



NINTH ANNUAL  
**Staying Competitive and Compliant in the EU**  
2015 Key Developments on Competition Matters  
January 28<sup>th</sup>, 2016



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NINTH ANNUAL

## Staying Competitive and Compliant in the EU 2015 Key Developments on Competition Matters



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This is the ninth 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 eight presentations focused on EU basic principles, the role of competition policy in the creation of a single EU market, European Community/EU member state merger control policies/procedures, European competition law/procedures, (including vertical restraints, technology licensing, cartel enforcement, competitor collaborations (e.g., information exchange)), trends and developments in European competition law, private remedies, class actions and best practices for compliance (including attorney-client privilege).

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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## I. INTRODUCTION AND OVERVIEW



- EU Competition Basics. Why They Remain Important and What's Ahead?
- Merger Developments: A discussion of latest developments at both EU and Member State Levels: What are the Emerging Trends?
- Distribution: Priority Issues Particularly for Companies Selling into the EU. There is increased scrutiny of E-commerce and its effect on a single EU market.
- Cartels: There are important new developments that reflect the continued high enforcement priority for the Commission of so-called white collar violations
- Horizontal cooperation guidelines: Joint Ventures and Information Exchange: Important Developments on Facilitation and Collusion
- Legislative Developments: A pending Commission legislative proposal may bring significantly increased procedural harmonization of anti-competition enforcement.
- Private enforcement developments: There is continued efforts to strengthen private damage and collective redress opportunities.
- Competition Law Compliance: Important Differences: What's different? A continuing wake-up call for non-EU and in-house Counsel dealing with EU Competition Investigations and Compliance Generally- Attorney-Client Privilege

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## Goals and Structure of European Union



- Create an integrated common economic market replacing a patchwork series of nationally imposed trade restraints
- Elimination of intra-Europe custom duties, quantitative restrictions and imposition of a common commercial policy toward third countries : free movement of goods, people services and capital; justifiable barriers, proportionality, mutual recognition, precautionary principle
- Establish a system of competition principals and procedures working with member states – Revolution from 1962 central *ex-ante* control authority to 2004 devolution of direct application of competition principles to national courts and competition authorities (and beyond)
- A report card after more that half a century – A work in process of evolution in a union of 28 widely diverse member states

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## EU Competition Basics: Why They Remain Important And What's Ahead



- Prohibition against undue horizontal (e.g., cartels) and vertical restraints (e.g., RPM), abuse of dominant positions, state aids that affect member state trade and commerce
- 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
- Important Trends: Subsidiarity pressures, growing tension between greater harmonization and increased local control

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## EU Merger Developments: Statistics, Latest Developments EU/Member States Procedures & Evolution



- Basic Regulation : Merger Regulations (EMCR), Notices and Guidelines: e.g., relevant market, remedies, ancillary restraints, etc.
- Thresholds : EU Dimension (“Concept of Community Dimension”) and Relationship to Member State Authority (Opportunities for Referrals to and from Commission/Member States
- Statistics
- Key Decisions
- Policy/Procedure Developments

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## EU Merger Developments



- See <http://ec.europa.eu/competition/mergers/legislation>
- Merger Regulations and Procedures (Compare to HSR)
- Notices and Guidelines
  - Consolidated Jurisdictional Notice
  - Simplified Procedure, since 2013 (greatly eased filing burden – in 2015, 222 of 337 cleared under simplified procedures)
  - Case Referrals : Division of Competency: Referral to Commission and Referral to Member States (Pre- and Post- Notification): Tensions growing on jurisdictional prerogatives
  - Cooperation on Merger Control: Within EU and International
  - Overview of Trends and Developments

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## EU Merger Developments: Statistics



	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>
Notifications	283	277	303	337

Referrals (accepted/rejected) Small number but growing friction  
 (in 2015, there were 13 requests to the Commission by parties notifying a transaction for referral to a member state, 12 referrals to member states, 3 requests to the Commission by a member state for a referral all of which were refused)

First Phase Compatible (including commitments)	254	252	280	297
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Phase II Initiated	10	6	8	11
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Second Phase Decisions				
Compatible	1	2	2	1
Compatible with Conditions	6	2	5	7
Prohibition	1	2	0	0

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## EU Merger Developments: Key Decisions



- EU increasingly conditioning approval on “up-front” “fix-it first” remedies, both in phase 1 and Phase 2 proceedings in order to get clearance.
- EU approved Alston/GE merger creating one of largest global electrical generations equipment, subject to divestiture of heavy duty gas turbine business. Fix it first very common in manufacturing, telecom and IT industries.
- EU and US (and others – ICN) continue to cooperate actively in merger investigations. Procedures for waiver of confidentiality.
- EU published its best practices on disclosure of information in data rooms - business secrets, confidentiality and data room procedures.
- Proposal on minority share interests notification, continues to be highly controversial and currently put on back burner (compare Brazil).
- EU/member states relations (Hutchinson – O2 Deal: UK rebuffed, Belgium given authority to handle large grocery store merger).

