



# Staying Competitive and Compliant in the EU: *2009 Significant Developments and 2010 Prospects*

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# Staying Competitive and Compliant in the EU

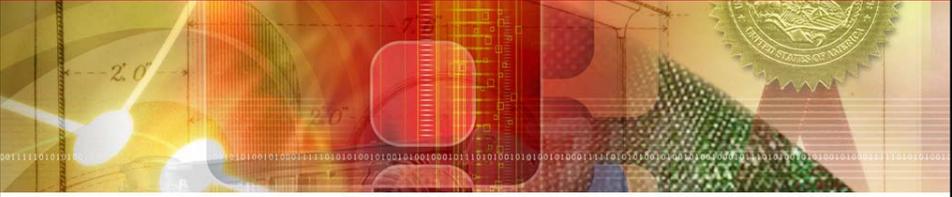
This is the fourth in a series of webinars presented by Foley & Lardner LLP on important competition issues posed for companies doing business in the EU.

The first three presentations were held, respectively, on September 18, 2008, November 5, 2008 and February 19, 2009 and focused on the following topics: European Community and EU member state merger control policies, procedures, remedies, European competition law and procedures, including vertical restraints, technology licensing, cartel enforcement, trends and developments in European competition law, including privilege, private remedies, class actions, and best practices for compliance.

The text and the audio of each of these preceding webinars is available on the Firm's website – [www.foley.com](http://www.foley.com). Click on services and then antitrust for access to these materials.

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## 2009 Developments and 2010 Prospects

- Treaty of Lisbon and EU Governance Issues
- Distribution: New Vertical Restraints Block Exemption
- IP Standards Interface: Abuse of Market Power
- IP Settlements and Internal Market Restraints
- Key Court of Justice Decisions
- New Commission Personnel and Priorities
- Private Enforcement Developments
- Conclusions

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## Treaty of Lisbon and EU Governance Issues

- Treaty of Lisbon amends the Treaty on the European Union (Maastricht, 1992) and the Treaty establishing the European Community (Rome, 1957- renamed the Treaty on the Functioning of the European Union) but does not replace them
- Entered into force on December 1<sup>st</sup> 2009

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## Treaty of Lisbon and EU Governance Issues

- **Creation of a long-term President of the European Council**
  - Herman Van Rompuy (Belgium)
  - Appointed for a term of two and a half year
  - Represents the EU at governmental level on common foreign policy
- **A new High Representative in Foreign Affairs and Security Policy**
  - EU Trade Commissioner Catherine Ashton (UK)
  - Represents the EU at a ministerial level on common foreign policy
  - Supported by a new European External Action Service

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# Treaty of Lisbon and EU Governance Issues

**Main institutional changes**

- Increased involvement of the European Parliament in the legislative process.
  - Co-decision procedure further extended
  - Greater role in approbation of EU budget
- Qualified majority voting becomes the norm in the Council of Ministers.
  - Extended to new policy areas
  - Unanimous approval restricted to certain sensitive areas
- Greater involvement of national Parliaments of the 27 EU member states.
- Access to the European Courts facilitated for individuals and national parliaments.

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# Treaty of Lisbon and EU Governance Issues

- Changes in terminology
  - All references to the “European Community” replaced by the “European Union”
  - The « common market » renamed the « internal market »
  - The « Court of First Instance » renamed the « General Court »
- Renumbering of the EC Treaty including of the two key EU antitrust provisions
  - Article 81 on restrictive agreements becomes Article 101
  - Article 82 on abuse of dominant position becomes Article 102

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# Distribution: New Vertical Restraints Block Exemption

- **Current VRBE and Guidelines**
  - Links to text:
    - 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 notice – Guidelines on Vertical Restraints Official Journal C 291, 13.10.2000, p. 1-44
  - Important issues
    - Market share criteria for BE protection
    - Limits on exclusivity
    - Black listed practices
    - Rule of reason analysis
    - Value of BE's in a post EU “modernization” world



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# Distribution: New Vertical Restraints Block Exemption (cont.)

