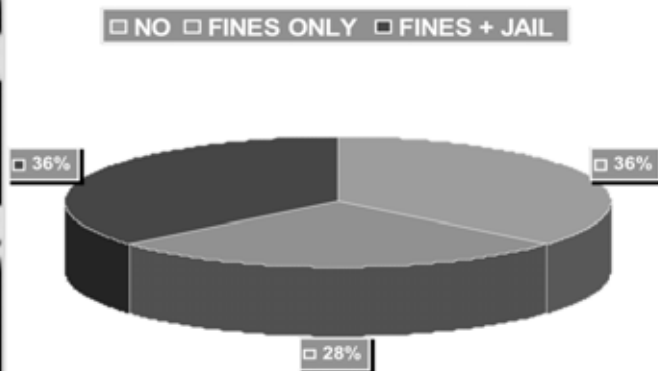
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Can individuals be sanctioned?

	AUSTRIA	YES	ONLY FOR BID-RIGGING: FINES AND/OR IMPRISONMENT
	BELGIUM	NO	-
	CYPRUS	NO	-
	CZECH REPUBLIC	YES	FINES AND/OR IMPRISONMENT
	DENMARK	YES	FINES ONLY
	ESTONIA	YES	FINES AND/OR IMPRISONMENT
	FINLAND	NO	-
	FRANCE	YES	FINES AND/OR IMPRISONMENT
	GERMANY	YES	ONLY FOR BID-RIGGING: FINES AND/OR IMPRISONMENT
	GREECE	YES	FINES ONLY
	HUNGARY	NO	-
	IRELAND	YES	FINES AND/OR IMPRISONMENT
	ITALY	NO	-
	LATVIA	YES	FINES AND/OR IMPRISONMENT
	LITHUANIA	NO	-
	LUXEMBOURG	NO	-
	MALTA	YES	FINES ONLY
	NETHERLANDS	NO	-
	POLAND	YES	FINES ONLY
	PORTUGAL	YES	FINES ONLY
	SLOVAKIA	YES	FINES AND/OR IMPRISONMENT
	SLOVENIA	YES	FINES ONLY
	SPAIN	YES	FINES ONLY
	SWEDEN	NO	-
	UNITED KINGDOM	YES	FINES AND/OR IMPRISONMENT

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Can individuals be sanctioned?



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Is there a cap for penalties imposed on companies?

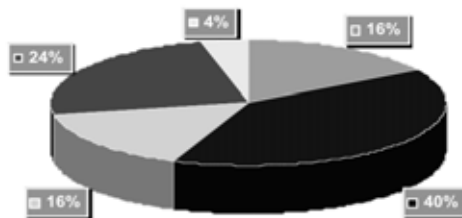
	AUSTRIA	10% WORLDWIDE TURNOVER
	BELGIUM	10% NATIONAL TURNOVER
	CYPRUS	10% TURNOVER (UNCLEAR IF NATIONAL OR WORLDWIDE)
	CZECH REPUBLIC	10% WORLDWIDE TURNOVER
	DENMARK	NO CAP
	ESTONIA	MAX. €16 MILLION
	FINLAND	10% WORLDWIDE TURNOVER
	FRANCE	10% WORLDWIDE TURNOVER
	GERMANY	UP TO 3 TIMES GAIN
	GREECE	15% TURNOVER (UNCLEAR IF NATIONAL OR WORLDWIDE)
	HUNGARY	10% TURNOVER ON RELEVANT MARKET
	IRELAND	10% TURNOVER (UNCLEAR IF NATIONAL OR WORLDWIDE)
	ITALY	10% NATIONAL TURNOVER
	LATVIA	10% TURNOVER (UNCLEAR IF NATIONAL OR WORLDWIDE)
	LITHUANIA	10% WORLDWIDE TURNOVER
	LUXEMBOURG	10% WORLDWIDE TURNOVER
	MALTA	10% TURNOVER ON RELEVANT MARKET
	NETHERLANDS	€450,000 or 10% NATIONAL TURNOVER
	POLAND	10% WORLDWIDE TURNOVER
	PORTUGAL	10% TURNOVER (UNCLEAR IF NATIONAL OR WORLDWIDE)
	SLOVAKIA	10% WORLDWIDE TURNOVER
	SLOVENIA	MAX. €126,000
	SPAIN	10% NATIONAL TURNOVER
	SWEDEN	10% WORLDWIDE TURNOVER
	UNITED KINGDOM	10% WORLDWIDE TURNOVER

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Is there a cap for penalties imposed?






