

EU Competition Law Compliance: Protecting Value for your Business and Society

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- What is compliance?
 - Nothing more than respecting the law
 - Should be the norm, nothing special
 - In daily life, often no special guidance provided

- Why does competition compliance stand out?
 - Competition compliance may wrongly appear at first sight to be against a company's interest:
 - The interest of one's company vs general (consumer) interest
 - Compare interest in driving fast to an appointment vs general road safety
 - The damage caused by non-compliance can have huge consequences for a company and an individual

- What are the avoidable consequences?
 - Fines – increasingly severe
 - Agreements unenforceable
 - Damages actions before national courts
 - Long-winded and expensive investigations
 - Reputational damage – loss of shareholder value (shareholder actions)
 - Could set off investigations (and further consequences) elsewhere:
 - Prison sentences for executives
 - Punitive damages
 - High government priority in the US, EU and Japan
 - Cooperation between enforcement agencies

- There are only two ways to completely avoid any value destruction resulting from competition law breach:
 - Ensuring strict and successful compliance
- or, if compliance fails or comes too late:
 - Obtain immunity from fines through a leniency application

- Even when a competition law issue emerges, the company can act to protect its value by:
 - Demonstrating an immediate end of the infringing conduct when detected
 - Applying for leniency to obtain a reduction in the fine (if immunity is not available)
 - Fully cooperating during investigations and dawn raids, etc.
- In this presentation, we will discuss the options available to companies to preserve its value and avoid further loss of value in the event of a breach of competition law

- I. Introduction
- II. The Value of Compliance
- III. Implementing Compliance Programmes
- IV. Leniency: A Safety Net of Last Resort
- V. DOs and DON'Ts in EU Competition Law

Introduction

The objective of Competition Law

- **General goal: Improving “consumer welfare” by:**
 - Lowering prices for consumers
 - Encouraging innovation
- **Means:**
 - Preventing market restrictions, especially cartels
 - Preventing abuse by “dominant” companies
 - Prohibiting mergers that may negatively affect market structure

By observing compliance with EU competition law, your company is deemed to contribute to consumer welfare!

- **Politically driven goal for EU competition law**
 - Creation of a single market in Europe

- Horizontal (between competitors)
 - Cartels (price fixing, customer allocation, output limitation, ...)
 - Potentially legitimate agreements
 - R&D, patent pools, licensing, joint selling, joint production, JVs
- Vertical
 - Potentially legitimate agreements
 - Distribution
 - Licensing
 - Franchising

Conditions conducive to cartel behaviour

- Some theoretical and practical indications -

■ Market conditions:

- Oligopolistic markets (with few suppliers)
- Similar (commodity) products
- Competition solely on price
 - Example: Only few parties respond to calls for tender or requests for quotation (RFQs) based on uniform specification
- Where suppliers' margins come under continued downward pressure from customers (downstream cost cutting)
- Adverse economic circumstances
- Mature industry with little possibilities for growth through innovation

Conditions conducive to cartel behaviour

- Some theoretical and practical indications -

- Where competitors regularly meet and exchange information:
 - Regular industry meetings where compliance is not observed
 - Trade associations
 - Trade fairs
 - Compilation of non-compliant industry statistics:
 - Facilitates exchange of detailed and recent information that allows parties to know each others' prices, quantities, customers etc.

Conditions conducive to cartel behaviour

- Some theoretical and practical indications -

■ Other venues:

- Golf course

- *Cathode Ray Tubes cartel*

- ‘Green meetings’ held at golf club followed by a round of golf

- *The Lysine cartel*

- Cartel members choose Hawaii as a location for one of their meetings for the quality of its golf courses

- Competition compliance seminar!

- *Irish Heating Oil cartel*

■ **Note:** a single meeting with competitors may constitute a cartel !!

- *T-Mobile Netherlands BV (C-8/08)*

The Value of Compliance

Non-compliance could seriously affect the value of a company:

- **Substantial fines**

- EU fines up to 10% of annual worldwide turnover
- Since 1990, the EU has imposed more than EUR 17 billion in cartel fines (and billions more in fines for abuse of a dominant position and anticompetitive distribution agreements)

- **Invalid agreements**

- **Private damages actions**

- Private actions before the national courts of Member States
- Collective action is also a growing and upcoming trend in the EU
 - Procedural developments at national and EU level expected in this area

- **Damage to reputation/brand**
- **Exposure to public arena of company behaviour and practices**
 - *Lysine cartel*: “our customers are our enemies”
- **Names of executives published in the media**
 - Often quoted in Commission Decisions; in press releases; DoJ statements
- **Substantial management and staff resources**
- **Substantial disruption to business**
- **High legal costs**
- **At EU level - the existence of compliance programme is not considered a factor justifying a reduction of a fine**
- **Back in Japan (but also elsewhere): Shareholders action**

