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Trade Law and Competition Law: Practical Perspectives on the Common Ground

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International trade and competition law considerations are becoming increasingly important for businesses. Although they are routinely regarded as distinct areas of law, there are areas of overlap between the two. Current legal and economic developments (such as the continued rise of globalisation) are creating a greater number of commercial issues to which trade law and competition law both offer solutions. Against this background, it is imperative that companies (whether inside or outside the EU) understand how both disciplines may impact on their business, in order to take the best possible advantage of the opportunities that each of the two presents, and minimise exposure to potential compliance and commercial threats.

The purpose of this chapter is to present some practical examples of how trade law and competition law can both apply, in parallel, to similar commercial issues. As we shall see, businesses that are able to take a holistic approach and consider both trade and competition as part of their commercial toolkit stand to win a considerable advantage over businesses that focus on one, but tend to overlook the other. Our goal is to correct the view, widely held in some sectors, that certain companies face either competition issues or trade issues. Rather, we believe that all companies face commercial issues to which competition and trade, and sometimes both together, provide the answer.

Use and abuse of intellectual property rights (IPRs)

In this section, we will consider how both trade law and competition law may interact with a third discipline, namely intellectual property (IP) law. Looking first at the seizure of goods in transit, and then at alleged abuses of dominance, we shall see how the measures taken by IPR holders to defend their property can be challenged under trade law and competition law. In both cases, fundamental questions are raised regarding the legitimate protection of IPRs, and the proper use of procedures designed for this purpose.

The seizure of goods in transit which are suspected of infringing IPRs, as permitted by the provisions of Council Regulation (EC) 1383/2003 (the Anti-Counterfeit Regulation), can have a worldwide impact. This is a highly controversial topic that raises important concerns regarding international free trade and has given rise recently to fresh disputes. It is also a sensitive issue, given that it may bear seriously adverse consequences in less developed non-EU countries.

The precise circumstances under which goods in transit can be seized on the basis that they infringe IPRs protected in the EU have not yet been settled. Differing interpretations by customs authorities and courts across member states has led to uncertainty among IPR holders and exporters. For example, the Dutch courts have applied the so called ‘production fiction’ (based on article 6(2)(b) of the previous Anti-Counterfeit Regulation), which views IPR holders as having the same right of action as if the goods in transit had been produced in the Netherlands. This was the case, for example, in Sisvel v Sosecal, a case concerning MPEG audio products produced in China and seized in the Netherlands while in transit to Brazil. By contrast, in Nokia v HMRC the English High Court took a different approach, stating that the Anti-Counterfeit Regulation did not support the production fiction, and that even fake goods in transit cannot be seized in the EU. The Court of Justice of the European Union (the CJEU) is yet to rule on this issue. Both cases referred to above have been appealed, however, and the question of whether the goods in transit infringe IPRs within the EU has been referred to the CJEU. Until the CJEU has ruled on this question, the matter will remain unresolved, and IPR holders can continue resorting to the Anti-Counterfeit Regulation to seize goods in transit in jurisdictions where this is possible.

This situation clearly has repercussions on an international level. The most controversial and high-profile cases concern the detention of generic drugs in transit in the Netherlands, Germany and France which were destined for developing nations. As a result, countries whose industries have been affected by the application of the Anti-Counterfeit Regulation have challenged its legality under WTO law, namely the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). The relevant provision (article 51 of the TRIPS Agreement) has been interpreted as meaning one of the following two things:

- goods in transit may be seized if there are valid grounds for suspecting that the goods may enter the market of the country in which they are in transit; or
- goods in transit may be seized if the IPR holder’s rights would be infringed in the country of final destination where the goods will be released into circulation.

Under the latter interpretation, the IPR holder does not have to wait until the goods reach their final destination before intervening; goods that infringe IPRs in their country of destination can be seized in transit. This, however, does not allow an IPR holder to seize goods because they infringe IPRs in the country where they are currently placed in transit. Unless the goods are likely to enter the market in that country – the scenario envisaged by the first interpretation above – then the IPR holder cannot apply article 51. Like the Dutch and UK courts, WTO members have differing views as to how article 51 should be applied. Crucially, however, the WTO Dispute Settlement Body (DSB) has never dealt with this issue and to date there has been no clear answer to this question. At this stage of caselaw development, it would therefore appear that the EU legislation allows IPR holders to go beyond the EU’s WTO commitments regarding enforcement, as seizures of goods in transit may be permissible even in cases where it is not proven that the IPR holder’s rights would be infringed in the country of final destination. This practice may allow dominant IPR holders to abuse their rights and may place generic drug producers in third countries in an unduly disadvantageous position.

