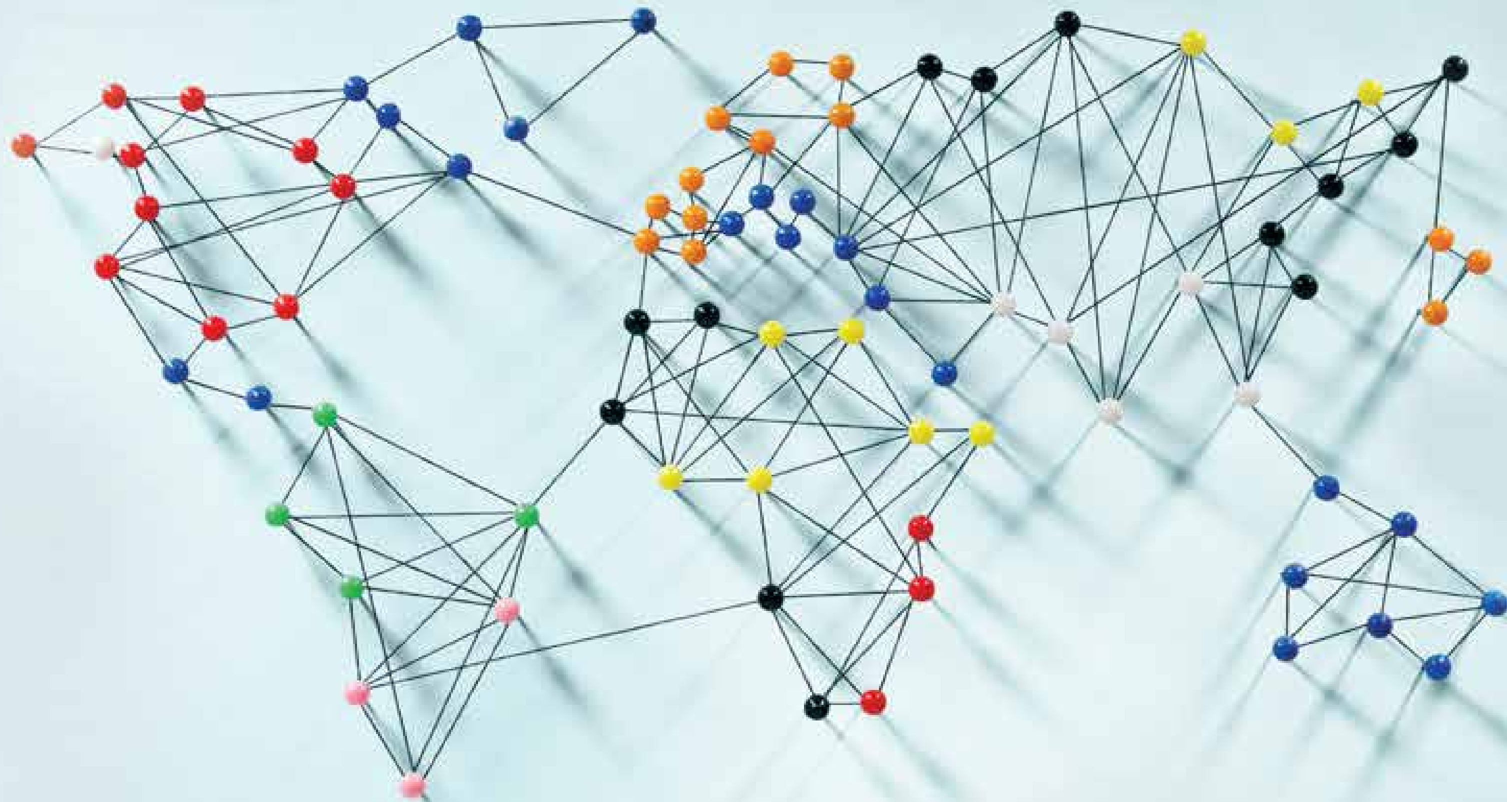

ANTITRUST MATTERS

DLA PIPER'S GLOBAL NEWSLETTER

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WELCOME TO OUR READERS

By Dr. Bertold Bär-Bouyssière

Dearest Reader,

Welcome to the first issue of our global competition law newsletter, "*Antitrust Matters*". It covers antitrust developments from around the world!

Antitrust matters indeed. Legally, financially, economically, politically, intellectually. Antitrust emerged as a policy in the late 1800s, when the American post-reconstruction economy underwent industrialization. Railway corporations had connected the most remote places of the American West with the rest of the world, and the emergence of oil companies and other industrial concerns as powerful economic forces had become such that political concerns arose about their power to increase their rates at will and otherwise adversely influence the marketplace.

Since Congress enacted the Sherman Act in 1890, and complemented it later with enactment of the Clayton and Federal Trade Commission Acts, debate has never ended. What is the true purpose of the competition rules? What are their objectives? And how are these best attained? Rarely has there been only one answer to any given question. Whether in merger control, antitrust or the prosecution of alleged abuses, governmental policies have shifted over a century from one extreme to the other. At all times, the public debate has been passionate. Cathedrals of thought were built to study industries, market structures, and the mechanics of competition. From Industrial Organization Economics to the Chicago School of Antitrust, a broad range of tools have been developed to deal with any particular issue raised. At one point in time, the sparks flew across the oceans. In Europe, competition law and policy developed forcefully in the wake of World War II. Competition law enforcement has now reached a level of sophistication that is close to its American counterpart. In Asia and Africa, competition policy has been emerging as well, with an ever-growing focus on legislation, enforcement and policy debate.

Antitrust matters for companies, because non-compliance can be costly. Antitrust matters for consumers, because it is about consumers' welfare. Thus, antitrust matters for everyone, and that's why it matters for you! If policy makers get antitrust policy wrong, we can all be much worse off. That is why antitrust is such a passionately debated topic, and why it is so passionately loved by those involved in it, drawing some of the greatest talents from the legal and economic talent pool. Antitrust is vocational in nature.

Markets are today global, hence antitrust matters globally. The fundamentals are roughly the same everywhere, but the parameters differ: policy priorities evolve locally in response to particular concerns, and the legal and institutional setup can make quite a difference from one jurisdiction to the next. DLA Piper being a global law firm, we want to share some of those global developments with you, periodically and regularly. We are following antitrust developments with many smart thinkers and curious eyes around the world. Whenever we think that an antitrust development matters to you particularly, we report it herein. As news get reported faster by others, we put the emphasis on analysis, reflection, and thought leadership. That is how we want to make the most out of your reading time, which we presume to be a limited and valuable resource. We hope you will like *Antitrust Matters*. If you do not enjoy reading it, let us know. Let us have your feedback anyway, share with us your enthusiasm or criticism. Tell us if you want other things included, and if you have any follow-up question on a topic covered, feel free to contact us. But first of all, have a good and inspiring read!

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EUROPE

EUROPEAN UNION

Holier-than-thou

Fiscal exemptions approved by the Council do not escape State aid control

By Carole Maczkovics

Which undertaking would decline the benefit of a tax exemption? The Court of Justice of the European Union (hereafter, the "Court of Justice") may have an interesting answer. In a judgment of 10 December 2013 rendered in Grand Chamber (C-272/12 P, *European Commission v Ireland and others*), the Court of Justice judged that tax exemptions granted by Member States may constitute State aid and be subject to reimbursement, even if such exemptions were authorised by the Council upon a European Commission proposal.

The case related to the exemption from excise duty on mineral oils used as fuel for alumina production in particular regions of France, Ireland and Italy. The contested exemptions had been authorised by the Council, acting on a proposal of the European Commission, pursuant to EU directives harmonising excise duties on mineral oils. The Council decisions contained though a reservation as to the application of State aid rules contained in Article 107 of the Treaty and the requirement for Member States to notify potential State aid measures pursuant to Article 108 of the Treaty. In 2001, the Commission initiated State aid procedures against these exemptions. It decided on 7 December 2005 that these exemptions constituted State aid incompatible with the internal market and had to be recovered for the part relating to the measures granted after the date of publication in the official journal of the opening of the investigation (hereafter, the "contested decision").

The Member States concerned brought in February 2006 proceeding a for annulment before the General Court of the contested decision. In December 2007, the General Court prove their case. The judgment was in its turn annulled by the Court of Justice which referred the case back to the General Court which annulled anew the contested decision. The latter judgment was the object of appeal before the Court of Justice.

The Court of Justice observed that the procedure laid down in the Directive for the adoption of authorisations to grant excise duty exemptions, had a purpose and scope different from the rules established in Article 108 of the Treaty. The latter provision provides for aid to be kept under constant review and monitored by the Commission which has thus a central role in determining whether aid is incompatible with the internal market. In consequence, a Council decision authorising a Member State to introduce an exemption of excise duties could not have the effect of preventing the Commission from exercising the powers conferred on it by the Treaty. As regards the Commission's involvement in the adoption of the authorisations, the Court of Justice considers that it was clear that the Commission had taken the view, at the time when the Council adopted the authorisation decisions, that those decisions did not give rise to a distortion of competition and did not impede the proper functioning of the internal market. The Court recalled then that the concept of State aid corresponds to an objective situation and cannot depend on the conduct or statements of the institutions. The Commission's involvement in the authorisations is thus irrelevant as regards the qualification of State aid. Though, it should be taken into account when considering the obligation of recovery, in order to comply with the principles of protection of legitimate expectations and legal certainty. The Court of Justice considered thus that the decision of the Commission to require recovery of the aid only as of the publication of its decision to formally open a State aid investigation was sufficient to protect legitimate expectations and legal certainty.

The conclusions contained in this case are no surprise. As recalled by the Court of Justice, State aid rules sanction objective situations. This judgment is in the same vein as the *Deutsche Telekom* case (C-280/08 P) rendered in the remit of Competition law, and in particular, Article 102 of the Treaty prohibiting abuses of dominant position. In that case, the Court found that Deutsche Telekom had abused its dominant position by squeezing the margins of its competitors on the downstream market. The fact that the tariffs were approved by the regulator was considered as being irrelevant since the undertaking still had some leeway not to engage in an anticompetitive behaviour. Indeed, what was at stake was not the level of wholesale or retail charges, but the spread between them. Similarly to the *Deutsche Telekom* case, the Member States that have been authorised to grant exemptions of excise duties on mineral oils still had the opportunity to notify the measures at stake if those measures are able to distort competition, which was recalled in the authorisations reserving the application of State aid rules. The Court of Justice only confirms the principle of autonomy of competition law, which logically extends to State aid rules.

