



# Staying Competitive and Compliant in the EU

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## Staying Competitive and Compliant in the EU

**Three-Part Webinar Series on EU  
Competition Laws**

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## Staying Competitive and Compliant in the EU

### Series Topics and Schedule

- European Community and EU member state merger control policies, procedures, and remedies – **September 18, 2008**
  - European competition law and procedures, including vertical restraints, technology licensing, and cartel enforcement – **November 5, 2008**
  - Trends and developments in European competition law, including privilege, private remedies, class actions, and best practices for compliance – **January 21, 2009**
- **Time**
- 12:30 p.m. Eastern  
11:30 a.m. Central  
10:30 a.m. Mountain  
9:30 a.m. Pacific
- Duration: 1 hour



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## Staying Competitive and Compliant in the EU

### Today's Presenters



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## Staying Competitive and Compliant in the EU

### I. Introduction: A Bit of Historical Perspective



## Staying Competitive and Compliant in the EU

### A. The Political, Social, Cultural and Economic Context

Louis Cartou, Professor Emeritus at the University of Paris V, Rene Descartes, wrote in his book, *The European Union*:

The construction of Europe or its reconstruction has been shaped by its history and by its philosophy. The veritable foundation of European unity rests on what one could call the "European tradition." In one of his most colorful passages, Victor Hugo wrote, "the past is a part of ourselves; perhaps, the most essential part. All of the waves of history that carry us forward, all of the energy that nourishes us comes from the past. What is a tree without its roots? What is a people without its history?"

Thus, it is essential to understand European history, its traditions, its principles, its goals of liberty and security in order to comprehend the evolution of European law.



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European law has evolved directly from the ashes of two great wars in this century in which millions of combatants were killed and literally tens of millions of people were liquidated. Its roots span countless centuries of war, conflict, suspicion, prejudice and isolation (political, economic and cultural).

Today, one can take a high speed train from Brussels to Paris in 1 hour and 25 minutes (if there are no strikes). About half way, the train passes through the valley of the River Somme, where several million troops died in a matter of a week during the first World War. A generation was lost. We always pass too quickly to give sufficient thought and consideration to these events and sacrifices.

In rapid chronology, the European law has taken shape through the European Coal and Steel Treaty in 1951, the European Atomic Energy Treaty in 1957, the European Economic Treaty in the same year, the Single European Act in 1986, the Treaty on European Union in 1992 and, subsequently, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon.



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It is important to understand not only the substantive provisions of these treaties but, as well, to remember the assumptions on which they were adopted. Thus, the preamble to the European Coal and Steel Treaty makes clear that the six signatory member states were resolved:

- To substitute for age old rivalries the merging of essential interests;
- To create, by establishing an economic community, the basis for a broader and deeper community among people long divided by bloody conflict; and
- To lay the foundation for institutions which will give direction to a destiny henceforth shared.

Based on these shared interests and common destiny, six European nations (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) determined to form an economic union. For that purpose, the European Economic Community (now the European Community) was formed by the Treaty of Rome in 1957.



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It is instructive to understand the *tasks* that they assigned to this community. Article 2 of the Rome Treaty states that, by establishing a common market and progressively approximating the economic policies of the members states, the Community will promote throughout the Community:

- Harmonious development of economic activities;
- A continuous and balanced expansion;
- An increase in stability;
- An accelerated raising of the standard of living; and
- Closer relations between member states.



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To achieve these goals, Article 3 of the Treaty directs that the activities of the Community shall include:

- The elimination as between member states of custom duties and quantitative restrictions on the import and export of goods and all measures having equivalent effect;
- The establishment of a common customs tariff and a common commercial policy toward third countries *towards third countries*;
- Institution of a system ensuring that competition in the common market is not distorted; and
- The approximation of laws of the member states to the extent required for the proper functioning of the common market.

Over the ensuing 60 years, the European Union has grown to include 27 member states.



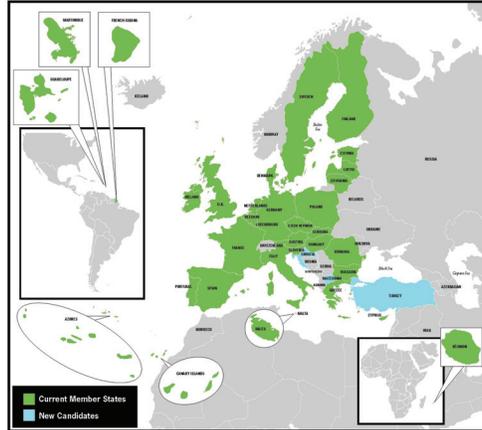
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### B. Growth in Size of European Union

