EC Competition Law: An Overview of the Major Developments of 2008 and Expected Future Trends For 2009 and Beyond

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The European Commission: Coming of Age

With the appointment of a new US administration and the anticipated departure of European Commissioner for Competition Neelie Kroes by the end of the year, there is growing speculation about the potential development of competition law on both sides of the Atlantic. The impact of the ongoing financial and economic crisis has also added pressure to emerging competition policy frameworks currently being developed by the competition regulators.

To better assess the direction in which European competition law and policy is likely to take over the coming year, it is helpful to review the key developments of 2008. Looking back, three major trends emerged through the European Commission’s (Commission) policy, practice and public statements, covering material new ground for the regulator.

First, it is clear that the Commission’s own self-perception markedly developed in terms of maturity and confidence during the course of 2008. This was illustrated by its independent and inherently ‘European’ approach to the advancement of European competition policy, in addition to the public recognition of its success as a leading competition regulator on a global level.

Secondly, the Commission demonstrated an increased appetite and focus on safeguarding procedural aspects of the European competition law framework. This involved the Commission initiating a number of investigations and in some cases imposing high penalties on undertakings for procedural infringements.

Thirdly, the onset of the financial and economic crisis demonstrably forced the Commission to exhibit a greater depth of understanding and increased flexibility regarding the surrounding macro-economic environment in its application of competition policy, particularly for state-aid and merger-control.

Looking ahead, each of the above developments indicates a taste of things to come throughout 2009, and well into the next Commissioner’s tenure.

European Competition Policy, the European Way
The year of 2008 illustrated a growing self-perception within the corridors of DG Competition that the European competition regulator represented a true leader in the field of anti-trust, cumulating with a couple of noteworthy events. First, towards the beginning of 2008, Global Competition Review’s Rating Enforcement Survey[1] ranked the Commission as ‘elite’, awarding it first position before both the UK’s Competition Commission and the US Federal Trade Commission (FTC) - the only two other competition regulators attaining similar elite categorisation. Such apparent public recognition of the Commission’s achievements and overall position as one of the leading competition regulators in the world understandably boosted its internal confidence and potential autonomy.

Secondly, despite earlier uncertainty as to the outcome of Microsoft’s appeal to the CFI, the Commission’s victory in September 2007[2] appeared to strengthen the Commission’s self-assurance (and awarded the judicial support) to further reinforce its own ideologies. Following the CFI’s Microsoft judgement, the Commission positively seized the opportunity to compare and contrast emerging differences between European and US-based competition law.

This opportunity was further enabled by the apparent (and remarkably public) rift which developed between the US Department of Justice (DOJ) and the FTC over the course of 2008 in relation to a number of antitrust policies. In the absence of the usually strong and unified counter from across the Atlantic, the Commission took advantage of the chance to drive its own principles forward.

Over the past year, while avoiding any form of US firm discrimination, the Commission has continued to pursue a decidedly European approach through multiple current policy initiatives. In addition to a number of notable legal decisions and judicial victories, the content of a wide variety of Commission papers and speeches published and presented during 2008 convey the strength and independence which the Commission’s forward-driving momentum presently embraces.

The long-awaited Article 82 Guidance Paper[3] (Paper) on exclusionary abuse was finally published in December 2008, setting out an economic and effects-based approach to exclusionary conduct. While the Paper represents a step towards the US approach to single firm conduct, there is still notable divergence between the stances adopted in Europe and the US (especially in relation to the approach outlined in the DOJ’s Report on Single Firm Conduct under Section 2 of the Shearman Act[4] (Report)). This was highlighted by the Commission, who outlined differences in the European approach to the way in which the pro- and anti-competitive effects of conduct may be balanced, the role of market shares in an assessment of dominance and how pricing conduct is assessed.[5]

However, it was already apparent from Commissioner Kroes’ Fordham University Symposium speech[6] in September 2008 that certain arguments advocated by the Report would not be pursued in any future European-based review of Article 82. Interestingly, Christine Varney, in her confirmation hearings in 2009 already announced that the DOJ will reconsider the DOJ report.

