The Public Competition Enforcement Review

Eighth Edition

Editor
Aidan Synnott

Law Business Research

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The Cartels and Leniency Review
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This article was first published in The Cartels and Leniency Review, 8th edition
(published in April 2016 – editor Aidan Synnott).

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Chapter 11

EUROPEAN UNION

Oliver Geiss and Will Sparks[1]

I OVERVIEW

Compared with previous years, 2015 saw relatively limited enforcement activity on the part of the European Commission. Only four cartel infringement decisions were adopted while no fines were imposed under Articles 101 (excluding cartels) or 102 TFEU. The European Court of Justice (ECJ) handed down significant judgments of wider interest, however, notably in relation to information exchange (*Dole v. Commission*)[2] and rebates (*Post Danmark II*).[3] The General Court, for its part, handed the Commission a notable defeat in relation to the *Airfreight*[4] cartel by annulling the Commission's finding of infringement, and all fines, in 13 separate appeals.

II CARTELS

2015 was notable for a reduced level of cartel enforcement on the part of the European Commission, which adopted only four new infringement decisions (compared to 10 the previous year). There were, however, a number of important judgments handed down by the

1 Oliver Geiss is a partner and Will Sparks is a senior associate at Squire Patton Boggs.

2 Case C-286/13 P, *Dole Food Company Inc. v. European Commission*, Judgment of 19 March 2015.

3 Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, Judgment of 6 October 2015.

4 Case T-9/11, *Air Canada v. Commission*; Case T-67/11, *Martinair Holland NV v. Commission*; Case T-56/11, *SAS Cargo Group A/S v. Commission*; Case T-48/11, *British Airways plc v. Commission*; Case T-46/11, *Deutsche Lufthansa AG v. Commission*; Case T-43/11, *Singapore Airlines Ltd v. Commission*; Case T-40/11, *Latam Airlines Group SA v. Commission*; Case T-39/11, *Cargolux Airlines International SA v. Commission*; Case T-38/11, *Cathay Pacific Airways Ltd v. Commission*; Case T-36/11, *Japan Airlines Co. Ltd v. Commission*; Case T-28/11, *Koninklijke Luchtvaart Maatschappij NV v. Commission*, Judgments of 16 December 2015.

ECJ, including in relation to information exchange and the jurisdiction of national courts to hear cartel damages claims. The General Court, meanwhile, annulled the Commission's findings in the *Airfreight* cartel – the first full annulment of a Commission cartel decision in several years, overturning some €790 million in fines.

i Significant cases

Information exchange as a restriction of competition by object: Case C-286/13 P, Dole

On 19 March 2015, the ECJ[5] dismissed an appeal brought by Dole in relation to the *Bananas* cartel.[6] The appeal followed a prior General Court[7] ruling which had upheld the Commission's Decision of October 2008 finding that Dole and two other importers of bananas (Chiquita and Weichert) had coordinated their quotation prices in eight EU Member States. Among its grounds of appeal, Dole argued that the information exchanges that had taken place were incapable of reducing uncertainty on the market since they were limited to pre-pricing information (i.e., price trends and other factors that might be relevant for upcoming quotation prices). Quotation prices were regarded as distinct from, and not the basis for, actual market prices. The ECJ held, nevertheless, that the information exchange constituted an infringement of competition by object. The judgment emphasises the strict approach taken by both the Commission and the European Courts in the assessment of horizontal information exchanges even where, as in this case, the information exchanged is limited to 'market signals, market trends or indications' that are not directly linked to the prices charged to consumers.[8]

Jurisdiction in cartel damages claims: Case C-352/13, CDC Hydrogen Peroxide SA v. Akzo Nobel NV

On 21 May 2015, the ECJ[9] responded to three questions referred to it by a German court concerning the application of the Brussels I Regulation[10] on jurisdiction and the recognition and enforcement of judgments in civil proceedings. In the context of an action for damages based on the *Hydrogen peroxide* cartel,[11] the ECJ ruled, first, that an action may be brought in the Member State of one 'anchor defendant' against several defendants based in other Member States who participated in the same cartel at different times and in different places. This remains the case even if the action against the anchor defendant is withdrawn. Secondly, the Court held that Article 5(3) of the Brussels I Regulation, which provides for companies to be sued in the Member State where the 'harmful event occurred', allows claimants to seek damages either where the cartel itself was concluded or where one specific agreement (identifiable as the sole cause of loss) was concluded, or at the place of the claimant's registered

