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European Union Competition Law and Practice

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Overview of E.U. Competition Law – Sources of Law

- **Treaty on the Functioning of the European Union (TFEU)**
 - Article 101 – “Agreements,” “Decisions,” and “Concerted Practices”
 - “May Affect Trade Between Member States”
 - “Have as Their Object or Effect the Prevention, Restriction or Distortion of Competition”
 - Similar to U.S. Section 1
 - Article 102 – “Abuse of a Dominant Position”
 - Similar to U.S. Section 2
- **National Competition Laws**

Overview of E.U. Competition Law – Enforcement

- **European Commission Directorate General For Competition (DG Comp) Investigates Infringement of E.U. Law**
- **European Commission Determines Liability**
- **Judicial Review in the European General Court and European Court of Justice**
- **National Competition Authorities Also Have Enforcement Authority**
 - E.U. Law
 - National Laws

European Commission Competition Enforcement

- **Cartel Investigations**
- **Vertical Restraints**
- **Abuse of Dominance**
- **Merger Review**
- **State Aid**
- **Very Substantial Fines Are Often Imposed**
 - Up to 10% of Global Turnover
- **Total Fines From 2007 – July 2011 (Not Adjusted For Court Judgments):**
 - € 10,307,968,432

Overview of E.U. Competition Law – Enforcement

- **No Criminal Liability Under E.U. Law**
 - But Some Member States Have Criminal Statutes

Private Enforcement

- **No E.U. Private Enforcement Law**
- **Developing Private Enforcement in Member States**
- **Ongoing Effort Toward E.U. Private Enforcement**
- **Commission Resources on Private Enforcement**
 - <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>
 - <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>

Private Enforcement

- **National Courts Must Follow Court of Justice Interpretation of E.U. Law**
- **Primacy of E.U. Law Requires National Courts to Reject Any Provision of National Law Conflicting With a E.U. Rule**

See Commission Notice on the Co-Operation Between the Commission and the Courts of the E.U. Member States, April 27, 2004, ¶¶ 5-6

Private Enforcement

- **Commission Decisions Binding in “Follow On” Litigation**
- **Causation and Damages Must be Proved**

Private Enforcement – Member State Survey

Member State	Class Action	Direct/Indirect Purchaser Actions	Joint and Several Liability
Czech Republic	No	Direct and Indirect Pass-on Defense Available	Yes
Germany	No	Direct Unclear on Indirect	Yes
Ireland	No	Probable Relief for Direct and Indirect Purchasers	Likely Yes.
Poland	Yes	Direct and Indirect	Yes
United Kingdom	Yes	Direct and Indirect	Yes

Overview of E.U. Competition Law – Jurisdiction

- **Broad Jurisdiction**
- **Commission Can Address Conduct Occurring Outside the E.U. Affecting E.U. Trade**
 - *Dyestuffs* (1972) – Actions of Controlled Subsidiary in E.U. Support Jurisdiction Over Non-E.U. Parent
 - *Wood Pulp* (1988) – Non-E.U. Agreement “Implemented” by E.U. Sales
 - *Lysine* (Commission 2000) – Only Non-E.U. Participants
- **DRAM: Nanya, Samsung, Hynix, Micron, Elpida**

U.S. vs. EU

- **U.S. – Civil and Criminal Enforcement**
- **E.U. – Civil Only**
- **U.S. – Vigorous Private Enforcement**
- **E.U. – Developing Private Enforcement**
- **U.S. – Jury Trial (Civil and Criminal)/Federal Trade Commission**
- **E.U. – Investigation and Decision by European Commission**

U.S. vs. E.U.