- The actions of one EU subsidiary affects the value of the parent company
 - Parent may have compliance policy, but if it is not respected overseas
 - Overseas expatriate business community: risk of cosy relations – golf, receptions...
 - Fines up to max 10% of worldwide group turnover
 - In the course of an investigation:
 - Costly procedural mistakes:
 - Document destruction
 - Email diversion, etc.
 - Breaking seals, etc (adhesive seals are used by the Commission during an investigation to close off business premises, documents or records in order to prevent access during the investigation. It enables the Commission to see if evidence has been tampered with)
 - May lead to further scrutiny of the company by competition authorities overseas
- Parent company in many cases held responsible
 - Even in the case of a joint venture where the parent does not exercise full control
- A compliance programme can only work if the entire organisation respects it

- Typical participants in cartel activity:
 - Senior Executives
and/or
 - Sales Manager
 - Marketing Manager
- Those with the power to set prices
 - Companies with large orders: mainly headquarters
 - Companies with smaller orders: often subsidiary (sales personnel)

- No EU fines or criminal liability for individuals **BUT**
 - Certain Member States have criminal sanctions:
 - United Kingdom, France, Germany
 - Some Member States impose fines on individuals:
 - Netherlands
- US and other non-EU countries
 - Individuals can be sent to another country to face criminal antitrust charges (e.g. individual in *Graphite Electrodes cartel*) if the behaviour is also considered a criminal offence in the “sending” country.

The Value of Compliance: Individuals (3)

- Japanese companies present in Europe are operating internationally
- If the behaviour of the company here or in Japan has an effect in the United States:
 - Serious risk of prison sentences for antitrust ‘conspiracy’
 - Recently 13 individuals imprisoned in the car parts cartel
 - Up to two years + individual fines
 - Could apply even if the individual has never been to the US
 - Compliance has a direct personal value to individual employees, protection of freedom; protection of personal estate; protection of reputation and career

- Could lead to other competition authorities taking an interest
 - Further investigations, prosecutions, fines, imprisonment
- The possibility of private actions for damages
 - Treble damages, Class actions in the US
- Significant legal costs and lengthy proceedings in multiple jurisdictions
- Could lead to further scrutiny and possible new investigations into other aspects of the company and other unrelated products
 - “Amnesty plus” in the US: obtain favourable treatment in exchange for denouncing a second or third cartel...

Highest Cartel Fines per Company

<i>Company</i>	<i>Year</i>	<i>Fine in €</i>	<i>Product /Case</i>
1. Saint-Gobain	2008	896,000,000	Car glass
2. Philips	2012	705,298,000 of which 391,940,000 jointly and severally liable with LG Electronics	TV and Computer Monitor Tubes
3. LG Electronics	2012	687,537,000 of which 391,940,000 jointly and severally liable with Philips	TV and Computer Monitor Tubes
4. Hoffmann-La Roche AG	2001	462,000,000	Vitamins
5. Siemens AG	2007	396,562,500	Gas insulated switchgear

Highest Cartel Fines per Company (cont.)

<i>Company</i>	<i>Year</i>	<i>Fine in €</i>	<i>Product /Case</i>
6. Pilkington	2008	370,000,000	Car glass
7. Ideal Standard	2010	326,091,960	Bathroom findings
8. E.ON	2009	320,000,000	Gas
9. GDF Suez	2009	320,000,000	Gas
10. ThyssenKrupp	2007	319,779,900	Elevators and Escalators

Highest Cartel Fines Imposed on Japanese Companies

<i>Company</i>	<i>Year</i>	<i>Fine in €</i>	<i>Product /Case</i>
1. Panasonic	2012	157,478,000	Cathode Ray Tubes (TV)
2. YKK	2007	150,250,000	Fasteners
3. Asahi Glass	2008	113,500,000	Car glass
4. Mitsubishi Electric	2007	74,817,000	Gas insulated switchgear
5. Asahi Glass	2007	65,000,000	Flat glass
6. Bridgestone	2009	58,500,000	Marine hoses
7. Toshiba	2007	56,793,000	Gas insulated switchgear
8. Hitachi	2007	51,750,000	Gas insulated switchgear
9. Sony	2007	47,190,000	Professional videotape
10. Denki Kagaku Kogyo (Denka)	2007	47,000,000	Chloroprene Rubber

Implementing Compliance Programmes

■ Tailor-made for the company

- Analyze competitive and compliance situation of the company:
 - Nature and size
 - Position on the market
 - Sectors of activity
(Many vs few players; commodity vs innovative product; dynamic or mature markets)
 - Competitive and business environment (bidding market or continuous competition)
 - Trade associations, sector organisations, trade fairs, Chamber of Commerce
 - Company organisation, corporate governance and culture
 - Specific Japanese business culture; culture in certain subsidiaries
 - Where are commercial (pricing) decisions taken? HQ or subsidiary?
- Identify specific risks and exposure of the company

▪ Reflects a clear and explicit strategy

- Commitment to the strategy by senior management
- Roll-out of the programme throughout the entire organisational structure; no exceptions for senior staff
- Designation of members of staff in charge of compliance with the necessary powers to ensure its respect
- Identification of certain (routine and extraordinary) business decisions that always need to be assessed for compliance before being implemented
- Keep general counsel fully and truthfully informed
- Implement clear processes (e.g. for contract review, M&A, etc.).

