

POWER(S) AND PRIVILEGE: THE COMMISSION'S POWERS TO OBTAIN AND USE INFORMATION UNDER THE NEW COMPETITION RULES

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For the European competition bar, the big event on 1 May 2004 was not entry into the European Union of an additional 10 member states, whose histories, languages and traditions differ significantly from those of the present 15, but rather the entry into force of Regulations 1/2003 and 139/2004, which set out the new rules for antitrust and merger investigations. Many of these changes are profound: the abolition of prior notification of restrictive agreements; the direct application of article 81(3) by member state courts and competition authorities; new rules on the allocation of jurisdiction in both antitrust and merger cases; and the introduction of a new standard of review for mergers. The changes to the European Commission's (the Commission) powers to obtain and use information are perhaps less dramatic, but no less significant.

This article provides an overview of the Commission's powers to obtain and use information, highlighting the key changes introduced by the new rules. The new EC competition rules largely harmonise the means by which the Commission obtains information in antitrust and merger investigations. The main channels through which the Commission obtains information are (a) initial submissions by private parties (such as notifications and complaints); (b) requests for information; (c) on-site inspections; (d) oral statements; and (e) information received from member states.

INITIAL SUBMISSIONS BY PRIVATE PARTIES

On rare occasions, the Commission will begin proceedings of its own initiative, either specific investigations on the basis of information that it has itself obtained, or sectoral investigations covering competition in an entire industry. In the vast majority of proceedings, however, the Commission first learns of the issue at hand through information submitted by one or more private parties.

Antitrust cases

As of 1 May 2004, most antitrust proceedings will begin on the basis of informal contacts, a formal complaint or a leniency application. In addition, although Regulation 1/2003 largely eliminated what was previously one of the most common forms of initial submission – the application for negative clearance or exemption – a vestige remains in the possibility to request for guidance letters in exceptional cases.

Informal contacts

The Commission is quite open to meeting informally with parties (or their lawyers) to discuss issues of concern. Such discussions may cover, for example, the legality of a proposed business arrangement or grievances about another company's actions. Such contacts frequently take place on a no-names basis. In other cases, the Commission may learn of a competition law violation from a disgruntled employee or customer. From the Commission's perspective, informal meetings

can be useful, not only for learning about potentially illegal practices, but also as a means of monitoring developments in a given industry or intervening at an early stage before a contemplated practice becomes an illegal act. There are, however, limits to the usefulness of informal contacts. A party which chooses to make an informal complaint to the Commission has no automatic standing and no rights to push the Commission to take a formal, appealable decision on whether to pursue the complaint. Companies which discuss their contemplated business practices informally – particularly if on a no-names basis – will have difficulty invoking the doctrine of legitimate expectations if the Commission subsequently challenges their actions.

Requests for guidance letters

Regulation 1/2003 eliminated the possibility that existed under Regulation 17/62 for parties to immunise themselves from the risk of fines and/or obtain complete legal certainty by notifying potentially restrictive agreements or abusive practices to the Commission. Although companies (or their advisers) must now determine the legality of their conduct themselves, the Commission will nonetheless issue guidance letters in exceptional cases. To obtain a guidance letter, a company must demonstrate that the case presents novel or unresolved questions for the application of articles 81 and 82, and that the issuance of the guidance letter would be merited by the economic importance of the practice in question, the extent to which the practice has been or is likely to be adopted, and the scope of the investment at risk. There is no set form for the request, but in principle the request should provide exhaustive information on the parties and the practice in question, detailed justifications for the request, and all other information that permits to evaluate the request. The Commission may seek additional information from the parties or any other source, including publicly available materials and its files from former proceedings.

Formal complaints

Under the Commission regulations that will implement Regulation 1/2003, complainants will be required to comply with the requirements of Form C. Although Form C is a one-page document, an effective complaint will require a quite substantial submission. Form C requires detailed information relating to the legal form and business of the complainant and the companies who are being complained about; the facts which set out the basis of the claim, including information about markets and market shares; all documents and statistics in the complainant's possession relating to or directly connected to the complaint and the names of persons able to testify to the facts in the complaint; the basis on which the complainant has a legitimate interest in the matter; and the relief sought. The Commission regularly exercises its discretion not to take up complaints, and therefore usually requires the complainant to have gathered most of the relevant information prior to filing the complaint. In practice, an effective complaint will provide the basis for a draft Commission decision. Given the increased burden of proof placed on the European Commission as a result of a series of CFI and ECJ judgments in competition cases since mid-2002, and the decentralisation of enforcement authority under Regulation 1/2003, it is likely to become harder to persuade the Commission to take up complaints.