- 1951 – Belgium, France, Germany, Italy, Luxembourg and Netherlands form European Coal and Steel Community
- 1957 – Treaty of Rome creates European Economic Community or Common Market
- 1973 – Denmark, Ireland and United Kingdom join the EU
- 1981 – Greece becomes member of the EU
- 1986 – Spain and Portugal join the EU
- 1995 – Austria, Finland and Sweden become members of the EU
- 2004 – Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia join the EU
- 2007 – Bulgaria and Romania join the EU



## Staying Competitive and Compliant in the EU



## Staying Competitive and Compliant in the EU

### II. Basic Concepts of Competition Policy



## Staying Competitive and Compliant in the EU

### A. Basic EU Legislation on Competition

- Treaty Provisions Relating to Competition
  - Article 81 – Prohibition of restrictive trade practices and concerted practices (agreements between undertakings) that may affect trade between Member States having the object or effect of preventing or distorting or restricting competition within the Common Market
  - Article 82 – Abuse by an undertaking with a dominant position that may affect trade between Member States
  - Article 83 – Authority to adopt regulations to insure compliance with prohibitions in Article 81 and Article 82, to establish procedures for the application of these Articles and to determine the relationship between national law and Article 83
  - Article 85 – Authority, in cooperation with Member States, to investigate suspected infringements and take action to restrain them
  - Articles 87-89 – State aids, state enterprises and subsidies



## Staying Competitive and Compliant in the EU

### A. Basic EU Legislation on Competition

- Treaty Provisions Relating to Freedom of Movement of Goods, People Services and Capital
  - Articles 29 and 30 – Quantitative restrictions on imports and exports and all and measures of equivalent effect shall be prohibited between member states – Free customs union
  - Article 30 – Prohibitions or restrictions on imports, exports between member states may be justified on grounds of public morality, public policy or public security, the protection of health and life of humans, animals or plants, protection of national treasures, protection of industrial and commercial property so long as not constituting a means of arbitrary discrimination or a disguised restriction on trade between member states (environmental protection now included) – Derogation of free customs union



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### B. Basic Underlying Principles for Competition Policy

#### ■ Competition

- Competition is a basic driver of a free market economy. Competition demands that companies provide consumers quality, innovative products that consumers want at the lowest possible price. To be effective, competition requires suppliers to be independent of each other, each subject to the competitive pressure exerted by the others.
- Thus, EU competition policy is aimed at preventing concerted multi-firm conduct and abusive market distortive conduct of firms with dominant positions.



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### B. Basic Underlying Principles for Competition Policy

#### ■ Single Economic Common Market

- The benefits of competition can only work on an EU-wide basis if the barriers to economic trade between Member States are eliminated. The single market is all about **bringing down barriers** and **simplifying existing rules** to enable everyone in the EU – individuals, consumers and businesses – to be able to choose its products and services from the supplier offering the best price, wherever located. The cornerstones of the single market are often said to be the '**four freedoms**' – the free movement of **people, goods, services and capital**. The single economic market fostered by EU legislation known as **additional laws** ('Directives') that require barriers between Member States to be eliminated in specific areas and are implemented at national level by Member States themselves.
- Member States may restrict the free movement of goods only in exceptional cases, for example when there is a risk resulting from issues such as public health, environment, or consumer protection.



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### C. Basic Economic Concepts

- Perfect Competition (Transparent and Complete)
  - Large number of buyers and sellers
  - Essential market information available to everyone
  - Sellers compete among themselves for business and would be induced to provide what the customers want
  - Sellers would seek to be innovative, progressive and to reduce costs
  - Competition would keep prices near costs
  - Producers would make as much product as buyers want



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### D. Reform of Competition Policy/Procedure – Effect on Vertical Restraints Policy: May 2004

- Structure
  - Repeal of Regulation 17 (Central Ex-ante system of prior approval)
  - Reversal of validity/enforceability presumption
  - Evolution of role and responsibility of European Commission and Member States
    - Allocating cases
    - Analyzing common substantive standards
    - Burden of proof
  - Role of private sector
    - Business and their counsel



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### D. Reform of Competition Policy/Procedure – Effect on Vertical Restraints Policy: May 2004 (cont.)

- Relationship between Articles 81 and 82 and national competition rules
  - Two distinct obligations
    - An obligation to apply 81 and 82 in all cases in which trade between member states may be affected
    - An obligation not to prohibit under national competition law agreements that affect trade and which are not also prohibited by Community competition law
  - Relationship of Articles 81 and 82 to national courts
    - Block Exemptions



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### D. Reform of Competition Policy/Procedure – Effect on Vertical Restraints Policy: May 2004 (cont.)

