

LITIGATION, LITIGATION, LITIGATION

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Despite reservations from some Continental European practitioners about ‘Anglo-Saxon excess’, antitrust enforcement in Europe appears to be moving inexorably into a more litigious environment. In addition to the spate of cartel prosecutions that the European Commission’s leniency programme has spawned, parties also appear more willing to litigate merger cases than previously – both prohibited and cleared cases. The Commission has presented a hotly debated proposal for private damages actions. At a national level, the antitrust bar is keenly watching the current battle before the UK courts concerning the extradition of Mr Ian Norris to the US.

Leniency and fines

The Commission’s leniency programme (as last enshrined in the December 2006 amended notice)

coupled with the massive increase in fines for cartel offences (see the Commission’s September 2006 fining guidelines and recent decisions) has led many high profile cartel participants not only to apply for leniency, but also to provide the Commission with information that enables the Commission both to substantiate its case and to justify a greater level of fines. Any concept of honour among closed-rank cartel members has become a thing of the past as companies decide to confess for a variety of reasons (eg, cleaning house prior to an IPO, a sale of a division or pure self-preservation). As the first company through the door escapes without fines, the others face the potential for huge penalties. This, in turn, may explain why firms are appealing so many Commission fines to the European Court of First Instance (CFI), irrespective of the weight of evidence in the Commission’s files – they must believe that they have nothing to lose. The Commission’s winning percentage in defending its recent cartel decisions before the CFI is remarkably high, though understandable, given

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Transnational competition experience

Morgan Lewis’ antitrust practice understands transnational competition matters in the global economy – and knows how to create the solutions clients need. Morgan Lewis provides integrated multi-jurisdictional competition law experience to its clients in civil and criminal antitrust litigation, government investigations and merger counselling and litigation in the United States, the European Commission and EU member states. We provide the full spectrum of integrated antitrust services, including state aid, from preventive counselling to merger approvals to defence of the ‘bet the company’ litigation.

Cartels

Morgan Lewis has substantial experience in the international cartel investigations, prosecutions and civil damage actions. We have defended corporations and corporate officers from six continents in major cartel investigations. In the intricate mosaic of multijurisdictional cartel investigations, our lawyers in the United States and Europe have served as international coordinating counsel anticipating the complexities and contradictory procedures that have evolved.

Mergers

Morgan Lewis regularly represents clients before the United States’ and European competition authorities in complex business combinations. In multi-jurisdictional transactions, we also provide the central strategy and ensure effective implementation with local counsel to accommodate jurisdictional nuances. Our team is familiar with the added complications that can arise in large joint ventures spanning several countries.

the quality and quantity of evidence likely to be disgorged during the leniency process. It remains to be seen what will happen when some of the CFI judgments are considered by the European Court of Justice – the second and ultimate level of appeal.

During the Commission/ IBA conference entitled ‘Cartel enforcement and antitrust damages actions in Europe’ in Brussels on 7, 8 and 9 March 2007, Commissioner Kroes specifically raised the possibility of “direct settlement” of cases as a logical next step. But it is still early days in the Commission’s own thinking on this process.

Private actions for damages

The pros and cons of private actions were discussed at length at the Commission/ IBA conference. The Commission is encouraging cartel victims to seek compensation from cartel members by litigating before national courts. The belief is that this will reduce the harm caused by cartels and will deter them – though letters to the editor of the *Financial Times* warn that only the lawyers will benefit! The Commission’s 2005 Green Paper (‘Damages actions for breach of the EC antitrust rules’) seems to have gained momentum despite resistance on visceral,

systemic and procedural levels. Jurisdictions such as the UK already appear to have a sufficiently attractive legal framework that a leading US plaintiff’s litigation firm that is known for antitrust work has established its first non-US office there. However, the European Commission is at pains to point out that it does not intend to create a carbon copy of the US system, with its lengthy and expensive litigation, treble damages and opt-out class action. Europe will doubtless come up with its own structures, based on appropriate traditions and cultures, warts and all, and these will evolve with experience. It is already evident, however, that the different legal traditions in the 27 EU member states will make for complexity.

Extradition

All antitrust eyes are currently on Mr Norris’s struggle to remain in the UK, where the cartel offence is a criminal offence subject to extradition to the US under the Enterprise Act 2002. Mr Norris, the former chief executive of Morgan Crucible, was given permission in March 2007 to appeal his fight against extradition to the US on price-fixing charges to the UK House of Lords. His case will determine the extent to which the UK Extradition Act can be applied retrospectively

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