



# ANTITRUST MATTERS

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# WELCOME TO OUR READERS

By Carl Hittinger

Welcome to the second issue of our global competition and antitrust law newsletter *Antitrust Matters*. The importance and shifting nature of antitrust problems facing companies and individuals is by its nature, a work in progress. There are always hot topics on the agendas of the enforcement agencies and at play in the courts. A significant example: nearly 100 years after Congress passed the Federal Trade Commission Act, the intent and meaning of one of its key provisions remains largely unsettled. In Section 5 of the FTC Act, Congress prohibited “unfair methods of competition” but declined to elaborate further. The FTC, for its part, has never issued any clear official guidance on its views of the provision. This ill-defined proscription is a potential challenge for modern businesses — and their legal counsel — when advising on the boundary between legal and illegal conduct. Specifically, if Section 5 proscribes conduct that is permissible under the US Sherman Antitrust Act, exactly how far does it reach?

Aside from consumer protection actions for fraudulent and deceptive practices, the FTC has tried to apply Section 5 beyond the boundaries of the primary antitrust statutes. More recently, there have been increasing calls to go further in that direction. FTC commissioners, and even members of Congress, are now publically debating what the FTC’s approach should be to this controversial bit of legislation.

The FTC Act was passed in large part, to respond to the US Supreme Court’s 1911 decision in *Standard Oil*. The Court had applied the rule of reason to the Sherman Act’s prohibition on “restraints of trade,” which some in Congress at the time viewed as undermining the purpose of that act. As former FTC Commissioner Jon Leibowitz explained, “Congress’s bipartisan reaction was to create an administrative agency with antitrust expertise, an enforcement mandate more expansive than that of the antitrust laws, and the structure and flexibility to identify, analyze, and challenge new forms of ‘unfair methods of competition’ as they developed.”

Some argue that Section 5 was intended to be a new substantive law that would extend beyond the Sherman Antitrust Act. As the Supreme Court has observed, “[Congress] explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase ‘unfair methods of competition’ by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply.” Instead, “Congress left it to the Commission to determine what practices were unfair.”

In several cases in the 1970s, the FTC urged a much broader reading of Section 5, and the Supreme Court’s 1972 decision in *FTC v. Sperry & Hutchinson Co.* seemed to endorse such a view. However, the FTC has suffered a series of setbacks in which federal appeals courts have held that the FTC’s view of Section 5 was too malleable, and lent itself to “arbitrary or capricious administration.” In the wake of those unfavorable rulings, the FTC shifted its attention to prosecutions and merger review under the Sherman Antitrust Act, and the debate about Section 5 largely faded away.

Recently, the pendulum has swung back in a big way. FTC commissioners have demonstrated renewed interest in utilizing the Section 5 unfair methods of competition provision for antitrust as well as consumer protection matters. Meanwhile, the FTC has also changed its policy on remedies in Section 5 cases, opening up the possibility that it will pursue disgorgement and restitution, rather than just injunctive relief, in all, not just some select, cases. Thus, not only has the FTC put the elusive prohibition on unfair methods of competition back in the mix, but it has dramatically upped the ante for Corporate America. Stay tuned.

We hope you liked the first edition of *Antitrust Matters* and will equally enjoy this, our second edition, in which our team of lawyers explores antitrust issues across additional jurisdictions.



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**EUROPE**





# EUROPEAN UNION

## A wind of change? On the concept of state aid

By Carole Maczkovics

The time when state aid was thought to be a synonym of subsidy is far in the past. For a measure to be categorised as state aid, first, there must be an intervention by the state or through state resources; second, the intervention must be able to affect trade between member states; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition. The first condition to be fulfilled contains in reality two sub-criteria. It is settled case law that those sub-criteria must be construed narrowly and are cumulative.

Hence, if there is an advantage, it must be granted directly or indirectly through state resources and its grant must be attributable to the state (C-73/91 *Sloman Neptun* [1993] ECR I-887). In the *Preussen Elektra* case (Case C-379/98 [2001] ECR I-2099), attempts failed to consider as an aid the requirement on private electricity suppliers to purchase local electricity above market value. In that case, the financial burden of such requirement rested with the electricity suppliers, so that no direct or indirect state resources were involved. In *Stardust Marine* (C-482/99 *France v Commission* [2002] ECR I-4397), the Court of Justice of the European Union (the CJEU) considered that even if the sums corresponding to the measure in question are not permanently held by

the Treasury, the fact that they constantly remained under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as state resources. In *Vent de Colère!* (Case C-262/12, not yet reported), the CJEU deemed that even if only part of the sums are not channelled through the account of a public body, the measure may fulfil the first condition to qualify as state aid.

In that case, Electricité de France (EDF) and non-nationalised electricity distributors were obliged by law to purchase electricity from producers in national territory using wind-power electricity-generating installations, at a price higher than the market price. Additional costs so incurred to electricity distributors were fully compensated by contributions made by all final consumers. By French law, the contributions paid by the end consumers were paid out to the operators bearing the purchasing obligation through the Caisse des dépôts et consignations (CDC), a French public entity. The question was whether the contributions paid by end consumers to cover the additional costs of such obligation were made through an intervention by the state and through state resources.

It was obvious that since the compensation mechanism was established by law, the measure was attributable to the state (para 18). As regards the sub-criterion whether state resources were involved, the CJEU recalled first that measures not involving a transfer of state resources may constitute an aid (para 19). That is the case where advantages are granted through the intermediary of a public or private body appointed by the state to administer the aid (para 20). In the present case, the law imposed upon end consumers compulsory contributions and entrusted to the CDC (paras 22 and 25), thereby remaining all the time under public control (para 33).

However, not all contributions to cover the additional costs incurred by the purchasing obligation were channelled through the CDC. It appeared that operators subject to the obligation retained the contributions received from final consumers in so far as they did not cover the operators' own total additional costs. The CJEU considered this very fact to be irrelevant for excluding state aid (para 27).

Hence, that it is rather the role played by the CDC (administering the accounts and distributing the monies) that must be taken into account than physical presence of money in an account (paras 42 and 47 of the opinion of Advocate General Niilo Jääskinen). And since that body is a public body *par excellence*, the criterion of state resources is presumed to be satisfied (paras 44 and 47 of the opinion of Advocate General Jääskinen).

This judgment could be seen as a continuation of the *Stardust Marine* case, which stressed the relevance of public control and availability to the national competent authorities and considered irrelevant the fact that the sums are not permanently held by the Treasury.

However, this judgment leaves some questions open as to the design of measures potentially granting advantages to escape state aid control. Would the conclusion of the CJEU have been the same if the operators obliged to purchase wind power energy at a higher price than market were entitled to levy a markup on every consumer to

recover the additional costs? Would not the absence of a specific central administration of such markup have a bigger potential to lead to overcompensation than in the case submitted to the CJEU? Development of legal engineering may lead to more judgments on the qualification of state resources in the future.

Companies whose business may involve state assistance, in any of its forms, may wish to keep a weather eye.



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## No mercy for cartel facilitators

By Boris Marschall

Fines imposed on cartel facilitators are not a surprise anymore.

The General Court of the European Union has dismissed all the appeals brought against the European Commission decision on the heat stabilisers cartels which lasted from 1993 to 2000 (the tin stabiliser cartel and the ESBO/esters cartel).

Most notably, the General court upheld the two €174,000 fines (€348,000 total) imposed on AC Treuhand, a consultancy firm that was not active on the markets affected by the restrictions of competition, but “actively and intentionally” contributed to the cartels by providing logistic assistance to the undertakings active on the affected markets.

AC Treuhand is already well known for having been fined a symbolic €1,000 in 2003 in relation to the organic peroxides cartel, based on the same type of organisational assistance provided at the same time (from 1993 to 1999). AC Treuhand had unsuccessfully argued before the General Court that the Commission infringed the principle of *nullum crimen, nulla poena sine lege* by imposing a fine for a behaviour that had never been considered antitrust breach before. In its 2008 judgement, the General Court insisted that settled case law already existed in relation to

undertakings that shared liability for the anti-competitive conduct of another economic actor because they were co-perpetrators or complicit in the overall infringement. Thus, the General Court held that the Commission’s decision also to apply such reasoning to a consultancy firm not active on the same market as the main participants was not unforeseeable. The General Court accepted that such factual context raised a “specific question” but judged that the Commission had merely clarified an existing practice rather than established a new one.

The 2008 ruling seemed a bit convoluted: the European Commission itself had acknowledged in 2003 that addressing a decision to the consultancy firm “having a role of this kind” was “to a certain extent a novelty”, so that a symbolic €1,000 fine was considered “appropriate”.

It should, however, be remembered that the Commission had already attributed an antitrust infringement to the consultant firm Fides in the Italian cast glass decision in 1980, although no penalty was imposed. (AC-Treuhand was established from a former division of Fides.)





In any event, the low fine in the organic peroxides cartel was interpreted as a sign of clemency. The threat of “heavy sanctions” communicated by the Commission seemed to be aimed at cartel facilitators for infringements that would start or last **after 2003**.

One may have hoped that cartel facilitation **prior to the 2003 Commission decision** but discovered or fined after 2003 would still result in a symbolic fine.

The European Commission ended such hopes with its 2009 decision in the heat stabilisers cartels. The recent judgement of the General Court upholding that decision thus constitutes a double warning.

