

# wirtschafts wissenschaften htw saar



## Competition Law

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# irto

**Hochschule für  
Technik und Wirtschaft  
des Saarlandes**

University of  
Applied Science

**Fakultät für  
Wirtschafts-  
wissenschaften**  
Business School

## Competition Law

0. EU, EU law, EU competition law
1. State Aid (EU law seen from the German perspective)
2. Cartel Law (EU law)
3. Abuse of dominant position (EU law)
4. Merger control (EU law seen from the German perspective)
  
5. if wished: EU Industrial Property Rights (Community trademark, Community design, Patent with unitary character)
  
6. Conclusion

## Bibliography and Websites

- Trevor Cook, EU Intellectual Property Law, New York et al. (Oxford University Press), 2010
- John Fairhurst, Law of the European Union, 7th ed., Harlow et al. (Pearson/Longman) 2010
- Andreas Heinemann, Compulsory Licences and Product Integration in European Competition Law – Assessment of the European Commission's Microsoft Decision, ICC 2005, p. 63
- Alison Jones & Brenda Sufrin, EU Competition Law, Oxford (Oxford University Press), 4th edition 2011
- Phedon Nicolaidis, State aid policy in the European Community: a guide for practitioners, The Hague (Kluwer Law International) 2005
- Christian Twigg-Flesner, European Union Private Law, Cambridge (Cambridge University Press) 2010

### Websites:

<http://europa.eu>

<http://curia.europa.eu> (Court of Justice of the European Union)

<http://eur-lex.europa.eu> (Online access to EU law)

<http://eur-lex.europa.eu/browse/summaries.html> (overview of EU legislation in various fields)

<https://europa.eu.int/celexdev/natlex/> (N-Lex: Gateway to national law)

<http://oami.europa.eu> (Office for Harmonization in the Internal Market)

<http://www.wipo.int> (World Intellectual Property Organization)

## Some abbreviations/acronyms

- EC – European Community (until 1 December 2009)
- TEU – Treaty on European Union
- TFEU – Treaty on the Functioning of the European Union
- CJ(EU) – Court of Justice of the European Union (case citator e.g. „C-280/10“)
- OJ L – Official Journal of the EU, series L
- CTM – Community Trademark
- OHIM – Office for the Harmonization of the Internal Market (EU institution)
- WIPO – World Intellectual Property Organization

„... Before you play the game, learn the rules! It would be absurd to start playing a new game without first understanding the rules. Yet some business people exhibit a remarkable lack of knowledge about marketing’s political/legal environment ... Numerous laws and regulations ... touch all aspects of marketing, decision making (designing, labelling, packaging, distribution, advertising and promotion of products and ser-vices) ... All marketers should be aware of the major regulations that affect their activities ...”

(Luis E Boone/David L Kurtz, Contemporary Marketing, 12th edition, Stamford [Thomson South-Western] 2006, p. 48)

**Know the rules of your market!**



The law entitles you to fight for your rights and supports you to enforce your rights until final judicial execution



## Produktpiraten unter Druck

Im Kampf gegen die internationale Produktpiraterie hat der baden-württembergische Badausstatter Hansgrohe AG gestern im elsässischen Straßburg rund 1000 gefälschte Handbrausen durch eine Walze zerstören lassen. „Wir wollen unsere Marke, Produkte und Arbeitsplätze nicht durch kriminelle Machenschaften kaputt machen

lassen“, erklärte Marken-Chef Richard Grohe. Nach seinen Angaben wird allein in der deutschen Wirtschaft der Gesamtschaden durch gefälschte Markenware auf 25 bis 30 Mrd. Euro geschätzt. Auslöser für die Zerstörungs-Aktion waren 1000 in China nachgemachte Handbrausen der Hansgrohe Aktiva-Klasse. lsw/Bild: dpa



KEEP  
CALM  
AND  
LEARN  
BUSINESS & LAW

<http://sd.keepcalm-o-matic.co.uk/i/keep-calm-and-learn-business-law.png>



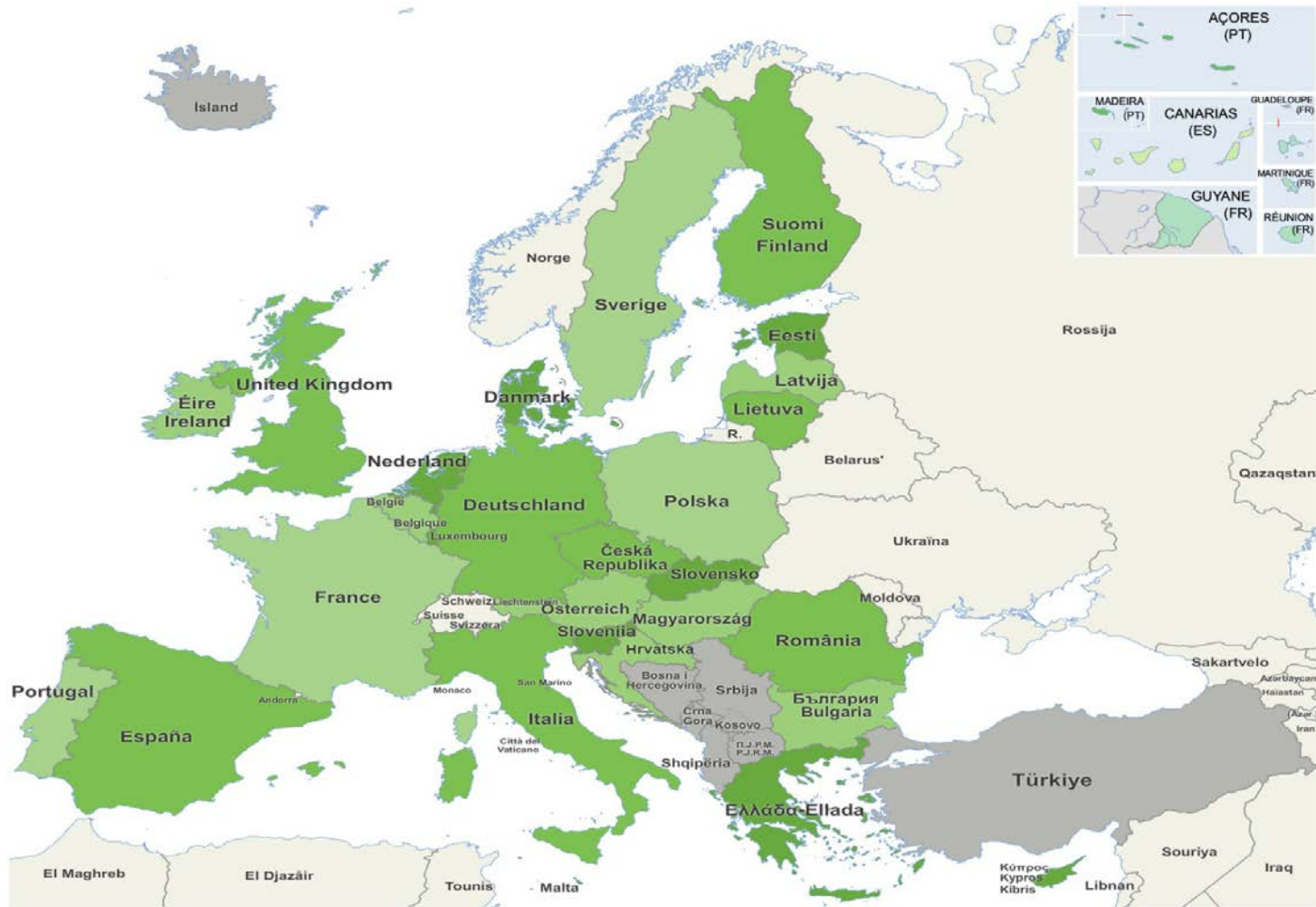
Stay  
COOL  
AND  
Study  
Business Law

