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From Europe . . . Beyond Europe

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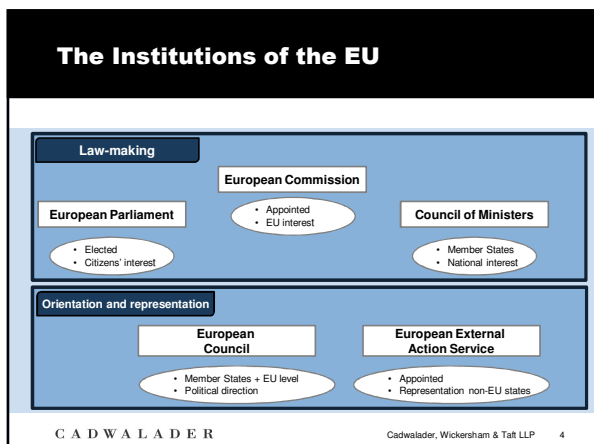
Outline

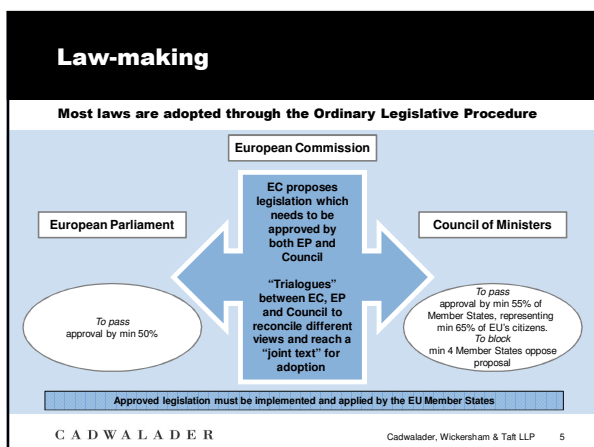
1. Who Runs the EU?
2. Lobbying in the Brussels Beltway
3. EU Competition Law
4. Cross-border Conflicts at the Crossroads of Antitrust and IP
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1. Who Runs the EU?

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2014 – Year of Change in the Brussels Beltway (1)

European Parliament elections and new College of Commissioners

- 2014: EP elections and appointment of new Commissioners
- Outgoing Commissioners focused on legacy: push to adopt key files, e.g. data protection file for Viviane Reding (European Commissioner for Justice, Fundamental Rights and Citizenship)
- From start 2014, general slowdown
- Parachuting 'Brussels Style': finding a position for the next five years

2014 – Year of Change in the Brussels Beltway (2)

European Parliament elections

- **Every 5 years**, next between 22-25 May 2014
- **National polls**: elections per Member State contested by national political parties. Once elected, most members opt to become part of a transnational political group affiliated with their national party:
EPP – Christian Democrats, **S&D** – Social Democrats, **ALDE** – Liberals, **Greens**, **ECR** – Conservatives and Reformists, **EFD** – freedom and democracy, **GUE** – left
- **Allocation of seats**: proportional representation: countries with a larger population have more seats, but smaller countries have more seats than strict proportionality would imply



2014 – Year of Change in the Brussels Beltway (3)

Appointment College of Commissioners

- **Every 5 years**, next Commission takes office on 1 November 2014
- **President of the Commission**: European Council nominates a President who must be approved by the European Parliament (July 2014)
- **Commissioners**: the President-elect chooses the Commissioners (and their policy area) from candidates put forward by the Member States. Candidates must be approved by the Council of Ministers and then by the Parliament. If the Parliament approves, the new Commission is officially appointed by the European Council




2. Lobbying in the Brussels Beltway

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Lobbying: EU Decision Makers

Know the process, to identify whom to influence ... and when

- **European Commission:** drafts legislative proposals but also has powers to adopt "delegated and implementing acts" in relation to existing EU legislation.
Proposals and decisions are adopted by the full College of Commissioners, not only the Commissioner responsible for a file.
- **European Parliament:** importance of political groups but also nationalities
- **Member States' governments:** represent national interests in the Council of Ministers
- **Presidency of the Council of Ministers:** sets the Council's agenda and determines its priorities