- Commission Modernization Notices
  - Enumeration: Cooperation network, cooperation with the courts, complaints, guidance letters, effect on trade and art. 83(3)
  - Role
  - Significance
  - Legal consequences



## Staying Competitive and Compliant in the EU

### D. Reform of Competition Policy/Procedure – Effect on Vertical Restraints Policy: May 2004 (cont.)

- Role and Responsibilities of Counsel
  - Lawyer-Client Privilege
  - Role as gate-keeper
  - Policy for handling government investigations
  - Interpreter of content of competition principles
  - Greater complexity, uncertainty, exposure to damage actions
  - Advocate of competition principles in national courts



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### E. Vertical Agreements – In General (Distribution)



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### Legislation

- Council Regulation (EC) No 1215/1999 of 10 June 1999 [amending Regulation No 19/65/EEC](#) on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices. Official Journal L 148, 15.6.1999, p. 1-4
- Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the [application of Article 81\(3\) of the Treaty to categories of vertical agreements and concerted practices](#). Official Journal L 336, 29.12.1999, p. 21-25
- Commission notice - [Guidelines on Vertical Restraints](#). Official Journal C 291, 13.10.2000, p. 1-44
- <http://ec.europa.eu/comm/competition/antitrust/legislation/vertical.html>



## Staying Competitive and Compliant in the EU

### December 29, 1999 Block Exemption

- Shortcomings of former policy
  - Strict form-based requirements
    - too legalistic
    - straight-jacket
    - burden and legal uncertainty
    - risk of competition distortions: no market share limits to exemption – companies with market power automatically benefit
    - covers only resale of final goods and not intermediary goods or services



## Staying Competitive and Compliant in the EU

### December 29, 1999 Block Exemption

- Need for more economics-based policy
  - Focus on market effects
  - Interbrand v. intrabrand competition
  - Focus of competition policy: enforcement of consumer welfare and efficient allocation of economic resources
  - Market integration
- December 29, 1999 regulation No 2790/1999 seeks to resolve these problems
  - One broad umbrella block exemption covering all vertical restraints for distribution of goods and services



## Staying Competitive and Compliant in the EU

### December 29, 1999 Block Exemption

- Market share thresholds established to distinguish between agreements that are or are not block-exempted
- Black-clause approach: defines what is not exempted
- Refocus of enforcement priorities
- Guidelines for individual block exemptions above market share thresholds and possible withdrawal of block exemption below thresholds
  - The scope of Article 81(1) above market share cap
  - The Commission's policy under Article 81(3)
  - The Commission's policy of withdrawal of benefits of block exemption, particularly in cumulative-effects cases
- Revision of Article 4(2) of Regulation 17 to permit all vertical distribution agreements to be exempted retroactively when notification takes place at later date



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### Economics of Vertical Restraints

- Principal assumption is that vertical restraints competition concerns can only arise if there is insufficient interbrand competition, e.g., a degree of market power (?)
- Consequence is that the same vertical restraint can have different effects depending on the market structure and on the market power of the company applying the vertical restraint
- Market power: power to raise prices above competitive levels (in short run marginal cost, in the long run total cost) – this is less than dominance
- Vertical restraints are generally less harmful than horizontal restraints



## Staying Competitive and Compliant in the EU

### Economics of Vertical Restraints

- Negative effects of vertical restraints
  - Foreclosure
  - Deterioration of price and non-price conditions
  - Collusion
  - Creation of obstacles to market integration: restrictions on interstate trade
- Specific vertical restraint issues
  - Exclusive distribution
    - exclusive territory permissible with the preservation of possibility of parallel “passive” sales



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### Economics of Vertical Restraints

- Selective distribution
  - retailers can be confined to final consumers and professional end-users
  - retailers must be free to sell actively and passively to these customer classes anywhere in the EC
- Single branding
- Resale price maintenance
- Market partitioning
- Combinations of vertical restraints
- Free riding issues
- Where does restraint bite: intermediate or final level
- Maximum or recommended prices
- Exclusive distribution v. tying arrangements
- Requirements contracts



## Staying Competitive and Compliant in the EU

### Market Share Thresholds and Legal Certainty

- In the absence of market power, a presumption of legality for vertical restraints can be made except for certain hard-core restrictions
- When market power exists, no general presumption of legality can be made
- Market shares are not a substitute for market power: establishment of infringement can be made only by looking at all aspects of market structure and market behavior



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### Market Share Thresholds and Legal Certainty

- Policy assumptions: safe harbor approach <30%
  - Normally, market shares less than 30% are insufficient to bring about net negative effects on competition that would result from vertical restraints practiced by a single firm
  - If there are significant efficiencies, should an exemption where the 30% market share zone is breached be permitted?



