



ANTITRUST LAW & POLICIES FROM BRUSSELS TO WASHINGTON, DC BRIDGING THE ATLANTIC DIVIDE?

17 October 2014 | Skadden Arps, Brussels



This half-day conference was organized by Concurrences Journal together with Skadden Arps and RBB Economics. Leading enforcers, practitioners, and economists discussed antitrust law and policy issues on both sides of the Atlantic. Key-note speech was delivered by Monique van Oers - Netherlands Authority for Consumers and Markets.

ATTENDEES

- ABB
- Anheuser-Busch InBev
- APCO Worldwide
- BHP Billiton
- DBB
- G+ Europe
- ING Bank
- Kuoni Global Travel Services
- Nokia
- Orange
- Priceline
- Samsung Electronics
- SanDisk
- SES Astra
- Solvay
- Stryker
- Thales
- The Brattle Group
- Transocean Management
- UPS Europe
- Vodafone

PROGRAM

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- 08.30 | 08.45** KEYNOTE SPEECH
Monique VAN OERS | Director, Legal Department, Netherlands Authority for Consumers and Markets, The Hague
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- 08.45 | 10.00** VERTICAL RESTRAINTS: ENFORCEMENT ON THE RISE
Rainer BECKER | Deputy Head of Unit, Antitrust case support and policy, DG COMP
Stephanie DOMINY | VP Legal, General Counsel, Kuoni Global Travel Services, London
Andrea LOFARO | Partner, RBB Economics, Brussels
Moderator: Frederic DEPOORTERE, Partner, Skadden Arps, Brussels
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- 10.15 | 11.30** MERGER CONTROL: RECENT DEVELOPMENTS IN EU AND US
Kate COLLYER | Director of Economics, Competition & Markets Authority, London
Johannes LUEBKING | Head of Unit, Mergers case support and policy, DG COMP
Jenni LUKANDER | Director, Global Head of Competition Law, Nokia, Finland
Matthew HENDRICKSON | Partner, Skadden Arps, New York
Moderator: Simon BAXTER, Partner, Skadden Arps, Brussels
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- 11.45 | 13.00** PRIVATE DAMAGES: THE EU DIRECTIVE - ARE WE THERE YET?
Ludovic BERNARDEAU | European Court of Justice, Référendaire, Luxembourg
Dominique SPEEKENBRINK | VP Legal Counsel Antitrust, ABB, Zurich
Francesco ROSATI | Partner, RBB Economics, Brussels
Paul ECKLES | Partner, Skadden Arps, New York
Moderator: Ingrid VANDENBORRE, Partner, Skadden Arps, Brussels
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- 13.00 | 13.10** CLOSING REMARKS
James VENIT | Partner, Skadden Arps, Brussels



PANEL I

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VERTICAL RESTRAINTS: ENFORCEMENT ON THE RISE

The first panel discussed recent developments on vertical restraints. The panel initially focused on whether the rules on vertical restraints needed to be rethought, given the increasing importance of online distribution alongside other traditional distribution methods. Many of the developments in online commerce were considered to be positive for competition, assisting customers in identifying a variety of offers, increasing intra- and inter-brand competition, enabling more informed consumer choice and facilitating market entry. It was noted that President-elect Jean-Claude Juncker's decision to put the issue at the top of his agenda, was unsurprising given the significant attention that vertical restraints have received and the uncertainty surrounding this constantly changing area of commerce.

The panel discussion then focused on the area of online hotel booking where several Member States of the EU have initiated investigations into sales restrictions. Panelists

discussed whether the online model provided added value to customers or added services to hotels. On this basis, the panel explored arguments that the rational and conceptual framework for distribution online and offline remains the same and that the e-commerce vertical relationship is still chiefly about distribution.

The panel contrasted the EU regime with the US paradigm. Panel members remarked on the fact that federal enforcers in the US appear to no longer bring cases that do not have some horizontal element. The panel considered the position of the Commission as against other national authorities and debated whether the Commission ought to rethink its approach to the block exemption, and the list of hard core restrictions and guidelines, given the great deal of case law that has been developed by national authorities.

Concern was expressed about the uncertainty emanating from the diverging views between different

national competition authorities, even within the EU. This was thought to lead to duplication of effort by both authorities and industry participants and the fear that different authorities will come to different conclusions, making it potentially impossible for participants to comply across multiple jurisdictions.

