

# A SELECTION OF RECENT DEVELOPMENTS IN EU COMPETITION LAW (YEAR 2011)

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## Abstract

This article offers an overview of the main developments occurred in 2011 in EU Competition Law at level of the European Commission (« Commission ») and the Court of Justice of the European Union (including both the General Court and the Court of Justice), through a selection of relevant cases in relation to the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (« TFEU »), EU merger control rules, State aid provisions and procedural issues.

### Keywords:

Cartels; horizontal agreements; vertical agreements; abuses of dominant positions; merger control; State aids; antitrust policy.

### JEL Classification:

K21 – Antitrust Law; K42 – Illegal Behavior and the Enforcement of Law.

**SUMMARY:** **1. Article 101 TFEU.** — 1.1. Cartels. — 1.1.1. Developments in the Commission's fight against cartels. — 1.1.2. Selection of judgments in cartel cases. — 1.2. Horizontal agreements. — 1.2.1. Commission's enforcement of article 101 TFEU with respect to horizontal agreements. — 1.2.2. The General Court confirms that Visa Europe's refusal to allow Morgan Stanley to join Visa's network in Europe violated Article 101 TFEU. — 1.3. Vertical Agreements. — 1.3.1. Activision Blizzard - The Court of Justice confirms that the agreements among Nintendo and its distributors aimed at limiting parallel trade violated Article 101 TFEU. — 1.3.2. Pierre Fabre Dermo-Cosmétique - The Court of Justice rules on Internet sales restrictions. — 1.4. Licensing. — 1.4.1. 1.4.1. Football Association Premier League — The Court of Justice assesses territorial restrictions in licensing of satellite broadcasting rights under Articles 56 and 101 TFEU. — **2. Article 102 TFEU** — 2.1. Developments in the Commission's enforcement of Article 102 TFEU. — 2.2. Selection of judgments concerning the application of Article 102 TFEU. — 2.2.1. TeliaSonera (margin squeeze). — 2.2.2. AG2R Prévoyance (principle of solidarity and economic activity; interaction between Articles 102 and 106 TFEU). — 2.2.3. Tele2 Polska (power to adopt negative decisions under Articles 101 and 102 TFEU). — 2.2.4. Solvay v. Commission (violation of the right of defense). — **3. Mergers** — 3.1. Selection of Commission decisions. — 3.1.1. Olympic/Aegean Airlines (prohibition

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decision). — 3.1.2. Intel/McAfee (commitment decision). — 3.1.3. Microsoft/Skype. — 3.2. Selection of judgments concerning merger control. — 3.2.1. EDF/Segebel (rights of third parties in merger control proceedings). — **4. State Aid.** — 4.1. Commission adopts new rules on services of general economic interest. — 4.2. Selection of judgments concerning State Aid. — 4.2.1. Diputación Foral de Vizcaya, Álava, Guipúzcoa v. Commission (no legitimate expectations for non-notified aids). — 4.2.2. Mediaset SpA v. Commission (technological neutrality; recovery of aid). — 4.2.3. Commission v. Gibraltar (selectivity of Gibraltar corporation tax reform). — **5. Policy and Procedure.** — 5.1. Guidelines on Best Practices in Antitrust Proceedings, Submission of Economic Evidence and the Role of Hearing Officers. — A. Commission Notice on Best Practices for the Conduct of Antitrust Proceedings. — B. DG Competition Best Practices for the Submission of Economic Evidence in Antitrust and Merger Cases. — C. Revision of the Hearing Officer's Mandate. — 5.2. Commission Consultations on Antitrust Damages Quantification and Collective Redress. — A. Damages Quantification — B. Collective Redress Consultation — 5.3. EU/US – Best practices on cooperation in merger investigations. — 5.4. Best practices on cooperation in merger review. — 5.5. Suez Environnement (breach of seal affixed during an inspection). — 5.6. e-Curia. — 5.7. Pfeleiderer (access to leniency documents by third parties).

## 1. Article 101 TFEU.

### 1.1. Cartels.

#### 1.1.1. *Developments in the Commission's fight against cartels.*

In 2011, the Commission issued four cartel decisions, imposing a grand total of € 614 million in fines <sup>(1)</sup>. The use of the settlement procedure in three cases <sup>(2)</sup> confirms the increasing success of this tool <sup>(3)</sup>.

Although the number of cartel decisions and, in particular, the amount of the overall fines has significantly decreased in comparison with 2010 <sup>(4)</sup>, the Commission made it clear that it still pursuing a « zero tolerance » policy against cartels <sup>(5)</sup>. On 14 April 2011, Commissioner Almunia revealed that, at that time, DG Competition's services were investigating over 25 cartel cases <sup>(6)</sup>.

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<sup>(1)</sup> See Commission decisions: (i) COMP/39579 – *Consumer Detergents*, 13 April 2011 (total fine of € 315.2 million), not yet published in the OJ, but available on DG Competitions' website; (ii) COMP/39482 – *Exotic Fruit (Bananas)*, 12 October 2011 (total fine of € 8.9 million), not yet published; (iii) COMP/39605 – *CRT Glass*, 19 October 2011 (total fine of € 128.7 million), not yet published; and (iv) COMP/39600 – *Refrigeration Compressors*, 7 December 2011 (total fine of € 161.2 million), not yet published.

<sup>(2)</sup> The settlement procedure has been applied in *Consumer Detergents*, *CRT Glass*, and *Refrigeration Compressors*.

<sup>(3)</sup> The Commission introduced the settlement procedure in 2008 with a view to simplifying the administrative proceedings and reducing litigation in cartel cases (see Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation 1/2003 in cartel cases, OJ 2008 C 167/1, and Commission Regulation 622/2008 of 30 June 2008, amending Regulation 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ 2008 L 171/3). However, it was only in 2011 that the Commission issued the first settlement decisions (see Commission decisions (i) COMP/38.511 – *DRAM*, 19 May 2010, not yet published in the OJ, but available on DG Competitions' website; and (ii) COMP/38.886 – *Animal Feed Phosphates*, 20 July 2010, 2011 OJ C 111/19).

<sup>(4)</sup> In 2010, the Commission issued seven cartel decisions imposing a grand total of over € 3 billion in fines.

<sup>(5)</sup> See speech by J. ALMUNIA, *Recent developments and future priorities in EU competition policy*, held at the International Competition Law Forum, St. Gallen, 8 April 2011 (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/>)