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SEMINAR ON TRANSNATIONAL ANTITRUST LAW

- List of topics -

PUBLIC ENFORCEMENT

1. Decline in Amnesty Applications

The Antitrust Division of the U.S. Department of Justice has stated that its amnesty program is “its most important investigate tool for detecting cartel activity,” and in the last 25 years nearly all of the Division’s criminal enforcement activity has been initiated as the result of self- reporting by amnesty applicants. In recent years, however, the number of amnesty applications appears to have declined in both the United States and the EU. This is particularly the case for large, multi-jurisdictional international cartels, although the reasons for the decline in applications are unclear. See, e.g, Douglas H. Ginsburg & Cecilia (Yixi) Cheng, The Decline in U.S. Criminal Antitrust Cases: ACPERA and Leniency in an International Context, George Mason Law & Economics Research Paper No. 19-31 (2019), available at https://ssrn.com/abstract=3460091. Some commentators have suggested that the decline is likely to be permanent, and that amnesty is no longer as attractive an option as it once was. These commentators point to the fact that many jurisdictions have now adopted amnesty regimes, and the cost of complying with the amnesty requirements in multiple jurisdictions can be excessive, particularly since the requirements for obtaining amnesty differ from jurisdiction to jurisdiction. It is also said that amnesty is less attractive because of the risk of private damage exposure in a growing number of jurisdictions, particularly the UK and the EU Member States. Other commentators have argued that the decline is only temporary, the timing of amnesty filings is serendipitous, and the advantages of amnesty outweigh whatever perceived disadvantages there may be. Still other commentators speculate that the number of amnesty applications may have declined because aggressive cartel enforcement has increased deterrence, corporate compliance programs are working, and there are fewer cartels to self-report. You are asked to write in essay addressing some of the theories advanced as to why there is an apparent decline in leniency applications. Is it because of the increased burdens of cross-border compliance requirements on leniency applicants, or the chilling effect of private litigation, or some other reason? Are there changes that you would make to the existing amnesty programs in the U.S. or the EU to make amnesty more attractive? Are there additional changes 1 that you would make to the ACPERA to mitigate some perceived disincentives to amnesty resulting from the risks of private litigation in the U.S.? Are there corresponding changes that you would make to limit the damage exposure of amnesty applicants in the EU? Should there be an effort to harmonize international amnesty applications and the obligations of amnesty applicants to cooperate with antirust enforcement authorities? In light of the apparent decline in amnesty applications, would it make sense for the DOJ (and the EU as well) to supplement its amnesty program with a whistleblower program that would provide financial incentives for individual whistleblowers to

come forward and report illegal cartel activity? Could a whistleblower program and an amnesty program co-exist comfortably?

