
EU Competition Law and its Relevance for Russian Metal and Mining Companies



Russian Union of Industrialists and Entrepreneurs

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Structure of the Presentation

Part I: Basics of EU Competition Law

Part II: Recent Enforcement of EU Competition Law

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Part I

Part I: Basics of EU Competition Law

- EU Competition Rules
- The Relationship between EU and National Competition Laws
- Possible Consequences of an Infringement

EU Competition Rules

- **Cartels**, anticompetitive coordination: Article 101 of the Treaty on the Functioning of the European Union (“TFEU”)
- **Abuse of a dominant market position**: Article 102 TFEU
- **State aid**, state-owned firms and anticompetitive regulations: Articles 106 et seq. TFEU
- **Merger control**: EU Merger Regulation (“EUMR”)

Relationship between EU and National Laws

EU competition law applies in the 27 EU and the 3 EEA Member States

- **Article 101 and 102 TFEU:**

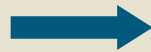
- European Commission (“Commission”) and National Competition Authorities (“NCAs”) enforce EU competition law
- Cooperation through the European Competition Network
- NCAs also enforce national competition law

- **Merger Control:**

- Concentrations that meet the EUMR thresholds (i) will only be reviewed by the Commission and (ii) do not require national filings
- Concentrations that do not meet the EUMR thresholds may require filings with NCAs
- Exception: Referral to Commission or NCAs at the request of parties or NCAs

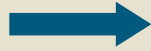
Possible Consequences of an Infringement

Significant fines



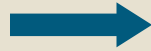
Up to 10 % of the worldwide group turnover

Impact on agreements



Nullidity of agreements and divestment of mergers

Litigation



Private damages claims (under national laws)

Imprisonment of directors/managers



Prison sentences in some Member States

Part II

Part II: Enforcement of EU Competition Law

- Enforcement Trends and Tools
- Level of Fines

Enforcement Trends and Tools

- Commission has stepped up enforcement activities in the recent years
 - Increased level of fines in recent years
 - Closer coordination with National Competition Authorities in the EU and elsewhere (e.g., Russia)
- Primary investigation “tools”:
 - Unannounced inspection (dawn raids)
 - Leniency programs
 - Requests for information
 - Sector inquiries



Increasing Level of Fines in Cartel Cases

Period	Amount in €*
1990 – 1994	344,282,550.0
1995 – 1999	270,963,500.0
2000 – 2004	3,157,348,710.0
2005 – 2009	8,924,457,162.5
2010 – 2011	3,482,729,432.0
Total	16,179,781,354.5

Source: Commission (December 7, 2011)

*) Amounts corrected for changes following courts judgments and only considering cartel infringements under Article 101 TFEU (previously Article 81 EC Treaty).

Record Fines Imposed on Companies in Cartel and Abuse-of-Dominance Cases

Year	Undertaking	Amount in €*
2009	Intel	1,060 million
2008	Microsoft	899 million
2008	Saint Gobain	896 million
2009	E.ON	553 million
2009	GDF Suez	553 million
2004	Microsoft	497 million
2001	F. Hoffmann-La Roche AG	462 million
2007	Siemens AG	396 million

*) Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice)

Part III

Part III: Relevance for Non-EU Companies

- Extraterritorial Application, and
- Extraterritorial Enforcement of EU Competition Law

The Application of EU Competition Law to Non-EU Companies

- **Single economic entity doctrine** (ECJ case 48/69, ICI v. Commission (*Dyestuffs*))
 - Conduct of EU subsidiary can be attributed to Non-EU parent company
 - Non-EU parent company must control EU subsidiary
 - Rebuttable assumption of control for (almost) wholly-owned subsidiaries
 - Non-EU parent company is (jointly and severally) liable for infringements of its EU subsidiary

The Application of EU Competition Law to Non-EU Companies (2)

- **Implementation doctrine** (ECJ case 89/85, A.Ahlström Oy v. Commission (*Woodpulp*))
 - Agreements/practices fall within the scope of EU competition law, if they are implemented within the EU
 - No need for physical presence in the EU, implementation (e.g., through sales) in the EU is sufficient
 - Possible gap: negative behavior (agreement not to sell to or buy from an undertaking in the EU), lack of implementation?
- **Effects doctrine** (no express adoption by EU courts)
 - Application of EU competition law, if there is a (foreseeable) effect in the EU
 - Commission decisions (e.g., case COMP/39.181 Candle Waxes)
 - Considered by the General Court (case T-102/96, Gencor Ltd. V. Commission)

