The Public Competition Enforcement Review

Sixth Edition

Editor
Aidan Synnott

Law Business Research

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This article was first published in
The Public Competition Enforcement Review 6th edition
(published in April 2014 – editor Aidan Synnott).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-01-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ANJIE LAW FIRM

BAYKANIDEA LAW OFFICES

BULBOACA & ASOCIATII SCA

BUSTAMANTE & BUSTAMANTE LAW FIRM

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CONTENTS

EDITOR'S PREFACE

The reports from around the globe collected in this volume will be of keen interest to practitioners of competition law everywhere. Increasingly we see that effects of public competition enforcement in individual jurisdictions are felt well beyond those jurisdictions as firms become globalised and cross-border trade increases. To be sure, many jurisdictions retain important local particularities in competition law and enforcement priorities. However, as we can see from the reports collected in this volume, increasing international cooperation among competition enforcers, the widespread reach of firms' conduct and the economic circumstances of certain industries have led to a notable convergence in the cases attracting the attention of enforcers.

With respect to cartel enforcement, the reports from the European Union, Switzerland and the United States all describe efforts in those jurisdictions concerning alleged fixing of the London Inter-Bank Offered Rate (LIBOR). Last year, in a related case, the European Commission levied its largest-ever aggregate fine. The past year also saw continued efforts by regulators to police *auto parts* price-fixing cartels. For example, the United States, the European Commission and Japan each have levied significant fines on auto parts companies around the globe, and Australia continued its proceedings against several firms in this industry. The alleged *liquid crystal display* cartel continues to attract attention from (and fines imposed by) authorities around the world.

Various alleged bid-rigging schemes have attracted the attention of authorities in many jurisdictions, including Brazil, Colombia, Germany, India, Romania, Switzerland and the United States. These investigations range from the provision of subway trains to railway tracks to rubber soles for boots to firearms to road construction. Competition authorities in the United States have continued their focus on bid rigging in municipal bond and real estate foreclosure auctions. The Italian authorities investigated a joint venture between Italian and French firms formed to bid on the provision of services to art museums and archeological sites, but found no infringement.

We also see a convergence in enforcement priorities in other areas. As detailed in the chapters that follow, several jurisdictions have acted against pay-for-delay agreements in the pharmaceutical industry. Last year, the United States Federal Trade Commission

won an important Supreme Court challenge to these agreements, and the European Commission and France levied several fines on parties to such agreements. Italy has also commenced an investigation into one such agreement. The reports from Australia, India and the United Kingdom describe further enforcement efforts in the pharmaceutical industry. Argentina and Italy, like the United States and Spain, continue to investigate various professional associations for possible anti-competitive agreements.

High technology industries – and in particular concerns surrounding the behaviour of firms holding standard-essential patents – continue to get significant attention from enforcers around the world. Chinese authorities have launched an investigation into a wireless research and development company over complaints that it has charged excessive fees for the licensing of certain of its patents for technology standards for mobile phones; the European Commission is undertaking an investigation of major industry players in connection with their ownership of standard-essential patents; and United States authorities continue to actively discuss policy in this area.

Additionally, both the United States and the European Commission have had success in their actions against e-Book publishers. Several jurisdictions – including Brazil, Germany, Switzerland and Finland – have brought actions concerning resale price maintenance schemes for various products. We also note that Brazil, Japan and Spain have moved against copyright management organisations for their actions with respect to royalties. Several of the chapters that follow note the efforts of various regulators concerning interchange fees associated with credit card transactions.

Enforcement activity related to mergers remains robust, and issues surrounding consolidation in the airline industry have occupied regulators across the globe. Both the European Commission and the United States Department of Justice confronted proposed airline mergers last year, leading to different results: the European Commission continued to oppose the proposed merger of Irish airlines Aer Lingus and Ryanair, while the merger of American Airlines and US Airways was ultimately cleared by the United States authorities. Brazilian authorities approved the merger of Azul and Trip Linhas Aéreas subject to conditions. Meanwhile, as detailed in the report from India, after an analysis that will be of interest to practitioners in and observers of airline competition issues, the Indian authorities approved various agreements between Etihad Airways and Jet Airways.

Competition law continues to evolve across the globe. Indeed, the report from the United Kingdom will be of particular interest. It describes the significant changes in the competition enforcement regime there, as authority for enforcement shifts from two separate authorities, the Office of Fair Trading and the Competition Commission, to a single Competition and Markets Authority. Mexico has a proposed new Antitrust Act, which is under discussion in the Mexican Congress. In China, Mofcom has published draft Provisions on Imposing Restrictive Conditions on Concentration of Undertakings which, we read, are expected to be adopted this year. We also note that in the coming year Australia will undertake a significant review of its competition laws. The report from Brazil details the first full year of that jurisdiction's new competition regime. The report from Germany describes important amendments to the German Act Against Restraints to Competition, particularly regarding the law's application to merger review; and the report from France details new guidelines there for merger control. Numerous

jurisdictions continue to implement and refine leniency programmes designed to encourage the reporting of cartel activity.

The reports that follow detail the efforts of public competition enforcers around the globe. Also of keen interest is the keynote piece challenging the European Commission's philosophy of encouraging private enforcement of competition laws. That chapter will surely provoke much thought on the efficacy and desirability of such enforcement.

Aidan Synnott
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April 2014

Chapter 10

EUROPEAN UNION

Oliver Geiss and Will Sparks[1]

I INTRODUCTION

2013 was the last full calendar year before the European parliamentary elections and the appointment of a new Commissioner for competition. The clock therefore started to run for the European Commission (Commission) to close a number of outstanding cases that have made the headlines in recent years.

In terms of cartel enforcement, 2013 saw the Commission impose its largest-ever aggregate fine in two cases relating to interest rate derivatives, and its largest-ever leniency waiver in terms of the fine avoided. Both the General Court, which decides cases in the first instance, and the Court of Justice of the European Union (CJEU), which hears appeals and requests for preliminary rulings from the Member States, issued a high volume of judgments including important decisions on parental liability. Access to the Commission file also emerged as a hot topic both for the courts and the Commission, which issued a comprehensive legislative proposal on antitrust damages actions (see Section II, *infra*).

Regarding non-cartel antitrust, the Commission for the first time fined an undertaking for breaching binding commitments it had offered to avoid a finding of an infringement. The CJEU handed down several important judgments on preliminary rulings, highlighting its role in assisting national courts with the effective public enforcement of competition law in the EU (see Section III, *infra*).

Although developments were limited as regards sectoral competition enforcement (see Section IV, *infra*), the Commission vigorously pursued its agenda of modernising state aid enforcement. This ongoing project saw the adoption of major legislative and regulatory changes in 2013, while the Commission also conducted several consultations

1 Oliver Geiss is a partner and Will Sparks is a senior associate at Squire Sanders. The authors are grateful for the assistance of Anthony Bochon in the preparation of this chapter.

in anticipation of further reforms before the end of its tenure in mid-2014 (see Section V, *infra*).

