

**German Federal Cartel Office Imposes €1.5 Million Fine on CIBA Vision
for Restricting Online Sales of Contact Lenses and for Resale Price Maintenance**

September 28, 2009

The German Federal Cartel Office (FCO) fined U.S.-based international firm CIBA Vision €1.5 million (\$16.8 million) for breaking German antitrust law by restricting online trading of its lenses and improperly pressuring online resellers to follow “recommended” resale prices. The eye-care unit of Novartis AG, CIBA Vision has denied the allegations but announced that it will not appeal the decision. The decision is an example of how national competition authorities and the European Commission are interpreting the concept of an “agreement” with increasing breadth.

The specific measures considered to be anticompetitive by the FCO involved agreements between CIBA Vision and its customers concerning the prohibition of online trading and the prevention of sales of certain types of lenses via eBay. In addition, CIBA Vision had a sophisticated monitoring system in place that was used to monitor and compare the resale prices of the online traders. Whenever the traders undercut the nonbinding recommended prices communicated by CIBA Vision beyond a certain degree, CIBA Vision contacted them and tried to convince them to raise their prices (in many cases successfully).

The German Act Against Restraints on Competition (GWB) does not prohibit unilateral price recommendations, as long as these are nonbinding. Whenever there is evidence of pressure with respect to such a recommendation, however, it is considered an indication that an illegal agreement or concerted practice exists or is being sought. The FCO decision body in charge of the case took the position that every contact (beyond a mere communication of the recommended price) that highlights the recommended price, specifically with a view to the reseller’s past pricing behavior, calls the nonbinding nature of the recommendation into question and has to be considered sufficient “pressure.” Contacts between supplier and reseller constitute illegal vertical agreements or concerted practices within the meaning of Section 1 GWB when the supplier attempts to coordinate the pricing of the reseller, and both come to an understanding about the future behavior of the reseller.

Despite the vertical nature of the behavior in question, it is noteworthy that such resale price coordination by a supplier may further lead to illegal concerted practices on the horizontal level among the resellers. The FCO considers this to be the case if all of the resellers follow the price recommendations and rely on their competitors to follow them as well. The FCO would not even require direct contacts between the resellers in order to find for a horizontal agreement.

The FCO's decision highlights the risks inherent in managing pricing policies across multiple distribution channels, especially where online sales are involved. Although purely unilateral conduct does not violate Section 1 GWB, the decision reflects the trend among both national competition authorities and the European Commission to interpret the concept of "agreement" and "concerted practice" very broadly. Companies should therefore seek advice from counsel before adopting measures aimed at limiting online sales.

For more information about the issues discussed in this LawFlash, please contact Dr. Jürgen Beninca or Eva Rayle, or any of the following Morgan Lewis attorneys:

Frankfurt

Dr. Jürgen Beninca	49.69.714.007.19	jbeninca@morganlewis.com
Eva Rayle	49.69.714.007.59	erayle@morganlewis.com

Brussels

Izzet M. Sinan	32.02.507.7522	isinan@morganlewis.com
Jonathan N. T. Uphoff	32.02.507.7543	juphoff@morganlewis.com

Paris

Jean Leygonie	33.1.53.30.4410	jleygonie@morganlewis.com
---------------	-----------------	--

New York

Harry T. Robins	212.309.6728	hrobins@morganlewis.com
-----------------	--------------	--

Washington, D.C.

Jonathan M. Rich	202.739.5433	jrich@morganlewis.com
Scott A. Stempel	202.739.5211	sstempel@morganlewis.com

About Morgan, Lewis & Bockius LLP

Morgan Lewis is a global law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered Attorney Advertising in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2009 Morgan, Lewis & Bockius LLP. All Rights Reserved.