- **U.S. – Rigorous Rules of Evidence**
- **E.U. – Few Limits on Evidence**
- **U.S. – Broad Attorney-Client Privilege**
- **E.U. – No Privilege For In-House Lawyers**
- **Some Differences in the Substantive Law**

U.S. vs. E.U. – Attorney/Client Privilege

- **In-House Counsel Communications Are Not Protected by the Legal Professional Privilege (LPP)**
- **LPP Applies to Communications Between Independent Attorney and Client For Purpose of the Exercise of the Client's Right of Defense** *Azko Noble Chemicals* (2010)

U.S. vs. E.U. – Attorney/Client Privilege

- **Rationale: In-House Counsel Are Not Sufficiently Independent Because They Are Employees of the Client and Retain Close Ties to Their Employers**
 - Impact in Global Investigations

European Commission Leniency Notice

- **“First In” – Immunity From Fines**
- **Others – Reduced Fines**
- **Later Applicants Must Provide Evidence That Offers “Significant Added Value”**
 - Second Applicant Receives a 30% to 50% Reduction
 - Third Applicant Receives a 20% to 30% Reduction
 - Others Up to 20%

See Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, December 8, 2006

European Commission Leniency Notice

- **Detailed Information Must be Provided by Applicants**
- **Ongoing Cooperation is Required**
- **“Oral Statements” by Leniency Applicants**
 - Implicate Competitors
 - Difficult For Others to Refute
 - Minimal Evidentiary Standards
 - Requirement of “Corroboration”

Private Litigant Access to Leniency Materials

- **Leniency Materials Submitted to the Commission Are Confidential**
- **Commission is Flexible Regarding Oral Submissions**
 - Issues Involving U.S. Discovery

Private Litigant Access to Leniency Materials

- ***Pfleiderer AG* (2011) – Allows Access to Leniency Materials Submitted to National Competition Authorities**
 - Subject to Case by Case Analysis in Member States
- **French Competition Authority Recently Ordered to Disclose Settlement Materials**
- **Impact on U.S. Private Litigation**
 - Prior Commission Position Regarding Materials Submitted to the Commission in U.S. Courts

European Commission – Settlement Process

- **2008 Commission Notice on Conduct of Settlement Procedure**
 - Invitation to Participate in Settlement Discussions
 - At the Discretion of the Commission
 - Access to Commission File
 - Discussion of Likely Commission Objections
 - Disclosure of Range of Potential Fine
 - Amount of Fine is Not Negotiated
- **Settlement Submission (Agreement)**
- **Statement of Objections**
 - Likely Less Detailed Than Traditional Statement of Objections
- **Commission Decision**

European Commission – Settlement Process

- **Agreement Process Allows Review of Draft Content of Statement of Objections**
- **Settlement Requires “Clear and Unequivocal” Acknowledgement of Liability**
 - Agreement Process Presents Opportunity to Limit Scope of Acknowledgement
 - Geographic Scope of Infringement
 - Violation of Laws of Other Countries
 - Negotiation of Details of Infringement is Limited

European Commission – Settlement Process

- **Impact on Private Litigation – Europe**
 - Access to Settlement Materials?
 - Result in the Commission Establishes Liability in Follow On Litigation
 - Causation and Amount of Damages Must be Proved
 - Limited Collective Actions
- **Impact on Private Litigation – U.S.**
 - Access to Settlement Materials From Defendant
 - Raw Data Submitted to the Commission
 - Specially Created Materials
 - Issue Preclusion?
 - “Actual Litigation”
 - “Identical Issues”

European Commission – Settlement Process

- **Impact on Government Enforcement in Other Jurisdictions**

Article 101

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 101

- **Similar to U.S. Section 1**
- **Applies to “Agreements,” “Decisions by Associations,” or “Concerted Practices”**
 - Analogous to U.S. Section 1 “Contract, Combination or Conspiracy”

Article 101 - Elements

- **Agreements Between Undertakings, Decisions by Associations of Undertakings and Concerted Practices**
 - “Concerted Practices” Include Coordination Between Undertakings That Have Not Concluded an Agreement
 - Cooperation Among Competitors at the Risk of Competition *Imperial Chemical Industries* (1972)
 - Concepts Are Fluid and May Overlap

Article 101 - Elements

- **May Affect Trade Between Member States**
 - “Objective Factors” Establish That the Practice May Have an “Influence,” Direct or Indirect, Actual or Potential, on Trade *Société Technique Minière* (1966)
 - Actual Effect on Trade is Not Required; Must be Capable of Having That Effect *European Night Services* (Court of First Instance 1998)

Article 101 - Elements

- **Have as Their Object or Effect the Prevention, Restriction or Distortion of Competition Within the Internal Market**
 - Object to Prevent, Restrict, or Distort Competition is Sufficient *Volkswagen AG* (Court of First Instance 2000)

