



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 – **February 19, 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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Housekeeping

- Call **866.493.2825** for technology assistance
- We will answer questions at the end of the program
 - Live questions
- Today's program is being recorded and will be available on our web site
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TRENDS AND DEVELOPMENTS IN EUROPEAN COMPETITION LAW



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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 (cont)

■ 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 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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Prior Two Webinars Focused on Substantive Issues:

- Horizontal Concerted/Cooperative Activities/Control Activities
- Vertical Relationships: Distribution, Licensing
- Mergers: EC and Member State Levels

Current Webinar Focuses on Important Collateral Issues:

- Compliance Policies and Procedures
- Attorney-Client Privilege
- Class Actions
- International Damage Materials



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European Cartel Enforcement and Investigations: One Rationale for Adoption and Implémentation of Best Practices for Compliance



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1.2. Fines imposed (not corrected for court judgments) period 1990 – 2009

Last update: ++28th January 2009++

Year	Amount in E*
1990 -1994	566.691.550
1995 – 1999	569.886.000
2000 – 2004	3.697.516.100
2005 - 2009	8.270.555.100
Total	13.104.678.750

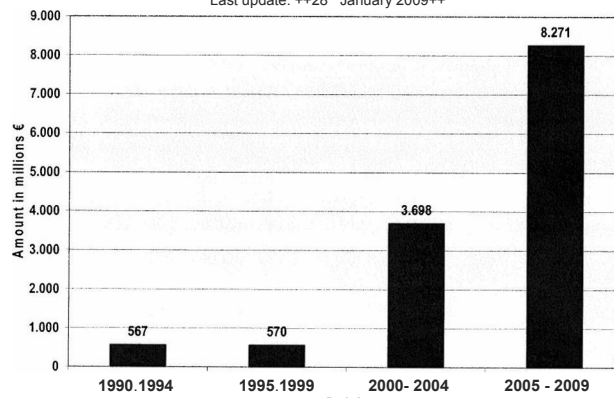
* Amounts as imposed by the Commission and not corrected for changes following judgments of the CFI an ECJ and only considering cartel infringements under Article 81 (previously Article 85) of the Treaty. Wherever prohibitions and fines concern infringements of Article 81 and of Article 82 (previously Articles 85 and Article 86) of the Treaty, only those amounts have been considered which concern the Article 81 infringements.



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1.2. Fines imposed (not corrected for court judgments) period 1990 – 2009 (cont.)

Last update: ++28th January 2009++



See website cartel statistics <http://ec.europa.eu/competition>



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Largest Fines Imposed by the Commission in Cartel Cases

- Highest imposed fine in a cartel case - (€1.3 billion for car glass producers in 2008); 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: (Saint Gobain (€896 million) in 2008; ThyssenKrupp (€479 m) in 2007; Hoffman-La Roche (€462m) in 2001; Siemens AG (€396m) in 2007; Pilkington (€370 million in 2008); Sasol (€318m) in 2008



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Compliance Programs: Rational

- Why is it necessary
- Coverage issues
- Implementation



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Compliance Program Rationale:

- Today's Environment Makes it Mandatory – stakeholders, regulators, decision makers invest in compliance with applicable laws
- Mitigation of Risks
 - Penalties
 - Damages
 - Costs: Time, Resources
 - Reputational Values
- Enforcement Trends
 - Amnesty
 - International Cooperation
 - Air Cargo, Domino Effect



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Compliance Program Content

- Policy – commitment from top
- Substantive content: see prior two webinar presentations
- Understandable principles and procedures: know your industry/practices
- Specific rules of conduct: do's and don'ts
- Red flags
- Change of communication/controls
- Document generation/retention
- Auditing/Spot-checks/Certifications
- Training
- Sanctions for violations
- Dealing with regulators: requests, inspections and damages



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Basic Do's and Don'ts of Antitrust Compliance

- **DO** compete vigorously and fairly in the marketplace by offering the best possible products, prices and service.
- **DON'T** discuss prices, pricing methods, terms or conditions of sale, bids, territories or customers with your competitors. This applies at all times and locations, including trade association activities and social occasions.
- **DO** obtain as much information as you can about competitors, but only from proper sources. **DON'T** get information (especially price information) directly from a competitor. **DON'T** seek the unauthorized disclosure of proprietary information from any source. In memoranda or other written material, clearly identify the information source, so there can be no suggestion later that it was obtained through collusion with a competitor or another improper source.
- **DO** maintain a professional relationship with your business associates. Treat all of them with respect, honesty and fairness. **DON'T** take undue advantage of anyone by utilizing the Company's overall influence.