Commissioner Kroes’ concluding remarks at Fordham also drew stark comparisons between the private enforcement regimes established within Europe and the US, observing that the application of US-style treble damages would risk under-enforcement meanwhile advocating Europe’s more balanced and cautious approach. This conveniently brings us on to the Commission’s White Paper on Damages Actions for Breach of the EC Antitrust Rules[7], published in April 2008. A number of commentators were disappointed with its narrowed scope which abandoned controversial proposals advocated in the Commission’s preceding 2005 Green Paper.[8] Nevertheless, the White Paper represents another example of the Commission’s determination in pursuing a truly European-based approach founded upon well-established European legal traditions, without influence from external foreign competition regimes.
The future development of European damages actions (particularly following the European Parliament’s recent support of competition-specific rules[9]) looks certain to offer increasingly effective redress mechanisms while ensuring a balanced approach is maintained, guarding against ‘excessive litigation and the risk of abuses’. [10]

Furthermore, it does not come as a surprise that the Commission also commenced its own damages action against four lift manufacturers it had previously imposed record fines on in 2007 for operating a cartel.[11] By actively pursuing cartel operators on a private damages level, the Commission not only publically leads by example, but it will gain hands-on strategic experience of the difficulties and various complications which may arise during the process, particularly with regard to accessibility to information. Such a pro-active approach will no doubt increase the effectiveness of any eventual legislation.

It will of course also be interesting to observe the path which the Commission decides to pursue during the anticipated reviews of Regulation 1/2003, the Merger Regulation and a number of different block-exemptions which lie ahead this year.

Of particular note will be the review of the Vertical Agreements Block Exemption Regulation, which expires in May 2010 (and the parallel review of the Guidelines on Vertical Restraints). In light of the above, the extent to which the recent US Supreme Court’s landmark decision in Leegin[12] will materially influence the Commission’s assessment is certainly questionable.

The present position is clear, in that the Commission remains reluctant to introduce any similar rule-of-reason analysis for resale price maintenance in place of the current per se approach which it has consistently applied. The leading Commission official on the subject has gone as far as admitting the existence of a deeper divide between Europe and the US than we sometimes recognise.[13] A similar stance has also been reflected during the early stages of the Commission’s re-examination of European legislation relating to on-line commerce.[14] How market participants will respond to any Commission proposals (with or without divergence from the present position) will no-doubt continue the very lively debate from both sides of the Atlantic.

Toughening-up on Procedural Infringements

Over the course of 2008 the Commission made a point of emphasising its commitment to robustly upholding procedural rules, and in doing so identified a number of potential infringements. In some instances this resulted in the imposition of relatively steep penalties.

Previously, the Commission’s dawn-raids powers to search for evidence of gun-jumping during European-level merger reviews were rarely used. However, before ultimately granting Phase II clearance in the Ineos/Kerling merger,[15] the Commission carried out unannounced inspections under Article 13 of the Merger Regulation at the premises of the parties involved, by the onset 2008.[16] Nevertheless, the Commission subsequently announced that the enquiry had been closed, following the discovery of vast quantities of exculpatory documentation during the raids.[17] However, the Commission noted that such raids illustrate its commitment to vigorously monitor compliance with all the provisions of the Merger Regulation. It would therefore appear that the Commission is not limiting its currently increased interest in procedural enforcement only to infringements which have been more commonly investigated in the past. Such a warning signal must be taken seriously by all future merger parties: gone are the days when undertakings could ignore the dangers of potentially inadvertent gun-jumping in Europe without substantial risk attached.