10% NATIONAL TURNOVER 10% WORLDWIDE TURNOVER
 10% TURNOVER (NOT DEFINED) OTHER CAP
 NO CAP



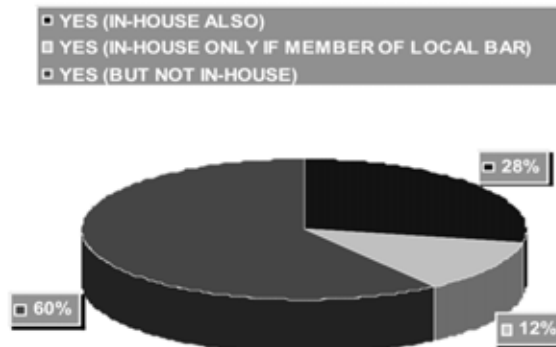
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Is legal privilege available?


























	AUSTRIA	YES	NOT IN-HOUSE ADVICE
	BELGIUM	YES	COVERS IN-HOUSE AND FOREIGN ADVICE
	CYPRUS	YES	COVERS IN-HOUSE AND FOREIGN ADVICE
	CZECH REPUBLIC	YES	NOT IN-HOUSE ADVICE
	DENMARK	YES	NOT IN-HOUSE ADVICE
	ESTONIA	YES	NOT IN-HOUSE ADVICE
	FINLAND	YES	NOT IN-HOUSE ADVICE
	FRANCE	YES	NOT IN-HOUSE ADVICE
	GERMANY	YES	NOT IN-HOUSE ADVICE
	GREECE	YES	COVERS IN-HOUSE AND FOREIGN ADVICE
	HUNGARY	YES	NOT IN-HOUSE ADVICE
	IRELAND	YES	COVERS IN-HOUSE ADVICE
	ITALY	YES	NOT IN-HOUSE ADVICE (UNLESS ADVISOR ADMITTED TO ITALIAN BAR)
	LATVIA	YES	NOT IN-HOUSE ADVICE
	LITHUANIA	YES	NOT IN-HOUSE ADVICE
	LUXEMBOURG	YES	NOT IN-HOUSE ADVICE (UNLESS ADVISOR ADMITTED TO LUXEMBOURG BAR)
	MALTA	YES	COVERS IN-HOUSE AND FOREIGN ADVICE
	NETHERLANDS	YES	NOT IN-HOUSE ADVICE (UNLESS ADVISOR ADMITTED TO DUTCH BAR)
	POLAND	YES	NOT IN-HOUSE ADVICE
	PORTUGAL	YES	COVERS IN-HOUSE ADVICE
	SLOVAKIA	YES	NOT IN-HOUSE ADVICE
	SLOVENIA	YES	NOT IN-HOUSE ADVICE
	SPAIN	YES	NOT IN-HOUSE ADVICE
	SWEDEN	YES	NOT IN-HOUSE ADVICE
	UNITED KINGDOM	YES	COVERS IN-HOUSE AND FOREIGN ADVICE

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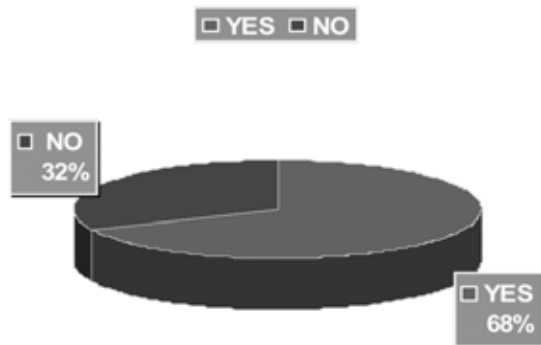
Is legal privilege available?



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Is there a leniency policy in place?

	AUSTRIA	NO	
	BELGIUM	YES	ADOPTED 2004
	CYPRUS	YES	ADOPTED 2003
	CZECH REPUBLIC	YES	ADOPTED 2002
	DENMARK	NO	
	ESTONIA	YES	ADOPTED 2004
	FINLAND	YES	ADOPTED 2004
	FRANCE	YES	ADOPTED 2001
	GERMANY	YES	ADOPTED 2001
	GREECE	NO	
	HUNGARY	YES	ADOPTED 2004
	IRELAND	YES	ADOPTED 2001
	ITALY	NO	
	LATVIA	YES	ADOPTED 2003
	LITHUANIA	YES	ADOPTED 1999
	LUXEMBOURG	YES	ADOPTED 2004
	MALTA	NO	
	NETHERLANDS	YES	ADOPTED 2002
	POLAND	YES	ADOPTED 2001 REVIEWED 2004
	PORTUGAL	NO	
	SLOVAKIA	YES	ADOPTED 2002
	SLOVENIA	NO	
	SPAIN	NO	
	SWEDEN	YES	ADOPTED 2002
	UNITED KINGDOM	YES	CORPORATE LENIENCY ADOPTED 2000 REVIEWED 2004 – INDIVIDUAL IMMUNITY ADOPTED 2003

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Is there a leniency policy in place?