If the judgment does not come as a surprise, it may nevertheless entail impracticable consequences. First for Member States that apply EU law but that have to evaluate on a regular basis whether such application may nevertheless distort competition or impair the internal market. Second for the undertakings that benefit from a specific legal regime but should renounce to such legal regime as from the day that the Commission has decided to investigate whether the regime constitute State aid or not. This jurisprudence, despite its coherence, increases undertakings' responsibility by exposing them to significant risks even if they act in accordance with the legislation.

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EU Merger Notifications: Simplified and streamlined, somewhat

By Michael Marelus

The European Commission ("Commission") has adopted new rules aimed at simplifying and streamlining the process for notifying concentrations in accordance with the EU Merger Regulation. The new package was published in the Official Journal of the European Union on 14 December 2013 and came into force on 1 January 2014; it contains (1) a new Notice on the simplified procedure for notifying certain transactions, and (2) a new Implementing Regulation amending the one currently in force. Particularly, the new rules allow for more concentrations to be able to be notified under the simplified procedure. Parties are also further encouraged to seek waivers from the Commission from needing to include certain information in the notification.

MORE TRANSACTIONS WILL BENEFIT FROM THE SIMPLIFIED PROCEDURE

Concentrations that are unlikely to raise competition concerns can generally be examined by the Commission under a simplified procedure. The simplified procedure requires less information to be included in the notification form, and the period of review by the Commission is generally shorter. The scope of concentrations that can be notified in accordance with the simplified procedure has now been expanded. Concentrations with a horizontal overlap (i.e. where at least two parties compete) may be notified under the simplified procedure where the parties' combined market share is less than 20%. Concentrations with vertically related markets (i.e. where one party sells an input to a market where the other is active) may be notified under the simplified procedure where the parties' combined market share is less than 30%. These thresholds are a five percentage increase from those applicable in the past.

The new Notice introduces an additional category of concentrations that may be notified under the simplified procedure. If the combined market shares of the parties is between 20% and 50%, and the increase in the market shares as a result of the concentration is small, it may be notified under the simplified procedure. An increase in market shares as a result of the concentration is considered to be small where the so-called Herfindahl-Hirschman Index (HHI) delta is less than 150.

The simplified procedure will remain available for concentrations where there is no overlap of market activities between the parties, and for the creation of joint ventures with limited actual or foreseen activities in the European Economic Area (see further below). So too will it remain available for transactions whereby a party is to acquire sole control of an undertaking over which it already has joint control.

PRE-NOTIFICATION CONTACTS STREAMLINED

The Commission recommends, as it does in the old Notice, the use of pre-notification contacts with the Commission's Directorate-General for Competition to resolve issues such as those regarding market definitions and the amount of information to be included in the notification. The new Notice now explains that no pre-notification contacts at all are required for transactions by parties with no market overlap or for the creation of a joint venture with limited activities in the European Economic Area.

INFORMATION...

The Commission has also adopted an amendment to the Implementing Regulation. The main changes relate to the information to be included in the standard notification form (Form CO), the notification form under the simplified procedure (Short Form CO), and the form requesting referrals between the Commission and national competition authorities and vice versa (Form RS). The forms invite parties to request waivers for certain specified categories of information generally included in the notification. In particular, the Commission may grant waivers for information such as that on shareholdings in companies active in affected markets, acquisitions made in the past three years, analyses, reports and studies conducted in relation to the concentration, market size information, *etc.*

.... BUT AMOUNT OF DOCUMENTS TO BE PROVIDED ARE BROADER

The revised notification forms (Short Form CO and Form CO) do however expand the scope of internal documents that need to be provided as part of the notification. The list of documents that must be submitted with a full notification (i.e. Form CO) now includes minutes of the management board, supervisory board and shareholders' meetings at which the transaction was discussed. It also includes documents where the transaction is discussed in relation to potential alternative acquisitions, and analyses, reports, studies, surveys and any comparable documents competitive conditions, competitors (actual and potential) and/or potential for sales growth or expansion into other product or geographic markets.

Furthermore, a simplified notification (i.e. Short Form CO) must now also include additional documentation where the concentration gives rise to reportable markets in the EEA (i.e. horizontal or vertical overlap or relationship between activities of the parties). Such notification must include copies of all presentations prepared by or for or received by any members of the board of management or other management organ analysing the notified concentration.

While parties may request a waiver from the Commission limiting the scope of documents to be included, the revised requirements seem to be a significant widening of the reporting obligation and an increased burden on notifying parties.

REPORTABLE MARKETS IN SHORT FORM CO RELATE ONLY TO ACTIVITY IN THE EEA

The revised Implementing Regulation reduces the amount of information to be included in the notification form used under the simplified procedure (i.e. the Short Form CO). The Short Form CO will only require information to be listed for markets in the EEA in which two or more of the parties to the concentration are engaged in business activities on the same horizontal market, or in business activities in a product market that is either upstream or downstream of a market in which any other party to the

concentration is engaged. This is a change from the past requirement on including information on all markets – even outside the EEA – on which such overlap exists.

LOOSENING OF REQUIREMENTS FOR JOINT VENTURES WITH NO ACTIVITY IN THE EEA

Furthermore, in the case of joint ventures, information only needs to be listed for markets in the EEA where the joint venture and at least one of the acquiring companies have an overlap. This is a departure from the old requirements which require simply at least two parties to have an overlap (e.g. where there is an overlap between the parents only and not with the joint venture). Notifications of joint ventures with no business activities in the EEA now do not need to include much detailed information on the relevant markets.

The Commission in its press release on the changes to the notification system states that while joint ventures that are mainly active outside of the EEA still need to be notified where the applicable turnover thresholds requiring notification are met, the notification will not require a lot of information. The Commission states that if a joint venture really does not affect Europe, companies can simply say so in their notification by explaining briefly the planned activity of the joint venture, without supplying further market data. The Commission believes that this is a business friendly solution for the notification of these joint ventures. It however remains to be seen how the Commission will implement this new policy.

REMEDIES STANDARD TEXTS: SLIGHTLY REVISED

The Commission also took this opportunity to revise its Best Practices Guidelines on model texts for divestiture commitments and trustee mandates, and the model texts. These now take into account the Commission's approach as set out in its 2008 Notice on Remedies. They make it clear that the standard model texts are not intended to provide exhaustive coverage of all issues that may be relevant in a particular case, and leaves flexibility to adapt the texts as needed. The standard texts are indeed not binding, but contain the elements of all standard provisions that should be included.

CONCLUSION

These changes, while not fundamental, are welcomed and should somewhat reduce the burden on companies in completing the EU merger control process. Particularly, the creation of joint ventures with no or limited activity in the EEA, or concentrations with no overlap, will benefit from speedy reviews. Although, the widened scope of documents to be included with the notification does seem somewhat counter-intuitive to the declared aim of the reform. It waits to be seen how flexible the Commission will be when granting waivers for certain information in the notification.

These changes are naturally different and separate from the more substantive issues the Commission is currently considering in relation to EU merger control, notably whether to extend the Commission's review to acquisitions of minority interests, on which we will continue keeping you updated.

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Concerted practice or why you should keep on fighting competitors

By Pierre Sabbadini

When do discussions and exchanges of information between competing companies fall in the wide net of 'concerted practice' pursuant Article 101 TFEU?

Is it just a way for the Commission to reduce the burden of proof when no agreement has been entered into?

In the recent case *Solvay SA v.* Commission (C-455/11 P), the CJEU held that to prove a concerted practice within the meaning of Article 101(1) TFEU, there must not necessarily be a pre-existing agreement: a concerted practice is simply a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition. The Court thereby confirms the reasoning contained in *T-Mobile Netherlands and Others* (Case C-8/08).

The key underlying principle is that each economic operator must determine independently the policy, which it intends to adopt on the common market. Following the Court's views, market players keep the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. What they cannot do is to either influence the conduct on the market of actual/potential competitors or disclose to them decisions or intentions concerning their own conduct on the market.

In other words, contacts between competitors to create conditions of competition, which do not correspond to the normal conditions of the market in question, given the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.

According to the Court, in the case of a highly concentrated oligopolistic market, the exchange of commercial information between competitors in preparation for an anti-competitive agreement suffices to prove the existence of a concerted practice within the meaning of Article 101 (1) TFEU. There is no need for the Commission to prove that those competitors formally undertook to adopt a particular course of conduct or that the competitors colluded over their future conduct on the market. Direct contacts between competitors with a view to 'stabilising the market' suffice to get caught.

What about the use of the information exchanged? The Court held that there is a rebuttable presumption that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market.

In order to rebut that presumption, it is for the undertaking concerned to prove that the concerted action did not have any influence whatsoever on its own conduct on the market (see *Hüls v Commission,* C-199/92 P). The proof to the contrary must therefore be such as to rule out any link between the concerted action and the determination, by that undertaking, of its conduct on the market.

For example, probative data illustrating the competitive nature of the market and, in particular, the decrease of prices during the period concerned cannot suffice, of itself, to rebut that presumption. The reason why is that data does not of itself make it possible to prove that that undertaking did not take account of the information exchanged with its competitors in determining its conduct on the market.

This shows that the Court of Justice maintains the approach on concerted practices taken in *T-Mobile Netherlands and Others* (Case C-8/08) by banning any practical cooperation between competitor that is knowingly substituted for the risks of competition.

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European Commission investigates restrictions of online sales

By Boris Marschall

Up to now, the European Commission had rarely dealt with antitrust cases concerning vertical restraints and never dawn-raided undertakings for a suspected behaviour in relation to online distribution. The Commission did provide some explicit developments on the Internet and its implications for the Common Market and competition within the EU, in particular in its Guidelines on Vertical Restraints ("Vertical Guidelines"). To a large extent, the application of such "rules" had been left to the national competition authorities. Recent dawn raids however indicate that the European Commission is more willing to review vertical agreements and in particular restrictions of the online commerce.