Leniency applications

The Commission's leniency programme has become one of the most important tools for detecting cartels. The programme allows the Commission to grant individual cartel participants complete or partial immunity from fines in exchange for turning in their co-conspirators. As full leniency is only available to the first company to provide decisive evidence of the existence of the cartel, there is frequently a race to be the first in the door. In making a leniency application, companies ordinarily contact the Commission through their lawyers, who will present on a hypothetical basis a detailed description of the type of information that their client would be willing to submit if their client is eligible for leniency. Applicants may, however, also simply provide all relevant information in their possession and hope for leniency. If the Commission decides that leniency would not be available, the applicant may withdraw its submission and the Commission will be barred from using that evidence against the applicant (although the Commission is free to obtain the same information through other means). If the Commission is satisfied that the proffered information would satisfy the criteria for leniency it will set a time limit for the company to produce that information. Even where leniency is not available, cartel participants may be eligible to have their fines reduced if they voluntarily provide evidence which 'significantly adds value' to the Commission's investigation.

In Tokai/Commission, the Court of First Instance allowed the request of the Commission to withdraw part of the reduction of a fine initially granted by the Commission to two undertakings. These two undertakings that had not contested certain facts before the Commission, nonetheless challenged these facts before the court. In SAS/Commission, the parties had notified certain collaborative arrangements to the Commission but did not disclose the illegal elements of the collaboration until asked by the Commission. On 18 July 2005, the court held that the parties could not subsequently claim a reduction in the fine over and above the standard 10 per cent reduction for not challenging the Commission's findings (because their additional observation was only supplied after a request for information and served to confirm what the Commission already knew). However, the court refused to accept that the parties' behavior cancelled their cooperation with the Commission and did not permit the Commission to withdraw the benefit of the 10 per cent reduction in the fine.

Merger cases

Merger cases differ from antitrust cases in that they are mandatory applications for regulatory clearance, rather than investigations to establish the infringement of the competition rules. Thus, in almost all cases, the Commission learns about a merger through the notification process.

Formally, the only notification obligation on parties for a notifiable merger, acquisition or joint venture is the submission of a complete notification on Form CO. This is a very extensive questionnaire that requires detailed discussions of the parties, the transaction and its motivations, the markets affected by the transaction, market shares, the structure of supply, market entry and exit, the ability of suppliers to shift production from one product to another, and the like, together with the transaction documents, contact details for competitors, customers and suppliers, the parties' internal documents

analysing the transaction and their annual reports.

However, before submitting the Form CO, parties are expected, under the Commission's 'best practice' guidelines, to initiate pre-notification contacts. These include the submission of a summary document to allow the Commission to select an appropriate case team, a more in depth briefing memorandum, a draft Form CO, and face-to-face and/or telephone meetings with the case team. The Commission also encourages the parties to provide their own internal documents analysing the transaction. In addition, where parties request that jurisdiction over a transaction be transferred from the member state level to the Commission, or vice versa, they must provide a 'reasoned submission' in support of their request. This request must be made on Form RS, which is likely to be similar to a Form CO in the type of information and the level of detail required.

In some cases, the Commission may also receive formal or informal submissions from third parties who have an interest in the outcome of the case. While ordinarily these submissions are made subsequent to the initiation of proceedings, it is not unheard of for third parties to approach the Commission even before the notifying parties have initiated pre-notification contacts.

REQUESTS FOR INFORMATION

The Commission's main tool for obtaining information once an investigation has commenced (whether under articles 81 or 82, or in merger cases) is the written request for information. Requests for information may be sent to any undertaking or association of undertakings at any time.

A request for information may take the form of either a 'simple request' or 'requests by decision'. The primary distinction between the two forms is that a company that fails to respond to a request by decision may be subject to fines (and may stop the clock in merger proceedings). The new rules eliminate the prior requirement for the Commission to send a simple request for information before sending a request by decision.

Both types of request for information take largely the same form: they state the legal basis and purpose of the request; identify the information requested; and set a time limit for response. The most apparent differences relate to the penalty provisions. In the case of a simple request, the request must set out the penalties for incorrect or misleading responses. By contrast, requests by decision must indicate the full range of penalties to which the company is exposed and the recipient's right to appeal the decision before the European Court of Justice.

Requests for information can be burdensome. They often require thorough file searches and large-scale document production, and frequently expert advice is required in order to answer the questions. Particularly in merger proceedings, companies may be faced with very short time limits and very long lists of questions – in one case the parties were given five working days to respond to 322 requests which involved the production of more than 300,000 pieces of information!