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Basic Do's and Don'ts of Antitrust Compliance (cont)

- **DON'T** agree with a competitor not to deal with certain companies, or not to sell in certain territories, markets or to the Company's competitors. **DON'T** refuse to deal without first consulting legal counsel.
- **DON'T** disparage or unjustifiably criticize the products of competitors.
- **DON'T** use trade association meetings and do not call other members to have Company business discussions.
- **DO** consult with legal counsel before answering any questions or providing documents to a party outside the Company in connection with an antitrust or other legal matter.



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Guidelines for Notes, Letters and Memoranda

Choose your words carefully when writing notes, letters, e-mails and memoranda, in order to avoid later misunderstanding or mischaracterization of lawful conduct. Consider the following tips on how to avoid false impressions of wrongdoing:

- **Avoid** using guilt-laden words and phrases (such as “destroy after reading”).
- **Avoid** exaggeration (“we dominate the market”) or suggesting that competition will be reduced (“this plan will destroy our competitors”).
- **Don’t** disparage competition or business associates. For example, don’t refer to price-cuts or discounts as “unethical” or “chiseling.” Don’t refer to suppliers as “under our thumb” or “control.”



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Guidelines for Notes, Letters and Memoranda (cont.)

- **Don’t** speculate about what competitors may do with their pricing.
- The Company competes vigorously and bases its prices solely on its own business judgment. **Don’t** improperly suggest that the Company follows any “industry agreement,” “industry policy” or “industry practice.”
- **Don’t** seek to use the Company or a trade association to “manage” industry conditions through coordination of production or supply.
- **Don’t** guess or speculate as to the legality or legal consequences of the Company’s or another company’s actions. Consult legal counsel when you have questions about the legality of the Company’s own or other companies’ actions.



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Antitrust Suits, Requests for Information, Subpoenas, Government Investigations

- If you are ever notified by another company or individual that suit is being considered against the Company on antitrust or any other grounds, the Company's legal counsel should be advised immediately.
- If you ever receive a written or oral request for information or documents from any person outside the Company in connection with an antitrust matter, the following procedures should be followed:
 - Whenever a subpoena, demand, letter of inquiry, or any other written request for information relating to an antitrust matter is received by an employee, legal counsel should be immediately notified, and a copy of the subpoena, demand or other request should immediately be forwarded to legal counsel.



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Antitrust Suits, Requests for Information, Subpoenas, Government Investigations (cont.)

- Employees should not submit themselves to interviews, answer any questions, or produce any documents or other written materials relating to the Company's practices or other business operations, without legal counsel being present or approving the release of the information.
- Any Company employee receiving a call or visit from any investigator should first obtain the person's name, employer, telephone number, and address, then politely state that all investigations are handled through legal counsel and request that the investigator contact legal counsel. Immediately after receiving a call or visit, the employee should notify legal counsel.



Legal Privilege



The Concept of Privilege

- Fundamental part of the legal process, particularly in the US and UK
- Two main types :
 - legal advice privilege : protects communication between a lawyer and his client provided they are confidential and are for the purposes of seeking or giving legal advice
 - litigation privilege : arises only after litigation and is wider than legal advice privilege and protects all documents produced for the sole purpose of the litigation including all communications between a lawyer and his client but also a lawyer and a third party.
- Intended to encourage full dialogue between clients and their lawyers and specifically, to safeguard the requirement that any person must be able to consult his or her lawyer without fear that any information given in confidence might subsequently be disclosed



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Legal Professional Privilege