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## Online Distribution



- On May 26, 2015, the European Commission launched an antitrust competition inquiry into the e-commerce sector regarding the ability of suppliers & resellers to sell their goods and services over the internet.
- Context : Commission’s Single Digital Market initiative : key priority
- Legal basis : Commission Decision of 6 May 2015 initiating an inquiry into the e-commerce sector pursuant to Article 17 of Regulation 1/2003
- Aim: Better access for consumers and businesses to online goods and services across Europe and remove unjustified barriers.
- Targeted products and services include clothings, shoes, consumer electronics, books, healthcare products, digital context, travel services
- Potential outcome: initiation of separate investigations against individual companies ( imposition of fines) and legislative measures
- At national level, lead taken by Germany as illustrated by FCO’s recent investigation into the online distribution system of a leading athletics manufacturer.

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## Online Distribution (cont.)



- The Focus is on contractual and other barriers to cross-border e-commerce in the EU :
  - Of particular concern is 'geo-blocking' where companies are preventing consumers from accessing their products in other Member States.
- EU online distribution rules : Some important principles
  - EU online distribution 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
    - Restrictions to Internet sales in selective distribution system only acceptable if equivalent to the criteria imposed for the sales from brick and mortar shops

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## Online Distribution (cont)



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:

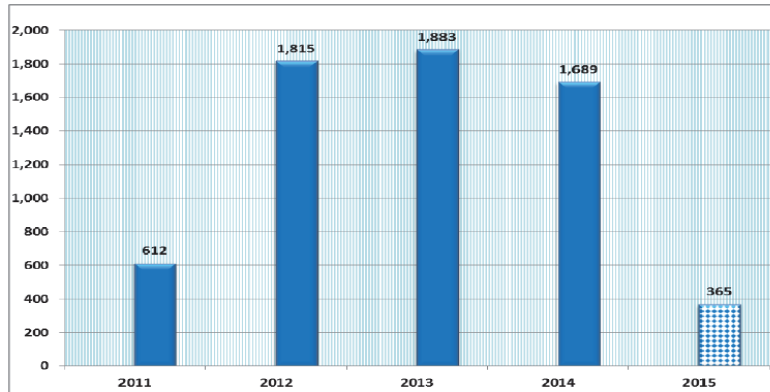
- certain objective standards of quality for a distributor's website provided they are equivalent to the conditions applicable to offline sales
- prevent distributors from selling only through the Internet (suppliers are allowed to refuse to supply pure online players)

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# Cartel Statistics



## Total fines imposed by the Commission



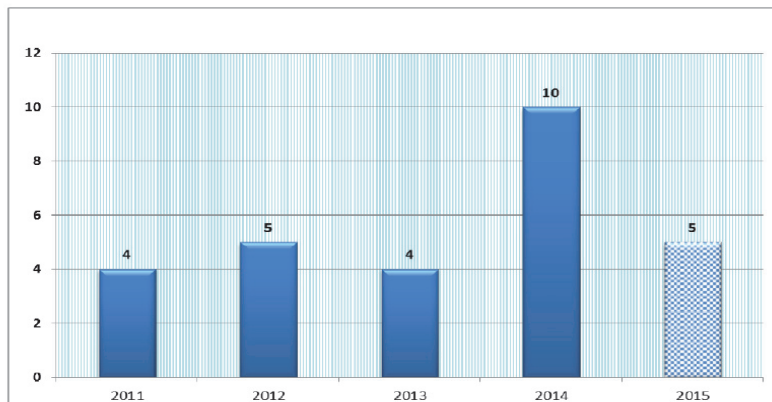
<http://ec.europa.eu/competition>

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# Cartel Statistics



## Number of cartel decisions



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

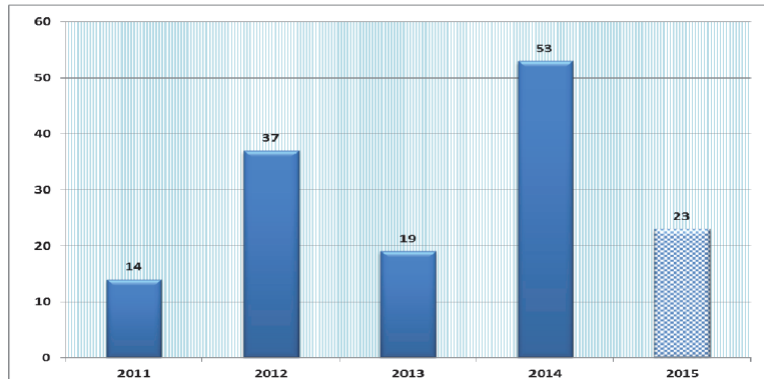
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## Cartel Statistics



