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COMPETITION LAW OF THE EUROPEAN COMMUNITY

Fifth Edition

VAN BAEL & BELLIS

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Competition Law of the European Community

PREFACE TO THE FIFTH EDITION

Together with trade policy, competition policy is an area where the EU authorities, and especially the European Commission, enjoy extensive investigative and regulatory powers. Building on Articles 81 and 82 of the EC Treaty, the Commission has over the years constructed an increasingly complex body of rules and regulations. In enforcing Articles 81 and 82, the Commission has not limited itself to intervention against the "traditional" antitrust offences such as price-fixing, market-sharing, the typical abuses of market power and the like. Instead, it has set out in an ambitious effort to regulate major aspects of business transactions in increasing detail. As a result, it is today more hazardous than ever to draft a distribution, licensing or joint venture agreement, to cite only a few examples, without having regard to EC competition law. Key factors that have now increased to a spectacular extent the cost of non-compliance with EC competition rules are the Commission's policy of imposing ever more severe fines, which have now exceeded €1 billion for a single company, and the encouragement it is now giving to private damages actions. In the wake of the modernization package of 2004, the dynamic lead of the Commission is also increasingly being followed in the vigorous application of Articles 81 and 82 at the national level. Similarly, in the area of merger control, the Commission has not limited itself to opposing mergers between large European companies leading to a single dominant firm. Rather, the Commission has exerted its authority over many non-EU firms and has applied ever more complex theories in opposition of mergers, acquisitions and certain joint ventures.

The purpose of this book is to provide a comprehensive and up-to-date analysis of the EC competition rules as developed by the Commission, the Court of First Instance and the Court of Justice. What distinguishes this book from other books written on the same subject is the perspective chosen by its authors from the first edition on: drawing on their experience as practitioners, they have attempted to cut through the theoretical underpinnings of EC competition law to expose its actual impact on business. This book combines a critical commentary on the rules with practical guidance on their application. It should therefore prove to be useful to both businesspersons and their legal advisers.

The fifth edition of this book on EC competition law updates all chapters of the fourth edition and includes significant developments up to the summer of 2009. The chapters on procedure and state involvement in competition in particular have been significantly extended.

The fifth edition of this book has been written and edited by the competition law team of Van Bael & Bellis. We wish to thank the following authors and editors (listed in alphabetical order) for their contributions: Marc Abenhaim, Antoine Bailleux, Gábor Báthory, Katharina Bongs, Richard Burton, Tomas Cihula, Thibaut D'Hulst, Florin Dascalescu, Raffaele Di Giovanni, Porter Elliott, Martin Favart, Anders Flood, Claire François, Sean Gerlich, Anna Halford, Etsuko Kameoka, Tim Kasten, Andrzej Kmiecik, Monika Kuschewsky, Anne Lamote, Peter L'Ecluse, Martin Martinez, Charlotte Nassogne, Helen Palmer, Kaisa Pärssinen, Stephanie Reinart, Christos Sakellariou,

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Ivo Van Bael Jean-François Bellis

ABOUT THE AUTHORS

The authors of the fifth edition of Competition Law of the European Community are the members of the multinational competition law team of Van Bael & Bellis in Brussels, one of the leading law firms in the area of EC competition law.

INTRODUCTION

DEVELOPMENTS SINCE THE FOURTH EDITION

The previous fourth edition of this book was published at the end of 2004, which had been a momentous year in the history of EC competition law. The new 'modernized' regime of enforcement had just entered into effect, abolishing the notification procedure under Article 81 together with the Commission's exclusive right to grant exemptions under Article 81(3). The responsibility for applying both Article 81(1) and 81(3) was for the first time to be shared with the national competition authorities and national courts. At the same time, a new EC Merger Regulation had entered into effect, as well as a new Technology Transfer Block Exemption. The years preceding the previous edition had also seen new block exemptions and guidelines in the field of vertical and horizontal agreements.

In the light of the above, it is not surprising that the legislative and other changes that have occurred since 2004 have been relatively modest. These years have first and foremost been a time for gaining experience in the application of the procedural and substantive rules which underwent such fundamental changes in the run-up to the previous fourth edition.

