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SEMINAR ON TRANSNATIONAL ANTITRUST LAW

- List of topics -

PUBLIC ENFORCEMENT

1. **Monopolization/Abuse**

   Section 2 of the Sherman Act prohibits monopolization and attempts or combinations to monopolize, while Article 102 of the EU Treaty, which is roughly analogous, prohibits abuse of a dominant position. Both statutes are directed principally at single firm (or unilateral) conduct, although Article 102 also recognizes the concept of collective dominance and its abuse. In the U.S., the Supreme Court (in Grinnell, 1966) has held that the offense of monopolization requires proof of both monopoly power (meaning a market share typically in excess of 60 percent) and some "exclusionary" or illegal act on the part of the defendant. Since Grinnell, the U.S. courts have struggled to define what is meant by exclusionary conduct. Most U.S. courts are in agreement that only anticompetitive conduct will satisfy the exclusionary conduct element, but there is disagreement about the tests to be applied for determining if conduct is anticompetitive. Some courts have held that conduct is anticompetitive if it lacks a procompetitive justification, or is not efficiency-enhancing, or makes no economic sense absent an intention to disadvantage or exclude a competitor. Other courts have suggested a "profit sacrifice" test by which conduct that sacrifices short-term profits and would be profitable only through recoupment after the exclusion of rivals would be condemned. In the Microsoft case (2001), the D.C. Circuit Court of Appeals adopted what is essentially a Rule of Reason approach, requiring courts to weigh anticompetitive effects against procompetitive justifications, and ultimately determine the effect of the challenged conduct on the competitive process. Article 102 is equally murky. It provides some illustrative examples of abuses, but not overarching principles or theories of competitive harm. It reaches both exclusionary abuses as well as exploitative abuses of a kind left untouched by Section 2. How do Article 102 and Section 2 differ from each other? Is the definition of "abuse" under Article 102 anymore settled than the definition of "exclusionary" under Section 2? Is it possible to define those concepts with greater clarity? Given the different histories, texts, and enforcement decisions that inform U.S. and EU competition policy on dominant firm behavior, is there a single test that could be applied to both abuses and exclusionary conduct under both statutes? What would that test be? Is harmonization or convergence between Article 102 and Section 2 desirable and/or achievable? Article 102 has also been used to more aggressively challenge tying arrangements and loyalty (or fidelity) discounts than in the U.S. Is the EU approach preferable to the U.S. approach, and if so, why? How do U.S. law, EU law and German law deal with the digital economy (new forms of dominance and abusive behavior; see e. g. the envisaged 10^{th} amendment to the German Act against Restraints of Competition)?

2. **Cartel liability for non-market participants and non-competitors**

   May an undertaking be held liable for a cartel violation even if it is not party to the cartel agreement and not active on the market on which the restriction of competition materializes? In addition, may an undertaking be held liable for a cartel violation between non-competitors? Examine these questions under U.S., EU and German antitrust law. Do these sets of law distinguish between complicity and "aiding and abetting" and if so, is the different way of participation a criterion when calculating the fine? Consider in this respect the judgment of the General Court in AC-Treuhand AG v. Commission, Case T-99/04 (2008) and the judgment of the Court of Justice in Villeroy & Boch, Case C-644/13 P (2017). According to the CJEU it cannot be inferred from the Court's case-law that Article 101(1) TFEU concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed on the markets upstream or downstream of that market or neighboring markets or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice. It follows from well-established case-law of the Court that the text of Article 101(1) TFEU refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the internal market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question. Which are the criteria for cartel liability for non-competitors under U.S., EU and German law? Which are relevant markets concerned? Are there differences between direct and indirect participation in the infringement? Do you agree with its conclusions?

3. **Unilateral refusals to deal**

   In the U.S. the Supreme Court has held (in Trinko, 2004) that unilateral refusals to deal by a monopolist are not generally actionable under Section 2 of the Sherman Act. In the EU, the European Court of Justice (in Bronner, 1999, and IMS Health, 2004) has held that a refusal to deal by a dominant firm can in some circumstances violate Article 102 of the EU Treaty. Some commentators have suggested that the test for imposing a duty to deal by a dominant firm is less stringent in the EU than in the U.S. These same commentators have also suggested that the threshold for what sort of conduct qualifies as exclusionary is lower in the EU than in the U.S. What are the differences between the U.S. and EU approaches to unilateral refusals to deal by dominant firms, and which approach do you prefer?