From a competition law perspective, the legitimate use of measures designed to protect IPRs also raises issues at both EU and national level. The interaction between principles of intellectual property and antitrust law, in particular, can at times be uneasy.
At EU level, an undertaking in a dominant position in the market may not abuse that dominance through the way in which it exploits, manages or protects its IPRs. Typically, such an infringement occurs where the dominant player refuses to license essential IPRs to actual or potential competitors, thereby blocking their entry to the market. This was the case in *Magill*, when the General Court held that the IPR holder was exercising its IPRs in a manner contrary to article 82 EC (now article 102 TFEU), by preventing the production and marketing of a new product for which there was consumer demand. Similarly, in the IMS and Microsoft cases, the right of a dominant undertaking to exploit its IPRs was curtailed on the grounds that a licence of the IPRs in question was essential for new entrants to access the market and launch new products or services, thus generating competition with the incumbent IPR holder.

Similar cases have also been heard at national level, with member state competition authorities finding that a refusal to license IPRs to competitors constitutes an abuse of dominance, and ordering the IPR holder to grant compulsory licenses by way of remedy. This was the approach taken, for example, by the AGCM in Italy, which ordered Merck and GSK, two major multinational pharmaceutical companies, to issue patent licences to competitors without charging royalties.

The recent judgment of the General Court in the AstraZeneca case demonstrates that not only negative unilateral conduct of dominant IPR holders (ie, refusal to license), but also their positive actions, can be challenged under competition law. In this case, the dominant patentee was found to have abused IP-related administrative procedures in order to prevent the launch of competing products.

The case concerned two allegedly improper uses of legitimate IPR-related procedures. The first concerned AstraZeneca’s applications for supplementary protection certificates (SPCs). These certificates extend the patent protection of pharmaceuticals by up to five years, essentially to compensate the patentee for a delay between the filing of a patent application and the grant of authorisation to market the product. The European Commission (the Commission) and the General Court found that AstraZeneca abused its dominance by filing misleading submissions with patent offices and national courts for SPCs related to a patented drug, omeprazole. This was found to be part of a strategy designed purposefully to exclude manufacturers of generic alternative drugs from the market.

Similarly, AstraZeneca was found to have abused its dominance by selectively deregistering its market authorisations for a different drug, Losec, in some EU member states, effectively foreclosing generic manufacturers from the market. EU law requires that pharmaceutical products must undergo extensive clinical testing before being placed on the market. To encourage competition, however, manufacturers of generic alternatives to a drug may rely on the original drug’s market authorisation, after a period of six or ten years, and thus avoid the time and cost of clinical testing. By selectively withdrawing the authorisation granted to Losec, therefore, AstraZeneca was able to prevent rivals from marketing competing products.

Similar concerns over the abuse of legitimate procedures can arise in the context of standardisation. The *Rambus* case is one example of this. A US standardisation organisation, JDEC, had set industry-wide standards for dynamic random access memory chips (DRAMs), a common component of PCs and other electronic devices. Rambus claimed, subsequent to the standard having been set, that it owned patents on technologies that read on the standard. This meant that any company wishing to manufacture DRAMs according to the JDEC standard was required to obtain a licence from Rambus. By not disclosing its patent until after the standard had been adopted – a process known as ‘patent ambush’ – Rambus was able to charge higher royalties for its licences than would otherwise have been the case. The Commission’s investigation into this conduct closed in late 2009, when Rambus offered commitments to effectively cap its royalty rates for a period of five years.

The cases above illustrate the tension that can arise between policy considerations in favour of IP protection, on the one hand, and the interests of free trade and competition, on the other. IPR holders whose business model is largely built on extracting revenues while their product is protected – for instance, original pharmaceutical manufacturers – will inevitably seek to enforce that protection by whatever legitimate means are available. Should they apply the provisions of the Anti-Counterfeit Regulation, however, they may find the legality of their actions challenged under WTO law even if they are compliant with national legislation.

State aid under article 107 TFEU v subsidies under the WTO Agreement

A further area of interaction between competition and trade law that has also undergone recent developments is the discipline governing the granting of government financial support to undertakings. In October 2004, the United States challenged a number of subsidies granted to Airbus by the EU, France, Germany, Spain and UK before the WTO, illustrating the apparent tension that exists between the WTO discipline governing the granting of subsidies and EU state aid rules. This dispute was put before a WTO panel, in accordance with the dispute settlement rules of the WTO Agreement.