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Lobbying: Criticism

EU media questions whether lobbyists hold the reins of power in the EU

"Behind the scenes in Brussels: a world where lobbyists oil every decision"
The Irish Times, 30 May 2013


"US Tech groups criticised for EU lobbying"
Financial Times, 4 February 2013

"Commission under fire over tobacco lobbying"
European Voice, 10 January 2013


"MEPs copy-pasting amendments from US lobbyists"
EU Observer, 12 February 2013

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Americans in Brussels (How to make friends and influence people . . .)




Philip Condit
Boeing CEO
Boeing / McDonnell Douglas (1997)



Duncan Niederauer
NYSE Euronext CEO
Deutsche Börse / NYSE Euronext (2011)




Jack Welch
GE CEO
GE / Honeywell (2000)



MasterCard
Commissioner Barnier publicly criticises lobbying (July 2013)

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A Merger Prohibition



"I have to say, it is quite strange to discuss European champions with Duncan Niederauer, quite strange," chuckles Mr Almunia, with a biting reference to the chief executive of NYSE, a Wall Street heavyweight who has recently been treating Brussels like a second home.

"They tried a public-relations campaign to get a positive deal with the Commission. This is the wrong way."

Reto Francioni, chief executive of Deutsche Börse, deplored a "black day" for Europe that blocked Frankfurt's elevation "on an equal footing with the financial giant New York".

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Criticism from a Commissioner

FINANCIAL TIMES

Brussels Blog

Home UK World Companies Markets Global Economy Lex Comment
Columnists Analysis Opinion The A-List Editorial Blogs Letters Corrections Obituaries

MasterCard, Google and the risks of Mega-Lobbying

"I have seen a lot of lobbying over the past three years, but I never saw that: advertorials, biased information, solicited interviews, false information to contest a proposal by the European Commission."

"I can understand that a big American company like this defends its point of view, but frankly I found this campaign insufferable and counterproductive."

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3. EU Competition Law


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Overview of EU Competition Law

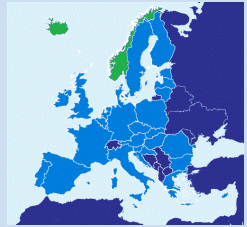
Mergers <small>Regulation 139/2004 (The Merger Regulation)</small>	Cartels <small>Article 101 TFEU</small>
Monopolisation ('Dominance') <small>Article 102 TFEU</small>	Control of Member State Subsidies ('State Aid') <small>Articles 107 & 108 TFEU</small>

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EU Merger Control: One-stop-shop



28 EU Member States (+2)



- If thresholds are met, filing is at EU level only, instead of multiple filings in several member states
 - Primary
 - Combined WW turnover > €5bn; and
 - EU turnover of each > €250m; and
 - 2/3 EU turnover of each not in same single state
 - OR
 - Secondary
 - Combined WW turnover > €2.5bn; and
 - EU turnover of each > €100m; and
 - In each of at least 3 EU states, combined turnover > €100m and each party has > €25m; and
 - 2/3 EU turnover of each not in same single state
- Can also request Commission to take jurisdiction if filings triggered in 3 or more Member States
- Some scope for transfer up or down

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EU Merger Control: US/EU Similarities


EU Standard	US Standard
<ul style="list-style-type: none">Prohibits mergers and acquisitions which would "significantly impede effective competition"	<ul style="list-style-type: none">Prohibits mergers and acquisitions where the effect may be "substantially to lessen competition"
<ul style="list-style-type: none">EU Timeline:<ul style="list-style-type: none">Pre-filing discussions with Staff25* Working Day Phase I90* Working Day Phase II* Can be extended if remedies offered or clock stopped	<ul style="list-style-type: none">US Timeline:<ul style="list-style-type: none">HSR filed when ready30-day initial waiting periodSecond Requests last until substantial complianceSecond 30-day waiting period