- In Europe, the protection of the confidentiality of written communications between lawyers and clients is called the legal professional privilege ('LPP')/ Attorney-client privilege in the US
- LPP exists in most EU jurisdictions and takes many different forms: diversity of approaches to the concept of privilege in the common and civil law jurisdictions
- Frequently contradictory laws on privilege:
 - advice that is privileged in the country where it is given may not be protected in other countries where a company operates.
 - Similarly, advice produced by a locally qualified lawyer may be privileged, while the same advice produced by a foreign lawyer practicing in the jurisdiction may not be protected.
- The lack of harmonization of its scope and conditions in the EU may present a significant risk for companies operating in multiple jurisdictions and their legal advisers



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Privilege in EU Law

- Approach to legal privilege in EU law clarified by case law in the context of European competition investigations
- Articles 81 and 82 EC do not contain any provisions in relation to legal privilege
- The EU doctrine was first formulated in the 1982 AM&S judgment of the European Court of Justice (ECJ) and its scope recently refined in the 2007 Akzo Nobel judgment of the EU Court of First Instance (CFI) (judgment under appeal to the ECJ)
- Recognition of the principle of confidentiality of written communications between lawyer and client subject to two conditions (AM&S case):
 - Communications must be made for the purpose and in the interest of the client's rights of defense
 - Communications shall be made with independent lawyers



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Clarifications brought by Akzo Nobel

- Internal company documents are protected by LLP if they are drawn up specifically and exclusively for the purpose of seeking legal advice from outside counsel in exercise of the rights of defense
 - applicability of a privilege should be unambiguously clear from the documents themselves
 - The mere fact that a document has been discussed with a lawyer is not sufficient to afford it such protection
- Legal privilege is a valid base defense to refuse the Commission access to lawyer-client communications
 - Companies invoking legal privilege must explain the grounds for and substantiate its claim but do not need to reveal the contents of the disputed documents for which it claims privilege
- Specified procedure to be followed when dispute over whether the document is protected by LPP



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Practical implications

- Difference of treatment regarding the required disclosure of communications made by in-house and outside counsels
- Need for in-house counsels to take necessary precautions with internal communications if their company wants these documents to be protected by privilege.
- To ensure full confidentiality and preserve the lawyer-client privileged relationship, companies should generally seek legal advice from external lawyers with no employment relationship with the company.
- Need for companies seeking to maintain the privilege to be extremely disciplined and precise in managing documents during compliance efforts
 - All documents that might be subject to a privilege claim should be clearly marked as a privilege communication (including emails)
 - If possible, all privileged documents should be kept in a file separate from normal business records



Class Actions



Current situation

- Currently, available collective redress ('CR') mechanisms - where they exist - are not satisfactory.
- Significant proportion of EU consumers who have suffered damage do not obtain redress : numerous barriers, including high litigation costs, complex and lengthy procedures, lack of information regarding available enforcement tools
- Great diversity of collective actions in the EU : many different approaches to standing, damages and judicial inquiries at Member State level
- In the competition field, the state of private antitrust litigation and private damages actions remains underdeveloped compared to the US : no single uniform system governing actions for damages for infringements of EC competition rules
- While, on a piecemeal basis, major EU jurisdictions such as France, Germany and Italy are contemplating, proposing or introducing legislation towards making collective actions more feasible, the EU is keen to provide some sort of consistency for its consumers and supports the introduction of harmonized pan-European collective procedures



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Two recent EU policy initiatives

- EC Green Paper on Consumer Collective Redress issued in November 2008 by DG SANCO (Health and Consumers)
 - Set out several options for addressing a deficit in cross-border collective redress, among which the establishment of a court-based collective redress system in all Member States
 - Comments can be submitted until March 1, 2009
- More advanced proposal made by DG Competition and intended to facilitate damages actions in antitrust cases
 - Commission White Paper published in April 2008
 - Follows the EC's 2005 Green Paper and demonstrates the EC continued efforts to encourage greater private antitrust enforcement



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EC White Paper on Damages Actions for Breach of the EC antitrust rules