The somewhat more balanced relationship between the Commission and the Member States' competition authorities which now exists has not been marred by major jurisdictional conflicts and the Commission has not used its powers to remove jurisdiction over specific behavioural cases from the national competition authorities. There has been an explosion of enforcement at the national level, often involving the parallel application of EC and national competition law. In terms of the numbers of decisions issued, the output at the national level has become far greater than that of the Commission. In many areas of the law (particularly involving vertical agreements outside of the motor vehicle sector), almost the only formal infringement decisions issued are now decisions taken by the national competition authorities. Although this decentralization of enforcement entails risks of diverging interpretations of EC law being adopted, it is still early days to assess meaningfully to what extent this has been happening in practice.[1] At the European Community level, the Commission has made considerable use of the power given to it for the first time by the Regulation on Procedure to issue commitment decisions, which avoids the need for a decision to be taken as to whether an infringement has occurred.

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1 The *Gremeau* case in France concerning selective distribution is, however, an important example of a divergent interpretation occurring at the highest judicial level in a Member State. See §3.54(2)(b) below for further consideration of this case and the intervention of the Commission.

In 2006, the Commission issued its revised Fining Guidelines.[2] Ever increasing fines have been a striking feature of the past years of competition law enforcement by the Commission, and in 2009 in *Intel* an individual fine for the first time breached the €1 billion barrier.[3] Although the Commission retains considerable discretion in setting the amount of the fine within the general parameters set by the Regulation on Procedure, the revised Fining Guidelines signal higher fines than under the previous guidelines, particularly in large markets and concerning infringements of long duration. Fines have reached such proportions that serious questions have started to be asked as to whether the infliction of this level of financial damage on companies is appropriate. Furthermore, new risks have arisen for companies on appeal, as the Court of First Instance has for the first time used its unlimited jurisdiction to increase a fine imposed by the Commission.[4]

Most of these fines, and most infringement decisions adopted by the Commission, have been in cartel cases. Cartel enforcement has been the area to which the Commission has allocated more of its enforcement resources than any other. The Commission's 2006 revised leniency programme has succeeded in generating an unprecedented number of cases.[5] The record levels of fines being imposed have meant that enforcement costs have presumably been recovered many times over for the Community. In an attempt to reduce the administrative burden and delays involved in having to conduct full proceedings, the Commission adopted a formal settlement procedure in June 2008.[6] It remains to be seen whether the relatively modest incentives on offer (essentially, a reduction in the fine of 10%) will encourage widespread use of this procedure, particularly by companies that have not sought to benefit from the leniency programme.

In the field of Article 82, the *Microsoft* judgment[7] of the Court of First Instance was perhaps the most mediatised ruling in the history of EC competition law. Applying a deferential standard of review, the Court of First Instance upheld all of the Commission's substantive findings (although it rejected the Commission's attempt to force Microsoft to create and pay for a monitoring trustee to supervise its compliance). With renewed confidence, the Commission has continued to pursue individual Article 82 cases with vigour, as evidenced by the record fine imposed on Intel in 2009, in particular concerning pricing, tying and interoperability. In December 2008, the Commission finally issued its long-delayed Guidance on Abusive Exclusionary Conduct.[8] In comparison to the Discussion Paper issued in 2005, the final version of the document is a more modest product. It is not a statement of the law and has only the limited purpose of providing guidance concerning the Commission's enforcement priorities. Although in

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2 The Commission's Fining Guidelines are discussed in §10.25.
3 *Intel*, Case COMP/C-3/37 .990 (decision currently only available on the Commission's website).
4 *See BASF and UCB* v. *Commission*, [2007] ECR II-4949 (paras 213-223).
5 The Commission's Leniency Notice and its implications are described in §10.27.
6 The Commission's 2006 Settlement Notice is described in §10.33.
7 *Microsoft* v. *Commission*, [2007] ECR-II 3601.
8 The Guidance on Abusive Exclusionary Conduct is discussed in §8.7.

some respects it follows the pattern of earlier reviews of other areas of competition law by appearing to reflect a more liberal economics-based view, it nonetheless leaves a substantial degree of discretion to the Commission and it remains to be seen whether it will in practice herald a softening of approach in, for example, the field of discounts compared to the much criticized case law in this area.

