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# **LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition**

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Pierre Kobel • Pranvera Këllezi •  
Bruce Kilpatrick  
Editors

# Antitrust in Pharmaceutical Markets & Geographical Rules of Origin

 Springer

*Editors*

Pierre Kobel  
Kobel Avocat Attorney-at-law  
Geneva, Switzerland

Pranvera Këllezi  
Këllezi Legal  
Geneva, Switzerland

Bruce Kilpatrick  
Addleshaw Goddard LLP  
London, United Kingdom

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## Preface

On behalf of the LIDC (the International League of Competition Law), we are delighted to present the fifth edition of LIDC Contributions on Antitrust Law, Intellectual Property and Unfair Competition, which captures the reports prepared by the international and national reporters at the League's Annual Congress held at the Hôtel Président Wilson on the shores of Lake Geneva in October 2016. The last time the Congress took place in Switzerland was in September 2002 in Montreux, when attendees voted to modify the format of the Congresses, reducing the number of topics and settling on the production of two international reports, which is the format that continues today.

The Congress is, in the editors' opinion, a real 'one of a kind' event, bringing together leading practitioners across the antitrust and intellectual property fields from a wide variety of jurisdictions across the globe, with detailed national reports on two topics chosen by the LIDC's Scientific Committee and an international comparative report on each topic. After a tumultuous year politically, the work of the LIDC and its role in bringing together practitioners from different legal systems in an exchange of best practices and expertise seem more relevant than ever before.

It takes a huge amount of work and commitment from the national reports, and particularly the international reporters, to produce their studies, and we would like to thank them for their enormous contribution, which is greatly appreciated. This year's Congress brought together delegates from across the world, with national reports from jurisdictions including Japan, Ukraine, Brazil, India and Australia, as well as from across the European Union. The purpose of this book is to share their learnings with a wider audience across the members of the LIDC and its constituent national organisations and with academics, practitioners and students across the world. We hope you enjoy reading it as much as we enjoyed listening to the debate in Switzerland before an audience of more than a hundred representatives from various jurisdictions.

In order to enhance the Swiss touch, the League's program in Geneva covered the application of competition law in the pharmaceutical sector, which continues to be a focus for antitrust authorities around the world. This year's antitrust topic (Question A) for the Geneva Congress was as follows: 'In the case of pharmaceuticals, in what way should the application of the competition rules be affected by the specific characteristics of those products and markets (including consumer protection rules, the need to promote innovation, the need to protect public budgets, and other public

interest considerations)?’ We would like to thank all of our national reporters, and particularly Stephen Dnes from the University of Dundee in Scotland (who is also a practitioner at Preiskel & Co LLP in London), for producing an excellent international comparative report on this complex subject, which sits at the heart of the interface between competition law and intellectual property law.

Stephen’s report made ten recommendations, in light of the various national reports produced in response to Question A, and at the Congress Stephen presented and defended these recommendations with a view to finding areas of shared practice for formal adoption as formal League Recommendations. The Congress adopted all of the proposed recommendations, save for one relating to the scope of private enforcement to complement public enforcement efforts. This proposal reflected the fact that many national reports noted particularly successful instances of well-organised pharmaceutical companies achieving redress against anti-competitive agreements. All of the other recommendations, spanning diverse issues relating to legal frameworks, enforcement patterns, innovation policy, and the interaction of price regulation and competition law, were adopted.

The second part of the book focuses on the intellectual property question (Question B) that was debated at the Congress, during a further working Session. This year’s topic was ‘What rules should govern claims by suppliers about the national or geographic origin of their goods or services?’ The international reporter was Dr Simon Holzer, a Partner based in Zurich with the firm Meyerlustenberger Lachenal. Dr Holzer’s report was masterly based on the multiple national reports received on Question B, and the session was chaired by Dr Dev S Gangjee, Associate Professor in Intellectual Property Law at the University of Oxford. The editors would also very highly commend Dr Holzer’s report and those of the national reporters, which provide an unparalleled comparative analysis of this topic, bring together common themes and contrast the various national provisions dealing with indications of origin, amongst other things.

The final reports have now been sent to national and supranational competition law enforcers, including the Competition Directorate of the EU Commission, whose Director General has, in the past, commented very positively on LIDC reports and their value to enforcers. The works of the LIDC have been a well of practical guidance for generations of lawyers, whether or not they are members of the LIDC, and for regulatory authorities.