4. **Single and continuous infringement under EU law**

   According to settled case-law, an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition in the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (CJEU, judgment of 26 January 2017, Villeroy & Boch, C-644/13 P, EU:C:2017:59, paragraph 47 et seq.; judgment of 24 June 2015, Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce, C‑293/13 P and C‑294/13 P, EU:C:2015:416, paragraph 156). Please analyze the concept of a single and continuous infringement. What are the impacts on private damages claims? Are there limits from the perspective of the Charter of Fundamental Rights of the European Union (e. g., no crime without a prior law)? Do U.S. and German law provide for similar concepts?

5. **Extraterritoriality**

   In an increasingly global world, there will be situations where conduct undertaken by parties in one jurisdiction has anticompetitive consequences outside that jurisdiction. Examples can be found in the merger context (where, for example, a merger is consummated in Jurisdiction A but produces anticompetitive consequences in Jurisdictions B and C); cartels cases (where the cartelists operate outside of Jurisdiction X but sell their products in that jurisdiction at elevated prices, thereby causing injury to direct purchasers and ultimately consumers in that jurisdiction); and monopolization/abuse cases (where anticompetitive conduct by the dominant firm in Jurisdiction M has anticompetitive consequences in other jurisdictions). The U.S. courts have dealt with extraterritoriality issues in a number of cases, including

Hartford Fire (1993) and Empagran (2004), both decided by the U.S. Supreme Court, and Alcoa (1945), Minn-Chem (2012), and the Chinese Vitamin C Antitrust Litigation (2016). The ECJ and the German courts have also dealt with cases involved the application of EU and German competition law to extraterritorial conduct that has anticompetitive effects within those jurisdictions. What are the basic principles governing the extraterritorial application of competition law under U.S., German, and EU law? Where the same conduct produces anticompetitive effects in multiple jurisdictions, can such conduct be regulated by more than one jurisdiction, and what should be the presumed limits on the exercise of regulatory power by each? How do comity concerns affect your answer? Was the same comity test applied by the U.S. Supreme Court in Hartford Fire and Empagran? What do you expect from the preliminary ruling procedure pending before the CJEU in Case C-819/19 Stichting Cartel Compensation?

6. Manipulation of financial benchmarks

In Gelboim v. Bank of America, 823 F.2d 759 (2d Cir. 2016), cert. denied, 2017 WL 160462 (U.S. Jan. 17, 2017), the Second Circuit held that manipulation of the U.S. Dollar London Interbank Offered Rate (LIBOR), a financial benchmark, by the collusive submission of estimates of individual bank borrowing costs used to calculate LIBOR constituted horizontal price-fixing and was a per se violation of Section 1 of the Sherman Act. The defendants in that case were the 16 LIBOR panel banks and the British Bankers' Association. Plaintiffs alleged in their complaint that the collusive submission of estimated borrowing costs by the panel banks violated the federal antitrust laws by distorting the LIBOR rate-setting process and lowering the rate of plaintiffs' investments pegged to LIBOR. Plaintiffs pointed out in their complaint that many of the panel banks had been charged criminally by the Department of Justice (and foreign enforcers) and had pled guilty to conspiring to manipulate the LIBOR rate. The District Court had dismissed plaintiffs' antitrust claims, holding that plaintiffs had failed to allege "antitrust injury." The District Court held that because the setting of LIBOR involved a "collaborative" rather than "competitive" process, the harm to plaintiffs did not result from anticompetitive conduct and plaintiffs did not thus suffer antitrust injury. On appeal the Second Circuit vacated the District Court decision, holding that that plaintiffs had adequately pled antitrust injury. In so holding, the court explained that "(1) horizontal price-fixing constitutes a per se antitrust violation; (2) a plaintiff alleging a per se antitrust violation need not separately plead harm to competition; and (3) a consumer who pays a higher price on account of horizontal price-fixing suffers antitrust injury." The Second Circuit remanded, however, for a determination by the District Court as to whether plaintiffs were "efficient enforcers" of the antitrust laws. As might be expected, the defendants have argued on remand that plaintiffs are not "efficient enforcers," claiming, among other things, that the chain of causation between defendants' conduct and plaintiffs' damages is too remote and attenuated, that plaintiffs' claims of injury are not sufficiently direct, that plaintiffs' damages are highly speculative and cannot be reasonably estimated, that plaintiffs' claims are better pursued under other (non-antitrust) theories, and that worldwide governmental enforcement actions today make private enforcement by these plaintiffs unnecessary. How persuasive are the defendants' arguments that the plaintiffs are not efficient enforcers and should thus not have a private damage remedy? Should there be limitations on the right of parties claiming injury by reason of a manipulation of a financial benchmark to sue for antitrust damages? What should those limitations be? Do you agree with the Second Circuit that manipulation of a financial benchmark by horizontal competitors should be a per se violation of the antitrust laws? Note that in the United States, the criminal cases brought by the Department of Justice alleged that collusion in the submission of borrowing costs in the LIBOR rate-setting process constituted criminal violations of the federal wire fraud laws. The DOJ charging documents did not allege violations of the U.S. antitrust laws. In the EU, the same conduct was challenged as a violation of the competition laws, and fines in excess of 1.7 billion Euros were imposed on the basis of Article 101 of the EU Treaty (those fines are currently being appealed).

