

A Review of European Competition Law for Canadian Business

Antitrust/Competition & Marketing Group Seminar
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Table of Contents

Presentations

Institutional Framework

Matthieu Adam

Merger Control

Stuart Richards

Distribution

Matthieu Adam

Abuse of Dominance

Stuart Richards

Cartels

Matthieu Adam

Private Litigation

Stuart Richards

Biographies

Reference Materials

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EU Competition Institutional Framework

Matthieu Adam



Overview of the Competition Institutional Framework in Europe

- Legislation
 - Treaty on the Functioning of the European Union (TFEU): Articles 101 (anticompetitive concerted agreements and practices), 102 (abuse of dominance) and 107 to 109 (State aids)
 - Regulations (e.g., Merger Control, Vertical agreements, procedural regulations)
 - Commission Guidelines and Notices (soft law = interpretative texts)
- EU enforcement bodies
 - European Commission (in charge of merger control, investigates and fines perpetrators of anticompetitive practices)
 - General Court: decides over appeals against decisions of the Commission
 - European Court of Justice (ECJ): decides over appeals against rulings of the General Court but only on matters of law, can also be referred a matter for preliminary ruling by Member States' courts
- Enforcement bodies at the Member State level
 - Administrations (usually under the authority of the Minister of Finance – e.g., the DGCCRF in France)
 - Competition authorities (e.g., Office of Fair Trading in the UK, Competition Authority in France)
 - Civil/commercial and/or administrative Courts and Courts of Appeals
 - Supreme Courts
 - Criminal Courts in certain Member States (e.g., UK, France)

EU law is directly applicable by Member States' courts and authorities in addition to national antitrust/competition provisions

Merger Control

Stuart Richards

Introduction

- EC Merger Regulation (ECMR)
 - Definitions
 - Thresholds
 - Notification
 - Substantive Test
 - Procedure
 - Remedies
 - Fines

Concentration

- A concentration arises where a change of control on a lasting basis results from:
 - the merger of two or more previously independent undertakings or parts of undertakings; or
 - the acquisition of direct or indirect control of the whole or parts of one or more other undertakings, whether by purchase of assets, securities or otherwise (including JVs performing on a lasting basis all functions of an autonomous economic entity)

Control

- “Control” may consist of rights, contracts or any other means which, either separately or in combination, confer the possibility of exercising decisive influence on a party, in particular by:
 - ownership or the right to use all or part of the assets of a party; or
 - rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of a party.
- Control is acquired by persons or undertakings which:
 - are holders of the rights or entitled to rights under the contracts concerned; or
 - have the power to exercise the rights deriving from the contracts concerned.

Exclusions

- Certain acquisitions of securities by banks and other financial institutions on a temporary basis (less than one year);
- Certain acquisitions of assets by a liquidator or other office-holder in the context of insolvency proceedings;
- Certain acquisitions by financial holding companies (companies which hold shares for investment purposes only); and
- Intra-group restructurings.

“Community Dimension” - Thresholds

- Concentrations have a Community dimension when either one of the following threshold tests is satisfied:
 - the combined aggregate worldwide turnover of all parties concerned is more than €5,000 million; and
 - the aggregate Community-wide turnover of each of at least two of the parties involved is more than €250 million;

or

“Community Dimension” - Thresholds (cont'd)

- the combined aggregate worldwide turnover of all parties concerned is more than €2,500 million; and
- the combined aggregate turnover of all the parties concerned in each of at least three member states is more than €100 million; and
- in each of the same three member states, the aggregate turnover of each of at least two of the undertakings concerned is more than €25 million; and
- the aggregate Community-wide turnover of each of at least two of the parties involved is more than €100 million.

Requirement of Notification

- All concentrations with a Community dimension must be notified to the Merger Registry prior to implementation of the concentration and following:
 - conclusion of the agreement;
 - announcement of a public bid; or
 - the acquisition of a controlling interest.
- Notification may also be made where the parties concerned demonstrate a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid
- There is automatic suspension of a concentration with a Community dimension

Member States' Jurisdiction

- Local laws may be different to ECMR – lower thresholds, different substantive tests, case law.
- Even if the turnover thresholds are exceeded, the ECMR does not apply if each of the parties achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state.
- Referring parties may request a qualifying merger be referred to member states instead; or that a non-qualifying merger be referred to the Commission.
- A member state may ask a merger referred to it to be dealt with by the Commission or ask that a merger referred to the Commission be referred to them.

Companies Outside EU

- A concentration with a Community dimension will be deemed to exist where the aggregate turnover of the undertakings concerned exceeds the given thresholds, *irrespective of whether or not the undertakings effecting the concentration have their seat or their principal fields of activity in the Community, provided they have substantial operations there.*

Companies Outside EU

- The Commission has demonstrated its willingness to impose conditions on mergers involving companies based primarily outside of the EU where it considers that they have a significant negative impact on competition in the internal market. See *Boeing/McDonnell Douglas (Case IV/M.877)*, *World/Com/MCI Case IV/M.1069*, *United Airlines/US Airways (Case IV/M.2041)* and *Gencor/Lonrho (Case IV/M.619)*, *WorldCom/Sprint (Case IV/M.1741)*.
- *General Electric/Honeywell (Case COMP/M.2220)* – first time the Commission blocked a merger between two US companies already cleared by US competition authorities.

Substantive Test

- A concentration which would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

Substantive Assessment

- Market definition – not binding in subsequent cases (*Coca-Cola v Commission*)
- Horizontal mergers – guidelines
- Non-horizontal mergers – guidelines
- Ancillary provisions

Procedure

- **Phase I**

Initial examination - possible decisions:

Concentration

- is outside ECMR
- is compatible with common market
- is compatible with common market subject to commitments
- raises serious doubts as to compatibility with common market – Phase II

Procedure

- **Phase II**

If the proposed concentration raises serious doubts, in depth investigation - possible decisions:

• Concentration

- is compatible with common market
- is compatible subject to commitments
- is incompatible with common market
- where implemented, or implemented in breach of a commitment, must be reversed or modified

Procedure

- **Phase I deadlines**
 - Within **25** working days after receipt of the **complete** notification
 - Unless increased to **35** working days if:
 - a Member State requests for a referral, or
 - if the undertakings concerned offer commitments
- **Maximum duration of phase I = 35 working days**
- Clock does not start ticking on incomplete notifications

Procedure

- **Phase II deadlines**
 - Within **90** working days as from the initiation of proceedings, or
 - Within **105** working days if the notifying parties offer commitments later than 55 working days from initiation of proceedings
 - + up to **20** working days upon request by, or with the agreement of, the notifying parties.
- **Maximum duration of phase II = 125 working days**

Statistics

- Between 1990 and March 2008, only 20 of 4,355 mergers prohibited, 4 annulled on appeal
- However, 6.5% of all notified mergers in that period having a Community dimension required modification before approval

Remedies

- Modification by way of commitments
- Breach of commitments liable for fines without further competitive assessment
 - Divestment of business to suitable competitor
 - Removal of link with competitors
 - Access commitments
 - Change of long-term exclusive contracts
 - NOT behavioural remedies except in exceptional circumstances

Fines

- **Failure to notify, comply, etc**
 - The Commission may also impose fines not exceeding 10% of the aggregate worldwide turnover of the parties concerned if they fail to notify a merger prior to implementation, implement a merger in contravention of the suspension requirement or a prohibition decision, or fail to comply with a remedial undertaking.
- **Information supply**
 - The Commission may impose fines of up to 1% of aggregate worldwide turnover, where parties intentionally or negligently supply incorrect, incomplete or misleading information or do not supply information within the required time limit.

Fines (cont'd)

- In fixing the amount of a fine, the Commission shall take into account the nature, gravity and duration of any infringement.
- The Commission has only imposed fines in few cases. However, the last few years have seen an increase in the use of the Commission's powers to impose fines on companies supplying misleading or incorrect information.
- Example – Electrabel case (*Case T-332/09 - Electrabel v Commission*).