The panel adopted its much awaited report on 30 June 2010, essentially finding that some, but not all, of the schemes targeted by the US were in breach of the WTO discipline. As is usual practice in WTO disputes, both sides claimed victory. However, the EU has since sought to appeal the panel report before the Appellate Body of the WTO DSB, while the US had not expressed an intention to appeal when this article was put to press. Various components of the subsidies granted to Airbus constituted aid notified to and approved by the European Commission.

Despite the fact that EU state aid rules are generally more stringent than the WTO subsidy discipline, there are significant differences between the two regimes, which can mean that subsidies found to be compatible with the EU state aid rules may breach the obligations of the EU and its member states under the WTO. We provide below one example of such striking differences.

Under EU competition law, article 107(1) TFEU sets out the general principle that state aids are incompatible with the internal market. However, under article 107(2) and (3) TFEU respectively, the Commission is mandated or allowed to declare state aid to be compatible with the internal market. While under article 107(2), the Commission is compelled to authorise state aid that falls in certain categories (social aid granted on a non-discriminatory basis, aid to redress damages by natural disasters and aid to certain areas in Germany affected by the country’s past division), the Commission enjoys discretion on whether to permit measures falling under certain types of aid listed in article 107(3), such as regional aid, aid to promote
projects of common European interest, aid to promote culture and heritage conservation, etc.

Conversely, the WTO Agreement on Subsidies and Countervailing Measures (WTO ASCM) does not provide categories of permitted subsidies. Today, the WTO simply recognises two categories of subsidies:

- prohibited subsidies (articles 3 and 4); and
- actionable subsidies (articles 5 to 7).

Prohibited subsidies are export subsidies, and subsidies contingent upon the use of domestic over imported goods. Subsidies found to be prohibited by the WTO dispute settlement body must be withdrawn. Actionable subsidies are those that have an adverse effect on the interests of other WTO members. A subsidy found to be actionable by a WTO panel will either have to be withdrawn or the adverse effect be removed. Subsidies that are not export subsidies, or do not cause any adverse effect to the interests of another WTO member, cannot be challenged under the WTO agreement.

The fact that there are no equivalent permitted subsidies under the WTO ASCM to those under article 107(2) and (3) TFEU means that some subsidies will be valid under article 107 TFEU, but will not be valid under the WTO ASCM as they are either prohibited or actionable.

As shown by the example above, the disparities that exist between the EU and the WTO subsidy disciplines means that subsidies permitted under article 107 TFEU may be in breach of the WTO discipline, and may thereby cause the EU and its member states granting the aid to be the target of WTO DSB proceedings, as was the situation in the Airbus case.

It is not yet clear whether the EU and its member states will eventually be ordered to recover the aid received by Airbus. The WTO panel did not order the reimbursement of duties by Airbus, but merely ordered the withdrawal of one subsidy scheme found to be an export subsidy, and ordered the EU and its member states to either withdraw those subsidy schemes causing adverse effects to the US, or to take ‘appropriate steps’ to remove such adverse effects. As the US did not request information regarding what such ‘appropriate steps’ might entail and with the panel being under no obligation to provide this, this term was left open.

It cannot be excluded, however, that the Appellate Body adopts a different opinion, and orders the EU to recover some of the subsidies granted to Airbus. The EU and the US have also declared their willingness to find a negotiated solution to this dispute; such negotiated solution may provide for the reimbursement of some of the subsidies.

The Airbus case clearly illustrates the risks that the differences between the WTO and EU state aid rules creates for companies in the EU benefiting from a subsidy approved by the Commission. A company receiving state aid from an EU member state, duly approved by the Commission or self-assessed as not requiring notification, may see this aid invalidated by a WTO panel, and may eventually be requested to repay it or be subject to other commercial obligations. The case also serves as a reminder to any company suffering from state aid granted to one or more competitors, that even if the aid has been deemed compatible with the internal market and can therefore no longer be challenged by the EU, there may still be redress through the WTO DSB channel.

**Promoting domestic business**

In this section, we will consider how both competition law and trade law have been used to support, or allegedly protect, EU-based businesses (including the EU operations of foreign companies). We focus in particular on the high-tech manufacturing sector, to illustrate how aspects of both areas of law can be applied – in a sometimes controversial fashion – to the benefit of the same industry, and to achieve largely the same goal: namely, to promote local investment and disadvantage competing foreign products.