7. **International comity and export price restraints**

In re Chinese Vitamin C Antitrust Litigation, 837 F.3d 175 (2d Cir. 2016), the defendants were Chinese Vitamin C manufacturers who admitted price-fixing and admitted selling price-fixed vitamins in the U.S., but who claimed foreign sovereign compulsion (or alternatively, the act of state doctrine) as a defense. They claimed that their price-fixing conduct was undertaken at the express direction of MOFCOM, the highest administrative authority in China authorized to regulate trade between China and all other countries, including all export commerce, and at trial they presented expert testimony to the effect that their conduct was compelled by MOFCOM. In particular, they contended that at all relevant times, Chinese law required them to coordinate in setting minimum exports prices and maximum export quantities for Vitamin C. The District Court denied the Chinese defendants' motion to dismiss and later denied their summary judgment motion, and the case was tried to a jury to determine whether "the Chinese government actually compelled" the defendants' admittedly anticompetitive conduct. The jury returned a guilty verdict and awarded the plaintiffs $147 million in damages. The case was appealed to the Second Circuit, and on appeal, the Chinese defendants, supported by MOFCOM, argued that their conduct was compelled by Chinese law, and as such was completely immune from U.S. antitrust liability. This was the first time in U.S. antitrust history that the Chinese government had ever appeared as amicus in a U.S. court. The Second Circuit reversed, holding that MOFCOM's interpretation of Chinese law was entitled to substantial deference, and that as a matter of comity, the U.S. courts should not attach antitrust liability to export conduct taken at the behest of the Chinese government. The Second Circuit held that because the defendants "could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case." The court based its decision entirely on comity considerations, declining to find that the challenged conduct was immune from U.S. antitrust liability under either the act of state or foreign sovereign compulsion doctrines. Why do you think the Second Circuit relied exclusively on comity considerations as the basis for its decision? How would the case have been decided under German law? Under EU law?

8. **Cartel sanctions**

In the U.S. cartel behavior is considered a criminal violation of Section 1 of the Sherman Act, the statute that prohibits concerted conduct that results in unreasonable restraints of trade, and both corporations and individuals are subject to criminal sanctions. Individuals are subject to both fines and imprisonment, and the maximum sentence under Section 1 is 10 years, although most individuals typically serve sentences of approximately 20-35 months. Some EU jurisdictions, most notably the United Kingdom, impose criminal sanctions on individuals but not corporations, and other EU jurisdictions, as well as the EU itself, impose only administrative fines on corporations found to have engaged in cartel behavior. Given that some commentators have described cartel behavior as a "scourge" (Mario Monti) and the "supreme evil of antitrust" (Justice Scalia), what should be the optimal sanction for cartel violations? Should cartel conduct be criminalized, and if so, should corporations and individuals, or just individuals, be subject to criminal sanctions?