UK Position Contrasted

- No obligation to notify
- Far lower thresholds
- Percentage share threshold
- Geographical scope
 - mergers of local bus routes
 - cinemas

Distribution

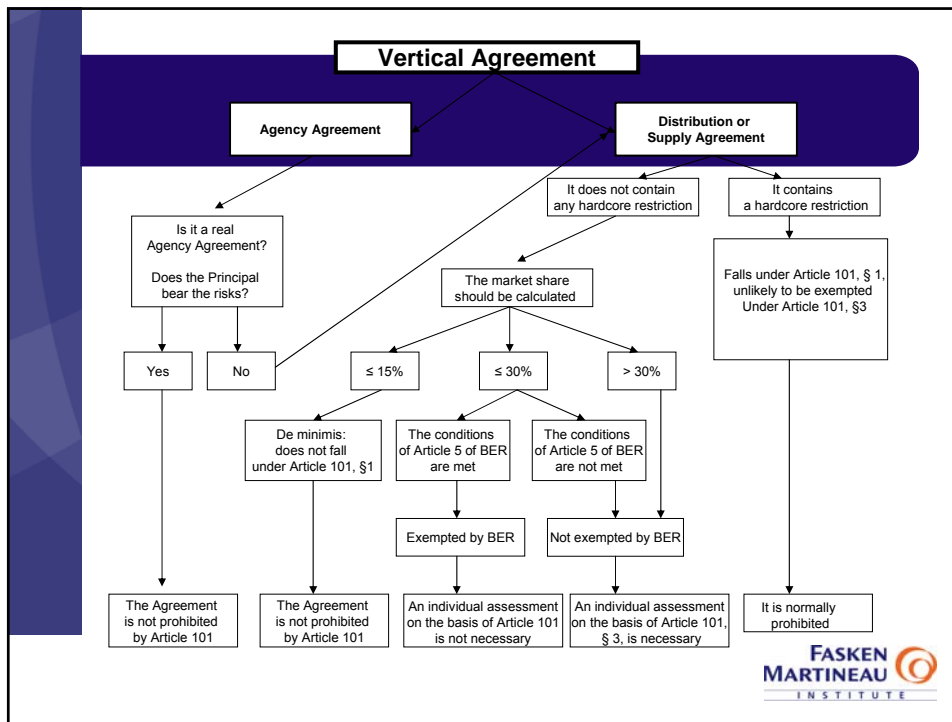
Matthieu Adam

Overview of Applicable Rules

- Art. 101§1 of the Treaty on the Functioning of the European Union (TFEU)
- New Block Exemption Regulation No.310/2010, adopted on 20 April 2010, in force on 1 June 2010
- New Commission Guidelines on vertical restraints of 19 May 2010
- Specific Block Exemption Regulations (e.g., motor vehicles)
- Article 101§3 of the TFEU if the vertical agreement does not meet the conditions required by any Block Exemption Regulation
- EU law applicable before Member States' competition authorities and courts where the practice at stake affects the trade within the EU. In addition, national rules may apply.
- Legal risks: Fine up to 10% of worldwide global turnover + civil damage exposure + nullification of agreements

Notion of Vertical Agreement

- Article 101 does not apply to unilateral conduct (such conduct can fall within the scope of Article 102 which prohibits abuses of a dominant position). Need to prove explicit agreement between the parties or at least acquiescence of a party to the conduct of the other party.
 - If the clauses of an agreement drawn up in advance provide for or authorize a party to adopt subsequently a specific unilateral policy which will be binding on the other party, the acquiescence of that policy by the other party can be established on the basis thereof
ECJ, C-74/04 P, 17 March 2006, Commission v./ Volkswagen AG
 - In the absence of explicit acquiescence, need to prove the existence of tacit acquiescence. For that it is necessary to show first that one party requires explicitly or implicitly the cooperation of the other party for the implementation of its unilateral policy and second that the other party complied with that requirement by implementing that unilateral policy in practice
CFI, T-41/96, 26 October 2000, Bayer AG v./ Commission
- Agreement between two or more enterprises
- Agreement between enterprises each operating, for the purposes of the agreement, at a different level of the production or distribution chain
- Agreements relating to the conditions under which the parties to the agreement, the supplier and the buyer, may purchase, sell or resell certain goods or services



Setting-up a Distribution Network

- Choice of the appropriate structure of distribution:
 - Resale structure
 - Exclusive distribution agreement
 - Selective distribution agreement
 - Franchising
 - Other distribution agreement
 - Representation structure (does the principal bear the financial and commercial risks or not?)
 - Agency (*i.e.*, acting in the name and on behalf of a principal)
 - Commission (*i.e.*, acting in its own name but for the benefit of a principal)
- Consequences of the choice:
 - Independency or not of the distributor (*e.g.*, pricing issue, signing of contracts)
 - End of the distribution agreement (*e.g.*, termination indemnity issue)

Managing a Distribution Network

- Key rules governing distribution agreements:
 - Safe harbor for vertical agreements: market share below 30%.

According to the new BER, such market share must not be exceeded by both the supplier and the purchaser (if a party to a multi party agreement sells the contract products or services to another party to the agreement, its market share must respect the market share threshold both as a purchaser and supplier).

- Prohibition of "hardcore restrictions"
 - Resale price maintenance (RPM)
 - Restrictions concerning the territory within the EU into which or the customers to whom the buyer may sell (market partitioning by territory or by customer)
 - Selective distributors cannot be restricted as to the end-users to whom they may sell
 - Cross-supplies between distributors within a selective distribution network cannot be restricted, including between distributors operating at different level of trade
 - An agreement between a manufacturer of spare parts and a buyer which incorporates these parts into its own products cannot restrict sales by the manufacturer of these spare parts to end-users, independent repairers or service providers
 - Internet sales (only referred to in the new Guidelines): restrictions relating to Internet sales in distribution networks are generally considered as hardcore restrictions

Managing a Distribution Network (Cont'd)

- Exceptions to the prohibition of « hardcore restrictions » (new Guidelines):
 - Where substantial investments by the distributor to start-up and/or develop a new market are necessary, restrictions on passive sales by other distributors into such a territory or to such a customer group would generally fall outside Article 101§1 during the first 2 years that this distributor is selling the contract products or services in that territory or to that customer group
 - In the case of genuine testing of a new product in a limited territory or with a limited customer group, distributors appointed to sell on the test market can be restricted in their active selling outside the test market
 - In a selective distribution system, if appointed wholesalers located in different territories have to invest in promotional activities in their territories to support the sales by appointed retailers, restrictions on active sales by the wholesalers to appointed retailers in other wholesalers' territories to overcome possible free riding may be exempted
 - Where a manufacturer agrees dual pricing with its distributors, charging more for sales to be made on-line, because sales on-line lead to substantially higher costs for the manufacturer than sales made off-line (e.g., because the latter are normally including home installation by the distributor while the former are not and therewith lead to more customer complaints and warranty claims), such an agreement may be exempted if such restriction is unlikely to limit internet sales and hinder the distributor to reach more and different customers
 - RPM may be acceptable under certain circumstances (for a new product during the introductory period, in a franchise system or similar distribution system if necessary to organize a short term low price campaign -2 to 6 weeks in most cases -, to encourage the provision of additional pre-sales services by distributors and prevent free riding)

Managing a Distribution Network (Cont'd)

- “Grey clauses” issue (e.g., direct or indirect non-compete obligations)

- Non-compete obligation during the term of the agreement:

Block exempted if:

- Limited to 5 years (except in the case of (i) sales from premises owned by the supplier or leased by the supplier from third parties not connected with the buyer – need to own the land where the premises are built as well: See ECJ, C-260/07, 2 April 2009, *Pedro IV Servicios SL v./ Total Espana SA* - or (ii) franchising contracts - such obligation can be imposed up to the duration of the contract if necessary to maintain the common identity and reputation of the franchised network)

- Only renewed after 5 years with the explicit consent of both parties

- The purchaser is free to put an end to such obligation after 5 years

- Non-compete obligation after the expiry or termination of the agreement:

Block exempted if:

