European Competition Practice

INTERNATIONAL

About CRA International
Founded in 1965, CRA International is a leading provider of economic and financial expertise and business consulting services. Working with law firms, businesses, accounting firms and governments, CRA offers a proven track record of thousands of successful engagements in competition advice, regulatory and litigation support, business strategy and planning, market and demand forecasting, policy analysis, and intellectual property management. The firm combines deep specialist expertise in a variety of industries with rigorous economic, financial and market analysis.

A Leader in Antitrust Economics
In the area of antitrust economics, CRA is a recognised leader in advising companies, law firms and competition agencies both in Europe and worldwide. CRA's experts and academic associates have been involved in many of the major competition cases of recent years, and have an unparalleled track record as advisers in merger control, restrictive agreements, abuse of dominance, cartels, damages estimation and state aid. Headquartered in Boston, the firm has more than 700 professional staff in over 20 offices across the US, Canada, Europe, the Middle East, and the Asia Pacific region, with around 200 competition specialists worldwide.

Detailed information about CRA is available at **www.crai.com**

CRA's European Competition Practice specialises in providing economic advice on matters of competition policy and regulation.

The European Competition Practice

We **assist** firms considering merger and acquisition opportunities or that are involved in merger control proceedings; firms undergoing investigations on cartels, restrictive commercial agreements, or on abuse of dominance. We also provide advice to firms involved in regulatory proceedings, sector inquiries, and state aid issues. We offer assistance on the estimation of effects and damages in cartel cases, antitrust litigation, international arbitration and intellectual property disputes.

We have a **reputation** for rigorous and innovative economic analysis, careful attention to detail, and the ability to work effectively as part of a wider team of advisors. From *Airtours* to *GE/Honeywell*, *Tetra/Sidel*, *Oracle/PeopleSoft*, *Ryanair/Aer Lingus*, *TomTom/Tele Atlas* and *Microsoft*, we have played a key role in many of the cases that have shaped European competition policy in recent years. We have also been involved in major cases before the competition authorities of the Member States, and in South Africa.

We have an **expanding** team and offices in London, Brussels, Amsterdam and Paris, and we work closely with our worldwide network of internationally-renowned academic experts. We have strong **sectoral expertise** in broadcasting, energy, financial services, consumer products, pharmaceuticals and telecoms. In addition, access to the full range of CRA's competition, finance and industry experts worldwide means we are uniquely placed to provide individually-tailored analysis and expert advice.

www.crai.com/ecp/

Economic analysis is now central to competition investigations. Economists play a key role at the European Commission and at the national level.

How we can help

The Chief Economist and his team play a prominent role in the decision-making of DG Competition, and economists occupy key positions in the competition authorities of several Member States. In complex cases emphasis is now firmly on the economic effects of the practices under investigation, rather than just their form. Sophisticated analyses are increasingly developed by regulators which require sound economic theory and evidence. We are able to help:

Developing the arguments
We typically work alongside law firms to help develop the key arguments for client submissions. We are usually involved at an early stage to assess potential competition concerns raised by a contemplated merger or business practice.

Drafting written submissions
We are experienced in presenting sophisticated economic arguments to competition authorities, regulators and the Courts; explaining highly technical concepts in a manner also accessible to a non-technical audience.

Carrying out sophisticated analysis
We have a strong reputation for high-end, sophisticated quantitative analyses. Our in-house team of econometricians and expert modellers specialises in managing data-intensive tasks and applying quantitative techniques to support our market analyses.

Expert witness support
Along with our extensive network of internationally-renowned academic affiliates, our experts provide clients with a choice of high-calibre expert witnesses. We have testified before many national and international regulatory bodies and Courts.

Competition proceedings increasingly involve economic analysis at every stage.

Where we can help

We use theoretical economic analysis and empirical tools to analyse markets, identify the key questions, assist in locating information relevant to these questions, and help formulate the economic answers.

Merger analysis
- What is the relevant market?
- Is the merger likely to create significant additional market power, either through unilateral or coordinated anti-competitive effects?
- Are there vertical or conglomerate concerns?
- What empirical evidence is relevant to the assessment of the potential anti-competitive effects?
- Is the merger likely to create significant efficiencies? Will consumers benefit from them?
- What remedies are most suitable to address the competition concern?