9. **Fine calculations for cartel violations and other violations of competition law**

In recent years the total amount of fines imposed by the competition authorities in the U.S., EU and Germany has increased significantly. In the EU and Germany, where the calculation of fines is subject to judicial review (unlike the U.S., where fines levels are not generally reviewable by the courts, particularly where the fine is imposed pursuant to a plea agreement), those fines have frequently been affirmed by the reviewing courts. The U.S. authorities are ranking by far as number one in this regard followed by the EU and Germany. Do these differences mainly reflect the different sizes of their respective GNPs or result from a more or less stringent application of the antitrust rules concerning the criteria used for imposing fines? Consider in this respect specifically the concept of "ringleader" as mentioned by the Guidelines on the Method of Setting Fines imposed pursuant to Article 23(2) of

Regulation (EC) No. 1/2003 [Official Journal C-210 of 1.9.2006]. What is the purpose of sanctions in antitrust policy?

10. Liability of parent companies for antitrust violations of their subsidiaries revisited

In its Akzo Nobel decision in 2009 the ECJ held that the presumption is justified on the sole basis of a 100 percent share ownership. A summary of the administrative practice of the Commission and the jurisprudence of the European courts can be found in Alexander Riesenkampff & Udo Krauthausen, Liability of Parent Companies for Antitrust Violations of Their Subsidiaries, (2010) ECLR 31(1), pp. 38 et seq. What is your opinion on the liability of parent companies in this context and on what a parent company needs to show to rebut the presumption of fault implemented by the ECJ, possibly also in view of more recent developments in Europe, Germany and the U.S. in this regard?

11. Revocation of amnesty

Both the U.S. Department of Justice (“DOJ”) and the European Commission have leniency programs that have been successfully used to generate the vast majority of cartel investigations that both agencies pursue. Under these leniency programs the first cartel member to come forward and self-report its membership in a cartel—sometimes referred to as the “amnesty applicant”—will receive complete immunity from fines for the anticompetitive conduct. (In the U.S., the amnesty applicant will also receive complete immunity from criminal prosecution for itself and all of its employees who cooperate with the DOJ in its investigation of cartel conduct that is reported.) In both the U.S. and the EU, the amnesty applicant is required to cooperate fully with the investigation and satisfy certain other conditions, including the obligation to promptly terminate its participation in the cartel. Since the creation of the amnesty programs in both the U.S. and the EU, there have been only two reported instances in which a competition authority has sought to revoke an amnesty applicant’s grant of immunity. In the U.S., the DOJ revoked the immunity of Stolt-Nielsen for its alleged failure to terminate its cartel conduct, but Stolt-Nielsen successfully challenged the revocation in the U.S. courts and had its amnesty restored. United States v. Stolt-Nielsen S.A., 524 F. Supp.2d 609 (E.D. Pa.2007). In the EU, in the Italian Raw Tobacco Case, the Commission revoked the conditional immunity of Deltafina S.p.A., and Deltafina’s efforts to overturn the Commission’s revocation were unsuccessful. Deltafina v. Commission, C-578/11 P (2014), available at
http://curia.europa.eu/juris/document/document.jsf?text=&docid=153583&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=66185
When, and under what circumstances, is it appropriate to revoke an amnesty applicant’s immunity? Will the threat of revocation make it less likely that amnesty applicants will come forward in the future, thereby jeopardizing the success of such programs? Is it possible to reconcile the courts’ opinions in reaching opposite conclusions in the Stolt-Nielsen and Deltafina cases?

PRIVATE ENFORCEMENT

12. Access to the file

In the EU, the European Court of Justice (in Pfleiderer, 2011), the European Court of Justice held that EU law did not bar a private claimant from seeking access to amnesty application and documentary materials submitted to a national competition authority, and that the question of access should be decided by the national courts on a case-by-case basis, balancing the need to protect public leniency programs with the need to promote the rights of private claimants. On remand, the Local Court of Bonn denied access to the file (Pfleiderer, 2012), holding that the interest of competition authorities in protecting the confidentiality of amnesty materials in their file outweighed the interest of claimants pursuing damage claims, and that in any event, the private plaintiff would be able to use the cartel decision of the Bundeskartellamt to prove a competition infringement in its private action, thus obviating the need for some of the amnesty documents. In November 2014 the European Council of Ministers approved the European Commission's Directive on Private Damage Actions in Competition Law, which provides, among other things, that national courts may issue disclosure orders addressed not only to claimants and defendants, but also to competition authorities and other third parties. With respect to submissions made to competition authorities, the Directive provides that corporate leniency statements and settlement submissions are to be treated as "black list" documents that are never subject to disclosure, but that certain "gray list" documents—which would include responses to requests for information and replies to Statements of Objection—could be disclosed after the Commission (or national competition authority, in the case of Member State investigations) has closed its investigation, and that all other documents, including pre-existing documents submitted as part of an amnesty application, can be disclosed at any time, subject to the claimant showing relevance and proportionality. Do the EU Directive and Section 33g of the German Act against Restraints of Competition reach a proper accommodation between the interests of competition authorities in robust public enforcement and the needs of claimants in effective private enforcement? Would amnesty programs work less well if there were greater access? Should the right of access to the file depend on the availability of alternative means of obtaining discovery from the defendants?