RECENT DAWN RAIDS IN THE CONSUMER-ELECTRONICS INDUSTRY

At the beginning of December 2013, the premises of manufacturers, distributors and retailers of consumer-electronics were visited by EU officials and their national counterparts in several Member States, after the European Commission initiated unannounced inspections because of concerns that undertakings in that sector may have put in place restrictions on online sales.

Prior to these EU-wide searches, officials of the French competition authority dawn-raided several undertakings of the consumer-electronics industry in October 2013. The relevant competition concerns might relate to prices and online sales, although the competition authority has not officially confirmed this.

It is unclear whether or how the investigation in France and the EU-wide inspections are linked. The fact that the European Commission did get involved may however reveal a change of policy, thus a higher exposure to fines (and an exposure to higher fines) for economic players trying to limit or hinder online sales of products they produce or distribute, in particular if the tools used to achieve that goal are used in several Member States.

THE EUROPEAN COMMISSION'S GUIDANCE REGARDING ONLINE SALES

In theory, the European Commission already provided the baseline of its analysis when it comes to the Internet and admissible restrictions of online sales, notably in the Vertical Guidelines. In principle, agreements that limit or ban online sales are prohibited under Art. 101(1) TFEU and analysed as (re)sales restrictions. This is because the Internet is viewed as an additional and complementary tool for customers to have access to products, including customers of other Member States. Thus limiting or banning online sales is considered a hardcore restriction that cannot be exempted under the Vertical Block Exemption Regulation ("VBER"). Dual pricing, that is to say agreeing on higher purchase prices for products that the distributor will sell online, is also a hardcore restriction unable to be exempted.

The European Commission however considers several limited forms of restriction that may be exempted depending on their context and how they are implemented, mostly in relation to selective distribution systems. The supplier may require from the authorised distributors in its selective distribution network to have one or more physical points of sale ("POS"). The supplier may also require standards and conditions for the use of the Internet by its authorised distributors, as long as the relevant criteria are overall equivalent to the criteria imposed for offline sales. Moreover, the supplier may require that the authorised distributor use third party platforms only in accordance with such agreed standards and conditions. More precisely, where the distributor's website is hosted by a third party platform, the supplier

may require that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform.

RECENT NATIONAL CASES IN RELATION TO SELECTIVE DISTRIBUTION

The implementation of such principles may however reveal to be tricky, and any restriction must have an objective justification. Cases handled by national competition authorities have demonstrated that the Commission's guidelines are not straightforward and that there is often a thin line between prohibition under, and compatibility with, the competition rules.

In Germany, the Federal Cartel Office ("FCO") ruled that the headphone-maker Sennheiser could not authorise Amazon as one of its appointed dealers on the one hand, and prevent its other authorised dealers from selling products on Amazon's web platform. Such ban could not be objectively justified since Amazon's online distribution fulfilled the qualitative criteria imposed in Sennheiser's selective distribution network. (See update for Germany below.)

One argument used by producers that want to limit or ban online sales of their products has been the need to protect their brand image, in particular for luxury products. Such argument may be fragile depending on the factual situation, as demonstrated by the Pierre Fabre case in France, in which the European Court of Justice ("ECJ") became involved. The restrictions at issue was the obligation for distributors to provide the presence of a pharmacist for any sale of a Pierre Fabre product to a consumer, thus de facto banning online sales. Eventually, the producer had to modify its selective distribution agreements because it could not impose a total prohibition of online sales, even for luxury products.

CONCLUSION

Vertical restrictions, in particular in relation to online sales, are often of contractual nature and national competition authorities or jurisdictions could handle them under the laws relating to unfair competition. However, there seems to be strong indicators that an approach based on antitrust investigations will become more and more popular, including EU-wide.

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GERMANY

FCO Notice on Domestic Effects in Merger

By Dr. Gregor Schroll LL.M. oec.

On 5 December 2013 the German Federal Cartel Office ("FCO") published a leaflet on domestic effects in merger control. Foreign-to-foreign mergers, i.e. mergers between companies based abroad, may raise the question of whether they are subject to notification in Germany. In contrast to the EU Commission's practice, notification requirements in Germany are not triggered by any transaction that amounts to a concentration and that reaches the relevant turnover thresholds under the Act against Restraints of Competition ("GWB"). In fact, these mergers are only subject to German merger control if they have an 'appreciable effect' within the territory of Germany. Even though the introduction of a second domestic turnover threshold has not substantially changed the legal situation with regard to domestic effects, it specified the requirements for certain mergers such as concentrations involving two parties (e.g. acquirer and target company in case of an acquisition of sole control) of which only one has achieved a turnover in Germany. These mergers are clearly not subject to mandatory notification as the turnover thresholds are not met. On the contrary, concentrations involving two parties, which both fulfil the turnover thresholds, always have sufficient domestic effects. If there are more than two parties to the merger, not all concentrations that exceed the turnover thresholds have sufficient domestic effects. For example, this is the case if a joint venture is neither currently active on a domestic market nor a potential competitor. Moreover, domestic effects can be ruled out, if any two parent companies of the joint venture are both neither active in the same domestic relevant product market than the one on which the joint venture is active abroad, nor in a domestic upstream or downstream market nor on any other relevant product market and are not potential competitors on these markets, either. Apart from these clear cases, it will be necessary to make a case-by-case assessment considering the circumstances of the individual case, in particular the concentration of the merging parties and its relation to markets that cover parts of or the entire territory of Germany. Domestic effects can be found where a concentration is likely to have a direct influence (certain minimum intensity = "appreciable effect") on the conditions for competition in the relevant markets in Germany. However, the FCO as well as existing case law indicate that the appreciability of domestic effects does not require high demands.

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Online sales restrictions under scrutiny of FCO

By Dr. Gregor Schroll LL.M. oec.

Competition authorities in Europe are clamping down on restrictions or bans on online sales, especially sales over internet platforms such as Amazon and eBay. As a general principle, the EU Commission considers that every distributor must be allowed to use the internet to sell products. However, in the case of third party internet platforms, the EU Commission accepts that a supplier may restrict sales over those platforms by requiring that customers do not visit the distributor's website through a site carrying the name or logo of the third party platform. Other competition authorities, including the German FCO, appear to diverge from this approach and require "objective reasons" for banning sales via certain online platforms. Following an investigation of the FCO, Sennheiser, a renowned headphones maker, distributing its product via authorized distributors, was forced to change the terms of its contracts that prevented the dealers from selling Sennheiser products on "Amazon Marketplace". Because Amazon was an authorised distributor, Sennheiser could not prohibit other authorized dealers from selling over Amazon's platforms. On the basis that Amazon's electronic distribution system fulfilled the qualitative criteria of Sennheiser's selective distribution system, the FCO was of the opinion that the internet platform ban did not have any efficiency enhancing effects ("objective reasons"). Furthermore, the FCO is currently reviewing platform bans imposed by Adidas and Reebok and agreed with household appliance manufacturer Bosch Siemens GmbH on abandoning its anti-competitive (dual-pricing) rebate system, which put so-called hybrid dealers at a disadvantage who sold household appliances both in brick-and-mortar shops and via a webshop (the more turnover hybrid dealers generated via their webshop, the less rebates they received). However, according to unofficial statements by FCO personnel, price differences between mere online dealers and conventional stores might be justifiable, e.g. due to their varying expenses.

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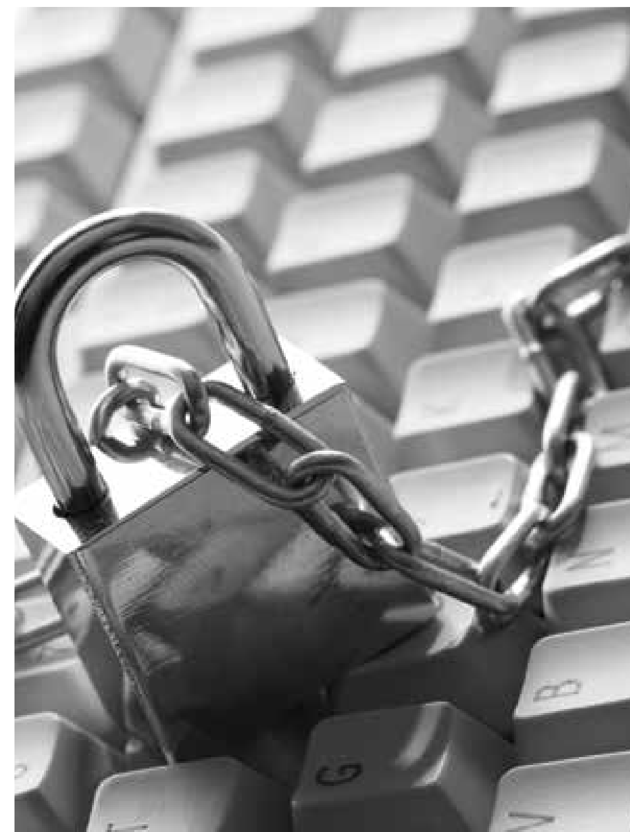

ITALY

The use of temporary joint-ventures is not an Antitrust infringement *Ex Se*

By Carlo Edoardo Cazzato, Ph.D., M.D.

On 7 May 2013 the TAR issued the Decision, concerning proceeding I740 of the AGCM.

As known, at its meeting on 2 August 2012, the AGCM stated that 2iGas Infrastruttura Italiana Gas S.r.l. (at the time E.ON Rete S.r.l., hereinafter respectively "2iGas" and "E.ON Rete") and Linea Distribuzione S.r.l. (hereinafter, "LD") restricted competition in the natural gas distribution market, forming a competition-restricting agreement (hereinafter, the "Gas Decision").

Specifically, according to the AGCM, LD and 2iGas formed a temporary joint-venture (known as "ATI") to take part in the tender called by the Municipality of Casalmaggiore, despite being able to bid individually as competitors. In the AGCM's view, the ATI had the aim to guarantee that both companies could continue to manage the gas distribution service independently, in the exact same Municipalities in which each had previously operated. In addition, it allowed 2iGas and LD to obtain the optimum economic conditions for the tender.