- **Continuous updating**

- Keep the programme up-to-date, reflecting ‘real’ business situations that have been encountered by company staff.

- **Clearly identified contact point for Competition law questions**

- E.g. legal department or liaison with external counsel

- **Proper internal reporting mechanisms (whistle blowing)**

- Identify contact person where the personnel can turn to –in confidence- if they have reason to believe that competition law may have been infringed.

- **Internal investigation mechanism**

■ Monitoring / auditing

– Monitoring

- Verifying the company's own competitive behaviour in the competitive process = prevention

– Auditing

- Verifying *ex post* whether anticompetitive behaviour occurred = detection
- Un-announced internal random 'inspections'

■ Disciplinary measures for careless or intentional breach of the internal compliance rules

- **Preparation and initial audit**
 - Full review of company's businesses and the competition exposure it may face
 - Full antitrust audit (review typical contracts, interview executives)
- **Drafting competition guidelines to be distributed to employees**
 - Overview of competition law principles
 - Risks the company may face
 - Sanctions/obligations in case of violation (suspension/availability for investigation)
 - Explanation of the company's compliance reporting structure

- **Statement by the Board expressing the company's commitment to compliance**
- **Rolling out a compliance training programme**
 - Interactive e-learning computer programmes for new and existing employees
 - Joint online webinars for different offices at the same time
 - Seminars on competition compliance
 - Tailor made modules for specific personnel
- **Ongoing monitoring**
- **Establish internal reporting mechanism**
- **Ensure that sufficient time and resources are dedicated to compliance**

- A compliance programme does not represent any value if:
 - It is not properly implemented; and
 - It is not properly maintained; and
 - If the breaches escape the attention of the company
- **NOTE** - The EU Commission does not treat competition law infringements more favourably if a compliance programme is in place

- **Require that trade association membership is conditional upon the existence of a strict compliance policy adhered to by the trade association**
 - Ensure that every association meeting starts with a reminder of the compliance policy
 - Make sure association antitrust counsel is present at sensitive meetings and the compliance programme is strictly adhered to; counsel to review agenda and minutes.
- **Ensure that Joint Ventures have a strict compliance policy in place**
 - This is often overlooked but is very important in order to avoid unexpected liabilities

Don't forget contract compliance!

- Any horizontal contract should be reviewed for compliance
- Any vertical agreement should be reviewed in case there is any diversion from a verified model contract (distribution, licenses, etc.)
- Get competition advice at any stage of M&A or JV process (merger notification requirements; compliance of the target; possible horizontal aspects)

Leniency: A Safety Net of Last Resort

■ What is leniency?

- Full or partial immunity from fines
 - Immunity – 100% > available if discovered before anyone else. Speed of action is essential
 - Leniency: reduction – (1) 30-50% (2) 20-30% (3+) up to 20%. To be considered at any stage
- Not only the EU but other jurisdictions such as Japan and the US have leniency programmes

■ Aim

- To encourage companies involved in cartel activities to come forward and **cooperate fully** with authorities

■ Why leniency?

- Compliance has failed and there has been a breach of competition law
- An acquired company is discovered to have been involved in illegal activity

Obligation to cooperate in the context of a leniency application

- A leniency applicant is under an obligation to cooperate *“genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure”*
- This includes an obligation to not disclose, *“the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed”*
- Non-cooperation or disclosure could jeopardise your leniency application
- This obligation remains even after leniency has been conditionally granted
- **DON'T** try to conceal other cartels that you are involved in
 - e.g. — *The vitamins cartel case*

DOs and DON'Ts in EU Competition Law

■ Contacts with competitors

— DOs:

- Be familiar with the company's competition compliance policy
- Discuss any meeting involving a competitor with the legal department before attending
- Keep accurate records of all formal meetings with competitors
- Document the purpose of informal contacts by competitors
- Refuse to discuss sensitive issues such as prices with competitors
- Contact legal department before agreeing restrictive provisions

■ Contacts with competitors

— **DON'Ts:**

- Complain to competitors about price cutting or price pressure from buyers
- Discuss with competitors - pricing, production levels, business strategy, customers
- “Signal” to competitors concerning prices or other commercial information

- **Contacts with customers: restrictive distribution agreements**
 - Conduct which should be avoided
 - Setting minimum resale prices
 - Prohibiting distributors in Country A from fulfilling unforeseen orders in Country B
 - Absolute resale ban

- Potentially dangerous conduct
 - Recommending resale prices
 - Exclusive purchasing requirements
 - Territorial exclusivity for distributors
 - Requiring customers to inform you of lower competitive offers
 - “Most-favoured-nation” clauses
 - Entering into long-term supply contracts (i.e. greater than 5 years)
 - Discriminating between customers or suppliers
 - Refusing to supply (without objective justification)
 - Bundling
 - Granting certain types of loyalty discounts

Thank You