## Staying Competitive and Compliant in the EU

### Market Share Thresholds and Legal Certainty

- Above 30% market share, is it unlikely that the last condition of Article 81(3) would be fulfilled
  - no presumption of illegality
  - Commission still bears burden of proof that agreement does violate Article 81(1)
    - negative clearance
    - individual exemption
    - prohibition ex tunc if conditions of Article 85(3) are not satisfied



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### Market Share Thresholds and Legal Certainty

- Practical considerations
  - Cumulative effects resulting from network of vertical restraints will be subject to withdrawal system, prospectively
  - Potential conflict between exclusive and selective distribution rules
  - Market share calculation rules (after market parts and accessories rules)



## Staying Competitive and Compliant in the EU

### Market Share Thresholds and Legal Certainty

- Hard-core restrictions
  - Minimum and fixed resale prices
  - Maximum resale or recommended resale prices that are, in reality, fixed or minimum resale prices as a result of pressure exercised by any party
  - Absolute territorial protection: prevention or restriction of active or passive resales other than
    - restrictions on active sales in territory of exclusive distributor
    - restrictions on active sales to exclusively allocated customers
    - restrictions on members of a selective distribution selling to unauthorized distributor



## Staying Competitive and Compliant in the EU

### Market Share Thresholds and Legal Certainty

- Exclusive or selective distribution combined with exclusive purchasing
- The combination, at the same level of distribution, of selective distribution and exclusive distribution containing a prohibition or restriction on active selling
- The combination, at the same level of distribution, of selective distribution and exclusive customer allocation
- An obligation on the supplier of an intermediate good not to sell the same good as a repair or replacement good to the independent aftermarket



## Staying Competitive and Compliant in the EU

### Rule of Reason Analysis

- Overall competitive effect =  
competitive harm  
pro-competitive benefit
- Nature of relevant agreement
  - Business purpose
  - Existence or likelihood of competitive harm
- If not per se illegal but may have likelihood of competitive harm



## Staying Competitive and Compliant in the EU

### Rule of Reason Analysis

- Define market to determine whether the agreement may create or increase market power or facilitate its exercise
  - Can the parties to the agreement compete independently
  - Other market circumstances: ease of entry
- If no potential for anticompetitive harm, inquiry ends; if so, the question is whether the agreement is reasonably necessary to achieve competitive benefits that likely affect anticompetitive harm



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### F. Vertical Restraints – Technology Transfer



## Staying Competitive and Compliant in the EU

### Legislation

- Commission Regulation (EC) No 772/2004 of 27 April 2004 on the [application of Article 81\(3\) of the Treaty to categories of technology transfer agreements](#)  
Official Journal L 123, 27.04.2004, p. 11-17
- Commission Notice - [Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements](#)  
Official Journal C 101, 27.04.2004, p. 2-42
- <http://ec.europa.eu/comm/competition/antitrust/legislation/transfer.html>



## Staying Competitive and Compliant in the EU

### Background Issues

- Intellectual Property
  - Patents
  - Know-how
  - Trademarks
  - Patent applications
  - Utility models
  - Topographics of semiconductor products
  - Others



## Staying Competitive and Compliant in the EU

### Background Issues

- Intellectual Property Rights
  - Intellectual property is basically comparable to other forms of property for purposes of antitrust analysis
    - right to profit from use
    - right to exclude from use
  - Intellectual property is not presumed to create market power
    - market power: ability to maintain prices profitably above or output below competitive levels for a significant period of time
    - market power is not *per se* illegal



## Staying Competitive and Compliant in the EU

### Background Issues

- Licensing of intellectual property can be pro-competitive
  - coordination of complementary factors of production
  - create economic efficiencies in production, distribution and marketing
  - provide incentives for research and development - innovation
  - benefit consumers through lower costs



## Staying Competitive and Compliant in the EU

### Background Issues

- Analysis of intellectual property rights in relevant markets
  - goods market: see Commission Notice on relevant market analysis: demand and supply side substitutability potential competition, barriers to entry, etc.
  - innovation market: separate and deployable inputs
  - technology market: technologies licenses, transferred or acquired under intellectual property law and close substitutes for these technologies
- Rule of reason (?):
  - entry
  - concentration
  - efficiency-producing integration
  - purpose and effect of the restraint
  - effect of restraint on access to price of inputs
- Specific rules of legality



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### Background Issues

- Exhaustion
  - Interplay of Articles 30 and 36:
  - This is a complex issue. Article 36 is applicable where such exception to the free movement of goods is necessary to preserve rights which constitute the specific subject matter of the property.
  - For a patent, the specific subject matter is
    - the guarantee (as a reward for the creative effort) of an exclusive right
    - to use the invention
    - to put the products made from the patent into circulation for the first time either directly or by grant of a license to a third party
    - to oppose infringements



## Staying Competitive and Compliant in the EU

### Background Issues

- IP owners cannot invoke IP rights in order to prevent importation and sale of goods that have been placed on the market with their consent in another member state
- Distinction between the existence of industrial property rights and the exercise of such rights (*i.e.*, national industrial property rights cannot be exercised in a manner that would interfere with the free movement of goods and services)
- Role of Articles 81 and 82