Vertical agreements
- Can a vertical agreement restrict competition in the markets where the buyer or the seller operate?
- Does a vertical agreement have significant pro-competitive effects? Is it indispensable for achieving these pro-competitive effects?

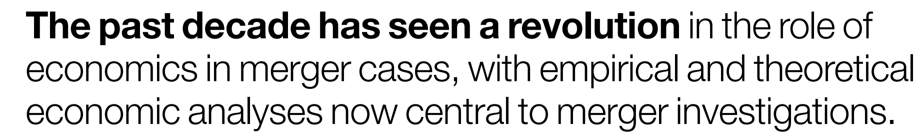
Cartel investigations
- Is there evidence that a cartel or other horizontal agreement operated over a certain time period or product range?
- Has a cartel resulted in significantly higher prices?
- What was the damage inflicted on customers? Were customers able to pass on any overcharge to end consumers? What is the likely size of damages that can be claimed?

Damages estimation
- What was the economic impact of the behaviour claimed to have caused damage to a third party?
- What would sales, prices and profits have been if the behaviour had not taken place?
- How does this compare with the actual outcome?

Abuse of a dominant position
- Does the company have market power? Is it dominant?
- Is a particular practice likely to foreclose competitors or otherwise harm competition? Will consumers likely face higher prices or lower quality supplies?
- Is there a legitimate commercial justification for the behaviour?

Regulatory proceedings
- Is regulatory intervention justified?
- What is the appropriate form of regulation or remedy?

State aid
- Has state aid been granted? Would a market investor provide financing on equivalent terms?
- Is the state aid justified by some form of market failure?
- Does the aid distort competition in the market? Does it affect trade?



The past decade has seen a revolution in the role of economics in merger cases, with empirical and theoretical economic analyses now central to merger investigations.

Merger analysis

Economic analysis has taken centre stage in merger control following landmark Court judgments on merger appeals, the creation of the Chief Economist role, the issuing of DG Comp's Guidelines on the assessment of horizontal and non-horizontal mergers.

Merger assessment now fully embraces modern economic thinking on the behaviour of oligopolistic markets, and theories of harm are closely tested against the available data and documents.

Economic advice is commonly sought at the planning stage of a transaction, to identify potential competition problems at the earliest opportunity.

We help define the relevant markets, anticipate the likely theories of harm that will be raised by competition authorities, identify the most appropriate model of competition for assessing the effect of the merger, select the relevant empirical tests to predict the likely impact of the merger on competition, and consider the potential implications of different remedies packages.

We have a strong reputation for helping clients gain approval in the first phase of an investigation, thus avoiding full-scale inquiries. At the same time, CRA's economists have worked on some of the most important and controversial cases of recent years, involving the assessment of mergers in oligopolistic markets, unilateral effects, vertical transactions and theories of bundling and conglomerate effects.

We have advised parties, both in the administrative proceedings and in appeal to the Court of First Instance (CFI), in landmark cases that have changed the course of competition policy enforcement in Europe, such as *Airtours, Tetra Laval/Sidel* and *GE/Honeywell*.

European cases in which we have advised in the last five years include:

- *Sappi / M-real* (2008)
- *BAT / STK* (2008)
- *TomTom / Tele Atlas* (2007/8)
- *Huntsman / Hexion* (2008)
- *Oracle / BEA* (2008)
- *Randstad / Vedior* (2008)
- *Saint-Gobain / maxit* (2008)
- *Thomson / Reuters* (2007)
- *INEOS / Kerling* (2007)
- *Yara / Kemira GrowHow* (2007)
- *Ryanair / Aer Lingus* (2007)
- *Kraft / Danone* (2007)
- *SCA / Procter & Gamble* (2007)
- *KarstadtQuelle / MyTravel* (2007)
- *CVC / Ferd / Elopak / SIG* (2007)
- *Owens Corning / Vetrotex* (2007)
- *INEOS / BP Dormagen* (2006)
- *Inco / Falconbridge* (2006)
- *Alcatel / Lucent* (2006)
- *Linde / BOC* (2006)
- *SEA-invest / EMO-EKOM* (2006)
- *GDF / Suez* (2006)
- *T-Mobile / tele.ring* (2006)
- *Adidas / Reebok* (2006)
- *Telefónica / O2* (2006)
- *E.ON / MOL* (2005)
- *Saint-Gobain / BPB* (2005)
- *Procter & Gamble / Gillette* (2005)
- *ENI / EDP / GDP* (2005 – CFI appeal)
- *Oracle / PeopleSoft* (2003–4)
- *News Corp / Telepiu* (2003)
- *Pfizer / Pharmacia* (2003)

