EIGHTH ANNUAL

Staying Competitive and Compliant in the EU

2014 Key Developments on Competition Matters

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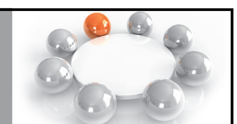
Housekeeping Matters



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

The prior seven presentations focused on the following topics, in the main: European Community and EU member state merger control policies, European competition law and procedures, including vertical restraints, technology licensing, cartel enforcement, competitor collaborations, 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 services and then antitrust for access to these materials.

2014 Developments and 2015 Prospects

- The Juncker European Commission and Commissioner for Competition, Margrethe Vestager
- Coordination through price signaling investigated in the EU
- Cartel: Leniency, Statistics and Compliance
- Restriction "by object" after the Cartes Bancaires ruling
- New Technology Transfer block exemption regime
- Exclusive rebates unlawful unless objectively justified
- EU Merger Developments : Statistics, Key Decisions, Minority Interests, EU/National Merger Control
- Vertical Restraints: What’s New?
- Private Damage Actions and Collective Redress
- 2015 Prospects

Basis Competition Policies/Procedures:

- Prohibition against undue horizontal and vertical restraints, abuse of dominant positions, state aids that affect member state trade and commerce
- Provisions for cooperation between EU and member states in regulating competitive behavior and promoting free movement of goods/people/services/capital in internal market
- Legislative Process : Interrelated Role of Key Institutions: Council, Parliament and Commission
- Regulations, decisions, directives, notices, guidelines
- Greater responsibilities of national competition authorities and national courts
- Notice on *de minimis* agreements

New Juncker European Commission and Commissioner Margrethe Vestager

New European Commission took office on 1 November 2014

- Team of 28 Commissioners headed by President Jean-Claude Juncker
- New Competition Commissioner : Margrethe Vestager
  - Fourth consecutive economist to hold the post but unlike her predecessors, not a vice president of the European Commission
  - Denmark's former Deputy Prime Minister and Minister for Economic Affairs. Member of the Danish Parliament since November 2001 and former leader of the centrist Danish Social Liberal Party.
  - Direct business experience: held a number of company board positions.
  - In her "*mission letter*", asked to (i) mobilize competition policy tools and market expertise so that they contribute to the jobs and growth agenda, including in areas such as the digital single market, energy policy, financial services, industrial policy and the fight against tax evasion; (ii) pursue an effective enforcement in all competition law areas; and (iii) and promote international cooperation.
  - To inherit a number of high profile cartel and antitrust investigations in key sectors such as energy, finance, food, pharmaceutical and high tech.

Horizontal Coordination Through Price Signaling Investigated in the EU

- Exchange of information in the form of public unilateral announcement
  - Restriction of competition by object ?
  - May amount to a « concerted practice » when exchanged information reduces the strategic uncertainty around future commercial policy
  - "*for example in a situation where such an announcement was followed by public announcements by other competitors, not least because strategic responses of competitors to each other's public announcements (which, to take one instance, might involve readjustments of their own earlier announcements to announcements made by competitors) could prove to be a strategy for reaching a common understanding about the terms of coordination*." *see EU Horizontal Guidelines*
  - First assessed by the Commission in Woodpulp.
  - On-going EU investigation against container liner shipping companies for making regular public announcements of future price increases through press releases and press articles – settlement discussion

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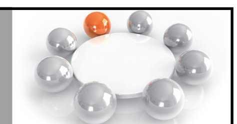
Cartels: Leniency, Statistics and Compliance

- In 2014, fines levied against 10 cartels in widely diversed industries (automotive bearings, spot power exchanges, power cables, steel abrasives, flexible polyurethane, canned mushrooms, smart card chip producers, interest rate derivatives, envelope producers, etc.)
- Total fines were €1,689,497,000 in 2014 compared with €1,882,975,000 in 2013 and €1,875,694,000 in 2012. The small decline on total annual fines is in no way an indication of reduced priority.
- Outgoing Commissioner Almunia indicated on September 19, 2014 that there was a long list of on-going cartel investigations in the automotive sector alone involving air bags, safety belts, steering wheels, cooling and lightening systems.

Cartels (Cont.)



- The global auto parts probe continues to provide fertile enforcement ground in the EU and underscores the absolute necessity of firms to adopt effective compliance programs.
- Cartel leniency and lenience plus procedures are increasingly the principal catalyst for enforcement activity. There is in the EU as in the United States great pressure to be the first in line to disclose a cartel (with concomitant reduced penalties) or to disclose a different cartel.
- Cartel settlement procedures act as well as powerful incentives to avoid costs and risks of litigating with the Commission which acts both as prosecutor but as decision-maker as well.
- Important decisions on investigative procedures, dawn raids and access to the file.