1. Background – inadequate mechanisms to redress injury
2. Objectives – provide victims with effective procedures and enhance deterrence
3. Scope – Broad complement to public enforcement
4. Proposed Measures – standing, access to evidence, binding effect, fault, passing on limitation periods, costs
5. Next Possible Steps – likely adoption in medium terms – five years



Discovery Issues in Private Antitrust Actions



Private Antitrust Litigation Overview

- Historically, private antitrust litigation focused in the U.S., encouraged by private standing (Clayton Act, Section 4), state antitrust laws (often permitting indirect purchaser claims), and the prospect for treble damages and attorneys fees.
- Plaintiffs' antitrust bar actively monitors DOJ and FTC case filings and "piggy-backs" on government's enforcement efforts.
 - Plaintiffs' counsel battle for class certification and over role as class counsel.
 - Proof burden often limited to damages issues.
- Liberal U.S. discovery rules increase defendants' costs and therefore plaintiffs' leverage.



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Private Antitrust Litigation Poised to Increase in the EU

- Having exported antitrust enforcement principles to world (e.g., over 100 countries now impose some form of cartel and merger control regime), the U.S. appears to be exporting an appetite for private antitrust enforcement.
- The EU Modernisation Regulation (2003) decentralized Article 81 and 82 enforcement to include national competition authorities and national courts. Increasing recognition of role for private claims:
 - Nellie Kroes (2007): “An increased level of private actions will also have the effect of increasing deterrence, complementing public enforcement.”
 - Philip Collins (2006): “We regard private enforcement as an essential complement to public enforcement.”
- EC White Paper (April 2008) cites “current ineffectiveness of antitrust damages actions” and calls for various EC and member state measures to address perceived barriers.



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Discovery from U.S. Sources

- Competition authorities routinely cooperate in cartel investigations through MLAT agreements, by sharing information, conducting joint raids, etc. International Competition Network (ICN) will facilitate.
- 28 U.S.C. §1782 permits a federal court to order discovery for use before a foreign tribunal. “Interested person,” not just foreign governments, may request assistance from U.S. courts.
- Scope of §1782 defined in *Intel v. AMD*, 542 U.S. 241 (2004).
 - AMD sought discovery from Intel (documents from Intel/Intergraph litigation) to aid in its antitrust complaint to the EC.
 - Supreme Court: No showing required that foreign tribunal allows similar discovery or would even admit as evidence. But is the request necessary, an attempt to circumvent, or unduly burdensome?
- District Court denied AMD’s amended request: EC could compel Intel directly, EC did not want the documents and the request was overbroad.



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Discovery of materials provided to competition authorities?

- Documents collected by DOJ pursuant to grand jury subpoena not discoverable from DOJ given FRCP Rule 6e secrecy requirements.
- Documents disclosed to DOJ in negotiations over Corporate Amnesty applications are generally protected from discovery and FOIA demands under DOJ's "law enforcement privilege." (DOJ did agree in 2009 to release over 100 amnesty letters (with names and other details redacted) to settle a FOIA suit brought by Stolt-Nielsen.
- The EC Leniency Program similarly provides for no or reduced fines in exchange for cooperation. (U.S. Amnesty Program also offers relief from imprisonment for individuals). EC fines not pegged to economic gain or loss, as permitted under 18 U.S.C. § 3571.) "Corporate statements" are rewarded in negotiations.
- Discovery concern: may private parties access corporate statements and other materials provided the EC in leniency agreement negotiations?



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Discovery of materials provided to competition authorities?

- New Leniency Notice of 2006: corporate statements and other materials protected by rule of professional secrecy and may not be disclosed by the E.C. to third parties. However, since corporate statements could be subject to discovery directed directly to the applicant, "oral" corporate statements are now authorized.
- Linger issues:
 - even if the applicant does not possess a copy of the corporate statement transcript, does it have "control" over the transcript because it has a right to request a copy from the EC?
 - does release of the EC's Statement of Objections to defendants, reflecting the applicant's statements, make the statement discoverable?
 - compelling disclosure of the substance of the statements through deposition or interrogatory.



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