In light of the above, the AGCM decided to impose a joint and several fine totalling €1,205,308 on E.ON Italia S.p.A. (at the time the parent company of E.ON Rete, which later became 2iGas, hereinafter "E.ON Italia") and 2iGas, and a joint and several fine totalling €129,675 on Linea Group Holding (the parent company of LD, hereinafter "LGH").

The Gas Decision was challenged before the TAR by E.ON Italia, Enel Rete Gas S.p.A. (hereinafter, "Enel Rete Gas"), LD and LGH. The related actions were joined.

First of all, in the Decision the TAR accepted the grounds concerning the relevant market taken into account by the AGCM. The Court did not confirm the relevant market singled out by the Gas Decision. Indeed, according to the TAR the possibility to single out a small portion of the territory as relevant market does not exclude the necessity to individuate conditions of autonomous supply and demand compared with that in contiguous areas. Indeed, "the mere existence of a situation of supply – side monopoly does not characterize the territorial area under discussion which does not have specific attributes compared to the about 6,500 local markets in which the demand may be equally distributed" (§ 4.5.1). In the same manner, in the TAR's view the AGCM did not establish that services requested by the Municipality of Casalmaggiore had specific characteristics able to be singled out as a separated market. This conclusion would be confirmed by the same case law of the AGCM.

In addition, the TAR affirmed that the possibility to single out a specific tender as relevant market is subordinate to the evidence that the anticompetitive agreement was within a substantial part of the national market. In light of the above the quantitative and qualitative relevance of the involved market needs to be considered as the prerequisite of the AGCM's sanctioning powers. According to the TAR this requirement was missing in the case under consideration because the Casalmaggiore's tender regarded less than 1% of the national gas users.

Secondly, the TAR excluded the existence of the ascertained anticompetitive agreement. To this regard, the TAR highlighted that, even if the assessment of the anticompetitive effects of the agreement need to be taken into account only in order to grade the related sanction, each anticompetitive agreement has to be structurally able to significantly and uninterruptedly impact on the market.

On this basis, the TAR took into account the fact that the Italian Code of Public Contracts does not single out limits regarding the use of the ATI and that in the same manner according to case law this device may not considered ex se unlawful. In addition, as known, horizontal co-operation agreements can lead to substantial economic benefits, in particular if they combine complementary activities, skills or assets. Horizontal co-operation can be a means to share risk, save costs, increase investments, pool know-how, enhance product quality and variety, and launch innovation faster.

As admitted by the same AGCM, in the case of ATI the unlawfulness needs to be ascertained on the basis of specific symptomatic signs. However, in the TAR's view, those cited by the AGCM (§ 6.2.) and substantially consisting in the common willingness to renounce an autonomous policy in name of a joint approach to the involved tenders are not enough to establish that the ATI was designed to infringe competition rules.

The Decision pertaining to the device, known as ATI, appears coherent with the recent Italian administrative case law.

Specifically, the CdS already examined the topic of the relationship between ATI and antitrust infringements, highlighting that the use of this device, when it is not necessary in order to take part in the tender, did not represent ex se an infringement.

According to the CdS on the basis of the case law of Italian Courts and of the AGCM, the ATI may be considered anticompetitive only when the device is chosen in a factual context, which highlights the anticompetitive aim of the involved undertakings.

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THE NETHERLANDS

Public statements of senior management scrutinized

By Sophie Gilliam

How much can senior management say in public about future commercial policy before they risk being fined? A commitment decision by the Dutch competition authority (ACM) published on 7 January 2014 provides some guidance.

COLLUSION THROUGH PUBLIC STATEMENTS

It is widely known that secret meetings and collusive price agreements amongst competitors entail risks for competition. A recent trend is the focus of European antitrust enforcement agencies on co-ordination of commercial behaviour through public channels. Examples of public channels are speeches or panel discussions at conferences or interviews in the (trade) press.

In its Horizontal Guidelines, the European Commission notes that where a company makes a unilateral announcement that is genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). Market transparency will in many cases improve competition. However, depending on the facts underlying the case at hand, strategic responses of competitors to each other's public announcements could prove to be a strategy for reaching a common understanding about the terms of coordination.

RECENT COMMITMENT DECISION IN THE NETHERLANDS

The recent commitment decision is the first decision in which the ACM established that public announcements by senior management in the public domain entail risks for competition. The ACM investigated possible price fixing practices by the three mobile network operators in the Netherlands: KPN, T-Mobile and Vodafone. It did not find proof that the mobile operators had been colluding, but it pointed out that public statements allowed the competitors to read each other's behaviour and reduce strategic uncertainty.

A relevant fact in the case at hand is that the market for mobile network services is a highly oligopolistic market and market conditions are conducive to tacit understanding. The public statements that were scrutinized by the ACM concerned statements on future price increases and other changes to commercial conditions. The announcements were made before there had been an internal decision on such changes, thus potentially making the own behaviour of the company that made the statement conditional on the reaction of competitors. Market leader KPN had announced for example at a public conference that it was planning to reintroduce connection fees. Vodafone and T-Mobile followed. At another occasion, an employee from KPN announced an increase in prices in an interview. In response to these statements, a senior manager of Vodafone publicly expressed the hope that KPN would carry out its intentions. Moreover, internal communication of T-Mobile and Vodafone showed that KPN's statements did influence the market strategy of those competitors.

In order to end the investigations, the mobile operators proposed the following commitments, that according to the ACM will effectively address the competition concerns and thus – without defining the exact boundaries of what is allowed – provide a safe haven for senior management:

Senior management will no longer make verbal or written statements in the public domain about future prices and other commercial conditions that are of material detriment to consumers before the internal decision making process is final and recorded.

The mobile operators commit themselves to incorporate this commitment above into their compliance programs and to give this matter special attention in employee training workshops.

A NEW TREND IN EUROPE

The recent commitment decision regarding the Dutch telecom sector is a good example of the new focus of antitrust authorities in Europe on indirect co-ordination of market behaviour through public media. This focus is visible in the OECD report 'Unilateral Disclosure of Information with Anticompetitive Effect', in the most recent changes to the European Commission Horizontal Guidelines as well as the European Commission's current investigation into 'price signalling' by shipping lines in which the European Commission will examine whether any breach of competition rules occurred when shipping lines announced price-increase intentions in press statements or via their websites.

As no business would like to be a test case in this matter, a (more) sensible policy with regard to public statements is considered desirable.

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NORWAY

Recent legislative changes

By Kjetil Johansen and Line Voldstad

Legislative changes have been adopted in Norway and the adopted changes entered into force on 1 January 2014. The changes mainly relate to merger control, but EEA harmonisation in general and certain procedural legislative changes in relation to cartel and dominance enforcement have also been adopted.

MERGER CONTROL.

Effective from 1 January 2014, the thresholds for merger notifications in Norway has been raised significantly. Under the new rules, filing is required when the combined annual turnover in Norway exceeds 1 billion NOK, and at least two parties involved has a turnover in the excess of NOK 100 million.

The Norwegian Competition Authority ("NCA") still remains competent and has jurisdiction to review concentrations below the new thresholds by ordering the submission of a filing. Such filing order can be issued up to three months after the transaction was final or control was achieved, whichever comes first.

The NCA has imposed a specific duty on nine named companies to inform the NCA regardless of the filing threshold. These companies are: Norske Shell, Norsk Gjenvinning, Nor Tekstil, Norgesgruppen, Plantasjen, Sector Alarm, Securitas Direct, Statoil Fuel & Retail og Telenor.

CARTEL AND DOMINANCE ENFORCEMENT

Introduction of a settlement procedure, in which rectifying measures proposed by the undertakings can be made binding upon the parties. If an undertaking offers remedial measures in a case where the NCA could have imposed sanctions/remedies, the NCA may close the case by adopting binding commitments similar to those under article 9 of Regulation 1/2003.

A MARKER SYSTEM FOR LENIENCY APPLICANTS HAS BEEN INTRODUCED.

As of 1 January 2014, the NCA can as a general rule only confiscate copies during an investigation. In some circumstances it can still confiscate the original, but would then normally be obligated to provide a copy to the company concerned.

It is notable that only individuals as of 1 January 2014 can be prosecuted under the Norwegian Competition Act. Criminal sanctions against individuals have to this date rarely been used. However, in the adoption of the changes in the Competition Act, the Ministry has indicated that criminal prosecution and sanctions should be more frequently used. The NCA has taken notice of this policy change, but still made clear that imprisonment will be reserved for aggravating circumstances and/or when there is no leniency application lodged with the NCA.

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POLAND

Key changes in the pipeline: new enforcement tools and harsher sanctions

By Dr. Andrzej Balicki and Michał Orzechowski

Legislative work on a new draft amendment to the Act of 16 February 2007 on Competition and Consumer Protection is currently under way in the lower chamber of the Polish Parliament (Sejm). The amendment is expected to be adopted by the end of 2014.

From the very beginning, the amendment has been a subject of discussion among legal practitioners and business professionals. If adopted in its current form, the amendment would certainly strengthen the position of the Polish competition authority (Urząd Ochrony Konkurencji i Konsumentów) ("PCA") and equip it with more sophisticated enforcement tools.

The aim of this article is to present, in brief, the main changes in enforcement concerning anticompetitive practices that are likely to affect the daily functioning of companies present on the Polish market.

SANCTIONS IMPOSED ON INDIVIDUALS

Polish competition law currently allows sanctions to be imposed on individuals only for violating competitive practices in the form of bid-rigging in public tenders.

The amendment introduces pecuniary sanctions that may be imposed on the management personnel of an company for deliberately violating national statutory provisions concerning other anticompetitive agreements, and/or Article 101.1 a-e of TFEU. In its initial form, the scope of these sanctions also covered the abuse of a dominant position, however, the current proposal is limited to anticompetitive agreements, both of a horizontal and vertical nature.

According to the proposal, sanctions can be imposed up to a limit of PLN 2,000,000 (approx. EUR 500,000) in one PCA decision. Irrespective of the level of the sanctions, they are not considered criminal thus it remains unclear what, if any, procedural guarantees will be granted to individuals.