The first, clear lesson is that clemency is over. Mercy lasted for one cartel, no more, and consultancy agencies (or other intermediaries) cannot minimise the legal risk any more when they facilitate an antitrust violation. Not only is there case law about finding cartel facilitating infringements: there is now also case law involving significant fines.

The second lesson is that the *nullum crimen, nulla poena sine lege* argument seems very difficult to use against the Commission in the field of competition law. There will

be other situations where the Commission will produce new solutions by “clarifying” existing case law, and the General Court does not seem prone to stopping the Commission from doing so. It might be worth fighting until the end, that is to say appealing to the Court of Justice of the European Union. The Commission will try to impose the new solution by imposing reasonable or even low fines, which lowers the incentive to litigate. Yet abandoning after the General Court judgement might backfire sooner than expected, as for AC Treuhand.



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# AUSTRIA

## Austrian Supreme Court: scope of an initial search warrant can be extended based on a file note in a dawn raid chance finding

*By Nicole Daniel and Florian Schuhmacher*

Austria's Supreme Court has upheld a decision of the Austrian Cartel Court extending the scope of a search warrant based on a file note made after a chance finding at a dawn raid.

This issue of chance findings is controversial under European Union and National Competition laws since it places companies under risks that further suspicions and investigations may arise after a dawn raid has been conducted. Such chance findings regularly cause extensive and time-consuming court proceedings, since the companies in question look for ways to omit them as evidence in antitrust proceedings.

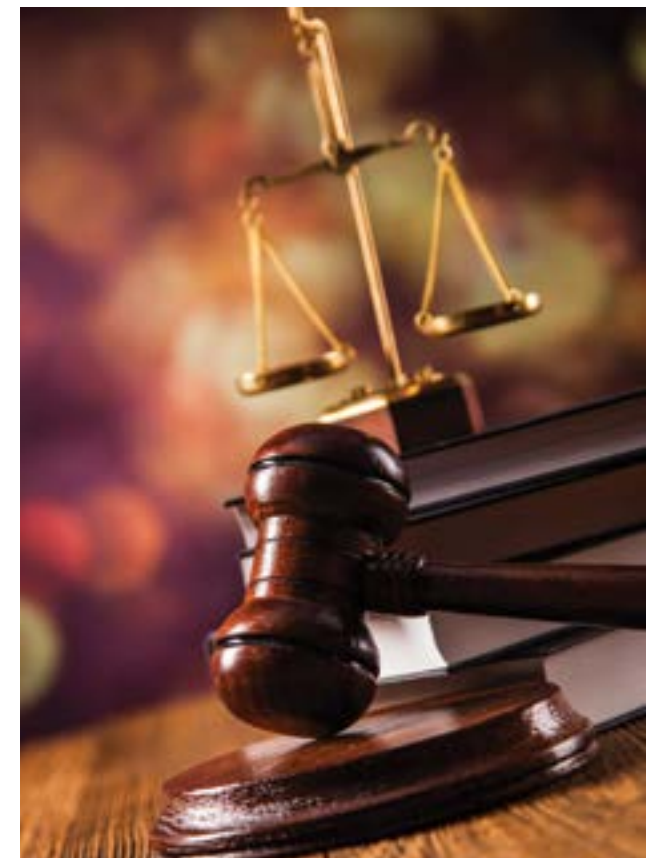
The Austrian ruling, made in November 2013, arose in a case that began with a search warrant issued by the Cartel Court to the Austrian Federal Competition Authority (FCA) in late April 2013 covering vertical price coordination between certain food retailers and a dairy producer and horizontal price coordination between those latter food retailers regarding the former dairy producer.


On 15 May 2013, the FCA searched the business premises and vehicles of the parties concerned – the food retailers and the dairy producer. A day later, the FCA submitted

an application to the Cartel Court to extend the scope of the search warrant to cover vertical price coordination between food wholesalers and the companies concerned. This application was based on a file note made at one of the dawn raids carried out on 15 May 2013. One of the documents suggested that there was vertical price coordination with a number food wholesalers.

The same day – 16 May 2013 – the Cartel Court accepted the application and extended the scope of the search warrant to cover vertical price coordination as explained above. This decision of the Cartel Court was appealed by the companies concerned, which argued that the execution of a search warrant may not go beyond the suspicions it was initially based upon and that evidence outside the scope of the search warrant must be disregarded.

Regarding chance findings, the Supreme Court held that, according to Regulation 1/2003, information discovered through such chance findings may not be used in the initial investigation the dawn raid was based upon; however, there is no utilization prohibition. The Commission may therefore rely on chance findings to initiate new proceedings.





Regarding the extension of the scope of the initial search warrant, the Supreme Court held that the question in this case is whether a new proceeding has to be initiated by the FCA or whether the prosecution of the new suspicions shall be part of the initial investigation via the extension of the scope of the initial search warrant.

According to the AEB decision of the Court of Justice of the European Union (CJEU)(C-67/91), information obtained as part of an investigation may not be used outside of that investigation due to the utilization prohibition and rights of defense. However, in the case at hand the FCA did not use the chance finding as evidence to apply for an extension of the scope of the search warrant. Instead it used a file note made at one of the dawn raids declaring that four FCA officials had found documents supporting the suspicion of vertical price coordination between food wholesalers and the companies concerned.

It is at the discretion of the FCA to decide whether to extend the scope of the initial proceeding or to initiate new proceedings.

The Supreme Court held that its decision is not contrary to the *Nexans* decision by the EU General Court (C-135/09), since the FCA did not embark on a fishing expedition: both the initial and the extended search warrant were precise enough and not unlimited. Furthermore, it is permissible to review documents

during a dawn raid which are not covered by the search warrant to assess whether these documents must be seized.

The consequence of this is that the FCA is able to circumvent the utilization provision and rights of defense by simply making a file note based on the chance finding in question and using that file note (instead of the chance finding itself) to extend the scope of the initial proceeding or to initiate new proceedings. Accordingly, an undertaking where a dawn raid was undertaken does not have legal certainty that documents not related to the investigation the initial search warrant was based upon may not be used to initiate new proceedings or extend the scope of the current proceeding when a file note was made on that chance finding.

The issue of the use of chance findings in Austria is therefore not entirely clarified, since it has to be seen how the Supreme Court will interpret this decision to decide upon chance findings which are not that closely related to the suspicion the initial search warrant was based upon or not even related to antitrust issues, but for example to tax or anti-corruption laws.

Since the issue of chance findings is not clarified and the decision clearly demonstrates that chance findings occur and are taken up by the authorities, undertakings and their lawyers should therefore react to the use of chance findings in an aligned manner.



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# BELGIUM

## Belgium's new Competition Authority: Has the game changed?

By Pierre Sabbadini

The new Belgian Competition Authority started its activities on 6 September 2013. The change was driven by a focus on increasing efficiencies and output while preserving rights of defence of the parties. After more than six months, it is now time for a status update.

On the merger control side, the Authority approved two deals in October 2013. The first involved the nonprofit organization Touring Club Royal de Belgique, which is acquiring sole control over S.A. Autoveiligheid and its subsidiary Bureau voor Technische Controle *N.V.* (see decision MEDE-C/C-13/0023) in the area of insurance and technical assistance and inspection for car users. The Authority imposed commitments on the parties: it required that inspection services (concerning the mandatory periodical inspection of all Belgian vehicles) and the company's commercial activities be kept separate from an operational and structural point of view.

The second allowed the creation in the media sector of the Mediahuis company by companies S.A. Corelio and S.A. Concentra, provided that they comply with commitments including the fact that each newspaper's

related activities are maintained and that the editorial teams are sufficiently developed and kept separate for each newspaper (See decision MEDE-C/C-13/0023).

Recently, the Auditorat (the body in charge of investigations within the Authority) opened an *ex officio* investigation into the creation of a joint venture between Telenet and the Belgian Pro League, whereby the soccer clubs would bring broadcasting rights of the Jupiler Pro League matches into the JV under an exclusive license agreement for a renewable term of six years. According to the Auditorat, this would enable the JV to set up one or more sport channels which would then be offered on a non-exclusive basis to other platforms or existing channels. The Auditorat took the preliminary view that the operation meets the Belgian notification thresholds and should be notified. In addition, the Auditorat deems that, under its current structure, the deal would raise competition concerns in the wholesale and the retail markets for the production of TV content and on the market for free-to-air (FTA) channels (See the press release [on this page](#)).







In the field of antitrust, the Auditorat has submitted its first project of decision (for the decisional body to review) in a case regarding alleged restrictive practices in the energy sector on markets including the wholesale market for the supply of electricity (See the press release [on this page](#)).

This short overview of past decisions and publications indicates that the new Competition Authority is indeed functioning well; indeed, its transparency in communicating its activities is welcome, even regarding the draft decision issued by the Auditorat. What is even more interesting is that an investigation was started *ex officio* by the Auditorat which could indicate that parties to future transactions should pay specific attention to Belgian thresholds in order to avoid *ex-post* scrutiny.

Many new provisions and mechanisms resulting from the 2013 reform still need to be tested in real life. One could think about the treatment of individuals in cartel cases especially regarding leniency application and potential financial sanctions. Will this change the stakes in the game?

In addition, a draft bill introducing the possibility for multiple claimants to ask for damages deriving notably from a breach of antitrust rules, is currently discussed at the Belgian Parliament. Will this change the number of players in the game?

The press releases and decisions mentioned above, as well as other related releases, are available in Dutch and in French on the website of the [Belgian Competition Authority](#).

