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Staying Competitive and Compliant in the EU

2011 Key Developments on Competition Matters

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This is the fifth annual webinar in a series presented by Foley & Lardner LLP on important competition issues posed for companies doing business in the EU.

The preceding presentations 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. Click on Our Services and then antitrust for access to these materials.

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Goals and Structure of European Union

- Rooted in long history of cultural, linguistic social divisions and rivalry/war
- Since the end of WWII, Europe sought economic integration as a vehicle to resolve past conflicts
- Its goal is to create a common economic market for the betterment of all
- Elimination of intra-Europe custom duties, quantitative restrictions and imposition of a common commercial policy toward third countries
- Creation of a system of competition principals and procedures working with member states

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Growth 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

EU remains the largest trading partner of the United States. It is the largest destination of U.S. outbound investments with 400+ million consumers

Competition is a key driver in this process



Basis Competition Policies:

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

- Treaty provisions prohibiting undue horizontal and vertical restraints, abuse of dominant positions, state aids that affect member state trade and commerce
- Treaty provisions providing for cooperation between EU and member states in regulating competitive behavior
- Treaty provisions relating to the free movement of goods, people, services and capital in an internal market
- Council regulations and directives: mergers, block exemptions, enforcement, shared enforcement
- Notices, guidelines, role of Commission NCAs and courts



2011 Developments and 2012 Prospects

- Horizontal cooperation guidelines: standards and information exchange
- Consultation over the review of the EU technology licensing rules
- Distribution: First Internet sales ruling
- Cartel enforcement: fine reductions, parent/subsidiary presumptions, recidivism
- Pharmas, particularly “pay for play”
- Investigation procedures: greater role given to the Hearing Officer
- Growing number of damages cases
- Common Trade Policy Toward Third Countries



New Rules on Horizontal Cooperation Agreements

- Commission Regulation No 1217/2010 of 14 December 2010 on the [application of Article 101\(3\) of the Treaty to categories of research and development agreements](#)
Official Journal L 335, 18.12.2010, p. 36
- Commission Regulation No 1218/2010 of 14 December 2010 on the [application of Article 101\(3\) of the Treaty to categories of specialisation agreements](#)
Official Journal L 335, 18.12.2010, p. 43
- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements
Official Journal C 11, 14.01.2011, p. 1



New Rules on Horizontal Cooperation Agreements (cont.)

- BERs effective January 1st, 2011 – transition period of 2 years
- Guidelines effective January 14, 2011
- Important issues
 - New guidance on exchange of information between competitors: important ECJ decisions (e.g., T-Mobile)
 - Better guidance on standard-setting
 - R&D agreements: wider scope of BER
- New Horizontal Guidelines and Regulations can be found at <http://ec.europa.eu/competition/antitrust/legislation/horizontal.html>



New Rules on Horizontal Cooperation Agreements (cont.)

- Standardization chapter
 - Safe Harbor regarding standard-setting process retained and more guidance on assessing agreements outside the safe-harbor
- New chapter on information exchange
 - Exchanging individualized information regarding intended future prices or quantities considered restriction of competition by object
 - Guidance on assessing effects of information exchange and efficiencies
- R&D agreements: most favorably treated category of horizontal agreements. Block exempted up to a 25% market share threshold
 - Scope extended to cover “paid for research”
 - Possibility for the parties to jointly exploit the results broadened
- Specific environmental agreements section removed



Distribution: Current Vertical Restraints Legislation

- Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices
http://ec.europa.eu/competition/antitrust/legislation/regulation_verticals_en.pdf Official Journal L 102, 23.4.2010, p.1-7
- Commission notice: Guidelines on Vertical Restraints
http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf Official Journal C 130, 19.05.2010, p.1
- Covers agreements between two or more companies, each of which operates at a different level of the production or distribution chain