SETTLEMENT PROCEDURES AND LENIENCY PLUS

The proposal also aims to expand the existing enforcement "toolbox", composed, inter alia, of a leniency programme and commitment decisions. Based on the experience of effective enforcement measures used in other countries, the amendment introduces several widely-known settlement procedures and a concept known as Leniency Plus.

According to the proposed solution, a settlement procedure may be initiated by the president of the PCA before the conclusion of proceedings concerning anticompetitive practices. In exchange for agreeing to a settlement, companies will be offered a 10% reduction of their fines. Both the president of the PCA and the companies involved in the proceedings will have the right to withdraw from the settlement procedure; however, the right of the president of the PCA to discontinue the procedure is limited to the situation in which it considers that procedural efficiencies are not likely to be achieved.

The amendment also introduces a second-chance opportunity for companies that do not qualify for full leniency (i.e. 100% fine reduction). Provided that they furnish the PCA with information about another (as yet undiscovered) competition law infringement, they may qualify for a so-called leniency plus programme, i.e. the fine in the original case will be increased by 30% in exchange for complete immunity in the new case.

The proposed change may be seen as a response to the relative lack of interest in the original leniency programme, which has been in place since 2004 (only 22% of proceedings were initiated based on leniency applications between 2004-2012). Given the thresholds for the reduction of fines, if adopted, the amendment may have a snowball effect and increase the number of proceedings.

TIME LIMITATION FOR INITIATING PROCEEDINGS

In addition to the enforcement tools discussed above, the amendment proposes the extension of time limits for the PCA to initiate antitrust proceedings. Under the current law, proceedings cannot be initiated if one year has elapsed since the end of the year in which anticompetitive practices were abandoned.

The amendment extends this time limit to five years, mainly as a response to several widely-publicised cases involving bid-rigging in tenders for the construction of Polish motorways, where the PCA could not take any action due to the expiry of the time limits. If adopted, the five-year time limit would certainly make companies extend the scope of their internal due diligence for competition compliance. On the other hand, the number of proceedings to be conducted by the PCA might increase, and the allocation of both human and financial resources would be focused on cases of greater importance.

POSSIBILITY FOR THE PCA TO IMPOSE REMEDIES

Last but not least, the amendment envisages the possibility of the PCA being able to impose remedies, as in the case of Regulation 1/2003. The proposal contains an open list of behavioural remedies, including the obligation to grant a licence on FRAND terms. If such behavioural remedies are unlikely to be effective, the president of the PCA may order a company (or companies belonging to the same group) to perform a particular type of business activity, including performing it at different levels of trade (e.g. unbundling).

The proposed amendment will introduce into Polish competition law solutions and legal instruments that are currently in force in other jurisdictions. The general impression is that the PCA will be given more powerful enforcement tools. The amendment has not yet been finalised, however, it is unlikely to change in any significant way before it enters into force. Therefore, it may be high time for companies to double-check their current practices.

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ROMANIA

Competition Council exonerates majority of parties investigated in relation to buy-back campaigns for waste electric and electronic equipment

By Livia Constantinescu

The Romanian Competition Council ("RCC") recently finalized its investigation concerning an alleged cartel on the market for the commercialization of electrical and electronic equipment ("EEE") and the market for waste management of EEE. The investigation involved a significant number of companies, i.e. more than 30 different EEE producers, importers and retailers, as well as two collective waste management organisations organized as trade associations, to which EEE traders transferred their legal management obligations of waste electric and electronic equipment ("WEEE").

The significance of the investigation results from the fact that the RCC engaged in an in-depth analysis of each company's specific position and individual implication in the alleged agreements. This ultimately resulted in the majority of the companies being excluded from the application of sanctions, as their individual participation in the alleged infringements could not be substantiated, primarily due to their lack of access to the decision making process and sensitive information regarding the EEE market.

The investigation also highlights the specific risks for companies whose representatives are appointed in executive bodies of trade associations. The RCC issued past decisions concerning members of trade associations and the associated risk areas, but this investigation regarding buy-back campaigns for EEE products is the first investigation to specifically address the antitrust risk exposure of companies which are part of the executive bodies of an association and are thus actively participating in the decision-making process within such association.

THE TIMELINE OF THE INVESTIGATION PROCEDURE

The RCC initiated its first investigation concerning the WEEE management sector in 2007. Additional investigations were initiated in 2010 and all such investigations were subsequently joined in September 2010 in a single investigation encompassing more than 30 EEE producers, importers and retailers, as well as two collective waste management organisations organized as trade associations (ECOTIC and ROREC). The Investigation also analysed the potential anticompetitive implications of the legislative framework in the WEEE management sector, thus targeting the Romanian National Authority for Environmental Protection.

The investigation was finalized in October 2012, when the RCC issued its statement of objections to the parties concerned. However, the investigation procedure was suspended as a result of a court action filed by one of the parties, which was denied access to confidential information in the investigation file.

The investigation procedure was resumed in September 2013, when oral hearings before the RCC Board took place. The deliberations of the Board lasted for approximately 3 months (i.e. until 18 December 2013) and the minutes of such deliberations were made available to

the investigated parties on 8 January 2013. The RCC now has 30 days from the date of the minutes to draft the final decision and communicate it to the parties involved.

THE ALLEGED INFRINGEMENTS ANALYSED BY THE RCC

The investigation of the RCC was targeted at two alleged antitrust infringements perpetrated during buy-back campaigns organized in 2008 and 2009 with the support of the ECOTIC and ROREC associations.

Buy-back campaigns were promotional campaigns in the context of which consumers which brought in a used EEE (technically, a WEEE) received a discount for the purpose of purchasing a new EEE of the same category. The rationale for the organizations of such campaigns was to improve the access of consumers to the latest technological updates for household EEEs and also to facilitate the reaching by Romania of its WEEE collection and processing targets imposed by the EU.

The first alleged infringement concerned an agreement between various EEE traders to fix discounts granted to consumers in buy-back campaigns. As per the investigation report issued by the RCC, it was alleged that a buy-back campaigns were organized based on a three-party agreement involving the EEE producer, the retailer and the collective organization, whereby a fixed discount of 15% was established for consumers, which would be supported equally by all the parties involved.

The second alleged infringement concerned an agreement between various EEE traders to restrict the commercialization of EEE during buy-back campaigns. As per the investigation report, such restriction could have been the result of (i) an alleged exchange of information between members of the collective associations, correlated with (ii) a conditionality between the financial support granted by the association for buy-back campaigns and a producer's contribution to the association's budget under the form of a green stamp applicable and payable for all commercialized EEE.

According to the RCC, these two elements could have been used by EEE traders as a mechanism to estimate the sales of their competitors during a buy-back campaign and thus to adjust their individual market behaviour, in light of the information allegedly exchanged.

CONCLUSIONS OF THE INVESTIGATION

Pursuant to its assessment and based also on the arguments of the parties as presented in writing and delivered orally during the hearings before the Board, the RCC exonerated the majority of the investigated companies. Sanctions were applied only to the EEE producers who were members in the executive bodies of the two collective associations.

The RCC found that such executive members were indeed involved in negotiations and decision-making regarding discounts to be offered to consumers during buy-back campaigns and were privy to certain sensitive information which were not available to other companies members of the associations or to the EEE traders having contractual relationships with the associations.

The EEE traders which were mere members or commercial partners of the associations were not sanctioned, even if they were informed via email about the decisions taken by the executive bodies of the associations and did not take steps to "publicly distance" themselves from any unlawful behavior.

The key lesson of the investigation is that an individualized analysis of each party is essential for the fair and effective enforcement an antitrust law. However, the RCC seemed inclined to rather apply a very straightforward differentiation criterion, such as the representation within the executive bodies of the associations, instead of looking into the specific situation of each party.

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SLOVAKIA

Fine upheld in Construction Cartel

By JUDr. Dr. Michaela Stessl and Mgr. Andrea Balazova

In December 2013 the Supreme Court of the Slovak Republic (hereinafter referred to as the "**Supreme Court**") confirmed the Decision of the Antimonopoly Office of the Slovak Republic (hereinafter referred to as the "**Antimonopoly Office**") and confirmed one of the highest fines imposed by the Antimonopoly Office for the cartel that was committed by six major construction companies, i.e. Strabag a.s., Doprastav, a.s., BETAMONT s.r.o, Inžinierske stavby, a.s., Skanska DS a.s., MOTA – ENGIL, ENGENHARIA E CONSTRUCAO, S.A. (hereinafter referred to as the "**Companies**"). The Companies concluded a cartel agreement and thus violated the provisions of the Act No. 136/2001 Coll. on Protection of Competition and Article 101 of the Treaty on the Functioning of the European Union. The abusive behaviour was associated with the tender for the execution of works for the construction of the D1 highway – Jánovce (stretch km 0.00 – 8.00) (hereinafter referred to as the "**Tender**"). The total fine imposed in this case amounts up to EUR 45 mil.

The Antimonopoly Office received information about a possible anti-competitive conduct from the contracting authority – Národná diaľničná spoločnosť, a.s. The suspicion of anti-competitive conducts of Companies as participants in the Tender induced high prices submitted by the Companies as bidders. Within the Tender, three separate offers were submitted. They included offer for complex construction works evaluated in the form of unit price (900 unit prices). The Antimonopoly Office analysed the Tender and found that the ratio between the unit prices submitted in each offer exhibited extremely constant figures. Such strong conformity is not standard and the Companies did not provide any satisfactory and objective explanation of such compliance.

None of the alleged explanations (software from contracting authority, rounding to two decimal places, identical sub-contractors, recommended price lists) submitted by the Companies could have justified the conformity of the offers and arguments of the Companies in this regard were refused within the proceedings held by the Antimonopoly Office and the Supreme Court. Within the proceedings it was proved that the Companies had sufficient space for communication and during the period relevant for the matter the Companies communicated and exchanged the information about the prices, which is prohibited and inadmissible under the competition law. Because Companies are giving their independent offer on the basis of their individual calculations and intentions in the Tender, without exchange of the information and without coordination of their procedure during the preparation of offers for the Tender, it is not possible to reach such constant indexes.