- Obligation relates to the products or services which compete with the contract product or services
- Obligation required in order to protect the know-how transferred by the supplier to the purchaser
- Obligation limited to the premises and land from which the purchaser has operated during the agreement period
- Duration of the obligation limited to a period of 1 year after expiry or termination of the agreement

Managing a Distribution Network (Cont'd)

- *De minimis* notice of 22 December 2001

Conditions:

- The seller and the purchaser each hold a market share below 15%
- 5% market share each if cumulative foreclosure effect of parallel networks of agreements having similar effects on the market
- No hardcore restrictions
- Continual monitoring regarding changes to market shares

Protecting a Distribution Network

- Authorized restrictions within distribution networks
 - Restriction of active sales only (not passive sales): a supplier is allowed to restrict active sales by his direct buyers to a territory or a customer group which has been allocated exclusively to another buyer or which the supplier has reserved to itself
 - To be noted: Internet sales are viewed as passive sales
 - Restrictions of both active and passive sales – it is permissible to restrict:
 - A wholesaler from selling to end-users
 - An appointed distributor in a selective distribution network from selling, at any level of trade, to unauthorized distributors in markets where such a system is operated
 - A buyer of components supplied for incorporation from reselling them to competitors of the supplier
 - Parallel imports issue: Protection by intellectual property rights
 - Right of imposing a maximum resale price or recommending a resale price (but be careful!)

BUSINESS CASES

Examples of Vertical Restraints

Restrictions Affecting Parallel Imports: The Nintendo Case

Cases COMP/35.587 PO Video games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega-Nintendo, 22 October 2002 (Confirmed but with reduction of the fine imposed to Nintendo by CFI, T-13/03, 30 April 2009, Nintendo)

- Commission fined Nintendo and seven of its European distributors for colluding to prevent trade in low-priced products (€167.8 million)
- The Commission collected evidence showing that Nintendo and its distributors colluded to maintain artificially high price differences in the EU between January 1991 and 1998. According to the arrangements, each distributor was under the obligation to prevent parallel trade from its territory, *i.e.*, exports from one country to another via unofficial distribution channels
- Under the leadership of Nintendo, the companies intensively collaborated to find the source of any parallel trade
- Traders that allowed parallel exports to occur were punished by being given smaller shipments or by being boycotted altogether

Single Branding

- Agreement inciting or compelling a purchaser to purchase at least 80% of its needs from a single supplier
- Risk: Foreclosure of the market
 - The higher the share of the market concerned by the restriction is and the longer it is, the higher the foreclosure risk
 - Risk less likely in case of intermediate products

Exclusive Distribution and Customer Exclusivity

- Agreement according to which a supplier commits to sell products to one distributor only which will resell them on an allocated territory or to a limited category of customers
- Risks
 - Reduction of the intra-brand competition
 - Segmentation of the market likely to result in price discriminations between the territories and customers
 - Horizontal collusion facilitated at the supplier and distributor level if such type of agreement is used by several suppliers in the same market
 - Combination of exclusive distribution or customer exclusivity
 - With single-branding: this may increase the risk of foreclosure of the market for competing suppliers
 - With exclusive purchasing agreement: this may increase the risk of segmentation of the market and price discrimination

Exclusive Distribution and Customer Exclusivity (Business Case)

Company "X" has developed a new sophisticated and innovating painting product

- Market description
 - Dynamic, technology is improving
 - Entry of two new competitors
 - Market share of the competitors between 5% and 25%
 - Competitors have been improving their products
- Market share
 - 20% with the former product
 - 40% with the new product
- Features of the product
 - Needs to be adapted to the type of building
 - Needs to be adapted to the use of the building (e.g., plant, hospital, commercial building)
- Company "X" selects distributors authorized to resell the painting products
 - Each distributor is being allocated a category of customers so that they can acquire a specialization
 - Active sales are prohibited to other categories of customers
 - The exclusivity will expire after 5 years: Company "X" will have the right to sell to other distributors and distributors will have the right to actively sell to all categories of customers

Exclusive Distribution and Customer Exclusivity (Business Case – Cont'd)

Legal analysis:

- Exemption likely
- Why?
 - Particulars of the exclusivity at stake
 - Duration limited
 - Distributors are allowed to recoup their investments
 - Distributors are allowed to concentrate their efforts during an initial development phase on a certain category of customers and to improve their knowledge of the sector and specific needs
 - Potential anticompetitive effects are limited considering the dynamic nature of the market and its structure

Exclusive Supply

- Agreement according to which a supplier commits or is incited to sell a product to a single purchaser only inside the EU for a specific use and for resale only
 - Often agreements relating to industrial supply of intermediary products
 - A company holding a dominant position cannot impose an exclusive supply obligation to its suppliers
- Risk: Eviction of other purchasers
 - Risk of foreclosure is less likely in case of heterogeneous and final products

Exclusive Supply (Business Case)

Company "A" (supplier) agrees with company "B" (purchaser) to develop a new version of a product component

- Market relating to a component (intermediary product)
- Market share and market structure
 - "B": 40% on the upstream component market and on the downstream market of final products
 - "A": 35%
 - Other suppliers: 2 (20-25%) and several smaller other suppliers
- Important investments required
 - For the production by "X"
 - For the incorporation of the component by "B"
- Exclusive supply to "B" by "A" for 5 years as from the commercialization of the component
- "B" shall exclusively purchase the component from "A" for the same period
- No exclusive supply and purchase imposed to "A" and "B" on other versions of the component

Exclusive Supply (Business Case- Cont'd)

Legal analysis:

- Exemption likely
- Why?
 - Efficiencies
 - Eviction effect is limited
 - "A" has a market share limited to 35%
 - Other suppliers may develop similar components
 - Impossibility for the competing suppliers to supply part of the needs of "B" limited to 40% of the market

Selective Distribution

- Agreement according to which a supplier sells its products only to authorized distributors
- Risks
 - Reduction of the intra-brand competition
 - Foreclosure of certain types of distributors and facilitation of collusion between suppliers or distributors
- Assessment criteria
 - Qualitative selective distribution: distributors selected only on the basis of objective criteria required by the nature of the product
 - The nature of the product must necessitate a selective distribution system to preserve its quality and/or ensure its proper use
 - Objective criteria must be of a qualitative nature and laid down uniformly for all potential distributors and not applied in a discriminatory manner
 - The objective criteria must not go beyond what is necessary
 - Quantitative selective distribution: in addition to objective criteria, distributors are selected also on the basis of further criteria that limit the potential number of distributors (e.g., min or max sales, limitation of the number of distributors)

Tying

- A supplier ties the sale of a product (tying product) to the purchase of another distinct product (tied product)
- Risks
 - Foreclosure of the market of the tied product
 - Increase of prices and barriers of entry in the market for the tying product and/or the tied product
- Criteria
 - Market position of the supplier (prohibited if dominant position)
 - Risks of restrictive effects will be less likely in case of significant purchase power of the purchasers

Recommended Resale Price and Maximum Resale Price

- Risk
 - This may be an incentive for the majority or totality of the distributors to apply the same price
 - Horizontal collusion between suppliers
- Criteria
 - Market position of the supplier
 - The higher the market share of the supplier is, the higher the risk of application of the price by the majority or totality of the distributors
 - Structure of the market
 - Collusion between suppliers will be more likely in the case of a small oligopoly

Recommended Resale Price and Maximum Resale Price (business cases)

- A company tells its distributors that it will fund their advertising budget only if their marketing supports refer to its recommended prices

Legal analysis:

If the distributors abide by the recommended prices and if the company monitors such prices/have such prices monitored, this is likely to constitute a resale price maintenance prohibited vertical practice

- One of your distributors is telling you that another distributor resells a product at a very low price. He is asking you to take urgent measures in order to put an end to such an aggressive competition. Your competitors are also telling you that they are very preoccupied by this practice.

Legal analysis:

- (i) You cannot monitor resale prices applied by your distributors
- (ii) You cannot put pressure on a distributor that is reselling a product at a very low price. In France, you may only file a complaint with competition authorities or sue the distributor if you believe that the distributor is reselling at a loss
- (iii) You cannot take retaliation measures against a distributor in a concerted manner with your competitors (for instance via a collective refusal to sell) as this would be a boycott.