Pre-filing discussions, which include submitting drafts of the Form CO, can last from several weeks for smaller transactions to many months for large, complex transactions, making early engagement of EU antitrust counsel even more important

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Prohibition of UPS/TNT Merger (2013)


- UPS and TNT are 2 out of only 4 "integrated operators" in Europe in the small package delivery sector along with FedEx and DHL
- EC concluded that competition would be restricted in 15 EU Member States in relation to express delivery
 - The number of integrators active in these Member States would be reduced to three or even two in some cases
- UPS offered to divest TNT's subsidiaries in each of 15 MS and provide access to its air network for 5 years to a buyer who is not an integrator
- EC prohibited the merger as the remedies offered were inadequate to address the competition concerns



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Clearance of Syniverse/Mach Deal (2013)

- Combination of the two largest providers of data clearing services and "near trade roaming data exchange services" in Europe and globally
- EC considered the merged entity would not be constrained by actual competitors, new entrants or by buyer power and would likely result in higher prices and/or lower quality
- Syniverse offered commitments which were accepted by the EC
 - Syniverse agreed to divest certain EU activities including infrastructure, operational assets, software, personnel and customer contracts



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Prohibition of Ryanair Bid for Aer Lingus (2013)

- Third hostile takeover attempt by Ryanair for its main competitor on routes into/out of Ireland
- The EC identified 46 overlap routes which would likely result in a monopoly post merger
 - The combined market share had increased from 80% to 87% for short haul flights out of Dublin since first bid
- Ryanair submitted 4 separate commitment packages and enlisted Flybe and BA as upfront entrants who would compete with the merged entity on the overlap routes
- The EC rejected Ryanair's commitment packages and prohibited the takeover attempt:
 - Flybe was in financial difficulty; and BA would not constrain Ryanair and was unlikely to stay on the route



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Minority shareholdings in the EU: the Ryanair/Aer Lingus example

UK Competition Commission requires Ryanair to reduce its 30% minority stake in Aer Lingus to 5%

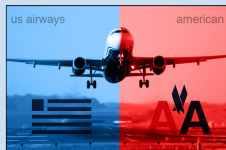
- Ryanair retained a near 30% stake in Aer Lingus from its first takeover attempt in 2006
- The European Commission considered it had no power to force a divestment
- The UK is one of the few European states which can review non-controlling minority shareholdings (Germany too)
- The CC found that Aer Lingus' commercial policy is likely to be affected by Ryanair
- The CC considered there was a tension between Ryanair's position as a competitor and its position as Aer Lingus' largest shareholder
- **The European Commission has recently launched a consultation process on extending the scope of the EU Merger Regulation to cover non-controlling minority shareholdings**

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US Airways / American Airlines Merger (2013)

- The EC found that the merger would lead to a monopoly on the London-Philadelphia route
- Commitments were offered by the parties to induce entry on that particular route and the EC cleared the merger
- Cooperation between US and EC: they exchanged views in the assessment of the merger
- The DoJ is now challenging the transaction in relation to US domestic overlap



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Cartels: US/EU Similarities

EU	US
<ul style="list-style-type: none">Prohibits:<ul style="list-style-type: none">agreements between businessdecisions by trade associationsconcerted practices <p>which have as their object or effect the prevention, restriction or distortion of competition</p>	<ul style="list-style-type: none">Prohibits agreements in restraint of trade (explicit or tacit)

Examples include:

- price fixing, market/customer sharing, bid rigging (which are always unlawful)
- joint ventures, requirements contracts, resale price maintenance, exclusive dealing, trade associations, information exchanges (which, depending on the circumstances, may be unlawful if they suppress competition)
- EU law is civil only, not criminal (but, e.g., UK law has both)

Cartels: Leniency and Compliance (1)

Leniency

- 100% immunity from fines for first applicant, up to 50% for next, 20-30% for third, up to 20% for others

- Who is liable to pay the fine?