- Number of undertakings\*



*Includes entities not fined such as immunity applicants*

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## EU Cartel Enforcement



- 2015 marks the first full year of Margrethe Vestager as the Commissioner of the European Commission's Competition Directorate with substantial fines totaling approx. €364.5 million.
- Fines levied against 5 cartels in widely diverse industries. Largest fines were imposed on 8 manufacturers and 2 distributors of retail food packaging trays (€115 million) and eight optical disk drive manufacturers (€116 million).
- 2015 falls well short of fines totals in the EU for previous year: €1.689 million in 2014 in 10 cartel decisions.
- However, the decline on total annual fines is in no way an indication of reduced priority. Several on-going investigations including into biofuel sector and the sector of automotive parts. Statement of Objections also issued to 10 manufacturers of electrolytic capacitors and to 5 companies suspected of operating a car battery recycling cartel.

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## EU Cartel Enforcement (Cont.)



- Continued success of EU leniency program : most decisions based on immunity applications
- 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)
- 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.
- 19th settled cases since the introduction of the settlement procedure including 2 cases decided in 2015 under the settlement procedure.

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## Cartel Rulings



Also, some important rulings :

- Information exchange : zero tolerance for sharing future pricing-related information with competitors amounting to serious violation of EU antitrust rules.
- Parent liability: Akzo still stands. Anti-competitive conduct of a full function JV can be attributed to parents companies. However, liability of parent company cannot exceed that of its subsidiary => parent can benefit from any reduction in liability of the subsidiary.
- 'Extra-territorial' fine calculation method permitted => in a cartel involving vertically integrated companies, Commission may take into account non-EEA sales of cartelized inputs incorporated into finished products and subsequently sold to a third party in the EEA.
- Disclosure : documents exchanged between a NCA and Commission in proceedings concerning an infringement of EU antitrust rules should not, in principle, be made accessible to the public.

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## Cartel Rulings (cont.)



- Important appeals won by the European Commission:
  - Commission's power to fine facilitators of cartel conduct (eg consultants of trade associations) confirmed by Court of Justice.
  - Commission not prevented from imposing higher fines on non-settling companies as long as same calculation method for fines applied on all cartel members.
- But also some setbacks:
  - Commission decision imposing € 790 million in fines against 11 air cargo carriers annulled for inconsistencies between the grounds and operative part of the Commission's decision.
  - while confirming Commission's ability to conduct dawn raids without judicial authorization, Court of Justice annulled the Commission's investigations because improperly discovered documents triggered the action.

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## Horizontal Cooperation, Information Exchanges and Collusion: Has the EU Gone Bananas?



- Important for associations and competitors: AC Treuhand decision
- Exchange of information: A hot button issue in EU
  - Restriction of competition by object ?
  - May be illegal when exchanged information reduces the strategic uncertainty around future commercial policy
  - Example: competitor makes *price announcement followed by public announcements by other competitors – EU views strategic responses of competitors to each other's public announcements as possibly triggering readjustments of earlier competitor announcements – it EU view, this could constitute a common understanding about the process and substantive terms of coordination. see EU Horizontal Guidelines*
  - *Even one exchange of prices can violate EU rules: T-Mobile*
  - General Principles reaffirmed by ECJ Bananas

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## Legal Certainty and the Horizontal Guidelines



### ■ Key Questions on Information Sharing

Is strategic, disaggregated, and individualized?

To what period does the information pertain:

#### **Future Focus**

*infringement by object*  
(agreement is presumed anti-competitive, with parties having burden of proof to show otherwise)

#### **Current/Past**

*infringement by effect*  
(agreement has no presumption of being anti-competitive, authority has burden of proof to show likely to be anti-competitive)

- Can sharing historic non-price information be problematic?
- What is the market structure in which exchange takes place?