The editors would like to thank all the authors for their contributions and their patient collaboration during the editing of this book. They would like to express their sincere gratitude to the Members of the Bureau, of the Council and of the Scientific Committee for their kind support and encouragement during the preparation of this book.

Geneva, Switzerland  
Geneva, Switzerland  
London, UK

Pierre Kobel  
Pranvera Këllezi  
Bruce Kilpatrick

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## List of Contributors

- Gusztav Bacher** Szecskay, Budapest, Hungary
- Marta Banyk** WKB Wierciński, Kwieciński, Baehr sp.k., Warsaw, Poland
- Mariia Baranovych** Arzinger Law Office, Kyiv, Ukraine
- Felipe Barros Oquendo** Di Blasi Parente & Asociados, Rio de Janeiro, Brazil
- Vladimir Bastidas Venegas** Uppsala University, Uppsala, Sweden
- James Bourke** Monckton Chambers, London, UK
- Julie Clarke** Deakin Law Schools, Deakin University, Geelong, Australia
- Guillaume Couet** Association Française d'Etude de la concurrence (AFEC), Paris, France
- Cees Jan de Boer** Van Doorne Advocaten, Amsterdam, The Netherlands
- Elise Dingli** Ganado Advocates, Valletta, Malta
- Stephen Dnes** University of Dundee, Dundee, UK
- Liliana Eskenazi** FTDP Avocats, Paris, France
- Olivier Freget** FTDP Avocats, Paris, France
- Gerhard Fussenegger** bpv Hügel Rechtsanwälte GmbH, Brussels, Belgium
- Arunabha Ganguli** Supreme Court of India, New Delhi, India
- Maria Geilmann** Van Doorne Advocaten, Amsterdam, The Netherlands
- Laetitia Ghebali** White & Case LLP, Paris, France
- Viktoriia Gladka** Arzinger Law Office, Kyiv, Ukraine
- Dominique Guex** Bourgeois Avocats SA, Lausanne, Switzerland
- Claire Hazée** Dessard Avocats, Liège, Belgium
- Simon Holzer** Meyerlustenberger-Lachenal, Bern, Switzerland

- 
- András Horváth** Hegymegi-Barakonyi Baker & McKenzie, Budapest, Hungary
- Clément Hubert** Fieldfisher, Paris, France
- Martina Isola** Association Française d'Etude de la concurrence (AFEC), Paris, France  
Allen & Overy, Paris, France
- Noriko Itai** Aoki, Sekine & Tanaka, Tokyo, Japan
- Barbora Jedličková** TC Beirne School of Law, The University of Queensland, St Lucia, QLD, Australia
- Paulina Komorowska** WKB Wierciński Kwieciński Baehr sp. k., Warsaw, Poland
- Juliusz Krzyżanowski** WKB Wierciński Kwieciński Baehr sp. k., Warsaw, Poland
- Nizar Lajnef** UGGC Avocats, Paris, France
- Jean-Julien Lemonnier** White & Case LLP, Paris, France
- Ádám Liber** Hegymegi-Barakonyi Baker & McKenzie, Budapest, Hungary
- Michael Meyenburg** Rechtsanwaltskanzlei Dr. Michael Meyenburg, Vienna, Austria
- Philip Mifsud** Ganado Advocates, Valletta, Malta
- Clément Mifsud-Bonnici** Ganado Advocates, Valletta, Malta
- Kamil Nejezchleb** The Office for the Protection of Competition, Brno, Czech Republic
- Christoph Petsch** Petsch Frosch Klein Arturo Rechtsanwälte, Vienna, Austria
- Ottavia Raffaelli** Rucellai & Raffaelli, Milan, Italy
- Rainer Schultes** GEISTWERT Rechtsanwälte, Vienna, Austria
- Olaf Sosnitza** Faculty of Law, University of Würzburg, Würzburg, Germany
- Aleksander Stawicki** WKB Wierciński, Kwieciński, Baehr sp.k., Warsaw, Poland
- Kenta Sugimoto** Aoki, Sekine & Tanaka, Tokyo, Japan
- Shigeshi Tanaka** Aoki, Sekine & Tanaka, Tokyo, Japan
- Elisa Teti** Rucellai & Raffaelli, Milan, Italy
- Koen T'Syen** Van Bael & Bellis, Brussels, Belgium
- Aleksandra Wędrychowska-Karpińska** WKB Wierciński, Kwieciński, Baehr sp.k., Warsaw, Poland
- Agnieszka Wiercińska-Krużewska** WKB Wierciński, Kwieciński, Baehr sp.k., Warsaw, Poland