- **Proposed new VRBE, expected to replace current rules on June 1, 2010**
  - <http://ec.europa.eu/competition/antitrust/legislation/vertical>
  - Important issues
    - Continuity with prior VRBE
    - Increase in large distribution market power
    - Role of internet on exclusivity issue
    - Re-enforce rule of reason approach
  - Role of national courts and counsel (in-house/out-house) after 2004 competition revolution
  - What should companies be doing: assess existing distribution arrangements, particularly if they have grown through acquisitions, look for potential problems and complainants



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## IP Standards Interface: Abuse of Market Power

- Commission Staff Views
  - “Patents, Standards and Antitrust,” (October 15, 2009) – outline of Commission priorities
- Economic and Legal Framework: Reaction to Rambus
- Standards and Market Power – importance, lock-in
- Patent Ambush – increased responsibilities of standard setting institutions
- Benefits of Standardization
- Dangers for the unwary



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## IP Standards Interface: Abuse of Market Power (cont)

- IPRs and market power; market definition
- Transparency and Indispensable Restrictions
  - Disclosure of IPR
  - FRAND commitment
  - Privacy standards
- U.S./EU differences: “Frands” across the sea...but
  - EU requires abuse of dominant positions: either exploitative (excessive prices) or exclusionary abuse
  - EU does not proscribe creations of dominance only abuse
  - U.S. proscribes creations of dominance by deception/exclusion



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# IP Settlements

- U.S. Context:
  - Settlement of patent infringement litigation between Pharms and generics – Hatch Waxman
  - New administration initiatives
- EU context: Basic Questions
  - Settlement OK if entry deferred for period of time less than patent life.
  - Outstanding issues scope of coverage (enter with non-infringing product), first or follow on generics and amount of compensation, broadened scope outside Pharma/generic conflict, settlement by M&A and others.
  - Commission launches investigations of patent settlements as outgrowth of sectoral review of Pharma industry: January 12, 2010 Commission press release.



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# Important Court of Justice Decisions

- Liability Thresholds:
  - **T-Mobile:** ECJ (June 4, 2009) lowers threshold of liability
  - Single meeting can result in liability under §101(1)
  - Issue is whether exchange of competitive information is capable of reducing uncertainty about future market conduct/presence of market effects only relevant for purposes of damage analysis/burden on actors to prove competition not affected.
- Internal Market Restraints:
  - **Glaxo Smith Kline** ECJ (October 9, 2009)
  - Art 101 (3) exemptions possible for dual pricing/export restrictions
  - OK if pro-competitive benefits, particularly innovations



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## Important Court of Justice Decisions (cont)

- Legal Privilege:
  - **Akzo Nobel** ECJ 2007 competition case:
    - No protection for communication with counsel unless documents specifically and exclusively to seek advice from outside counsel on rights of defense: counsel must be fully independent even if member of EC member bar/requires great care
    - Commission reaffirms limits on privilege in January 2010
    - Extremely important for non-EU lawyers in-house and out-house



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## Important Court of Justice Decisions (cont)

- Parental Responsibility: It's 10 pm, do you know where your children are?
  - **Erste Bank** (Lombard Club) (ECJ) September 21, 2009:
    - Normally liability for cartel activity committed by a sub does not follow to parent that subsequently acquires it. According to ECJ, either former or new parent can be liable.
  - **Akzo Nobel** (ECJ) (September 10, 2009)
    - Parent liable for antitrust violations of wholly-owned sub with prima facie assumption of decisive influence being exercised from 100% ownership – can be rebutted by proof that sub acted independently on issues of pricing production, margins, etc.



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# New Commission and Priorities

- **New Spanish Commissioner: Joaquin Almunia**
  - January 12, 2010 confirmation hearing: any break from past strict (and some might say vigorous “one-sided”) enforcement) – very unlikely
  - Greater emphasis on economics (recall Mario Monti)
  - Will enforcement be more transparent?
- **Commission Priorities:**
  - Cartels (see statistics attached): single or multiple infringements (implications for scope and fines)
  - Sectoral inquiries: pharmaceuticals (death by association): January 12 Commission press release on Pharma inquiries
  - Greater emphasis on analysis of effects of company behavior on market functioning and consumer welfare: (effects and importance of guidelines)



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# New Commission and Priorities (cont)

- Greater EU internal and external convergence
- Transparency and predictability of proceedings: best practice in proceedings and in submission of economic evidence, hearing officer guidance (see attached structure of proceedings)
- Decentralization of competition enforcement which raises serious questions of uniform application of competition rules
- Review of state aids
- Review of horizontal cooperation agreements



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# New Commission and Priorities (cont)

## I. CARTELS

### 1.1. Fines imposed (not corrected for court judgments) period 2004 - 2009

Last update: \*\*1<sup>st</sup> November 2009\*\*

Year	Amount in €*
2004	390.209.100
2005	683.029.000
2006	1.846.385.500
2007**	3.338.427.700
2008	2.271.232.900
**2009**	1.623.384.400
<b>total</b>	<b>10.152.668.600</b>