From a competition law perspective, the EU rules on state aid create a framework within which member states can legitimately support domestic industries. Within this framework, there is scope to grant funds supporting interests of a horizontal nature, such as environmental objectives, or to assist specific regions within a member state. The latter takes place through the EU’s regional aid programme, whose purpose, according to the Commission’s Guidelines on Regional Aid 2007-2013, is to ‘promote[s] the expansion and diversification of the economic activities of enterprises located in the less-favoured regions, in particular by encouraging firms to set up new establishments there.’ This goal is backed up by a huge budget, with an estimated €49 billion expected to be invested in regional projects in 2010 alone.

To meet the objective of ‘encouraging firms to set up new establishments’, the levels of public investment permitted under the regional aid programme are necessarily high. Moreover, aid can be provided even to large enterprises – those whose establishment in a region lagging behind in terms of development is likely to have the most impact, by creating significant numbers of jobs and encouraging major secondary investment. One good example of this scenario is the €54.5 million granted by the Polish government to Dell Products Poland, which the Commission approved in 2009. The investment went towards Dell's construction of a major PC manufacturing plant in the Łódź special economic zone, creating an estimated 3,000 direct jobs in a region with an abnormally low standard of living and high unemployment.

Poland’s offer of substantial regional aid clearly had a significant influence on Dell’s decision to locate its factory in Łódź. Dell relocated to Poland following the closure of its plant in Limerick, Ireland (at the cost of 1,900 jobs), and would no doubt have considered a wide range of alternative locations for the creation of its new factory. It may well be that both other EU and non-EU sites were considered, raising the possibility that the regional aid available under the state aid rules served as a strong incentive for Dell to remain in the EU. It is for this reason that some might see regional aid as a competition-distortive industrial policy tool that unfairly disadvantages non-EU businesses. To others, however, it is a legitimate and vital way of creating jobs and growth in disadvantaged EU regions.

Similar allegations of protectionism are, if anything, even more likely to arise in the field of trade law. The competence of the EU to apply trade defence duties on imported products is destined to support domestic production. Another means of doing so is by classifying certain goods under a combined nomenclature (CN) code that entails high duties. On numerous occasions, interested parties have claimed that incorrect customs classification, leading to high customs duties on imported products, has amounted to a protectionist tool that favours domestic products over imports. The customs classifications of goods by national authorities have regularly been the subject of disputes at both national and international level.

This issue was recently at the heart of a trade dispute before the WTO between the EU, on one side, and Japan, the US and Chinese Taipei on the other. In 2008, Japan, the US and Chinese Taipei filed a request for consultations with the EU concerning the EU’s tariff treatment of a range of electronic products: certain flat-panel displays, multi-function printers and set-top boxes. Due to the impo...
position by the EU of tariffs from 6 per cent to 14 per cent on a range of goods, the complainants asserted that the EU had violated its obligations under the Information Technology Agreement (the ITA), which requires duty-free treatment of the products.\(^{21}\) The EU argued that it was allowed to impose the duties because the products contain technologies or functions that were not in existence when the ITA was concluded, and which were therefore outside the scope of the ITA.

The US, in particular, expressed concerns that this policy amounts to ‘taxing innovation’, and increases prices for foreign undertakings’ original goods which could ultimately affect millions of consumers. On 16 August 2010, a WTO panel issued its report in favour of the complainants, rejecting the EU’s defence that extra functions on the devices, such as web access or recording ability, made them consumer, rather than tech products, and subject to import tariffs.\(^{22}\) This is an interesting precedent, which may apply to other industries. Following the ruling, the EU has the option to appeal the decision – if the EU fails to appeal or loses before the WTO Appellate Body, it is likely that the EU will have to amend its CN to ensure compliance with the ruling.

Taken together, the grant of state aid to Dell and the imposition of customs duties on non-EU electronics goods can be seen as two sides of the same coin. Both actions are borne out of the common goal of bolstering the EU’s high-tech manufacturing sector – in one case, through positive intervention at the domestic level using competition law, and in the other, through negative intervention at the international level using trade law. The use of state aid to support domestic industry is the less controversial of the two, but it can be highly contentious nevertheless; Poland’s grant of regional aid to Dell was only approved following an in-depth investigation by the Commission. The phase II investigation included a request for third-party opinions, and involved a detailed economic analysis to determine whether the aid in question had a genuine incentive effect.