Illustrative Examples

- **“Directly or Indirectly Fix Purchase or Selling Prices or Any Other Trading Conditions”**
- **“Limit or Control Production, Markets, Technical Development, or Investment”**
- **“Share Markets or Sources of Supply”**
- **“Apply Dissimilar Conditions to Equivalent Transactions With Other Trading Parties, Thereby Placing Them at a Competitive Disadvantage”**

Article 101(1)(a)-(d)

Article 101 – Analysis

- **Whether Conduct Has the Object or Effect of Restricting Competition Within the Meaning of Article 101(1)**
- **If so, Whether an “Efficiencies” Defense is Available Under Article 101(3)**

Article 101 – Cartel Behavior

- **Price Fixing**
- **Territorial Allocation**
- **Customer Allocations**
- **Supply Restraints**

Efficiencies under Article 101(3)

- **Any Agreement, Decision by Association, or Concerted Practice, or Category of Same:**
 - Which Contributes to Improving the Production or Distribution of Goods or to Promoting Technical or Economic Progress, While Allowing Consumers a Fair Share of the Resulting Benefit, and Which Does Not:
 - (a) Impose on the Undertakings Concerned Restrictions Which Are Not Indispensable to the Attainment of These Objectives;
 - (b) Afford Such Undertakings the Possibility of Eliminating Competition in Respect of a Substantial Part of the Products in Question

Vertical Restraints

- **Agreements Between Different Members of the Production Chain (*e.g.*, Manufacturer and Distributor)**
- **Evaluated Under Article 101(1) and 101(3)**

Resale Price Maintenance

- **Resale Price Maintenance (RPM)**
 - Restriction of Buyer's Ability to Determine its Sale Price
 - Prohibits Direct and Indirect Means to RPM

See Commission Regulation No. 330/2010 on Application of Article 101(3) of TFEU to Categories of Vertical Agreements and Concerted Practices, April 20, 2010, Article 4(a)

Territory and Customer Restraints

- **Territory and Customer Restraints**

- Restriction on Territory or Customers For Buyer
- Prohibited by Article 101

- **Exceptions to Territory/Customer Restriction:**

- Exclusive Territory/Exclusive Customer Group Reserved to the Supplier
- Prohibition of End User Sales at Wholesale Level
 - Allows Supplier to Keep Wholesale and Retail Separate
- Prohibition of Sales by Members of Selective Distribution System to Unauthorized Distributors Within the Territory Reserved by the Supplier
- Prohibition of Sale of Components to Customers Who Would Use Them to Manufacture the Type of Goods Produced by the Supplier

See Commission Regulation No. 330/2010 on Application of Article 101(3) of TFEU to Categories of Vertical Agreements and Concerted Practices, April 20, 2010, Article 4(b)

Vertical Restraints – “Hardcore Restraints”

- **RPM and Territory and Customer Restraints Are Considered “Hardcore Restraints”**
- **Efficiency Defense is Available Under Article 101(3)**
- **Presumption That Article 101(3) Conditions Are Not Fulfilled**

Vertical Restraints – Safe Harbor

- **Block Exemption For Vertical Restraints:**
 - Buyer and Seller Have Less Than 30% Market Share
 - No Hardcore Restraints

See Commission Notice Guidelines on Vertical Restraints, May 10, 2010, ¶ 23

Single Branding

- **Buyer Obligated or Induced to Concentrate its Orders With One Supplier**
- **Commission Looks to Market Share of Supplier's Competitors, Number and Strength of Competitors, and Barriers to Entry in Assessing Anticompetitive Effect**
- **Safe Harbor if Supplier's and Buyer's Market Shares do Not Exceed 30% and Agreement is For No More Than Five Years**

See Commission Notice Guidelines on Vertical Restraints, May 10, 2010, ¶¶ 129-150

Tying

- **Buyer Required to Purchase “Tied” Product When Purchasing “Tying” Product**
- **Safe Harbor Applies When Market Share of Supplier in Both Tied and Tying Product Markets, and Market Share of Buyer in Relevant Upstream Markets, do Not Exceed 30%**

See Commission Notice Guidelines on Vertical Restraints, May 10, 2010, ¶¶ 214-222

Article 102

Article 102

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 102 – Abuse of a Dominant Position