Companies doing business in Belgium should take into account in their business strategy what could be seen as a new era of enforcement where the Belgian Competition Authority has more means to maintain an increased scrutiny on the markets.



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# GERMANY

## Exercising patent rights in light of German and EU competition law

*By Dr. Gregor Schroll*

The world's five largest patent authorities – the so-called IP5 – collectively issued nearly 2 million patents in 2012 – an increase over 2011 of nearly 17 percent.

As the importance of patents grows, so does concern about the abusive exercise of patent rights and, thus, closer scrutiny of patent rights by antitrust authorities.


### **LEGAL FRAMEWORK: PATENT LAW VERSUS ANTITRUST LAW**

There is a natural tension between patent and antitrust laws. Patents constitute restrictions of competition, because they grant the holder of the patent an exclusive right. These kinds of restrictions are politically intended to a certain extent, because they particularly foster innovation: the protection against imitation will cause an increase of innovation.

However, a correction by the application of antitrust laws is necessary where the legal monopoly granted by the patent law is being abused. Such conduct may constitute an abuse of a dominant position under antitrust laws. A dominant position is not already created by the fact that a certain patent awards the holder of the patent an exclusive right, because otherwise any rights holder would be obliged to license the patent to any third party.

However, in the case of patents which are essential for the production of specific products due to the lack of availability of alternative technologies – so-called standard-essential patents (SEPs) – license requirements may arise. In such cases, an injunction by the patentee can be abusive. Such a situation usually occurs, if a technology or technological development becomes a standard (EU Commission Horizontal Guidelines (2011/C11/01), para. 257, 266). Familiar examples include JPEG, MP3 or G3. Currently, patent disputes are pending between *all* major electronics manufacturers relating to the telecommunication standards UMTS and GPRS, which are essential for the use of mobile phones. In terms of SEPs, patentees are obliged to grant licenses to competitors on the basis of so-called FRAND conditions (fair, reasonable and non-discriminating) because they are in a position to control both the technology market as well as access to the downstream market through their licensing. If a licensee submits an effective offer, the patentee will be accused of anti-competitive behavior if the patentee rejects the license offer either without basing the rejection on objective reasons or by making the contract subject to conditions that are unlawful and, hence, the licensee could not reasonably be expected to accept. If, in such a case, the licensee uses the patent without being licensed by the patentee, the licensee may





raise the so-called compulsory license-defense in order to repel an injunctive relief sought by the patentee. This objection is based on the consideration that the licensee, while acting unlawfully if using the patent without being awarded a proper license in advance, cannot be subject to a cease-and-desist order when the patentee would otherwise obtain a legal position that would immediately have to be returned. The legal practice under German and EU law, however, is not consistent in terms of the requirements a company requesting a license for SEP needs to meet in order to repel an injunction by the patentee in such cases.

## CURRENT DEVELOPMENT

The German Federal Court of Justice requires, on the one hand, that the infringer has made a binding and concrete offer to the SEP holder in such a way that the SEP holder cannot refuse licensing without treating the infringer unfairly or discriminatorily; and, on the other hand, that the infringer has lodged an “appropriate” license fee in advance. The difficult question of the “appropriateness” of the license fee may, under German law, be addressed by applying section 315 of the German Civil Code, which may entitle a company requesting an SEP license from the patentee to determine the amount of an appropriate

license fee at its own discretion (FCJ, judgment of 6 May 2009, KZR 39/06 – *Orange Book Standard*). Which conditions exactly need to be met in order to submit a “concrete” offer remains uncertain.

The EU Commission, on the other hand, apparently takes the view that a request for licensing already needs to be complied with if the rights holder has committed to grant a license under FRAND terms and the licensee is “willing to negotiate a license”. In the context of a patent dispute between the electronics makers Huawei and ZTE, the Regional Court of Dusseldorf, which hears more patent infringement cases than any other court in Europe, referred this question to the CJEU for a preliminary ruling (LG Düsseldorf, 4b O 104/12). An opinion issued by Europe’s highest court will be binding on the European Commission’s Directorate-General for Competition as well as the courts and competition authorities of the EU member states.

However, for the time being companies concerned are only on the safe side, if they meet the extensive requirements of the FCJ with regard to the concreteness of the offer as well as the appropriateness of the license fee. It remains to be seen how the CJEU will position itself in this matter. It is welcome, in any case, that this issue will now be decided at the highest European level

## CONCLUSION

Companies that may be affected by this increasingly important legal topic should be aware that market dominance with regard to patents is not conditioned by the size or turnover of the company but by the importance of its patent(s) in terms of SEP quality. Should a company be a right holder of an SEP patent, it is subject to certain limitations of its market conduct, in particular relating to discrimination issues. An undertaking requesting a license for an SEP patent may therefore under German law not be rejected without legitimate cause if it has submitted a binding and concrete offer to the SEP holder and additionally has lodged an appropriate license fee.



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## Italy: Postponement of deadlines in antitrust proceedings must be justified

*By Carlo Edoardo Cazzato*

The recent decision of the Italian Regional Administrative Court of First Instance (TAR Latium), Sec. I, 7 October 2013, No. 8671 (hereinafter, the judgment) closed a judicial proceeding launched by the action brought by Marcegaglia S.p.A. against the Italian Competition Authority (AGCM), aimed to annul the AGCM's decision No. 23931 issued in 2012.

It appears useful to recreate the framework in which the decision was adopted by the AGCM.

### THE DECISION

In September 2012, the AGCM closed its investigation, ascertaining that seven companies, which represented around 95 percent of the market for road and highway barriers – Industria Meccanica Varricchio Imeva S.p.A., Marcegaglia, Metalmeccanica Fracasso S.p.A., San Marco S.p.A. – Industria Costruzioni Meccaniche in liquidation, Tubosider S.p.A., Car Segnaletica Stradale S.r.l. and Ilva Pali Dalmine Industries S.r.l. infringe d Article 101 of Treaty on the functioning of the European Union (TFEU) TFEU by forming an anticompetitive agreement.

In light of this, the AGCM imposed the following sanctions on the basis of revenue and length of participation in the cartel: Imeva €4,866,690; Marcegaglia €11,865,217; Metalmeccanica €11,013,165; San Marco €814,520; Tubosider €7,385,805; Car €1,338,994; and Ilva €33,174.

All the sanctioned undertakings were part of Comast consortium (Consorzio Manufatti Stradali Metallici in liquidation), dissolved in 2007 in light of a criminal proceeding according to which the consortium was the vehicle for engaging in collusive behaviors. The related investigation confirmed this conclusion. In light of this, the Special Market Protection Unit of the Guardia di Finanza (Italian Tax Police) sent to the AGCM a report that became the basis of the investigation.

The investigation unveiled behaviors constituting an agreement aimed at dividing up the market and at sharing reference prices through the exchange of strategically-sensitive information. The anti-competition mechanism, which lasted from 2003 to 2007 (until dissolution of the consortium), first entailed notification of the existence of a supply request by subjects interested in purchasing the barriers (guardrails) through public tendering, followed by the precise division of sales and the simultaneous sharing of reference prices.

### THE JUDGMENT

Marcegaglia challenged the decision on seven grounds aimed at annulling it. According to Marcegaglia:

- (i) The anticompetitive conducts under discussion would be realized by a subsidiary of Marcegaglia and in light of this they could not be directly attributed to Marcegaglia
- (ii) The decision would be issued after the period of limitation (five years) provided by Article 28 of Law 24 November 1981, No. 689
- (iii) The AGCM infringed Article 14 of Law 24 November 1981, No. 689, pursuant to which a sanctioning decision needs to be served within 90 days and
- (iv) The related investigation would take too long.

The judgment rejected the first two grounds and accepted the residual arguments. In light of this, it did not take into account the further five grounds submitted by Marcegaglia.



It seems useful to highlight that meanwhile the Court accepted Marcegaglia's interlocutory request aimed at suspending the execution of the decision because the imposed sanctions were so high.

The TAR, through the judgment under discussion, decided to annul the decision.

However, the TAR rejected the first two grounds concerning the liability for the infringement and the limitation, respectively.

Specifically, with reference to the first ground, according to Marcegaglia its liability would be excluded by the selling of the involved branch to Marcegaglia Building S.p.A., a subsidiary. However, in the Court's view, this transfer was not sufficient to exit from the related market. Indeed, pursuant to European case law, the controlling company is presumed to be liable for antitrust infringements realized by its subsidiaries. Finally, Marcegaglia was not able to pass this presumption.

In the same manner, the Court rejected Marcegaglia's second ground. According to the company, the decision would be adopted in contrast with Article 28 of Law No. 24 November 1981, No. 689 as quoted by article 31 of Law No. 287/1990 (hereinafter, Italian Competition Law). Pursuant to this article, the AGCM shall collect the sanctions imposed within five years from the day on which the infringement was realized.

However, in this regard the TAR invoked dominant administrative case law, according to which, with reference to administrative sanctions, every act of the

investigation is a formal notice able to interrupt the said limitation. On this basis, the decision through which the AGCM decided to launch the related investigation was considered enough to interrupt the limitation.

In contrast, the Court accepted the third and the fourth grounds of Marcegaglia. The grounds under discussion were jointly examined, both concerning the timetable of the AGCM during the investigation.

It seems useful to take into account that the AGCM decided to launch the related investigation on 13 January 2010. In the same manner, it extended the proceeding to Marcegaglia through the decision of 14 December 2011, communicated to the company only on 23 February 2012.