2. Acquisitions of nascent competitors

In recent years competition authorities and the courts have had to deal with the question of whether to allow acquisitions by dominant firms of so-called "nascent" competitors—meaning acquisitions of start-up or relatively new firms, often with little or no sales and no history of profitability, whose competitive potential may not be, for a variety of reasons, fully understood at the time of acquisition, but which pose a substantial threat to incumbent firms. See generally C. S. Hemphill & T. Wu, Nascent Competitors, 168 U. Pa. L. Rev. 1879 (2020). Those who think that competitive authorities have not been aggressive enough in challenging such acquisitions point to Facebook's $1 billion acquisition of Instagram in 2012. At the time of its acquisition Instagram had 13 employees and had never been profitable. All that changed, of course, once Facebook acquired Instagram, and today Instagram accounts for approximately 50 percent of Facebook's total revenues. Facebook's acquisition of Instagram was cleared by the Federal Trade Commission after a 30-day review process under the premerger notification provisions of the Hart-Scott-Rodino Act,. At that time the FTC chose not to issue a second request that would have subjected the transaction to a more extensive investigation. Critics of the acquisition say that Instagram was uniquely situated to challenge Facebook's dominance as a social networking platform, and that the transaction should have been seen in 2012 as having the potential to eliminate competition, thus satisfying the 2 standard of illegality under Section 7 of the Clayton Act. Defenders of the acquisition say that Instagram would likely have failed as a company if Facebook had not acquired it and provided it with the financial, marketing, and strategic support to realize its full potential. Acquisitions of nascent competitors can occur in a variety of contexts. In some instances the firm to be acquired will be the most likely firm—or one of a few number of likely firms—capable of challenging the dominant firm. Some of these acquisitions can involve platform markets with network effects, where there can be benefits of size and ubiquity that prevent other firms from gaining critical mass or otherwise effectively competing. In other instances the firm to be acquired will appear to be one of a large number of competitors all seeking to gain a foothold in a new or previously undeveloped market. In still other instances the firm to be acquired may appear to pose a competitive threat to an incumbent firm, but barriers to entry may appear to be low or the market may appear to be characterized by dynamic competition. How should competition authorities in the U.S., the EU and Germany deal with acquisitions of nascent competitors? How should they distinguish between acquisitions that are anticompetitive and those that are benign or procompetitive? Should a different standard of illegality be applied to acquisitions by dominant firms? Given that merger analysis is inherently predictive and that predictions as to future competitive effects will not always be correct, how can competition authorities minimize the risk of error in assessing the likely effects of nascent competitor acquisitions? Would it be better to allow more challenges to already consummated mergers (because we would have better evidence of competitive effects), or should the main focus be on trying to identify anticompetitive acquisitions prior to their consummation? How easy would it be to order divestiture once after a transaction had been consummated, and how would the risk of post-consummation divestiture affect investment decisions in start-up firms and the incentives of such firms to engage in innovation? In 2021 the FTC filed an amended complaint alleging that Facebook's acquisitions of Instagram and WhatsApp constituted monopoly maintenance in violation of Section 2 of the Sherman Act and seeking divestiture of the two acquired firms. See Federal Trade Commission v. Facebook, Inc., Case No. 1:20- cv-03590-JCB (D. D.C. filed August 19, 2021), available at https:// www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf. The lawsuit is ongoing.

3. Big Tech and the Digital Economy

Big Tech is currently in the news, and competition authorities, courts, and legislators are all considering the question of whether Big Tech firms can be adequately constrained by existing competition laws, or whether new laws, or a combination of new laws and new forms of regulation, are needed to assure that digital markets will remain competitive and open to continued innovation. Some commentators believe that existing laws are inadequate to constrain Big Tech firms, and that new legislation is needed, particularly with respect to "killer acquisitions" by dominant firm sand other allegedly abusive conduct. Other commentators believe that existing laws are inadequate, but that the solution is not new or more legislation, but the creation of a sectoral regulator to oversee the practices of Big Tech firms, at least with respect to certain of their pricing, data privacy, and access policies, in a manner not dissimilar from how utilities have been regulated in the past. These commentators point to some of the characteristics of Big Tech firms—the platform nature of their businesses, the network effects phenomenon, the heavy emphasis on intellectual property rather than hard assets, and the winner-take-all nature of competition in certain of their markets—to suggest that regulation, not new legislation, is the better approach. Still other commentators believe that existing competition laws are sufficiently adaptable and flexible to adjust to new competitive realities. These commentators point to the opinion of the U.S. Court of Appeals for the District of Columbia in the Microsoft case, see United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), as a paradigm as to how abuse of dominance and monopoly maintenance issues can be effectively addressed in today's world of Big Tech. You are asked to write an essay in which you indicate whether you think new legislation or new forms of regulation are needed to assure that digital markets remain competitive. In this regard, you may want to consider the proposed legislation introduced in the U.S. by Senator Amy Klobuchar that would change certain evidentiary standards, definitions, and presumptions in merger and abuse of dominance cases, see B. Baer, "How Senator Klobuchar's Proposals Will Move the Antitrust Debate Forward," available at https:// www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-proposalswill-move-the-antitrust-debate-forward/; the Furman Report issued in 2019 by a Digital Competition Expert Panel in the UK, which recommends the creation of a sectoral regulator to regulate certain of the 4 practices of Big Tech firms, available at https:// assets.publishing.service.gov.uk/government/uploads/system/uploads/ attachment_data/file/785547/ unlocking_digital_competition_furman_review_web.pdf; and a 1999 speech by Robert Pitofsky, the former chairman of the Federal Trade Commission in the U.S., entitled "Antitrust in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems," in which he argued that existing antitrust laws in the U.S. (and by extension, the EU as well) were sufficient to address competition issues in Big Tech markets, available at. https://www.ftc.gov/ news-events/news/speeches/antitrust-analysis-high-tech-industries-19th-centurydiscipline-addresses-21st-century-problems.