13. Direct purchaser/indirect purchaser recoveries

In the U.S., only direct purchasers are entitled to sue for damages under the federal antitrust laws (Illinois Brick, 1977), although indirect purchasers may sue under state law in states that have adopted so-called "Illinois Brick" repealers. In the EU, all persons injured by reason of an infringement of Article 101 or 102 of the EU Treaty are entitled to sue (Courage, 2001; Manfredi, 2006). In its recent Directive on Private Damage Actions in Competition Law (2014), the European Commission has said that any system of private remedies in the EU Member States must provide for both indirect purchaser recoveries and the availability of a pass-on defense, neither of which is available under the U.S. system. Which approach do you prefer, and why?

14. Component products and cartels

In Motorola Mobility LLC v. AU Optronics Corp., 2014 WL 258154 (N.D. Ill.), the question was whether direct purchasers of products (cellphones) containing price-fixed components (liquid crystal display (or LCD) panels) could sue manufacturers of the components for violation of the U.S. antitrust laws where the components were purchased abroad by foreign subsidiaries of U.S. parents companies and then incorporated by those subsidiaries into final products that were later shipped into the U.S. The U.S. Court of Appeals for the Seventh Circuit (per Posner, J.) originally held that claims for overcharges based on the price-fixed components purchased and incorporated abroad were barred by the Foreign Trade Antitrust Improvements Act ("FTAIA") because the impact of such conduct of U.S. commerce was not direct enough for FTAIA purposes, 746 F.3d 842 (7th Cir. 2014) ("Motorola I"). The court later vacated its decision, and in a subsequent decision, 775 F.3d 816 (7th Cir.), cert. denied, 135 S. Ct. 2837 (2015) ("Motorola II"), held that the claim was not barred by the FTAIA, but was nonetheless barred by the Illinois Brick doctrine, because the plaintiffs—the U.S. parent companies—were not the direct purchasers of the price-fixed components, which had been purchased by their foreign subsidiaries. How would Motorola II have been decided under EU notions of extraterritoriality? Would parent companies be entitled to sue for overcharges sustained by their wholly or majority owned subsidiaries under EU law? If the Motorola II court was correct in holding that the U.S. parent companies could only recover overcharges on components that they had purchased directly for assembly in the U.S., how would (or should) this rationale affect the calculation of cartel fines under the Sentencing Guidelines of the Department of Justice and the European Commission where the price-fixed components are purchased abroad for assembly into products later imported into the U.S. and the EU?

15. Umbrella damages

In the EU, the European Court of Justice (in Kone, 2014) has held that members of a cartel could be liable for inflated prices charged by competing firms who did not participate in the cartel but who nonetheless raised their prices independently to take advantage of the price "umbrella" made possible by the cartel. In the U.S., most courts that have addressed the issue have held that cartel members are not liable for the umbrella price overcharges of non-members. See, e.g., Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573, 587 (3d Cir. 1979). Which approach do you think is preferable, and why?

16. Collective actions

Are collective actions (by which small value claims are aggregated in a single action and pursued by a representative of victims of an alleged infringement) a good thing, or do they lead to an abusive culture of litigation? What kind of limitations, if any, should be imposed on collective actions seeking redress for violations of competition law, and how should such actions be funded? See generally, European Commission, Recommendation on Collective Redress Mechanisms Concerning Violations of Rights Granted under Union Law, issued in June 2013? Do you agree with those recommendations? What should be the role of private enforcement (and claims aggregation, in particular) in a well-functioning competition law system? How does the aggregation of private damage claims affect deterrence of anticompetitive conduct? Should deterrence be the exclusive province of public enforcement?