On this basis, according to the third ground of Marcegaglia this conduct would have infringed Article 14 of Law No. 24 November 1981, No. 689, pursuant to which an infringement needs to be served by ninety days from the date of the related ascertainment. On this basis, in the undertaking's view the AGCM would have had to serve to Marcegaglia the decision aimed to extend the investigation to Marcegaglia by ninety days from the launch of the investigation.

Pursuant to the fourth ground of Marcegaglia the Decision would have closed a proceeding in which the AGCM *"acts as if it has an unlimited lapse of time in order to conclude its investigation"*. Indeed, in Marcegaglia's view, the decision was issued on 28 September 2012, about three years after the launch of the investigation (13 January 2010) and about two years







from the original deadline for completing the proceeding (31 December 2010). In this regard, the deadline under discussion was successively postponed to 30 June 2011 and to 31 December 2011. Finally, through the decision that extended to Marcegaglia, the investigation was delayed to 2 July 2012.

According to Marcegaglia, this dilatory practice would allow the AGCM to infringe Article 6 of the Decree of the President of the Republic of 30 April 1998, No. 217 (hereinafter, the Regulation of investigation procedures of the AGCM) pursuant to which the Authority's resolution to initiate the investigation shall indicate *inter alia* the deadline for completing the proceeding.

The TAR agreed with both the said grounds. First of all, under the judgment in its decision of 14 December 2011, the AGCM did not argue the reasons which justified extending the investigation to Marcegaglia. However, on the basis of the same decision, it was not based on documents and information additional to those in the original Tax Police's report. On the contrary, this extension follows the status of Marcegaglia (controlling party), which the AGCM would have had to take into account by the term *ex* Article 14 of Law No. 24 November 1981, No. 689.

In the same manner, the Court concluded that the decision was unlawful due to its long duration.

According to the TAR, an antitrust proceeding needs to have a prearranged deadline which shall not be postponed *ad libitum*. Indeed, Article 6 of the Regulation of investigation procedures of AGCM is founded on the principle of legal certainty. Clearly, this does not mean that an original deadline cannot be postponed. However, it is essential that – in contrast to what occurred in Marcegaglia's case – this deferment is adequately argued.

On this basis, the TAR justified only the last postponement concerning the proceeding under discussion and based on the extension of the investigation on Marcegaglia. On the contrary, the deferments to 30 June 2011 and to 31 December 2011, which were based only on formal and identical arguments, were considered completely unjustified.

Accepting both the said grounds, the Court annulled the decision with reference to Marcegaglia's position.

## CONCLUSIONS

The judgment confirms the thorny relationship which recently exists between AGCM and administrative judges.

The judgment is significant expressly because it confirms a principle already inferable from Italian and European legal frameworks. According to this principle, the AGCM may postpone the deadline of a proceeding only

when the delay is clearly justified. Only in this case, the AGCM's enforcement can be considered consistent with the principle of legal certainty as transposed in the Italian Law concerning administrative proceedings (Law No. 241/1990) and in the Regulation of investigation procedures of the AGCM.

## CALL TO ACTION

The investigated companies should take into consideration the long duration of the investigation carried out by the Antitrust authority. Indeed, it could impact on the lawfulness of the Authority's final decision.



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# THE NETHERLANDS

## ACM fines telecom provider €30 million for breach of non-discrimination obligation

*By Stijn de Zwart and Sophie Gilliam*

### INFRINGEMENT

The Authority for Consumers & Markets has fined a major telecom provider nearly €30 million for breaching its non-discrimination and transparency obligations. While publication of the decision and the subsequent ruling on an appeal was put on hold at the request of the telecom provider, in late January the Dutch Trade and Industry Appeals Tribunal (Cbb) ordered that ACM was entitled to disclose its decision.

In 2010, the telecom provider infringed its non-discrimination obligation during a large tender procedure called OT2010 for providing fixed telephony services to several government agencies. The ACM has established that, at a crucial moment during the tender procedure, the leading telecom provider favored its own subsidiary to the detriment of competitors by providing it relevant information on a discount scheme before informing competitors. By not simultaneously informing its competitors of the new offerings, these competitors were placed in a disadvantageous position because they could not implement the lower tariffs in their tender offer.

### FINE WAS LARGER BECAUSE COMPLIANCE PROGRAM WAS INEFFECTIVE

Interesting to note is that the imposed fine was increased because the telecom providers' compliance program had proved ineffective. This is in contrast to the often pleaded argument that having a compliance program gives reason to lower a fine. In a speech on 24 January 2014 for the International Chamber of Commerce, ACM chairman Chris Fonteijn pointed out that the circumstances at hand were special. The telecom provider had agreed with the ACM on the content of the compliance program and provisions were included on the effect of fines. The ACM has made no such agreement with companies in other sectors.

Does the ACM in general grant a fine reduction if a compliance program is in place? The answer is no. The ACM still advises to have an efficient compliance program because it may prevent an infringement, will generally limit the duration of an infringement and timely discovery of an infringement allows the company to be the first to file a leniency application.

The ACM recommends the use of an effective compliance program. Further, we advise to add an internal procedure to the compliance program in order to steer in the right direction in case of a dawn raid or other procedure. DLA Piper is happy to assist in designing a compliance program.



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# NORWAY

## Recent Supreme Court abuse of dominance assessment – access to ski lift facility

*By Kjetil Johansen and Line Voldstad*

Norway's Supreme Court has ruled in a matter concerning a commercial ski instruction school's access to a ski facility and the ski schools' instructors rights to use the ski lifts in the facility.

The matter has been pending in the Norwegian courts since autumn 2011. Kristiansand City Court gave a judgment in favor of the ski lift facility, while the Appellate Court found that the ski lift facility had breached Section 11 of the Norwegian Competition Act, equivalent to Article 102 TFEU/Article 54 EEA.

Due to special Norwegian regulations on access to nature and uncultivated land, the Supreme Court considered that everyone, including commercial actors, as a main rule can access and use the ski slopes in a ski facility. However, the ski lifts are not covered by the same regulations. The question before the Supreme Court was whether a ski lift facility

was abusing a dominant position by not letting a ski school's instructors use a ski lift facility under the same conditions as the facility's standard consumers.

Unlike the Appellate Court, the Supreme Court took a broad market definition approach and found that the relevant market could not be limited to merely the ski facility in question.

In January 2014, the Supreme Court ultimately held that there was no abuse, because the ski lift facility had not refused to negotiate fair terms with the ski school. There was no obligation for the ski lift facility to provide the commercial ski school with the same terms as its consumer terms. The ski lift facility could differentiate between consumer groups as long as such differentiation was carried out with business-like objectivity.



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# POLAND

## Restrictions on online distribution under scrutiny in Poland

*By Andrzej Balicki and Michał Orzechowski*

The Polish Competition and Consumer Protection Authority (Urząd Ochrony Konkurencji i Konsumentów, PCA) has fined pet food manufacturer Royal Canin Polska (RCP) and its five distributors for entering into an agreement restricting the mode and ways of distribution of RCP's products. The fines amounted to PLN 3.2 million (€770,000) including a fine of PLN 2 million (€480,000) for Royal Canin Polska which, according to the PCA, initiated the agreement. The decision is not yet final and the companies have already lodged an appeal with the Court of Competition and Consumer Protection.

The PCA found that the above-mentioned companies agreed, via coordinated actions, to a scheme under which they limited distribution channels for RCP's "Veterinary Diet" product by restricting sales only to bricks-and-mortar veterinary offices that do not offer sales through the Internet. According to the president of PCA, at a later date companies modified their practice by agreeing that products could only be distributed via resellers which ensured the supervision

of veterinarians, therefore excluding also distribution through such outlets as veterinary technicians or veterinarian and zoological wholesalers.

During the course of the proceedings before the PCA, RCP argued that it was entitled to introduce the requirement of a prior consultation with veterinarians in order to ensure the safe and proper use of its products. According to the company, safe therapy and administration of Veterinary Diet products requires prior veterinary supervision, so RCP opted for a selective distribution system by choosing resellers on the basis of their qualifications and professionalism.

The PCA did not accept RCP's position and stressed that dietetic feeds are not issued based on prescription and the applicable legislation places an obligation of safe therapy and correct use of products only on pet owners and not on the manufacturers. The President of PCA agreed that a prior consultation with a veterinarian may be advised by the pet food manufacturer; however, the choice of where to purchase should be solely the buyer's decision.







Therefore, the PCA considered that restrictions limiting distribution channels by requiring a distributor to ensure supervision by a veterinarian were not necessary under applicable veterinary regulations. To the contrary, the president of PCA held that, under the same regulations, dietetic feeds may also be sold via remote communication means – for instance, through the Internet. In support of its argumentation, the President of PCA endorsed the conclusion presented in *Pierre Fabre* (C-439/09), a case in which the European Court of Justice refused to accept the justification that Internet sales of a product should be barred because a pharmacist was necessary to provide personal assistance to consumers about the product.

The *RCP* decision seems to be in line with the European Commission's recent approach regarding online sales restrictions. Moreover, the case is already being called “the Polish *Pierre Fabre* case” and it certainly provides more guidance on the assessment of vertical agreements under competition law in Poland. The case also proves that regardless of the fact that most vertical cases in Poland concern resale price maintenance, the PCA is

keen to diversify its enforcement priorities. With this decision as a precedent, further proceedings involving other markets cannot be far away. Therefore online distribution companies will have to double-check whether their agreements with resellers are in line with the recent decisional practice of the PCA, in particular by verifying if potential restrictions on online distribution stem from a legislative basis concerning specific products.