- Joint and several liability of parent companies
- Under EU law presumption that parent exercises decisive influence over subsidiary if parent holds 100% or near 100% of share capital. Presumption can be rebutted (in theory, but hardly in practice)



Cartels: Leniency and Compliance (2)

Compliance programs

- Not considered a mitigating factor by the European Commission when imposing a fine
- Unsuccessful industry lobby to reverse this view
- Some Member States, e.g. the UK, accept a possibility of mitigation
- Moral: you still need a compliance program!
- Dawn raids: guidance on IT searching



Cartels: Severe Sanctions for Antitrust Law Breaches at EU and Member State Level

- | | |
|---|--|
| <p>Corporate Liability</p> <ul style="list-style-type: none"> • severe corporate penalties for antitrust infringements • potential compensation claims by harmed customers or competitors (unlike US, no treble damages for private plaintiffs) • reputational damage | <p>Individual Liability</p> <ul style="list-style-type: none"> • fines and in some countries also imprisonment and extradition • court actions against individuals for compensation to harmed customers and liability of employees to company • administrative sanctions in some countries leading to disqualification of directors and censure by financial regulator • disciplinary sanctions by employer |
|---|--|

Cartel Fines at EU Level (1)

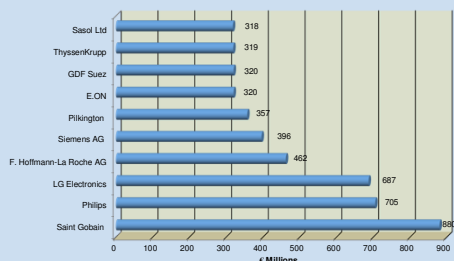
2006 European Commission Fining Guidelines

- Starting point for the fine is percentage of the company's annual sales of the product in the relevant market which can be up to 30% depending on:
 - Gravity of the infringement
 - Geographical extent of the infringement e.g. EU-wide
 - Duration of the infringement

- | | |
|--|--|
| <p>Aggravating circumstances</p> <ul style="list-style-type: none"> - Repeat infringer - Refusal to cooperate with Commission - Role as leader of cartel | <p>Mitigating circumstances</p> <ul style="list-style-type: none"> - Negligent rather than intentional - Limited role |
|--|--|

Cartel Fines at EU Level (2)

Highest cartel fines since 2000



Criminal Sanctions

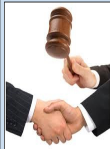
- No criminal sanctions at EU level
- Possibility of criminal sanctions in some Member States, e.g. UK and Ireland. For example:
 - Marine hose cartel: joint investigation between the US and UK which resulted in criminal charges against individuals in both countries



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Ongoing Antitrust Investigations: Examples (1)

- **Gazprom** – European Commission (EC) is currently investigating Russian energy giant Gazprom for possible anti-competitive practices in Central and Eastern European gas markets
- **Google** – EC investigation into the alleged unfavourable treatment of service search providers in Google's unpaid and sponsored search results and an alleged preferential placement of Google's own services
- **Platts, BP, Shell & Statoil** – The EC recently raided in relation to alleged manipulation of fuel indices
- **LIBOR** – EC investigation into the LIBOR (and other benchmark rate) manipulation. The LIBOR scandal concerned the false submissions of banks' estimated interbank lending rates in order to benefit their trading position



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Ongoing Antitrust Investigations: Examples (2)

Gazprom

In September 2012, the European Commission opened an investigation against Gazprom, the Russian producer and supplier of natural gas, due to concerns that the company may be abusing its dominant market position in upstream gas supply markets in Central and Eastern European Member States in breach of Article 102 TFEU

The Commission is investigating three main suspected anti-competitive practices

- Division of gas markets by hindering the free flow of gas across Member States
- Preventing the diversification of the supply of gas
- Imposing unfair prices on its customers by linking the price of gas to oil prices



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Ongoing Antitrust Investigations: Examples (3)

Google



- The European Commission opened an investigation against Google in November 2010 following complaints by search service providers of unfavourable treatment of their services in Google's unpaid and sponsored search results and an alleged preferential placement of Google's own services.
- The European Commission has announced four areas where Google is abusing its dominance and offered Google the chance to present voluntary commitments.

