



European Union Enforcement Update: 2012 Developments in the enforcement of Art 102 TFEU

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Background

Article 102 of the Treaty on the Functioning of the European Union ("TFEU") provides: "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited". The European Commission ("Commission") has wide powers to investigate any undertaking it believes to have violated Article 102 TFEU. Several investigations were initiated in the first part of 2012, including against an undertaking established outside the European Union ("EU").

In the same period, the Commission also fined a company for obstructing an inspection. Joaquín Almunia, Commission Vice President responsible for Competition, said: "the Commission will not tolerate actions which could undermine the integrity and effectiveness of [our] investigations by tampering with such information during an inspection."¹

Instead of pursuing formal proceedings, the Commission may close an investigation if it receives commitments from the firms under investigation which will remedy the perceived violation. The Commission is currently considering commitments in a number of cases.

Challenges to the European Courts against Commission decisions have, in the large majority of cases, concluded with the Courts upholding the Commission decisions. This trend was followed in the first half of this year with the Courts imposing a periodic penalty payment on Microsoft for failing to comply with a Commission decision, upholding a €151 million fine on Telefónica for abusing its dominant position in the market for access to broadband internet in Spain and upholding a €24 million fine on Tomra for abusing a dominant position in the market for reverse vending machines.

Developments

Policy and Procedure

DG Competition's manual of procedure for the application of Articles 101 and 102 TFEU: the Commission has published an internal staff document on procedures for the application of Articles 101 and 102 TFEU ("ManProc"). The Antitrust Manual of Procedures does not contain binding instructions

for staff, and the procedures set out in it may have to be adapted relative to the circumstances of each case. It does, however, contain detailed guidance on many aspects of procedure relative to the application of Articles 101 and 102 TFEU.

Cooperation between Antitrust Authorities: in order to ensure effective enforcement of EU competition policy in a global environment, the Commission cooperates closely with Competition Authorities of countries inside and outside the EU. This is done on the basis of bilateral agreements or Memoranda of Understanding. The Commission has recently signed a Memorandum of Understanding to increase cooperation between DG Competition and the Chinese Antitrust Authorities. The Memorandum covers legislation, enforcement and technical cooperation in relation to cartels, other restrictive agreements and the abuse of dominant market positions.

Commission Investigations

Obstructing Commission Inspections

The Commission has fined two Czech energy companies, *Energetický a Průmyslový Holding* and *EP Investment Advisors*, €2.5 million for obstructing an inspection carried out by Commission officials at their premises in the Czech Republic.

The companies had failed to block an email account and diverted incoming emails during the Commission's inspection. The Commission inspectors had directed that e-mail accounts of key individuals were blocked so as to ensure that the inspectors had exclusive access to the content of the e-mail accounts. Although the accounts were blocked, the inspectors discovered that the password for one account had been modified to allow the account holder to access the account and one employee had asked the IT department to divert all e-mails arriving in certain blocked accounts away from the accounts. As a result, the incoming e-mails did not become visible in the inboxes concerned and could not be searched by the inspectors.

The power to carry out inspections is one of the Commission's most important investigative tools. This has been confirmed

¹ Commission Press Release IP/12/319, 28 March 2012.



by the European Courts, most notably in *EON Energie*, in which a fine of €38 million was imposed on EON for breaking a seal applied by the Commission during a Commission inspection.²

Investigations

Gas The Commission has opened formal proceedings to investigate whether Gazprom, the state-owned Russian producer and supplier of natural gas, may be abusing its dominant position in upstream gas supply markets in Central and Eastern European Member States, in breach of Article 102 TFEU. Specifically, the Commission is investigating whether Gazprom may have (i) divided gas markets by hindering the free flow of gas across Member States, (ii) prevented the diversification of supply of gas and (iii) imposed unfair prices on its customers by linking the price of gas to oil prices. EU competition laws apply to all companies active in the EU, irrespective of their ownership. However, following the announcement of the EU investigation, Russian President Vladimir Putin, signed a decree whereby "strategic" companies operating abroad may not pass information to foreign regulators without first seeking clearance from Moscow. It remains to be seen whether this decree will obstruct the EU investigation.