<u>Form the EU perspective:</u>

With the ECJ's landmark case in Google Shopping, the EU took another step to its aim of creating fair competition in the digital economy. The ECJ in September 2024 upheld the General Court's decision from 2021, leading to the fine of EUR 2.42 bn imposed on Google becoming final. The Commission initially fined Google for self-preferencing the search results of its own price comparison tool over those of its competitors. Those were presented merely as blue links while results of Google Shopping were at the top of the page and highlighted with images and text. Thereby Google allegedly abused its dominant position on the market. Facing similar proceedings in the US, the Department of Justice (DOJ) even went as far as proposing structural remedies to counteract Googles dominant market position. Yet, only a week after the ECJ's judgment, a fine of EUR 1.49 bn against Google was lifted by the GC, as the Commission failed to sufficiently prove Google's abuse if dominance with its service "AdSense for Search". The Commission did not consider all relevant circumstances in assessing the abuse. For Google, AdSense is - financially – rather a niche product. Similar cases are pending, including proceedings at the Commission for further vertical price comparison services (Google Flights/Google

Hotels) for self-preferencing. The German FCO is investigating, pursuant to Section 19a (2) GCA, licences for infotainment systems and terms of use for Google Maps. Additionally, Google is already facing sanctions in the US for revenue sharing, exclusivity agreements and the exclusion of third-party app stores, those conducts violating Sections 1 and 2 Sherman Act. Finding the balance between regulating big player's dominance on the market and preserving competitiveness and innovation appears to be a challenging task in the Google-Saga. Where must the line of performance competition be drawn? Recommended Readings: Zinndorf, NZKArt 2024, 659 (EuGH in Google Shopping zu Selbstbevorzugung: Wann sind Grenzen des Leistungswettbewerbs überschritten?); Rössel, ITRB 2024, 280 (Marktmissbrauch bei bevorzugtem eignen Preisvergleichsdienst)

4. 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 10th amendment to the German Act against Restraints of Competition)?

5. DMA and national competition regimes

Being into force for merely less than two years, first reactions to the Commissions new tool for establishing fair (online) markets already has generated first responses from both, the legislative and the judicial side. Having been demanded for years (and taking eight years of development), the regulation of the digital economy was finally established by means of the DMA in 2022, equally strengthening consumer protection. Already during the process of developing a regulatory tool for the digital economy on a European level, the German legislator issued a bill giving

the German Competition Authority (*Bundeskartellamt*) a possibility to sanction anti-competitive behaviour of major companies in the digital economy. Leading to controversies in the development of the DMA, the provision is supposed to be an independent mechanism on a national level with its focus on the assessment of abusive conduct. This raises the question, how the DMA is excluding the application of provisions on a national level and thus, if the mechanism at hand will implement an efficient tool for the German FCO at all. In its most recent alteration of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) means to support private enforcement were implemented, inter alia by making violations of the DMA subject to claims of damages or cease-and-desist and easements on the burden of proof. Despite taking a step to supporting the efficient implementation of the DMA, it remains to be seen how (well) the new rules will the DMA. On the other hand, first practical implications regarding the DMA can be found on a transnational level. The Commission appointed the first six *gatekeepers* under Article 3 in July 2023, followed by a second appointment of another gatekeeper (simultaneously denying the status of further core platforms). ByteDance, appointed in the first "wave", challenged its status before the Commission and the General Court, ultimately losing the case. The GC however took the opportunity to outline the conditions for a rebuttal, setting the bar high. Can companies – in a practical point of view - escape the status as gatekeepers at all, once being appointed? Recommended Readings: GC (Eighth Chamber) Judgement of 17.7.2024 – T-1077/23 (ByteDance Ltd / Commission) m. Anm. Fila, EuZW 2024, 1007; Higer/Patt, NZKart 2024, 78 („Kampf gegen Windmühlen" – ist eine Abwendung der Gatekeeper benennung nach dem DMA tatsächlich überhaupt möglich?); Butorac Malnar/Kunda, EuCML 2024, 242; Deselaers, NZKart 2024, 366 (Die ersten Verfahren des Bundeskartellamtes nach § 19a GWB – gelöste und ungelöste Fragen); Krönke, NZKart 2024, 616 (Fragmentierte Regulierung digitaler Plattformmärkte? – Der DMA und das nationale Wettbewerbsrecht); Kleine/Mienert/Moryn/Timm, Newsdienst Compliance 2024, 220008 (Auf dem Prüfstand: Die Durchsetzung des DMA in der Digitalwirtschaft); Bueren/Zober, NZKart 2024, 642 (Privatrechtliche Durchsetzung des DMA nach der 11. GWB-Novelle); Galle/Dressel, EuZW 2024, 107 (Private Rechtsdurchsetzung des DMA); Podszun/Hinck, GRUR 2024, 1304 (Kartellrecht und Plattformökonomie vor dem BGH)

