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A new landscape for competition enforcement: new challenges via e-discovery?

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18 October 2011 – Almost a month before the adoption of a package of measures improving the system of competition enforcement in Europe, we attended the 15th Annual Competition Conference presented by the International Bar Association Antitrust Committee … and what better place than in Florence, Italy.

The IBA conference is one of those rare settings where you can discuss current developments in merger law and enforcement, the next steps in antitrust litigation, and the challenges posed by the growing internationalisation of cartel investigations.

And the speakers and attendees are the major players in the field. Joaquin Almunia, EU Commission Competition Commissioner, gave the keynote speach with subsequent presenters including U.S. Federal Trade Commissioner Edith Ramirez, Andreas Mundt who is President of the Bundeskartellamt in Bonn, and Sharis Pozen, Acting Assistant Attorney General, U.S. Department of Justice Antitrust Division.

We were also able to speak with attendees which included the General Counsels and Senior Competition Counsel of such companies as Siemens and Rio Tinto and BHP Billiton, plus the senior partners from such firms as Allen & Overy, Binder Grosswang,

Freshfields, Dewey & LeBoeuf, Norton Rose, O'Melveny & Myers, Oppenheim and White & Case.

As one can expect, a 2-day conference of this sort packs in a tsunami of information coupled with great opportunities for lunch, dinner and coffee chats/networking. Therefore I will just touch upon a few of the main points:

In the light of the soon-to-come changes which include the revision of best practices for antitrust proceedings and the submission of economic evidence, Joaquin Almunia highlighted the relation between competition enforcement and Europe's efforts to create an environment favoring open markets, innovation and growth. For the full speech of Joaquin Almunia please *click here*.

An indicative example of Commission's efforts to encourage innovation in the technology-driven sectors lies in the commitments/remedies undertaken by the parties involved in the Intel acquisition of McAfee which sought to clear the merger in Phase I. The approval was remarkable if only because (for those of us that keep track of these things) the European Commission and Intel do not have a very pleasant history, and the former seems to always be suspicious of the latter's activities. Ever since the European Commission fined Intel $1.45 billion for antitrust charges, it seems to have kept close watch on it. But the deal was approved, with conditions. For more on this case *click here*.

As to cartel deterrence, the discussion was built on the tripod of the protection of leniency information, the need for collective redress, and the methods for quantification of damages. In the aftermath of the much debated European Court of Justice (ECJ) *Pfleiderer* ruling, Almunia emphasized the Commission's commitment to defend both its leniency program and those of the ECN partners. In that case, the ECJ had ruled that EU Law does not prohibit access to leniency documents by third parties seeking damages. Access should be determined according to national law, which must weigh the interests arguing in favour and against a disclosure of documents received under leniency. The possibility of such access being granted is a further way in which private enforcement could undermine public enforcement, raising the question of whether competition authorities are shooting themselves in the foot by encouraging such actions. The ruling was largely criticized. The criticism revolves around the fact that the door seems now open to the use of any evidence provided through leniency against the revealing parties. Since leniency documents are not exempt from disclosure, and damage claims against self-reporting firms are facilitated, corporations' motivation for cooperation is defeated. With the divergence in approaches across EU member states, what remains to be seen is the practical implication of the ruling in the treatment of the confidential leniency disclosed information. For full text of the ruling please *click here*.

Turning now to Commission's efforts for harmonization across Europe, the discussion focused on the collective redress. There is the 2008 White Paper on antitrust damages which was followed by the respective public consultation that indicates the

Commission's willingness to adopt a harmonized legislation across EU. However this approach is far from being unanimously considered as optimum. Siemens for example believes that Commission's approach overlooks the existence of adequate national legislation in several countries such as Germany as well as their dynamic nature. Besides, the danger of abuse against market players needs careful consideration. A further argument arises from the likelihood of the introduction of something similar to the U.S. discovery regime, especially at the pre-trial stage which can be a very costly procedure. And European pundits have said there is always a danger for misuse to extort settlements. They argue there is an incompatibility between US- style discovery with the "civil law" European tradition. There concern is adoption of "US rules" where a party seeking damages for violation of competition rules has a wide range of possibilities to get access to the evidence needed to prove his case. These far-reaching powers of discovery are reinforced by jail sentences and fines for contempt of court, resulting from the non-production or destruction of documents.

Plus the concern over the divergence between US and Europe as to the treatment of the attorney-client privilege with the main difference being the lack of protection of correspondence with in-house lawyers in the EU. The concern is that discovery in the EU could be, if not properly adapted and adopted, much more sweeping than in the US. For the full "Position Paper of Siemens for the Public Consultation of the European Commission" which addresses all of these issues *click here*.

Access and assessment of information plays a key role, and when it comes to the third of the main issues discussed (the quantification of damages) this becomes even more apparent. Bearing in mind the difficulty in calculating precisely the damages and the likelihood of disproportionality between the requirements for the calculation and the amount of claims, the Commission proposes the drafting of a pragmatic framework providing non-binding guidance for quantification. Full compensation by definition requires detail, and detail by definition requires the input of a fair amount of data. Therefore, the model to be used to quantify damages will be highly dependent on the information disclosed by the defendant (data on sales, volumes, prices, business plans, market studies, board minutes etc) as this will be the key data to substantiate the damages claim.

Besides the above, the increase of scrutiny in financial markets as indicated by the recent investigation of Markit and the much discussed *Deutsche Boerse – NYSE* merger points to the same direction: recent and forthcoming developments will show that e-discovery and e-disclosure … especially its more revolutionary form of predictive coding … will be holding a leading and definitely challenging role in the new competition enforcement landscape.

Gregory P. Bufithis is the founder and chairman of Project Counsel SCS (http://www.projectcounsel.com). He is also the founder and chairman of The Electronic Discovery Reading Room (http://www.ediscoveryreadingroom.com) and Babel-Law (www.babel-law.com).