Setting the Stage

Cartels are infringements by object

This means that:

- Cartels are prohibited irrespective of whether participants pursue other legitimate objectives and irrespective of participants’ intent
- Cartels are prohibited regardless of their effects. They are deemed to be appreciable restrictions of competition
- No market definition is required and no need to demonstrate cartel mechanisms
Cartel Investigations and Evidence/Proof

- Three notions interact: burden of proof, burden of adducing evidence and the standard of proof <-> presumption of innocence

- Burden of proof rests on the authority regarding the constituent elements of a cartel

- But an undertaking cannot afford to take a passive role and limit itself to challenging the facts

Both authorities and defendants have to adduce evidence to support their allegations

The requisite legal standard ("firm conviction", "beyond reasonable doubt") must be met or the presumption of innocence will prevail.
Standard of proof

Concerns quantity, quality and reliability of evidence

- Authority must produce sufficiently precise and consistent evidence to support the firm conviction that the infringement took place
- Nature of evidence determines its probative value
  - Direct/indirect evidence
  - Contemporaneous (in tempore no suspecto)
  - Inculpatory statements from direct witnesses
  - Close relationship with the interpretation of substantive law
Evidential Presumptions / Legal Rules

- Authority is allowed to resort to presumption that reverses the burden of proof, including:
  - Infringements by object: competition is restricted
  - Unlawful conduct determines subsequent market behaviour
  - Liability of one participant for the whole cartel
  - Concrete presumptions depending on the case at hand
Interpretation of the constituent elements of a cartel and evidential rules

■ Extensive, if not sometimes excessive, interpretation of key notions of the cartel infringement, for example the existence of a *global agreement*

■ Broad interpretation of infringements by object (see however, recent EU ruling in *Groupement des Cartes Bancaires*)

■ Single and continuous infringements (recent CNMC investigations show a wider use of this concept -> difficulties for undertakings to exercise a proper defence)
Interpretation of the constituent elements of a cartel and evidential rules (cont.)

- Inferring evidence from a number of coincidences and circumstantial evidence (e.g., market conduct)

- “Cogent body of facts”: not every item of evidence must satisfy the standard, but as a whole there must be sufficiently precise and consistent evidence unless that specific item is the sole basis for establishing a given fact.
Possibilities of Rebuttal

- Public distancing from cartel conduct (but difficult to establish)
- Plausible alternative explanations that cast doubt (but there is often little readiness to test alternative explanations)
- Inconclusive evidence (in practice, more a question of the duration of the participation in the cartel, rather than the participation as such)
- Art. 1(3) LDC / Art. 101 (3) TFEU (more a theoretical possibility)
Key Points

- There is no defined set of evidentiary thresholds: the assessment of evidence is necessarily case specific.
- Evidentiary presumptions that shift the burden to the accused party have to reflect common sense and reality.
- Risk of extensive interpretation of legal rules.
- While the body of evidence must be considered as a whole, the prevailing evidence is the principle of unfettered evaluation of evidence before the courts. The latter brings with it the need for detailed assessment of the parties’ allegations.
Thank you for your attention!