6. Wouters/Meca-Medina-Test – Antitrust in Sports

Since first developed in the ECJ's judgement in 2002 (C-309/99), the *Wouters*-doctrine has been heavily discussed in academia. By decision of 23 December 2023, the ECJ modified and substantiated the approach whilst also sharpening the distinction between Wouters/Meca-Medina. Whilst the judgement was generally well received in the academic literature, the impact on legislation and practice remains to be further discussed. The ECJ firstly established the exception of considering non-competitive aspects in the application of Article 101(1) TFEU in the assessment of restrictions on professional associations. The court acknowledged that the legal and economic background had to be taken into account and that not necessarily every restriction falls under the scope of Article 101(1) TFEU. Moreover, the competitive restrictions must necessarily correlate to achieve the pursued aims. Following this approach, the court assessed in Meca-Medina (C-519/04), whether the IOC's anti-doping regulation was a violation of Article 101(1) TFEU. Instead of establishing an exception of "purely sporting", the court developed a sports-specific rule to offset a prima facie case of competitive harm based on the Wouters exception. However, the there are limits to the applicability of the doctrine. Being inapplicable to restrictions on competition by object or abuse of dominance, this certainly needs to be taken into account in the field of highly concentrated sports associations. Further, the ECJ left open some questions, whose answer by the national court will be highly anticipated (now decided by the Madrid commercial court). Though after the most recent judgement Diarra v. FIFA from October 2024 this approach can be seen as established case law, deviating details and the implementation by national courts need to be analysed. Recommended Readings: ECJ, C-650/22 (4.10.2024) – FIFA; Pauer, NZKart 2024, 177; Heermann, NZKart 2024, 289; Wiedemann, NZKart 2024, 347; Ebert, NZKart 2024, 681; Palzer, NZKart 2024, 437; Wirtz/Schulz, NZKart 2024, 625

7. 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?

8. 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?

9. 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?

10. 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?

11. 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).

12. International comity and export price restraints

In Animal Science Products Inc. v. Herbei Welcome Pharmaceuticals Co. Ltd., 138 S. Ct. 1865 (2018), the defendants were Chinese manufacturers of Vitamin C who admitted fixing the prices of the Vitamin C that they sold in the U.S., but who claimed that their conduct was compelled by the Chinese government, which, they said, required them to coordinate in setting minimum prices and maximum export quantities at all relevant times. In particular, they argued that their conduct was undertaken at the express direction of MOFCOM, the highest administrative body in China with authority to regulate trade between China and other countries. In the face of contradictory evidence on this question, including evidence submitted by the plaintiffs that the Chinese government had abandoned its program of requiring Chinese companies to collectively set export prices and quantities in 2002, the case was tried to a jury, which returned a verdict in favor of the plaintiffs, resulting in a damage award of $147 million after trebling. When the case was appealed to the Second Circuit, the Chinese government filed an amicus brief arguing that the conduct at issue was compelled by Chinese law. This was the first time that the Chinese government had ever appeared as amicus in any U.S. court. On appeal, the Second Circuit reversed, holding that the District Court erred in making its own independent interpretation of Chinese law and should have deferred to Chinese government's construction of its own law. The Supreme Court reversed, holding that the Chinese government's interpretation of its own law was entitled to "respectful" consideration, but not conclusive deference. The case was remanded to the Second Circuit with instructions to the Second Circuit to apply the "respectful" consideration standard to the Chinese government's submission. On August 10, 2021 the Second Circuit held, 2-1, that the defendants' conduct was required by the Chinese government, and that because the defendants could not comply with both Chinese and U.S. law, principles of international comity prevented injured purchasers in the U.S. from recovering damages under the U.S. antitrust laws. In re Chinese Vitamin C Antitrust Litigation, ___ F.4th ___, 2021 WL 3502632 (2d Cir. Aug. 10, 2021). Do you think the case was correctly decided? Do you think the Second Circuit applied the correct standard of review in deciding whether the defendants' conduct was required by Chinese law? Is there an argument that the Second Circuit should have applied a "clearly erroneous" standard when the District Court had the opportunity to assess the credibility of witnesses who gave conflicting expert testimony on the Chinese law at issue? Should the Second Circuit have requested the views of the Solicitor General's Office and/or the Department of State on the relevant Chinese law? Where does comity fit into analysis of the foreign sovereign compulsion defense? Why should the U.S. courts decline to provide a private remedy for conduct by a Chinese-sanctioned export cartel that injures consumers in the U.S. market? Why is the Chinese interest in fixing export prices for products not sold in China greater than the interest of the U.S. in protecting its consumers from price-fixing on purchases made by them in their home market? Is there any forum other than a U.S. or Chinese court where this issue could better be resolved?