Finally, in the field of merger control, the Commission instituted substantive reforms intended to streamline the notification process and its review of filings, including by overhauling most of its standard forms. Even more significant changes may lie ahead if the Commission presses forward with plans to extend its remit to investigate acquisitions of non-controlling minority shareholdings (see Section VI, *infra*).

II CARTELS

The Commission adopted four cartel decisions in 2013, the same number as in both 2012 and 2011. The total fines of €1.882 billion imposed in these four cases exceeded the total fines of €1.744 billion imposed in 2012, but fell far short of the €2.868 billion imposed in 2010. 2013 saw the largest aggregate fine ever imposed as well as the largest fine ever avoided under the leniency programme, both in the context of an investigation into the manipulation of interest rate derivatives. Both the CJEU and the General Court handed down judgments in several cartel appeals in 2013 that included notable decisions on issues concerning parental liability and access to the file.

i Significant cases

Commission decisions

Three of the four cartel decisions adopted in 2013 involved use of the settlement procedure, which is based on (some or all) of the parties under investigation admitting their liability in return for reduced fines. It is notable that the one case decided in 2013 that was not settled was, by some distance, the smallest in terms of scope and financial impact.

Interest rate derivatives: EIRD and YIRD[2]

In December 2013, the Commission imposed its highest-ever aggregate fine in two decisions relating to the *Euro (EIRD)* and *Yen (YIRD)* interest rate derivatives cartels. The Commission found that these cartels led to the manipulation of two currency benchmarks, namely LIBOR (London Interbank Offered Rate) and EURIBOR (Euro Interbank Offered Rate).

In the *EIRD* case, seven international banks were found to have colluded to distort price components for EIRD (from 2005 to 2008), exchanging information on their respective submissions for the calculation of EURIBOR and their trading and pricing strategies. Following unannounced inspections in October 2011, the Commission opened proceedings in March 2013 in response to which four of the banks applied for settlement. Barclays received full immunity, avoiding a fine of around €690 million, while three other banks (Deutsche Bank, RBS and Société Générale) received fines for a

2 *Euro interest rate derivatives (EIRD)*, Case COMP/39.914, not yet published, and *Yen interest rate derivatives (YIRD)*, COMP/39.861, not yet published.

total of €1.042 billion, which were reduced for cooperating under the Leniency Notice[3] and agreeing to settle. The Commission is still investigating the three banks that did not settle (Crédit Agricole, HSBC and JP Morgan).

In the *YIRD* case, the Commission found that five international banks and two brokers had attempted to influence the submissions of other LIBOR banks. The parties exchanged information on trading and future LIBOR Yen submissions for a period of up to 10 months between 2007 and 2010. One bank, UBS, received full immunity under the Leniency Notice for revealing the cartel's existence and so avoided what would otherwise have been the Commission's highest-ever fine on a single undertaking, of approximately €2.5 billion. Reduced fines were imposed on the four other banks and one broker, totalling €669.72 million.[4] The combined fines imposed on Deutsche Bank in the *EIRD* and *YIRD* cases amounted to €725.36 million, the second-highest individual cartel fine to date in the EU.

Automotive wire harnesses[5]

In July 2013, the Commission imposed fines totalling €141.791 million on suppliers of automotive wire harnesses following dawn raids held in February 2010. One supplier, Sunitomo, received full immunity for revealing the existence of the cartel, while the remaining four cartelists received reduced fines for cooperation. All participants settled. The case involved several separate infringements affecting supplies to Toyota, Honda, Nissan and Renault, and is the first in what is expected to be a series of antitrust decisions in the car parts sector.

North Sea shrimps[6]

This case was the only Commission cartel decision of 2013 that did not involve a settlement. Four shrimp traders were found to have entered into a cartel to fix prices and sales volumes for North Sea shrimps between 2000 and 2009. The fines imposed on three of the cartel members totalled €28.716 million, while the fourth received a 100 per cent reduction under the Leniency Notice. This case demonstrated the Commission's discretion to set fines below 10 per cent of turnover, as two of the three companies fined received reduced penalties to reflect the characteristics of their businesses and the extent of their participation. Heiploeg, which received by far the largest fine of €27.082 million and had an inability-to-pay application rejected, has since been declared bankrupt.

3 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2006 C298/17.

4 The Commission continues to investigate the broker ICAP, which did not settle.

5 Summary of Commission Decision of 10 July 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case AT.39748 – *Automotive wire harnesses*), OJ 2013 C283/5.

6 *Shrimps*, Case COMP/39.633, not yet published.

ii Significant judgments

The CJEU and, in particular, the General Court issued a high volume of judgments in relation to cartels in 2013. Common themes examined in these cases included the limits of parental liability,[7] evidence of cartel participation[8] and procedural issues.[9] The cases considered in more detail below all involved, to some extent, original interpretations of law by the EU courts.

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7 Case C-499/11 *The Dow Chemical Company and Others v. European Commission*, Judgment of 11 July 2013, not yet published; Case C-508/11 *ENI SpA v. European Commission*, Judgment of 8 May 2013, not yet published and Case C-511/11 *Versalis SpA v. European Commission*, Judgment of 13 June 2013, not yet published; Case C-446/11 *European Commission v. Edison SpA*, Judgment of 5 December 2013, not yet published; Case T-399/09 *Holding Slovenske elektrarne doo (HSE) v. European Commission*, Judgment of 5 December 2013, not yet published; Case C-286/11 *European Commission v. Tomkins plc*, Judgment of 22 January 2013, not yet published; Case C-287/11 *European Commission v. Aalberts Industries NV and Others*, Judgment of 4 July 2013, not yet published.

8 *Marine hoses* cartel: Case T-146/09 *Parker ITR Srl and Parker-Hannifin Corp v. European Commission*, Joined Cases T-147/09 and Case T-1478/09 *Trelleborg Industrie SA v. European Commission*, Case T-154/09 *Manuli Rubber Industries SpA (MRI) v. European Commission*, Judgments of 17 May 2013, not yet published; *Bathroom fittings and fixtures* cartel: Case T-364/10 *Duravit Duravit AG, Duravit SA and Duravit BeLux SPRL/BVBA v. European Commission*, Case T-368/10 *Rubinetteria Cisal SpA v. European Commission*, Joined Cases T-373/10, T-374/10, T-382/10 and T-402/10 *Villeroy & Bosch v. European Commission*, Case T-375/10 *Hansa Metallwerke AG and Others v. European Commission*, Case T-376/10 *Mamoli Robinetteria SpA v. European Commission*, Case T-378/10 *Masco Corp and Others v. European Commission*, Joined Cases T-379/10 & Case T-381/10 *Keramag Keramische Werke AG and Others and Sanitec Europe Oy v. European Commission*, Case T-380/10 *Wabco Europe and Others v. European Commission*, Case T-386/10 *Aloys F Dornbracht GmbH & Co KG v. European Commission*, Case T-396/10 *Zucchetti Rubinetteria SpA v. European Commission*, Case T-408/10 *Roca Sanitario, SA v. European Commission*, Case T-411/10 *Laufen Austria AG v. European Commission*, Case T-412/10 *Roca v. European Commission*, Judgments of 16 September 2013, not yet published; *Penetration bitumen* cartel: Case T-462/07 *Galp Energía España, SA, Petróleos de Portugal (Petrogal) et Galp Energia, SGPS, SA v. European Commission*, Case T-482/07 *Nynäs Petroleum AB and Nynas Petróleo, SA v. European Commission*, Case T-495/07 *Productos Asfálticos (PROAS), SA v. European Commission*, Case T-496/07 *Repsol Lubricantes y Especialidades, SA and Others v. European Commission*, Case T-497/07 *Compañía Española de Petróleos (CEPSA), SA v. European Commission*, Judgments of 16 September 2013, not yet published.