Abuse of Dominance

Stuart Richards

Abuse of Dominance – Rationale for Prohibition

- A dominant position carries a special responsibility for ensuring that one's commercial activities do not harm the market.
- While a dominant player (like a non-dominant player) can theoretically plan and run its own business strategy, case law indicates that it can be an abuse of a dominant position to, for instance, refuse or limit supplies, sell below cost, or bundle products together.

Article 102 TFEU

- Article 102 of the TFEU prohibits the abuse by one or more undertakings with a dominant market position within the EU (or a substantial part of it) in a way which may affect trade between the EU member states.

Article 102 TFEU

- Such abuse may, in particular, consist of:
 - directly or indirectly 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; or
 - 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 TFEU

- There is no prohibition *per se* on being dominant.
- There is no prohibition *per se* on abusive unilateral conduct without dominance.
- There need not be a causal link between the dominance and the abuse.
- Abuse and dominance may each be in different markets (cf *Tetra Pak* decisions).
- No block exemptions but recent guidance – see below.

Dominance

- **Definition**
 - Economic strength which enables a firm to prevent effective competition by giving it the ability to behave, to an appreciable extent, independently of competitors, customers and consumers.

(Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*)
 - Market share is not the only factor that should be taken into account in assessing dominance. Also barriers to entry, brand strength, innovation, countervailing purchasing power.

Dominance (cont'd)

- However, market share is the usual starting point for an assessment of dominance:
 - Shares under 40% are unlikely to give rise to dominance;
 - Other than in exceptional circumstances, there is a rebuttable presumption of dominance if a company's market share for a particular product is 50% or more;
 - Shares of 70 – 80% usually clearly indicate dominance.
- A number of cases have indicated that companies may be dominant with market shares in excess of around 40% (British Airways case – next nearest competitor had around 6%).

Abuse

- Commission will intervene where the alleged abuse is likely to lead to anti-competitive foreclosure. It will consider:
 - Position of dominant undertaking
 - Conditions of the market
 - Position of competitors
 - Position of customers or suppliers
 - Extent of abuse
 - Evidence of actual foreclosure
 - Evidence of exclusionary strategy

Objective Justification

- While there is no block exemption and the wording of Article 102 of the TFEA does not, like Article 101, provide for it, there is a “defence” of objective justification (or, perhaps, such justification renders there no abuse) provided the action taken is proportionate for such justification.
- *Guidance of Commission’s Enforcement Priorities in Applying [Article 82 EC Treaty] to Abusive Exclusionary Conduct* (Brussels, 3 Dec 2008, COM 2008)

Objective Justification

- Efficiencies have or will be likely to result from conduct
- Conduct is indispensable to realising efficiencies
- Likely efficiencies must outweigh negative effects
- Conduct does not eliminate effective competition
- Guidance has no legal weight and only indicates the approach the Commission is likely to take
 - Commission decisions may be overruled on appeal
 - National competition authorities and courts may apply different tests.

Types of Abuse

- Exploitative
- Exclusionary
- Single Market Abuses

Exploitative Abuse

- Generally European competition authorities do not view their role as price regulators – market forces should regulate prices; would require assessment of “fair” prices
- It is clear from case law that excessive pricing can constitute an abuse; however how to assess it remains an issue.
- Excessive pricing to impede parallel imports is actionable.
- Excessive differential exclusionary pricing is actionable.
- UK has been active in area of excessive pricing activities; cf *Napp* and Ofcom/BSkyB decision.

Exclusionary Abuse

- **Exclusive dealing**

- Foreclosure of competitors by imposing exclusive purchase obligations on, or giving rebates to, customers.
- Other activities can have effect of exclusive purchasing (freezer cabinets in *Van der Bergh Foods v Commission* [2003] ECR II-4653).
- Conditional rebates based on purchase volumes are not uncommon but may amount to abuse.

Exclusionary Abuse

- **Bundling/Tying**

- Bundling – selling two or more products more cheaply than if sold individually.
- Tying – making sale of one product conditional on sale of another – often spare parts or other components (whether by contract or technically).

Exclusionary Abuse

- **Predation**

- Incurring losses or foregoing profits in the short term to foreclose competitors.
- “Sacrifice” and anticompetitive foreclosure
- Evidence of competitors leaving market is not necessary
- Consumers likely to be harmed if dominant undertaking's power would be greater than before once predation ends

Exclusionary Abuse

- **Refusal to supply**

- “Essential facilities” doctrine
- Refused product need not have been supplied in the past – potential demand enough.
- Refusal to licence IP
 - *Magill* case;
 - Rights owners position weakened by Microsoft decision and possibly the Pharmaceutical Sector Inquiry (see below)

Remedies

- Commission has power to:
 - impose fines
 - order dominant undertaking to cease conduct
 - order dominant undertaking to adopt positive measures to stop violation
 - order divestment of assets
- Once commitments are accepted, if dominant undertaking fails to comply the Commission could impose fines without having to prove any violation of European competition rules.

Fines

- Maximum 10% of worldwide turnover (the same as for cartels, merger violations).
- Highest in amount: Intel - €1.06 billion, representing 4.15% of Intel's total 2008 turnover
- (Exceeds highest ever single cartel fine €896 million imposed on Saint-Gobain; but does not beat highest percentage fine – 6.8% on Irish Sugar re Art 102 abuse)
- Fine imposed on Microsoft for breach of Article 102 in 2004 of €497 million, and penalty payments of €280.5 million and €899 million imposed in 2006 and 2008.

Commitments - example

- **Microsoft**
 - First round – obliged to supply interface information to third party developers of workgroup server operating systems; sell versions of Windows without Media Player (but at same price!)
 - Second round – committed to send to Internet users in the EEA who receive automatic updates for Windows and have Microsoft's browser set as default a “choice screen” setting out alternative web browsers. It is expected that the browser Choice Screen will be displayed on over 100 million personal computers in Europe.
 - NB – second round not as a result of an adverse finding; Microsoft offered commitments after receiving a statement of objections.

An Area of Innovation

- *AstraZeneca/Losec* case – first case to construe an abuse from manipulating regulatory system
- Pharmaceutical Sector Inquiry – highlighted
 - use of patent clusters
 - use of litigation/third party interventions
- Reverse settlement agreements – status?

Cartels

Matthieu Adam

Overview of Applicable Rules

- Article 101 of the TFEU prohibits any agreement, decision or concerted practice (formal or informal, written or verbal, including "gentlemen's agreements") between competitors that have as their object or effect to prevent, reduce, restrict, or distort competition (horizontal anticompetitive practices)
- Fine up to 10% of worldwide global turnover (Commission Guidelines on the method of setting fines, 1st September 2006) + civil damage exposure + criminal sanctions (fines and/or jail) in certain EU countries (e.g., UK) although not frequent in most of them
- Cartel members may be sanctioned even if they are absent from the relevant market in Europe if their prohibited agreement contributes to the restriction of competition in the EU market (See Case COMP/38511 – DRAMs, 19 May 2010; Case COMP/38.899 - Gas insulated switchgear, 24 Jan 2007)
- According to competition law, competitors are supposed to compete:
 - On prices
 - On quality
 - On services
 - On innovation, etc.
- Competitors are not supposed to:
 - Exchange sensitive commercial information
 - Coordinate their behaviour
 - Agree on how to compete (e.g., set market shares, prices, allocate customers or territories)
 - Signal what other competitors are on their way to do
 - Prevent or distort competition

Leniency Program

- The EU has a leniency program in place: Commission notice of 8 December 2006 on immunity from fines and reduction of fines in cartel cases
- Companies may get total or partial immunity against fines if they act quickly (marker system)
- Such system benefits essentially to the first company which reports a cartel to the Commission and provides them with useful and complete information about the cartel. As a consequence, you should contact your legal department as soon as you are aware of a violation of competition law
- Leniency has been a very effective system to limit and disclose cartels
- Reporting a cartel requires full cooperation and provision of information by the leniency applicant
- Confidentiality/coordination with other leniency programs and potential criminal sanctions in certain jurisdictions

Settlement Procedure

- Regulation (EC) No 622/2008 of 30 June 2008 (conduct of settlement procedures in cartel cases) + Commission Settlement Notice of 2 July 2008 (conduct of settlement procedures): cartel cases can be settled through a simplified procedure
- This procedure is intended to be used where companies are convinced that the Commission could prove their involvement in a cartel
- The Commission can reduce the fine imposed on the parties by 10% in order to reward their cooperation to attain procedural economies. Parties have neither the right nor the duty to settle
- Parties are informed about the envisaged objections and the evidence supporting them and have the opportunity to state their views before a formal statement of objections (SO) is sent to them.
- If the parties decide to introduce a settlement submission, the Commission's SO endorses the contents of the parties' submission and is much shorter than an SO issued without prior cooperation
- Other procedural steps are simplified. Following confirmation by the parties, the Commission can proceed swiftly to adopt a final decision
- The Commission retains the possibility, until the final decision, to revert to the standard procedure
- **Case COMP/38511 – DRAMS, 19 May 2010.** First settlement decision of the Commission and dual application of Leniency and Settlement Notices.