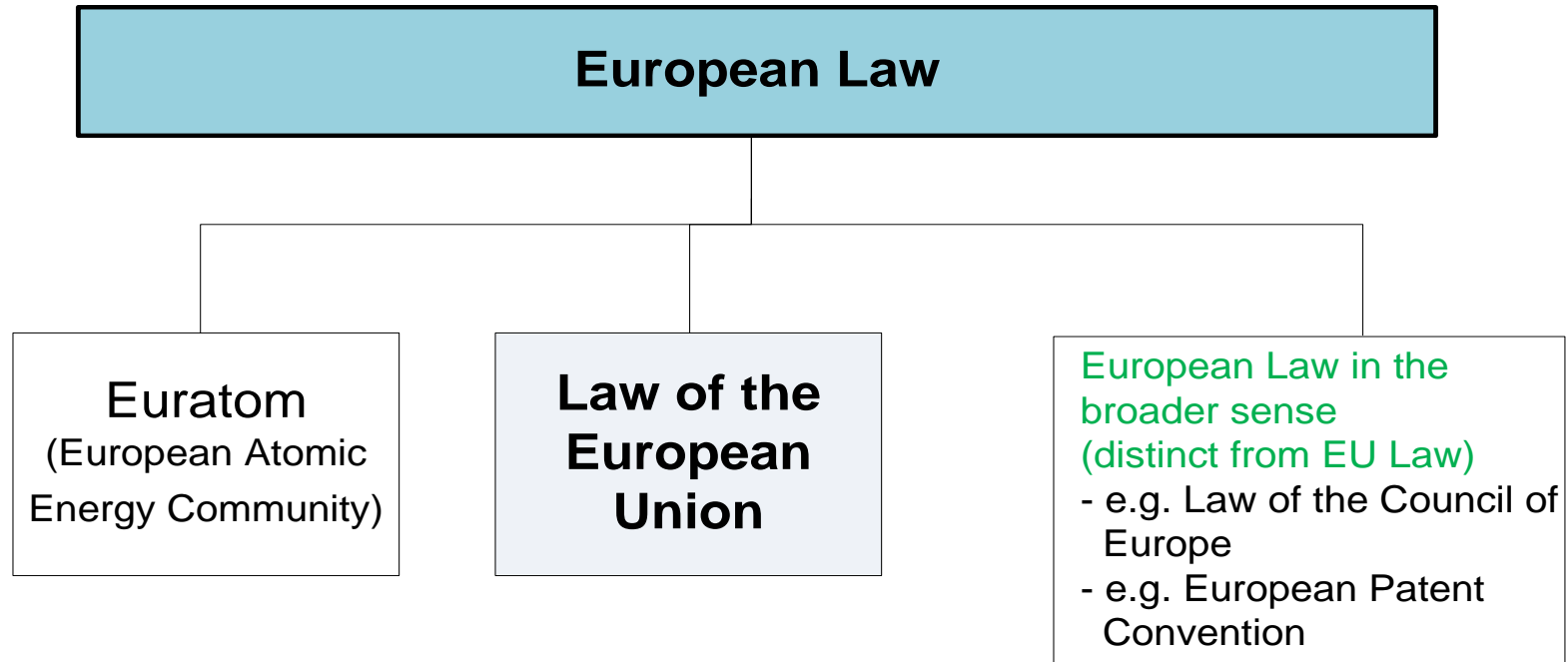
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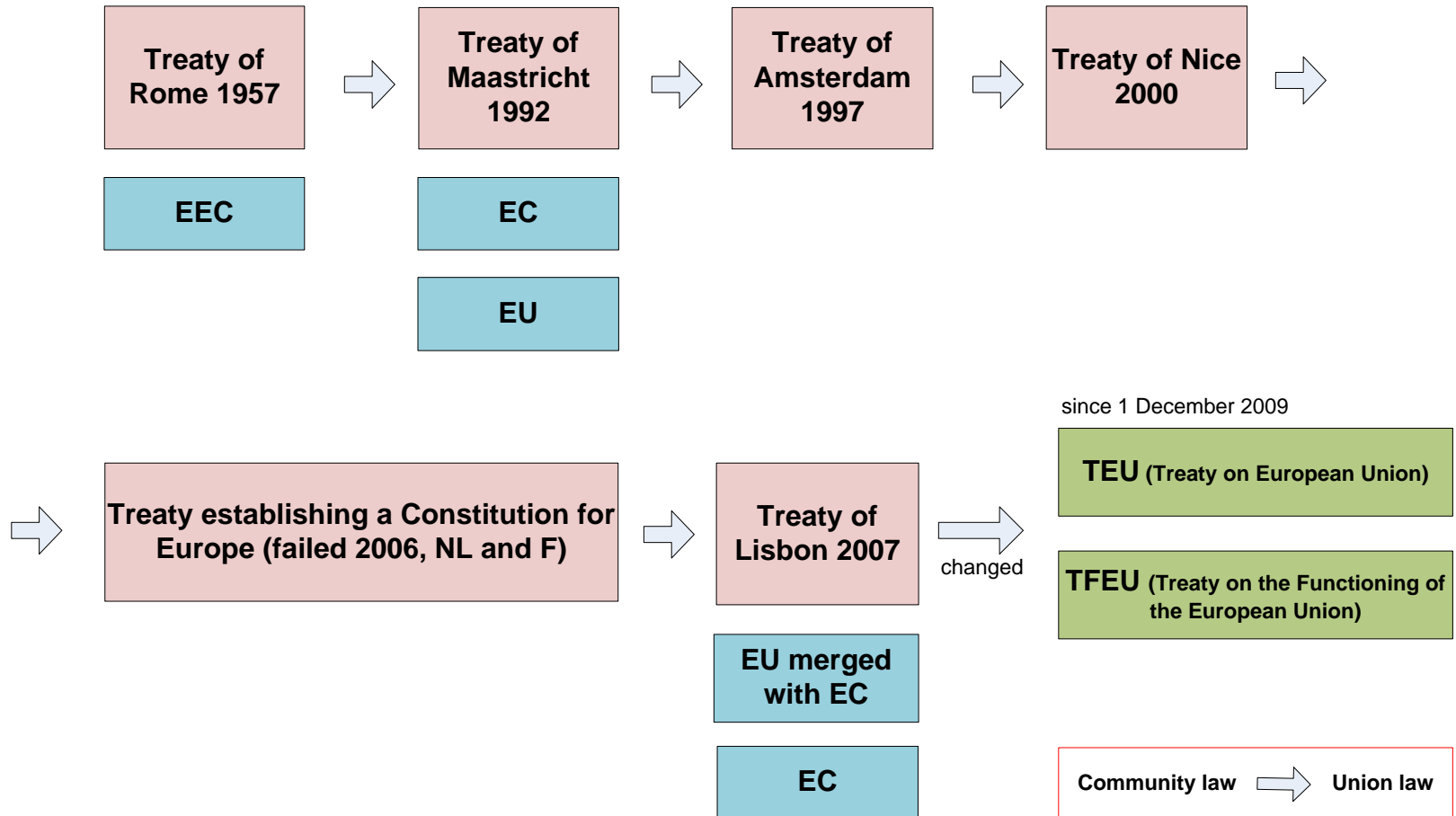