In this context, competition law and trade law should be seen as part of a toolkit available to businesses within and outside the EU. Companies with an interest in establishing or expanding operations in the EU – or using outsourced production in the EU – may seek state aid to help them do so; rival businesses, whether based in the EU or not, may challenge such aid on the grounds that it distorts competition. Equally, EU businesses may support the imposition of customs duties on competing products from overseas, while importing non-EU businesses will seek their abolition. In either case, an understanding of both competition and trade law – and the links between the two – will deliver far greater results than viewing the two disciplines in isolation.

**Competition, trade and the environment**

In this section, we shall consider the application of competition and trade law to one of the major issues facing businesses in the EU: supporting efforts to combat climate change, by reducing harmful emissions. The EU’s plans to substantially cut emissions across all sectors of industry will have direct financial consequences, especially for businesses in energy-intensive sectors. Both competition law and trade law are likely to play a vital role as businesses seek ways to mitigate some of the potential harm that these measures could cause to their bottom line.

The EU has committed to reducing greenhouse gas emissions by 20 per cent from 1990 levels by 2020. To achieve this aim, the EU implemented the ‘climate and energy package’ in 2009, at the centre of which is the revised Emission Trading Scheme (ETS) Directive.\(^{23}\) Under the ETS, CO\(_2\)-intensive industries are required to obtain ETS allowances for each tonne of CO\(_2\) to be emitted. During the first trading phase (2005-2007) and second trading phase (2008-2012), member states have essentially allocated these allowances for free. As from 2013, the amount of free allowances will gradually decrease, from 80 per cent in 2013 to 30 per cent in 2020.\(^{24}\) Industries subject to ETS will thereafter have to obtain additional allowances via annual public auctions.

A number of concerned businesses claimed that the ETS will lead directly to higher costs for EU industry. Ultimately, this could lead to a loss of market share to installations outside the EU that are not required to take comparable action to reduce emissions (a scenario referred to as ‘carbon leakage’). To reflect these concerns, the revised directive established certain exemptions from the general ETS for sectors and subsectors deemed to be exposed to a significant risk of carbon leakage, such as mining, steel-making, fertiliser production, and cotton-spinning.

Whether a sector and subsector is exposed to a significant risk of carbon leakage is determined by the Commission\(^{25}\) with reference to the additional costs introduced by the ETS and the level of trade intensity.\(^{26}\) These (sub)sectors will receive free allocation of 100 per cent of allowances between 2013 and 2020.\(^{27}\) Furthermore, article 10b of the ETS Directive discusses – albeit in vague terms – the introduction of a carbon equalisation system to prevent carbon leakage. EU industries at risk of carbon leakage could receive a greater free allocation of allowances, or an alternative carbon equalisation system could be introduced with a view to putting EU installations and those from third countries on a comparable footing.

In particular, stakeholders have requested the introduction of border measures on CO\(_2\)-intensive products imported from countries that do not enforce a system similar to the ETS. Interested parties have also demanded that costs for ETS allowances should be refunded for exported goods. Such requests for both import duties and export subsidies have been highly controversial, particularly as regards their compliance with WTO law. While some see little or no compliance issues arising, others are convinced that such measures are motivated by protectionist considerations and contest their legality under WTO laws.

The refund to exporters of costs incurred in acquiring ETS allowances at auction could well be seen as a prohibited export subsidy under article 3 of the ASCM as it will likely adversely affect the interests of competitors of other WTO members. At the same time, any measures imposed on imported goods from third countries would have to withstand the tests under articles I (most favoured nation treatment), III (national treatment principle), XI (prohibiting quantitative restrictions) and XX (general exceptions) of the General Agreement on Tariffs and Trade (the GATT) depending on how such measures are constructed.\(^{28}\)

Under articles I and III of the GATT, WTO members may not apply any measures either internally or at the border that will discriminate between like products originating in different WTO member states, or between imported and domestic like products. The emphasis here is placed on the likeness of the products, which has been defined in WTO case law by physical characteristics, properties, nature and quality, end uses, tariff classification and consumers’ perceptions and behaviour, but not by process and production methods (PPMs). Consequently, products cannot be regarded as different on the basis of their PPMs alone.

It would therefore be permissible to impose different duties or taxes, for instance, on two types of steel (such as hot-rolled plates and rails), assuming that they do not constitute like products. By contrast, hot-rolled plates produced by environmentally friendly means and hot-rolled plates produced with high carbon emissions
would constitute like products, insofar as only their PPMs differ. Subjecting them to different duties or taxes would amount to discriminatory treatment under articles I and III, respectively.\(^3\)

Carbon equalisation systems designed to counter carbon leakage, by their very nature, need to differentiate products based on PPMs. They are therefore at a high risk of being held incompatible with articles I and/or III (and in the case of quantitative import restrictions) with article XI of the GATT. However, they may be justified under article XX GATT which allows certain exemptions from the MFN and national treatment principles to protect human, animal, plant life or health,\(^3\) or for the conservation of exhaustible natural resources.\(^2\) Such an exemption must be applied in a manner so as not to constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or as a disguised restriction on international trade.\(^3\) It seems that the compliance of carbon equalisation systems with article XX is likely to depend on their exact wording and structure, and will be assessed on a case-by-case basis.