In October 2013 the Antimonopoly Office rendered the decision by which it imposed a fine to the Slovenská advokátska komora – Slovak Bar Association (hereinafter referred to as the "**SBA**") because the SBA determined a very limited and binding range of the information that can be provided to the public while advertising and offering of the legal services in the Slovak Republic. Herein mentioned limitations were stipulated via the Attorneys Code adopted by the SBA. Such conduct is considered as the decision by an association of enterprises, which may have the effect of restricting competition on the market of legal services within the legal profession in the Slovak Republic and which may affect trade between Member States and is therefore prohibited. The decision is not effective yet, whereas it is the first instance decision against which the SBA may and probably will appeal. The SBA is of the opinion that legal services shall be provided on the basis of the trust between the attorney and the client. The relationship of trust may be

established either in correct and professional manner or via advertisement which is alike to the one for the consumables. The attorneys must enjoy the confidence of the public in order to provide legal services which may be endangered by the unsuitable or defective advertisement or by an advertisement on inappropriate places. The SBA stresses that providing the legal services as attorney at law is not just a business, but it's the mission. The role of attorneys is to protect fundamental rights and freedoms of natural persons and legal entities and this justifies the different, rather than extensive limitations on advertising the advocacy in other forms of business. Therefore, the SBA states that it is necessary to regulate the advertisement of the legal services specifically.

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SPAIN

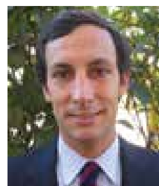
First Steps of the New Competition Authority

By Joaquin Hervada

In Spain, the newly created National Markets and Competition Commission (NMCC) is taking its first steps. Two of the most relevant steps are the opening of infringement proceedings against Telefónica and Yoigo for a network sharing agreement and its decision not to validate the electricity auction that took place on 19 December 2013 (25th Cesur Auction) which determines the estimated cost of wholesale contracts in order to calculate the last resort tariff.

This new authority results from the merger of the competition commission with the main regulatory bodies (energy -Comisión Nacional de Energía-, telecommunications -Comisión del Mercado de las Telecomunicaciones-, rail sector -Comité de Regulación Ferroviaria-, postal services -Comisión Nacional del Sector Postal-, airports -Comisión de Regulación Económica Aeroportuaria- and the audio-visual sector -Consejo Estatal de Medios Audiovisuales). The NMCC is composed of a council and four directorates. The council has two chambers, one dedicated to competition and the other to regulatory matters, and the directorates include a competition directorate and three regulatory directorates (telecoms, energy and transport).

The NMCC will act as a unified market supervisor, theoretically better suited to developing market supervision functions that benefit from existing synergies across regulators in terms of resources (personnel and assets) and expertise. This approach, based on a single authority, is different from the one adopted by other main European countries and so its appropriateness is still to be tested. In fact, the European Commission has publicly expressed its concern that the new authority might not carry out its regulatory activity in an effective and independent way.



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AMERICAS

UNITED STATES

US Record 5 Year Jail Price-Fixing Sentence Imposed

By Robert E. Connolly

Frank Peake, the former CEO and President of Sea Star Line, was sentenced in December for his role in a conspiracy to fix prices and surcharges on cargo shipped by water between the United States and Puerto Rico. The 60-month jail sentence was a record for a Sherman Act conviction. The Antitrust Division, which had sought an even longer jail sentence of 87 months, stated it hopes the record sentence "will get the attention of companies and executives around the world."

Peake was convicted of participating in a price-fixing conspiracy from 2005-2008 that affected billions of dollars of goods shipped by coastal water freight transportation between the U.S. and Puerto Rico. Sea Star transports a variety of cargo, such as heavy equipment, perishable food items, medicines and consumer goods, on scheduled ocean voyages between the continental United States and Puerto Rico. During the trial the government proved that Peake and his co-conspirators agreed—through meetings, hundreds of emails and phone calls—to fix, stabilize and maintain rates and surcharges for Puerto Rico freight services. The conspiracy, which began shortly before Peake joined Sea Star, was carried out on a day-to day basis by subordinates. But Peake was aware of the cartel, approved of it, and became involved when issues had to be resolved at the highest level.

The Peake trial came after subordinates of his and co-conspirators from other companies had pled guilty and cooperated with the government. Peak's direct subordinate at Sea Star, Peter Baci, was sentenced to 48 months in prison and fined $20,000. Peake's counterpart at Horizon Lines, Gabriel Serra, was sentenced to 34 months in prison. Other executives at Sea Star and Horizon had pled guilty, and received prison terms ranging from 7 months to 29 months.

Peake was sentenced under the Antitrust Criminal Penalty Enhancement and Reform Act that was passed in 2004 and increased the Sherman Act maximum prison sentence from 3 years to 10 years. The Act also increased the maximum corporate fine from $10 million to $100 million, but this was not of great import as the Antitrust Division had been negotiating fines in excess of $100 million under an alternative fine provision that allows the fine to be up to twice the gross gain from the cartel, or twice the loss to the victims. The new penalty regime will apply to all post 2004 cartel conspiracies.

The United States has sentencing guidelines that weigh various factors to come up with a recommended "guidelines range" prison sentence. In response to the increase in the statutory maximum jail sentence, the United States Sentencing Commission revised the sentencing guidelines for price fixing and bid rigging. The most significant factor in calculating a recommended guidelines sentence is the volume of commerce affected by a cartel. The greater the commerce the greater the potential jail sentence. And this is true even for lower level employees involved in the cartel. Under the revised sentencing guidelines, it would not be unusual for an individual involved in an international cartel to be at or near the new ten year Sherman Act maximum under the sentencing guidelines.

The new maximum sentences and revised sentencing guidelines provide the Antitrust Division with powerful new leverage in securing cooperation in cartel investigations. Leniency, which was very effective when

the maximum sentence was three years, becomes an even greater prize when executives may face ten years in prison. The Antitrust Division's hand is strengthened in plea negotiations as well. In plea agreements with individuals, the Antitrust Division will always calculate a "guidelines sentence" range, but it will depart from that range in negotiating a jail term in return for the individual's cooperation. Without a motion for departure from the Division, an individual could face ten years in prison instead of the previous maximum of three. For example, in the LCD panel price fixing cartel, the maximum sentence the Division agreed to in a plea agreement for an individual who cooperated was 18 months. But when two senior AU Optronics executives went to trial and were convicted, the Division sought a sentence of 10 years.

When courts impose a sentence, the judge is not bound by the sentencing guidelines. A court may depart for good reason. In fact, in the AU Optronics case, the court imposed a sentence of three years on the senior executives—not the 10 years requested by the Antitrust Division. (These executives are currently out of jail on bail. Their convictions are being appealed on the grounds that the Sherman Act does not apply to the extraterritorial foreign cartel activities of the defendants.) Even in the Peake case, the sentencing judge departed from the government's sentencing guidelines recommendation of 87 months in imposing the record five-year sentence. But, even though judges have been reluctant (so far) to impose the full measure of a potential jail sentence, the mere possibility of a ten-year sentence, or at least one significantly longer than the previous maximum of three years, presents new challenges and dangers for individuals in cartel cases.

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2013 Antitrust Developments for Insurance Companies

By Steven Levitsky

Insurers and reinsurers are often involved in collective action, either in co-ventures or by government edict. At the same time, any collaboration among competitors has the potential to be misinterpreted as anticompetitive behavior. 2013 saw significant US developments in the area of antitrust exemptions.

In 2013, an important antitrust development, with strong implications for insurers, was the Supreme Court's decision on the state-action doctrine in Federal Trade Commission v. Phoebe Putney Health System, Inc. This decision (decided 19 February 2013, and available at www.supremecourt.gov/opinions/12pdf/11-1160_1824.pdf) could affect many insurers because the insurance industry often relies on the state-action doctrine to protect its collective action from antitrust claims.

The state-action doctrine allows states to displace competition, in favor of regulation or monopoly, if two essential elements are met. The two requirements are that the state (1) must "clearly articulate" its intention to exempt the activity from competition and (2) must "actively supervise" the exempt activity. (If the anticompetitive activity is itself carried out by a government entity, then only the first requirement applies.)

The state-action exemption is important to insurers and reinsurers. Typical examples of its use include cases where insurers are required by law to collaborate on rate submissions or to take other joint activity with competitors. Or, insurers or reinsurers might co-venture on projects. Collaboration among competitors on sensitive issues like price or output always has the potential to raise serious questions about whether the joint activity could be misinterpreted as a conspiracy to restrain trade.

In the past, state-action doctrine defenses have typically failed when one of the two essential elements – either the "clear articulation" of intent to displace competition, or the "active supervision" of the exempted activity – was missing. In many cases, the participants, and sometimes even the state itself, may have assumed these essential elements had been satisfied. That was the case in Phoebe Putney.

Phoebe Putney involved a hospital merger which was claimed to have been immune from antitrust law because of a state-action exemption. A Georgia law had created special-purpose hospital authorities and gave them general corporate powers. These included the authority "to provide a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state," as well as the powers to "exercise public and essential governmental functions," "all the powers necessary or convenient to carry out and effectuate" the law's purposes, and the power "[t]o acquire by purchase, lease, or otherwise and to operate projects."

Phoebe Putney itself was a hospital owned by one of these hospital authorities. Phoebe Putney proposed to buy the only other hospital in its county. If approved, the merger would have given the combined hospitals an 86% market share in the county. Relying on the enabling statutes, the authority approved the purchase.

The FTC challenged the merger. But it lost in the District Court and Eleventh Circuit, which held that, even though the transaction would lessen competition, or even create a monopoly, the acquisition was exempt from antitrust scrutiny because it was a "foreseeable result" of the Georgia enabling statute.

The Supreme Court reversed. Turning to the first state-action test ("clear articulation"), it found that the statutes were inadequate. The Court agreed that the test did not require an "express" statement authorizing the activity. Instead, the Court said, it would be enough if the

anticompetitive effect was "foreseeable result" of the state's authorizing law. The Court said, "we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'"

In Phoebe Putney, the Supreme Court found that "there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." Despite the broad powers given to the hospital authority, the Court concluded that there was no authority "to act or regulate anticompetitively." In fact, the Court observed that only a relatively small proportion of the powers delegated by the State to the hospital authority had the ability to reduce competition. As a result, the Court concluded "this is too slender a reed" to rely on for "clear articulation" of an intention to create antitrust immunity.