Extraterritorial Enforcement of EU Competition Law

- **Investigations**

- Commission cannot force non-EU companies to cooperate with its investigation
- Commission can take lack of cooperation or obstruction into account in final decision and increase the fine
- Commission usually requires EU subsidiaries to cooperate with its investigation
- March 10, 2011: MoU on cooperation between the Russian FAS and the Commission

- **Sanctions**

- Commission cannot enforce orders in the territory of a foreign state
- Commission can enforce orders against an EU subsidiary or seize assets present in the EU
- Commission, submission to the OECD Roundtable on Cartel Jurisdictional Issues, 2008:

“So far problems relating to execution of fines have, however, rarely arisen as the mere threat of enforcement measures (which are indeed effective) seems to date have been sufficient to secure compliance.”

Part IV

Part IV: Recent EU Competition Policy Developments

- Overview: Major Recent Policy Developments
- Enforcement Priorities for Article 102 TFEU
- New Vertical Rules for Supply and Distribution
- New Rules for Collaborations with Competitors

Overview: Major Policy Developments

- 2006: New **Fining Guidelines** and **Leniency Program**
- 2007: **Non-Horizontal Merger Guidelines** (for vertical and conglomerate mergers)
- 2008: Procedure for **Settlements** in Cartel Cases introduced
- 2009: Commission declares its **Enforcement Priorities** for applying **Article 102 TFEU**
- 2010: New Rules for **Vertical Agreements**
- 2011: New Rules for **Horizontal Collaboration Agreements**

Article 102: Enforcement Priorities

- Guidance on **enforcement priorities**, new economic approach (not meant as a statement of the law)
- Focus on **single dominance** and **exclusionary conduct** (not: collective dominance and exploitative conduct)
- **General approach**
 - Safeguarding the competitive process and not the protection of competitors
 - Effects on consumers
 - Objective necessity and efficiency defense

Article 102: Dominance and Market Power

- **High market shares** are only an **indication**
- Low market shares (below **40 %**) are an indication for the absence of substantial market power
- Can the firm behave independently of **competitive constraints** exercised by
 - Actual competitors?
 - Entry of potential competitors?
 - High bargaining strength of customers?

Article 102: Exclusionary Conduct

- **Anticompetitive Foreclosure**
 - **Foreclosure:** Access to market is hampered or eliminated
 - **Anticompetitive:** In such a way that consumers are harmed
- Assess the current or likely future market situation relative to an appropriate **counterfactual**
- **Criteria:** Conditions of entry, existence of scale/scope economies, network effects, counterstrategies of competitors and customers, market coverage, etc.
- Small place for “hardcore conduct”

Article 102: Defences

- **Conduct may be justified, if**
 - **Objectively necessary** and **proportionate**, or
 - **Efficiencies** outweigh the anticompetitive effects on consumers
- **Efficiency defense:** Dominant firm must prove that
 - The efficiencies are the result of the conduct
 - The conduct is indispensable (no less restrictive alternative)
 - The efficiencies outweigh the negative effects for consumers
 - The conduct does not eliminate effective competition (conduct must not maintain or create a monopoly)

Article 101: New Rules for Vertical Agreements

- Block Exemption Regulation (“BER”) 330/2010 and Guidelines
- **BER 330/2010** states what kind of vertical agreements are exempted under Article 101(3) TFEU; it does not state what kind of agreements infringe Article 101(1) TFEU
- BER 330/2010: „**Safe harbor**“ for vertical agreements, if
 - Market share of supplier and buyer not more than 30 % on the selling and purchasing markets
 - No hardcore restriction
 - No exception from safe harbor rules
- **Guidelines:** Principles for the Commission’s assessment of vertical agreements under Article 101 TFEU

BER 330/2010 for Vertical Agreements

- **Hardcore Restrictions** under the BER 330/2010 include
 - Price fixing restrictions, resale price maintenance
 - Certain territorial/customer sales restrictions (generally)
 - Certain territorial/customer sales restrictions in selective distribution systems
 - Certain sales restriction affecting spare parts
- **Other non-exempted restrictions:**
 - Buyer non-compete obligations (incl. quantity obligations of >80 %) if beyond 5 years
 - Post-termination buyer non-compete obligations
 - Restriction on sales of particular competing product (in selective distribution system)