We have extensive experience in mergers before national competition authorities, including the German, French, Austrian, Dutch, Italian, Spanish, and Portuguese authorities, as well as the OFT and the Competition Commission in the UK.

CRA's recent UK experience includes *Lloyds TSB / HBOS, Co-op / Somerfield, Home Retail Group / Focus stores, Seawell / Noble UK, Kemira GrowHow / Terra Industries, Pan Fish / Marine Harvest, Stericycle International / Sterile Technologies Group* and *Boots / Alliance Unichem*.

In addition we have been involved in many high-profile cases before the South African competition authorities, including *Netcare / Community Hospital Group, Telkom / BCX, Sasol / Engen, Harmony / Gold Fields* and *Anglo American / Kumba Resources*.

The European Commission's guidelines on the application of Article 82 embrace a more economics-based approach – focusing on the effect, rather than form, of the alleged abusive behaviour.

Abuse of a dominant position

The European Commission's discussion paper on the application of Article 82, followed by new Guidelines, places economic analysis centre-stage in the assessment of abuse cases.

In order to show an abuse of a dominant position has taken place, it is necessary to establish dominance and then show that this has been abused to the detriment of consumers. Economic arguments and evidence are central to both of these issues.

The relevant market must be defined first, to then analyse the extent to which the firm has market power. If dominance is established, it is then necessary to analyse the effects of its conduct on competition, with a focus on whether the conduct is likely to harm consumers.

Practices such as bundling, rebate schemes and refusal to supply can be either pro- or anti-competitive, even when carried out by a dominant firm, so careful economic analysis of the actual effects of the conduct in each specific case must be carried out. It is not enough simply to present theory on how conduct might have foreclosing effects on competitors: it is essential to carry out an analysis of the likely effect on consumers, corroborated by empirical evidence.

In many Article 82 cases it is imperative to consider the dynamic effects of the dominant firm's practices, and of the likely reaction by competitors. An analysis of effects of alleged abusive conduct on industry-wide incentives to innovate and the interface between intellectual property and competition policy have also been a major issue in recent Article 82 investigations.

CRA has advised in a large number of cases involving the possible abuse of a dominant position at the European level, before the national competition authorities, and increasingly before national courts. Our experience in Article 82 cases includes successful advice to *Sun Microsystems*, *AOL*, the *CCIA (Computer and Communication Industry Association)* and others in their complaints against *Microsoft* to the European Commission, leading to the Commission's landmark decision in 2004, which was upheld in 2007 by the European Court of First Instance. We have also advised firms which have filed Article 82 complaints against Qualcomm related to licensing and other practices in the mobile phone industry.

We have supported companies such as *Bacardi, Deutsche Telekom, AstraZeneca, Bus Eirrean, ENI, Tomra, SIS,* and *Airbus* in their defence against alleged abuses. We have also worked on abuse of dominance cases in front of the competition authorities in Germany, Italy, UK, Ireland, Sweden, Bulgaria and South Africa.

We often advise on Article 82 issues outside the confines of an official investigation. Typically working with a client's legal advisors, we assess whether a firm is likely to be found dominant by a regulatory authority and, if so, whether its current conduct might constitute an abuse of a dominant position and how its future conduct is likely to be restricted by the regulatory authorities on account of such dominance.

Commercial agreements that might prevent, restrict, or distort competition are scrutinised under Article 81. Increasingly, competition authorities are using economics to evaluate the effects of commercial agreements on competition.

Anti-competitive agreements

The European Commission has adopted guidelines on various types of agreements (vertical, horizontal and technology transfer), that are all heavily reliant on economic effects, and many national competition authorities have followed suit. To minimise antitrust risks, companies with significant market presence must establish whether an agreement will benefit or hinder competition. Economic analysis is at the heart of such an assessment.