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## But What are 'Future Intentions'



Future/Current /Past?	
Future	Current/Past
<b>Object Infringement</b>	<b>Effects infringement</b>
In private      Other	In public
<i>Risks of Presumed Object Infringement if relates to key strategic issues, particularly prices and supply intentions</i>	<i>"press release or posting of individualized prices or quantities not necessarily considered illegal"</i>  <i>Issues of signaling as in Bananas and Liner Shipping</i>

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# Bananas



- Case centered on weekly bilateral telephone calls between parties to disclose pricing intentions for that week's banana sales.
- Article 101 prohibits both formal and informal agreements and understandings
- Commission found that these calls constituted a coordination of their price-setting behavior and as such was assessed as a **cartel**.
  - Communications before setting quotation prices reduced uncertainty for each participant as to likely competition conduct and altered normal functioning of competitive market.
- Confirmed recently in General Court, dismissing appeals based on prices being 'general knowledge' and quotation prices not being either actual prices charged to customers or an indication of output.
- Infringement by Object Analysis Upheld

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# 'Effects' Based Cases



## Guidelines outline two main considerations

• Characteristics of relevant market	• Nature of exchange
➢ Degree of concentration	➢ Scope of Exchange
➢ Stability of supply and demand	➢ Strategic significance of information
➢ Market Transparency	➢ Public versus non-public information
➢ Frequency of firms interactions	➢ Context: public versus private
➢ Entry Barriers	➢ Aggregation of Data
	➢ Age of data
	➢ Frequency of exchange

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## Legislative Developments



- Update of Regulation 773/2004 on antitrust procedural rules and related notices to reflect provisions of the new Damages Directive on accessing and using information in the files of competition authorities => leniency statements and settlement statements must not be disclosed at any time.
- Revised version of European Commission's explanatory note on inspections. No major changes but clarifies that Commission may search private devices and media (ie mobile phones and tablets) when found on the premises and are used for work purposes.
- More importantly, the European Commission opened a consultation seeking views on how national competition authorities (NCAs) should be given more effective tools to enforce EU antitrust rules.

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## Legislative developments (cont)



- 2014 Commission Communication on Ten years of Regulation 1/2003 identified areas where antitrust enforcement could be improved = > divergences in national procedures and sanctions.  
Need for action to guarantee that all NCAs:
  - Have more effective enforcement tools
  - Can impose effective fines
  - Have effective leniency programmes in place
  - Have adequate resources and safeguard in place to ensure their independence
- EU goal is to promote greater harmonization to reduce inconsistencies.
- Next steps: Consultation opened until 12 February 2016.  
Commission expects to propose legislation reflecting the results of its consultation in early 2017.

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## Private Enforcement



- Private enforcement has become a major risk for companies breaching EU antitrust rules.
- Under EU law, anyone that has suffered harm caused by a competition law infringement can claim full compensation for the harm suffered, irrespective of the existence of a direct contractual relationship with the infringing undertaking.
- 2014/14/EU Damages directive aims to remove practical obstacles to compensation for all victims of EU antitrust law 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.

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## Private Enforcement (cont.)



- The EU's 28 Member States have until the end of this year to pass domestic legislation bringing the Damages Directive into effect. It will require changes to the legal procedures of the Member States to achieve compliance.
- In the UK, to promote a more robust approach to private enforcement, adoption of the Consumer Rights Act 2015 which entered into force on October 1<sup>st</sup>, 2015 increasing exposure of companies found to have infringed competition law to compensation claims :
  - Introduces significant changes to facilitate claims, including the establishment of a fast-track procedure for simple claims, introduction of a collective settlement regime and an extension of the limitation period for actions before the UK's Competition Appeal Tribunal (CAT).

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## Private Enforcement (cont.)



- But also, the introduction of collective proceedings on an 'opt-out' basis allowing competition claims to be brought on behalf of a defined set of claimants (excluding those that formally opt out)
- The CAT in the UK will be able to hear collective actions for both stand-alone (without a prior infringement decision) or follow-on claims, on an opt-in or opt-out basis.

Private antitrust litigation is changing. Litigation brought by private parties (consumers, competitors or NGOs) to enforce competition law rights – whether on a stand-alone basis, or following an investigation brought by an enforcement agency – has long been common in the US and is now a frequent occurrence in some jurisdictions in the EU particularly the UK, the Netherlands and Germany.

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## EU Antitrust Compliance Essential But Important Differences From US



- Compliance? What is it? Compliance means obeying the law. In business it means proactively observing competition rules.
- Why Comply? Competing is good business, particularly in the EU, one of the largest economic markets in the world.
- What Are the Risks and Rewards of Compliance ... or Non-Compliance? The risks of non-compliance can be astronomic both in fines and damages. While EU law not criminal (like US), increasing number of EU member state competition laws have criminal sanctions (e.g., UK and France). Private damage remedies are increasingly important.
- While essential, there are important differences between the EU and US compliance which must be understood by U.S. companies -- One size does not fit all! There are between U.S. and EU compliance law and procedure. An effective policy must take these important differences into account.
- What are there important differences?