Given their potentially restrictive impact on international trade, the implementation of carbon equalisation system is likely to be highly controversial at an EU and international level. There is also the possibility that other WTO members would test the validity of any system before the WTO DSB. At the same time, the system is important to help industries who are dedicated to environmental protection maintain their competitiveness. As this area develops, the Commission and interested stakeholders will be in a better position to assess whether and what measures will be necessary and are best placed to achieve this protection. However, the EU should be careful to do so in a WTO-compatible way.

In addition to the measures envisaged under trade law, the EU state aid discipline might also be used to compensate businesses for the costs they may incur once the ETS is implemented. The Commission issued revised state aid guidelines for environmental protection in 2008 to combat climate change. In addition the Commission is considering between DG Competition, which has overall competence to set allowances and companies’ ability to attract financing.

Such measures, if introduced, would be the result of consultations between DG Competition, which has overall competence to set new state aid rules, and a range of other Directorates General that have an interest in EU business or the environment – for example, DG Trade, DG Industry and DG Environment. Interested parties are expected to campaign hard to ensure that the rules, should they be introduced, provide adequate protection for their business and their sector. The Commission, for its part, will aim to provide a state aid framework that gives member states the necessary scope to prevent carbon leakage, and avoid the prospect of EU businesses relocating to third countries to avoid higher costs. Even if no guidelines are introduced, in any event, affected companies may still consider seeking public sector support to offset their ETS costs. This could be by submitting an ad hoc notification of state aid to the Commission for approval, or implementing a measure that does not require notification and approval (on the basis of self-assessment).

It is clear that a very wide range of businesses are likely to be affected by the introduction of the ETS. As this section has demonstrated, there will be means available to minimise the potentially serious financial impact that the new system will have, which will derive from both trade law and competition law. Businesses will need to understand their options under both disciplines, and consider how they may be used in parallel, to ensure that they receive the maximum protection for their interests.

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This chapter has sought to illustrate how trade law and competition law can frequently interact or apply in parallel on the same commercial concerns or factual situations. Both fields of law have the potential to present threats and opportunities for industries, and they should not be viewed in isolation. Rather, companies should take a wider view that incorporates both trade and competition into their commercial strategy – whether they are dealing with complex IP issues, considering where to expand or develop new operations and where to locate them, or tackling major challenges such as the introduction of ETS. Trade law and competition law largely remain distinct fields, but both should be used to maximise businesses’ advantages.