Vertical agreements between companies at different levels of the supply chain often have strong efficiency rationales and enhance competition. However, they may also have anti-competitive effects, unfairly eliminating rivals or making them less effective competitors, or reducing competition between buyers or sellers.

There is a large and growing economic literature that identifies the types of agreements that might be problematic. Regulators require a systematic economic assessment of whether pro-competitive or anti-competitive effects of a vertical agreement will dominate when these agreements involve companies with a significant market share.

CRA has provided such an assessment in a variety of industries – from consumer goods to industrial products and luxury goods – and before numerous regulators (from DG Competition to the competition authorities of most Member States). We have also provided policy advice to various competition authorities on vertical issues.

DG Competition will be shortly reviewing the Vertical Restraints Guidelines and the discussion has already started on the changes that should be made to the Guidelines. For instance, there are different views in relation to the lawfulness of the restrictions manufacturers might wish to impose on internet resellers to prevent free riding vis-à-vis the "brick and mortar" retailers.

DG Competition has also analysed in a number of cases the extent to which territorial restrictions imposed by manufacturers that help create separate national markets (and sustain different prices) within the EU might be unlawful under Article 81. These cases occurred in a number of industries including car manufacturing, pharmaceuticals and online music supply. Economic analysis has played a central role in these discussions.

The recent *Leegin* Judgment in the US has also re-opened the debate on whether resale price maintenance should be regarded as a *per se* violation of Article 81 or whether substantive economic analysis is required to ascertain whether resale price maintenance constitutes a potential violation of Article 81.

Horizontal agreements aimed at softening competition among firms – most obviously cartels – are illegal. However, without direct circumstantial evidence it is difficult to establish collusion. Even evidence of communication between the parties does not necessarily justify a finding of collusion, and the interpretation of such communications requires careful investigation.

Empirical economic analyses can play a significant role in establishing whether the evolution of prices in a market could have an innocent (i.e. non-collusive) explanation, at least over certain periods or group of products. Similarly, economic theory can be used to analyse whether the market conditions in the industry are conducive to sustainable collusion, or whether a specific alleged practice (such as an exchange of information between firms) can facilitate collusion.

Moreover, some horizontal agreements can be granted exemption because their efficiency benefits outweigh any competitive harm – for example, if an agreement allows a new market to be opened. The burden of proof in such cases is high, and an exemption will therefore rely on a thorough economic assessment of costs and benefits. CRA has worked on the major reviews of existing Block Exemptions for liner shipping and IATA interlining, and on other similar cases.

Even where there is no exemption and the issue of culpability is beyond doubt, empirical economic analysis is central to assessing the size of fines and the potential for future damages claims. We have carried out estimations of the effects of cartels, including complex analyses of overcharge pass-through, in a variety of industries (see below). We have also provided expert opinions and testimony on damages in a number of cases, including working for plaintiffs in the European damages actions against the vitamins cartel.

We have worked on a large number of competition authority investigations into cartels, as well as private litigation cases against alleged cartel members. Some examples are listed below.

- Airfreight (2008–)
- Bananas (EU, 2007–2008)
- Dairy Products (UK, 2006–2008)
- Jet Fuel (2006–2008)
- Gas-insulated Switchgear (EU, 2006–2007)
- Offshore Services to the Oil Industry (2006)
- Choline Chloride (2005–2006)
- Lifts (EU, 2004–2007)
- Methionine (EU, 2004–2006)
- Synthetic Rubber (EU, 2004–2006)
- Rubber Chemicals (EU, 2004–2005)
- Fertilisers (South Africa, 2004–)
- Chemical Tanker Shipping (USA and EU, 2003–2007)
- Generic Pharmaceuticals (UK, 2002–)
- Football Kits (UK, 2002–2003)
- Tobacco (Italy, 2002)
- Vitamins (2001–2004)
- Bank Charges Finland (EU, 2000–2001)

The estimation of damages is not only an essential part of many commercial disputes – it is also increasingly important in anti-competitive conduct cases. The size of the effect of the anti-competitive conduct may influence the size of the fine, and will be critical in determining the quantum of possible claims from third parties.