Licensing and Standard setting The Commission has increased its scrutiny of licensing disputes for patents adopted into industry standards. In line with the Commission's Guidelines on Horizontal Cooperation Agreements, standard setting organisations require the owners of patents, that are essential for the implementation of a standard, to commit to license these patents on fair, reasonable and non-discriminatory ("FRAND") terms. However, the Commission has received several complaints about companies who allegedly abuse their monopoly power by failing to honour FRAND commitments in licensing negotiations, including by seeking injunctive relief before the courts of Member States. Telecom equipment maker Huawei filed a complaint against Interdigital, *Apple* and *Microsoft* have complained about Motorola Mobility's conduct and *Apple* has complained about Samsung's conduct.

Pharmaceuticals The Commission is progressing investigations in the pharmaceutical sector to address issues highlighted in the final report of its sector inquiry. A formal Statement of Objections was issued to Danish pharmaceutical company, *Lundbeck*, over its conclusion of "pay-for-delay" agreements with four generic producers of citalopram, an antidepressant medicine. *Servier* and several of its generic competitors also received a Statement of Objections for allegedly protecting market exclusivity by inducing generic competitors to conclude patent settlements. Proceedings are also pending against *Cephalon* and *Teva*, *Johnson & Johnson* and *Novartis* in relation to its generic branch Sandoz.

Rail The Commission has opened an investigation into whether the German railway incumbent, *Deutsche Bahn AG*, and several of its subsidiaries operate an anticompetitive pricing system for traction current in Germany. The Commission is investigating whether the discounts applied by *Deutsche Bahn* lead to higher prices for its competitors thereby placing them at a disadvantage in the rail freight and passenger markets.

Software Interoperability The Commission has opened an investigation to assess whether *The MathWorks Inc.*, a US-based software company, has refused to provide a competitor with end-user licences and interoperability information. In 2004 Microsoft was fined for a similar abuse of dominant position and obliged to make "complete and accurate" interoperability information available to its competitors at reasonable rates.

Telecommunications The Commission is investigating whether *Slovak Telekom a.s.* ("ST") and its parent company, *Deutsche Telekom AG*, may have refused to supply unbundled access to its local loop and wholesale services to competitors. It is alleged that ST used unreasonable and burdensome technical and commercial terms to delay and obstruct negotiations in particular as regards unbundled access to local loops. It is also alleged that ST set its wholesale prices at a level that made it impossible for alternative operators to enter and operate in the retail broadband market in Slovakia (margin squeeze). On a preliminary basis the Commission thinks *Deutsche Telekom* may be liable for the conduct, because of the nature and degree of its links with its subsidiary ST, in which it owns a majority stake of 51%.

Commitments

Instead of pursuing formal proceedings, the Commission may accept legally binding commitments from the firms under investigation. The Commission is considering commitments in several cases. It has also opened an investigation against a firm for failure to comply with its commitments.

² Case T-141/08. In 2010, the General Court dismissed an appeal by EON Energie against a €38 million Commission fine for breach of a seal during an inspection and earlier this year Advocate General Bot, giving his Opinion in the appeal to the ECJ, found that most of EON's pleas were unfounded or inadmissible. However, he considered that the GC had not exercised its unlimited jurisdiction when considering the proportionality of the fine imposed on EON and recommended that the General Court judgment be set aside and referred back to the General Court for judgment concerning the proportionality of the fine to be imposed.



Google In 2010, the Commission opened an investigation into an alleged abuse of a dominant position by Google. In May 2012 the Commission published its four main concerns:

- In general search results on the web, Google displays links to its own vertical search services differently than it does for links to competitors. The Commission is concerned that this may result in preferential treatment.
- Google may be copying original material from the websites of its competitors without their prior authorisation. The Commission is concerned that this could reduce competitors' incentives to invest in the creation of original content for the benefit of internet users.
- The Commission is concerned about agreements between Google and partners, on the websites of which Google delivers search advertisements, whereby Google requires its partners to obtain all or most of their requirements for search advertisements from Google.
- The Commission is also concerned about restrictions that Google puts on the portability of online search advertising campaigns from its platform (AdWords) to the platforms of competitors.

The Commission is currently in talks with Google to settle the investigation by way of commitments, a procedure the Commission prefers in fast-moving technology markets. If the Commission accepts commitments from Google, the investigation will be closed without a formal decision from the Commission as to whether Google has infringed Article 102 TFEU. If an acceptable set of remedies is not forthcoming, the Commission may progress its investigation by issuing a formal statement of objections.