9 *Aluminium fluoride*: Case T-404/08 *Fluorsid SpA and Minmet financing Co v. European Commission*, Case T-408/08 *Industries chimiques du fluor (ICF) v. European Commission*, Judgments of 18 June 2013, not yet published; *Slack wax*: Case T-548/08 *Total SA v. European Commission*, Case T-566/08 *Total Raffinage Marketing v. European Commission*, Judgments of 13 September 2013, not yet published; *Bananas* cartel: Case T-587/08 *Fresh Del Monte Produce, Inc v. European Commission* and Case T-588/08 *Dole Food Company, Inc and Dole Germany OHG v. European Commission*, Judgments of 14 March 2013, not yet published.

Parental liability

Several CJEU judgments handed down in 2013 considered the concept of parental liability in the context of cartel infringements.

In one of several appeals arising from the Spanish and Italian *raw tobacco* cartel cases, the CJEU examined the interest of Mindo, a subsidiary seeking the annulment of a Commission decision imposing fines that had already been paid by its parent company. In an earlier judgment, the General Court had ruled that Mindo had no interest in appealing the Commission's decision to impose a fine of €10 million on Alliance One International, its parent company, of which Mindo was jointly and severely liable to pay €3.99 million. Mindo was considered to have no interest since its parent had paid the fine in full. On appeal, however, the CJEU held that Mindo, being a co-debtor of the fine, retained an interest in the annulment of the decision since there was no evidence that Alliance One International would not claim a contribution from Mindo towards payment.

The CJEU handed down four judgments in 2013 in the *international removal services* cartel cases. The General Court's judgments were confirmed in three cases[10] but set aside in the fourth upon the Commission's appeal.[11] In this judgment, the CJEU found that the General Court had wrongly held that a holding company, established as a foundation, was not an undertaking and therefore could not be held liable for the conduct of its subsidiary (one of the cartelists). The Court found that the test applied in the first instance was incorrect because the parent and the subsidiary formed a single economic entity.

In appeals concerning the *chloroprene rubber* cartel, the CJEU upheld the General Court's finding that EI DuPont de Nemours and Dow were both liable for the conduct of a joint venture over which they each exercised joint control. The CJEU considered that the Commission was entitled to impute liability for the conduct of a 50/50 joint venture to each of its two parents where evidence is adduced that both companies exercised joint influence over the joint venture.

10 Case C-429/11 *Gosselin Group NV v. European Commission*, Case C-439/11 *Ziegler SA v. European Commission* and Case C-444/11 *Team Relocations NV and Others v. European Commission*, Judgments of 11 July 2013, not yet published.

11 Case C-440/11 *European Commission v. Stichting Administratiekantoor Portielje and Gosselin Group NV*, Judgment of 11 July 2013, not yet published.

Other 2013 CJEU judgments that considered parental liability included appeals in the *copper fittings* cartel[12] (Tomkins, Aalberts), the *synthetic rubber* cartel[13] (Eni, Dow), *industrial bags* cartel[14] and *bleaching chemicals* cartel.[15]

Access to the file/disclosure and confidentiality

Several 2013 judgments concerned access to the Commission's file on cartel investigations, in the context of actions for damages. This issue, and other similar issues, will be critical as the Commission attempts to advance private antitrust litigation in parallel with public enforcement (see below).

In June 2013, following a reference for a preliminary ruling from the Austrian Cartel Court, the CJEU held that a national law that made third-party access to documents that had been placed before the Cartel Court subject to the consent of the parties was incompatible with EU law.[16] The CJEU concluded that the principle of effectiveness under EU law precludes such a national rule, on the basis that an absolute bar on disclosure without consent leaves no discretion for the national court to weigh up the interests involved.

In September, the CJEU dismissed an appeal against a General Court judgment granting Pilkington interim relief for confidential treatment of certain information in the Commission's *car glass* cartel decision.[17] The CJEU upheld the General Court's ruling that, under the circumstances, Pilkington faced serious and irreparable damage if the Commission refused to grant confidentiality and published the information in question.

The General Court also handed down three judgments in 2013 regarding access to the file in cartel investigations.

In two judgments involving Henkel,[18] the General Court upheld Commission decisions refusing the transfer of documents to the French Competition Authority at

12 Case C-286/11 P *European Commission v. Tomkins plc*, Judgment of 22 January 2013; Case C-287/11 *P European Commission v. Aalberts Industries NV and Others*, Judgment of 4 July 2013.

13 Case C-499/11 P *The Dow Chemical Company and Others v. European Commission*, Judgment of 18 July 2013; Case C-508/11 P *Eni v. European Commission*, Judgment of 18 July 2013.

14 Case C-40/12 P *Gascogne Sack Deutschland GmbH v. European Commission*, Case C-58/12 P *Groupe Gascogne SA v. European Commission* and Case C-50/12 P *Kendrion v. European Commission*, Judgments of 26 November 2013.

15 Case C-455/11 P *Solvay SA v. European Commission*, Case C-449/11 P *Solvay Solexis v. European Commission*, Case C-446/11 *P European Commission v. Edison*, Case C-447/11 P *Caffaro in administration (formerly Caffaro) v. European Commission* and Case C-448/11 P *SNIA in administration (formerly SNIA) v. European Commission*, Judgments of 5 December 2013.

16 C-536/11, *Bundeswettbewerbsbehörde v. Donau Chemie AG*, Judgment of 6 June 2013.

17 C-278/13, *Pilkington v. Commission*, Order of 10 September 2013.

18 Case T-607/11 *Henkel and Henkel France v. Commission* and Case T-64/12 *Henkel AG & Co KGaA and Henkel France v. European Commission*, Orders of 7 March 2013, not yet published.

Henkel's request. The Court concluded that Henkel no longer had standing, on the basis that the relevant national proceedings had concluded by the time of the request.

In the third judgment, which concerned the Dutch *road bitumen* cartel,[19] the General Court upheld the Commission's decision to refuse access to the full text of its decision. The Court found that there was no public interest in disclosure, the purpose of which was to help private litigants bring actions for damages, and that the published version of the decision was sufficient to provide the Netherlands with an understanding of the Commission's reasoning.