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## Abbreviations

AUD	Australian dollar
Berne Convention	The Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as amended
BGBI.	Bundesgesetzblatt (Germany)
BGH	Bundesgerichtshof (Germany)
BGN	Bulgarian lev
B2B	Business to business
B2C	Business to consumers
bn	Billion
BRL	Brazilian real (reais)
c./ca.	Circa
cf.	Compare
CFI	Court of First Instance of the ECJ (before 1 December 2009)
CFREU	The Charter of Fundamental Rights of the European Union, OJ 2010 C 83, p. 389
CHF	Swiss franc
CJEU	Court of Justice of the European Union (after 1 December 2009)
CMLR	Common Market Law Review
CR <sub>n</sub>	Concentration ratio measuring the percentage market share held by <i>n</i> largest undertakings
De minimis Notice	Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ 2001 C 368, p. 13
Directive 97/7	Directive 97/7 of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144, p. 19
Directive 2000/31	Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000 L 178, p. 1

Directive 2001/83	Directive 2001/83 of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ 2001, L 311, p. 67
Directive 2004/48	Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004, L 157, p. 45
Directive 2005/29 or Unfair Commercial Practices Directive	Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450, Directives 97/7, 98/27 and 2002/65 of the European Parliament and of the Council and Regulation 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149, p. 22
Directive 2009/24 or Software Directive	Directive 2009/24 of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, OJ 2009 L 111, p. 16
Directive 2014/104	Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014, L 349, p. 1
DKK	Danish krone
DM	Deutsche Mark
e.g. or eg	For example
EC	European Community
ECHR	Council of Europe, European Convention for Human Rights of 4 November 1950
ECJ	European Court of Justice (before 1 December 2009)
ECR	European Court Reports
ECtHR	European Court of Human Rights
EU	European Union
ff	and following
GBP	Pound sterling (UK)
GC	General Court of the CJEU (after 1 December 2009)
GDP	Gross domestic product
Guidelines on the effect on trade concept	Commission Notice—Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, OJ 2004 C 101, p. 81
ha	Hectare
HRK	Croatian kuna ( <i>hrvatska kuna</i> )
HMT	Hypothetical monopolist test
HUF	Hungarian forint ( <i>Magyar forint</i> )

i.e.	id est (that is)
Id./Idem	The same as previously mentioned
IP	Intellectual property
Lisbon Agreement	Lisbon Agreement for the Protection of Appellations of Origin and their International Registration of October 31, 1958, as revised at Stockholm on July 14, 1967, and as amended on September 28, 1979
m	Million
m <sup>2</sup>	Square metre
min	Minutes
MFN	Most favoured nation
NAAT rule	The non-appreciable affectation of trade rule
Notice on the relevant market	Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997 C 372, p. 5
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
p./pp.	Page(s)
para/paras	Paragraph(s)
Paris Convention	Paris Convention for the protection of industrial property of 20 March 1883
pt	Point
kg	Kilogram
R&D	Research and development
Regulation 2659/2000	Commission Regulation 2659/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of research and development agreements, OJ 2000 L 304, p. 7
Regulation 1400/2002	Commission Regulation 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2002 L 203, p. 30
Regulation 1/2003	Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1, p. 1
Regulation 2006/2004	Regulation 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ 2004 L 364, p. 1
Regulation 139/2004	Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ 2004 L 24, p. 1

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Regulation 110/2008	Regulation 110/2008 of the European Parliament and the Council of 15 January 2008 on the definition, description, presentation, labelling and protection of geographical indications of spirit drinks, OJ 2008 L 39, p. 16
Regulation 330/2010	Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102, p. 1
Regulation 1151/2012	Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs, OJ 2012L 343, p. 1
Regulation 608/2013	Regulation 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation 1383/2003, OJ 2013L 181, p. 15
Regulation 1308/2013	Regulation 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations 922/72, 234/79, 1037/2001 and 1234/2007, OJ 2013L 347, p. 671
Regulation 251/2014	Regulation 251/2014 of the European Parliament and of the Council of 26 February 2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatized wine products, OJ 2014 L 84, p. 14
Regulation 316/2014	Commission Regulation 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ 2014 L 93, p. 17
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961
RON	Romanian leu
SEK	Swedish krona
SMEs	Small and medium-size enterprises
SMP	Significant market power
SSNIP	Small but significant and non-transitory increase in price
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994

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UAH	Ukrainian hryvnia
UK	United Kingdom
US/USA	United States of America
v	Versus
WCT/WIPO Copyright Treaty	World Intellectual Property Organization Copyright Treaty, 1996