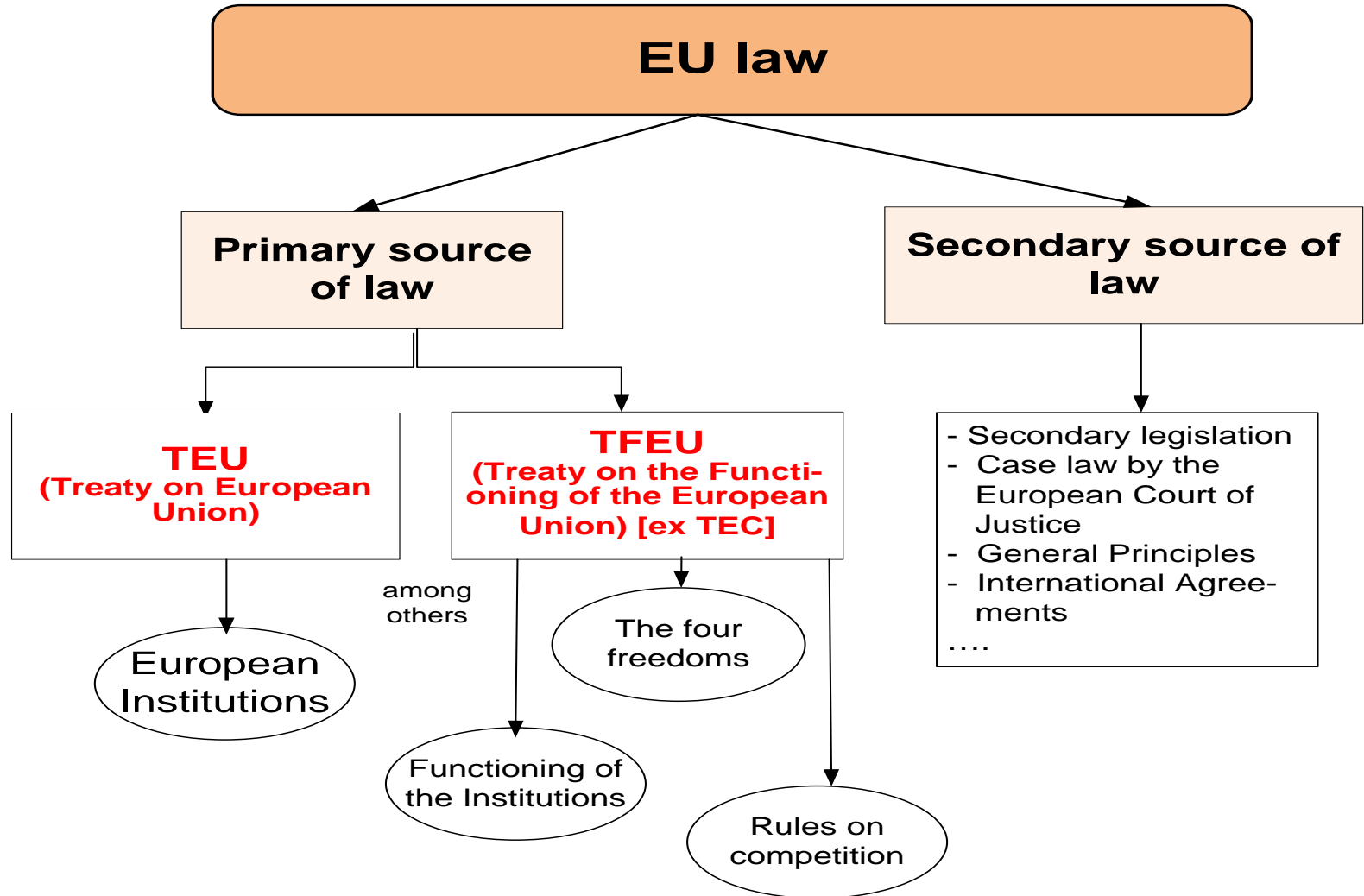
0. **EU, EU law, EU competition law**
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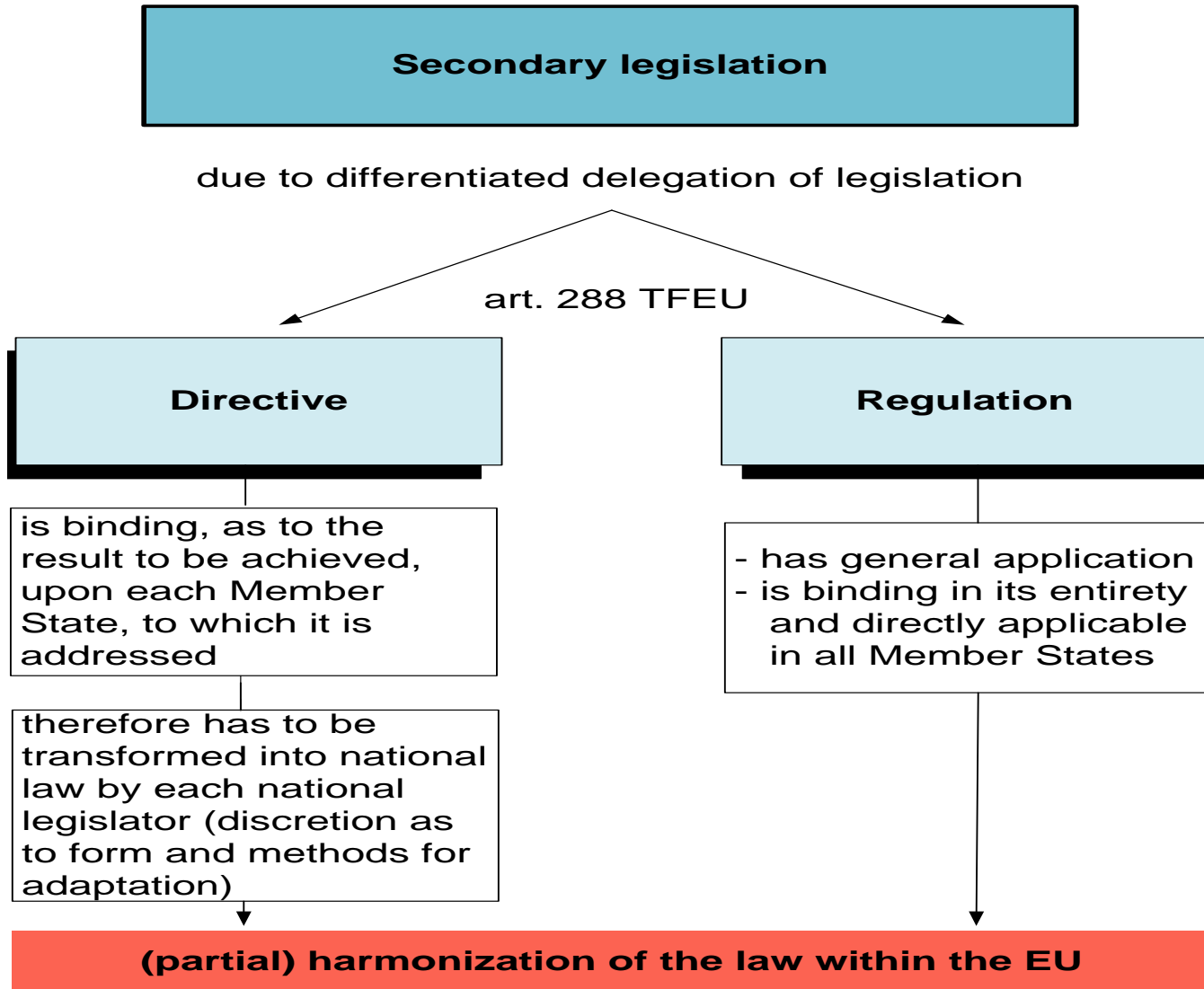




## The historical development of the EU and its legal system







## Wording of art. 288 TFEU:

THE LEGAL ACTS OF THE UNION

*Article 288*  
(ex Article 249 TEC)

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

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C 83/172    EN    Official Journal of the European Union    30.3.2010

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

## Relationship between EU and national law (e.g. French law):

- Absence of an explicit rule within the treaties and in most of the national legal systems [Art. 4 s. 2 TEU: „... [the Union] shall respect their essential State functions, including ... maintaining law and order ...].
- The European Court of Justice has recognized the **principles** of **direct effect** and of **supremacy** of [EC] EU law (in colliding fields of law).
  - **EU law is directly applicable and prevails over national law.**



*“The **internal market** shall comprise an **area without internal frontiers** in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”*

(art. 26(2) TFEU [ex art. 14(2) Treaty of Rome])

### **The impact of the „Four Freedoms“ on the internal market of the EU:**

The „Four Freedoms“ set out in the TFEU are tremendously helpful for carrying out business in the EU and for completing the internal market:

- 1. Free Movement of Goods** (art. 28-37 [ex art. 23-31 Treaty of Rome])
- 2. Free Movement of Persons** (art. 45-55 [ex art. 39-48])
- 3. Free Movement of Services** (art. 56-62 [ex art. 49-55])
- 4. Free Movement of Capital and Payments** (art. 63-66 [ex art. 56-59])

## Why legal rules dealing with competition?

For the benefits of

- ✓ all market participants
- ✓ consumers
- ✓ the competition as such

**Competition**  
Konkurence  
Wettbewerb  
Konkurencija  
Konkurents  
Concurrence  
Concorrência  
Ανταγωνισμού

The better shall win!

Fair Play!

Refrain from market  
restrictions!