## Staying Competitive and Compliant in the EU

### Background Issues

- Licensing Provisions
  - Exclusive licenses – incentive to innovative efforts
  - Field of use restrictions
  - Territorial and customer restrictions
  - Tying arrangements
  - Grant backs
  - No challenge clauses
  - Restrictions on development/sale of competing products
  - Limitation on period of exemption



## Staying Competitive and Compliant in the EU

### Background Issues

- Technology Transfer Block Exemption
  - Status of Parties: Competitor/Non-competitor
  - White list
  - Market Share Criteria: 20% vs. 30% Safe Harbor
  - Exclusive license - Passive parallel imports:
  - Selective Distribution
  - Others:
    - confidentiality
    - non-exclusive grantbacks
    - minimum quantities and specifications
    - duty to inform of misappropriation or infringement
    - termination in event of challenge



## Staying Competitive and Compliant in the EU

### Background Issues

- Black list
  - resale price maintenance
  - exclusive grantbacks
  - absolute territorial protection
  - ban on research and development



## Staying Competitive and Compliant in the EU

### Background Issues

- Other Relevant Issues
  - quality specifications
  - no challenge clauses
  - market share thresholds
  - continuing application of Articles 81 and 82



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### G. Horizontal Cooperation Agreements



## Staying Competitive and Compliant in the EU

### General Legislation

- Council Regulation No 2821/71 on [application of Article 85 \(3\) \[now 81 \(3\)\] of the Treaty to categories of agreements, decisions and concerted practices](#), Official Journal L 285, 29.12.1971 p. 46-48
- Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the [application of Article 81\(3\) of the Treaty to categories of specialization agreements](#), Official Journal L 304, 05.12.2000, p. 3
- Commission Regulation (EC) No 2659/2000 of 29 November 2000 on the [application of Article 81\(3\) of the Treaty to categories of research and development agreements](#), Official Journal L 304, 05.12.2000, p. 7
- Commission Notice - [Guidelines on the applicability of Article 81 to horizontal co-operation agreements](#), Official Journal C 3 of 06.01.2001, p. 2
- <http://ec.europa.eu/comm/competition/antitrust/legislation/horizontal.html>



## Staying Competitive and Compliant in the EU

### Statistical Exchange Among Competitors

- **Guidelines on the application of Article 81 of the EC Treaty to Maritime Transport Services, SEC (2008) 2151 Final, July 1, 2008**
- <http://ec.europa.eu/comm/competition/antitrust/legislation/maritime/guidelines>



## Staying Competitive and Compliant in the EU

### Overview

- In general, information exchange programs, whether conducted through a trade association or otherwise by the industry members themselves, raise serious competition risks depending on (1) the market structure of the industry in question, in particular whether it is concentrated; (2) the nature of the information involved – sensitive or non-sensitive (where is the line e.g., production v. inventories); (3) the level of aggregation, if any (is individual producer data disclosed, whatever kind of information is disseminated); (4) the age of the data when disseminated (e.g., monthly, quarterly, annually); (5) other industry characteristics facilitate effective collusion among market participants (e.g., commodity nature of product); and (6) possible “unrelated” coordinated activity in industry tending to stabilize or raise prices or restrict output (e.g., ownership links or alliances between/among competitor producers).



## Staying Competitive and Compliant in the EU

### Overview

- First, the exchange of information is more likely to violate competition policies if the structure of the industry in which the exchange occurs is concentrated or oligopolistic in nature (*i.e.*, few competitors, homogeneous product, inelastic demand, stable market shares) and where changes in competitor conduct in the market are easily transparent. The higher the share held by the competitors exchanging the information in such a market, the greater the likelihood of challenge. Further, the possibility of collusion is enhanced to the extent that the industry typically employs marketing practices “facilitating” collusion. These practices may include, under appropriate circumstances, exclusive dealing arrangements and most favored customer clauses.



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### Overview

- Second, the likelihood of antitrust liability increases greatly if the information exchanged is current or future individual company information. If the data are historic, in aggregate form, and do not identify specific producers, then they are less likely to create antitrust risk. However, the more specific the data and the more current or projected the data, the more likely the chances are of challenge, especially if the information pertains to prices, costs, discounts, production levels, new investment, changes in production capacity, market shares, inventories and other types of competitively sensitive information that implicate future market conduct.



## Staying Competitive and Compliant in the EU

### Overview

- On the other hand, if the information has already been publicly disclosed by a producer, the risk from disclosure during the course of a trade association meeting focusing on the development of future market profiles is much diminished. The ultimate legal issue is whether the statistical exchange program may facilitate agreements or concerted practices having the effect to restrict future pricing or output decisions. The older the data and the more individual producer information is masked, the less likely the adverse impact.
- Third, the likelihood of violating competition policies is much greater if there is a direct exchange of information among competitors than if individual information is aggregated and a reporting firm or trade association is used. Furthermore, the risk decreases if the public or purchasers also receive the information on a timely basis.