Rights of defence

In 2013's two *escalator* cartel cases, the CJEU confirmed the fines imposed by the Commission and dismissed the appeals of two cartel members, Schindler[20] and Kone.[21] The CJEU rejected several arguments based on the primacy of the Charter of Fundamental Rights of the European Union which has, since the Lisbon reforms, acquired the same legal status as the Treaty on the European Union and the TFEU, and which contains primary provisions on competition law. In particular, the CJEU held that the General Court had not infringed the right to a fair trial (Article 47 of the Charter and Article 6 of the European Convention on Human Rights) in finding that the Commission has the power to impose fines in competition cases. Furthermore, the Court held that the Commission's 1998 Guidelines on fines[22] did not violate the principles of non-retroactivity and legitimate expectations.

In *Schindler*, the CJEU also confirmed previous case law that assessed the relevance of compliance programmes in determining liability.[23] Firstly, the Court pointed out that the adoption of a code of conduct by a parent company aimed at preventing its subsidiaries from engaging in anti-competitive activities does not alter its liability, but rather demonstrates that the parent in fact supervises the commercial policy of those subsidiaries. Secondly, the Court concluded that the mere existence of a compliance programme could not be the basis for a reduction in fines if it had no positive effect on conduct and in fact made it more difficult to discover an infringement.

19 Case T-380/08 *Kingdom of the Netherlands v. European Commission*, Judgment of 13 September 2013, not yet published.

20 Case C-501/11, *Schindler Holding Ltd and Others v. European Commission*, Judgment of 18 July 2013, not yet published.

21 Case C-510/11 *Kone Oyj and Others v. European Commission*, Judgment of 24 October 2013, not yet published.

22 Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No. 17 and Article 65 (5) of the ECSC Treaty fines, OJ 1998 C9/3.

23 Case T-352/94 *Mo Och Domsjö AB v. European Commission*, Judgment of 14 May 1998, ECR [1998] II-01989; Case T-208/06 *Quinn Barlo Ltd, Quinn Plastics NV and Quinn Plastics GmbH v. European Commission*, Judgment of 30 November 2011, ECR [2011] II-07953.

iii Trends, developments and strategies

Following a White Paper published in 2008 and a public consultation organised in 2012, on 11 June 2013 the Commission published a proposal for a Directive on damages claims by victims of competition infringements.[24] The Directive seeks to support the claimants' need to gain access to documentary evidence without undermining the success of the Commission's leniency programme, which depends upon parties disclosing their liability in full confidence.

The proposed directive would introduce a passing-on defence into national laws, although the defendant would bear the burden of proving that the claimant did pass on (some or all of) the financial harm caused by the infringement. Indeed, in the interests of supporting claimants' effective right to compensation, the proposal introduces a rebuttable presumption that any infringement of antitrust legislation has caused harm.

Along with the proposed directive, the Commission also released a package of non-binding guidance[25] on the assessment of damages that anticipates full harmonisation within the next three years.

On 8 October 2013, the Commission published a guidance note on the delivery of oral statements in leniency applications.[26] Among other details, the note limits the use of pre-existing documents or annexes when making oral statements and lays down rules regarding the format of documentary evidence.

iv Outlook

The Commission conducted several dawn raids during 2013 at the premises of undertakings suspected of cartel activities. These ongoing investigations concern various sectors including cargo train transport services,[27] white sugar supply,[28] and oil and biofuels.[29] Further developments in these cases are expected in 2014, as well as in the multiple ongoing *car parts* investigations.

As regards the *interest rate derivatives* cartels (see above), three banks (Crédit Agricole, HSBC and JP Morgan) have now commenced settlement discussions in the *EIRD* case, while proceedings remain open against ICAP in the *YIRD* case. It should be noted that, in any settlement case, the Commission may revert back to the full investigative procedure at any time, as evidenced in 2013 in the smart card chips

24 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013)404 of 11 June 2013. Following agreement between the Commission, the Parliament and the Member States on a revised text, the proposed Directive will be subject to final approval by a vote in Parliament in mid-April 2014.

25 A communication, a staff working document (a practical guide for quantifying harm in action for antitrust damages) and an impact assessment study on damage claims.

26 Commission note of 8 October 2013, 'Delivering oral statements at DG Competition'.

27 http://europa.eu/rapid/press-release_MEMO-13-586_en.htm.

28 http://europa.eu/rapid/press-release_MEMO-13-443_en.htm.

29 http://europa.eu/rapid/press-release_MEMO-13-435_en.htm.

investigation. In this case, the Commission sent a statement of objections to smart card chip suppliers[30] having previously commenced the settlement procedure, on the basis that there was a 'lack of progress' to justify continuing the settlement discussions.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Commission was less active in public enforcement outside the cartel arena, and in particular did not adopt any new infringement decisions under Article 102 TFEU in 2013. Nevertheless, there was a landmark of sorts as the Commission issued the first ever fines imposed for failure to comply with binding commitments. Judicial activity was also relatively limited, with the CJEU and General Court together handing down 11 non-cartel antitrust judgments during the course of the year.

i Significant cases

Microsoft commitment fine

On 6 March 2013, the Commission fined Microsoft €561 million for breaching a commitment decision (i.e., a decision whereby the Commission terminates proceedings and withdraws charges after the undertaking concerned offers commitments to resolve the concerns raised by the investigation).[31] The scale of the fine – the first of its kind – reflects the Commission's aims of emphasising the gravity of such conduct and deterring future breaches.

In 2009, the Commission had accepted commitments proposed by Microsoft concerning the Internet Explorer web browser, which it tied to shipments of the Windows operating system. Under the terms of the commitments, Windows users were to be provided with a choice of alternative browsers in addition to or as a replacement for Internet Explorer. In 2012, it was established that Microsoft had breached these commitments, leading to the fine imposed in March 2013.

Infringement decisions

The Commission adopted three infringement decisions in 2013, two of which concerned the pharmaceutical sector. The decisions confirm the Commission's continued focus on eliminating anti-competitive practices in that area.

Lundbeck[32]

This case concerned a non-compete agreement between Lundbeck and certain manufacturers of generic pharmaceuticals who accepted payment not to market generic equivalents of Lundbeck's branded antidepressant, Citalopram. The Commission held that this constituted a breach of Article 101 TFEU, which prohibits agreements that could distort competition. Lundbeck received a fine of €93.8 million, while the five generic companies were fined an aggregate amount of €52.2 million.

30 http://europa.eu/rapid/press-release_IP-13-346_en.htm.

31 See Article 9 of Regulation 1/2003.

32 *Lundbeck*, Case COMP/39.226, not yet published.

Johnson & Johnson/Novartis[33]
In this case, Sandoz, the Dutch subsidiary of Novartis, received incentives from Janssen-Cialg, the Dutch subsidiary of Johnson & Johnson, to delay the entry of a generic rival to Johnson & Johnson's Fentanyl drug into the Dutch market. The Commission held that the agreement in question breached Article 101 TFEU and fined Johnson & Johnson €10.8 million and Novartis €5.5 million.

Telefónica/Portugal Telecoms[34]
Telefónica and Portugal Telecoms, the two incumbent telecommunications operators in Spain and Portugal respectively, had entered into a non-compete agreement concerning the Iberian market. The terms prescribed that neither company would enter and compete in the other's national market, which was found to be contrary to Article 101 TFEU. The Commission fined Telefónica €66.894 million and Portugal Telecoms €12.29 million.

