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A legal update from Dechert's Antitrust Group

European Commission Launches Pharmaceutical Competition Inquiry with Dawn Raids

Key Action Points for Pharmaceutical Clients To Consider

- Be sure you have in place a procedure for responding to dawn raids
- Update your familiarity with EU and U.S. privilege rules
- Review your patent-related activities for possible competition law implications

The European Commission ("Commission" or "EC") carried out dawn raids on several innovator and generic pharmaceutical companies on Wednesday, January 16, 2008, as the first step in a "sector inquiry" into competition in the pharmaceutical industry. For the pharmaceutical industry, the initiation of the sector inquiry means intensified scrutiny that likely will last for several years. **The Commission has also announced that it intends to send out requests for information to other pharmaceutical companies as part of its inquiry.** For other industries, the novel use of the dawn raid in connection with a sector inquiry underscores the need to have in place a process for dealing with dawn raids, particularly to protect privileged communications that are not afforded the same protections in the EU that they are afforded in the United States.

The European Commission's Intensified Interest in Pharmaceutical Competition

Before this inquiry, the Commission's interest in pharmaceutical competition outside of distribution issues had been relatively recent and sporadic. In June 2005 the Commission issued a decision against AstraZeneca for violating Article 82 of the EC Treaty by making misrepresentations to the patent offices of several countries and withdrawing certain versions of its product from the market in order to limit generic competition for its omeprazole-based products. In March 2007 the Commission announced a proceeding against Boehringer AG for allegedly misusing the patent system to exclude potential competition in chronic obstructive pulmonary drugs. The present inquiry confirms that these were not isolated matters, but the forerunners of a broader initiative to look into a wide range of practices to determine their effect on pharmaceutical competition.

Although the inquiry is not targeting companies suspected of wrongdoing at this time, some previous Commission sector inquiries in other industries have led to follow-on enforcement proceedings. The Commission has identified patent settlement agreements, patent misuse, and vexatious litigation as among the specific objects of their current sector inquiry. These practices have all been the subject of intense scrutiny by the U.S. Federal Trade Commission and the U.S. courts—often in matters in which Dechert has been heavily involved.

Important Lessons for Other Industries – Avoiding Attorney-Client Privilege Waiver

This is the first time that the Commission has used a dawn raid in connection with a sector inquiry, as opposed to an enforcement matter. One of the critical issues that arises with Commission dawn raids is the handling of privileged documents. Voluntarily producing

privileged documents to the Commission could waive the privilege for purposes of U.S. litigation. The Commission has specific procedures in place for handling privilege claims, which, if not carefully followed, could result in a privilege waiver in U.S. courts. It is, therefore, important to have a plan in place for handling the Commission's inspection and its aftermath, so that any production cannot be deemed a waiver. The Commission's rules on attorney-client privilege are much narrower than the U.S. rules, which heightens the need for careful advance planning. Most importantly, the Commission does not extend the privilege to communications involving in-house counsel or non-EU-qualified outside counsel unless those communications are prepared *solely* for the purpose of obtaining legal advice from EU-qualified outside counsel.

Following the U.S. Playbook

This new inquiry confirms the Commission's intention to devote substantial attention to pharmaceutical competition matters. There is no doubt that the Commission will be looking at practices that have already drawn serious attention from antitrust authorities and courts in the United States.

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For further information on Dechert's relevant experience and key pharmaceutical team members, please see the attachment at the end of this article.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/antitrust.

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Dechert Antitrust

Our Experience

Dechert has substantial experience with dawn raids in a variety of industries. We can bring that experience to bear to assist clients in establishing in advance a process for responding to dawn raids that allows onsite personnel to respond to the Commission's demands while preserving applicable privileges.

Dechert's U.S. pharmaceutical experience, coupled with our established competition law practices in London and Brussels, and our experience handling dawn raids in cartel cases, enable Dechert to provide the highest level of expertise to the substance and procedure of any Commission inquiry in this area. For further information, please contact one of the Dechert lawyers noted below.

