

McDermott
Will & Emery

EU Competition

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EU Competition

INTRODUCTION

McDermott's EU Competition Group advises on the full range of competition issues. Litigation is an integral part of our EU service offering, and the McDermott team includes seasoned competition litigators who have an unparalleled record of success in the EU and national courts. Our team provides sophisticated competition advice and effective, result-oriented representation before the European Commission and other EU institutions, as well as before National Competition Authorities. Our multilingual, multinational team of competition lawyers, admitted to practice in Australia, Belgium, France, Germany, Italy, the United Kingdom and the United States, has experience counselling clients on the whole spectrum of competition issues, as well as a deep understanding of the industries in which our clients operate. These industries include life sciences, chemicals, energy, food and beverage, manufacturing, technology and network industries.

Our Brussels office serves as the focal point for our EU Competition Group, and our lawyers work with colleagues across all of McDermott's European offices to provide seamless EU and national competition advice to clients. The EU practice is an integral part of McDermott's global antitrust/competition law team, which is recognised as one of the leading antitrust/competition practices in the world. Our global team provides seamless integrated service to our multinational clients, and is uniquely positioned to conduct cases directly before EU, US and China competition authorities.

OUR CAPABILITIES

Merger Clearance

Our involvement from the early stages of a transaction allows us not only to advise clients on the feasibility of a particular transaction under the merger control regime, but also to assist in structuring and presenting the deal in such a way that the chances of a smooth merger control clearance are significantly enhanced. We advise clients on the likely procedural and substantive treatment of their transactions, and develop timely, cost-effective strategies directed towards obtaining regulatory clearance for those transactions. We organise, manage and execute the notification processes for multinational transactions, and, in the context of merger control clearances, coordinate the advice for the relevant jurisdictions at the EU and national levels. This ensures consistency of approach and compliance with requisite filing deadlines and waiting periods, as well as removing the burden of dealing with local lawyers in different jurisdictions with different procedures and timing considerations.

Cartels

We have one of the most creative and successful cartel defence practices in Brussels, situated at the cutting edge of developments in cartel defence, including the new EU settlement procedures. The strength of our current practice and position at the forefront of EU cartel cases is predicated on a long pedigree that started with the landmark paper pulp case in the mid-1980s. Our sectoral experience in cartel defence includes oil and gas, polyethylene, vitamins, bathroom and kitchen fittings, peroxides, animal feed phosphates, DRAMs and automotive products. Increasingly we have been involved in follow-on litigation where customers claim compensation for damages suffered as a result of the existence of an alleged cartel. We work closely with our cartel defence colleagues in the United States and elsewhere to provide clients with an effective coordinated defence team in international cartel investigations and prosecutions.

EU Competition



Horizontal & Vertical Agreements

Our EU competition lawyers regularly advise on the full spectrum of cooperation agreements between competitors, including joint research and development, standardisation agreements and strategic alliances. Our lawyers also advise on vertical agreements, such as supply and distribution contracts. We are experienced in structuring distribution systems and individual arrangements with distributors in line with European, national and international competition laws. We also have substantial experience advising clients in connection with intellectual property licensing and commercialisation agreements.

Abuse of Dominance

We are experienced in defending companies with strong market positions against allegations of infringement of EU and national rules dealing with abuse of dominance. We also have extensive experience representing companies in connection with private complaints alleging the infringement of such rules, and prosecuting complaints for clients that have been victimised by dominant competitors and suppliers.

State Aid

We advise clients on a wide variety of State aid issues, including the analysis of the legal situation, drafting of relevant documents and establishment of compliance programs. We have acted for investors being granted subsidies, tax breaks or other incentives provided by national authorities, and helped them to receive the necessary approvals at national and European levels. We assist clients in challenging the grant of such advantages to competitors. Indeed, McDermott lawyers successfully pleaded the landmark case before the European courts establishing the right of a company to object to State aid being granted to a competitor. Our team also regularly assists clients in conducting due diligence on acquisition targets that may have received impermissible government assistance, which may effectively represent a contingent liability for the acquiring firm and, therefore, have a material impact on valuation considerations.