Commitments
The Commission adopted four commitment decisions in 2013, thereby terminating its investigations and binding the addressees to strict adherence with their terms (as evidenced by the *Microsoft* decision, above). Two cases were based on breaches of Article 101 TFEU, and two on breaches of Article 102 TFEU.

Penguin e-books[35]
This decision followed the Commission's investigation into the distribution of e-books, which also led to commitments being offered in December 2012 by Apple and four other publishers.[36] Penguin committed to adopt similar measures allowing retailers the freedom to discount e-books under certain conditions, and modifying or terminating certain problematic agency agreements, to prevent an infringement of Article 101 TFEU.

Airlines joint venture (Star Alliance)[37]
United Airlines, Air Canada, Continental Airlines and Lufthansa had entered into a revenue-sharing joint venture concerning transatlantic routes. This agreement was found to reduce competition between Lufthansa and Continental on the Frankfurt/New York

33 *Fentanyl*, Case COMP/39.685, not yet published.

34 Summary of Commission Decision of 23 January 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (Case COMP/39.839 — *Telefónica/Portugal Telecom*), OJ 2013 C140/11.

35 Summary of Commission Decision of 25 July 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39.847/*E-BOOKS*), OJ 2013 C378/25.

36 Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books, Memo/2012/983 of 13 December 2013.

37 Summary of Commission Decision of 23 May 2013 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union (Case AT.39595 – *Continental/United/Lufthansa/Air Canada*), OJ 2013 C201/8.

route, potentially resulting in higher prices for premium passengers. The Commission opened an investigation under Article 101 TFEU in 2009, and the companies offered initial commitments in 2012 that were revised after consultation and made legally binding in 2013. These included making available slots in Frankfurt and New York to competitors, and allowing competitors to offer tickets on the parties' flights.

Deutsche Bahn[38]

After dawn raids conducted in March 2011, the Commission opened antitrust proceedings in June 2012 against the German national rail operator Deutsche Bahn for alleged abuse of its dominant position in breach of Article 102 TFEU. Deutsche Bahn was accused of a margin squeeze in relation to the pricing of traction current (the electricity necessary to power the traction of locomotives) through the sole German provider, DB Energy. Deutsche Bahn committed to change its pricing system by distinguishing between the costs for access to the electricity network and actual supply. Deutsche Bahn also committed to allow other providers access to DB Energy's network.

CEZ[39]

By a decision of 10 April 2013, the Commission made legally binding certain commitments offered by CEZ, the Czech state-owned electricity operator. The Commission had opened proceedings on 11 July 2011 into an alleged breach of Article 102 TFEU. CEZ was accused of abusing its dominant position by preventing new entry on the markets for general and wholesale supply of electricity through its practice of pre-emptively booking capacity in the transmission network. CEZ committed to divest part of its generation capacity to decrease its dominance and improve the competitive structure of the Czech energy market.

ii Significant judgments

The most significant judgments in the antitrust field in 2013 were delivered on references for preliminary rulings from national courts, in particular those from Austria, Slovakia and Hungary.

Effects of legal advice and decisions of national competition authorities[40]

On reference from the Austrian Supreme Court, the CJEU held that undertakings cannot rely on external legal advice or a prior decision from a national competition

38 *Deutsche Bahn III* (Administrative Closure) COMP/39.915, not yet published, and summary of Commission decision of 18 December 2013 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (Case AT/39.678 – AT/39.731 – *Deutsche Bahn I/II*), OJ 2014 C85/14.

39 Summary of Commission Decision of 10 April 2013 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39727 – *CEZ*), OJ 2013 C251/4.

40 Case C-681/11 *Bundeswettbewerbsbehörde and Bundeskartellanwalt v. Schenker & Co AG and Others*, Judgment of 18 June 2013, not yet published.

authority to avoid fines imposed by the national competition authority itself, in relation to infringements of competition law discovered later by the Commission. Neither external legal advice nor the findings of a national authority give rise to a legitimate expectation that a particular course of conduct is lawful, since the Commission alone has competence to determine whether conduct is compatible with EU law.

Slovak banks exclusion agreement[41]

In this case, the CJEU responded to a request for a preliminary ruling from the Supreme Court of Slovakia. The CJEU held that undertakings could not justify an agreement to exclude a rival from the market on the grounds that the competitor was trading illegally. The CJEU stressed that this mere circumstance can never legitimise anti-competitive agreements, and that the parties to the anti-competitive agreement should have complained to the competent regulatory authorities if they considered their rival's activities to be problematic.

Hungarian car insurers[42]

The Hungarian Supreme Court requested a preliminary ruling on whether bilateral agreements between car insurers and car repairers, which aligned repair charges in light of the number of insurance policies to which the car repair company subscribed, constituted a restriction of competition by object pursuant to Article 101 TFEU. The CJEU confirmed that the nature of the agreement impeded the proper functioning of the insurance and car repair markets. This judgment is contrary to the view of many practitioners that only a narrow category of infringements such as price-fixing and market allocation are 'restrictions by object', rather than this being an open category that can include any type of infringement, depending upon its gravity.

iii Trends, developments and strategies

On 18 March 2013, the Commission updated its explanatory note on its authority to conduct inspections,[43] providing more detailed guidelines on the obligation of an undertaking subject to an inspection to cooperate and facilitate the Commission's searches. The note provides detail on the nature and methodology of the Commission's forensic IT techniques and its capacity to search a very wide range of hardware and storage media (including mobile phones and tablets). The note emphasises that the undertaking must actively cooperate with the Commission as regards the IT environment, which may specifically require blocking staff e-mail accounts, disconnecting computers from the firm network, removing hardware drives or providing administrator access rights.

41 Case C-68/12, *Protimonopolný úrad Slovenskej republiky v. Slovenská sporiteľňa a*s, Judgment of 7 February 2013, not yet published.

42 Case C-32/11 *Allianz Hungária Biztosító Zrt and Others v. Gazdasági Versenyhivatal*, Judgment of 14 March 2013, not yet published.

43 Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003.

iv Outlook

As of 1 January 2014, antitrust investigations were ongoing in several different markets. In the telecommunications and information society sector, the Google investigation,[44] Samsung and Motorola standard essential patents investigations[45] and the internet connectivity services investigations[46] are continuing. In the energy and environment sector, investigations are currently focused on central and eastern Member States and more specifically on Bulgarian Energy Holding,[47] OPCOM,[48] ARA[49] and Gazprom.[50] In the transport sector, the Commission opened investigations into Lithuanian railways[51] and container liner shipping companies.[52] As regards financial services, important decisions are expected in the MasterCard interbank fees investigation[53] and the investigation into credit default swaps.[54] Finally, the Commission continues to monitor the pharmaceuticals industry, with ongoing investigations involving Les Laboratoires Servier,[55] Cephalon and Teva.[56]

In 2014, the Commission will also adopt its new *de minimis* notice,[57] the revised draft of the Technology Transfer Block Exemption Regulation and the Technology Transfer Guidelines.[58] Unlike the substantive 2004 revisions to these texts, the proposed amendments would not alter the current position significantly.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

There were no new sector inquiries launched in 2013; nor were significant decisions adopted by the Commission or judgments handed down by the Courts.