For more information please see [this page](http://www.uokik.gov.pl/news.php?news_id=10856). [http://www.uokik.gov.pl/news.php?news\\_id=10856](http://www.uokik.gov.pl/news.php?news_id=10856)



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# ROMANIA

## RCC decision regarding the applicability of the must-carry obligation

*By Alina Lacatus and Sandra Moga*

The Romanian Competition Council (RCC) recently finalized its investigation concerning an alleged infringement of the Romanian Competition Law by the Romanian National Audio-visual Council (CNA), as a result of the issuance by CNA of a decision which allegedly limited the commercial autonomy of undertakings and established discriminatory conditions regarding their activity.

The RCC decision is relevant as it results from a first-time competitive assessment of the obligation to retransmit certain radio and television channels (i.e., the must-carry obligation). The RCC assessed the existence of potential differences between the retransmission of audio-visual programs through satellite platforms, such as direct-to-home (DTH) and the retransmission through co-axial cables. More specifically, the must-carry obligation was incumbent on cable operators, but not on DTH operators as well.

The analysis also concerned the criteria for granting must-carry status to certain TV channels.

The RCC assessment will likely change the rules of the game on the market for audio-visual channels retransmission services, given that, following the

RCC's recommendations, the must-carry obligation should be applied in a non-discriminatory fashion to both DTH and cable.

### THE INITIATION OF THE INVESTIGATION

In 2012, CNA issued a decision which interpreted the provisions of the Audio-visual Law regarding the rules for the application of the must-carry obligation to the effect that only DTH platforms are exempted from such must-carry obligation.

The must-carry obligation provided by the Audio-visual Law transposes the provisions of art. 31 of Directive 2002/22 on universal service and users' rights relating to electronic communications networks and services, which allows member states to impose must-carry obligations on undertakings providing electronic communications networks used for the distribution of radio or television broadcasts to the public ("operator"), where such obligations are necessary to meet general interest objectives and provided that there is no discrimination in the treatment of the operators. The Audio-visual Law

only exempts from the application of the must-carry obligation the operators exclusively using the radio spectrum for the distribution.

Pursuant to the CNA decision, several operators complained to the RCC that some of the broadcasters started to charge increased rates for the retransmission of certain TV channels on DTH platforms, although such TV channels had a must-carry status and, therefore, were free-to-air on Cable platforms.

The RCC initiated the investigation, based on specific provisions of the Romanian Competition Law, which are not mirrored at EU level, but which allow the RCC the possibility to open an investigation against a public authority with respect to any acts of such authority which may have as an object or effect a limitation of competition.

### THE ASSESSMENT OF THE RCC

The RCC defined the relevant market in line with the EU-level approach and established that the provision of the retransmission services through a DTH platform is substitutable with the provision of such services through a cable platform.



In this context, the RCC found that, as a result of the CNA decision, operators using DTH platforms cannot equally compete with operators using cable platforms, as the latter do not have to pay for the retransmission of must-carry channels.

Moreover, the RCC reached the conclusion that DTH platforms do not exclusively use the radio spectrum and, therefore, do not fall under the scope of the exemption provided by the Audio-visual Law. In conclusion, the RCC established that all the operators have the obligation to retransmit must-carry channels, regardless of the platform used.

Furthermore, the RCC analysed the list of must-carry channels which comprises the channels declared as free-to-air based on their national rating index. In this regard, the RCC concluded that the very large number of must-carry channels on the list (ie approximately 39) defeats the purpose of having a must-carry obligation for selected channels in view of certain general interest objectives and places a high burden on the operators, especially on those who are technically limited from providing a larger number of channels to their subscribers.

## CONCLUSIONS OF THE INVESTIGATION

The RCC decided to close the investigation given the fact that the CNA decision was based on a viewpoint expressed by ANCOM, the Romanian telecom regulator.

However, the RCC provided key recommendations for CNA which will likely have a significant impact on channel retransmission services. The RCC indicated that CNA must take all necessary measures to amend the Audio-visual Law within six months as of the RCC decision.

Firstly, the RCC recommended the application of the must-carry obligation based on technological neutrality principles, irrespective of the platform used for the retransmission of channels.

Secondly, the RCC recommended the granting of must-carry status only to channels with a global content of general interest (i.e., public channels) following a competitive procedure. The RCC took the view that such status may also be granted to private channels only if the granting is strictly necessary for the achievement of a general interest. As a result, the number of channels holding the must-carry status would likely be reduced.

The RCC decision can be expected to have multiple implications. On the one hand, it should lead to the elimination of discrimination between operators, resulting in the limitation of potential abuses from the broadcasters of must-carry channels. On the other hand, it should relax the barriers for potential new entrants on the market, since they would no longer be obliged to retransmit a large number of must-carry channels.

In the aftermath of the RCC decision, it is expected that modifications to the Audio-visual Law will be enacted. Such modifications will need to be assessed

considering the recommendations of the RCC. Moreover, the RCC decision may also have an impact on the prices charged to final customers, depending on the legislative amendments which may be implemented in the future as regards the must-carry status.



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# SPAIN

## Freedom of enterprise and market sharing agreements

*By Joaquin Hervada*

Spain's Competition Authority has decided to close an investigation into the sanitary waste management sector in the Balearic Islands.

The investigation was triggered by a complaint from a new entrant into the market who argued that its competitors had market and client-sharing agreements in place. According to the complainant, some companies had agreed to limit their activities to sanitary waste collection, while another competitor was only active in treatment/processing activities (and in fact operating the only available plant in the Balearic Islands). Additionally, those players active in collection activities agreed to share clients and not to bid for each other's traditional customers.

The interest of this decision lies in the fact that the authority declared that no infringement had been proven even though the proposal from the Directorate for Investigation was to fine the main market players for a hard-core cartel.

According to the case handler, the cartel included market and client sharing agreements, price fixing agreements and even collective efforts to prevent the complainant from entering the market. However, little evidence was found on price fixing or market/client

sharing agreements and the only evidence of a boycott to the new entrant was legal claims filed against the new entrant on environmental and sanitary grounds. The exercise of legal rights such as filing complaints before competent authorities did not hold as proof of an antitrust infringement. The accusation therefore rested on the presumption that the company operating the only available processing plant had not entered collection activities because an agreement was in place with other market players.

Although the Directorate for Investigation proposed to fine the companies for a hard-core cartel, the Council – in charge of issuing final decisions – declared that no infringement had been proven and shelved the investigation. The Council's arguments included references to the presumption of innocence, reasonable doubt and, also, the freedom of enterprises to determine whether they want to expand their activities or not.

It remains to be seen whether the Directorate for Investigation will raise its internal standard of proof following this decision from the Council. In the meantime, it might be advisable for companies to keep records of their past strategic decisions, including their decisions not to invest or expand activities.



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# AMERICAS



A wide-angle photograph of the Golden Gate Bridge in San Francisco, taken from a low angle looking across the water. The bridge's iconic orange-red towers and suspension cables are silhouetted against a vibrant orange and yellow sunset sky. The water reflects the warm light, and the distant city skyline is visible on the horizon.

# UNITED STATES

## DOJ auto parts cartel investigation rolls on

*By Robert E. Connolly*

Several additional auto parts cartel criminal cases have been filed by the Antitrust Division, US DOJ in the last month. Two of these cases provide important lessons in understanding how the Antitrust Division operates.

In the first case, a former director of Japan-based Denso Corp. agreed to plead guilty to obstructing justice by destroying documents when he learned that the FBI was executing a search warrant at Denso's US subsidiary. Kazuaki Fujitani deleted numerous emails and electronic documents in February and March 2010 that contained communications between Denso and competitors regarding price quotations for an auto part sold to Toyota. The crime of obstruction carries a maximum penalty of up to 20 years in prison. Under Fujitani's plea agreement, if accepted by the court, he will serve one year and one day in a US prison.

The Antitrust Division places the highest priority on prosecuting conduct that obstructs its grand jury investigations. Destroying emails or documents is a guarantee of becoming a prime target of the Division's

investigation. It may seem safe and tempting to an executive located overseas to delete documents when an investigation begins. After all, how will prosecutors in the US ever know? But, if the company later cooperates with the Division, as Denso did, the obstruction will come to light and will be prosecuted.

The Division has even sought extradition of fugitives charged with obstruction of justice. In 2010, Ian Norris, a British executive, was extradited to the US from the UK after a seven-year battle in which British authorities advanced the Division's extradition request. Norris was tried by a jury, convicted and sentenced to 18 months in prison. Lesson: destroying documents, wherever they are located, is the worst possible reaction to a cartel investigation.

February's charges against the Bridgestone Corp. highlight another crucial lesson when dealing with the Antitrust Division. Bridgestone Corp, a Tokyo-based company, agreed to plead guilty and pay a criminal fine of US\$ 425 million for its role in a conspiracy to fix prices of automotive anti-vibration devices.

In October 2011, Bridgestone had pled guilty and paid a US\$28 million fine for price fixing in the marine hose industry. At that time, Bridgestone did not disclose that it had also participated in the anti-vibration rubber parts conspiracy. The Division held Bridgestone accountable for this lapse when negotiating a fine. "The Antitrust Division will take a hard line when repeat offenders fail to disclose additional anticompetitive behavior," said Brent Snyder, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement. By contrast, Denso Corp, which was one of the earliest companies to cooperate in the auto parts investigation, negotiated a US\$78 million fine. The fine is thought to be about 60 percent below Denso's guidelines range fine, one of the largest discounts ever for cooperating with the Division.