Distribution: Online Selling

- The use of Internet is a form of passive sales (i.e. where the consumer takes the initiative) and the Commission's policy is that every distributor must be free to use the Internet to advertise and sell products
- Limits in vertical agreements on Internet sales are generally considered to be restrictions on passive selling and therefore hardcore restrictions that cannot be exempted
- Restrictions to online selling in the context of a selective distribution system are only acceptable if they are equivalent to the criteria imposed for the sales from brick and mortar shops
- In its Pierre Fabre Dermo-Cosmétique case (C-439/09) ruling, the Court of Justice confirmed that an absolute ban on Internet sales in the context of a selective distribution system is a restriction by object, unless that ban can be objectively justified



Distribution: Online Selling Ruling

- In its ruling, the Court strongly suggested that there was no such justification:
 - The need to provide customers with individual advice at the point of sale is not a valid justification for a ban on Internet sales (contact lenses case)
 - Nor is the argument of protection of brand image
- Therefore any agreement containing a restriction by object of passive sales cannot be block exempted
- No guidance as to whether or not an exemption may still be possible outside the scope of the block exemption regulation
- This ruling shows the Court's determination to protect Internet selling and may signal a less favorable attitude toward selective distribution systems



Technology Transfer Agreements

- Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty (now Article 101(3) TFEU) to categories of technology agreements, the so-called TTBER – Official Journal L 123, 27.04.2004, p. 11-17
- Guidelines on the applicability of Article 81 of the Treaty to technology transfer agreements – Official Journal C 101, 27.04.2004, p. 2-42
- Both instruments to expire in April 2014
- Consultation launched by the Commission last December on the review of the current regime for technology transfer agreements
- The consultation is open until February 3, 2012



Technology Transfer: Current Regime

- TTBER covers licensing agreements concerning patents, know-how and software copyright
- Creates a safe harbor for licensing agreements that are considered to be non-problematic and do not contain any hardcore restrictions (such as price fixing) by exempting them from scrutiny under Article 101
- Market share caps: 20% on the affected relevant technology and product market for agreements between competitors; 30% for agreements between non-competitors
- Outside the TTBER, no presumption of illegality: require an individual analysis by the parties on the basis of the guidelines

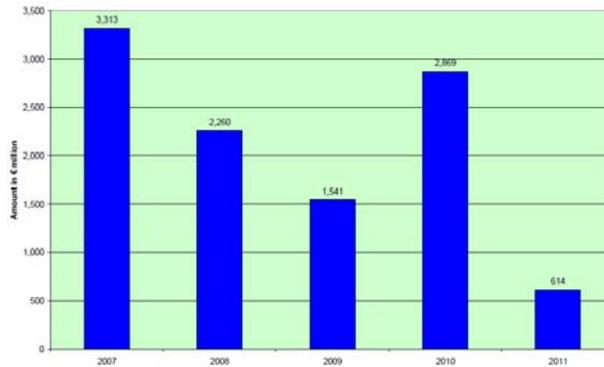


Technology Transfer: Review

- What changed since 2004? Is there room for a revision of the current regime? Any weaknesses or inconsistencies?
- One major difficulty for businesses in applying the current rules is compliance with the market share caps. While, in theory, "market share" thresholds may provide some limited level of comfort, reliable information 1) is very, very rare; 2) is normally historically focused (inappropriate for predicting future competitive effects; and 3) is particularly suspect in an IP context where normal complexities of measuring and verifying share are even more complex.
- Publication of a CRA/CEPR economic study tendered by the Commission and dealing with cross-licensing, patent pools, pass-through and remedies for IP-significant mergers intended to stimulate the debate
- Input from stakeholders is crucial considering the very few available cases



Cartel Fines Imposed (Not Adjusted For Court Judgments) – Period 2007-2011



Year	Amount in €*)
2007**	3.313.427.700
2008***	2.260.112.900
2009*****	1.540.651.400
2010****	2.868.676.432
++2011++	614.053.000
total	10.596.921.432

* Amounts as imposed by the Commission and not adjusted for changes following judgments of the Courts (General Court and European Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Article 81 resp. Article 85 of the Treaty). Wherever prohibitions and fines concern infringements of Article 101 TFEU and of Article 102 TFEU (previously Articles 81 resp. 85 and Article 82 resp. 86 of the Treaty), only those amounts have been considered which concern the Article 101 TFEU infringements.