In the field of merger control, it is debatable whether the broadening of the substantive test from the previous dominance standard to one of "significantly impeding effective competition" has resulted in the Commission raising objections in cases that previously would have been approved. What is clear, however, is that the trend towards more sophisticated, economic-based decision-making continues. This was the case even prior to the European Court of Justice's 2008 ruling in *Sony/BMG* that the same standard of proof must be applied by the Commission to approve a merger as to prohibit one.[9] It is fair to say that the overall burden of EC merger control for business has never been higher. Since the fourth edition of this book, data requests have become even more onerous and the average duration of Commission merger reviews has increased. This may explain why there already appears to be a decline in the number of companies seeking to use the referral mechanism introduced by the current Merger Regulation to transfer jurisdiction over concentrations without a Community dimension. While companies may well appreciate having the option to make a referral request from the Member States to the Commission, in many cases making multiple notifications to Member State competition authorities may be a quicker route to deal approval.

A feature of recent years has been the holding of sector inquiries by the Commission, thus far in the financial services, energy and pharmaceutical sectors; the inquiry of the pharmaceutical industry was even initiated by unannounced inspections (known as dawn raids). Such inquiries have resulted in growing enforcement in the energy and financial services sectors by way of follow-up proceedings against individual companies.

In the pharmaceutical sector, the sector inquiry followed the Commission's *Astra Zeneca* decision, a striking decision which found the company's use of patent and regulatory procedures to infringe Article 82.[10] Another important development was the highly anticipated ruling of the Court of Justice in *Glaxo Greece*.[11] After conflicting opinions of two Advocate Generals, the Court of Justice ultimately recognized that dominant pharmaceutical producers may at least limit supplies of medicines destined for parallel trade without infringing Article 82. This was based in part on the recognition that the distortive effect of state-regulated pricing places some limits on the goal of single market integration.

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9 *Bertelsmann and Sony* v. *Independent Music Publishers and Labels Association (Impala)*, [2008] ECR I-4951.

10 *AstraZeneca*, Case COMP/A.37.507/F3 (decision available on the Commission's website; a summary version of the decision is also available at OJ 2006 L332/24); on appeal: *AstraZeneca* v. *Commission*, Case T-321/05, not yet decided.

11 *Sot. Lelos kai Sia EE and Others* v. *GlaxoSmithKline AEVE Farmakeftikon Proionton*, Joined Cases C-468/06 to C-478/06, not yet published.

The Commission has continued to pay, arguably, disproportionate attention to distribution issues in the motor vehicle sector in the application of the Motor Vehicle Block Exemption. The Evaluation Report published by the Commission in 2008, and the subsequent Communication on the future competition law framework adopted in July 2009, appear to reflect for the first time an acknowledgement on the part of the Commission of the questionable benefits of this approach.[12]

Overall, after a string of high profile defeats before the European Courts earlier in the decade, most notably in merger cases, the Commission has since fared much better in recent appeal proceedings. The long trend of deference to Commission decisions in non-merger cases, in particular those under Article 82, has continued. In addition to *Microsoft*, this trend is reflected by cases such as *British Airways*[13] and *France Télécom*.[14] The *Schneider*[15] and *MyTravel*[16] judgments are also important as they confirm the very demanding test which must be met in order to trigger the Community's non-contractual liability and which, therefore, appear to virtually eliminate the prospect of the Commission being exposed to huge damages awards in complex merger control proceedings in which it is found to have committed errors of assessment.[17]

Looking ahead, the Commission has been actively pursuing a policy initiative to promote private damages actions for breaches of the competition rules in the national courts and issued a White Paper in April 2008.[18] Further initiatives appear likely.

At the time of going to press, Europe is facing an unprecedented financial and economic crisis. The effect of this on the enforcement of EC competition law remains to be seen and whether, despite early calls for vigilance, the Commission may bow to political pressures to permit greater consolidation through mergers and other forms of horizontal cooperation than would have been acceptable in the recent, more prosperous past.

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12 The rules in the motor vehicle sector are discussed further in §3.50–3.64.

13 *British Airways* v. *Commission*, [2007] ECR I-2331.

14 *France Télécom* v. *Commission I*, [2007] ECR II-107; on further appeal: *France Télécom* v. *Commission*, Case C-202/07 P, not yet decided.

15 *Schneider Electric* v. *Commission III*, [2007] ECR II-2237; on further appeal: *Commission* v. *Schneider Electric*, Case C-440/07P, not yet published.

16 *MyTravel Group* v. *Commission I*, Case T-212/03, not yet published.

17 Actions for damages based on the non-contractual liability of the Community are discussed in §10.35(3).

18 The Commission White Paper on damages actions for breach of the EC antitrust rules is discussed in §11.4(3)(b).

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