The lesson from Bridgestone is that if any collusion within a company is detected, it is crucial to immediately conduct a thorough internal investigation and report all problematic conduct at once. If Bridgestone had



reported the auto parts conspiracy at the time it pled guilty to the marine hose cartel, it may have received immunity. Instead, it is paying one of the highest fines imposed yet in the auto parts cartel investigation.

To date, 29 individuals have been charged in the auto parts price fixing investigation. Additionally, 26 companies have pleaded guilty or agreed to plead guilty and have agreed to pay a total of over US\$2.25 billion in fines. **Companies doing business in the United States must have a serious and comprehensive competition law compliance program.** Non-US executives in particular may not fully understand that not only can price fixing fines (and follow-on civil damage actions) be significant, but the Sherman Act carries a maximum ten-year prison sentence. Jail sentences are becoming longer, even for foreign executives.



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## Another hospital-physician group merger fails the antitrust test

By Steven Levitsky

In the first litigated Federal Trade Commission (FTC) challenge to a hospital-physician group merger, a federal court found the merger violated the Clayton Act and ordered divestiture. This was a small case (the acquisition price was US\$16 million), involving a small community, and the technical antitrust issues were clearly on the FTC's side. But the case raises broader social issues – whether the antitrust laws are the best way to regulate the changes of the medical industry in small communities where a major buyout may be the only way to upgrade the medical facilities, enhance medical delivery, and ultimately benefit the community.

*FTC v. St. Luke's Health System* (D. Idaho, Jan. 24, 2014) involved a hospital's acquisition of the leading local physician's group in Nampa, Idaho (population 81,000). Hospital acquisitions of physician groups is a rapidly accelerating trend in the US, driven at least partly by the Affordable Care Act's push to eliminate the traditional fee-for-service model and move to one where many different medical practitioners take joint responsibility for a single patient's "wellness."

Here, the judge found that St. Luke's Hospital foresaw the trend towards integrated health care. In fact, the court repeatedly complimented both merger parties on their foresight and vision, and their dedication to improving medical care in the community. Unfortunately, they were so aggressive in executing that vision that they ended up

with 80 percent of the primary care physicians in town, no prospect of new entry and a post-transaction HHI over 6,200 (2,500 is presumptively anti-competitive).

That alone would normally be enough to condemn the transaction, but there were other egregious facts. Essentially, the court found that the merger combined not only the two largest primary-care providers, but that it also merged the closest substitutes; that the merger stripped buyers of the ability "to walk away" from negotiations, because there was essentially no other first-choice provider to walk towards; that medical costs to insurers would increase; and that referrals to physicians outside the group would shrink or disappear. And, as is typical, the internal documents contained what were, at the very least, ambiguities, such as "Price Increase (\$ unknown)" and "Pressure Payors for new/direct agreements." Among other things, St. Luke's also projected increasing revenues by escalating office charges to "hospital" rates. For example, the price of routine services, such as x-rays or lab tests, were more expensive when billed as "hospital rates," even when the tests were done in their original locations. It is possible that these statements were taken out of context, and it also seems likely that the merger parties did not document their intentions properly.

The FTC (and others) sued to challenge the merger, winning a divestiture order. The hospital intends to appeal.

Based on these facts, this merger seems like a prototype loser. So much so, that you might wonder why the parties even tried the transaction.

But presumably what motivated them were the unique factors affecting US health care. As the judge pointed out in this case, in the rankings of global spending on health care, the US spends *more* than the next ten countries *combined* – but ranks *last* out of 16 industrialized countries (measured on mortality amenable to medical care). The judge credited the expert testimony that the only way to change this failing health model was to adopt an integrated health care model that involves vast and fundamental changes to the medical industry. But this noble goal is saddled with huge expenses to pay for the conversion. As just a single example, integrated medical care is not possible without an electronic medical records system. But the Rand Institute estimated that the cost of the records project *alone* would be a staggering US\$115 billion.

Hospitals and medical groups now argue that, given the impending fundamental changes in health care, declining hospital revenues, the need for efficiencies and economies of scale, the shift from paid services to delivering value, the huge cost of funding these changes and the increasing difficulty in raising capital, large-scale consolidation is the only solution. That works great in metropolitan areas, where there are large groups of medical facilities.

But what about small, isolated communities, like the one in Nampa, Idaho? The judge found that no entry was likely because young physicians don't want to live or work in isolated communities, and patients are not going to drive 30 miles just to see a primary care physician. This is not the first time that an FTC "victory" left the community with the appearance of competition but the actual prospect of being served by a medical facility that can't afford to buy new medical equipment and can't attract young physicians. Last year, even the Secretary of Health and Human Services observed that some provisions of the ACA, such as the call for integration and economies of scale, were in "constant tension" with the antitrust laws.

The judge in this case diligently applied the Clayton Act standards to this merger and found it wanting. But, conspicuously, the judge was sensitive to issues that went beyond antitrust law. For example, throughout the decision, he emphasized the radical change that was needed to try to repair the US medical system by adopting an integrated treatment model. The court repeatedly acknowledged that the goal of the merger parties was to improve patient care. And he found that the physician's group did try unsuccessful alternatives short of merger, like partnering with other hospitals (including one of the co-plaintiffs), and joint venturing with St. Luke's (as opposed to a full merger). But after three years of only "limited success," they decided to merge. Had the parties documented their efforts better, the outcome might have been different.

The merger issues in this case are a small example of a larger picture that is playing out across the US, where buyouts seem to be a community's best hope for newer, better facilities and the delivery of higher levels of medical care. And even though the judge condemned the merger for failing the Clayton Act test, he seemed to have questions about the ultimate benefit of a purely antitrust analysis:

"In a world that was not governed by the Clayton Act, the best result might be to approve the Acquisition and monitor its outcome to see if the predicted price increases actually occurred. In other words, the Acquisition could serve as a controlled experiment."

"But the Clayton Act is in full force, and it must be enforced. The Act does not give the Court discretion to set it aside to conduct a health care experiment."

The bottom line is that the pure, technical antitrust answer in this case may be easy. But the antitrust laws are also supposed to be consumer protection laws. As medical facilities in smaller communities come under intense pressure to meet new requirements, the question here really is whether competition is the best way to regulate medical services in small communities.

The teaching of this case is two-fold. *First*, Medical practitioners who want to merge for scale or efficiency cannot expect any leniency from the antitrust agencies, which will continue to apply standard merger law. *Second*, accepting that it might be a long shot, the medical community might consider an extensive lobbying program for some form of regulation that would displace competition. Though it is unlikely to happen on the federal level, state legislatures can and have granted antitrust immunities for activities within their own area of jurisdiction, including the delivery of medical services. The trade-off would obviously deliver the benefits of scale and efficiency, but at the cost of a regulated cap on charges.



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## Anti-Trust Division San Francisco office continues aggressive prosecution policy

*By George O'Connell*

The Department of Justice Antitrust Division is continuing an aggressive policy of criminal enforcement in cartel price-fixing cases.

In 2012, the most recent year with published statistics, the Anti-trust Division obtained more than US\$1.1 billion in criminal fines and penalties in such cases, much of it from fines collected by its San Francisco field office. It also continued its campaign to prosecute and sentence individuals, including foreign nationals, to substantial prison time in price fixing cases. During 2012, for example, 78 percent of the individuals who pleaded guilty or were successfully prosecuted were sentenced to prison time. And the prison time is substantial: the average prison sentence for individuals between 2010 and 2012 was 25 months.

Leading the charge has been the Antitrust Division's San Francisco office. Prosecutors in that office have been particularly aggressive in pursuing large criminal cases such as the DRAM price-fixing cases, the LCD price-fixing cases, and the mortgage loan/foreclosure cases.

The Division has obtained record fines and substantial prison sentences for individuals engaged in price fixing activities.

Despite significant changes in top leadership in that office, its prosecutors continue to pursue criminal investigations at a near-record pace, and there is no reason to believe that this won't continue in 2014.

See [this page](#) to learn more.



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**ASIA PACIFIC**





## MOFCOM publishes criteria for a simplified merger review

By Jingwen Zhu 朱静文

China's merger review regulator, the Antimonopoly Bureau at the Ministry of Commerce (MOFCOM), has published criteria for a simplified merger review, *the Interim Rules on Application Criteria of a Simplified Review*, which came into effect on 12 February 2014.

The criteria include three market share-based thresholds and three categories of transactions (offshore joint ventures, outbound acquisitions and change of control between joint venture partners).

### CRITERIA

A notifiable concentration is qualified for a simplified review if it meets one of the six criteria below:

1. In a concentration between competitors, the combined market share of all participating undertakings is less than 15 percent
2. In a concentration between undertakings in related upstream and downstream markets, the market share of the undertakings in both upstream and downstream markets is less than 25 percent
3. In a concentration which is neither between competitors nor between undertakings in vertically related markets, the market share of each undertaking is less than 25 percent in the markets related to the transaction

4. Undertakings set up a joint venture outside China and the joint venture does not engage in commercial activities in China
5. Undertakings acquire shares or assets of an overseas company which does not engage in commercial activities in China or
6. In a joint venture where two or more undertakings have joint control, one or more undertakings among them acquire sole control after the proposed concentration.