Cartel Enforcement: Commission Decisions

- 4 cartel decisions in 2011 (compared to 7 in 2010)
- Not so many fines: largest fine imposed on consumer detergents cartel case with total fines of €315.2 million
- Highest company fine imposed on Procter & Gamble (€211 million)
- Reduction of fines: often granted including in the heat stabilizers decision (application of the 10-year-limitation period) and prestressing steel case (review of the parent subsidiary liability)
- Settlement procedure: shorter and no appeals
- Only 1 non-settlement cartel case: exotic fruit (October 2011) involving Chiquita (immunity applicant) and Pacific Fruit
- Inability to pay: careful review of the stringent conditions but can be successful (Refrigeration Compressors case)



Cartel Enforcement: Case Law

- Great number of rulings in 2011 resulting in significant reduction in fines with particular focus on burden of proof, evidence (duration), parent liability, recidivism
- Breach of seal during a dawn raid: €38 million fine imposed on EON and upheld by the General Court => negligence not protected
- Recidivism:
 - Parent not recidivist unless evidence is given of decisive influence over infringing subsidiaries each time, i.e. part of the same legal 'undertaking' (Lifts and Escalators [July 2011] => 50% recidivist increase annulled [Thyssen Krupp])
 - In Synthetic Rubbers appeal (July 2011), recidivism against ENI not retained (lack of clarity as to group structure and absence of liability of ENI in previous decision)



Cartel Enforcement: Case Law (cont.)

- Parental subsidiary liability:
 - Akzo ruling confirmed
 - Elf Aquitaine (May 2011): presumption of parent/subsidiary control also applies where parent companies own *almost all* of the stock (97%) in the subsidiary (as opposed to 100%)
 - Akzo presumption also applies when control of a company is limited to 4 months (Areva – March 2011)
 - Rebuttable presumption (not automatic) means that the relevant arguments raised to rebut presumption must be examined by the Commission
 - While presumption not irrebuttable, to do so is exceptional



Cartel Enforcement: Case Law (cont.)

- Joint and Several Liability
 - Where several companies are held personally liable for the participation in the same company
 - Only covers the period during which they form an economic unit
 - Penalties must be specific to the offender and the offense: fines within a group have to be defined
- Burden of proof: evidence carefully reviewed by the EU courts
 - Commission required to produce sufficiently precise and consistent evidence re cartel (Fittings cartel, March 2011)
 - Any doubt in the mind of the Court must operate to the advantage of the undertaking



Focus on the Pharmaceuticals Sector – Background

- Launched in January 2008 in response to concerns that fewer new medicines were being brought to market
- In its final 2009 report, the Commission concluded that market entry of generic drugs is delayed and there is a decline in the number of novel medicines reaching the market. Particular concern with respect to settlement agreements in particular those where an originator company pays to delay entry of a generic drug ('pay for delay' settlements).
- First monitoring exercise on patent settlements in 2010
- Proceedings opened respectively against Les Laboratoires Servier in July 2009, Lundbeck in January 2010. No decision yet.



Pharmaceuticals: 2011 Developments

- In January 2011, information requests sent to 129 pharmaceutical companies asking for copies of their patent settlement agreements between originator and generic companies concerning the EEA
- In July 2011, the Commission published the results of its second monitoring exercise, showing a continuing decline of these problematic deals ('pay for delay' settlements): only 3% of the settlements fell into the category that might attract scrutiny by the Commission. The monitoring exercise is expected to be repeated in 2012.



Pharmaceuticals: 2011 Developments (cont.)