Micron received **full immunity** because it was the first to inform the Commission. Between December 2003 and February 2006, Infineon, Hynix, Samsung, Elpida and NEC **also applied for leniency under the Leniency Notice**. The Commission took account of their cooperation in the investigation and granted a reduction of respectively 45% (Infineon), 27% (Hynix) and 18% (Samsung, Elpida, NEC). Due to mitigating circumstances, the fine of Hynix was further reduced by 5% for Hynix and by 10% for Toshiba and Mitsubishi. Finally, all companies benefitted of a **reduction of 10% for settling the case** with the Commission.

Cartel Statistics

Fines imposed by the EU Commission

Year	Amount in €
2004	390,209,100
2005	683,029,000
2006	1,846,385,500
2007	3,338,427,700
2008	2,271,232,900
2009	1,623,384,400
TOTAL	10,152,668,600

Reduced to 10,123,809,600 if corrected by court judgment

Fines as percentage of global turnover under the Fines Guidelines 2006

Number of companies	Percentage of global turnover
41	0-0.99%
6	1-1.99%
4	2-2.99%
7	3-3.99%
3	4-4.99%
1	5-5.99%
2	6-6.99%
2	7-7.99%
0	8-8.99%
9	9-10%

Ten highest cartel fines since 1969

Per case:

2008 Car glass	1,383,896,000
2009 Gas	1,106,000,000
2007 Elevators and escalators	992,312,200
2001 Vitamins	790,515,000
2007 Gas insulated switchgear	750,712,500
2008 Paraffin waxes	676,011,400
2006 Synthetic rubber	519,050,000
2007 Flat glass	486,900,000
2002 Plasterboard	458,520,000
2006 Hydrogen peroxide	388,128,000

Per company:

2008 Saint Gobain (car glass)	896,000,000
2009 E.ON (gas)	553,000,000
2009 GDF Suez (gas)	553,000,000
2007 ThyssenKrupp (elevators)	479,669,850
2001 F. Hoffmann-La Roche (vitamins)	462,000,000
2007 Siemens (gas insulated switchgear)	396,562,500
2008 Pilkington (car glass)	370,000,000
2008 Sasol Ltd (candle waxes)	318,200,000
2006 Eni SpA (synthetic rubber)	272,250,000
2002 Lafarge SA (plasterboard)	249,600,000

Prohibited Practices

- Price fixing (including margins or any elements having an effect on prices)
 - Agreement between competitors regarding prices
 - Such an agreement may be inferred from any communication with a competitor on prices or price practices in general in the market
 - NEVER DISCUSS PRICES WITH A COMPETITOR, EVEN INFORMALLY OR FROM TIME TO TIME

Representative cases: Case COMP/37.512 – Vitamins; Case COMP/39.181 - Candle waxes

Prohibited Practices

- Limitation of output or supply
 - Limitation of supply sources
 - Limitation of market shares
 - Agreement on investments and output capacities

Prohibited Practices

- Market partitioning
 - Allocation of customers between competitors
 - Agreement between competitors on the allocation of territories
 - Agreement between competitors not to sell in certain markets

Representative cases: Case COMP/37.512 – Vitamins; Case COMP/38.638 - Synthetic rubber (BR/ESBR); Case COMP/39.401 E.ON - GdF collusion; Case COMP/39.125 - Car glass

Prohibited Practices

- Bid rigging
 - Agreement between competitors to submit or not a proposal
 - Agreement relating to the submission of identical proposals
 - Fictitious submission of a proposal – no intent to win
 - Rotating offers – Agreement with a competitor to win or lose the bid
 - Agreement to maintain market shares
 - Exchange of sensitive information between competitors during a bid

*Representative cases: Case COMP/38.823 - Elevators and escalators;
Case COMP/38.899 - Gas insulated switchgear*



Prohibited Practices

- Boycott
 - Agreement with a competitor to impose retaliation measures or restrictions on a customer
 - Agreement with a competitor to set up or not a commercial relationship with a customer



Prohibited Practices

- Exchange of sensitive commercial information
 - Exchange of confidential information relating to prices, margins, costs, capacities or level of output, etc. EVEN IF SUCH INFORMATION IS NOT SUBSEQUENTLY USED
 - Be extremely careful during meetings of trade associations (a participant may be sanctioned on the ground that he was present during a meeting where prohibited discussions took place if he did not subsequently publicly and explicitly denounce such discussions)
 - Exchange of price list or information relating to customer relationships (e.g., status of commercial negotiations)

Representative cases: Case COMP/37.152 – Plasterboard; Case COMP/38.823 - Elevators and escalators; Case COMP/38.899 - Gas insulated switchgear



Examples of Prohibited Topics of Discussion Between Competitors

- Individual prices or sector prices
- Exchange of prices
- Increase of prices
- Terms and conditions of sale
- Price differences
- Rebates, discounts
- Production or distribution costs
- Cost structure
- Method of calculation of costs
- Payment terms
- Sensitive figures (e.g., supply sources, costs, output)
- Any information of future projects (e.g., technology, production, marketing)
- Any topic relating to a supplier, distributor or specific customer

As an exception, information sharing may be authorized in the case of historic aggregated data under certain conditions but be very careful and always seek prior advice from your legal department



CARTELS

SELECTION OF BUSINESS CASES

Facts No.1

- A competitor tells you that customer A told him that your company sold a product to him at a certain price
- He asks you to confirm this information and requests your comments

Legal Analysis No.1

- It is strictly prohibited to exchange/discuss such information
- You should inform your competitor that you cannot discuss such questions with him and put an end to this conversation
- Any inappropriate contacts of this kind should immediately be reported to your legal department

Facts No.2

- Your customer A tells you that he can purchase a product at better conditions from one of your competitors but he cannot provide you himself with a copy of the prices offered by such competitor
- He adds: « If you do not believe me, check by yourself the prices with your competitor »

Legal Analysis No.2

- You must never contact a competitor in order to check a price or any other sales condition
- However, you may lawfully obtain from a customer copies of price lists or promotional documents of your competitors but you should specify on the documents so obtained who provided them to you and when

Facts No.3

- A competitor calls you and asks you whether your company has any credit problems with a customer and what conditions are being offered to such customer by your company

Legal Analysis No.3

- It is strictly prohibited to disclose to a competitor credit conditions granted by your company and ask or solicit such information from such competitor

Facts No.4

- You have been asked internally to gather price information regarding your competitors in order to help your company to maintain its competitive position
- You ask one of your customer friends to provide you with copies of price lists of your competitors as soon as he receives them
- Your customer friend tells you that he is ok
- This customer also asks you to provide him with additional copies of your price list and rebate conditions because he received the same request from other competitors

Legal Analysis No.4

- Obtaining the price list of a competitor from a customer is not against competition law
- However, the other facts highly suggest that there is an exchange system in place relating to the prices that is likely to be prohibited by competition law and may even lead to price fixing. The customer seems to be used as an intermediary for this exchange of information between competitors. As a consequence, you should not provide additional price information to such customer