**Notes**

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1. The term ‘goods in transit’ refers to goods passing through the EU from one third country to another, which are not destined or intended to enter into free circulation in the EU.
5. EWHC 1903 (Chancery division), 27 July 2009.
7. In this context, India and Brazil have recently launched negotiations with the EU under the WTO dispute settlement procedure. If these negotiations fail to find a satisfactory solution to both sides, a WTO panel will appreciate the matter.
11. AstraZeneca, Case T-321/05, Judgment of the General Court of 1 July 2010 (not yet reported).
12. One point to note is that the regulatory regime in which AstraZeneca was operating at the time has now changed, such that the conduct in question would no longer be possible. Nevertheless, the principle established by the case – that abuse of regulatory procedures can be prosecuted as a breach of antitrust law – remains valid.
13. The question as to whether Rambus was required to disclose its patents during the standard-setting process, or at least whether other participants in the process had a legitimate expectation that all patents would be disclosed, remains open.
14. Case DS316, EC and certain member states – Large Civil Aircraft. See www.wto.org/english/tratop_e/dispu_e/cases_e/ds316_e.htm. On the same day, the EU retaliated with its own WTO challenge of a large number of subsidies granted by the US to Boeing. Case DS317, USA — Large Civil
Aircraft. See www.wto.org/english/tratop_e/dispu_e/cases_e/ds317_e.htm.
16 The panel report can be accessed here: www.wto.org/english/news_e/news10_e/316r_e.htm.
17 Deadline for the US to notify its decision to appeal is 60 days from the date of circulation of the panel report, ie, 29 August 2010.
18 Articles 8 and 9 of the WTO ASCM concerning non-actionable subsidies lapse in January 2000 (see article 31 WTO ASCM).
19 Or rather the WTO panel sets out a number of “recommendations”. A WTO Panel cannot force a WTO member state to comply with its recommendations. However, should the EU fail to comply with them (as the case may be as amended by the Appellate Body), a separate panel may authorise the US to adopt retaliatory measures against the EU and/or the member states concerned.
20 DS 375, 376, 377 – European Communities – Tariff Treatment of Certain Information Technology Products.
21 The IIA was signed in the framework of the Singapore Round in 1996. Signatory states commit themselves to eliminating customs duties on certain high-tech products. See www.wto.org/english/docs_e/legal_e/itadea_e.pdf
24 Under article 10a(2) of the ETS free allowances shall be allocated based on product-specific benchmarks for each relevant product. The starting point for the benchmarks is the average of the 10 per cent most efficient installations, in terms of greenhouse gases, in a sector and they shall take into account the most efficient techniques, substitutes and alternative production processes. See also http://ec.europa.eu/environment/climat/emission/carbon_en.htm.
25 The electricity production sector will have to auction 100 per cent of allowances as from 2013 onwards, as experience from the first two phases of the ETS showed that this sector is able to pass on additional costs.
26 For the period 2013 to 2014 see Commission Decision of 24 December 2009 determining, pursuant to Directive 2003/87/EC of the European Parliament and of the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, OJ 2010 L1/10. Every year the Commission may at its own initiative or at the request of a Member State, add a sector or subsector to the list.
27 Article 10a(15) of the directive sets out that a sector or subsector is deemed to be exposed to a significant risk of carbon leakage if:

- the sum of direct and indirect additional costs induced by the implementation of this directive would lead to a substantial increase of production costs, calculated as a proportion of the gross value added, of at least 5 per cent; and
- the intensity of trade with third countries, defined as the ratio between the total value of exports to third countries plus the value of imports from third countries and the total market size for the Community (annual turnover plus total imports from third countries), is above 10 per cent.

In addition carbon leakage is assumed if:

- the sum of direct and indirect additional costs induced by the implementation of this directive would lead to a particularly high increase of production costs, calculated as a proportion of the gross value added, of at least 30 per cent; or
- the intensity of trade with third countries, defined as the ratio between the total value of exports to third countries plus the value of imports from third countries and the total market size for the Community (annual turnover plus total imports from third countries), is above 30 per cent.

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Hammonds LLP is a leading commercial law firm with offices throughout Europe and Asia. Hammonds LLP has enjoyed a strong presence in Belgium since 1991, when we opened our Brussels office specialising in competition/European law, state aid, public procurement and international trade/WTO.

Over the last 20 years the practice has established a leading reputation for delivering seamless and high-quality advice on all aspects of competition/European law to clients throughout the EU and beyond. Hammonds LLP offers a comprehensive service to clients, as its expertise encompasses not only core practice areas such as antitrust, cartels and merger control, but also state aid, public procurement, IP-related matters and regulatory work. The Hammonds team comprises dedicated attorneys who are experts in their field and who combine stand-out technical expertise with a commercial and focused approach to complex legal issues. Our team also has a very strong international focus, consisting of attorneys who originate from eight EU member states, China and Brazil and who are able to work in a number of languages. This puts the team in the position not only to advise on all aspects of EU competition law, but also to provide advice on national competition laws.

Hammonds also boasts one of the leading international trade law practices in the EU. Our team’s experience is recognised by clients and peers alike (Chambers, Legal 500, Expert Guides). Our trade lawyers have in-depth expertise in all trade law disciplines, including cooperation in EU and Russian trade defence investigations (anti-subsidy, anti-dumping and safeguard) and the representation of sovereign governments before the WTO’s Dispute Settlement Body in Geneva. Our team also has extensive experience in dealing with customs issues under the competence of the World Customs Organization, national customs litigations and export control.

The competition and trade teams work closely together, articulating sophisticated trade arguments in a competition context, in particular concerning merger control, climate change regulatory activities and national/WTO subsidies, as well as competition arguments in trade defence investigations and trade law advice.
The Commission clarifies on its website that sectors subject to carbon leakage are not exempted from the ETS. Free allowances will be allocated as set out in note 24. Sectors subject to carbon leakage will also be subject to the annual reduction in total allowances. The only ‘advantage’ is that for these sectors the free allocation will be multiplied by a factor 1 (100 per cent) while for other sectors the allocation will be multiplied by a lower figure, i.e., 0.8 in 2013 and reduced every year to reach 0.3 in 2020. See also http://ec.europa.eu/environment/climat/emission/carbon_en.htm.