Platts, BP, Shell & Statoil

- The European Commission in May 2013 conducted dawn raids to establish whether the companies colluded to submit "distorted prices" to oil and gas index publisher Platts to manipulate prices in the oil and biofuel markets.

Ongoing Antitrust Investigations: Examples (4)

LIBOR

The European Commission is currently conducting an investigation into the alleged LIBOR (and other benchmark rate) manipulation. The LIBOR scandal concerned the false submissions of banks' estimated interbank lending rates in order to benefit their trading position



Parallel investigations:

- under securities laws
- in US and elsewhere

Monopolisation: US/EU Similarities

EU

- Prohibits any abuse by one or more undertakings of a dominant position:
 - dominance can arise as low as a 40% market share
- Dominance is not illegal, only *abuse* of dominance
- Special responsibility of dominant firms


US

- Prohibits unlawful monopolization, attempted monopolization, and conspiracies to monopolize.
- Requires:
 - monopoly power (or the dangerous probability of achieving it)
 - some form of exclusionary conduct
- A monopoly alone is not unlawful
- Conduct lawful for some, may be unlawful for a monopolist

Examples of abuse/exclusionary conduct: predatory pricing, margin squeezing, price discrimination, loyalty discounts, bundling, refusal to supply

Monopolisation: Fines

Record fines in abuse of dominance cases



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Private Enforcement (1)

- Historically the number of private antitrust actions in the EU has been low compared to the US
- Procedural differences across EU Member States and lack of legal certainty on the right to compensation
- In June 2013 the EC published its proposal for a Directive for standardized European approach across a number of policy areas including:
 - disclosure of documents
 - follow-on actions
 - the treatment of leniency recipients
- Attempt to stimulate private antitrust actions in Europe

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Private Enforcement (2)

Proposal for an EU-wide law on antitrust damages

- Disclosure of evidence**
 - Attempt to standardize disclosure rules across the EU and remove the possibility of forum shopping where claimants initiate damages claims in Member States which have more favourable disclosure rules
 - Courts would be able to order the disclosure of documents
 - National courts would be able to order disclosure of documents that were prepared by an agency during the course of an antitrust investigation only after the agency has found an infringement of competition law or has closed the proceedings

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Private Enforcement (3)

Proposal for an EU-wide law on antitrust damages (cont'd)

- **Follow on actions**
 - The Proposal for a Directive provides that all infringement decisions, by the European Commission or by an agency, will be binding on courts in follow-on actions
 - It is hoped this measure will entice injured parties to bring forward damages claims relying on the agency's findings
- **Damages**
 - Damages awards under the proposed Directive are to be compensatory in nature – wish to avoid promoting a litigation culture (no treble damages)
 - Rebuttable presumption of harm in cartel cases
- **Leniency programs**
 - Leniency statements and settlement statements would be exempted from disclosure

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Control of Government Subsidies (1)

- Control of 'State Aid'
- Member States cannot grant selective subsidies (in any form) to companies which would distort competition at EU level
- No favouritism for 'national champions'
- Notification requirements exist – government has to pre-notify, before grant
- No equivalent in US law

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Control of Government Subsidies (2)

'Crisis Aid' for EU Banks: US v. EU approach

US	EU
<ul style="list-style-type: none">• Banks received financial support• Banks required to repay financial support	<ul style="list-style-type: none">• Banks received financial support from Member States• Banks required to repay financial support• Banks required to implement structural and behavioural changes to eliminate the subsidies' effect on competition

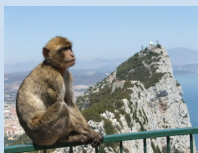
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Control of Government Subsidies (3)