Rio Tinto Alcan The Commission is market testing with interested parties commitments offered by Rio Tinto Alcan to address concerns that the company may have infringed EU competition rules by tying its leading AP aluminium smelting technology to aluminium smelter equipment it supplies. To address these concerns, Rio Tinto Alcan offered to modify its AP technology transfer agreements to enable the licensees of the AP aluminium smelting technology to choose any supplier whose PTAs meet certain technical specifications.

Thomson Reuters The Commission is market testing with third parties a new proposal from Thomson Reuters to address concerns that its licensing practices in relation to Reuters Instrument Codes ("RICs"), may violate EU competition rules. RICs are codes that identify securities, used by financial institutions to retrieve data from Thomson Reuters' real-time datafeeds. The Commission is concerned that

Thomson Reuters may be abusing its dominant position in the market for consolidated real-time datafeeds by prohibiting customers from using RICs for retrieving data from alternative providers and cross-referencing them to alternative codes by other suppliers. Under the new proposal, Thomson Reuters offers to allow customers to license additional RIC usage rights for the purpose of switching and to use RICs for retrieving data from other providers against a monthly license fee. In addition, Thomson Reuters would provide customers with the necessary information to map RICs to alternative symbology (codes by other suppliers).

CEZ Czech electricity incumbent, CEZ, has offered commitments to the Commission to address concerns that it may have violated EU competition rules by hindering the entry of competitors into the Czech electricity markets, in particular through excessive capacity reservations. The Commission asserts CEZ has a dominant position on the Czech market for the generation and wholesale supply of electricity. CEZ has offered to divest coal-fired generation capacity in the Czech Republic.

Non-compliance with Commitments

Microsoft The Commission has opened an investigation into whether Microsoft has failed to comply with a "legally binding commitment" it gave in 2009 to provide Windows users with a "choice screen", enabling them to easily choose their preferred web browser. The Commission believes that Microsoft may have failed to roll out the choice screen with a subsequent Windows 7 update. If the Commission were to find that Microsoft has breached its commitment, it may impose a fine of up to 10% of Microsoft's total annual turnover. The Commission has previously fined Microsoft for abuse of a dominant position (2004) and twice imposed penalty payments for non-compliance with its obligations under the decision.

European Court Judgments

Compliance with Commission decisions

The General Court ("GC") has upheld a Commission decision imposing a periodic penalty payment on *Microsoft* for failing to allow its competitors access to interoperability information on reasonable terms.³ In 2004, the Commission fined Microsoft more than €497 million for abusing its dominant position. One of the abuses comprised Microsoft refusing to make available to its competitors certain interoperability information. By way of remedy, the Commission required Microsoft to grant access to that information. However, following adoption of the decision, the Commission found that

³ Case T-167/08, *Microsoft Corp. v Commission*.



Microsoft had failed to provide a complete and accurate version of the interoperability information within the period set by the 2004 decision and that the remuneration rates sought by Microsoft for granting access to the information were unreasonable. The Commission therefore adopted a number of decisions imposing periodic penalty payments and Microsoft brought an action before the GC for annulment, cancellation or reduction of the periodic penalty payment. Although the GC reduced the amount of the periodic penalty payment, the GC essentially upheld the Commission's decision and rejected all the arguments put forward by Microsoft in support of annulment.

Margin squeeze

The GC has dismissed actions brought by *Telefónica* and *Spain* against a Commission decision of July 2007 fining Telefónica €151 million for abusing its dominant position in the market for access to broadband internet in Spain.⁴ The GC confirmed:

- Margin squeeze is itself a category of abuse distinct from a refusal to supply.
- The methodology to calculate margin squeeze is the "equally efficient competitor" test. This test uses the dominant entity's own costs as a benchmark in order to establish whether or not it has unfairly constrained its rivals' ability to compete in the market.
- It is not necessary to establish dominance at both wholesale and retail level to find an abuse in the form of a margin squeeze by a vertically integrated company.
- National legislation concerning telecommunications does not release dominant firms from their obligation to respect EU competition law.

Telefónica has appealed the GC's judgment to the European Court of Justice ("ECJ").