Damages

A key issue in many commercial litigation disputes is the assessment of the damages resulting from the actions of one of the parties. Similarly, in cases involving anti-competitive conduct, assessing the effects of the conduct (typically on customers) is an important step – not only to help determine the size of any eventual fine, but also to provide an indication of the quantum of possible claims from third parties.

In the future, the likelihood and frequency of third party claims will increase as the European competition authorities encourage private antitrust actions. Empirical economic analysis will play a major role in assessing the damages arising from a particular action or event.

The general approach to damages assessment is to compare the actual outcomes that are observed in the market affected by the particular action (i.e. actual prices, sales and profits), with an estimate of what these outcomes would have been "but-for" the particular action. The difference between the actual and the but-for outcomes provides an estimate of the effect of the damage caused by the action in question.

Estimating the but-for market outcome requires an understanding of how the action may affect prices, sales and profits, and what other factors influence these outcomes. In some cases it may be possible to use relatively simple empirical analyses to estimate the but-for outcomes. More typically this requires an econometric estimation in order to be able to control for all factors that can influence market outcomes and may have been changing over the period that the behaviour in question took place. Various econometric techniques can be used to do this and the resulting estimates need to be accurate and robust.

CRA has been involved in numerous cases where we have estimated the damages resulting from a particular action. For example, we have acted for the plaintiffs in *Provimi and Nutreco v Aventis* and others, a case that concerned the vitamins cartel which operated between 1989–1999. In that case (and in subsequent work), CRA used a number of empirical techniques to estimate the excess pricing caused by the cartel on various vitamins.

In another example, CRA assisted the National Irish Bank during an investigation by the Irish High Court, by estimating the customer overcharges that may have resulted from certain fee-charging practices of the Bank.

Recent European cartel cases where we have examined what effect (if any) a cartel had on prices and sales, include cases related to rubber, chemicals, methionine, elevators, choline chloride, gas insulating switchgear and air freight services sectors. In several of these cases we have also been involved with subsequent private litigation.

As **competition and regulatory authorities** actively promote competition in regulated industries, the boundaries between regulation and competition policy have become blurred.

Competition advice in regulated industries

Competition is being introduced in regulated industries throughout Europe, with direct reference to the principles of European competition law. Competition authorities are playing an increasingly active role in regulated industries – as shown for example by the European Commission's recent Energy Sector Inquiry, followed by various competition proceedings. Mergers in the telecoms and energy sectors have also attracted close regulatory scrutiny, with complex remedy packages being designed to accelerate liberalisation.

We combine our recognised strength in competition analysis with a detailed knowledge of regulated industries – from telecoms to broadcasting, energy, pharmaceuticals, transport, postal and airport services – and we have advised on many issues in these sectors.

Telecoms and Broadcasting
We bring together an understanding of relevant economic and regulatory theory with detailed practical knowledge of fixed, mobile, cable and satellite networks. We have advised leading telecoms operators and broadcasters in Europe and beyond (including *T-Mobile, Vodafone, eircom, Orange, Telefónica, Deutsche Telekom, KPN, BT, Telecom Italia, Cesky Telekom, BTC, Telkom SA, MTN, Digicel, Vodacom, BSkyB, Sky Italia* and the *M Group*).

Recent assignments in these sectors have included:

- Merger analysis (including *T-Mobile/tele.ring* and *Telefónica/O2* before the European Commission, *Sonaecom/Portugal Telecom* before the Portuguese Competition Authority, and *Telkom/BCX* before the South African Competition Tribunal);
- Work for *BSkyB* and *Sky Italia* on vertical foreclosure, regulated access to the satellite platform and commercial terms for wholesale channel supply to third parties;
- Market definition and competition assessments in the context of the EU regulatory framework for electronic communications;
- Appraisal of allegations of anti-competitive conduct (including allegations of anti-competitive bundling, price discrimination, discounting and margin squeezes);
- Regulatory design, including design related to local loop unbundling, mobile termination rates, MVNO access, national and international roaming, network sharing and international benchmarking;
- Bid strategy and bidding support in relation to spectrum auctions.