## Staying Competitive and Compliant in the EU

### Overview

- An information exchange, even involving non-price information, may be problematic if it facilitates competitor coordination, for example, to stabilize production or restrict new investment. Thus, while the disclosure by a producer of its future plans may not, standing alone be problematical, the discussion among competitors and dissemination of individual producer data or future production investment plans may facilitate collusion to the extent they validate historic patterns, deviations from which are easily detected and for which retaliation may be possible.



## Staying Competitive and Compliant in the EU

### Overview

- Current Standards for Trade Association Statistical Programs
  - These bright-line rules (or, perhaps, presumptions) are the following:
    1. There is significant risk if the exchange or publication of even non-price statistics identifies the enterprise involved.
    2. There is a gradation in risk with respect to non-price data – inventories being more problematic than production or trade.
    2. Aggregation is required (at least three producers' data amalgamated) so as to mask the individual enterprise data being disclosed unless the non-price data is historic, i.e., at least one year old.
    3. The more frequently market statistics are published, the more likely competition will be restricted.
    4. Preparation and publication of supply/demand forecasts by a trade association may be suspect (like any exchange of forward-looking market information among competitors, including non-price data) unless it can be demonstrated that the forecasts are not likely to facilitate collusion. The burden of persuasion is on the disseminator of the forecasts.



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### Overview

- Of course, it should go without saying that the foregoing general bright-line principles (presumptions) are always viewed through the prism of market concentration: the level of concentration (oligopolistic or atomistic) and the structure of supply and demand (number of enterprises, their symmetry, the stability of market shares, existence of structural links among competitors and market transparency).



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### Overview

- See, e.g., 2008 European Commission “Guidelines on the application of Article 81 of the EC Treaty to maritime transport services;” 2001 European Commission “Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements;” 2000 U.S. Department of Justice and Federal Trade Commission Antitrust “Guidelines for Collaborations among Competitors;” 1996 U.S. Department of Justice and Federal Trade Commission Statements of “Antitrust Enforcement Policy in Health Care”; All of these guidelines and statements of enforcement intent are available on line at the respective U.S. and EC enforcement agency websites:  
<http://ec.europa.eu/comm/competition> and  
[www.usdoj.gov/atr](http://www.usdoj.gov/atr)



### H. European Cartel Enforcement and Investigations



### What Is a Cartel?

- It is an illegal secret agreement concluded between competitors to fix or increase prices, restrict supply and/or divide up markets. The agreement may take a wide variety of forms but often relates to sales prices or increases in such prices, restrictions on sales or production capacities, sharing out of product or geographic markets or customers, and collusion on the other commercial conditions for the sale of products or services.



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### Dramatic Increase in European Cartel Enforcement and Investigations

- 1990 to date - 80 cartel decisions imposing fines in excess of €10.5 billion
- 2000 to date - 59 Cartel decisions imposing fines in excess €9.9 billion
- 2006 to date - 21 Cartel decisions imposing fines in excess €6 billion
- Commission making on average 8-10 cartel decisions a year



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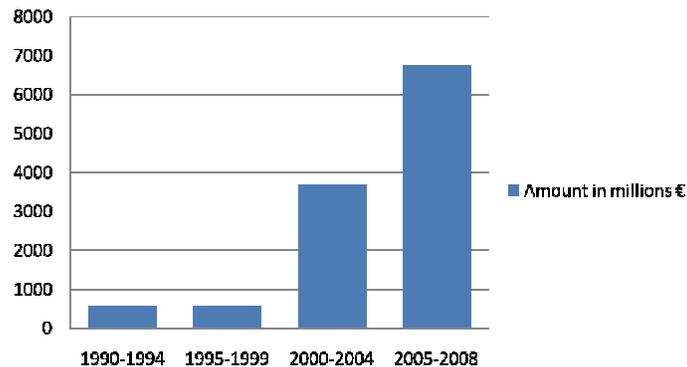
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### Fines Imposed on Cartels



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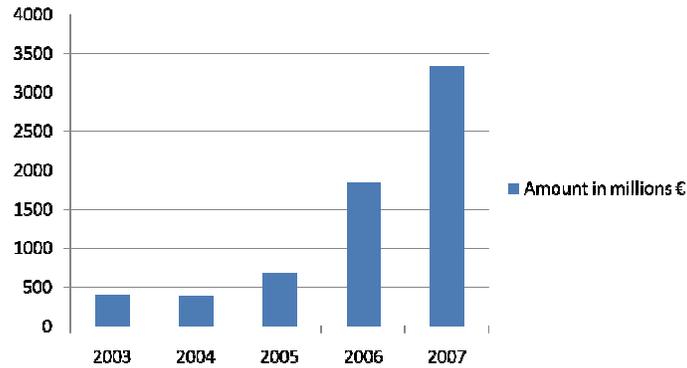
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## Staying Competitive and Compliant in the EU