Facts No.5

- During an informal conversation in a trade event gathering the operators in the market, a competitor notes that « the prices in the sector have been low for quite a certain period », waiting for your comments

Legal Analysis No.5

- Do not go beyond such an informal conversation and do not comment on this sensitive topic
- If the competitor insists on the subject, you should tell him explicitly: « Sorry, I cannot discuss this subject with you ». You should stand away from him if he continues
- Do not comment and do not use « codes » and do not discuss, even indirectly, about prices or sales conditions

Facts No.6

- A competitor suggests not to sell a product to one of your customers in exchange for an identical commitment from you vis-à-vis one of his customers

Legal Analysis No.6

- This situation constitutes an allocation of customers and is prohibited
- You should tell your competitor that you cannot engage in such practices prohibited by law
- Such inappropriate contact should be reported to your legal department

Facts No.7

- A purchaser sets up a reverse bid in order to select a supplier for certain products
- You and your competitors are concerned by such a system as this is likely to draw down the prices
- You are contacted by your competitors in order not to submit an offer during such a reverse bid

Legal Analysis No.7

- It is strictly prohibited to discuss with your competitors regarding your participation to a reverse bid
- Any concerted refusal to participate to such a reverse bid would be considered as a boycott
- Such inappropriate contact should be reported to your legal department

Facts No.8

- You take part to a meeting of a trade association
- There is no agenda and you are being involved in a discussion relating to the current level of prices and means to increase them

Legal Analysis No.8

- Such a discussion is strictly prohibited
- During such meeting, you should immediately request the other participants to stop discussing this subject
- If the discussion continue, leave the meeting and ensure that the reason why you left is clearly stated in the minutes of the meeting
- In addition to the official minutes of the meeting, take you own notes on what you said and did
- You should refrain from applying any measure decided during such meeting and publicly state your disagreement with what was said during the meeting
- Such inappropriate contact should be reported to your legal department. If the activity of the trade association is not duly corrected, you should not continue to be a member of it

Private Litigation Including Class Actions

Stuart Richards

Introduction

- According to the European Court of Justice, any citizen or business who suffers harm as a result of a breach of the EU antitrust rules (Articles 101 and 102 TFEU) should be able to obtain reparation from the party who caused the harm. *Courage v Crehan* (2001)
- The Commission's view:
 - Absence of an effective legal framework for damages actions hampers full enforcement of the antitrust rules and has a negative bearing on competition in an open internal market.
 - Best addressed by a combination of measures at both EU and national level.
 - Measures should achieve effective minimum protection of the victims' right to damages in every Member State, create a more level playing field and provide greater legal certainty across the EU.

Commission White Paper – April 2008

- Recommends a middle ground between hurdles to compensation that currently exist and the over-incentives that lead to excessive litigation in non-European jurisdictions.
- Recommendations:
 - Single, not multiple, damages
 - Should be collective redress via representative actions (brought by, for example, consumer groups)
 - Collective actions for which victims can opt in – not class actions for unidentified number of claimants

Commission White Paper – April 2008

- Recommendations (cont'd):
 - Both parties should have equivalent access to evidence (but not so far as wide pre-trial discovery)
 - Infringer should be able to invoke passing on defence – but eventual victims should be easily able to prove passing on
 - Final infringement decisions of national competition authorities (NCAs) of member states should be considered sufficient proof of infringement in damages actions
- No legislation since April 2008

Other Issues

- Imperative to safeguard the leniency regime for whistleblowers in cartels. One of the most effective tools of the EU competition authorities
 - Should whistleblowers be subject to damages in civil actions – at all – or reductions/caps?
 - Should certain documents be excluded from discovery in civil actions to protect whistleblowers?

Damages Actions at National Level

- Whole purpose of Commission intervention is to bring harmonisation
- Very different approach across EU
- Commission regards UK as having systems they would like
- Other jurisdictions – different rules re costs and damages, civil vs common law jurisdictions, non-specialist judges hearing complex competition cases, time for hearing cases

UK Experience

- System allows stand alone claims and follow on claims – courts and specialist tribunal
- Increasing number of cases – but reticence remains and customers may find commercial ways to redress infringements in the future
- Group Litigation Orders
- Consumer representative actions – but cf *Which?* experience with replica football kits case
- Super complaints
- Passing on defence

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BIOGRAPHIES



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Matthieu Adam is a partner of the firm's Paris office. He joined the office in September 2009 after eight years spent as an associate and then, as counsel, in the Paris offices of Latham & Watkins and Dewey & LeBoeuf.

Areas of Practice

Antitrust/Competition & Marketing

Abuse of Dominance/Monopolization

Merger Notification & Review

Cartels & Other Competition Criminal Matters

Energy, Environmental, Climate Change and Regulatory

Energy

Corporate / Commercial

Cross-Border and International Transactions

Retailing, Franchising and Distribution

Climate Change

Pricing and Distribution

Joint Ventures

Education

Diploma, Economics and Finance

L'Institut d'études politiques de Paris, 2000

LLM (France), Business and Economics Law
University of Paris I, 1999

LLB (France), Business Law

Matthieu practices in the field of antitrust and competition and has developed specific expertise concerning cross-border transactions, in particular those involving French- and English-speaking African countries. He has assisted companies in various French, EU and international merger control filings as well as in antitrust litigation and investigation cases (cartels, abuse of dominance, restrictive practices, State aids) before French and EU courts and authorities (EU Commission, French Competition Authority, etc.).

In addition, Matthieu assists clients in the negotiation and drafting of commercial agreements and is an experienced practitioner in the field of distribution law (e.g. franchising, exclusive and selective distribution, agency agreements).

Finally, a regular part of Matthieu's practice involves climate change related issues, including public policy analysis and emissions trading work (e.g. CER and VER purchase agreements) governed by or falling outside the Kyoto Protocol.

Matthieu acts for international and French clients across a wide range of industry sectors, such as energy (e.g. oil & gas, electricity), telecommunications, hotels and casinos, private equity, financial services, consultancy, advertising, electronic devices, smart cards, consumer goods, industrial goods, real estate, alcoholic beverages, food, paper, motor vehicles, and environment.

Presentations

- A Review of European Competition Law for Canadian Business, Antitrust/Competition & Marketing Group Seminar, June 3, 2010
- A Review of European Competition Law for Canadian Business, Antitrust/Competition & Marketing Group Seminar, June 2, 2010

Publications

- "Antitrust/Competition & Marketing Group 2009 Year in Review", Antitrust/Competition & Marketing Bulletin, January 2010
- "After Portugal, Spain...and soon France? Local taxation and State aid", Revue Lamy des collectivités territoriales, January 2009
- "State-owned legal persons against anticompetitive practices: State-owned legal persons are encouraged to seize the administrative judge", Les Echos, May 2008

BIOGRAPHY

Matthieu Adam

Université Paris XI Paris-Sud,
1998

Year of Call

Paris, 2002

Languages

English

French

- "The Coulon Commission proposes an in-depth overhaul of criminal competition law", Le Magazine des affaires, April 2008
- "Pharmacy: Series of antitrust dawn raids: The EU Commission uses strong-arm methods within the framework of a sector inquiry intended to disclose problems in the sector", Les Echos, March 2008
- "The hindrance to the EU Commission's investigation powers; The Commission severely punishes an enterprise for having broken seals", Les Echos, February 2008
- "Latest development in the " Livre Français saga ": About the "CELF" European Court of Justice ruling of February 12, 2008", Lamy Droit public des affaires and Revue Lamy Droit public des affaires, April 2008
- "How an express mail takes eighteen years to reach its destination", Revue Lamy de la concurrence, Fall 2008
- "A new obligation imposed on sellers; The Ordinance No. 2005-136 of February 17, 2005 provides for a new warranty granted to consumers", Les Echos, March 2005



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Partner

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Stuart Richards is a partner in Fasken Martineau LLP (London) and a member of the Technology and Intellectual Property and Life Sciences practice groups.