Energy
We have a detailed understanding of how market design, sector regulations and technological characteristics can affect competition in the energy sector. We have advised extensively on competition issues in the energy industry, and we can draw upon the expertise of our global Energy practice in assisting clients in this sector. We have worked on most of the major European mergers involving the electricity and gas markets in recent years, including *Gas Natural/Union Fenosa, Essent/Nuon, GDF/Suez, Gas Natural/Endesa, E.ON/MOL, EDP/ENI/GDP* and *Centrica/Dynegy*, in addition to several other confidential transactions. We specialise in the application of sophisticated simulation tools to mergers in the electricity generation sector.

We have also provided advice to energy companies on sector inquiries (both at the European and national level), investigations of anti-competitive behaviour, dominance assessments, and the design of virtual capacity auctions and capacity payment mechanisms. Our recent competition work for European energy clients includes assignments in the UK, Italy, Spain, Portugal, Germany, Belgium and the Netherlands.

Under the UK Enterprise Act of 2002, the former complex and scale monopoly inquiry regime was replaced by 'market investigations provisions'.

Market investigations

The UK Office of Fair Trading (OFT) and certain regulators can refer specific markets to the Competition Commission for a public investigation whenever there are reasonable grounds to suspect that competition is distorted or restricted. The European Commission also has market investigation powers, as do the authorities in some Member States (e.g. Ireland).

Inquiries can focus narrowly on a particular industry practice but most market investigations involve a wider appraisal of whether competition is functioning effectively. Such inquiries tend to be time-consuming (usually lasting more than a year), and the parties are often required to submit a large amount of information.

The themes examined in market investigations typically include how competition in oligopolistic markets can be expected to evolve, how prices and profits have moved over time and whether the industry in question is meeting the needs of its customers.

Economic analysis is central to market investigations. It provides insights into how competitive markets should be expected to work and helps define the appropriate empirical techniques to develop the analysis using large data sets. We have extensive experience of market investigations.

Recent examples include:
- Payment Protection Insurance
- Northern Irish Personal Banking
- Classified Directory Advertising Services
- Store Cards
- Extended Warranties
- Veterinary Medicine
- Mobile Phone Charges
- SME Banking
- Supply of Milk in Scotland
- Supermarkets

We have also advised on OFT inquiries in which the behaviour concerned was deemed not to warrant a referral to the Competition Commission, as well as on government inquiries investigating similar issues (for example, the Cruickshank report into competition in UK banking).

Under Article 87(1) of the EC Treaty, Member States are prohibited from granting state aid that distorts competition and trade in the European Union.

State aid

The European Commission and the Courts have interpreted the concept of state aid widely to include not only state grants, but also less obvious forms of public financing such as tax relief, interest relief, state guarantees and holdings, and the provision of goods and services at below-market rates.

The consequences of a finding of illegal state aid can be serious, with the recipient forced to pay back all the aid granted plus interest. However, state aid is not always found to be incompatible with the common market. For example, aid may be permitted if it promotes the development of certain disadvantaged areas; if it funds a public service obligation; if it is designed to remedy market inefficiencies in the supply of risk capital to small and medium enterprises; if it is designed to improve research and development not supported by the private sector; or if it is needed to rescue and restructure important firms in difficulty.

The European Commission has moved to a more economic approach to state aid assessment, which began with the State Aid Action Plan in 2005. CRA has strong skills in assessing whether a given measure should be classified as state aid and, if so, whether it should be declared compatible with the common market. For example, we can investigate whether the investment would have been undertaken by a market investor, whether the aid appreciably distorts competition in the market, whether it remedies a market failure, and whether it has an impact on trade.

CRA has prepared reports on the economic impact of state aid for presentation to the European Commission and the European Courts in a number of sectors, including airlines, broadcasting, telecommunications, pay-TV, banking and financial services more generally, energy, entertainment, and postal services. Recent cases in which we have been involved include Olympic Airlines (2008), as well as the nationalisation of Northern Rock and Bradford and Bingley in the UK (2008), together with additional bank rescue measures adopted in other countries in the wake of the credit crunch.

CRA also developed an analytical framework for the Commission to use in evaluating the effect of state aid on competition and trade. This methodology is part of the compatibility test, a tool used to prioritise EC state aid control and focus on those cases where true harm to welfare is likely.

To learn more about our expertise and service offerings, contact our nearest regional office or visit us on the web at **www.crai.com/ecp/**

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