It was generally agreed that the Commission would be ideally placed to offer a pan-European approach on these difficult cross-border issues. The Commission is attempting to co-ordinate and communicate more intensively with the national competition authorities in this area, in order to find collective solutions. The group deliberated over the possibility that a single EU Member State take the lead and coordinate an approach. The panel considered that case law from the European Court might be helpful to set out a uniform framework for assessment. ■





PANEL II

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MERGER CONTROL: RECENT DEVELOPMENTS IN EU AND US

The focus of the second panel was on recent developments in merger control, concerning both the EU and the US regimes. Of particular interest was the issue of market definition in the telecommunications market and this was analysed in relation to the Microsoft/Skype case. The panel considered various examples in this industry. The group noted

that while market shares were quite high in consumer communication, this was a very dynamic industry with a great deal of growth and innovation, and one in which new players were frequently emerging.

The panel considered the US perspective on the efficiency debate and discussed the requirements surrounding a failing firm defense.

The question of cooperation between US agencies on the one hand and the EU on the other was addressed by all the panel, with members focusing on how well this coordination was working and how it might be improved to ensure that the bodies return decisions with non-conflicting remedies. ■



PRIVATE DAMAGES: THE EU DIRECTIVE - ARE WE THERE YET?



The panel discussed the possible implications of the recent directive on damages and assessed its likely impact on future damages claims. The group acknowledged that while harmonizing rules must be a welcome objective, the relatively high degree of legal uncertainty that was left by the directive in several areas was concerning.

After a long awaited process, the final proposal to be adopted in November, looks to optimize the different factors of private and public enforcement. The directive is based on the internal market provision of the Treaty and drafted with the objective of harmonizing the procedural and substantive rules for victims of breaches of competition rules to obtain compensation. The panel acknowledged, however, that there were a number of open points that would still need to be resolved by national law. It was evident that there is currently no common view for example on

what the trigger ought to be for the application of the limitation period set out by the directive. The panel also considered the impact of the directive in economic terms, and discussed the EC Guide on quantifying harm, where damages are seen as flowing from exclusionary conduct.

The panelists identified uncertainty over the legal basis for joint and several liability for damages. Panelists commented that if the intention of the directive is to maintain the incentive of immunity, then it may be preferable for joint and several liability not to apply to the question of damages, and exceptions to this rule – as currently provided for in the directive – ought to be applied restrictively. The position was compared with US processes where several and joint liability exists without a right of contribution. In this context, defendants have developed different strategies for dividing fines, including judgment sharing agreements

where parties will agree to contribute their market share of the decision in a case.

The panel also considered the issue of document retention. Recognizing the possibility of follow-on claims, companies increasingly need to anticipate later disclosure and manage files accordingly. Awareness of potential follow on civil claims is likely to be a factor in the relationship with the investigating government agency, particularly for leniency applicants. Some of the panel hoped to see document retention policy developed in respect of critical documents, in recognition of the business reality that archiving is not always a perfect process. The panel discussed differences between the EU and the US, where processes are substantially less document intensive, and claimants seek discovery directly from defendant companies. ■

Skadden



SKADDEN: GLOBAL COMPETITION ELITE

investigations and litigation, trial-level and appellate litigation, and international arbitration. In the U.S., Skadden lawyers assist clients in hearings before the Congress and federal regulatory agencies, including those in health care, energy, transportation and communications, as well as the U.S. Department of Defense.

Awards and Rankings

Skadden was selected by *The American Lawyer* as a finalist in its 2014 Litigation Department of the Year issue and named among *Law360's* Competition Groups of 2013. We were named the Antitrust Firm of the Year at the 2013 *Benchmark Litigation Annual Awards*. *Chambers Global*, *Chambers USA*, *Legal 500* and U.S. News – Best Lawyers “Best Law Firms” recognize Skadden as one of the top-tier firms in the area of antitrust and competition. In addition, we rank among *Global Competition Review's* Global Elite in the GCR 100, the publication's guide to the world's leading competition law practices. ■

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Offices

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Antitrust lawyers

Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates provides timely, seamless assistance with competition law challenges. The Antitrust and Competition Group possesses the proven ability to pilot the most sophisticated international competition investigations, merger reviews and litigations through the complexities of a new and shifting framework. Given that today's competition law enforcers increasingly coordinate, clients should expect the same from their counsel.

Worldwide Platform

To best assist clients, the Antitrust and Competition Group draws on the resources of Skadden's worldwide platform, which includes focused, integrated services in global mergers and acquisitions, government enforcement and white collar criminal