Discounts and rebates

The ECJ has issued an important judgment on the application of rebate schemes by dominant undertakings. In 2006, *Tomra* was fined €24 million by the Commission for abusing a dominant position in the market for reverse vending machines ("RVMs"). RVMs are machines for recycling drinks packaging, which automatically calculate an amount of money to be reimbursed to the customer who deposits a used container. The Commission found that Tomra (i) concluded exclusivity agreements to ensure that customers bought RVMs only from Tomra and (ii) operated a system of discounts and

rebates to ensure further loyalty. Tomra unsuccessfully appealed to the GC. The ECJ has now dismissed a further appeal by Tomra.⁵ The ECJ confirmed that:

- The notion of abuse is an objective one. The Commission can, but is not obliged, to establish the existence of intent on the part of the dominant undertaking.
- The use of individualised target rebates payable on all purchases, where the target is all or most of the customer's requirements, are likely to be considered an abuse by a dominant undertaking.
- It is not necessary to fix an absolute threshold for foreclosure - each case must be analysed on its own. The GC found that Tomra's practices foreclosed around 40 per cent of the market which the ECJ concluded was sufficient for a finding of abuse.
- It is not necessary for the Commission to find predation if circumstances point to the rebates being anti-competitive.

The judgment highlights the difference between the approach of the ECJ for the assessment of unilateral conduct, an approach that binds national judges when deciding on possible infringements of Article 102 TFEU, and the more economic, effects-based approach advocated by the Commission, as set out in its 2009 Guidance Paper on Exclusionary Conduct. According to the ECJ, it is sufficient to show that abusive conduct by a company in a dominant position tends to restrict competition or that the conduct is capable of having that effect - an analysis of actual effects is not necessary.

Selective price reductions

The ECJ has confirmed that selective price reductions by a dominant postal undertaking (that has a universal service obligation) to a level lower than the postal undertaking's average overall costs but higher than the provider's average incremental costs, do not necessarily mean that the dominant undertaking has committed an exclusionary abuse in breach of Article 102 TFEU.⁶ The facts of each case must be taken into account to establish whether the pricing practice has the effect or the potential, without objective justification, to produce an actual or likely exclusionary effect to the detriment of competition and consumers' interests.

Public authority acting as undertaking

The ECJ has handed down a ruling on a reference from an Austrian Court on the question of whether a public authority is performing an "economic activity" such that it qualifies as an

⁴ Cases T-336/07 and T-398/07, Kingdom of Spain v European Commission.

⁵ Case C-549/10P, *Tomra v Commission*.

⁶ Case C-209/10, *Post Danmark A/s v Konkurrenserådet*.



undertaking for the purposes of Article 102 TFEU.⁷ The ECJ concluded that where a public entity maintains a commercial registry database of companies and makes that data publicly available in return for remuneration, it is not acting as an undertaking for the purposes of Article 102 TFEU as those activities do not constitute economic activities. In addition, a public entity also does not engage in an economic activity where, in reliance on intellectual property rights, it prohibits any re-use of that data.

Abuse of regulatory process

Advocate-General ("AG") Mazák has delivered his Opinion in *AstraZeneca*.⁸ In July 2010, the GC partially upheld the Commission's decision finding that AstraZeneca had misused the regulatory framework to prevent or delay the market entry of competing generic products. AstraZeneca appealed the judgment to the ECJ. The AG has now recommended that the ECJ dismiss AstraZeneca's appeal. Although, the AG's Opinion is not binding on the ECJ, the ECJ generally follows the advice of its AGs. There will be significant implications for the pharmaceutical industry if this occurs. The AstraZeneca case is the first case in which abuse of regulatory process was held to be an abuse of a dominant position and confirmation of this approach by the ECJ can be expected to result in more cases of this nature being brought. The AG also confirmed that a misleading statement to the patent office in the context of a patent application process, can constitute an abuse of dominance, regardless of whether such a mistake was honestly made. If the ECJ accepts this legal standard, companies will have to be exceptionally vigilant when applying for IP rights in order not to risk future claims for misleading the regulatory authorities. The ECJ judgment is expected before the end of 2012.

Conclusion

The first half of 2012 has been an active period. The Commission has again made it clear that it will pursue firms active within the EU, including against those established outside the EU. The Commission has reminded businesses that it can and will impose large fines, for competition law violations and for failure to comply with its investigations and decisions.

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⁷ Case C-138/11, *Compass-Datenbank GmbH v Austria*.

⁸ Case C-457/10, *AstraZeneca v Commission*.