The Court summed up, saying, "'simple permission to play in a market' does not 'foreseeably entail permission to roughhouse in that market unlawfully.'"

The lesson here is that parties who rely on state-action immunity need to verify for themselves that the "clear articulation" or "active supervision" tests were met. This failure to critically verify the pre-conditions for the state-action doctrine is not a new story. In the past there have been many failures. In fact, one of the leading cases in this area, FTC v. Ticor Title, 504 U.S. 621(1992), is a great example of a failure to verify the "active supervision" test. In Ticor, title insurance industry members used rating bureaus to set joint rates and file them with the states. The insurers relied on the state-action doctrine, citing state authorization for the rating bureau activity and the states' power to review rate filings that were made. But in fact, many of the filings were "inertia" filings. They became effective automatically after the passage of time unless the state insurance regulator failed to veto them. In fact, many of the states never reviewed the filings at all. As a result, the Supreme Court found there was a failure to "actively supervise" the collective activity, and the defense failed.

The lesson here is that anyone who relies on the state-action doctrine for antitrust immunity needs to independently ensure that there is (1) "clear articulation" and (2) "active supervision" of the anticompetitive activity. Merely assuming that these two critical elements are satisfied is just not enough and could involve very serious ramifications.

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ASIA PACIFIC

AUSTRALIA

It's reform season down under; from mining boom to dining boom

By David Peters

Australia elected a new government (Coalition Government) in September 2013. Accordingly, 2014 promises a number of reforms, including a "root and branch" review of Australia's competition law framework.

Australian investment is in a transition from mining to food production, keeping in step with the economic transformation of China (Australia's largest trading partner) from developing to developed nation. There are competition law implications, including food industry consolidation through mergers.

ROOT AND BRANCH REVIEW OF COMPETITION LAW

December 2013, the Coalition Government issued terms of reference for a root and branch review of Australian competition law. The review will examine current laws and also the broader competition framework.

The root and branch review is the first major review of competition policy since the Hilmer Report was published in 1993. The Hilmer Report was influential and resulted in significant legislative changes. Those changes included the introduction of controversial rules providing for third party access to significant bottleneck infrastructure, important given Australia's reliance on the export of bulk minerals such as iron ore and coal which need such infrastructure.

The final report of the root and branch review is due in 12 months. Whatever the report says, we consider it unlikely that the Coalition Government will make major changes to competition law. The Hilmer Report followed close on the heels of an economic recession. There is no such impetus for major changes currently – Australia has not been in recession since the early 1990s.

NATIONAL THIRD PARTY ACCESS REGIME REVIEW

During 2013 Australia's Productivity Commission (PC) reviewed the operation of the third party access provisions in Part IIIA of the *Competition and Consumer Act 2010 (CCA)*. Part IIIA provides for third parties to get access to significant bottleneck infrastructure under certain circumstances. The PC's final report was provided to the government in October 2013. The government is expected to release the report shortly along with its views on which recommendations will be accepted and legislated.

Much of Australia's coal export infrastructure and some of its iron ore export infrastructure is subject to access rules that derive from Part IIIA. During 2004 to 2012, mining majors BHP Billiton and Rio Tinto successfully fought off Fortescue Metals' attempts to bring their Australian iron ore rail infrastructure under Part IIIA.

We consider that the Coalition Government may face some difficult decisions on which of the PC's recommendations to accept. In particular, should third party access be granted because a regulator decides that it would be efficient or because a third party can't profitably provide its own infrastructure? The efficiency approach arguably involves some degree of central planning, the profitability approach suggests cross subsidisation of more marginal firms – neither may be palatable to the Coalition Government which considers itself business friendly.

FROM MINING BOOM TO DINING BOOM

Australian investment is said to be in transition. Much of Australia's economic growth during the last decade stemmed from an expansion of mining, particularly for iron ore and coal. Demand for these minerals was driven primarily by economic growth in China.

Mining investment in Australia is now tapering off, particularly for coal as world prices fall in response to increased global and regional supply. Mining will continue to be important for Australia during 2014, however, investors and policy makers are now looking to Australian food production as the next growth industry.

The economic driver for the so called "dining boom" is the increasing demand for quality food products from China's growing middle class. The example is New Zealand which has strong economic growth based on Chinese demand for its milk products. This demand is strengthening the New Zealand dollar which is tipped to reach parity with the weakening Australian dollar in 2014 (for the first time in 40 years).

The increased commercial interest in food production is driving the proposed takeover by dairy coop Murray Goulburn of Warrnambool Cheese & Butter (WCB). At time of writing the takeover is due to be assessed under Part VII of the CCA by the Australian Competition Tribunal. A hearing is set down for February 2014. Murray Goulburn will argue that any resulting lessening of competition in the purchase of raw milk from farmers will be offset by public benefits arising from the transaction. If convinced, the Tribunal must authorise the transaction.

Canadian dairy giant Saputo is also bidding for a controlling share of WCB. Saputo does not currently compete with WBC and therefore does not need to get approval under competition law. At time of writing Saputo looks increasing likely to win the bidding contest, in which case the Tribunal hearing would not proceed. Nonetheless, we expect food industry consolidation will continue.

OTHER FOOD INDUSTRY HAPPENINGS IN 2014

The owners of wheat port export facilities in Australia are required to grant access to third party wheat exporters. Access is currently granted under an undertaking given by owners of wheat port export facilities to the Australian Competition and Consumer Commission (ACCC) under Part IIIA of the CCA. The Department of Agriculture, Fisheries and Forestry is currently consulting with industry to draft a mandatory code of conduct under Part IVB of the CCA that will govern third party access from October 2014.

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SOME OTHER NEWS...

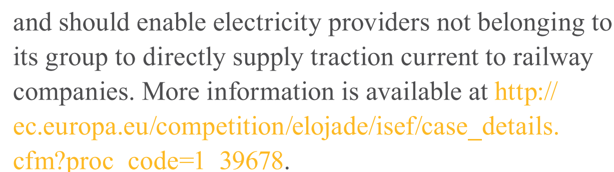
EUROPEAN UNION

Commission fines Johnson & Johnson and Novartis €16 million for delaying market entry of generic pain-killer fentanyl. The Commission imposed fines of EUR 10,798,000 on the US pharmaceutical company Johnson & Johnson, and EUR 5,493,000 on Novartis of Switzerland. In July 2005, their respective Dutch subsidiaries concluded an anticompetitive agreement to delay the market entry of a cheaper generic version of the pain-killer fentanyl in the Netherlands. They had entered into a "co-promotion agreement", which according to the Commission was little more than an agreement to limit generic entry of the medicine in the Netherlands. The agreement, which was terminated when a third party launched generic version of the product in the Netherlands, lasted seventeen months. This is the second decision by the Commission relating to so-called "pay for delay" agreements in the pharmaceutical sector. The Commission's press release is available at http://europa.eu/rapid/press-release_IP-13-1233_en.htm.

Commission publishes Fourth Report on the Monitoring of Patent Settlements. This report is the outcome of the monitoring exercise of patent settlement agreements between originator and generic companies in the pharmaceutical sector launched by the Commission in January 2013 as a follow-up to its inquiry in the sector concluded in July 2009. This fourth report covers the period of the calendar year 2012, and finds that the number of settlements that may give rise to antitrust concerns remains low. It also finds that the overall number of patent settlements has increased in comparison to the results of the Commission's three earlier reports on patent settlements. The Commission considers as demonstrating that companies can successfully settle their disputes within the boundaries of EU competition law. The Fourth Report on the Monitoring of Patent Settlements is available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/patent_settlements_report4_en.pdf.

Commission fines banks EUR 1.71 billion for participating in cartels in the interest rate derivatives industry. In a highly publicised case, the Commission fined eight international financial institutions a total of EUR 1,712,468,000 for participating in illegal cartels in markets for financial derivatives covering the European Economic Area. Four of these institutions participated in a cartel relating to interest rate derivatives denominated in the euro currency. Six of them participated in one or more bilateral cartels relating to interest rate derivatives denominated in Japanese yen. This is a settlement decision, in accordance with which the parties received a 10% reduction in fines for their admittance of the infringement. Investigations continue into financial institutions that have not agreed to settle, and in regard to alleged collusion in relation to other currency-denominated benchmark rates, credit default swaps, foreign exchange markets, and benchmarks of oil and biofuels. These are the highest total fines for a cartel ever imposed by the Commission. The Commission's press release is available at http://europa.eu/rapid/press-release_IP-13-1208_en.htm.

Proceedings against Deutsche Bahn's pricing of traction current in Germany: Commission accepts legally binding commitments. The Commission undertook unannounced inspections in March 2011, and it initiated formal antitrust proceedings against Deutsche Bahn in June 2012. The Commission has now adopted a decision accepting legally binding commitments by Deutsche Bahn in relation to its pricing of traction current in Germany and thereby closes its investigation. The Commission had concerns that its pricing system, in particular discounts that only railway companies belonging to its own group could obtain, may have hampered competition in the German markets for rail freight and long-distance passenger transport in breach of EU competition law. Deutsche Bahn has committed to introducing a new pricing system for traction current that would apply uniformly to all railway companies



and should enable electricity providers not belonging to its group to directly supply traction current to railway companies. More information is available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39678.

Commission opens in-depth investigation into Telefónica Deutschland's acquisition of E-Plus. The Commission opened an in-depth inquiry into the acquisition of E-Plus by Telefónica Deutschland. Both companies provide mobile telephony services in Germany via their own respective mobile networks. The Commission has concerns that the transaction may reduce competition in the markets for retail mobile telephony and for wholesale access and call origination in Germany. The Commission has until 14 May 2014 to take a decision. The Commission's press release is available at http://europa.eu/rapid/press-release_IP-13-1304_en.htm.

Commission approves – subject to conditions – the acquisition of ground handling service provider Servisair by Swissport. The Commission approved the acquisition of the ground and cargo handling service provider Servisair by its competitor Swissport. The approval is conditional upon the divestment of Swissport's ground handling activities at Birmingham airport and Servisair's ground handling activities at Helsinki, London Gatwick and Newcastle airports. The Commission considers that the merged entity would have faced insufficient competition to avoid price increases for ground handling services at those airports. More information is available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7021.