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## What is Different and Why Does It Matter?



- At least 3 differences are critically important to remember.
- These differences relate to 1) carrots/sticks for compliance; 2) means of assuring effective compliance; and 3) attorney-client issues related to compliance
- First, compared to the US, there is the relatively little credit given for effective compliance: carrots and sticks
- Both jurisdictions expect effective compliance and both impose heavy penalties on violators without such policies.
- However, the EU provides little tangible economic incentive for compliance. Indeed, penalties are assessed based on the “gravity” and “duration” of the violation.
- In contrast, the US gives real credit for effective programs.

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## What is Different and Why Does It Matter?



- A second major difference between EU/US compliance programs goes directly to effectiveness. Many elements of U.S./EU programs are the same. But, they differ on self reporting/cooperation: whistle-blowing/confidential hotlines.
- US compliance programs view confidential hotlines to report corporate misfeasance as standard “best practices.”
- Instead, such policies in EU are viewed as unlawful, unacceptable intrusions into the workplace/violations of rights of privacy. Reflecting sharp cultural and historical differences with the United States, European privacy policies view confidential hotlines as pitting employees against each other.
- They are highly suspect. This is another essential difference.

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## What is Different and Why Does It Matter?



- Indeed, EU data privacy protection laws have been interpreted to virtually eliminate the possibility of a confidential hotline given what is seen as the lack of proportional value between the hotline and the benefits achieved.
- Beyond EU data privacy protections that constrain fulsome American-style compliance programs and procedures, EU member state labor protection laws further restrict the ability of companies to compel employees to participate in programs to facilitate legal compliance through means of hotlines and whistle blowing procedures.
- Accordingly, great care must be taken to avoid these potential mine-fields in extending a North American style compliance program to Europe.

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## What is Different and Why Does It Matter? Attorney Client Privilege



- The final difference that is critically important relates to how you conduct antitrust compliance investigations and negotiate with governments and or damage claimants
- In the United States, there is a long, well-established and robust privilege for confidential communications between an attorney and a client
- This privilege applies for communications involving in-house and outside counsel in fact-gathering investigations, negotiations or trial preparation.
- The situation is very different in the EU for complex historic, cultural reasons which combine to limit the scope (when and to whom) the privilege applies.

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## What is Different and Why Does It Matter? Attorney Client Privilege



- AKZO NOBEL – 14 September 2010 Court of Justice decision
  - Upheld 2007 judgment by the General Court denying extension of legal professional privilege (LLP) to certain communications with in-house counsel
  - Confirms the very narrow scope of LLP in the EU
  - In-house lawyers - even if members of a national Bar – are viewed as economically dependent on their employer : do not enjoy same degree of independence as external lawyers
  - Two conditions for LLP protection : documents (1) created '*specifically and exclusively*' to seek legal advice from outside counsel on rights of defense and (2) prepared by "independent lawyers" not bound by a relationship of employment
  - Very important decision not only for European lawyers (whether in-house or not) but non-EU lawyers involved in EU law matters

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## What is Different and Why Does It Matter? Attorney Client Privilege



- Refusal to extend LLP to in-house counsel communication delivered in the context of an EU cartel investigation
- However, risk that such refusal would to apply to all competition matters in the EU, such as mergers, distribution agreements
- may move to other areas of regulatory scrutiny in the EU

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## Conclusions/Predictions?



- EU Commission will retain authority on high priority, EU wide issues (large mergers, cartels and abuse of dominant positions) while continuing to devolve local competition issues to NCAs.
- Greater involvement of NCAs in applying/developing EU antitrust rules. European Commission shares competence on EU competition law with member states. Since 2004 NCAs have made 85% of all decisions applying EU competition law.
- Enhanced empowerment/effectiveness of NCAs as EU antitrust enforcers coupled with greater harmonization of current divergent NCAs powers/practices.
- More effective antitrust damages actions in EU, importantly a damages directive provided increased harmonization to be adopted by EU member states this year.
- Energy union and digital single market high priorities on the Commission's agenda. First results of Commission's e-commerce sector inquiry expected later this year possibly followed by antitrust investigations against individual companies. Commission's initiative supported by NCAs – in particular, Germany – investigating at national level on barriers to cross-border e-commerce.
- EU competition issues remain a high priority for EU single market integration.