Compliance

We deliver competition law advice to multinationals and other companies that need sophisticated counselling on the strategic ramifications of EU competition enforcement initiatives for their business operations. We have frequently provided competition law compliance audits to our clients. Based on these audits, we have designed and rolled out effective, user-friendly, Europe-wide compliance programs that are tailored for the specific needs of our clients. We have assisted companies with operations in many jurisdictions, not only on competition law, but also on compliance with commercial bribery, data protection, privacy, trade and intellectual property rules.

Competition Litigation

We are well known for our litigation experience—and successes—in the national and EU courts. We frequently represent clients in actions against decisions of competition authorities. We also defend clients in cases involving damage claims resulting from cartel and other competition cases, and we represent clients that have themselves been victimised by competition law offences. McDermott's global team is well known for class action defence, and our European lawyers work closely with US antitrust colleagues and the Firm's litigation team to provide coordinated strategy and seamless execution in multi-jurisdictional proceedings. We offer clients the most advanced defence techniques and technology tools to handle litigation proceedings requiring the management of large amounts of documentation, such as class action proceedings.



Representative Cases

MERGER CONTROL

- Representation of a world leader in imaging products and solutions in its acquisition of a global leader in digital document management (clearance in first phase with divestments).
- Representation of a leading Finnish paper company in the European Merger Control procedure for the sale of its whole European graphic paper business located mainly in the United Kingdom, Germany and Finland to a South African paper manufacturer for approximately US\$1 billion (Phase I unconditional clearance).
- Representation of a leading Finnish paper company in the European Merger Control procedure in the sale of its carbonless paper business to a paper solutions company (Phase II clearance subject to the divestment to a competitor's carbonless paper business).
- Representation of Degussa in its acquisition of the superabsorbent polymers (SAP) business of The Dow Chemical Company, which strengthened Degussa's position as the leading SAP manufacturer in the world. This global transaction was coordinated by a multi-disciplinary team of lawyers across five offices.
- Representation of Essilor, a leading optical products company, in merger control proceedings by the German Federal Cartel Office, obtaining clearance in Phase II without any divestments/remedies.
- Representation of Lockheed Martin Corporation in the formation of the United Launch Alliance joint venture with Boeing, against strong opposition from a European competitor.
- Representation of OMV Agrolinz in one of the few cases referred to the European Commission under Article 22 of the Merger Regulation following national filings in Italy, Austria, Germany and Poland.
- Representation of Polish oil refinery PKN Orlen through to clearance by the European Commission of its acquisition of the Czech company Unipetrol, leading to the first clearance of a merger between two major companies from the new EU Member States in Eastern Europe.
- Representation of Starwood Hotels & Resorts Worldwide, Inc., and Le Meridien Hotels and Resorts Limited in obtaining EU merger clearance and clearance of separate parts of the three-party transaction before the German and Austrian competition authorities. This was the first case where a single concentration approach to two conditional transactions was used.
- Advice to a multinational company active in the rolling stock sector in relation to competition issues arising from a contractual joint venture with a major competitor in Italy.

CARTELS

- Representation of FMC Chemical Corporation in European Commission proceedings in the hydrogen peroxide case, resulting in the total length of the alleged infringement being reduced significantly. McDermott handled subsequent representation of the company in a court challenge on the issue of attribution of liability to the parent company for the activities of an alleged cartel member.
- Representation of FMC Chemical Corporation in respect of a European Commission investigation into alleged anticompetitive practices in the feed phosphates market.
- Representation of Hitachi in the European Commission's landmark DRAM investigation, in which McDermott secured a substantial reduction in the client's fine over and above additional savings as a result of discussions with the Commission regarding the fining methodology originally proposed.