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44 *Google*, Case COMP/39.740.

45 *Samsung – Enforcement of UMTS standards essential patents*, Case COMP/39.939 and *Motorola – Enforcement of GPRS standard essential patents*, Case COMP/39.985

46 http://europa.eu/rapid/press-release_MEMO-13-681_en.htm.

47 *BEH gas*, Case COMP/39.849.

48 *OPCOM/Romanian Power Exchange*, Case COMP/39.984.

49 *ARA foreclosure*, Case COMP/39.759.

50 *Upstream gas supplies in Central and Eastern Europe*, Case COMP/39.816.

51 *AB Lietuvos geležinkeliai*, Case COMP/AT.39.813.

52 *Container Shipping*, Case COMP/39.850.

53 *MasterCard II*, Case COMP/40.049.

54 *CDS – Information market*, Case COMP/39.745.

55 *Perindopril (Servier)*, Case COMP/39.612.

56 *Cephalon*, Case COMP/39.686.

57 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*) OJ 2001 C368/13.

58 Commission Regulation 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, OJ 2014 L93/17.

i Trends, developments and strategies

In a speech about the consumer goods market on 14 May 2013, Joachim Alumnia, the European Vice-President responsible for competition policy, predicted major developments in this sector.[59] This follows the creation of 'Task Force Food' within the Directorate-General for Competition in 2012 as a response to increasing concerns about effective competition in the food supply chain. In January 2013, the Commission published a Green Paper on unfair trading practices in the business-to-business food and non-food supply chain, while it also commissioned a study on the economic impact of modern retail on choice and innovation in the EU food sector.[60] It is anticipated that the Commission will maintain its focus on the consumer goods market, with a particular emphasis on food, during 2014 and beyond.

ii Outlook

Following on from its 2007 business insurance sector inquiry report, in 2013[61] the Commission published a study on co(re)insurance pools and *ad hoc* co(re)insurance agreements on the subscription market. This study will act as a tool for the future review of Block Exemption Regulation 267/2010,[62] expiring on 31 March 2017, as it looks at market practices that concern *ad hoc* co(re)insurance agreements.

V STATE AID

Throughout 2013, the Commission continued to pursue its state aid modernisation agenda. This was launched in May 2012 with the stated aims of fostering growth, focusing enforcement on cases with the biggest impact on the internal market, and delivering streamlined rules and faster decisions. The Commission introduced amendments to both the Enabling Regulation and the Procedural Regulation, and new Guidelines on Regional State aid for 2014–2020, as well as launching consultations on several other aspects of state aid control. 2013 also produced two noteworthy judgments from the CJEU on the definition of an aid measure and the market economy investor principle, respectively.

59 Consumer-goods markets: A litmus test for competition policy, Joachim Almunia, http://europa.eu/rapid/press-release_SPEECH-13-410_en.htm.

60 COMP/2012/015 – Study on the economic impact of modern retail on choice and innovation in the EU food sector.

61 Study on co(re)insurance pools and on ad-hoc co(re)insurance agreements on the subscription market, http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3113422.

62 Commission Regulation 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 2010 L83/1.

i Significant cases

Overview of Commission decisions

The Commission adopted 269 state aid decisions in 2013, of which the vast majority (237) were decisions not to raise objections to aid that was notified by Member States. The Commission only adopted negative decisions ordering recovery of aid deemed to have been granted unlawfully in seven cases. A high number of decisions (57 in total) related to the financial crisis, including as regards the liquidation or restructuring of several banks across the EU.[63]

ii Significant judgments

It is in the nature of state aid cases that final judgments are often handed down after a considerable period has elapsed since the original Commission proceedings. This was the case with both *France Télécom*, in which the CJEU endorsed a Commission finding of aid dating back to events in 2002, and *Frucona*, in which the CJEU upheld an appeal relating to state aid proceedings initiated in 2004. Both cases are likely to prove significant precedents for future state aid practice.

France Télécom[64]

Against the background of France Télécom's share price tumbling and credit rating dropping, the French government in July 2012 declared that it would take any steps necessary if the company – in which the state was a shareholder – faced further financial difficulties. This statement triggered a sharp rise in France Télécom's shares and prevented a downgrading of its credit rating to junk status. Subsequently, the state announced its intention to grant a €9 billion shareholder loan to the company, an offer that France Télécom did not accept. In 2004, the Commission concluded that the shareholder loan proposal together with the previous declaration constituted state aid.

On appeal from France, France Télécom and Bouygues, the General Court had found that the Commission had not adduced sufficient evidence that the announcement of the shareholder loan entailed a transfer of state resources that could be considered aid. Overturning this judgment, the CJEU found that the proposal of the loan, even though not accepted, did confer an advantage to France Télécom that could potentially have burdened the state budget. The CJEU also found that the General Court had erred in requiring the Commission to prove a close connection between the advantage received and the commitment of state resources. This judgment may lead to similar complaints in the future, as many governments have expressed that they would assist large national companies in difficulty, especially since the beginning of the economic crisis.

Frucona

This case concerned a tax debt write-off granted in 2004 to a Slovakian alcohol and spirits producer that faced bankruptcy if it could not reach an arrangement with its

63 http://europa.eu/rapid/press-release_MEMO-14-126_en.htm.

64 Case C-399/10 *Bouygues SA and Bouygues Télécom SA v. European Commission and Others*, Judgment of 19 March 2013, not yet published.

creditors, which included the Slovak exchequer. Following a complaint, the Commission investigated the tax settlement and found that it constituted state aid, ordering recovery from Frucona.

On appeal, the General Court upheld the Commission's decision in 2010.[65] The CJEU, however, set aside the General Court's judgment in January 2013[66] for failing to establish whether the Commission had properly applied the private creditor test. This is the central test that the Commission uses to determine whether a state measure has granted a beneficiary an advantage (i.e., aid) or if the state has acted in the same way as would a normally prudent and diligent private creditor. In this instance, the General Court did not examine whether the Commission took into account all of the information available to the state at the time it adopted its decision, including as to the likely duration of bankruptcy proceedings.

iii Trends, developments and strategies

During the past year, reforms continued on three different levels of the Commission's legislation on state aid control.

First, the Commission amended both the State Aid Enabling Regulation[67] and the State Aid Procedural Regulation.[68] The changes to the Procedural Regulation, in particular, sought to improve the procedure for handling state aid complaints and granted the Commission new powers to request information from sources other than the Member State, but failed to allow beneficiaries or complainants the improved position in state aid investigations that many had hoped for.

Secondly, the Commission adopted new horizontal rules in respect of regional aid[69] (funding used to support less advantaged parts of the EU) and *de minimis* aid[70] (low amounts of aid that are presumed not to distort competition).

65 Case T-11/07, *Frucona Košice v. European Commission*, Judgment of 7 December 2010, ECR [2010], II-05453.

66 Case C-73/11P, *Frucona Košice v. European Commission*, Judgment of 24 January 2013, not yet published.

67 Council Regulation 733/2013 of 22 July 2013 amending Regulation 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid, OJ 2013 L204/11.