Member States' tax measures

- In 2011, the European Court of Justice upheld a Commission finding that plans by the UK to reform Gibraltar's corporation tax – which would enable offshore companies to avoid taxation – would confer material selective advantages on those companies
- Therefore, such a tax system would constitute a state aid scheme which is incompatible with the internal market
- The European Commission is now probing Ireland, for example, with regard to its low corporate tax rates



4. Cross-border Conflicts at the Crossroads of Antitrust and IP

Standard-Essential Patents (SEPs)

- Standard-setting organizations (SSOs) convene industry participants to develop industry-wide standards
- Participants contributing patented technology to the standard may declare their patent "essential" to implementing the standard; those patents are called SEPs
- SEP owners often agree to license their SEPs on a fair, reasonable, and non-discriminatory (FRAND) basis
- SEP owners that refuse to license SEPs on a FRAND basis can cause "patent hold up" where potential licensees will have to pay exorbitant sums to obtain a license to the SEP

Are Injunctions Un-FRANDly?

- US: While some FTC officials expressed reticence with delving too far into SEP issues, the FTC has taken action against SEP owners seeking injunctions on FRAND-encumbered SEPs; also, senior DOJ official recently noted that failing to license FRAND-encumbered SEPs may constitute an antitrust violation
 - *Robert Bosch GmbH and Google/MMI*: FTC required both parties to drop suits seeking injunctive relief against any willing licensee and prohibited parties from seeking injunctions on SEPs against any willing licensee
- EU: The Commission has preliminarily taken the view in two cases that seeking an injunction for SEPs can serve as an abuse of dominance where the SEP holder committed to license on FRAND terms
 - *Samsung Electronics Co.*: Samsung is proposing a settlement with the EC
 - *Google/MMI*: Oral hearing took place recently



Reverse-Payment Settlements

- US: After *FTC v. Actavis Corp.*, US Supreme Court applies rule-of-reason standard to reverse-payment settlements
- EU: EC also is in the process of wrapping up two significant investigations in this area
 - *Servier*: EC issued Statement of Objections in July 2012, and is apparently reaching an end to the investigation
 - *Lundbeck*: EC imposed €146 million in fines because Lundbeck paid and induced generic drug producers not to enter the market and to destroy existing stock of generic drugs

Patent Assertion Entities (PAEs or Patent Trolls)

- US: White House, Congress, FTC, and DOJ continue to assess the effects of PAEs
 - September 27, 2013: FTC to use Section 6(b) authority to study PAE activity
 - June 4, 2013: Obama administration issued executive actions and legislative recommendations relating to PAEs
- EU: EC has been less active on the PAE front but recently invited study of the role of IP in the semiconductor industry with a section dealing with non-practicing entities



5. Global Competition Policy Coordination

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Competition Policy Coordination Among EU, US, and China

- EU, US, and China have signed separate Memoranda of Understanding (MOU)
 - September 23, 1991: US and EU sign MOU
 - July 27, 2011: US and China sign MOU
 - September 20, 2012: EU and China sign MOU
- Because International Competition Network (ICN) has had some success in facilitating cross-border competition dialogue, bilateral MOUs are less frequent

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International Competition Policy Coordination

- ICN and MOUs create a common framework that can foster communication and cooperation across jurisdictions on a number of fronts including:
 - Sharing confidential information or business secrets (cf. waivers)
 - Comparing legal and economic theories regarding market definition and theories of harm
 - Affording deference or suspending an investigation where a specific competition authority has a greater interest in investigating
 - Commenting on proposed rules, regulations, and guidelines
 - Increasing transparency of competition analysis and decision-making processes



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Multiple Reviews . . .