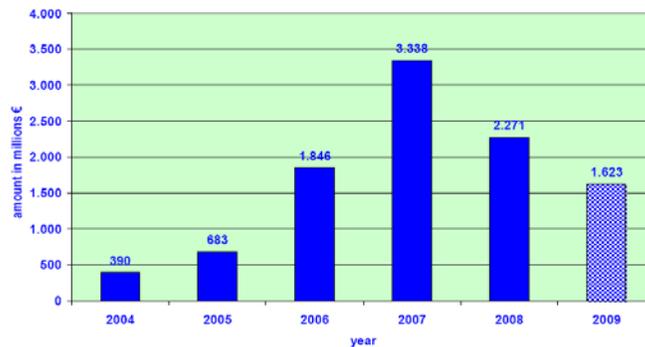
- \* Amounts as imposed by the Commission and not corrected for changes following judgments of the CFI or ECJ and only considering cartel infringements under Article 81 (previously Article 85) of the Treaty. Wherever prohibitions and fines concern infringements of Article 81 and of Article 82 (previously Articles 85 and Article 86) of the Treaty, only those amounts have been considered which concern the Article 81 infringements.
- \*\* This figure takes into account the amendment of 23<sup>rd</sup> June 2008 to the decision of 5<sup>th</sup> December 2007 (see [IP.07/1835](http://ec.europa.eu/competition)).



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# New Commission and Priorities (cont)

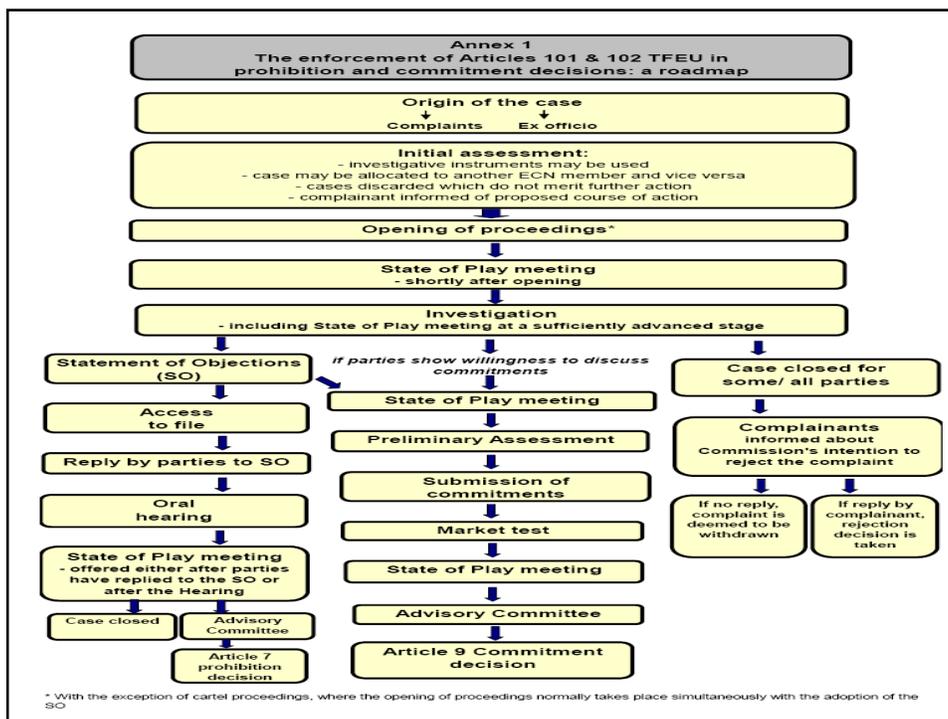


 <http://ec.europa.eu/competition>



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## Is the EU becoming increasingly a Tower of Babel? Fair or Unfair?

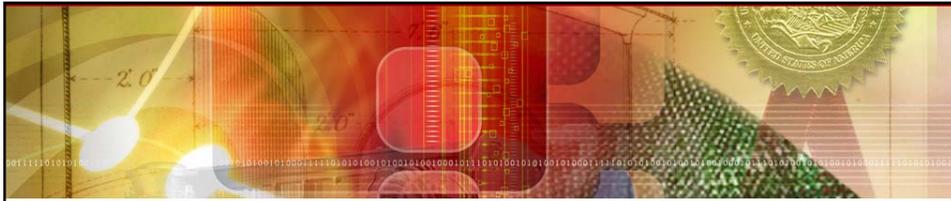
Private enforcement/class actions as paradigm

- While many see as essential to achieve consumer welfare goals, private enforcement raises many issues, concerns and fears which are unlikely to be resolved in the near future.
- Rules of evidence
- Rules of discovery
- Rules regarding damages
- Role of national courts
- Risk taking and game theory
- Role of EU institutions (e.g., ECJ, General Court, commission) as drivers of consistent application of law (and procedures?)



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