The threshold for horizontal merger is set at 15 percent and for vertical merger at 25 percent, the same as the old European simplified merger review rules. Effective from 1 January 2014, the European Commission raised these thresholds to 20 percent and 30 percent respectively. Transactions notifiable in both China and EU may qualify for a simplified review in Europe but still have to go through the standard review in China.

A substantial portion of Chinese merger notification has been the joint venture notification. Many of them have no link to China and do not cause any anti-competitive effects on the Chinese market. A simplified review will greatly reduce the notification burden in such transactions. However, guidance is needed as to what

constitute “commercial activities”. Will the presence of a representative office disqualify the joint venture for a simplified review?

### EXCEPTIONS

There are exceptional scenarios where a simplified review does not apply:

- a) One undertaking acquires sole control of a joint venture over which it already has joint control, and it competes with the joint venture in the same relevant market
- b) The relevant market is difficult to define or
- c) The concentration may cause a detrimental effect on market entry, technological progress, consumers and other related parties, or on national economic development.

A simplified merger review based on market share thresholds requires a clear definition of the relevant market and MOFCOM's acceptance of such definition. In practice, this is not always straightforward. Transaction parties and their counsel should assess the risks that MOFCOM holds a different view on the market definition, which may result in a protracted process to determine whether the case qualifies for a simplified review procedure.





Whether the transaction will cause a detrimental effect on market entry, technological progress, consumers or other related parties, or more broadly on national economic development, requires a comprehensive competition analysis. Conclusion are unlikely to be made in the procedure determination phase.

The exceptions listed above are non-exhaustive, and MOFCOM has discretion not to apply a simplified review procedure to concentrations which may cause anti-competitive effects on the market.

## OUTLOOK

A simplified merger review regime has been discussed in China for a few years. Hundreds of notification reviewed by MOFCOM in recent years provide an empirical basis for a simplified review regime. While the necessary implementation rules covering review time, notification form requirement (short versus long) and procedural issues have not been issued at the same time, we understand that basic procedural rules had been considered by MOFCOM at the outset when it designed the simplified review regime. We expect that the rules will be refined in the future.

MOFCOM will likely follow the European Commission's practice to publish simplified notification cases it has officially accepted for review and disclose basic transaction information to the public. This will increase transparency and enable the public or relevant parties to comment. Companies preparing a merger notification are advised to discuss with their antitrust counsel so as to make a simplified review practically possible and obtain the clearance ideally in the phase one period (30 days).

With MOFCOM implementing a simplified review regime and stepping up its enforcement on fail-to-file transactions, companies will not be able to use MOFCOM's protracted review in unproblematic cases as an excuse for not making the notification.



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## EUROPEAN UNION

Yasmin Bailey, Michael Marelus, Saiqa Panday

**Commission fines two power exchanges €5.9 million in cartel settlement.** The European Commission has imposed fines on two leading European spot power exchanges, EPEX Spot and Nord Pool Spot. The fines totaled to just over €5.9 million and were in relation to an agreement between the two parties not to compete with one another in the European Economic Area. It was determined that this amounted to a market sharing agreement which allocated certain European territories and markets between the parties. The parties were also held to have breached Article 101 and 53 of the TFEU. The parties agreed to settle the case with the Commission, admitting their participation in the infringement and their liability, which meant that they received a 10 percent reduction in fines. The settlement procedure has assisted the Commission in bringing the investigations to a rapid conclusion. For more information see this page. [http://europa.eu/rapid/press-release\\_IP-14-215\\_en.htm](http://europa.eu/rapid/press-release_IP-14-215_en.htm).

**Commission fines Romanian Power Exchange OPCOM for discriminating against EU electricity traders.** The European Commission has imposed a fine of approximately €1 million on the Romanian Power Exchange OPCOM for having abused its dominant position in the Romanian market for facilitating electricity spot trading. The European Commission alleges that between 2008 and 2013, OPCOM required members of

the spot electricity markets to have a Romanian VAT registration, refusing to accept traders that were already registered for VAT in other EU member states. As a result, EU traders could only enter the Romanian wholesale electricity market by setting up a fixed establishment in Romania, which entailed additional costs and organizational disadvantages for EU traders compared to Romanian traders. This discrimination amounted to an abuse of dominance. For more information see this page. [http://europa.eu/rapid/press-release\\_IP-14-214\\_en.htm](http://europa.eu/rapid/press-release_IP-14-214_en.htm).

**Commission investigates restrictions affecting cross border provision of pay-TV services.** The European Commission has launched formal antitrust proceedings in order to investigate licensing agreements between several major US film studios and some of Europe's largest pay-TV broadcasters with a view to examining whether such agreements prevent broadcasters from providing their services across borders, for example, by refusing subscribers from other member states or by blocking cross-border access to their services. Currently, films are licensed by US film studios to pay-TV broadcasters on an exclusive and territorial basis. The Commission will consider whether such provisions granting territorial protection may constitute an infringement of EU antitrust rules and therefore amount to anti-competitive agreements under Article 101 TFEU. For more information see this page. [http://europa.eu/rapid/press-release\\_IP-14-15\\_en.htm](http://europa.eu/rapid/press-release_IP-14-15_en.htm).

**Commission accepts commitments from Visa Europe about credit card interbank fees.** The European Commission has rendered legally binding the commitments offered by Visa Europe to significantly cut its multilateral interchange fees for credit card payments to a level of 0.3 percent of the value of the transaction (which amounts to reduction of about 40-60 percent) and to reform its rules in order to facilitate cross-border competition. It has to be noted that in July 2012, the Commission sent Visa a supplementary statement of objections informing them that the interbank fees set by Visa and related practices may violate EU antitrust rules since these inter-bank fees are paid by merchants' banks (acquirers) to cardholders' banks (issuers) for transactions with Visa's consumer credit cards. For more information see this page. [http://europa.eu/rapid/press-release\\_IP-14-197\\_en.htm](http://europa.eu/rapid/press-release_IP-14-197_en.htm).

**Commission proposes extension of liner shipping consortia block exemption.** On 27 February 2014, the European Commission invited comments on a proposal to amend the liner shipping consortia block exemption (Regulation 906/2009) as regards its period of application setting a new expiry date of 25 April 2020. All consortia agreements (except those on price-fixing) which involve the joint operation of liner shipping services are exempted from the European Commission Treaty's ban on restrictive business practices provided they fulfill the conditions set out in the Regulation. The draft regulation is available here [http://ec.europa.eu/competition/consultations/2014\\_maritime\\_consortia/index\\_en.html](http://ec.europa.eu/competition/consultations/2014_maritime_consortia/index_en.html).





### **General Court reduces fines in LCD cartel appeals.**

On 27 February 2014, the General Court of the European Union reduced the fines imposed on Innolux and LG Display relating to a previous decision of the European Commission on December 2010 where it had imposed fines of about €649 million on six Korean and Taiwanese manufacturers of liquid crystal display (LCD) panels. In the original decision, the General Court found that these companies operated a cartel between October 2001 and February 2006 in relation to LCD panels. Innolux and LG Display were handed down the largest fines. Both companies brought actions before the General Court seeking an annulment of the Commission's decision or a reduction of fines. In its February 2014 judgment, the Court upheld the Commission's decision, but did reduce the fines. For Innolux, the reduction was made because it had provided incorrect sales data, i.e., it had included sales relating to non-cartellised LCD products. The Court re-calculated the fine to €288 million instead of €300 million. For LG Display, the Commission also made an error in calculating its fine because its calculation had included a month for which LG had been granted partial immunity due to early disclosure of information relating to the cartel. The fine imposed on LG Display was thus recalculated and reduced from €215 million to €210 million. For more information see this page. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/cpl40029en.pdf>.

**Commission publishes decision on Syniverse/Mach merger.** On 27 February 2014, the European Commission approved the proposed acquisition of Mach by Syniverse under the EU Merger Regulation (EC/139/2004).

The approval is conditional upon the divestiture of Mach's Data Clearing (DC) services and Near Trade Roaming Data Exchange (NRTRDE) services in the European Economic Area. The divestment includes infrastructure which will allow Syniverse to provide not only DC and NRTRDE services but also a comprehensive set of other roaming-related services. Syniverse and Mach are the two largest providers of these services globally. After a preliminary investigation, the Commission had concerns that the original transaction would have allowed Syniverse to raise prices or to decrease the quality of these services, creating a dominant player with virtual monopoly market shares. The Commission's concerns had centered around the merger creating a concentration and a risk of increased prices of DC and NRTRDE services and with a decrease in the quality of these services. The full decision is available here [http://ec.europa.eu/competition/mergers/cases/decisions/m6690\\_20130529\\_20600\\_3519889\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6690_20130529_20600_3519889_EN.pdf).

**Commission refers Ireland to ECJ for failing to fully transpose EU energy rules.** The European Commission determined on 20 February 2014 that Ireland had not fully transposed the Electricity Directive (EC/2009/72), which facilitates the proper functioning of the EU energy markets. Although it was acknowledged that Ireland had transposed parts of the Directive, key provisions had yet to be and had still not been transposed into national law. In particular, the Commission felt that Ireland had not transposed provisions relating to unbundling of

transmission system operators and transmission systems. As a result, the commission has referred Ireland to the European Court of Justice and requested that a fine be imposed on Ireland of Ireland of €20,358 a day until transposition of the Directive is complete. The substantial fine intends to reflect the severity of the infringement. For more information see this page. [http://europa.eu/rapid/press-release\\_IP-14-155\\_en.htm](http://europa.eu/rapid/press-release_IP-14-155_en.htm).

