



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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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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Today's Presenters



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Introduction: A Bit of Historical Perspective



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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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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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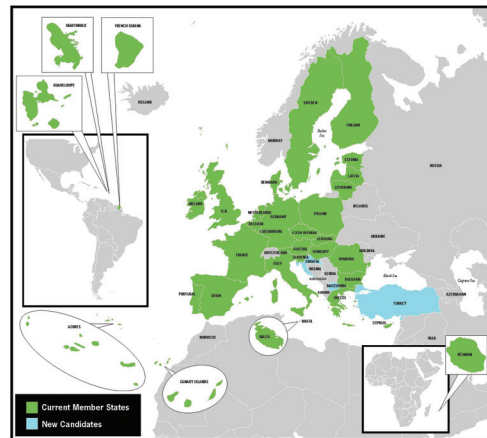
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Growth in Size of European Union

- 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



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Basic Concepts of Competition Policy



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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



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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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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, Member States
 - Role of Business and their counsel



Vertical Agreements – In General (Distribution)



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



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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>



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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

- 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



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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?



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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

- 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



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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



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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



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Vertical Restraints – Technology Transfer



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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>



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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



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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



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2004 IP Licensing Block Exemption

- Technology Transfer Block Exemption
 - Status of Parties: Competitor/Non-competitor
 - White and Black Lists 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



Horizontal Cooperation Agreements



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>



European Cartel Enforcement and Investigations



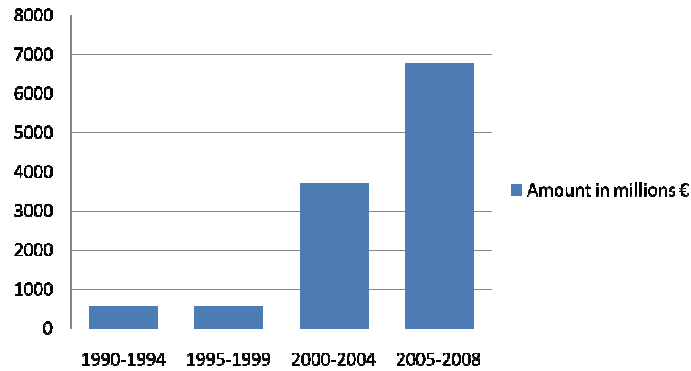
What Is a Cartel?

- 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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Fines Imposed on Cartels



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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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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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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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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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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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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



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Forthcoming Schedule

- | | |
|--|---|
| ■ 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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