Article 101: New Rules for Horizontal Agreements

- Cooperation agreements between actual and potential competitors
- BER 1217/2010 on **Research & Development**
- BER 1218/2010 on **Specialization**
- **Horizontal Cooperation Guidelines**, guidance for
 - Information exchange
 - Research and development agreements
 - Production agreements
 - Purchasing agreements
 - Commercialization agreements
 - Standardization agreements

Information Exchange

- “Information exchange” includes the sharing of data:
 - Directly between competitors
 - Through a common agency (e.g. trade association)
 - Through a third party
- **No safe harbor**
- **New enforcement trend:**
 - € 38 million fine on Kraft Foods, Unilever and Dr. Oetker (Germany, Bundeskartellamt, 2011)
 - £33.6 million fine on Royal Bank of Scotland (unilateral disclosure – UK, OFT, 2010)
 - €88 million fine on five Dutch mobile phone operators (one-off discussion on payments to dealers – Netherlands, NMa, 2002)
 - € 10 million fine against manufacturers of luxury cosmetics (Germany, Bundeskartellamt, 2008)
 - €900,000 fine on Spanish perfume association (Spain, CNC, 2011)

Information Exchange: Restriction by Object

- **Per se illegal?** Individualized intentions concerning future conduct regarding prices or quantities
- **Future prices** = actual prices, discounts, rebates, reductions, increases
- **Future quantities** = intended future sales, market shares, territories and sales to particular groups of customers

Information Exchange: Restrictive by Effect

- Exchange of other information? Issue: likely adverse impact on price, output, product quality, variety or innovation?
- *"If they reduce or remove the uncertainty as to the operation of the market in question"* (ECJ in Asnef-Equifax v. Ausbanc)
- **The Test:** is the exchange sufficiently detailed and frequent to allow participants:
 - To reach a common understanding on the terms of coordination
 - To identify and retaliate against deviations from the common policy in a timely manner, and
 - To identify and target new market entry in order to sustain the coordination

... in light of

1. The economic conditions on the market; and
2. The characteristics of the information exchanged

(1) Economic Structure of the Market

- Likely adverse impact **more likely** in tightly oligopolistic market (transparent, concentrated, non-complex, stable, symmetric), or
- If the exchange **changes** market conditions so as to facilitate coordination by increasing transparency, reducing complexity, buffering instability or compensating for asymmetry

(2) Type of Information Exchanged

- Strategic information – more likely to be caught by Article 101
- Price and quantity most strategic; then costs and demand data
- Also strategic:
 - customer lists
 - production costs
 - quantities
 - turnover
 - sales
 - capacity
 - qualities
 - marketing plans
 - risks
 - technologies
 - investments
 - R&D programs and results

Information: Aggregated/Individualized

- Effects unlikely if too difficult to recognize individual company information
- Aggregated information can still allow better-informed decisions
- But caveat for tight oligopolies
- Guidelines in practice: UK OFT Motor Insurance (2011)
 - OFT analysis of insurance data suggested minimum number in motor insurance industry is five
 - Case-by-case analysis

Information: Age of Data

- Historic data unlikely to lead to anti-competitive collusion
- Market-specific issue
- More than one year old?
- Benchmark in Guidelines: historic information is several times older than average length of industry contracts
- Guidelines in operation:
 - *Dutch hospitals* (2010): no exchange of data unless (i) at least 12 months old or (ii) aggregated for general benchmarking purposes

Information: Frequency of Exchange

- Long term contracts: infrequent exchange may be sufficient
- Short term contracts: infrequent exchange unlikely to have adverse effect

Part V

Part V: Major Issues and Trends for 2012

- Cartel Cases
- Merger Control
- Abuse of Dominance
- Private Enforcement

Major Issues and Trends for 2012

- **Cartel cases**

- Appeals are increasingly successful
- Human rights arguments (ECHR): judicial review and fair trial?
- Parental liability: Rebutal of presumption of parental liability (ECJ in Elf Aquitaine); joint venture cases before the ECJ

- **Merger Control**

- Economic analysis firmly established
- State-owned undertakings (Chinese SASAC companies cases)
- “First-come, first served” rule for parallel mergers (Seagate/Samsung, Western Digital/Viviti)
- Minority shareholdings? Review of timetables?

Major Issues and Trends for 2012

- **Abuse of Domiance**

- Increasing use of commitments
- Focus on IT (Google, IBM) and financial sector (Standard & Poors, Thomson Reuters, credit default swaps)

- **Private Enforcement**

- Access to cartel records (ECJ in Pfleiderer)
- Guidance paper on quantification of damages
- EU rules for collective actions?

Thank you for your attention!

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