

GLOBAL COMPETITION REVIEW

The international journal of competition policy and regulation

The Handbook of Competition Enforcement Agencies

A Global Competition Review special report
published in association with:

Morgan Lewis

2008



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006

Enforcement and Settlement

Izzet M Sinan

Morgan Lewis

The European Commission's active – and sometimes high-profile – prosecution of antitrust violations continues. Identified below are selected recent matters of particular interest.

Dawn raids

The Commission's dawn-raid powers entitle it to enter business premises and vehicles, inspect any non-privileged records relating to the business in question and question staff.

Mergers

In December 2007, the Commission carried out dawn raids on two PVC manufacturers suspected of 'gun-jumping' when they exchanged proprietary information prior to obtaining merger clearance. Gun-jumping involves taking any action to implement a notifiable merger without first obtaining regulatory approval. This is the first time the Commission has exercised its dawn-raid powers in the merger context (since it was granted them in 2004). Merging parties will need to be even more vigilant with regards to their pre-merger contacts in Europe.

Articles 81 and 82 of the EC Treaty

In January 2008, the Commission carried out dawn raids on several pharmaceutical companies. This was part of an investigation of patent dispute agreements suspected of infringing article 81 of the EC Treaty, and misuse of patent rights and vexatious litigation in violation of article 82 of the EC Treaty. The investigation was carried out pursuant to the Commission's wide-ranging powers to launch 'sector enquiries' under Regulation 1/2003. The Commission launched the investigation in response to indications that competition in the pharmaceutical markets 'may not be working well' because there were fewer instances of new and generic entry. The Commission made it clear that it did not target companies suspected of any individual wrongdoing and that it had no specific evidence of infringements.

An article 82 bright-line rule?

In October 2007, the Commission closed its investigation of gas producer, *Distrigas*, for alleged abuses of dominance in violation of article 82 of the EC Treaty after the latter entered into legally binding commitments. These commitments included limiting the duration of long-term contracts with large customers to a maximum of five years and ensuring that its long-term contracts tied up no more than 30 per cent of the annual supply of gas to the relevant market.

The significance of this case reaches beyond the energy sector. The Commission stated that dominant companies are less likely to be the subject of an investigation if they use the principles in *Distrigas* as a basis for their own contracts. *Distrigas* confirms that, while long-term contracts are not per se illegal under article 82, dominant companies must consider the duration of contracts and the share of the market foreclosed by them. *Distrigas* builds on cases like *Coca-Cola* by laying down thresholds or 'bright-line' rules for article 82 investigations. In *Coca-Cola*, the commitments only applied so long as Coca-Cola's next closest competitor's market share was less than half of Coca-Cola's. In *Distrigas*, the Commission clarified that commitments with regard to long-term contracts may be necessary where the dominant company's market share exceeds 40 per cent and its next closest competitor's share is over 20 per cent lower.

Proposed settlement procedures for cartels

In December 2007, the Commission published proposals for a fast-track settlement procedure in cartel cases. The aim is to enable companies to enter into an agreement with the Commission under which they would receive a set reduction in fines in return for admitting their participation in a cartel. The proposed settlement procedure seeks to simplify the administrative proceedings in cartel cases, and reduce the litigation that often follows cartel decisions. A corollary benefit for the Commission may be the anticipated

reduction in appeals to the Court of First Instance contesting the level of fines imposed by the Commission, because the cartel participant would have admitted liability and ‘consented’ to the fines imposed.

There are a number of stages in the settlement procedure, but the overall theme is that the Commission retains the broad discretion to initiate, continue and discontinue settlement talks. The parties cannot demand a settlement. The Commission will consider settlement and fine reductions separately from applications for immunity or leniency. In contrast to immunity and leniency applications, parties involved in the settlement procedure will be required to admit liability in writing. These documents may be discoverable in follow-on third party litigation and could prove a major concern to companies given that third-party litigation in the US, in

particular, could leave companies exposed to an award of treble damages.

Extradition

At the time of going to press, the Appellate Committee of the UK’s House of Lords handed down its opinion not to extradite Ian Norris, the former CEO of Morgan Crucible, pursuant to the Enterprise Act 2002 on charges of price fixing a graphite cartel (see the 2007 edition of this special report, page 7). The Lords ruled that simple price-fixing was not a criminal offence. However, additional charges relating to the obstruction of justice have been remitted back to a lower court. Extradition for these charges may still be possible, as the Lords did not accept the argument that the fact the price-fixing was not a criminal offence meant that the related obstruction of justice charge could not be one either.

Morgan Lewis

rue Guimard 7
B-1040 Brussels
Belgium
Tel: +32 (0) 2 507 7522
Fax: +32 (0) 2 507 7555

Izzet M Sinan
isinan@morganlewis.com

1111 Pennsylvania Avenue NW
Washington, DC 20004
United States
Tel: +1 202 739 3000
Fax: +1 202 739 3001

Scott A Stempel
sstempel@morganlewis.com

www.morganlewis.com

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.