Key Members of Dechert's Pharmaceutical Team

Isabelle M. Rahman

Isabelle M. Rahman is a partner in Dechert's antitrust/competition group. Ms. Rahman focuses her practice on EC competition law, advising an international client base active in a variety of industries, including pharmaceutical, chemical, food, airlines, consumer products, packaging, and information technology. She has substantial experience in the application of EC competition rules, advising on a wide range of issues, including cartels, leniency applications, abuses of dominance, and merger control and litigating cartel-competition cases before the European Commission (DG-4).

Jonathan A. Schur

Jonathan Schur is co-managing partner of Dechert's Paris office. He represents technology-based companies in transactions, financings, and regulatory matters with particular focus on French and multinational companies in the pharmaceutical, medical device, and health care sectors. Mr. Schur advises companies in structuring mergers and acquisitions, divestitures, licensing and distribution arrangements, joint ventures, and cooperative development and marketing relationships. He also works with clients to arrange venture and later-stage financing, as well as representing them pre-IPO and at the IPO stage.

Edward L. Kling

Edward Kling has been a partner of Dechert's London office for more than 25 years. His work involves international business, litigation, and arbitration, including numerous antitrust and technology-related contested matters.

Dechert LLP

George G. Gordon

George G. Gordon is a litigation partner, co-chair of the firm's antitrust/competition group, a member of the firm's commercial litigation group, and a member of the firm's Policy Committee. Mr. Gordon has defended and advised pharmaceutical companies on litigation strategy in a variety of different types of pharmaceutical litigation, including antitrust, consumer fraud, and ANDA patent infringement cases.

Jeffrey W. Brennan

Jeffrey W. Brennan, a partner, joined Dechert in 2006 after five years in senior positions with the FTC's Bureau of Competition—first as Assistant Director, in charge of the Health Care Services and Products Division, and then as Associate Director. His primary responsibility at the FTC was to direct antitrust investigations and law enforcement targeting anticompetitive practices in the pharmaceutical industry.

Stephen A. Stack, Jr.

Stephen A. Stack, Jr. is a member of Dechert's trial team and former co-chair of Dechert's antitrust/competition group. Mr. Stack's experience covers the full range of antitrust activities from litigation to preventive counseling to practice before U.S. federal and state and European enforcement agencies. Mr. Stack is a former chair of the ABA Antitrust Section's Pharmaceutical Task Force and co-editor of the Antitrust Section's forthcoming treatise on Pharmaceutical Antitrust. He regularly counsels pharmaceutical and chemical clients on antitrust issues relating to patenting strategies, licensing, research and development collaborations, manufacturing joint ventures, patent litigation strategies, settlement of patent litigation, interference proceedings, and sales and marketing activities.

Joseph A. Tate

Joseph A. Tate is a partner in Dechert's antitrust/competition and white collar litigation groups. For more than 25 years, he has defended U.S. and foreign corporations, executives, lawyers, and others against allegations of white collar crime, with particular emphasis on antitrust, patent fraud, and other regulatory issues. His practice also involves complex civil litigation and class actions. Mr. Tate has represented numerous pharmaceutical companies in antitrust class actions filed by consumers, third-party payors, and direct purchasers. Mr. Tate has also tried cartel-competition cases before the European Commission (DG-4).

Christine C. Levin

Christine C. Levin is a partner in Dechert's antitrust/competition and white collar litigation groups. Ms. Levin concentrates on complex civil litigation, including antitrust and class action matters, and on white-collar criminal investigations. Her antitrust experience includes litigation involving the pharmaceutical, roofing and siding, baby food, newspaper, and chemical industries, and she has experience in cartel investigations and trials in both the EU and the United States involving several different industries. She has also been involved in class actions raising price-fixing, false advertising, and a variety of product liability claims.■