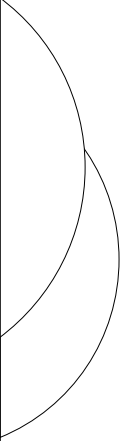


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Conclusion



- **risk of being caught has never been greater**
- **ensure you have a good compliance programme**
 - **support of senior management**
 - **appropriate policies and procedures**
 - **training**
 - **evaluation**



The increased relevance of State Aid policy in the Enlarged EU

Felice D'Acquisto

Director, Legal and Governmental Affairs – Ford Italia S.p.A.



Member States reluctant to reduce distorting state aid

- Member States paid out 53 billion euro (0.57% of EU GDP) to troubled companies or sectors in 2003.
- Although member states committed themselves in 2001 to reducing state aid, in reality the trend is stable instead of declining.

State aid in EU-10 doubled prior to enlargement

- On average, state aid in the EU-10 countries amounted to 1.42% of GDP in 2000-2003. The EU-15 average was 0.4%.
- The EU-10 states granted an average of just under six billion euro annually in state subsidies between 2000 and 2003. This compares with 34 billion euro spent by the EU-15 in 2002.

State Aid no longer the “neglected” side of EC Competition law

- Today, the Commission reviews thousand state aid cases each year.
- Many recipients of state aid have undergone lengthy investigations and some have gone bankrupt following recovery of illegal aid.
- Companies are now re-organising their operations as benefits of aid declared incompatible with the EC Treaty cease.
- Competitors are now increasingly willing to lodge complaints about market distorting subsidies.
- Financial institutions and purchasers of businesses are increasingly aware of the risks inherent in dealing with companies that have received state aid.

Definition of State Aid under Art. 87 of the EC Treaty

- Any economic advantage or benefit that is conferred on a specific undertaking (or group of undertakings);
- By a Member State or through public resources;
- Distorting competition; and
- Which at least affects trade between Member States

Exemptions (Art. 87(2) and 87 (3) of the EC Treaty

- **Art. 87 (2)** sets out certain statutory exemptions (aid with social character to individual consumers or aid in connection to natural disasters);
- **Art. 87 (3)** leaves some discretion to the Commission. In particular, the Commission has issued five block exemptions:
 - De minimis Aid (€ 100.000 over 3 years);
 - Training Aid;
 - Aid to SMEs;
 - Aid for employment;
 - Aid to SMEs in the agricultural sector

Procedural framework

- **Existing Aid:** any aid existed prior to entry into force of the EC Treaty or that has been authorised;
- **New Aid:** must be notified with the Commission and investigation entail two stages:
 - **Stage 1:** Commission has 2 months to raise doubts as to its compatibility. If not, measure is cleared;
 - **Stage 2:** In depth investigation that should not last longer than 18 months;

Procedural framework

- **Standstill clause:** New aid may not be put into effect prior to the authorisation by the Commission. A breach of standstill obligation may result in:
 - If aid found illegal, Member State has to recover the aid from the recipient;
 - **Art. 88 (3) EC Treaty is directly applicable:** Competitors may ask suspension of the measure or claim the repayment before national courts even in case of subsequent approval by the Commission (Van Calster);
 - Contract or other act granting aid may be deemed void

The reform of State Aid – the objectives

- The Commission has announced a comprehensive five year reform aimed at:
 - Focusing on “less & better state aid”;
 - “A refined economic approach”;
 - “More effective procedures, better enforcement higher predictability and enhanced transparency”;
 - A shared responsibility between Commission and Member States

The reform of State Aid – the proposed instruments

- Enlarge the scope of Regulation 994/98 to simplify, consolidate and enlarge the scope of block exemptions
- Increase “de minimis” threshold;
- Increase further cooperation with Member States (also through independent authorities) to ensure higher quality notifications and full implementation of recovery injunctions;
- Engage in advocacy to encourage stakeholders to make use of their rights under Art. 88 (3) EC

Recent Developments – Acquirer liability for past state aid?