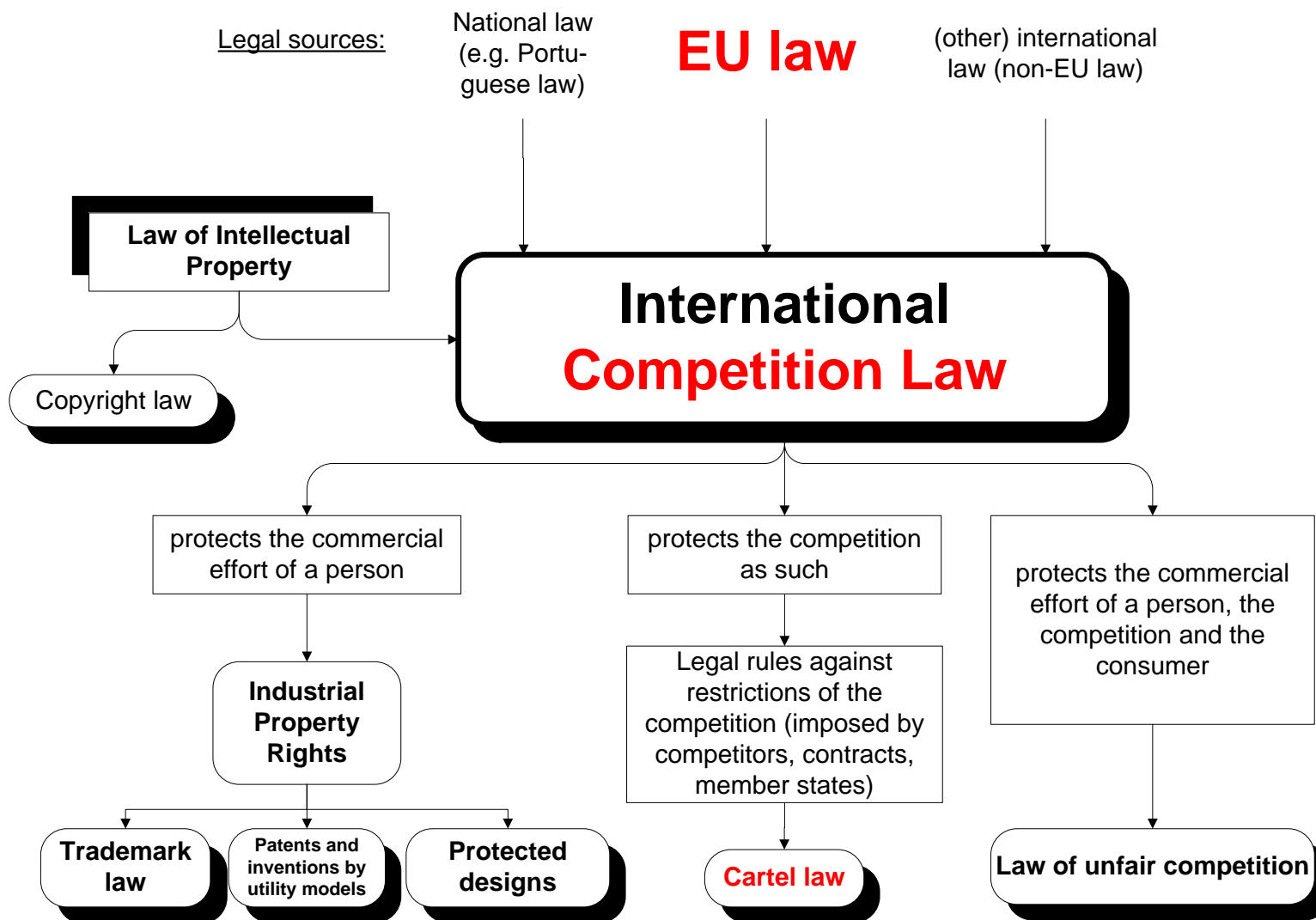
Free and unimpeded  
markets!

No infringements  
of the free market

Keep the market free from any distortion

No unfair means

## EU Competition law is embedded in an international legal regime





## Objectives of EU competition law:

„... that the internal market ... includes a system **that competition is not distorted**  
...”

(Protocol [no 27] on the internal market and competition; ex art 3(1)(g) TEC - Treaty Establishing the European Community, Rome 1957).

## Which legal fields are covered?



EU's engagement against a reduction or distortion of competition within the Common Market includes measures

- against concentrations,
- against dominant positions [cf. the Microsoft case],
- against collusion between undertakings

(art. 101-102 and Regulation (EC) 139/2004 on merger control)

and

- against state aid granted by a Member State

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**Case study:**

Portuguese company „Pingo Doce“ and German company „Metro“ secretly fix the selling price of TV sets for sale within the EU.

**Case study:**

Company Penhaligan only distributes their product „Douro Portugal Eau de Toilette“ within the EU in high end stores. Supermarkets are excluded from the distribution channel.





## 1. Legal sources on EU cartel law:

- **art. 101 TFEU [ex art. 81 EC Treaty]**  
(cf. legal text)
  
- Further important source of law: **Regulation (EC) 1/2003**
  - art. 1: application of the provisions of TFEU
  - art. 3: relationship between art 101 TFEU and national competition laws (competition laws in the meaning of national cartel law).
  
- Further important source of law: **Regulation (EC) 330/2010**

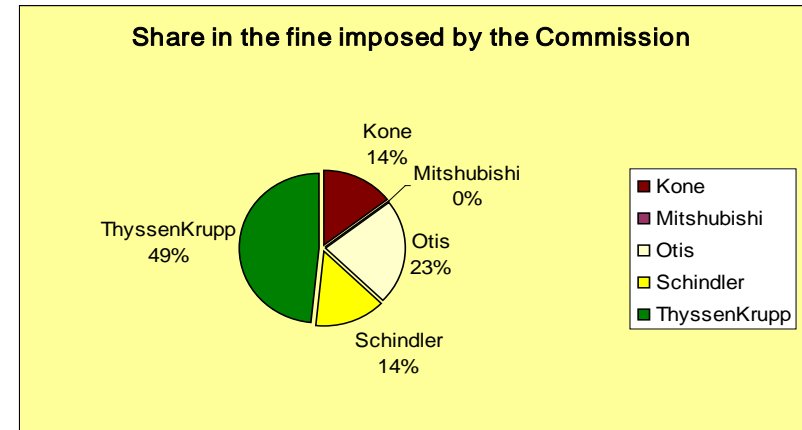
= one of several block exemption regulations: Block exemptions create safe rules for categories of agreements, relieving the contracting parties from the need to individually analyse those agreements to see whether they violate EU rules on restrictive business practices (art. 101 TFEU).

= Block Exemption Regulation to categories of vertical agreements and concerted practices, e.g. regards solus and exclusive distribution agreements.

## 2. Cartels (examples)

- a. Lift and Escalators Cartel: Decision of the Commission of 21 February 2007: Fines of € 992 Mio!
- b. (Needle and) Zipper Cartel: Fines of € 328 Mio.:

Letter of Prym of 1993: „... Ein weiterer Wettbewerber auf dem Markt für Hartkurzwaren in Europa ist das Letzte, was wir brauchen! Daher wäre es sinnvoll, wenn die drei beteiligten Unternehmen – Coats/NIL, Entaco und Prym – zusammenarbeiten, um sicherzustellen, dass der europäische Markt für Nadeln nicht weiter unter selbst zugefügten Wunden leidet! ...“ (ECJ, judgement of 12 September 2007, T-30/05, margin no 23)



1.5. Ten highest cartel fines per case (since 1969)

Last change: ++10 October 2014++

Year	Case name	Amount in €*
2012	TV and computer monitor tubes	1 470 515 000
++2008++	Carglass	1 185 500 000
2013	Euro interest rate derivatives (EIRD)	1 042 749 000
2014	Automotive bearings	953 306 000
2007	Elevators and escalators	832 422 250
2010	Airfreight	799 445 000
2001	Vitamins	790 515 000
2007/2012	Gas insulated switchgear (incl. re-adoption)	675 445 000
2013	Yen interest rate derivatives (YIRD)	669 719 000
2009	E.ON/GDF collusion	640 000 000

1.6. Ten highest cartel fines per undertaking (since 1969)

Last change: ++31 March 2014++

Year	Undertaking**	Case	Amount in €*
++2008++	Saint Gobain	Carglass	715 000 000
2012	Philips	TV and computer monitor tubes	705 296 000 <small>of which 391 940 000 jointly and severally with LG Electronics</small>
2012	LG Electronics	TV and computer monitor tubes	687 537 000 <small>of which 391 940 000 jointly and severally with Philips</small>
2013	Deutsche Bank AG	Euro interest rate derivatives (EIRD)	465 861 000
2001	F. Hoffmann-La Roche AG	Vitamins	462 000 000
2013	Société Générale	Euro interest rate derivatives (EIRD)	445 884 000
2007	Siemens AG	Gas insulated switchgear	396 562 500
2014	Schaeffler	Automotive bearings	370 481 000
2008	Pilkington	Car glass	357 000 000
2009	E.ON GDF Suez	E.ON/GDF collusion	320 000 000 320 000 000

### 3. EU's leniency programme

→

[http://ec.europa.eu/competition/cartels/legislation/leniency\\_legislation.html](http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html)

EU law offers entrepreneurs who are involved in cartels to cooperate and a reduction of fines up to a total immunity of fines (due to Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ L 298/17 of 8.12.2006)).