13. 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?

14. 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?

15. 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?

16. 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

17. 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?

18. 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?

19. 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?

20. 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?

21. 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?

22. 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

23. Killer Acquisitions

The discussion about the competition authorities' handling of so called "Killer Acquisition" has gained momentum since the ECJ's recent judgement in the Illumina/Grail Saga. Killer Acquisitions, mostly prominent in the pharma and tech sector, are referred to when undertakings with a large market share eliminate possible competitors, often start-ups, that come up with promising inventions, by acquiring them in an early stage of their growth. Given the mostly revenue-based thresholds imposed by national or the EU competition law framework (e.g., European Merger Regulation, EUMR), authorities often lack competence to scrutinise mergers as those start-ups merely make any revenue at all shortly after their market entry. The Commission therefore adapted the view that those transactions could be reviewed by means of the referral mechanism in Article 22 of the EUMR. In the case present, Illumina, a US biotech company specialised in the genomic sequencing technologies, wanted to acquire Grail, a US biotech company that recently invented a blood test for cancer detection. The transaction neither exceeded the thresholds of national nor European merger control regimes. The Commission then encouraged Member States to make referrals according to Article 22 EUMR to be able to assess the transaction despite the lack of competence in the first place. Subsequently, France made use of the referral mechanism supported by further Member States. The Commission, after accepting the referral, prohibited the merger between Illumina and Grail and fined the undertakings EUR 432 million for gun-jumping. Whilst the European General Court (T-227/21) upheld the Commission's decision, the ECJ (C-611/22 P; C-625/22 P) overturned the prior decisions. According to the judgment, member states cannot make referrals to the Commission by means of Article 22

EUMR without being competent to assess the case themselves. Whilst the judgment was perceived as "a victory of legal certainty", certainly not all questions were answered and new questions arose. Not only is the Commission anticipated to come up with a response which can be expected with excitement especially in the light of the current revision of the guidelines on the application of Art. 102 TFEU. The judgement has it further sparked off the discussion if an adaption of the European Merger Control Framework is necessary for the Commission to effectively safeguard competition. Multiple national regimes already acknowledge revenue-based thresholds being insufficient to address competition concerns evoked by killer acquisitions, taking according measures. Which kind of regime could be a suitable solution and is there a need to prevent killer acquisitions in the first place? What can be learned from the ECJ's Towercast judgement (C-229/21) in terms of ex post control of mergers by means of Article 102 TFEU?
Recommended Readings: Urban/von Schreitter, NZKart 2024, 609 (Lichtspieltheater – Das Illumina-Drama und die Folgen); Schmidt/Betzendorfer, NZKart 2024, 535 (Eliminating Grail – Wer prüft in der EU künftig potenziell kritische Zusammenschlüsse?); Ende, NZKart 2024, 532 (Die Schwelle des Vertretbaren übertreten: Art. EWG_VO_139_2004 Artikel 22 FKVO nach dem EuGH-Urteil Illumina); Gundel, NZKart 2024, 527 (Grenzen der kreativen Zuständigkeitsbegründung im EU-Wettbewerbsrecht: Der Fall Illumina).

24. 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

25. 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?

26. 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?

27. 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

28. 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 con-

centrations 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?

29. 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?

30. 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?

31. 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:

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