Stuart specialises in representing a variety of pharmaceutical, biotechnology and medical device companies with a particular emphasis on the needs of drug delivery companies. He advises on a broad range of transactions, including inbound and outbound licensing, development deals, research and development collaborations, manufacture and supply arrangements, distribution agreements and clinical trials agreements, as well as all aspects of pharmaceutical regulatory law and practice, including data exclusivity, Bolar exemptions, medical device regulation and PPRS. In 2005, Stuart was seconded to SkyePharma Plc for a year during which time he dealt with a wide range of commercial transactions for the client and its Swiss and American subsidiaries. With Alistair Booth, Stuart is the firm's representative of Biologics, its European wide network of life sciences specialist law firms (see www.BioLegis.net).

Stuart has extensive experience representing clients in EU and UK competition work, including advising on anti-competitive agreements, dominance, pricing practices and parallel trade (including repackaging and relabelling, distribution systems and restrictions on supply). In addition he advises on merger referrals and clearances. Stuart advises on the protection and exploitation of intellectual property for clients in a wide range of industries and provides general commercial and contractual advice, including carrying out and coordinating contractual and IP due diligence. For a number of years Stuart has advised a UK-registered charity in relation to contractual and commercial issues, including IP licensing, marketing agreements, fundraising and sponsorship agreements.

Representative Experience

- *Oxford Nutrascience completes Placing of new ordinary shares; entire issued share capital admitted to trading on AIM*
- *Alliance Pharmaceuticals complete purchase of Buccastem and Timodine from Reckitt Benckiser*
Advised Alliance Pharma plc and Alliance Pharmaceuticals Limited.
- *Summit Corporation and Evolva Biotech enter exclusive worldwide licensing agreement*
Advised Summit Corporation plc
- *SkyePharma agrees Flutiform exclusive licence deal with Kyorin in Japan*
Advised SkyePharma PLC
- *Jim Pattison Group acquires Guinness World Records*
Advised Jim Pattison Entertainment Ltd.
- *Cossette Communications acquires 65.4% of Dare Digital Limited for a purchase price that could rise up to £30 million*
Advised Cossette Communications Inc.

Areas of Practice

Antitrust/Competition & Marketing
Corporate / Commercial
Cross-Border and International Transactions
Life Sciences
Technology and Intellectual Property
Intellectual Property
Cartels & Other Competition
Criminal Matters
Trade Associations
Pricing and Distribution
Abuse of Dominance/Monopolization
IP/Competition Interface

Education

Diploma, EC Competition Law
King's College London, 2003
LPC,
University of Bristol, 1995
LLB (Hons),
University of Bristol, 1994

Year of Call

England and Wales, 1998

- *SkyePharma receives €15 million for exclusive license agreement for marketing and distribution of Flutiform in Europe*
Advised SkyPharma Plc.
- *SkyePharma receives \$25 million for exclusive license agreement for marketing and distribution of Flutiform in the US*
Advised SkyePharma Plc.

Presentations

- A Review of European Competition Law for Canadian Business, Antitrust/Competition & Marketing Group Seminar, June 3, 2010
- A Review of European Competition Law for Canadian Business, Antitrust/Competition & Marketing Group Seminar, June 2, 2010
- BIA Business Development Directors Forum, 2006
- IRR, 2004
- Bioindustry Association 2004, 2004
- Informa Conference 2001, 2001

Publications

- "Agents of change?", TheBookseller.com, April 27, 2010
- "EU Competition Law", March 2010
- "Fasken Martineau's Life Sciences Newsletter", Life Sciences Newsletter, March 2010
- "Antitrust/Competition & Marketing Group 2009 Year in Review", Antitrust/Competition & Marketing Bulletin, January 2010
- "Fasken Martineau's Life Sciences Newsletter", Life Sciences Newsletter, October 2009
- "Pharmaceutical Development Patenting Strategies and Competition Law", Life Sciences Bulletin, October 2009
- "Antitrust/Competition & Marketing Group 2008 Year in Review: Developments in the U.K. and Europe", Antitrust/Competition & Marketing Bulletin, August 2009
- "Fasken Martineau's Life Sciences Newsletter", Life Sciences Newsletter, April 2009
- "Fasken Martineau's Life Sciences Newsletter", Life Sciences Newsletter, April 2009
- "European Commission Pharmaceutical Sector Inquiry", Article by Stuart Richards and Allistair Booth, December 2008
- "Fasken Martineau's Life Sciences Newsletter", Life Sciences Newsletter, September 2008
- "Tackling Anti-Competitive Conduct in the United Kingdom Through Private Actions", April 2008
- "The Very First Newsletter of the Life Sciences Practice Group!", Life Sciences Newsletter, April 2008
- "Antitrust/Competition & Marketing 2007 Year in Review", Antitrust/Competition & Marketing Bulletin, March 2008
- "Outsourcing Transactions: A Practical Guide", Eds. C. Ian Kyer and John Beardwood, Canada Law Book, 2008
- "Legal module of the Pharmaceutical Licensing Group M.Sc on Pharmaceutical Licensing", Published by Manchester University by Paul Ranson, Stuart Richards and Emilce Vega, 2007

- "Agency 2007 - Commercial Agency Contracts Claims of Agents in the case of termination of contract", 2007
- "Life Sciences June 2007 Trading and Commercial Issues Newsletter", Fasken Martineau Stringer Saul Bulletin, February 2007
- "Trade Marks and the Internet E-Commerce Law & Policy", 2005
- "The Effect of Brand Management When a Business Migrates onto the Internet", A Legal Perspective, 2004
- "Where Does Your Licence Fit? Technology Transfer Block Exemption", 2004
- "Opinion Piece in Legal Week Tesco/Levi's Parallel Import Decision", 2002

Memberships and Affiliations

- Law Society of England & Wales
- Association of British Pharmaceutical Industry
- BioIndustry Association
- Biolegis network of law firms



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Tony Baldanza is Chair of Fasken Martineau's Antitrust/Competition & Marketing Law Group and a Senior Partner of the firm. Tony practises business law, with a focus on competition law and foreign investment law.

In his competition law practice, Tony provides advice and representation in relation to mergers, criminal matters including cartels, and restrictive trade practices. In his merger practice, Tony has handled merger transactions in a wide range of industries, and regularly assists clients in clearing such transactions through the Canadian Competition Bureau pursuant to the *Competition Act*, the Investment Review Division of Industry Canada pursuant to the *Investment Canada Act* and, along with counsel in other jurisdictions, the competition law/antitrust authorities of other jurisdictions. Also, Tony regularly advises companies on how to structure distribution and licensing arrangements to avoid competition law problems, and counsels companies and professional and trade associations on the scope of permissible activities.

In his general business law practice, Tony provides advice and assistance in relation to a wide range of matters including, mergers and acquisitions, joint ventures, corporate reorganizations, supply and distribution arrangements, and general corporate and commercial matters.

Tony is a former Chair of the Mergers Committee of the CBA's Section on Competition Law. Tony is a frequent speaker at professional seminars and conferences on a wide range of competition law and foreign investment law topics, including conferences sponsored by the ABA, the CBA, the Association of Corporate Counsel, the Ontario Bar Association, the BC Bar Association, Federated Press and Insight. His articles have been published by these organizations and by various other publications including *Canadian Business Law Reports*, *Global Competition Review*, *Metropolitan Corporate Counsel*, *Mergers and Acquisitions in Canada* and *CCH Commercial Times*. He has also co-authored the Competition Law chapter in *Doing Business In Canada* and a chapter on mergers in *Fundamentals of Canadian Competition Law*.

Tony is listed in a wide range of reports and surveys as one of Canada's leading competition law lawyers. These publications include *Chambers Global: The World's Leading Lawyers*; *The International Who's Who of Business Lawyers*; *Practical Law Company Cross-border Handbooks-Competition Handbook*; *Global Counsel Competition Law Handbook* and *The Legal Media Group Guide to the World's Leading Competition and Antitrust Lawyers*.