68 Council Regulation 734/2013 of 22 July 2013 amending Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 2013 L204/15.

69 Guidelines on regional state aid for 2014–2020, OJ 2013 C209/1.

70 Commission Regulation 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ 2013 L352/1.

Thirdly, the Commission adopted new sectoral rules in respect of *de minimis* aid in the agriculture sector[71] and state aid for films and other audiovisual works.[72]

In parallel with implementing these changes, the Commission also launched a swath of consultations on amendments to the General Block Exemption Regulation,[73] the Guidelines on state aid for environmental protection,[74] the Framework for state aid for research, development and innovation,[75] the Guidelines on rescue or restructuring aid to firms in difficulty,[76] the Guidelines on state aid to promote risk finance investments,[77] the Guidelines on state aid to airports and airlines,[78] and the Agricultural Block Exemption Regulation.[79]

iv Outlook

In 2014, the Commission's state aid modernisation plan will enter its final phase with the adoption of new legislation and guidelines in an array of sectors, following up on the many consultations held in 2013. Significant Commission investigations will take place in particular in the energy sector, including into German legislation to promote renewable energy and the UK's planned £16 billion investment to build an atomic plant with Electricité de France at Hinkley Point in southwest England. It is also to be hoped that the new Guidelines on state aid to airports and airlines will allow the Commission in 2014 to address the 61 reviews of airport subsidies that were suspended pending the adoption of the new rules.

VI MERGER REVIEW

2013 saw significant changes to the Commission's merger control procedure with the adoption of measures intended to streamline and simplify the notification process. The Commission also prohibited two notified mergers during the course of the year, including blocking Ryanair's acquisition of Aer Lingus for a second time.

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71 Commission Regulation 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector, OJ 2013 L352/9.

72 Communication from the Commission on state aid for films and other audiovisual works, OJ 2013 C332/1.

73 Consultation on a draft General Block Exemption Regulation (the GBER) on state aid measures, 18 December 2013.

74 Draft Guidelines on environmental and energy aid for 2014–2020, 18 December 2013.

75 Consultation on the draft Union Framework for state aid for research, development and innovation, 20 December 2013.

76 Draft guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty, 5 November 2013.

77 Consultation on the draft Union guidelines on state aid to promote risk finance investments, 24 July 2013.

78 Consultation on the draft Guidelines on state aid to airports and airlines, 3 July 2013.

79 Draft Block Exemption Regulation for the agriculture and forestry sector and for rural areas.

i Significant cases

Commission decisions

The Commission received 277 merger notifications in 2013, of which 252 were approved unconditionally in Phase I and 11 were approved in Phase I subject to conditions.[80] It adopted decisions to open a detailed Phase II investigation in six cases, of which two were later cleared unconditionally (*Nynas/Harburg Refinery* and *Olympic Air/Aegean Airlines II*), two were approved with conditions (*Munksjo/Ahlstrom* and *Syniverse/Mach*) and two (considered in more detail below) were prohibited (*UPS/TNT* and *Ryanair/Aer Lingus*).

'Failing firm' defence: Olympic Air/Aegean Airlines II and Nynas/Harburg Refinery

It was notable that both of the unconditional Phase II clearance decisions were based to an extent on a failing firm argument. In *Olympic Air/Aegean Airlines II*,[81] the Commission accepted the parties' argument that, absent the proposed merger, the most likely counterfactual would see Olympic's assets leave the market. The Commission approved the proposed merger, since any harm to competition caused by Aegean's acquisition of Olympic's market share could not be attributed to the transaction, but would arise in any event. In *Nynas/Harburg Refinery*,[82] the parties submitted that the Harburg Refinery would close were it not acquired by Nynas, and that this would result in increased prices. The Commission accepted this argument, and found that the concentration would allow Nynas to reduce its variable costs and that consumers would benefit to some extent from these savings.

UPS/TNT

In June 2012, UPS notified its proposed acquisition of rival logistics firm TNT Express. The Commission opened an in-depth investigation in July 2012 and subsequently issued a statement of objections in October 2012. Remedies were proposed in both November and December 2012, and then finally submitted on 3 January 2013. These included divestitures in 15 EU Member States and, to a more limited extent, in two others. The Commission found that there were serious doubts as to the viability and sufficiency of these commitments, as the concentration would essentially leave only one alternative competitor in the market for express delivery of small packages, namely DHL (with more limited competition arising on occasion from FedEx). The Commission prohibited the concentration on 30 January 2013,[83] and UPS has since appealed the decision before the General Court.[84]

80 http://ec.europa.eu/competition/mergers/statistics.pdf.

81 *Aegean/Olympic II*, Case COMP/M.6796.

82 *Nynas/Shell/Harburg Refinery*, Case COMP/M.6360.

83 *UPS/TNT Express*, Case COMP/M.6570.

84 Case T-194/13, *United Parcel Service v. European Commission*, OJ 2013 C147/30, ongoing.

Ryanair/Aer Lingus II

The low cost Irish airline, Ryanair, continued its pursuit of rival carrier, Aer Lingus, during 2013. The Commission first prohibited Ryanair's proposed acquisition in 2007,[85] and a second notification in 2009 was withdrawn when the Irish government rejected Ryanair's bid. Ryanair was not discouraged, however, and in July 2012 notified the deal for a third time. The Commission's investigation found that the concentration would create a dominant position, if not a monopoly, over certain routes, 46 of which overlapped (11 more than at the time of the Commission's last investigation in 2007). Ryanair's proposed divestment remedies failed to satisfy the Commission,[86] which found that there was no viable competitor to operate on certain divested routes while, on others, competitors would lack incentives to continue competing with the merged entity. Ryanair has appealed the case to the General Court, which in November 2013 authorised the Dublin Airport Authority to intervene in the proceedings in support of the Commission.[87] In parallel, the UK competition authorities in 2013 ordered Ryanair to sell its existing minority stake in Aer Lingus down to 5 per cent

ii Significant judgments

The General Court upheld two Phase I clearance decisions on appeal in 2013, as well as upholding the Commission's refusal to grant access to internal documents in the context of the failed Deutsche Börse/NYSE Euronext merger.

Microsoft/Skype [88]

The General Court upheld the Commission's decision of 7 October 2011 authorising Microsoft's acquisition of the internet call and message service provider Skype.[89] Two competitors, Cisco Systems and Messagenet, appealed the approval decision. Despite high market shares and concerns over bundling and interoperability issues, the Court supported the Commission's conclusion that the concentration would not lead to a lessening of competition. The Commission's decision, now endorsed by the Court, is notable for its finding that the merged entity would face competitive pressure in the fast-growing and innovative consumer communications sector, in which market shares were liable to shift dramatically. This argument is instructive of the Commission's approach to assessing dynamic competition in hi-tech markets.

85 *Ryanair/Aer Lingus*, Case COMP/M.4439.