Representative Cases



- Submission of a successful leniency application in the European Commission's bathroom fixtures cartel case.
- Representation of a leading Italian pharmaceutical company in a cartel investigation by the Italian Competition Authority. This is one of the few cases where the Authority decided to close an investigation following a dawn raid, as McDermott was able to show that there was not sufficient evidence to prove any breach of competition rules.

HORIZONTAL & VERTICAL AGREEMENTS

- Advice to FILA and other major clothing and footwear brands on internet sales, distribution and licensing arrangements for the EU market.
- Representation of several incumbent European railway companies on their cooperation in the fields of single wagon load and high speed passenger transport, and their subsequent representation before the European Commission.
- Advice to major banking groups on competition issues relating to joint ventures and agreements in the financial services sector.
- Advice to major international beer manufacturers on complex acquisition proposals and competition compliance with EU and national antitrust rules within their distribution network.
- Advice to a leading international manufacturer of medical devices on potential competition issues raised by a major supply agreement in Italy.
- Advice to major pharmaceutical companies on patent dispute settlement agreements, data sharing agreements related to medicines and their manufacture for submission to EU agencies, and competition law issues arising from licence and distribution agreements.

ABUSE OF DOMINANCE

- Representation of a telecom company in European Commission investigations directed at alleged infringement of European antitrust rules.
- Representation of a global company specialising in the production of roof windows in abuse of dominance proceedings before the European Commission.
- Advice to the editors of the two major Italian train timetable booklets in a complaint before the Italian Competition Authority for abuse of dominance by the de facto monopolist in the Italian railways sector in relation to the supply of train timetable data.
- Representation of European postal operators in complaints to the European Commission regarding changes in national postal law that excluded alternative operators from the market of hybrid mail, resulting in a European Commission decision against the Member State that the change of law was incompatible with European competition law.

STATE AID

- Representation of Ford Motor Company in several complex State aid investigations by the European Commission, including the privatisation of a company that involved obtaining approval of the European



Representative Cases

Commission for investment aid, for public guarantees of EUR 400 million and for the highest amount of training aid that the European Commission has approved to date (EUR 57 million).

- Representation of General Workers' Union of Denmark (3F) in its complaint regarding illegal State aid in the maritime shipping sector and subsequent court challenge to the European Commission's decision.
- Representation of a German regional airport in a European Commission State aid investigation concerning infrastructure financing and incentives.
- Assistance to a major European energy producer with respect to the compatibility of gas legislation with European law, in particular State aid and energy regulation laws.
- Advice to shipyards in several Member States concerning loans and guarantees of several hundred million euros under the European Commission's Temporary Framework during the global financial and economic crisis.

COMPLIANCE

- Advice to a number of trade associations, including the Nickel Institute, on competition law compliance.
- Advice to an international supplier of equipment in the veterinary sector concerning distribution, sales and compliance with competition rules as a potentially dominant supplier.
- Antitrust and Foreign Corrupt Practices Act audit and advice on an antitrust compliance program for the German subsidiary of a US company.
- Regular advice to a major international bank on compliance with EU rules.
- Antitrust compliance training for companies in a wide range of industries, including aerospace, automotive products, consumer goods, medical devices, primary metals, chemicals, mining services, air transport and professional services.

COMPETITION LITIGATION & ARBITRATION

- Representation of FMC Chemical against damage claims brought by Cartel Damage Claims (CDC) in the hydrogen peroxide case in Dortmund, Germany.
- Numerous successful representations in the European Court of Justice and the European General Court in appeals against decisions of the European Commission and national authorities and courts.
- Advice to companies in the broadcasting sector in national court proceedings relating to the use of and access to broadcasting rights.
- Representation of a major creator, manager and promoter of interactive content for mobile phone users in a number of civil and criminal proceedings on antitrust, consumer protection, unfair competition and misleading advertisement issues, as well as on regulatory issues in the telecom sector, related to the agreements with the main Italian mobile phone operators for the supply of ringtone and other interactive content for mobile phones.

McDermott lawyers advised on a number of the above matters while at previous firms.

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