17. Opt-out or opt-in collective actions

In the U.S., class actions are governed by Rule 23 of the Federal Rules of Civil Procedure, and the typical class action in a case alleging violations of the antitrust laws is an opt-out action, meaning that unless a member of the class gives notice that it does not wish to be included in the class, that individual will remain a member of the class (assuming that a class is certified) and will be bound by the judgment in the case. In the U.S., the costs of the litigation are typically borne by plaintiffs' class counsel, and individual members of the class are not required to contribute to such costs. In the European Commission's Recommendation on Collective Redress Mechanisms, the Commission recommended an 'opt-in" approach to collective actions, whereby the claimant group would consist only of persons who have given their express consent to joining the action and who are free to leave it at any time prior to final judgment. In many European jurisdictions, there is a "loser pays" rule, and claimants' counsel are precluded by ethical and other constraints from advancing the costs of litigation, and so any claimant choosing to join in an action as an opt-in member will in all likelihood be required to bear a portion of the costs of the litigation. Not all European jurisdictions provide for collective redress, but most of the ones that do provide for opt-in actions. In the United Kingdom, however, the UK Government has introduced a draft Consumer Rights Bill, which if enacted by Parliament, would establish an opt-out collective action regime (limited to UK-domiciled persons). The UK Competition Appeal Tribunal ("CAT") would serve a gatekeeping function and determine whether a collective action should be permitted. Should collective actions seeking redress for competition law infringements be opt-in (as the EU has recommended) or opt-out (as is the case in the U.S. and potentially the UK), and what are the arguments in favor of each approach? Two articles well worth reading on this subject are Samuel Issacharoff & Geoffrey P. Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009), and Richard A. Nagareda, Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism, 62 Vand. L. Rev. 1 (2009).

MERGER CONTROL

18. Minority shareholdings

In July 2014 the European Commission published a white paper entitled "Toward More Effective EU Merger Control," in which the Commission noted that Articles 101 and 102 of the EU Treaty may not be well suited for regulating acquisitions of minority shareholdings that raise competitive questions, because such acquisitions may not constitute an "agreement" having the object or effect of restricting competition (which would render Article 101 inapplicable) and because not all acquiring persons will have a dominant position (which would be an essential precondition for the applicability of Section 102). In addition, the EU Merger Regulation, which applies only to "concentrations," does not require the notification of acquisitions of minority shareholdings that do not confer control. On the other hand, in the U.S., Section 7 of the Clayton Act—the U.S. merger statute—has been held by the Supreme Court to apply to partial acquisitions (E.I. DuPont, 1957), and partial acquisitions of holdings of as little as 15 percent have been held to violate Section 7. In addition, acquisitions of minority shareholdings are potentially reportable under the Hart-Scott-Rodino Act, the analog to the EU Merger Regulation. What are the theories of competitive harm of minority shareholdings, and do they justify regulation under EU or Member State law, and if so, how?

VERTICALS

19. Resale price maintenance

In the U.S., the Supreme Court (in Leegin, 2007) held that vertical minimum resale price maintenance ("RPM") agreements should be judged under the same Rule of Reason standard applicable to all other vertical restraints under U.S. law. The Leegin decision, decided by a 5-4 vote, overturned a nearly 100-year precedent (Dr. Miles, 1911), which had held that RPM agreements were per se unlawful under Section 1 of the Sherman Act. Under Leegin, the legality of RPM agreements is to be determined by weighing the competitive benefits of such agreements against their harms, and it was clear from the Court's decision that a RPM agreement imposed by a manufacturer that lacked market power would not be found to be unlawful in most circumstances. It was also clear from the Court's decision that in determining the lawfulness of a particular RPM agreement, the courts would be required to weigh the procompetitive justifications of such agreement (including enhanced intra-brand competition, the elimination of free riding, and potential efficiencies) against possible anticompetitive harms (including higher consumer prices and the facilitation of manufacturer and/or retailer cartels). In the EU, RPM has long been treated as a "hardcore" restriction of competition falling within the prohibition of Article 101(1) of the EU Treaty. The European Commission's Guidelines indicate that it views RPM agreements as restraints which are restrictive by "object," a characterization which basically treats such agreements as per se unlawful because of the unlikelihood that they will satisfy the strict conditions for exemption under Article 101(3). The Commission's position on RPM is consistent with earlier decisions by the European Court of Justice. See, e.g., SA Binon & Cie v. SA Agence et Messageries de la Presse, Case 234/83 [1985] ECR. With respect to the envisaged review of the Vertical-Block-Exemption-Regulation and the Vertical Guidelines, should the Commission maintain its current position on the legality of RPM, or should it adopt a position closer to that of the Supreme Court in Leegin? Is there a possible intermediate position? Should certain kinds of RPM agreements be available for an exemption under Article 101(3)? What are the arguments in favor of adopting a more permissive standard for RPM agreements in the EU? What are the arguments for maintaining the status quo? How can a multinational manufacturer with operations in both the U.S. and EU comply with the legal rules in both jurisdictions if it wishes to impose RPM obligations on its distributors in both?