Compliance with requests for information is enforced with potentially draconian fines. Companies that provide false or misleading information, or fail to provide complete and accurate responses within the time set by a request by decision, may be fined up to

one per cent of their total revenues for the preceding year. In addition, the Commission may impose daily periodic penalties of up to five per cent of a company's average daily revenues in order to compel companies to provide complete and accurate responses to a request by decision. Although in most cases such penalties will only accrue if the recipient fails to respond within the period set in the letter, Regulation 1/2003 and 139/2004 allow the Commission to impose daily fines without having let such a period run.

ON-SITE INSPECTIONS

The most dramatic weapon in the Commission's information gathering arsenal is the power to conduct on-site investigations. Lawyers love to scare their clients with stories of 'dawn raids' where Commission investigators show up at corporate headquarters in the small hours of the morning with the local gendarmerie in tow. The Commission has historically had the same powers with respect to both antitrust and merger investigations. However, to date the Commission has not exercised its powers of on-site investigations in cases of notified mergers (although it has raided companies suspected of having failed to notify).

The Commission has the power to conduct all necessary inspections in order to carry out its duties. Specifically, Regulations 1/2003 and 139/2004 empower the Commission:

- to enter any premises, land and means of transport of undertakings and associations of undertakings

- to examine the books and other records related to the business, irrespective of the medium on which they are stored
- to take or obtain in any form copies of or extracts from such books or records
- to seal any business premises and books or records for the period and to the extent necessary for the inspection
- to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers

In addition, Regulation 1/2003 gives the Commission the power to inspect "any other premises, land and means of transport, including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned" if reasonable suspicion exists that books or records related to the business and to the subject matter of the investigation are located there. This new power generated significant controversy and was ultimately not extended to merger investigations.

On-site inspections may be conducted either on the basis of an authorisation or a decision. Although a company is not required to submit to an inspection on the basis of an authorisation, it will be subject to fines if the records it provides are not complete or the answers given to on-the-spot questions are false

PRIVILEGE

The status of legal professional privilege is poorly developed and wholly unsatisfactory under EC competition law. The basic rules were set out by the European Court of Justice in the 1982 AM & S case: The Commission may not compel disclosure of (a) written documents (b) relating to the subject matter of proceedings commenced by the Commission (c) between a client and outside legal counsel (d) who is entitled to practice in an EC member state. The Court based its ruling on the principle, "the importance of which is recognised in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it". As the exclusions from legal privilege make clear, it is highly questionable whether the Court succeeded in implementing such a fundamental principle.

First, legal professional privilege only applies to written communications. In most cases, this is not of concern, as the Commission's powers to compel oral testimony are limited. However, in the age of multimedia convergence, one can certainly envisage situations in which lawyer/client communications could be subject to disclosure, eg videos prepared for counsel or saved voicemail messages that would be privileged under most legal systems. Second, privilege only applies with respect to the subject matter of proceedings commenced. Thus, for example, the Commission may potentially compel disclosure of communications with counsel relating to issues outside the scope of commenced proceedings. Third, the AM & S judgment expressly excluded communications between business persons and in-house legal counsel on the grounds that in-house counsel are employees and therefore incapable of

giving independent legal advice, even though they may be subject to the same ethical rules as outside counsel. Fourth, communications with outside counsel not admitted to practice in the EC are subject to disclosure. Thus, the Commission may compel disclosure of correspondence between a company and its outside counsel admitted in other jurisdictions, even where it relates to the same subject matter and would be as prejudicial as the disclosure of communications with outside counsel admitted to practice in the EC.

Good news appeared to be on the horizon and was long overdue. On 30 October 2003, the president of the court granted interim measures in *Akzo Nobel Chemicals v Commission*, protecting internal documents that had been seized during a dawn raid. Some of the documents were factual summaries prepared with a view to obtaining advice from outside counsel. The other documents were correspondence between business persons and their in-house counsel. In his order, the president accepted the applicants' arguments that such documents should be privileged were not manifestly unfounded. The president's order is important not only because it opens the door for communications with in-house counsel to be covered by privilege (at least where the in-house counsel is subject to the same ethical rules as outside counsel), but also because the order repeatedly emphasises the role of legal professional privilege in preserving companies' rights of defence. However, the president of the European Court of Justice subsequently issued an Order annulling the relevant operative parts of the prior Order, albeit noting the Commission's declaration that the latter would not allow third parties access to the documents for which legal privilege was claimed until judgment was given in the main proceeding.

or misleading. Companies must submit to inspections ordered by decision. Inspections of private premises must be ordered by decision.