[„whistle blowing“]

The screenshot shows the European Commission's website for Competition. The header includes the EU flag and the word "Competition". Below the header, there is a navigation bar with "HOME", "Policy areas", "Sectors", "About", "Information", and "Contact". The main content area is titled "Cartels" and "Legislation > Leniency". Under "Leniency legislation", there is a list of documents:

- 2006 Commission notice on immunity from fines and reduction of fines in cartel cases.
  - » [Commission notice on immunity from fines and reduction of fines in cartel cases](#) Official Journal C 298, 8.12.2006, p. 17
  - » [Press release](#): Commission adopts revised Leniency Notice to reward companies that report cartels. IP/06/1705, 07.12.2006
  - » [Frequently asked questions](#) during the public consultation MEMO/06/469, 07.12.2006
- 2002 Commission notice on [immunity from fines and reduction of fines in cartel cases](#) Official Journal C 45, 19.02.2002, p. 3-5
- 1996 Commission Notice on the [non-imposition or reduction of fines in cartel cases](#) Official Journal C 207, 18.07.1996 p. 4-6

At the bottom, there is a link for "Public consultations during the revision of the Leniency Notice".

#### 4. Possible settlement procedures for cartels:

Even after official cartel proceedings have been opened an entrepreneur involved in a cartel may cooperate. After having checked the Commission's file the entrepreneur has the right to acknowledge his involvement in the cartel and his liability. Opting to such a settlement procedure may result in the reduction of the fine imposed by 10% (due to Commission Regulation (EC) 622/2008 of 30.6.2008 ... as regards the conduct of settlement procedures in cartel cases, OJ L 171/3 of 1.7.2008).

The screenshot shows the European Commission's Competition website. The header includes the European Union flag, the word 'Competition', and an 'Important legal notice' link. Below the header is a navigation bar with 'HOME', 'Policy areas', 'Sectors', 'About', 'Information', 'Contacts', and 'Key Issues'. The main content area is titled 'Cartels' and 'Legislation > Settlements'. Under 'Settlement procedure for cartels', there are two bullet points:

- [Commission Regulation \(EC\) No 622/2008 of 30 June 2008 amending Regulation \(EC\) No 773/2004, as regards the conduct of settlement procedures in cartel cases \(Text with EEA relevance\)](#), Official Journal L 171, 1.7.2008, p. 3–5
- [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 \(EC\) No 1/2003 in cartel cases \(Text with EEA relevance\)](#), Official Journal C 167, 2.7.2008, p. 1–6

## 5. Court actions for damages of victims of EU cartels

- Court of Justice of the European Union opened the path that victims of EU antitrust rules may exercise the right to compensation/may obtain reparation (CJ, judgement of 20.9.2001, C-453/99 – Courage/Drehan; judgement of 13.7.2006, C-295/04 – C 298/04 – Manfredi).
- E.g. the buyer of cement who suffered harm as a result of a cartel (he paid too much) may start court action against the cartel member who delivered the cement.
  
- German law does not acknowledge class actions/collective redress (Sammelklagen) in this particular field of law. Therefore German plaintiffs use several possibilities to start court action in other EU countries (e.g. the German law firm Linklaters provides information on possible proceedings and strategies, [www.linklaters.com/pdfs/publications/germany/Flyer\\_Schadenersatz.pdf](http://www.linklaters.com/pdfs/publications/germany/Flyer_Schadenersatz.pdf)).
  
- However, the German High Court enforces individual antitrust damages actions damages
  - of the party of a contract when the other party has participated in a cartel to obtain reparation for the harm suffered
  - of indirect victims of cartels(BGH, judgement of 26.8.2011, KZR 75/10)  
(Oberlandesgericht Düsseldorf safeguards the safe status of a key witness (Kronzeuge), judgement of 22.8.2012 V-4 Kart 5+6/11 (OWi))

- Judgment of the Court of Justice of the European Union, 5 June 2014 (C-557/12):  
*„Art. 101 precludes ... domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.”*
- Oberlandesgericht Hamm (Supreme Court Hamm), order of 26 November 2013 (1 Vas 116/13, 120/13 and 122/13) allows that the victim of a cartel may inspect the files of the public prosecutor (right to inspection of the records) to prepare civil court proceedings/action for damages against the cartel participants.

### Deutsche Bahn sues ThyssenKrupp over rail cartel

Premium Article • Friday, 21 December 2012



German railway operator Deutsche Bahn has sued ThyssenKrupp and other rail manufacturers for damages following a cartel decision by Germany's Federal Cartel Office.

(source: <http://globalcompetitionreview.com/news/tags/1188/deutsche-bahn>)

- The EU wishes to implement an effective EU-wide legal framework for antitrust actions for damages and prepares that at the moment.

The screenshot shows the European Commission website page for 'Actions for Damages > Overview' under the 'Antitrust' section. The page features a navigation menu with 'HOME', 'Policy areas', 'Sectors', 'About competition policy', 'Cases & legislation', 'Current Issues', and 'Contacts'. A sidebar on the left lists various categories: Overview, What's new?, Official Journal, Legislation, Cases, Cooperation with national courts, Sector inquiries, Publications, Actions for damages, Compliance, and Practical information. The main content area includes a list of key documents and a section titled 'Towards more effective antitrust damages actions in Europe'.

**Actions for Damages > Overview**

- **Overview:** Steps towards a European legal framework
- **Key Documents:** Main background documents
- **Proposal for a Directive:** Commission proposal for a Directive on Antitrust Damages Actions
- **Collective redress:** Towards a coherent European approach
- **Quantification of harm:** Commission Communication and Practical Guide on the quantification of harm caused by infringements of the EU antitrust rules

**Towards more effective antitrust damages actions in Europe**

Infringements of the EU competition rules, such as price cartels and abuses of a dominant position in the market, are not only negative for the economy and consumers as a whole: they also cause **direct harm to the infringer's customers and competitors (e.g. higher prices, lost profits)**.

The European Court of Justice held that any citizen or business who suffers harm as a result of such breaches is **entitled to compensation** from the infringers.

However, most victims of antitrust infringements, particularly SMEs and consumers, rarely obtain reparation for the harm suffered. The exercise of the right to compensation is governed by national rules. These often make it costly and difficult to bring actions, so that compensation is not available for victims in all Member States.

That is why the [Commission proposed a Directive](#) on 11 June 2013 to remove the main obstacles standing in the way of effective compensation, and guarantee a minimum protection for citizens and businesses, everywhere in the EU.



## 6. National German law: remaining cases

- Pure national cartel cases having no crossborder impact are subject to German cartel law = GWB Gesetz gegen Wettbewerbsbeschränkungen (Cartel act).
- Bundeskartellamt is the responsible state authority to deal with German cartel law cases (e.g. coffee roasting companies).

**Bundeskartellamt**

**Aktuelle Meldungen**

**Über das Bundeskartellamt**

**Presse**

**Rechtsgrundlagen**

**Kartellverbot**

**Missbrauchsaufsicht**

**Fusionskontrolle**

**Vergaberecht**

**Stellungnahmen/Publikationen**

**Veranstaltungen**

**Internationale Zusammenarbeit**

**AGB-Verzeichnis (alt)**

**Links und Adressen**

**English**

**Français**

**Pressemeldung des Bundeskartellamtes vom 09.06.2010**

**Bundeskartellamt verhängt weitere Geldbußen gegen Kaffeeröster - 30 Mio. Euro Bußgeld wegen Preisabsprachen im Außer-Haus-Vertrieb**

Das Bundeskartellamt hat gegen acht Kaffeeröster und den Deutschen Kaffeeverband e.V., Hamburg, (DKV) sowie zehn verantwortliche Mitarbeiter Geldbußen in Höhe von insgesamt ca. 30 Mio. Euro wegen Preisabsprache sog. Außer-Haus-Bereich (Belieferung von Großverbrauchern) verhängt. In acht Unternehmen handelt es sich um die

- Kraft Foods Außer Haus Service GmbH, Bremen,
- Tchibo GmbH, Hamburg,
- J.J. Darboven GmbH & Co. KG, Hamburg,
- Melitta SystemService GmbH & Co. Kommanditgesellschaft, Minden,
- Luigi Lavazza Deutschland GmbH, Frankfurt,
- Seeberger KG, Ulm,
- Segafredo Zanetti Deutschland GmbH, München, und
- Gebr. Westhoff GmbH & Co. KG, Bremen.