### Fines Imposed – Period 2003-2007



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### Largest Fines Imposed by the Commission in Cartel Cases

- Highest imposed fine in a cartel case - Elevators and Escalators (€992m) in 2007; Vitamins (€790m) in 2001; Gas insulated switchgear (€750m) in 2007; Candle waxes (€676m) in 2008
- Highest ever imposed cartel fine on an undertaking: ThyssenKrupp (€479 m) in 2007; Hoffman-La Roche (€462m) in 2001; Siemens AG (€396m) in 2007; Sasol (€318m) in 2008



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## Staying Competitive and Compliant in the EU

### What Is New in EU Cartel Enforcement?

- Effect of Modernization of EU competition law on cartel enforcement
- Leniency policy
- Fining policy
- Settlement – new procedure
- International cooperation



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### Effect of « Modernization »

- Legal basis of Commission's action to combat cartels: Article 81 of the Treaty establishing the European Community prohibits all agreements and concerted practices between firms which both affect trade between EU Member States and have as their object or effect the prevention, restriction or distortion of competition.
- Until 1 May 2004, it was principally the Commission that enforced Article 81.
- Decentralized application and enforcement as a result of the adoption of the new EC Regulation 1/2003 which enables and requires the NCAs and the national courts to play an active role in the enforcement process of Article 81 and to apply it in its entirety. NCAs may be able to impose fines, and/or other more severe sanctions on non-compliant undertakings, including criminal sanctions against individuals in certain circumstances.
- Allows the Commission to refocus its resources on the most serious infringements of the EC competition rules, especially participation in cross-border cartels.
- New Regulation 1/2003 which replaces Regulation 17/62 also confers broader powers of investigation on the Commission: new EC investigation tools.



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### Effect of « Modernization »

Commission's new investigative tools:

- Power to seal any business premises and books or records
- Power to examine and obtain copies of documents stored on a computer system
- Power to ask any staff member for explanations of facts or documents
- Power to interview employees and directors during inspections
- Power to search private homes under certain conditions
- Power to impose fines for incomplete or misleading information: increased sanctions for procedural breaches, which can be as high as 1% of turnover



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### Effect of « Modernization »

- Restructuring of DG Competition
  - Increased priority given to the fight against cartels through the establishment of a specific Cartel Directorate in DG Competition
  - Five Operational Units in the Directorate dedicated to cartel enforcement assisted by some 60 specialized staff members
- Increasing role played by NCAs /network of European competition agencies – especially important with enlargement and new 12 Member States



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### The Leniency Instrument

- Leniency programmes allow authorities to grant full immunity or a reduction in the penalties that would otherwise have been imposed on a participant in a cartel, in exchange for freely volunteered disclosure of information on the cartel and continuous cooperation in the authorities' investigation.
- Powerful tool to detect cartels
- 60% of EC decisions based on immunity applications



## Staying Competitive and Compliant in the EU

### Leniency Policy

- New 2006 Commission notice on immunity from fines and reduction of fines in cartel cases. Published in the EC Official Journal C 298, 8.12.2006, p. 17
- Provide more guidance to applicants and increase the procedure's transparency. Improvements reflect experience gained in applying the 2002 Leniency Notice and are in line with the European Competition Network's (ECN) Model Leniency Program
  - Immunity thresholds clarified
  - Introduction of a discretionary marker system
  - Conditions for reduction of fines more explicit



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### Conditions for Immunity From Fines (100%)

- Be the first company to submit evidence
- Provide information and evidence enabling EC to carry out a « targeted inspection» or to find an infringement: oral corporate statements accepted
- Cooperate fully throughout the procedure
- Cease participation in the infringement
- Refrain from destroying, falsifying or concealing evidence while contemplating application
- Not coerced others to participate in the cartel



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### Marker System

- Introduced by the 2006 Leniency notice for immunity applicants according to which an application can be accepted on the basis of limited information and the applicant is then given time to perfect the information and evidence to qualify for immunity.
- Protects the immunity applicant's place in the queue who has not yet gathered the evidence necessary to formalize an immunity application
- Made available only for immunity applicants at the discretion of the Commission
- Granting of a marker is subject to the provision of details of cartel (parties, affected products and territories, duration and nature of cartel conduct )
- Time limit imposed on applicant to perfect the marker
- Information and evidence provided will be deemed to have been submitted on date of marker



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### Conditions for Reduction in Fines