86 Summary of Commission Decision of 27 February 2013 declaring a concentration incompatible with the internal market and the EEA Agreement (Case COMP/M.6663 – *Ryanair/Aer Lingus III*), OJ 2013 C216/22).

87 Case T-260/13 *Ryanair Holdings v. European Commission*, OJ 2013 C189/28, ongoing.

88 Case T-79/12, *Cisco Systems Inc & Messagenet v. European Commission*, Judgment of 11 December 2013, not yet published.

89 *Microsoft/Skype*, Case COMP/M.6281.

REWE/ADEG[90]

In this case, the General Court upheld the Commission's decision of 23 June 2008[91] authorising the acquisition of ADEG, a chain of supermarkets, by a subsidiary of REWE, one of its competitors. The decision was appealed by their rival, Spar. The Court found that the Commission had neither wrongly assessed the relevant markets and markets shares, nor erred in law about the competitive effects of the concentration. The General Court therefore found that the Commission rightly closed the investigation by accepting commitments from the parties in Phase I rather than opening a detailed Phase II investigation.

Access to the case file[92]

In the context of an appeal against the Commission's decision to prohibit the Deutsche Börse/NYSE Euronext merger, an attorney for Deutsche Börse had applied as an individual for access under Regulation 1049/2001[93] to an internal document on the Commission's case file. The General Court ruled that there was a general presumption, in light of the pending appeal, that ordering disclosure of the document would seriously undermine the Commission's decision-making process. The Court also found that the individual in question could not justify its application on public interest grounds (as required by Regulation 1049/2001) since its motivation arose from private, rather than public, interests – namely, to support Deutsche Börse's appeal.

iii Trends, developments and strategies

In June 2013, the Commission opened a consultation on potential substantive changes to EU merger control, in particular with a view to extending the scope of the EU Merger Regulation to allow the Commission to review acquisitions of non-controlling minority shareholdings. At present, the Commission only has competence to review transactions that give rise to a permanent change in control over a company or assets, creating an 'enforcement gap' as regards acquisitions of minority stakes that may nonetheless have an impact on competition. An extension of the Commission's competence would, however, lead to a corresponding increase in the compliance burden on companies active in the EU.

In December 2013, the Commission implemented a range of measures intended to streamline and simplify the merger review process.[94] As well as amending the forms that notifying parties are required to file, with the stated intention of reducing the volume

90 Case T-405/08, *Spar Österreichische Warenhandels AG v. European Commission*, Judgment of 7 June 2013, not yet published.

91 *REWE/ADEG*, COMP/M.5047.

92 Case T-561/12 *Jürgen Beninca v. European Commission*, Judgment of 25 October 2013, not yet published.

93 Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L145/43.

94 Commission Implementing Regulation 1269/2013 of 5 December 2013 amending Commission Regulation 802/2004 implementing Council Regulation 139/2004 on the control of concentrations between undertakings, OJ 2013 L336/1.

of information that must be provided, the Commission also altered the thresholds for the use of the 'simplified procedure' (applicable to deals that are not expected to cause any harm to competition). The Commission hopes that these changes will lead to 10 per cent more cases qualifying for the simplified procedure, reducing both the Commission's workload and costs for merging parties. The Commission also updated the model texts for commitments[95] and trustee mandates[96] and its Best Practice Guidelines.

iv Outlook

The Commission has announced that it will publish a White Paper on the review of minority shareholdings in 2014, following on from the 2013 consultation (see above). This should provide a clearer picture as to the likelihood of the Commission adopting arguably the most significant reform of the EU Merger Regulation since its adoption in 2004.

At the level of the European courts, 2014 may see further developments in Electrabel's appeal to the CJEU of the €20 million fine imposed by the Commission in 2009 for acquiring control of Compagnie Nationale du Rhône without prior approval, which was upheld by the General Court. The Commission also faces ongoing appeals of its decisions in *Ryanair/Aer Lingus II*, *UPS/TNT Express*, *IAG/bmi*, *Deutsche Börse/NYSE*, *Crédit Agricole/Carispe*, *Oracle/Sun Microsystems* and *Lufthansa/Austrian Airlines*.

VII CONCLUSIONS

In a number of respects, the Commission strengthened its position in the public enforcement of competition law in 2013 despite the shift in the institutional balance, following the entry into force of the Treaty of Lisbon, that allegedly reduced its powers. Regarding cartel policy, the Commission sought to advance private enforcement while carefully ring-fencing its leniency programme from adverse impact; in the wider antitrust arena, it demonstrated its readiness to issue heavy fines on parties that renege on agreed commitments, while in the state aid field, it extended its capacity to undertake investigations. It remains to be seen whether this trend continues with a further, substantial increase in the scope of its powers to investigate mergers, and specifically acquisitions of non-controlling minority shareholdings.

The forthcoming European parliamentary elections will also impact on competition policy in 2014. The direct election of its new President may increase the politicisation of the Commission's agenda, which could lead to the incoming Competition Commissioner seeking out high-profile targets and imposing ever-larger fines. Whether this transpires will come to light during the coming year as the Commission continues its ongoing investigations into sectors of high concern for consumers, including energy, telecommunications and banking.

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95 Model texts for divestiture commitments, DG Competition http://ec.europa.eu/competition/mergers/legislation/template_commitments_en.pdf.

96 Model texts for trustee mandates, DG Competition http://ec.europa.eu/competition/mergers/legislation/trustee_mandate_en.pdf.

Appendix 1

ABOUT THE AUTHORS

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Squire Sanders

Oliver Geiss is a partner in Squire Sanders' antitrust practice, focusing on competition law in the European Union and Germany. He is recognised in *Chambers Global 2014* and *European Legal Experts 2012* for his EU and competition expertise.

He regularly advises clients on merger notifications of cross-border transactions with the European Commission, the German Federal Cartel Office and other competition authorities throughout Europe. He has also represented companies in some of the largest EU cartel investigations, including the *Air Freight*, *LCD Screen*, *Optical Disk Drive*, *Refrigeration Compressors* and *Car Components* cases. His significant expertise in EU state aid matters involves representing a beverage manufacturer before the European Court of Justice, defending a large US corporation against Commission allegations that it was in receipt of illegal state aid and advising a US refining technology company in a state aid complaint.

Mr Geiss has extensive experience in a variety of industry sectors including chemicals, energy, fast-moving consumer goods, pharmaceuticals and tele-communications.

He frequently represents clients before the European Courts in Luxembourg and also advises clients on competition law aspects of commercial agreements, such as distribution agreements or joint buying or selling arrangements.

WILL SPARKS

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Will Sparks is a senior associate in the antitrust and competition practice based in Squire Sanders' Brussels office. He advises on all aspects of competition law including merger control, antitrust investigations and competition compliance. He is also experienced in public procurement and state aid.

Mr Sparks regularly advises on the notification of cross-border mergers and acquisitions to competition authorities in the EU, eastern Europe, the Middle East and Asia Pacific. He has also represented clients in relation to major international cartel investigations including appeals before the European Court of Justice. His experience covers a wide range of sectors including chemicals, pharmaceuticals, energy, commodities, telecommunications and IT.

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