- In April 2011, opening of an investigation into a settlement agreement between Cephalon and Teva suspected of hindering entry of the generic Modafinil in the EEA
- In October 2011, opening of an investigation into agreements between Johnson & Johnson and Novartis with respect to generic versions of a pain killer for chronic pain called Fentanyl in the Netherlands
- Investigation of Boehringer Ingelheim suspected of misusing the patent system to block Almirall's entry into the market closed: the settlement with Almirall removes the alleged 'blocking positions' in Europe



EC Best Practices and Hearing Officer Rules

- Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU published OJ C 308, 20.10.2011, p. 6-32
- Terms of Reference of the Hearing Officer, OJ L 275, 20.10.2011, p.29
- Best practices for the submission of economic evidence, http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf
- The package includes:
 - Procedural best practices in antitrust proceedings
 - Revised mandate for the Hearing Officer mandate
 - Guidance on the submission of economic evidence and data collection



EC Best Practices: Conduct of Proceedings Under 101 and 102 TFEU

- Greater access to submissions made by complainants or third parties, such as economic studies, prior to the Statement of Objections (SO)
- Inclusion of a section on fines in the SO
- More information on remedies if contemplated to be provided in the SO
- State of Play meetings at key points of the proceeding, including in cartels cases (after the oral hearing)
- Public announcement of opening and closure of procedures and rejection of complaints



EC Best Practices (cont.)

- The package also includes further developments to the best practices on the submission of economic evidence
- Due to the increasing importance of economics in complex cases, the parties tend to develop arguments based on complex economic theories or provide empirical analysis. The Best Practices outline the economic criteria and econometric analysis should fulfill in its generation and presentation.
- The notice on antitrust best practices and the best practices on the submission of economic evidence apply to pending cases (to procedural steps that still remain to be taken) and future cases as from the date of their publication
- Transparency: EU FOIA Art.15(3) of TFEU/Reg. 1049/2001 2001 OJ 145/43



Hearing Officer Rules

- Extended mandate of Hearing Officer in the investigative phase (prior the issuance of the SO) with explicit role as regards dispute on the confidentiality of communications between companies and their external lawyers (legal professional privilege), timing issues (extension of deadlines to reply to information requests)
- This is in addition to his current responsibilities on confidentiality issues in the context of access to files: sections on procedures for confidential disclosure and data room access maintained
- Independent review of key procedural rights during the entire investigation process, right from the start of proceedings



Damages Litigation

- Increasing number of damages actions across the EU, in particular in the UK, Germany and the Netherlands
 - Illustrated by recent cartel cases which have, for the most part, generated damages litigation at national level
 - Despite the serious obstacles that discourage consumers and businesses from claiming compensation
 - So far, no US style “class action” for damages in the EU but alternative de facto group actions available
- Legal basis of right to claim damages for infringement of 101 and 102 TFEU found in EU law (Courage and Manfredi)
 - Determination of jurisdiction in accordance with Brussels I Regulation although broad interpretation given by some member states (Netherlands)



Damages Litigation (cont.)

- Quantification of harm in private actions/difficult exercise
 - Numerous approaches by national courts
 - Often difficult because of limited information available in fining decisions
 - No pre-trial disclosure
 - Burden of proof generally relies on the plaintiff
- Useful guidance provided by Commission's draft paper on quantification of harm (June 2011)
 - Assistance to parties involved in actions for damages but also to national courts in appraising damages claims
 - Provides an overview of the main methods and techniques available to estimate the harm suffered as a result of antitrust infringements although choice of methods depends on each individual case



Damages Litigation (cont.)

- Funding of private actions
 - Increasingly viewed as valuable assets
 - Variety of alternatives: investment in litigation by investment funds
 - Cost/risk analysis to be conducted by the funder
- Risks of private damages litigation in Europe can no longer be minimized



Common Trade Policy Toward Third Countries

- EU Member in WTO and signatory to multilateral agreements on dumping, subsidies, trade in services, intellectual property rights
- Current focus during recession on protecting domestic industries
- Rethinking issues on state aids (subsidies)
- Export Controls Policies – trade sanctions



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