Eingeleitet wurde das Verfahren durch einen Bonusantrag der Alois Dallmayr Kaffee oHG, München, gegen die deshalb keine Geldbuße verhängt wurde. M und Darboven wurde für ihre Kooperation bei der Aufklärung der Vorwürfe im Laufe des Verfahrens eine Reduktion ihrer Geldbußen gewährt.

**Bundeskartellamt**

**Service**

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Publikationen

Bibliothek

Presse

Besuchergruppen

Rechtsgrundlagen

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Links & Adressen

**Bundeskartellamt - Jahresrückblick 2013**

**Meldung vom:** 27.12.2013

Andreas Mundt, Präsident des Bundeskartellamtes: „Ein wesentlicher Grund für den anhaltenden Erfolg der deutschen Wirtschaft ist sicherlich auch das wettbewerbliche Umfeld auf den Heimatmärkten in Deutschland. Wettbewerb funktioniert aber nur, wenn es Spielregeln gibt, an die sich alle halten. Das Bundeskartellamt hat die verantwortungsvolle Aufgabe, als Schiedsrichter über die Einhaltung der Regeln zu wachen.“

**Kartellverfolgung**

Das Bundeskartellamt hat 2013 in 11 Fällen rund 240 Mio. Euro Bußgelder gegen insgesamt 54 Unternehmen und 52 Privatpersonen verhängt. Darunter waren der Abschluss des Schienenkartells sowie Bußgelder gegen Unternehmen der Mühlenindustrie, bei Süßwaren, Haushaltsgeschirr und im Bereich Drogerieartikel. Außerdem legte das Bundeskartellamt in diesem Jahr seine überarbeiteten Bußgeldleitlinien vor.

Andreas Mundt: „In der Kartellverfolgung sind wir in den vergangenen Jahren schlagkräftiger geworden, und der Trend reißt nicht ab. In 17 Durchsuchungsaktionen im Laufe des Jahres 2013 konnte das Bundeskartellamt mit Unterstützung der Kriminalpolizei und der Staatsanwaltschaften bei insgesamt 84 Unternehmen und Privatwohnungen zahlreiche neue Hinweise auf illegale Kartellabsprachen sicherstellen. Dabei waren über 300 Mitarbeiter des Bundeskartellamtes und der weiteren beteiligten Behörden im Einsatz.“

**Fusionskontrolle**

### Bußgeldverfahren gegen Unternehmen der Mühlenindustrie

Branche:	Herstellung und Absatz von Mehl
Aktenzeichen:	B11 – 13/06
Datum der Entscheidungen:	Oktober 2011 bis Februar 2013

Das Bundeskartellamt hat am 19. Februar 2013 die Bußgeldverfahren gegen Unternehmen der Mühlenindustrie abgeschlossen und Geldbußen von insgesamt rund 65 Mio. Euro gegen 23 Unternehmen, den *Verband Deutscher Mühlen e.V.* sowie deren Verantwortliche verhängt.

(source: [www.bundeskartellamt.de](http://www.bundeskartellamt.de))

Prof. Dr. Holger Buck – Competition Law (gest lecture ISEG 2014)

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### **3. Abuse of a dominant position**

- 1. Source of law: art 102 (and 103 and 104) TFEU [ex art. 82 EC Treaty]**  
(cf. legal text)

## 2. case study: EU's Microsoft case I

The integration of Microsoft's Internet Explorer and Media Player into Windows constitute an abuse of a dominant position according to both U.S. law and EU Law.

(*U.S. v. Microsoft*, U.S. District Court of Columbia, Civil Action No. 98-1232, based on the Sherman Act: Settlement of 2 November 2001, modified final judgement of 7 September 2006; the action is still pending: joint status report relating to Microsoft's compliance with the final judgements of 27 April 2011]; [http://www.justice.gov/atr/cases/ms\\_index.htm](http://www.justice.gov/atr/cases/ms_index.htm))

- 23 March 2004: the Commission imposed a fine of € 497 million (violation of EU cartel law) and ordered that Microsoft has to disclose interface information (on interoperability) to allow competitors to interoperate with Windows.
- 5 October 2005: English Prof. Barrett appointed as monitoring trustee.
- 17 September 2007: CJ (General Court) upheld the Commission's decision (case T-201/04)
- 27 February 2008: Commission imposed € 899 million penalty for non-compliance with March 2004 decision.
- 9 May 2008: Microsoft appealed the Commission's decision to the CJ (T-167/08).
- 27 June 2012: Judgement of CJ upheld the Commission's decision and reduces penalty to € 860 million.

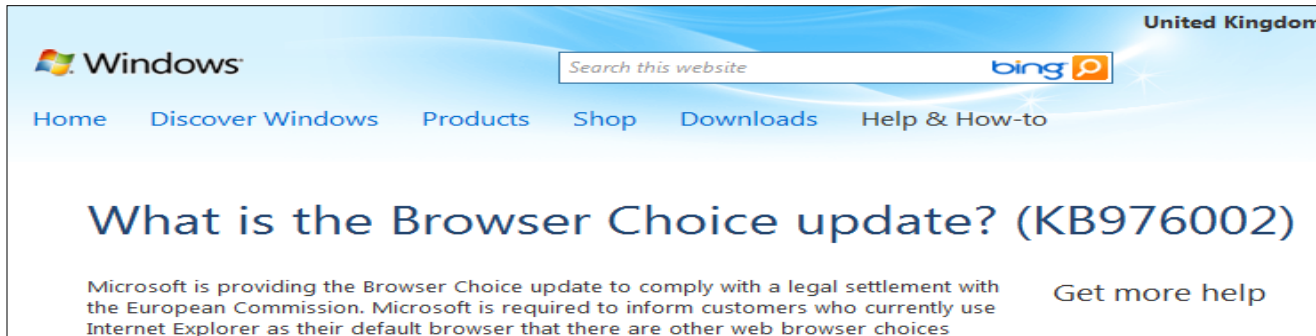
### 3. case study: **EU's Microsoft case II**

For many years Microsoft has automatically tied its 'Internet Explorer' web browser to its 'Windows' computer operating system.

The Commission acting as EU's cartel authority is of the opinion that this constitutes an abuse of a dominant position and that it distorts competition.

On 16 December 2009 the Commission has adopted a decision that renders legally binding commitments offered by Microsoft to make available for five years within the EU a “Choice Screen” enabling users of Windows to choose in an informed and unbiased manner which web browsers they want to install in addition to, or instead of, Microsoft's web browser (e.g. Apple Safari, Mozilla Firefox, Opera).

Microsoft implemented that browser choice screen for Europe on 2 March 2010.



However, from February 2011 until July 2012 millions of Windows users in the EU may have not seen the choice screen. That is why the Commission opened investigations concerning possible non-compliance with browser choice commitments. If Microsoft is found that the company has breached legally binding commitments, it may be fined up to 10% of its total annual turnover.

Microsoft acknowledges a “technical error” and apologizes.

On 6 March 2013 the Commission has imposed a fine of €561 million (COMP/39.530).

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4. Merger control (EU law seen from the German perspective)
5. Conclusion

- Merges may reduce competition in the relevant market, usually by creating or strengthening a dominant market participant. Therefore a merger may be likely to harm consumers through higher prices, reduced choice or less innovation.
- A merger may affect the internal market negatively if there is a EU dimension. Approx. 300 mergers are typically notified to the EU Commission each year.
- If the negative effects of a merger prevail, a merger project can be prohibited.

## 1. Legal sources within the EU:

- a) TFEU
  - art. 101
  - art. 102
  - art. 106

(art. 3, 14, 103-105, 119, 346)

- b) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24/1, 29 January 2004
- c) Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 (OJ L 133, 30.04.2004, p.1), as amended (consolidated version of December 2013)



## 2. The core rules:

- A merger occurs
  - where two or more formerly independent entities uniteor
  - in the event of an acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings

(cf. art. 3(1)(a) and (b) Regulation 139/2004).
- The Merger regulation 139/2004 shall apply to all concentrations with a Community [Union] dimension (art. 1(1)).