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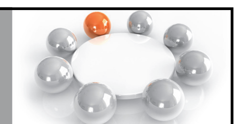
Article 101(1) Restriction "by Object" after Cartes Bancaires Ruling

- Court of Justice clarified "by object" restriction standard as described in the revised *De Minimis* Notice.
- The Court of Justice ruled that "by object" concept is narrowly applicable only to conduct that itself reveals sufficient harm to competition that there is no need to examine their effects.
- According to the Court, not all agreements, even if they include some pricing measures, can be presumed to harm competition but only those that are clearly and sufficiently injurious to competition.
- All other agreements that do not have the object of restricting competition, the appreciable effect on competition needs to be assessed taking into account the conditions in which the agreement operates and the economic context.

2014 Revised Technology Transfer Block Exemption Regime



- New Transfer Block Exemption Regulation came into force on 1 May 2014 :
  - Commission Regulation no 316/2014 of 21 March 2014 on the application of Article 101(3) of the TFEU to categories of technology transfer agreements (TTBER) OJ L93, 28.03.2014, p.17-23
  - Accompanying Technology Transfer Guidelines published in OJ C89, 28.03.2014, p.3-50
- What are the main changes ?
  - Precedence of other block exemptions (R&D) in case of overlapping application with the TTBER.
  - While patent pools not covered by TTBER, additional guidance set out in the Guidelines.
  - All exclusive grant-backs clauses (including of 'non-severable' improvements) excluded from the exemption provided by the TTBER

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2014 Revised TTBER (cont.)

- All passive sales restrictions in licences between non-competitors excluded from the safe harbour including temporary restrictions during the first two years of the agreement unless ‘objectively necessary’ for a licensee ‘to penetrate a new market’ say the Guidelines.
- Termination clauses following challenge of validity of licensed technology excluded from the safe harbor for non-exclusive licences : to be assessed individually.

• What does not change?

The block exemption’s market share thresholds remain unchanged.

- agreements concluded between competing undertakings where the undertakings’ combined market share does not exceed 20 % of the relevant market;
- agreements concluded between non-competing undertakings where the undertakings’ combined market share does not exceed 30 % of the relevant market.

Exclusive Rebates Unlawful Under 102 Unless Objectively Justified

• General Court ruling of 12 June 2014

- The EU lower Court dismissed in its entirely Intel’s appeal against 2009 EC decision imposing a huge fine of € 1.6 billion on the company.
- Exclusivity rebates granted by a dominant company are abusive ‘by their very nature’ unless objectively justified says the Court.
- By restricting purchaser’s freedom to choose his supplier, and denying other producers access to the market, such rebates are incompatible with the objective of undistorted competition.
- No need to apply the « as efficient competitor test » says the Court : the actual foreclosure effects of exclusivity rebates on the market do not need to be considered.
- In line with earlier case law including Hoffman-La roche and Tomra.
- Intel appealed the General Court ruling.

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Other Article 102 TFEU -- Main Decisions and Rulings

- Romanian Power Exchange OPCOM fined € 1 million for requiring from all EU electricity traders a Romanian VAT number and refusing to accept EU traders established abroad and registered for VAT outside Romania.
- Motorola and Samsung decisions on Standard Essential Patents (SEPs)
  - Motorola found to have abused its dominant position in seeking and enforcing injunctions against a willing licensee (Apple) to take a license on FRAND terms. No fine imposed by the Commission on Motorola.
  - Samsung : Similar to Motorola but offered commitments not to seek injunctions in Europe to settle the case and allowing licenses on FRAND terms.
- Court of Justice dismissed in its entirety Telefonica's appeal of EU 2007 decision imposing a fine of €151,9 million on the company for abuse of its dominant position through margin squeezing on Spanish broadband market
  - Sufficient for the EC to demonstrate the potential anti-competitive effect of such a practice says the Court.
- Slovak Telekom fined € 38,8 million by the Commission for refusing unbundled access to local loops to competitors and margin squeezing on alternative operators. Deutsche Telekom, the parent company was held jointly and severably liable and fined an additional fine of € 31 million for deterrence and recidivism.

EU Merger Developments : Statistics, Key Decisions, Reforms, Minority Interests, EU/National Merger Control

- Basic Regulation : Merger Regulations, Notices and Guidelines
- Thresholds : EU Dimension and Relationship to Member State Authority
- Statistics
- Key Decisions
- Policy/Procedure Developments

EU Merger Developments

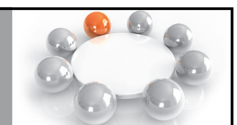
- See http://ec.europa.eu/competition/mergers/legislation
- Merger Regulations
- Notices and Guidelines
  - Consolidated Jurisdictional Notice
  - Simplified Procedure
  - Case Referrals : Division of Competency: Referral to Commission and Referral to Member States (Pre- and Post- Notification)
  - Notices on Substance: Horizontal and Non-Horizontal Relevant Market, Remedies, Ancillary Restraints
  - Best Practices : Submission of Economic Evidence, Market Share Ranges, Merger Control Procedures, Divestiture Commitments
  - Cooperation on Merger Control: Within EU and International

