

International Coordination in Competition Enforcement

The view from the Private Sector

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Increased international coordination

- For the private sector lawyer, the issues differ:
 - Merger control – the parties are in the driver's seat
 - Cartel enforcement
 - The immunity applicant can choose where to go
 - An early leniency applicant has some control
 - After the dawn raids, the other defendants have little control
 - Monopolisation and abuse of control
 - Increasingly multi-country / forum shopping

Merger Control – the Parties in control

- More than 70 countries worldwide operate enforced merger regimes
- Parties analyse filing requirements at beginning of transaction
- Substantive merger analysis is global
 - Limited analytical differences between countries around the world, e.g.
 - Dominance test versus significant lessening of competition
 - Recent focus on upward pricing pressure/ closest competitor in the US
 - Often one template for all jurisdictions, but with added elements by country
 - national market shares, additional corporate information, documentation
- Parties have some leeway to decide when to file where
 - Most jurisdictions require clearance before closing but do not determine timing of filing
 - Difficult when filing deadline exists (Brazil within 15 working days of signing).
 - Possible to obtain clearance in more affected jurisdictions earlier,
 - e.g. US centric transactions, it can be useful to have cleared DOJ/FTC before completing the global exercise.
 - In EU in some cases a choice exists between EU and EU Member States
- Room for improvement – a Wish list
 - Even more coherence in the substantive analysis
 - More coherence in process and timing
 - More coherence in information requirements

Cartel Enforcement is more complex

- The issues facing a company are more complex and time-sensitive than for merger control
 - Leniency systems create race against the clock
 - If a dawn raid, you may need to act in days (leniency race)
 - Cartel cases are often “bet the company” cases
 - Criminal exposure - Senior management take an acute interest

The first steps in a cartel investigation

- Hire a global law firm specialised in international cartel defence
- Conduct a full internal investigation / legal privilege concerns
- Assessing the facts under the various legal systems affected
 - Criminal exposure for management?
 - Exposure to administrative fines
 - Exposure to a jurisdiction
- Assessing the options – Defence or Cooperation/Leniency
- The decision whether to apply for leniency or immunity
 - For another product / amnesty plus?
 - For the product under investigation / are there “2nd in” positions
 - What to do about jurisdictions with no leniency program?
 - What to do about “unpredictable” jurisdictions, or which lack precedents?
- Organising the company for years of litigation
 - Defending in 8, 10 or 15 countries
 - Preparing for, and defending, the civil damages actions
 - Reputational issues and client relations

Conflicts between leniency systems

- Greater enforcement cooperation among agencies has led to an increase in coordinated immunity/leniency applications
- Leniency and immunity applicants are faced with:
 - Different timing of investigative steps
 - Different tests for marker/immunity/leniency
 - Different scope of proceedings, hence of leniency coverage
 - Information waivers & “leaks” from leniency to non-lenieny jurisdiction
 - Risk of evidence “leaking” to third parties, such as plaintiffs (witness statements)
 - Conflicting demands on applicant’s internal investigation
 - Difficulty of reconciling demands on witnesses
 - Inability to comply with strict confidentiality requirements in leniency regimes (such as the EU regime)
 - Effectiveness of leniency regime (unitary enforcement regime)
- The enforcement agencies are constrained by their legal systems and by their national courts

Why is this a concern?

- For immunity and leniency applicants
 - International enforcement is perceived to lack predictability
 - The uncertainty adds expense and complexity to procedures
 - Outcomes may be asymmetric between jurisdictions
 - Increased risk of losing leniency or immunity
 - Class action plaintiffs get better evidence, because applicants cannot control flow of information
- Overall, the conflicts affect the cost-benefit analysis undertaken when assessing whether to apply to leniency
- This undermines the incentives to seek leniency and undermines enforcement efforts

Understanding the problems

- Both agencies and leniency applicants must understand the issues in order to deal with them
- We must realise that some problems are real and others may be perceived,
- But, when a company is assessing whether to apply for leniency, perception is reality!

Useful resources (public)

- International Competition Network (ICN) – (competition rules by country/template):

<http://www.internationalcompetitionnetwork.org>

- Mergerdata.net (Wiki-Project) – <http://www.mergerdata.net>

- Global Legal Group -- The International Comparative Legal Guide to Merger Control 2011 <http://www.glgroup.co.uk>

- World Law Group - Merger Control Basics 2010
<http://www.theworldlawgroup.net>

- Merger control in 65 jurisdictions
<http://www.gettingthedealthrough.com/books/20/merger-control/>

- Cartel regimes in 41 jurisdictions:
<http://www.gettingthedealthrough.com/books/5/cartel-regulation/>

- ICN Cartel Enforcement Manual (and similar comparative ICN materials)
<http://www.internationalcompetitionnetwork.org/uploads/library/doc756.pdf>



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For further speeches on international cartel issues see materials to be downloaded from:

<http://www.lw.com/attorneys.aspx?page=attorneybio&attno=01263>