▪ „Concentration with an EU dimension“:

→ A merger is only examined by the EU Commission if the merging entities reach certain **turnover thresholds**:

- (a) a combined worldwide turnover of all the merging firms over € 5 000 million, and
- (b) an EU-wide turnover for each of at least two of the firms over € 250 million

or

- (a) a worldwide turnover of all the merging firms over € 2 500 million, and
- (b) a combined turnover of all the merging firms over € 100 million in each of at least three Member States,
- (c) a turnover of over € 25 million for each of at least two of the firms in each of the three Member States included under (b), and
- (d) EU-wide turnover of each of at least two firms of more than € 100 million.

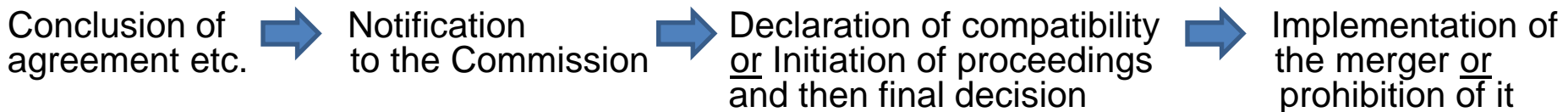
An EU dimension is not met if each of the firms achieves more than two thirds of its EU-wide turnover within one and the same Member State.

(art. 1(2)-(3)).

- A concentration with a EU dimension must be notified to the EU Commission prior to its implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest (art. 4(1)).
- The EU Commission has the task to examine the notification as soon as it is received (art. 6(1)).
- The EU Commission has strong powers of requiring any information needed (art. 11) and of inspecting the entities involved (art. 13); professional secrecy is secured (art. 17).
- The EU Commission has power of imposing fines (art. 14). EU Court of Justice has unlimited jurisdiction to review decisions having fixed fines (art. 16).
  
- Where the Commission
  - (a) concludes that the concentration notified does not fall within the scope of the Merger Regulation, it shall record that finding by means of a decision;
  - (b) finds that the concentration notified, although falling within the scope of the Merger Regulation, does not raise serious doubts as to its compatibility with the internal market, it shall decide not to oppose it and shall declare that it is compatible with the internal market
  - (c) finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the internal market, it shall decide to initiate proceeding.  
(art. 6(1) – first phase decisions).

- Where the EU Commission finally finds
    - (a) that a concentration with EU dimension does not harm the internal market, it shall issue a decision declaring the concentration compatible with the internal market
    - (b) that a concentration harms the internal market, it shall issue a decision declaring that the concentration is incompatible with the internal market
    - (c) that a concentration has already been implemented and that concentration has been declared incompatible with the internal market, the EU Commission may require the undertakings concerned to dissolve the concentration
- (art. 8(1)-(4) – second phase decisions).

### Summary of the proceedings:



### 3. The EU Commission's statistik on merger control:

III.) FIRST PHASE DECISIONS																							September		Total	
90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14		
Art 6.1 (a) out of scope Merger Regulation	2	5	9	4	5	9	6	4	4	1	1	1	1	0	0	0	0	0	0	0	0	0	0	1	53	
Art 6.1 (b) compatible	5	47	43	49	78	90	109	118	196	225	278	299	238	203	220	276	323	368	307	225	253	299	254	252	211	4966
Art 6.1(b) compatible, under simplified procedure (figures included in 6.1(b) compatible above)	0	0	0	0	0	0	0	0	0	0	41	141	103	110	138	169	211	238	190	143	143	191	171	166	160	2315
Art 6.1 (b) in conjunction with Art 6.2 (compatible w. commitments)	0	3	4	0	2	3	0	2	12	16	26	11	10	11	12	15	13	18	19	13	14	5	9	11	5	234

IV.) PHASE II PROCEEDINGS INITIATED																							September		Total	
90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14		
Art 6.1 (c)	0	6	4	4	6	7	6	11	11	20	18	21	7	9	8	10	13	15	10	5	4	8	10	6	4	223

V.) SECOND PHASE DECISIONS																							September		Total	
90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14		
Art 8.1 compatible (8.2 under Reg. 4064/89)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	4	5	9	0	1	4	1	2	2	56	
Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	2	1	6	2	4	106
Art 8.3 prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	0	1	1	2	0	24
Art 8.4 restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	4

VI.) OTHER DECISIONS																							September		Total	
90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14		
Art 6.3 decision revoked	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
Art 8.6 decision revoked	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Art 14 decision imposing fines	0	0	0	0	0	0	0	0	1	4	1	0	1	0	1	0	0	0	0	1	0	0	0	0	1	10
Art 7.3 derogation from suspension (7.4 under Reg. 4064/89)	1	1	2	3	3	2	4	5	13	7	4	7	14	8	10	6	2	3	6	5	1	3	1	1	1	113
Art 21	0	0	0	0	0	1	0	1	0	1	1	0	1	0	0	2	1	0	0	0	0	0	0	0	0	8

Source: <http://ec.europa.eu/competition/mergers/statistics.pdf>

## Recent EU cases of the Commission:

The screenshot shows the 'COMPETITION' section of the European Commission website. It features a navigation menu with 'HOME', 'Policy areas', 'Sectors', 'About competition poli', 'Cases & legislation', 'Current Issues', and 'Contacts'. Below the menu, there are links for 'What's new?', 'Manuals', and 'Contact'. The main content area is titled 'Merger cases by date - Last 3 months' and lists cases for November, October, and September 2014. Each case entry includes a date, a case number, and the names of the companies involved, along with a link to the document or public version of the decision.

European Commission

COMPETITION

European Commission > Competition > Cases

HOME Policy areas Sectors About competition poli Cases & legislation Current Issues Contacts

[What's new?](#) | [Manuals](#) | [Contact](#)

[New Search](#)

**Merger cases by date - Last 3 months**

**november**

03 nov 2014

- [M.7440](#) EASTMAN CHEMICAL COMPANY / TAMINCO CORPORATION (document published)
- [M.7428](#) IRIDIUM / DIF / CONCESSION BUSINESSES (public version of decision published)
- [M.7367](#) CNP / SANTANDER / SANTANDER IRISH INSURANCE SUBSIDIARIES (document published)
- [M.6992](#) HUTCHISON 3G UK / TELEFONICA IRELAND (public version of decision published)

**october**

31 oct 2014

- [M.7440](#) EASTMAN CHEMICAL COMPANY / TAMINCO CORPORATION (Notification)
- [M.7436](#) VISTA / TIBCO (Notification)
- [M.7433](#) OTPP / PAMPLONA / CSC (document published)
- [M.7431](#) MAPFRE / DL GERMANY / DL ITALY (document published)
- [M.7417](#) SIME DARBY / NEW BRITAIN PALM OIL (Notification)
- [M.7375](#) UTC / CIAT (Notification)

30 oct 2014

- [M.7407](#) LEAR CORPORATION / EVERETT SMITH GROUP (document published)
- [M.7430](#) FOSUN / CLUB MEDITERRANEE (document published)
- [M.7367](#) CNP / SANTANDER / SANTANDER IRISH INSURANCE SUBSIDIARIES (Notification)

29 oct 2014

- [M.7389](#) AEGON SPAIN / SANTANDER TOTTA SEGUROS / AEGON SANTANDER VIDA / AEGON SANTANDER NÃO VIDA (document published)
- [M.7292](#) DEMB / MONDELEZ / CHARGER OPCO (document published)
- [M.7252](#) HOLCIM / LAFARGE (document published)
- [M.7401](#) BLACKSTONE / ALLIANCE BV / ALLIANCE AUTOMOTIVE GROUP (document published)

28 oct 2014

- [M.7433](#) OTPP / PAMPLONA / CSC (document published)
- [M.7431](#) MAPFRE / DL GERMANY / DL ITALY (document published)