- Glencore's acquisition of Xstrata: The European Commission required a remedy concerning zinc. MOFCOM imposed a divestiture of a copper mine project in Peru. MOFCOM's clearance came last, delaying closing
- SEPs: Consistent with US and EC policy, judge in Supreme People's Court of China recently noted that refusals to license SEPs may be considered an abuse of dominance



6. EU Data Protection Reform

Data Protection Reform Proposal

- Draft bill proposes significant reforms aimed at remedying lack of legal certainty under the current applicable EU law
- Reform aims to:
 - strengthen online privacy
 - address fragmentation of national laws – companies with operations in multiple countries would be subject to the jurisdiction of a single data protection authority
- Possibly huge impact on personal data management of EU and non-EU companies. For example, the following rules are under discussion: "right to be forgotten", right of data portability, reduction in use of implicit consent, mandatory notification of data security breaches, data protection officer for companies with more than 250 employees



Next Steps

- Applicable to companies not established in the EU if they offer goods or services in the EU or monitor the online behaviour of citizens
- Reform causing heated debates in the European Parliament and Council of Ministers
- NSA/PRISM revelations have stirred controversy
- Strong will to adopt law before 2014 parliamentary elections
- Wide media coverage focusing on lobbying efforts of US and UK authorities and US industry



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7. EU Anti-Corruption Policy

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EC To Address Fragmentation of Laws (1)

- No unified EU legislation: all Member States have laws against corruption but they are not always implemented consistently
- Member States have given the European Commission a political mandate to develop a common anti-corruption approach ("Stockholm Programme", 2010-2014)
- Light-touch approach to common European policy, examples of steps to be taken:
 - two yearly assessments monitoring Member States' progress in preventing and reducing corruption (start 2013)
 - amending rules on award of government contracts, accounting standards and statutory audits for EU companies



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EC To Address Fragmentation of Laws (2)

- The European Parliament recently adopted a draft report on organised crime, corruption and money laundering recommending which actions should be taken to combat corruption
- UK Anti-Bribery Act has not yet seen a marquee corporate prosecution since its introduction in 2011. The UK Serious Fraud Office is currently conducting a consultation re Deferred Prosecution Agreements in the UK, which may ultimately lead to an increase the number of companies who admit to bribery infringements in the hope of avoiding criminal sanctions

8. Trade Law

Will Bilateral Trade Agreements Sound the Death Knell to WTO Negotiations?

- US and EU to expand trade relationship through Transatlantic Trade and Investment Partnership (T-TIP)
 - By January 2014, US and EU plan to develop first outline for T-TIP
- US and China are expanding trade relations as well
 - Reports suggest that US and China have experienced a "breakthrough" in negotiating Bilateral Investment Treaty (BIT)
 - US-China Joint Commission on Commerce and Trade (JCCT) continually work to improve Sino-US trade relations
- Last year, US and EU launched Trade in Services Agreement (TiSA) talks; China set to join trade talks as well
- Relative difficulty in achieving multilateral trade consensus suggests that progress in future negotiations may lay with bilateral or regional trade pacts, over WTO multilateral negotiations



EU Dumping and Trade Policy

A company is dumping if it is exporting a product at prices lower than the "normal" value of the product (the domestic prices of the product or the cost of production) on its own domestic market

- The European Commission is responsible for investigating allegations of dumping by exporting producers in non-EU countries
- It usually opens an investigation after receiving a complaint from the Community producers of the product concerned, but it can also do so on its own initiative

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Recent Examples

- The EC recently accused China of selling solar panels below-cost and threatening 25,000 jobs in the European solar panel industry. On this basis the European Commission decided to impose provisional anti-dumping tariffs on Chinese solar panels in June 2013. The Chinese government then began lobbying EU governments to oppose the Commission's tariff plan. The pressure succeeded and the European Commission found "an amicable solution in the EU-China solar panels case that will lead to a new market equilibrium at sustainable prices"
- In response to the agreement to avoid tariffs on the imported solar panels China agreed to discuss dropping an anti-dumping probe it was conducting into European wine imports which was widely seen as a retaliation against the EU for the solar-panel tariffs



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Pending Dumping Cases: Examples

- In February 2012, the Commission imposed a provisional anti-dumping duty on imports of steel ropes and cables originating from the People's Republic of China
- In June 2013, the European Commission announced the initiation of anti-dumping proceedings concerning imports of agglomerated stone originating from the People's Republic of China



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