The Commission is currently working on respective guidelines which are expected to be published for consultations later in 2010 or early 2011. There are different views among stakeholders whether article 10a (6) should only apply to sectors that are subject to a significant risk of carbon leakage due to (indirect) costs relating to greenhouse gas emissions passed on in electricity prices, or to all carbon leakage sectors, (or all sectors subject to ETS).
Vassilis Akritidis
Hammonds LLP

Vassilis is a partner in our Brussels office and heads our trade team. His particular expertise covers trade defence measures and WTO practice, EU competition law including state aids and litigation before the European courts in Luxembourg and the European Court of Human Rights in Strasbourg.

Vassilis has acquired great experience over the last twelve years in the field of anti-dumping, anti-subsidy and safeguards investigations and in advising governments and private parties on WTO law. The clients he represents extend from private parties to professional associations and sovereign governments and are located in India, China, Thailand, Taiwan, Croatia, Russia, Greece, Dubai, Ukraine and the US. He is thus familiarised with the trade defence practices in several jurisdictions. Vassilis also works in the field of competition in cartel investigations, state aid matters as well as in issues related to the EC internal market. He is an experienced litigator and a regular writer and speaker in related topics.

Riccardo Croce
Hammonds LLP

Riccardo is a partner in our corporate strategy and finance (competition, trade and EU regulatory) practice based in the Brussels office. His particular expertise covers EC and national competition, regulatory and intellectual property law. Riccardo is also increasingly involved in EU and trade-related matters.

Riccardo’s experience in the antitrust field covers a range of markets including information technology, internet, consumer electronics, wireless microprocessors, PCs, new and traditional media, pharmaceuticals, hospitals, steel, chemicals, aerospace, defence, financial services, food and beverages, FMCG and telecoms and utilities. He has assisted multinational corporations in connection with multi-jurisdictional and transatlantic mergers and alliances, exclusive and selective distribution agreements, parallel trade, technology transfers, patent pools, patent disclosures to SDOs and interaction with patent offices, selling and discounting practices, package deals, standard and R&D agreements and cartel work, including compliance and dawn raid programmes.

Riccardo also advises on several aspects of EU state aid law, including in relation to the steel, energy, and health-care sectors and the IT and telecommunications industries.

Riccardo represents his clients within administrative and judicial proceedings before the European Commission, European courts in Luxembourg, national competition authorities and national courts in the EU and beyond, including in China and the United States.
Yves Melin
Hammonds LLP

Yves is a Belgian avocat, senior associate in our corporate strategy and finance (competition, trade and EU regulatory) practice based in our Brussels office. He specialises in various aspects of international trade and customs laws, with a particular emphasis on EU and Russian trade remedies (anti-dumping measures, countervailing measures and safeguards) laws and proceedings, and WTO law.

He advises governments and corporations on specific issues relating to EU, Russian and WTO international trade laws and practices; and regularly speaks at seminars, conferences and training sessions organised on various international trade law topics. Yves provides assistance to clients throughout trade remedies investigations, in particular for the preparation of questionnaire responses and during on-the-spot verifications, representation before the European Commission and for the negotiation, implementation and monitoring of undertakings.

Jochen Beck
Hammonds LLP

Jochen joined Hammonds LLP’s Brussels office in March 2007 after having worked with Gleiss Lutz Rechtsanwälte and Vermulst, Verhaeghe and Graafsma. Jochen obtained his basic degree and a PhD in European law from the Vienna University and an LLM from Cornell Law School in New York State. He clerk-shipped for judges at an Austrian district and appellate court and was a research assistant during his second semester in Cornell. He is a qualified NY attorney-at-law and a UK solicitor.

Jochen works in both Hammonds LLP’s trade and competition teams. Jochen advises clients in all aspects of European and national competition law, including merger control, horizontal and vertical cooperation agreements, and antitrust litigation before national courts and in an arbitration proceeding. He has assisted clients in cartel investigations including during dawn raids. Jochen also handles WTO-related matters and advises clients in relation to negotiations of FTAs and EPAs. Jochen has represented a third-party government in a major WTO dispute settlement proceeding. He has profound experience in handling trade defence investigations including anti-dumping, anti-subsidy and safeguards. Jochen also advises clients on customs matters and on export control, including delivering compliance seminars and training sessions. Jochen speaks German, English and French and has basic knowledge of Spanish.