20. Distribution agreements in the U.S. and the EU

Vertical restraints in the U.S. have been judged under the relatively permissive Rule of Reason standard ever since the Supreme Court's 1977 decision in GTE Sylvania. In the EU vertical restraints have been subjected to more rigorous scrutiny under Article 101 of the EU Treaty and the European Commission's Vertical Agreements Block Exemption Regulation, Commission Regulation 330/2010 of 20 April 2010, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF. What are the major differences between the U.S. and EU analytical frameworks for judging the lawfulness of vertical restraints?

21. Reverse payment settlements in the pharmaceutical sector

In the U.S., the Supreme Court (in Activis, 2013) held that settlements of patent infringement litigation between branded manufacturers of pharmaceuticals and their generic competitors by which the generic competitor agrees to refrain from entering the market for a period of time in return for a substantial payment from the branded manufacturer were not exempt from antitrust challenge because of the branded manufacturer's exclusionary rights under the patent and should be analyzed under the Rule of Reason. In the EU, the European Commission has brought proceedings against a number of pharmaceutical companies under Article 101 of the EU Treaty challenging similar conduct (Servier, 2014, and Lundbeck, 2013). According to press accounts, the European Commission analyzes these so-called "pay-for-delay" agreements as restrictions by "object," meaning that there can be a violation without proof of competitive effects. There are no reported decisions by the General Court or the European Court of Justice reviewing decisions by the European Commission dealing with reverse payment settlements. What are the major differences in the treatment of "pay-for-delay" agreements in the U.S. and the EU, and what should be the applicable standards for judging such agreements in both jurisdictions?

GENERAL PRINCIPLES

22. Goals of competition law

In the U.S., in the first half of the twentieth century, U.S. antitrust jurisprudence was largely preoccupied with populist goals—the protection of small businesses, antipathy toward concentrations of economic power, and skepticism toward mergers and many forms of competitor collaborations. Since the 1970s, U.S. antitrust thinking has been increasingly influenced by proponents of the so-called "Chicago School," most notably Prof. (and later Judge) Robert Bork and Judge Richard Posner, and the courts have changed course, holding that the primary purpose of the antitrust laws is to promote consumer welfare and economic efficiency—both identified by the Chicago School as important antitrust values The Chicago School's faith in the self-correcting nature of markets and in the virtues of deregulation are also important themes in modern U.S. antitrust jurisprudence. In the European Union, competition law was originally an important tool for integrating the internal markets of the Member States comprising the then European Economic Community. EU competition law was based in large part on German cartel law, which was enacted in the late 1950's and which was in turn influenced by U.S. antitrust law. The German law and the U.S. law were based on two main pillars—a cartel prohibition and a prohibition against certain types of dominant firm conduct. Since the enactment of Articles 85 and 86 of the Treaty of Rome (now Articles 101 and 102 of the EU Treaty), EU competition law has become more nuanced, moving closer at times to the U.S. model and embracing more robust economic analysis, but also preserving some distinctive features, such as the notion that there can be actionable harm to consumers without harm to the competitive process. The U.S. Supreme Court has described the antitrust laws as a "consumer welfare prescription" (Reiter, 1979). What should be the goals and purposes of competition law? Is the goal to protect competition as such, or to promote consumer welfare? Does consumer welfare follow inevitably from a system of effective competition? What is the meaning of consumer welfare, and does consumer welfare refer to the protection of consumers in the affected market or to the broader goal of maximization of the wealth of society as a whole? What is (or should be) the role of economics in antitrust analysis? How valid are the arguments advanced by the Chicago School theorists? Is there room in antitrust theory for a middle ground between excessive populism and excessive faith in free market economics?