When seeking to enter premises, Commission inspectors must provide a written authorisation specifying the subject matter of the investigation and the penalties for refusing to provide information and/or providing false or misleading information. In two cases, the Commission must also obtain a warrant: where the Commission seeks the assistance of national law enforcement officials who normally would require a warrant to conduct such an investigation on their own; and where the premises belong to a private individual rather than to an undertaking. The issuing court may ensure that the inspection is not arbitrary or repressive and is proportionate to the information sought, but may not question the need for the inspection.

Companies are allowed to have lawyers present during an inspection, but have no right to delay an inspection until their lawyers arrive. As a matter of administrative policy, the Commission will ordinarily accept a reasonable delay (ie less than one hour) to allow the closest in-house or local lawyer to arrive, provided that management undertakes not to remove documents and to allow the inspectors to enter and occupy the offices of their choice.

ORAL STATEMENTS

Historically, oral testimony has played a minimal role in EC competition law procedures, and could only enter the record through one of two ways: as answers to concrete factual questions about the location and/or contents of documents, asked in the course of an on-site inspection, or as statements made at oral hearing

following a statement of objections. The new rules give more weight to oral testimony, although EC competition proceedings will remain predominantly document-based.

Under the new rules, the Commission “may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation”. This power is rather limited both because the subject must consent to be interviewed and because there are no penalties for providing false or misleading information. However, in some cases, it may significantly expedite the gathering of information, especially where it would eliminate the need for follow up requests for information or where witnesses would be more forthcoming if they could avoid creating documents that could be subject to disclosure in private litigation in the US.

In addition, the new rules give the Commission the power to fine companies for refusing to answer or providing false or misleading answers to on-the-spot questions asked in the course of an on-site inspection, and for failing to correct within a reasonable period incorrect or misleading answers by members of staff to such questions.

Member state competition authorities
The cornerstone of the Commission’s antitrust and merger reform package is the reallocation of responsibility between the Commission and the member states. One result is the new obligations on the parts of member state competition authorities (MSCAs) to actively provide information to the Commission. Under the new rules, the Commission may instruct MSCAs to undertake on-site inspections on its behalf.

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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 multijurisdictional 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 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 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 multijurisdictional 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.

Such inspections are conducted under national law. In some jurisdictions (eg under the Enterprise Act 2002 in the UK), the powers to investigate cartels go significantly beyond those of the Commission and include covert or intensive techniques. In addition, MSCAs must now inform the Commission of any time they formally commence an antitrust investigation under article 81 or 82, and must provide the Commission with a summary of the case, decision or proposed course of action at least 30 days before reaching a decision. The Commission may take exclusive jurisdiction over any such case after consultation with the member state that commenced proceedings.

LIMITS ON THE USE OF INFORMATION

There are two very important limitations on the Commission's use of the information it has gathered.

First, the Commission may only use the information it has gathered for the purpose for which it was originally gathered. Thus, the Commission may not provide information obtained in the course of a cartel investigation to government bodies with different competencies, eg tax authorities. However, the Commission is not required to pretend ignorance where, in the course of an investigation, it learns of other competition law infringements, and may use such information as the basis for initiating a new investigation. The same restriction extends to MSCAs that receive information from the Commission; they may use the information to apply national analogues to articles 81 and/or 82, where the outcome would not differ from EC law. However, MSCAs may not use such information to impose custodial sanctions under national law.

Second, the Commission (and MSCAs by extension) may not disclose information that is covered by obligations of 'professional secrecy'. This includes not only 'business secrets' but also other non-public information obtained or generated in the course of an investigation. Although the Commission may disclose information covered by professional secrecy if necessary for the proper conduct of the investigation (eg to ensure a party's right to be heard or to prove an infringement), the Commission may never disclose business secrets, eg through publication or a grant of access to a file.

CONCLUSION

Battered by severe – and justified – criticism from the European Court of First Instance and the European Court of Justice for lack of rigour in reaching its decisions, the Commission is now seeking to back up its decision with more and better data. The combination of new weapons in its information gathering arsenal, and new resolve to ensure that its legal and economic arguments are not undermined by factual weaknesses, is pushing the Commission to make greater use of its investigative powers.

For companies, this is a double-edged sword. More rigorous decisions should mean better quality decisions and greater opportunities to hold the Commission to account for its decisions. The cost of this, however, is that parties will also have to be more rigorous in presenting their own cases, because potential litigation will be prominent in the minds of all sides. Companies will have to be prepared for the Commission to require them to provide more, and more detailed, information as competition proceedings become more paper intensive.