- Is an acquirer liable for recovery of illegal aid granted to the seller prior to acquisition?
 - **Seleco**: no risk if acquirer purchased at assets/shares at market price. Ensure:
 - Use of independent evaluation/expert;
 - Price is determined by way of auction or tender;
 - Mirror these “improvements” in acquisition agreements
 - **SMI**: ECJ confirms Seleco ruling
 - **British Steel/US**: the Commission used same arguments before the WTO

Recent Developments – Services of general economic interest

- **Altmark**: State measures are not State aid to the extent they are compensation for services provided in discharge of public service obligations provided that:
 - Public Service obligation is clearly defined (postal services, broadcasting..);
 - Compensation may not exceed additional costs;
 - Parameters for compensation are set in advance in objective and transparent manner (cost factors identified and budgeted)
 - If choice of provider does not follow a public bid, the compensation must be determined on the basis of the costs that would be incurred by a “well run company”
- In its **proposed framework** the Commission sets the guidelines to determine the appropriate level of compensation and introduces a mechanism of reimbursement of overcompensation

Recent Developments – Rescue and restructuring aid

- The 2004 Commission Guidelines anticipate some elements of the action plan:
 - The Commission will no longer assess the viability of SME's restructuring plans;
 - A streamlined procedure is introduced for some instances of rescue aid;
 - No rescue or restructuring aid to undertakings that did not reimburse previous illegal aid;
 - More emphasis on firms' obligation to raise part of the restructuring costs

State aid in the New Member States

- "New aid" will be subject solely to the scrutiny of the European Commission (national authorities will lose their competence to review aid) to ensure that government financial assistance is scrutinised vigorously
- Under certain circumstances, EU rules may apply retroactively to aid measures granted before accession.

State aid in the New Member States

- Three main categories of aid:
 - Existing Aid
 - Granted before 10/12/1994 ("per se" existing aid);
 - Listed in the Annex to Accession Treaties;
 - Undergone the Interim Procedure (aid approved by national authority and not objected by the Commission)
 - New Aid
 - Transitional Aid (steel, shipbuilding and selective tax reliefs)

State aid in the New Member States Memorandum for Investors

- Carefully examine balance sheet of Target Co. and verify if benefited from public measures in the past;
- Check if such measures qualify as state aid and, if so, whether it is an "existing aid";
- Is the aid "de minimis" or falls within existing block exemption?
- (especially) in case of privatisation, always check the rules of awarding were open and transparent and if a true tender procedure was in place. If not, procure an independent expert evaluation;
- Establish dialogue with national authorities and Commission;

State aid in the New Member States Memorandum for Investors

- Evaluate the impact of discontinuation or amendment of the aid may have on future target's profitability;
- Transitional aid ceases in case of merger or acquisition and any changes made to restructuring plan need to be notified to avoid recovery measures;
- New aid: New Member States may encounter difficulties in defending the interests of the beneficiaries as they are not familiar with State Aid procedure and relevant enforcement

Conclusion

- Commission plans further scrutiny on aid of relevant amount and with substantial impact on EC trade;
- Follow up on implementation of recovery measures bt Member States will be tightened;
- Challenge before National Courts will become an effective tool for competitors of firms who have benefited of aid;
- Make sure:
 - to carry out appropriate due diligence of targets who have benefited of public measures in the past;
 - Your companies engage in dialogue with Commission before finalising arrangements on state aid with MS; and
 - That you are equipped and ready to challenge state aid benefited from your competitors



Cases and documents quoted

- State Aid Scoreboard - Spring 2005 update
http://europa.eu.int/comm/competition/state_aid/scoreboard/2005/spring_en.pdf
- C-262/01, Belgian State v. **Van Calster**, judgment 21/10/2003
- State Aid Action plan
http://europa.eu.int/comm/competition/state_aid/others/action_plan/
- Joined Cases C-328 and 399/00, Italian Republic and SIM 2 Multimedia SpA v. Commission (**Seleco**)
- C-277/00 Germany v. Commission (**SMI**)
- C-280/00, Altmark Trans, judgment of 24.07.2003
- A proposal from the Services of the Competition Directorate-General for a Community framework for State aid in the form of Public Service Compensation
http://europa.eu.int/comm/competition/state_aid/others/public_service_comp/en.pdf
- Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty
http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_244/c_24420041001en00020017.pdf