- **Applies to Unilateral Conduct**
- **“Abuse”**
 - “Recourse to Methods Different From Those Which Condition Normal Competition” *Hoffman-La Roche* (1979)
 - Not “Competition on the Merits”
 - Illustrative Practices
 - “Imposing Unfair Purchase or Selling Prices or Other Unfair Trading Conditions”
 - “Limiting Production, Markets or Technical Development to the Prejudice of Consumers”
 - “Applying Dissimilar Conditions to Equivalent Transactions With Other Trading Parties, Thereby Placing Them at a Competitive Disadvantage”

Article 102(a)-(c)

Article 102 – Abuse of a Dominant Position

- **“Abuse” (cont.)**
 - “Exclusionary Conduct”
 - Use of Market Position to Weaken Competitors
 - Must be Capable of Excluding Equally Efficient Firms
 - Actual Exclusion is Not Required *TeliaSonera* (2011)
 - “Exploitative Conduct”
 - Unfair Use of Market Position to the Detriment of Consumers
 - “Objective Justification” Defense
 - Efficiencies Preventing Net Consumer Harm Defense

Article 102 – Abuse of a Dominant Position

- **“Dominant Position”**
 - Position of Economic Strength Allowing to an Appreciable Extent Behavior That is Independent of Competitors, Customers, and Consumers so as to Prevent the Maintenance of Effective Competition
United Brands Co. (1979)
- **No Invariable Direct Equation of Market Share and Dominance**
 - Market Share Above 50 % – Rebuttable Presumption of Dominance *Akzo Chemie (1991)*
 - Between 40% and 50% – Detailed Market Analysis
 - Below 40% – Finding of Dominance Unlikely

Article 102 – Abuse of a Dominant Position

- **“Dominant Position”**
 - Geographic and Product Market Definition
 - Assessment of Market Conditions
 - Market Structure
 - Number of Competitors
 - Respective Shares
 - Barriers to Entry
 - Nature and Number of Buyers

Article 102 – Exclusionary Conduct

- **Predatory Pricing**

- Pricing at a Level That May Drive Equally Efficient Competitors Out of the Market
- Below Average Variable Cost, or
- Below Average Total Cost With Intent to Eliminate a Competitor *Akzo Chemie* (1991), *France Telecom* (2009)
- Likelihood of Recoupment is Not Required *Cf. Brooke Group* (1993) (U.S.)
- No Meeting Competition Defense *France Telecom* (2009)

See Guidance on Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, February 2, 2009

Article 102 – Exclusionary Conduct

- **Excessive Pricing**
 - See Article 102(a)
 - Pricing With “No Reasonable Relation to the Economic Value of the Product Supplied” *United Brands Co.* (1978)
 - Comparison With Pricing by Similar Companies in Comparable Markets
- **“Margin Squeeze”**
 - Dual Distributor Pricing at a Level That Precludes Competition by an Equally Efficient Wholesale Competitor *TeliaSonera* (2011), *Deutsche Telekom* (2010), *Telefonica* (Commission 2008)

Article 102 – Exclusionary Conduct

- **Rebate Practices**

- Rebates Based on Large Purchases or High Percentage of a Buyer's Requirements Which Thus Foreclose Smaller Firms
- Rebates That Apply to All Purchases Once Triggered *Intel* (2009)

- **Price Discrimination**

- Discrimination Lacking in Cost or Other Objective Justification

Standard Setting Organizations

- **Standard Setting is Generally Procompetitive**
- **Potential for Anticompetitive Effects When Holders of IP Rights (“IPR”) Are Members of the Standard Setting Organization.**
 - “Patent Holdup”
 - Rambus and Qualcomm investigations
- **Article 102 and Article 101 Issues**

Standard Setting Organizations

- **Commission Guidelines:**
 - Unrestricted Participation
 - Procedure is Transparent Including Good Faith Disclosure of IPRs Necessary for its Implementation
 - No Restriction on Developing Alternatives to the Standard
 - Irrevocable Written Commitment to License Essential IPR to All Third Parties on a Fair, Reasonable and Non-Discriminatory Basis
 - IPR Must be Disclosed Prior to Adoption of Standard

See Guidelines on Horizontal Cooperation ¶¶ 280-286

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