Representative Experience

- *MDS completes divestiture of instrument division to Danaher for US\$650 million*
Canadian counsel to MDS Inc.
- *CPR reduces interest in Detroit River Tunnel Partnership for proceeds of \$110 million*
Advised Canadian Pacific Railway Company
- *Rexnord acquires Fontaine-Alliance*
Advised Rexnord LLC

Areas of Practice

Antitrust/Competition & Marketing
Corporate / Commercial
Cross-Border and International Transactions
Foreign Investment
Joint Ventures
Securities and Mergers & Acquisitions
Retailing, Franchising and Distribution
Merger Notification & Review
Marketing & Advertising
Competition Compliance Programs
Cartels & Other Competition Criminal Matters
Abuse of Dominance/Monopolization
Pricing and Distribution
IP/Competition Interface
Trade Associations

Education

LLB, Osgoode Hall Law School
at York University, 1978

BA, University of Toronto, 1981

Year of Call

Ontario, 1980

- *Industrial Alliance acquires DundeeWealth's Quebec-based mutual fund dealer and insurance distribution operations*
Advised Industrial Alliance Insurance and Financial Services Inc.
- *Prestige Telecom completes \$20 million acquisition of Radian and concurrent financings*
Advised Prestige Telecom Inc.
- *DaimlerChrysler sells Chrysler Group to Cerberus Capital Management in US\$7.4 billion deal*
Acted as special Canadian counsel to DaimlerChrysler AG
- *Hitachi and GE Energy forge global alliance in nuclear industry*
Advised Hitachi, Ltd.
- *Smiths Group completes US\$4.8 billion sale of aerospace business to General Electric Company*
Advised Smiths Group PLC
- *MDS sells diagnostics business to Borealis Infrastructure Management in \$1.325 billion transaction*
Advised MDS Inc.
- *Fraser Surrey Docks sold to Macquarie Infrastructure Partners*
Advised APTL Terminals Ltd., the vendor in this transaction
- *Exceldor acquires Grenville Poultry*
Advised Exceldor
- *HMSHost Corporation acquires Cara Operations' Airport Terminal Restaurant Division for \$62 million*
Advised Host International of Canada
- *De Beers Canada sells participating interest in diamond joint venture for \$180 million*
Advised De Beers Canada
- *First Quantum acquires Adastra for \$275 million*
Advised First Quantum Minerals Ltd.
- *Merck KGaA acquires Agribiotics for US\$25 million*
Advised Nitragin Holding Inc., Nitragin Inc. (a US subsidiary of Merck KGaA) and Merck KGaA
- *Arcelor acquires Dofasco for \$5.6 billion*
Advised Dofasco Inc.
- *Dofasco acquires Copperweld businesses for US\$178 million*
Advised Dofasco Inc.
- *Allied Domecq in US\$5 billion transaction that sees Fortune Brands acquire brands from Pernod Ricard*
Advised Allied Domecq
- *Dofasco acquires Québec Cartier Mining for \$306 million*
Advised Dofasco Inc.
- *360networks sells its Canadian telecommunications business to Bell Canada for \$275 million*
Advised 360networks Corporation
- *Rogers Wireless acquires Microcell Telecommunications for \$1.5 billion*
Advised Rogers Wireless Inc.
- *Cable operator Persona Inc. acquired for \$406 million by consortium of Canadian and U.S. private equity groups*
Advised Hicks, Muse, Tate & Furst Incorporated and Canadian Cable Acquisition Company Inc.

- *P&O Ports Canada acquires assets of Casco Terminals and Canadian Stevedoring businesses of BCR Marine*
Advised P&O Ports Canada Inc.
- *Ontario Ministry of Transportation enters into public-private partnership to deliver driver examination services*
Advised the Ministry of Transportation of Ontario
- *Kinross merges with TVX and Echo Bay*
Acted for the special committee of the board of directors of TVX and as special counsel to TVX
- *KKR and Teachers' Merchant Bank acquire Bell Canada phone directories for \$3 billion - Canada's largest-ever leveraged buyout*
Advised the lenders, The Bank of Nova Scotia, Canadian Imperial Bank of Commerce and Credit Suisse First Boston
- *AT&T Corp. completes \$5.5 billion "back-end" acquisition*
Advised AT&T Corp.
- *Autoliv acquires restraint electronics business of Visteon Corporation*
Advised on Autoliv Inc.
- *St. Lawrence Cement acquires indirect subsidiary of Lafarge*
Advised St. Lawrence Cement Inc.
- *Bristol-Myers Squibb Company acquires DuPont Pharmaceuticals Company for US\$7.8 billion*
Advised DuPont Pharma Inc.
- *Credit Suisse completes US\$11.6 billion acquisition of Donaldson, Lufkin & Jenrette*
Advised Credit Suisse
- *DeBeers successful in its unsolicited take-over bid of Winspear Diamonds Inc.*
Advised De Beers Canada Holdings Ltd.
- *Grafton-Fraser purchases Tip Top Tailors Group from Dylex*
Advised Grafton-Fraser Inc.
- *MDS acquires Phoenix International*
Advised MDS Inc.

Memberships and Affiliations

- Canadian Bar Association
- American Bar Association
- International Bar Association
- Vice Chair, Foreign Investment Review Committee, Canadian Bar Association
- Former Chair, Merger Committee, Competition Law Sector, Canadian Bar Association

REFERENCE MATERIALS

12008E101

**Consolidated version of the Treaty on the Functioning of the European Union - PART THREE:
UNION POLICIES AND INTERNAL ACTIONS - TITLE VII: COMMON RULES ON
COMPETITION, TAXATION AND APPROXIMATION OF LAWS - Chapter 1: Rules on
competition - Section 1: Rules applying to undertakings - Article 101 (ex Article 81 TEC)**

Official Journal 115 , 09/05/2008 P. 0088 - 0089

Article 101

(ex Article 81 TEC)

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.

12008E102

Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS - Chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 102 (ex Article 82 TEC)

Official Journal 115 , 09/05/2008 P. 0089 - 0089

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.

REFERENCE LINKS

MERGER CONTROL PRESENTATION

- Merger Regulation: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF>
- Implementing Regulation (consolidated): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0802:20081023:EN:PDF>
- Statistics: <http://ec.europa.eu/competition/mergers/statistics.pdf>

DISTRIBUTION PRESENTATION

- Article 101: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>
- Regulation on vertical agreements and concerted practices: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>
- Commission Guidelines on vertical restraints: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>
- De minimis Notice: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:368:0013:0015:EN:P>

ABUSE OF DOMINANCE PRESENTATION

- Article 102: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E102:EN:HTML>
- Commission Guidance: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF>

PRIVATE LITIGATION PRESENTATION

- Commission White Paper: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF>

CARTELS PRESENTATION

- Article 101: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>
- Commission Guidelines on the method of setting fines: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:EN:PDF>
- Commission Notice on immunity from fines and reduction of fines in cartel cases: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>
- Commission Regulation on the conduct of settlement procedures: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0622:EN:NOT>
- Commission Notice on the conduct of settlement procedures: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:167:0001:0006:EN:PDF>

- Commission press releases relating to cartel decisions:
 - - 38511 DRAMs:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/586&format=PDF&aged=0&language=EN&guiLanguage=en>
 - - 39.401 E.ON - GdF collusion:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1099&format=PDF&aged=0&language=EN&guiLanguage=en>
 - - 39.125 Car glass:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1685&format=PDF&aged=0&language=EN&guiLanguage=en>
 - - 39.181 Candle waxes:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1434&format=PDF&aged=0&language=EN&guiLanguage=en>
 - - 38.823 Elevators and escalators:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/209&format=PDF&aged=1&language=EN&guiLanguage=en>
 - - 38.899 Gas insulated switchgear:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80&format=PDF&aged=1&language=EN&guiLanguage=en>
 - - 38.638 Synthetic rubber:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1647&format=PDF&aged=1&language=EN&guiLanguage=en>
 - - 37.152 Plasterboard:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/02/1744&format=PDF&aged=1&language=EN&guiLanguage=en>
 - - 37.512 Vitamins:
<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1625&format=PDF&aged=1&language=EN&guiLanguage=en>