23. Due process

Some commentators have suggested that the European Commission's procedures for investigating and punishing competition infringements under Articles 101 and 102 of the EU Treaty violate due process, because, among other things, the same agency acts as prosecutor and judge, respondents do not have access to the Commission's file until after the Statement of Objection has been issued, there is no right to cross-examine witnesses (as there is in the U.S.), and decisions in EU competition cases are rendered not by a single individual but by the EU College of Commissioners, 28 political appointees who are not trained as judges and who have not heard or studied the evidence. See, e.g., Ian Forester, Due Process in EC Competition Cases—A Distinguished Institution with Flawed Procedures, [2009] Eur. L. Rev. 817. The Commission, on the other hand, insists that its procedures in competition cases provide sufficient due process safeguards. It points to the decision of the European Court of Human Rights in Menarini, where the ECHR held that the availability of full judicial review obviated any due process concerns, and the decisions of the European Court of Justice in Chalcor (Chalcor v. Commission, Case C-386/10 P (2011)) and KME (KME v. Commission, Cases C-389/10 P and C-272/09 P (2011)), where the ECJ clarified that Commission competition cases were to be judged according to a rigorous standard of review rather than the deferential standard applied in earlier cases. Other defenders of the Commission's procedures have noted that those procedures are not unlike the administrative procedures followed by the Federal Trade Commission in the U.S. in its adjudicative proceedings. Which side has the better of the argument, and why? Are there changes that you think should be made in the Commission's procedures for adjudicating competition infringements?

24. Market definition

Market definition figures prominently in both merger control and in monopolization/abuse of dominance cases. In both contexts, courts in both the U.S. (Brown Shoe, 1962) and the EU (Airtours, 2002) had held that market definition was a necessary predicate to determining market power. More recently, however, some courts and commentators have suggested that market power and competitive effects generally can be proved without the need first to prove a relevant market. The 2010 Horizontal Merger Guidelines adopted by the Department of Justice and the Federal Trade Commission in the U.S. now acknowledge that the agencies' analysis often does "not start with market definition," and explain that market definition is not necessary when there are other tools for reliably assessing competitive effects. Some commentators have also questioned the need for defining a relevant market in non-merger cases (typically monopolization cases and other cases in the U.S. where collective conduct is judged under the Rule of Reason). See, e.g., Louis Kaplow, Why (Ever) Define Markets?, 124 Harv. L. Rev. 437 (2010). The European Commission generally begins with the definition of a relevant market. See Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, OJ C 372 (1997). In its review of proposed mergers, the Commission follows a two-step approach, by which a market is provisionally defined and then the possibility of various theories of harm—coordinated effects and unilateral effects are examined within the context of that market. What should be the role of market definition in merger analysis? Can monopolization claims be properly assessed without first defining a market? What of unreasonable restraints challenged under the Rule of Reason? What are the advantages of the market definition approach? What are the disadvantages? How effective are the econometric tools that are offered as substitutes for market definition?

25. Legal professional privilege

Do you agree with the decision by the European Court of Justice in Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission, Case C-500/07 P (14 September 2010), available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-550/07? Should there be a legal professional privilege (LPP) recognized in the EU for communications between in-house counsel and their corporate clients? What are the arguments in favor of recognizing such a privilege? What are the contrary arguments? Should the result depend on whether the in-house counsel is a member of the national bar? Note that in the United States there is no distinction between external counsel and in-house counsel for purposes of LPP; communications with both are privileged if such communications otherwise satisfy the requisites for LPP.

SUGGESTED READINGS:

Meinrad Dreher/Michael Kulka, WETTBEWERBS- UND KARTELLRECHT, C.F. Müller, 11th ed., 2021.

Michael Kling/Stefan Thomas, KARTELLRECHT, Vahlen, 2nd ed., 2016.

ANTITRUST STORIES (Eleanor M. Fox & Daniel A. Crane, eds., Foundation Press 2007).

Das Seminar wird geblockt voraussichtlich am 18./19. Januar 2023 stattfinden. Am 20. Januar 2023 ist eine Exkursion geplant (Details folgen; unter Vorbehalt je nach COVID-Lage).