- If not the first to apply for immunity, still possible to get fine reduction if new disclosure adds 'significant added value' to evidence already received
  - Evaluation on a case by case basis
  - Any evidence strengthening the EC's ability to prove the infringement (written, incriminating and compelling evidences)
  - Any evidence enabling the EC to enlarge the scope of its decision
- Cooperate fully throughout the procedure
- Obligation not to destroy, falsify or conceal evidence while contemplating application



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### Scale of Fine Reductions (20%-50%)

- First company to provide significant added value: reduction of 30-50%
- Second company to meet the standard: reduction of 20-30%
- Subsequent companies: reduction of up to 20%
- Still uncertainty of total amount of fine to be imposed on cartel participants



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### Fining Policy

- New 2006 Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, p. 2-5 - Replace 1998 fining guidelines
- General expectation of higher fines
- However, no change in the overall maximum limit of any fine: 10% of the undertaking's total turnover in the preceding business year, as set by Regulation 1/2003.
- Within this 10% limit, fining guidelines give Commission wide margin of discretion in setting fines
- Starting point for setting the fine will take into account a percentage of actual sales in market affected (up to 30% of value of sales depending on gravity of infringement) multiplied by the number of years of infringement



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### Fining Policy

- A so-called "entry fee" comprised between 15-25% of the company annual sales will be added to the fine. This is a penalty for committing the infringement.
- Recidivism and obstruction - Significant increase in the level of fines to be imposed on repeat offenders and, even more, on multiple repeat offenders as well as on companies refusing to cooperate with or obstructing the Commission in carrying out its investigations: the basic amount may be increased by up to 100%. In deciding whether a company is a repeat offender, the Commission takes into account decisions by NCAs adopted under Art 81 or 82 ECT.
- Deterrence – Fines may be increased to exceed amount of gains improperly made when imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates. Ensure fines on big conglomerates have « sufficiently deterrent effect ».



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### New EC Settlement Procedure for Cartels

- Great success of leniency program: more cartels uncovered. However, Commission issues relatively few decisions every year. Need to reduce duration of cartel investigations and free up resources on a wider number of cases.
- The new framework is intended to speed up and simplify cartel investigations. It consists of a Settlement Notice and a Commission Regulation that entered into force on July 1, 2008
  - Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases Official Journal L 171, 1.7.2008, p. 3–5
  - [Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation \(EC\) No 1/2003 in cartel cases \(Text with EEA relevance.\)](#) Official Journal C 167, 2.7.2008, p. 1–6



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### EC Settlement Procedure

- Does not replace traditional investigative tools
- Cumulative to any leniency application reduction
- Not an alternative to leniency: starts when leniency application are no longer possible
- Rewards companies (10% reduction fine) for accelerating the administrative procedure through acknowledgement of their involvement and liability in the cartel
- No right to settlement: Commission's wide discretion to identify cases suitable for settlement
- Settlement discussions may take place only upon parties' explicit request and once the Commission has gathered and analyzed evidence and is prepared to raise objections



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### Settlement Procedure

- Settlement discussions: no negotiations but mutual exchange. Intended to lead to a « common understanding » on the scope of potential infringements and on the likely fine.
- Upon such « common understanding », parties invited to introduce a formal Settlement Submission (SS) (in writing or orally) containing:
  - Acknowledgement of liability
  - Indication of the maximum amount of the fine
  - Waiver of rights (hearing, access to file and SO in original language)
- Abbreviated procedure: EC issues a short SO reflecting the SS
  - If endorsed: SS commits
  - If rejected: no settlement and acknowledgement withdrawn, return to normal procedure



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### International Cooperation

- Greater focus on cooperation with non-EU competition authorities to combat international cartels through:
  - Multilateral cooperation as regards the policy dialogue and principles to be applied in the pursuit of hard-core cartels. Discussions take place within the OECD, WTO and the ICN (International Competition Network).
  - Bilateral cooperation with numerous foreign jurisdictions based on an institutionalized agreement, i.e. with the US (1991), Canada (1999) and Japan (2003) or using other instruments, i.e. MoU with Korea (2004), Terms of Reference with China, Association Agreements with Balkan countries or through Free Trade Agreements or EPAS (Russia, Mexico, Morocco, Tunisia) or in the absence of a formal agreement (Australia).
- Greater planning and coordination of down-raids and investigations with partner jurisdictions on cartel cases, for example in the vitamins and graphite electrodes cases.



## Staying Competitive and Compliant in the EU

### Forthcoming Schedule

- |  |   |
|--|---|
| ■ Trends and developments in European competition law, including privilege, private remedies, class actions, and best practices for compliance – <b>January 21, 2009</b> | ■ <b>Time</b><br>12:30 p.m. Eastern<br>11:30 a.m. Central<br>10:30 a.m. Mountain<br>9:30 a.m. Pacific<br><br>Duration: 1 hour |
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