In the field of antitrust, the notable fine of €38 million was imposed on E.ON for the breach of a Commission seal in E.ON’s premises during an ongoing inspection in 2006. [18] The seal had been fixed by Commission officials during a dawn-raid to protect
exclusionary conduct by dominant firms – frequently asked questions,

Similarly, the Commission also commenced formal proceedings against Sanofi-Aventis, [19] alleging that it had infringed procedural requirements by obstructing an inspection of its premises. Sanofi-Aventis had apparently refused to let inspectors examine and copy relevant documents until the French Authorities produced a national search warrant. The investigation has since closed,[20] but the potential fine that could have been imposed for failing to fulfil the obligation to cooperate may have been significant.

Such developments emphasise the increasingly clear message that the Commission is not frightened to come down firmly on any undertaking which attempts to obstruct or interfere with an investigation in any way. Market participants should therefore be prepared to keep on their toes in all dealings with the Commission, and at all costs avoid becoming an easy target as a result of a potentially inadvertent oversight.

A Flexible Solution for Trying Times

Despite an increase in the Commission’s appetite for procedural enforcement, 2008 also forced the Commission to adopt a very practical and flexible approach to the application and utilisation of the existing competition law framework following the onset of the financial and economic crisis. Over recent months, Commissioner Kroes has repeatedly stated that competition law, and state aid rules in particular, form ‘part of the solution’ to the crisis and not part of the problem.[21]

The Commission reacted to the unfolding financial crisis by reassuring markets that rescue measures envisaged by Member States were not going to be ‘jeopardised by EU rules’. [22] However, the Commission concurrently illustrated its own belief that the existing legal framework was sufficient to cope with the developing situation and that there would be no over-flexible interpretation.

By October 2008, Commissioner Kroes was empowered to authorise state-aid related ‘emergency rescue measures’. [23] This was expressly designed to allow the Commission to make highly expedited decisions at any time in order to positively contribute to the resolution of the current crisis.[24] Such measures resulted in high numbers of state-aid decisions being adopted by the Commission in shortened time frames, some of which were made within 24 hours.

Nevertheless, banks which have recently benefited from governmental aid have also been required to submit a restructuring plan to the Commission within six months. [25] While this remains a controversial requirement with national governments, the Commission believes that such restructuring will be key to resuscitating the banking sector following the bail-out measures put in place for the European banking industry.

Similarly, in the area of merger control Commissioner Kroes has simultaneously maintained her intention to continue ‘applying existing rules’[26] while illustrating the Commission’s readiness to assist acquirers initiating bank rescues, by grant derogations from the ECMR standstill requirement. Nevertheless, the recently Commission warned this ‘should not be a blank cheque for abandoning remedies altogether’[27] towards banks who are intending to use the exceptional circumstances of a global recession to engineer a favourable merger review from the Commission.

However, despite the firm interpretation (yet increasingly flexible application) the Commission adopted towards state-aid and merger control, it must be kept in mind that other areas of competition law are highly unlikely to benefit from any passive acceptance of misbehaviour which infringes competition law, despite the gravity of the economic downturn. As Kroes recently commented ‘Anyone who thinks we are
In 2008, the Commission adopted seven cartel infringement decisions including one involving the highest cartel fine ever imposed for market sharing in the car-glass industry.[29] It is clear that any increase in cartel activity which may occur due to dwindling companies fighting to survive will continue to be aggressively pursued by the Commission (despite the prospect of any ‘flexible’ approach to cartels which may be floated at Member State level by certain NCAs).[30]

**Conclusion**

In 2008, a number of developments tested the Commission to its limits. Embracing such challenges, the Commission took a forceful stand affirming the independent development of European policy, condemning infringements across the entire spectrum of European competition law, and tackling the economic and financial crisis head-on. However, the year ahead will bring fresh new challenges, not least with the economic and financial crisis appearing to deteriorate into a pan-European or global recession of unprecedented levels.

While the potential problems and economic conditions we may face in 2009 remain uncertain, Commissioner Kroes is clearly committed to ensure that solid foundations are laid to enable the Commission to continue to respond effectively and efficiently, both during the financial and economic crisis and well beyond.

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