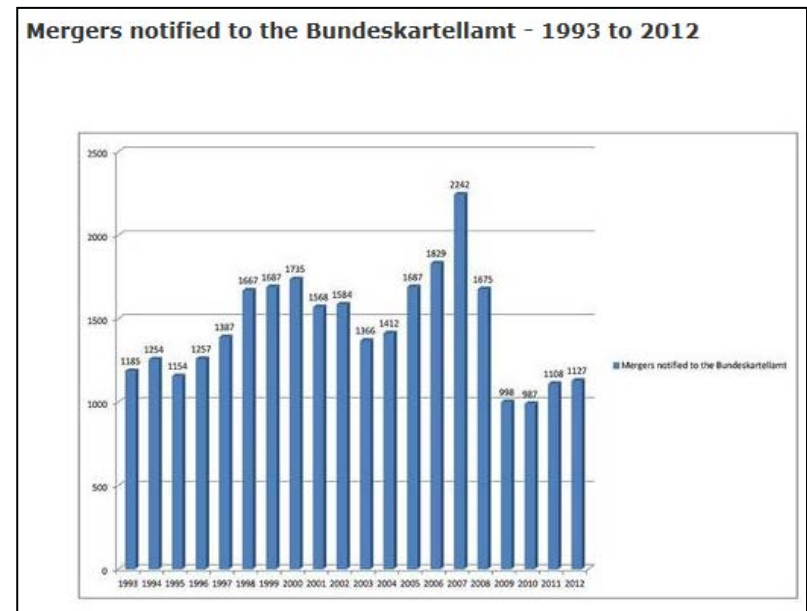
Source: [http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp\\_merger\\_by\\_date](http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_merger_by_date)

### 3. National (German) cases

- Smaller mergers which do not have an EU dimension may fall instead under Member States' competition laws.

In Germany: GWB (Gesetz gegen Wettbewerbsbeschränkungen) – Act against Restraints of Competition  
(English version: [http://www.gesetze-im-internet.de/englisch\\_gwb/index.html](http://www.gesetze-im-internet.de/englisch_gwb/index.html))

- A referral mechanism exists between the EU Commission and Member States' competition authorities to transfer the case between themselves, both at the request of the companies involved and of the Member States (cf. art. 9, 20, 22 Regulation 139/2004).
- The competent German authority is (the federal) Bundeskartellamt ([www.bundeskartellamt.de](http://www.bundeskartellamt.de))



(source: [www.bundeskartellamt.de/EN/Mergercontrol/mergercontrol\\_node.html](http://www.bundeskartellamt.de/EN/Mergercontrol/mergercontrol_node.html);jsessionid=C50158909FA2E98224AA92114A7CEF66.1\_cid362)

▪ Current German merger control proceedings:

Datum	Aktenzeichen	Unternehmen	Produktbereiche	Bundesland
28.10.2014	B1-219/14	Dream Global Mittelbarer Erwerb von Mehrheitbeteiligungen an IREF Gesellschaften	Immobilien	-
28.10.2014	B9-161/14	SSVP III (GBG); Erwerb Prae-Turbo Verwaltungs GmbH & Co.KG	Verdichterräder und Turbinenradprototypen für PKW und LKW	Bayern, Niedersachsen
27.10.2014	B1-218/14	Rhenus KG Erwerb der Brenner Schweiz/Holding	Transport und Handel mit Alt- und Restholz	Nordrhein-Westfalen, Rheinland-Pfalz
27.10.2014	B8-137/14	Verbund Solutions GmbH/GETEC heat & power AG/GU-Gründung	Energiedienstleistungen	Niedersachsen, Sachsen-Anhalt
24.10.2014	B3-175/14	WH Beteiligungs GmbH/VR Equitypartner GmbH, gem.Übernahme der	Herstellung von Kunststoff-Spritzguss	Baden-Württemberg, Bayern, Hessen

(source:[www.bundeskartellamt.de/SiteGlobals/Forms/Suche/EN/Entscheidungssuche](http://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/EN/Entscheidungssuche))



Current prohibition decisions:

B9-202/08	Case summary from 24 January 2011: Final abandonment of acquisition by RheinEnergie AG of stake in municipal utility Stadtwerke Bonn Beteiligungs-GmbH – Rejection of so-called "tracking-stock model"	19.05.2009	Land transport (60), energy supply (40), waste management (90)	Prohibition
B3-215/08	Case summary from 24 July 2009: Acquisition of Gesundheitsholding Werra-Meißner GmbH, Eschwege, by Gesundheit Nordhessen Holding AG, Kassel	24.07.2009	Hospitals (85)	Prohibition
B2-75/09	Case summary from 9 March 2010: Bundeskartellamt clears an agricultural trade case in Saxony-Anhalt (BayWa/Wurth Agrar) and issues statement of objection in another case in the Baden region (ZG Raiffeisen/Wurth Agrar)	08.10.2009	Agricultural trade	Clearance Prohibition
B8-175/08	Case summary from 29 April 2009: Prohibition of the acquisition of 59 petrol stations in Saxony and Thuringia belonging to OMV Deutschland GmbH by Total Deutschland GmbH	29.04.2009	Petrol stations (5050)	Prohibition
B7-70/12	Case summary from 22 April 2013: Prohibition of the acquisition of Tele Columbus by Kabel Deutschland	22.02.2013	Broadband cable networks, broadcasting, broadband connections	Prohibition
B1-10/10	Case summary from 24 January 2011: Creation of joint venture between BHP Billiton and Rio Tinto abandoned after concerns expressed by the Bundeskartellamt	18.10.2010	Mining, iron ore	Prohibition Termination of proceeding
B6-79/09	Case summary from 12 May 2010: Planned merger between Rheinische Post and Aachener Nachrichten/Aachener Zeitung abandoned after objection by the Bundeskartellamt	26.11.2009	Subscription dailies	Prohibition Termination of proceeding

(source:[www.bundeskartellamt.de/SiteGlobals/Forms/Suche/EN/Entscheidungssuche](http://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/EN/Entscheidungssuche))

■ Approval of important merger cases:

B4-133/08	Case summary from 14 November 2009: Major Mergers in the Banking Sector 1. Deutsche Bank AG / Deutsche Postbank AG 2. Commerzbank AG / Dresdner Bank AG (/ Allianz SE) 3. DZ Bank AG / WGZ Bank AG	14.11.2009	Financial intermediation, except insurance and pension funding (65)	Clearance
B3-64/09	Case summary from 5 June 2009: Cleared - Creation of a joint venture for HIV drugs by GlaxoSmithKline PLC and Pfizer Inc.	05.06.2009	Pharmaceuticals	Clearance
B2-117/09	Case summary from 7 June 2010: Bundeskartellamt clears merger between Heiner Kamps Beteiligungs-gesellschaft and Nadler Feinkost et al.	12.04.2010	Production of delicatessen salads and fish specialties	Clearance
B2-137/09	Case summary from 31 May 2010: Clearance of Merger between Pelikan International Corporation and Herlitz	17.03.2010	Manufacture of stationery	Clearance

(source:[www.bundeskartellamt.de/SiteGlobals/Forms/Suche/EN/Entscheidungssuche](http://www.bundeskartellamt.de/SiteGlobals/Forms/Suche/EN/Entscheidungssuche))

0. EU, EU law, EU competition law
1. State Aid (EU law seen from the German perspective)
2. Cartel Law (EU law)
3. Abuse of dominant position (EU law)
4. Merger control (EU law seen from the German perspective)
5. Conclusion

- To achieve the Internal Market the EU is – with good reasons - empowered to harmonize the laws of the Member States (art. 114 et seq.TFEU).
- Beyond all EU criticism and beyond a hyperbolizing European bureaucracy the Law of the European Union endorses the EU industries to comfortably carry out their business all over the Member States without barriers and without discrimination and is helpfull for global business.
- „Competition“ means that competitive companies operating on a level playing field which is free of distortion do succeed.
- To effect the Internal European Market the TFEU’s provisions on state aid and the efficient control of state aid by the Commission are indispensable.
- In order to cut down state aid the Commission in recent years favoured horizontal state aid (aid on research, on environment protection or for the benefits of SME) rather than sectorial aid (car manufacturing or ship building industry). The Commission prefers short running state aid rather than long running aid.

- Cartel law, rules against abuse of dominant position and merger control are essential to fight for an unimpeded internal market. Not only consumer benefit from this sector of the EU/national legal system, business people as well (safeguarding the rights of competitors).
- I hope you agree with me that for the benefits of our societies competition should be treated as a sacred cow.
- EU entrepreneurs profit from legal provisions that facilitate trading within the internal market (e.g. the Four Freedoms, Community Trademark).
- The Law of the European Union is well shaped to respond to the needs of transborder business and at least in times of „globalization within the EU“.
- Business people involved in EU and international business and their staff should know the national – Portuguese – law as well as EU law and international law.