EU Merger Developments: Statistics

	2011	2012	2013	2014
Notifications	274	283	277	303
Referrals (accepted/rejected)	Small number			3 requests rejected
First Phase Compatible (including commitments)	304	263	263	293
Phase II Initiated	8	10	6	8
Second Phase Decisions				
Compatible	4	2	2	5
Compatible with Conditions	1	6	2	5
Prohibition	1	1	2	0

EU Merger Developments: Key Decisions

- EU imposed Euro 20M fine on Marine Harvest for implementing acquisition of Morpol prior to EU clearance. Same fine imposed on Electrabel.
- EU approved Lafarge/Holcim merger creating largest world cement company, subject to substantial divestitures in EU.
- EU investigated Ahlstrom/Munksjö for substantially understating market shares in notification in sharp contrast to internal documents discovered in investigation. EU closed investigation after market share discrepancies explained
- Chiquita/Fyffes banana deal approved with commitments to eliminate exclusivity provisions in shipping contracts potentially opening EU markets
- Proposal on minority share interests notification, member state/EU referrals and possible exemption for JVs outside EU



EU Distribution

- Vertical Restraints Legislation – Block exemption regulation
  http://ec.europa.eu/competition/antitrust/legislation
- Enforcement : large majority of cases involving distribution arrangements handeld at national level
- Important Structural Differences between EU Vertical Restraints Activity and Other EU Competition Activities : Compare Merger Cartel Enforcement with Vertical Restraints – Policy/Enforcement : Member state level
- Summary of Continued Critical Issues : Exclusivity (territorial restrictions: active vs. passive), Online Sales, Selective distribution, RPM and MAP
- Notice on Agreements of Minor Importance (*De Minimis* Notice)
- Compliance Matters – Significant Differences between EU and US Models in Vertical Restraints Area

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EU Distribution: Summary of Important Principles

Exclusive and Selective distribution

- EU rules remain less favorable than US rules.
- As a general rule, suppliers may restrict "active" sales by distributors to a specific territory or a customer group.
- However, absolute restrictions that prohibit passive sales are unlikely to be allowed.

Online sales

- EU rules remain less favorable than US rules.
- Online sales considered as a passive form of selling any absolute prohibition on internet sales likely to be considered illegal
  - absolute ban on Internet sales in selective distribution system is a restriction by object, unless the ban can be objectively justified - Pierre Fabre ruling (C-439/09)
  - Restrictions to Internet sales in selective distribution system only acceptable if equivalent to the criteria imposed for the sales from brick and mortar shops

EU Distribution and Online Sales

Other internet selling restrictions considered as hardcore restrictions that cannot be exempted:

- Charging a reseller a different price depending on whether the product is resold online or offline
- Limitation on the proportion of overall sales made over the internet
- Compulsory re-routing of 'foreign' customers to their national websites
- Terminating internet transactions if 'foreign' credit cards are used

Online sales restrictions likely to be permitted under EU law:

- certain objective standards of quality for a distributor's website provided they are equivalent to the conditions applicable to offline sales
- prevent distributors from selling only through the Internet (suppliers are allowed to refuse to supply pure online players)
- require that a certain amount of the products be sold offline and agree on a fee with the distributor to support the latter's online or offline effort

EU Directive on Private Damage Actions and Collective Redress

- EU adopts directive on antitrust damages actions, harmonizing procedural rules for competition damages actions in EU Member States and easing ability to obtain compensation for loss suffered.
- The Directive facilitates private actions with introduction of uniform disclosure regime, confirmation that cartelists are jointly and severally liable for the entire loss caused by a cartel, establishment of a uniform statute of limitations, authorization of a right of indirect purchasers to institute proceedings directly against cartelists and the introduction of a rebuttable presumption that cartels cause harm.
- To further enhance opportunities for effective redress, EU announced consultation to align antitrust procedures with damage actions directive, particularly with regard to use of information obtained from competition authorities in damage actions.
- While there are many remaining differences among member state procedures and while the incentives are in no way as attractive as in the United States, these developments are very important.

2015 Prospects and Predictions

- Competition Compliance Continues Crucial
- Differences in U.S./EU Law Continue to be Potential Traps for the Unwary – Vertical Restraints, *De Minimis* Rule, RPM and MAP
- Merger Enforcement Focus Increases Uncertainty
- Global Coordinated Cartel War Will Continue and Intensify Particularly in Automotive Sector
- Risk/Rewards for Private Redress of Competition Injuries Continue to Increase as Policy and Procedural Hurdles Are Increasingly Overcome

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