### **Mergers: Commission sends warning to Munksjö and Ahlstrom for providing misleading information in their merger notification.**

The European Commission has sent a Statement of Objections (SO) to Ahlstrom Corporation, Munksjö Oyj, both of Finland, and Munksjö AB of Sweden. In October 2012 Ahlstrom and Munksjö, both producers of speciality papers, had notified the Commission of plans to combine their activities in the production of abrasive paper backings. The Commission takes the preliminary view, that the parties provided misleading information with regard to the market for abrasive paper backings. Such behaviour would be in breach of the companies' obligation to include their true best estimates of the markets in question in the notification and could result in a fine of up to 1 percent of turnover. It has to be kept in mind that the sending of a Statement of Objections does not prejudice the final outcome of the investigation. For more information see this page. [http://europa.eu/rapid/press-release\\_IP-14-189\\_en.htm](http://europa.eu/rapid/press-release_IP-14-189_en.htm).



**State aid: Commission adopts new guidelines for state aid to airports and airlines.** On 20 February 2014 the European Commission adopted new guidelines relating to how member states can support airports and airlines in compliance with EU state aid rules. The guidelines aim to ensure fair competition in the aviation industry and ensure compliance with Article 107(1) of the Treaty on the Functioning of the European Union. Key features of the guidelines include: state aid being permitted for investment in airport infrastructure where there is a genuine transport need with certain degrees of aid permissible depending on the size of the airport; operating aid to regional airports being permitted for a transitional period of 10 years; and the availability of startup aid to airlines proposing to launch a new air route. The new guidelines are available here [http://ec.europa.eu/competition/mergers/cases/decisions/m6690\\_20130529\\_20600\\_3519889\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m6690_20130529_20600_3519889_EN.pdf).

**State aid: Commission opens in-depth investigation into restructuring aid for Cyprus Airways and for Estonian Air.** The European Commission has opened an in-depth investigation to verify whether Cyprus' plans to support the restructuring of Cyprus Airways with €102 million are in line with EU state aid rules. The Commission will investigate in particular whether the restructuring plan is suitable to make Cyprus Airways viable without continued state support and to offset the competition distortions created by the state aid. Similarly, the European Commission has opened an in-depth

investigation to verify whether the plans of Estonia to grant €40.7 million state aid for the restructuring of the national flag carrier Estonian Air is in line with EU state aid rules. In this case, the Commission will in particular assess whether the airline's restructuring plan is suitable to restore the company's long-term viability and to offset the distortions of competition created by the state support. The opening of an in-depth investigation gives interested third parties an opportunity to comment on the measures under assessment; it does not prejudice the outcome of the investigation. Find out more on this page. [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_SA\\_36868](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_36868).

## THE NETHERLANDS

Sophie Gilliam, Stijn de Zwart

**Dutch government proposes increase of maximum competition fines.** In a letter to the Dutch parliament, the Dutch Minister of Economic Affairs has proposed an increase of the fining maxima for various regulatory offences, including cartels, in order to strengthen their deterrent effect. The Minister proposes the following changes: (i) the maximum fines for cartels will be increased from 10 percent of the offender's annual turnover to 10 percent of its turnover *calculated over the duration of the infringement*, maximized to four years; (ii) maximum fines for various other offences (e.g. refusal to cooperate) are doubled from 1 percent of annual

turnover to 2 percent; (iii) in case of repeated offences, the limits are doubled. The minister has indicated that after public consultation and coordination with the European Commission, he intends to submit the draft law to parliament by autumn 2014. We consider the proposal as problematic from an EU perspective, as Dutch law would systematically deviate from EU competition law, as well as regimes in neighbouring countries.

## NORWAY

Kjetil Johansen, Line Voldstad

### Oslo City Court judgment in asphalt cartel case.

The case concerned the Norwegian Competition Authority's (NCA) decision from March 2013 to impose a fine of NOK 140 million on two affiliated companies in the asphalt industry, NCC AB and NCC Roads AS, for colluding with another company, Veidekke, between 2005-2008. Oslo City Court found in its recent judgment that there had been a grave competition law violation. The judgment confirms that companies are responsible for employees' actions. Oslo City Court reduced the fine to NOK 40 million as it did not agree with the NCA's calculation of the fine. Furthermore, the Court did not find grounds to hold the parent company, NCC AB, responsible for the infringement. The judgment is, *ultimo* February 2014, not yet binding and the parties are currently consider whether to appeal or not.





### **Fine imposed for breach of standstill obligation.**

The NCA has concluded that a player in the grocery sector, Norgesgruppen, broke the competition law's standstill obligation by taking over lease contracts and continuing grocery business on the premises without clearing the transaction in question. Norgesgruppen asserted that the transfer of the lease contracts did not amount to any concentration. Up to present the highest fines for breach of the standstill obligation have been around NOK 350 000. The NCA has imposed an all-time high fine of NOK 25 million on Norgesgruppen for its breach of the standstill obligation. See this page. <http://www.konkurransetilsynet.no/en/news/archive/Fine-imposed-on-Norgesgruppen/>.

**Purchase and distribution agreement in the grocery sector may be blocked.** The NCA has, after assessing the case for over one year, concluded its preliminary assessment and found that an agreement on cooperation in purchasing and distribution between two actors in the grocery business, Ica and Norgesgruppen, is illegal, and that the cooperation therefore must cease. The case is unique, as this is the biggest cooperation case ever in Norway. The parties have been notified this assessment and given until 25 April 2014 to respond to the notification. Find out more on this page. <http://www.konkurransetilsynet.no/en/news/archive/Warns-that-the-agreement-between-Ica-and-Norgesgruppen-may-be-blocked/>.

## **ROMANIA**

**Alina Lacatus, Sandra Moga**

**Sector inquiry: car insurance market.** In January 2014, the Romanian Competition Council has opened a sector inquiry on the car insurance sector with the purpose of analyzing the functioning mechanisms and to identify and correct possible competitive failures. Based on the findings of the sector inquiry, the Romanian Competition Council will be able to substantiate its viewpoint in relation to potential legislative changes in this field. The sector inquiry will focus on mandatory civil liability insurance and optional insurance, as well as the relationship between insurers and car services. The official press release is available on this page. [http://www.consiliulconcurentei.ro/uploads/docs/items/id9087/asigurari\\_auto\\_english.pdf](http://www.consiliulconcurentei.ro/uploads/docs/items/id9087/asigurari_auto_english.pdf).

## **UK**

**Jessica Mayhall, Maria Scott**

**Hotel online-booking probe: settlement.** The UK's antitrust authority, the Office of Fair Trading (OFT), has closed its investigation into Booking.com B.V., Expedia Inc and InterContinental Hotels Group plc ("IHG") (together, the parties). The OFT's investigation centred on competition concerns that

Booking and Expedia each entered into separate agreements with IHG which restricted Booking's and Expedia's ability to discount the rates at which room-only hotel accommodation bookings were offered to consumers. Following a consultation on the revised commitments proposed by the parties, the OFT formally accepted the commitments on 31 January 2014. All online travel agents (OTAs) and hotels that deal with the parties will be able to offer discounts off headline room-only rates so long as customers sign up to a membership scheme and make one undiscounted booking before being eligible for the cut rates. Such discounts may be funded by commissions received by the travel agents. The commitments address the OFT's concerns, allowing greater competition on price between OTAs and also between OTAs and hotels. The commitments will apply to bookings made by European Economic Area residents for rooms in UK hotels for a period of two years.

**Infringement decisions: distribution of Mercedes-Benz vehicles.** The OFT has published the full non-confidential versions of its March 2013 infringement decisions finding that Mercedes-Benz (MB) and five of its commercial vehicles dealers infringed competition law. The OFT imposed fines totalling over £2.8 million.





The OFT launched a formal investigation into suspected breaches of the Chapter I prohibition in the distribution of MB commercial vehicles in January 2010. The OFT issued a statement of objections to MB and five dealers of MB vehicles in June 2012 and, in March 2013, announced it had issued five separate decisions finding that MB and the dealers had infringed the Chapter I prohibition. Each of the five decisions relates to separate infringements that took place over different periods between March 2007 and January 2010, involving different parties. The nature of the infringements varies, but all contain at least some element of market sharing, price coordination or exchange of commercially sensitive information aiming to dampen competition for vehicle sales in the dealers' respective areas. MB was found to have participated in one of the infringements by contributing to the agreement or the concerted practice among the relevant dealers. Links to the non-confidential versions of the decisions can be found [here](#).

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We have a leading global Competition and Antitrust practice across all areas including competition investigations by regulators, compliance, cartel enforcement defence, civil litigation, criminal antitrust defence and merger regulation. Our network of specialists allows us to provide clients with a fully integrated team who work closely together providing consistent quality across multiple jurisdictions. We also work closely with DLA Piper's full service international network to provide clients with a truly integrated service in particular with our trade and global government relations practice which represents clients in the political arena and in the media, giving us a unique perspective on the workings of governments and policy makers, and allows us to provide a broader range of solutions to the problems faced by businesses.

Our lawyers have the experience and insight to find creative and innovative solutions to competition law issues. Members of the team have gained experience not only in law firms but also as in-house counsel within global companies in a number of sectors, with trade associations, and as officials of competition authorities.



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