Commission consults on draft Regulation exempting more aid measures from prior notification. The Commission published for public consultation a draft revised version of the General Block Exemption Regulation (GBER). The Regulation exempts unproblematic categories of aid from needing to be notified to the Commission. The draft includes new categories of exempted aid and aims to simplify the assessment. It will seeks to improve the ex-post control of aid granted in accordance with the Regulation. The public consultation is open until 12 February 2014. More information is available at http://ec.europa.eu/competition/consultations/2013_consolidated_gber/index_en.html.

Commission consults on draft rules on state aid for research, development and innovation. The Commission also published for public consultation a draft framework setting out revised conditions under which Member States can grant state aid for research, development and innovation activities (R&D&I). The proposed framework on state aid for R&D&I is complementary to the General Block Exemption Regulation (GBER) which sets the conditions for certain aid measures – including R&D&I – to be exempted from prior notification to the Commission. The R&D&I framework, however, sets the standard for large R&D&I aid that goes beyond the GBER's limits. The Commission considers that the changes will grant Member States more flexibility for implementing R&D&I aid. Stakeholders' comments on the draft R&D&I framework are welcome until 17 February 2014. The Commission intends to adopt a new framework in the spring of 2014. The draft framework on R&D&I and further details are available at http://ec.europa.eu/competition/consultations/2013_state_aid_rdi/index_en.html.

Commission consults on draft rules for state support in energy and environmental field. A third public consultation by the Commission in the field of state aid this month is on draft guidelines for assessing public support projects in the field of energy and environment. The public consultation is open until 14 February 2014. Further information is available at http://ec.europa.eu/competition/consultations/2013_state_aid_environment/index_en.html.

Commission adopts revised exemption for small aid amounts (*de minimis* Regulation). The Commission adopted a revised Regulation on small aid amounts that fall outside the scope of EU state aid control because they are deemed to have no impact on competition and trade in the EU. Measures that fulfil the criteria of the Regulation do not constitute "state aid" in the meaning of EU law. They, therefore, do not need to be notified to the Commission for approval before they are implemented. The Commission's press release is available at http://europa.eu/rapid/press-release_IP-13-1293_en.htm.

Commission opens in-depth investigation into public funding of certain Spanish professional football clubs. The Commission opened three in-depth investigations to verify whether various measures in favour of Spanish professional football clubs are in conformity with EU state aid rules. The alleged aid includes possible tax privileges, a land transfer, and bank guarantees granted to clubs. Clubs concerned are Real Madrid CF, Barcelona CF, Athletic Club Bilbao, Club Atlético Osasuna, and three Valencia clubs. The Commission's opening of these investigations follows a decision by the European ombudsman this month which accused the Commission of maladministration – for taking too long to investigate the alleged aid, and for the appearance of a conflict of interest considering the EU Competition Commissioner Joaquin Almunia's strong links with one of the clubs. The EU administrative watchdog's recommendation is available at http://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/52874/html.bookmark, and the Commission's press release is available at http://europa.eu/rapid/press-release_IP-13-1287_en.htm.

Other in-depth investigations into possible breaches of EU state aid rules opened in December 2013. The Commission also opened an in-depth investigation into support for energy-intensive companies benefitting from a reduced renewables surcharge (so-called EEG-surcharge) in Germany (see http://europa.eu/rapid/press-release_IP-13-1283_en.htm), into the UK government's plan to subsidise the construction and operation of a new nuclear power plant at Hinkley Point in Somerset (see http://europa.eu/rapid/press-release_IP-13-1277_en.htm), and into Belgium's implementation of a system of support for innovative companies (Young Innovative Companies, see http://europa.eu/rapid/press-release_IP-13-1203_en.htm).

AUSTRIA

Austrian Federal Competition Authority continues push against alleged price fixing by major supermarkets. After the € 20,8 Mio fine by the Austrian Cartel Court against REWE in May 2013 for vertical price fixing the Austrian Federal Competition Authority brought new claims against the other major Austrian supermarket chain SPAR on 29 November 2013 and 16 December 2013. The Competition Authority alleges that prices for consumers were set between the supermarkets and suppliers (vertical price fixing). At the same time this was used to supplement horizontal price fixing using suppliers as middle-men. The case is now pending at the Austrian Cartel Court. In addition, the Federal Competition Authority is consulting on guidelines on vertical resale price maintenance. This shows that vertical restraints, especially in highly concentrated markets, continue to be at the centre of enforcement activities in Austria. The press release is available at: http://www.en.bwb.gv.at/News/Seiten/BWB208millionEURfineagainstREWE.aspx

GERMANY

On 1 December 2013 the operation of the Market Transparency Unit ("MTU") for Fuels started. The setup of the MTU aims on a more effective prevention, detection and prosecution of illicit behavior in the fuel markets. Due to the existing oligopoly-structure of the market as well as the homogeneity of fuel and the high transparency of prices for competitors, monitoring of the price building process in the gas stations sector seemed to be inevitable. For this purpose, petroleum producing companies as well as operators of gas stations are required to report any change of the fuel prices to the MTU, who transfers the data received from the operators to car drivers via internet, smartphone or navigation systems. The FCO's press release is available at: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/29_11_2013_MTS_Regelbetrieb.html?nn=3599398.

Funke takeover of regional newspapers and women's magazines of Springer cleared. On 3 December 2013 the FCO cleared the takeover of two regional daily newspapers (Hamburger Abendblatt and Berliner Morgenpost), several advertising newspapers and the women's magazines segment of Axel Springer AG by the media group Funke Mediengruppe. The planned takeover of Springer's TV program magazines and the creation of two joint ventures in the area of marketing and distribution are still being examined.

The FCO's press release is available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/03_12_2013_Funke-Springer-Freigabe.html?nn=3599398.

On 20 December 2013 the FCO prohibited online hotel booking platform HRS from continuing to apply its "best price" clause (most favoured customer clause). It ordered the company to remove the clause from contracts and general terms and conditions as far as it affects hotels in Germany. The FCO was of the opinion that such clauses ultimately prevent the offer of lower hotel prices elsewhere and, thus, restrict competition between online platforms. Moreover, the FCO argued that best price clauses would make the market entry of new platforms considerably more difficult because they would prevent them from offering hotel rooms at lower prices. The FCO's press release is available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html?nn=3599398.

UNITED KINGDOM

Hotel booking websites. The OFT has opened a consultation on revised commitments proposed by Booking.com, Expedia and IHG, which are designed to address the regulator's concerns in relation to the online offering of room-only hotel accommodation bookings by online travel agents ("OTAs"). In the OFT's Statement of Objections, the OFT alleged that Booking.com and Expedia (the OTAs) had entered into agreements with IHG which restricted their ability to discount rates at which room-only hotel bookings are offered to consumers. The three parties have amended original commitments proposed in August 2013. The OFT is minded to accept the revised commitments, and is inviting interested third parties to comment. The press release is available at: http://www.oft.gov.uk/news-and-updates/press/2013/86-13.

UNITED STATES

New Criminal Enforcement Leadership at Antitrust Division for 2014. The US Department of Justice's Antitrust Division had another very strong year in 2013 with more than $1 billion in criminal fines being imposed and the imposition of the longest jail sentence (5 years) for an antitrust conviction. The Division also helped collect several billion dollars in restitution for victims of various conspiracies. The government faces challenging docket in 2014 as the auto parts investigation rolls on and other investigations, particularly in the financial industries continue. These challenges will be met with new leadership. In October Scott Hammond stepped down as the Division's top criminal enforcement official after 8 years. Hammond has been replaced by Brent Snyder, a long time Division prosecutor who has had notable trial success, including the prosecution of AU Optronics. Also, the head of the New York and San Francisco field offices departed late in 2013. Jeff Martino (New York) and Marc Siegel (San Francisco) will be taking over. The Division will also continue in 2014 with a greatly reduced head count of criminal enforcers. The number of prosecutors working on criminal antitrust matters has fallen from 124 to 84, in large part because of the closing of four field offices in 2013—Atlanta, Cleveland, Dallas and Philadelphia. As the amount of fines imposed and the increasing jail sentences show, however, the Division is still an aggressive enforcement agency and engaging in cartel activity has never been more risky.

Conviction of Three for Muni Bond Bid Rigging Reversed. In December, the Second Circuit Court of Appeals issued a 2 to 1 decision reversing the convictions of three defendants who had been convicted after trial of rigging the interest rate paid on municipal bonds. The court ruled that the statute of limitations had run and the convictions were time barred. The government had contended that the conspiracy continued as long as payments were being made on the bonds at the fixed interest rate—a period that could last 25 years or more depending on the duration of the bond. The Second Circuit found this went too far and reversed stating "A conspiracy ends notwithstanding the receipt of anticipated profits where the payoff merely consists of a lengthy, indefinite series of ordinary, typical noncriminal unilateral actions." There was a strong dissenting opinion and the government may seek a rehearing before the entire Second Circuit. The ruling is not expected to impact other government munibonds convictions.

United States v. Grimm, No. 12-4310-cr, slip op. at 11-12 (2d Cir. Dec. 9, 2013). The judgment is available at: http://www.ca2.uscourts.gov/decisions/isysquery/496693c9-1394-40bc-afc1-40283f59d0dc/7/doc/12-4310_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/496693c9-1394-40bc-afc1-40283f59d0dc/7/hilite/

Antitrust Division Joins FOREX Probe. The US Department of Justice confirmed that it had "an active, ongoing investigation into possible manipulation of foreign exchange rates" by traders at several global banks. The US has joined other enforcement agencies in what has become another global investigation similar to the LIBOR investigation. The investigation centers on evidence that may show that traders from different banks shared information about client orders and agreed to a sequence for placing their own trades to their advantage. The alleged discussions took place in electronic chat rooms with names including "The Cartel" and "The Bandits' Club." The investigation is in its early stages and will likely be making international headlines for quite some time.

KEY CONTACTS

DLA Piper is a global law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs anywhere in the world.

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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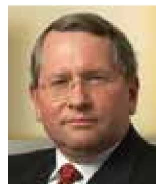

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