5 Case C-286/13 P, *Dole Food Company Inc. v. Commission*, Judgment of 19 March 2015.

6 Case COMP/39188 – *Bananas*, summary published in OJ 2009 C189/12.

7 Case T-588/08, *Dole Food Company, Inc. and Dole Germany OHG v. Commission*, Judgment of 14 March 2013.

8 Case C-286/13, *Dole Food Company v. Commission*, paragraph 130.

9 Case C-352/13, *CDC Hydrogen Peroxide SA*, Judgment of 21 May 2015.

10 Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ 2013 L181/4

11 Case COMP/F/C.38620 – *Hydrogen Peroxide and Perborate*.

office. Thirdly, the Court held that jurisdiction clauses in contracts can exclude a national court from hearing an action for cartel damages, provided that such clauses refer specifically to disputes concerning liability incurred as a result of a breach of competition law.

Implementation of a cartel through finished products: Case C-231/14 P, Innolux

On 9 July 2015, the ECJ[12] dismissed an appeal brought by Innolux against a General Court judgment[13] which had upheld the Commission's findings in the *LCD panels* cartel.[14] Innolux argued that the Commission had erred by taking into account, when setting its fine, sales within the EEA of finished products which incorporated the cartelised LCD panels. The LCD panels themselves had been sold outside the EEA. The ECJ endorsed the Commission's approach and held that it was appropriate to treat sales of finished products as being affected by the cartel. It was therefore within the Commission's jurisdiction to apply Article 101 TFEU to the cartel on the basis that it was implemented indirectly in the EEA, and to impose fines that took into account sales in the downstream market.

Fines based on sales to parent companies: Case C-227/14 P, LG Display

Also in relation to the LCD panels cartel, on 23 April 2015 the ECJ delivered a judgment[15] dismissing an appeal brought by LG Display. LG Display had argued that sales it had made to its parent companies – regarded as third-party sales, since the parents did not form part of the same undertaking as LG Display – should nevertheless not have been taken into account when the Commission calculated its fine. The ECJ dismissed this argument and held that all sales on the market affected by the cartel should be taken into account, even if the price of certain sales (such as those made to a parent company) was in reality unaffected by the cartel.

Fines imposed on parent companies: Case C-597/13 P, Total SA

On 17 September 2015, the ECJ[16] upheld an appeal by Total SA against a judgment of the General Court[17] relating to the *Paraffin wax* cartel.[18] The General Court had held that Total SA was not entitled to receive a reduction in the fine imposed upon it in order to reflect a reduction granted on appeal to its subsidiary, Total Marketing Services. The ECJ held that the General Court had erred in this regard, and ruled that when a parent company and its subsidiary bring parallel applications for annulment, and the parent's liability is based solely on the subsidiary's conduct, the parent should benefit from any reduction in such liability including through a reduced fine.

12 Case C-231/14 P, *InnoLux v. Commission*, Judgment of 9 July 2015.

13 Case T-91/11, *InnoLux Corp. v. European Commission*, Judgment of 27 February 2014.

14 Case COMP/39309 – *LCD – Liquid Crystal Displays*, summary published in OJ 2011 C293/8.

15 Case C-227/14 P, *LG Display Co. Ltd and LG Display Taiwan Co. Ltd v. European Commission*, Judgment of 23 April 2015.

16 Case C-597/13 P, *Total SA v. Commission,* Judgment of 17 September 2015.

17 Case T-548/08, *Total SA v. Commission*, Judgement of 13 September 2013.

18 Case COMP/C.39181 – *Candle waxes*, summary published in OJ 2009 C295/17.

Liability of a cartel 'facilitator': Case C-194/14 P, AC Treuhand

On 22 October 2015, the ECJ[19] dismissed an appeal against the General Court's judgment[20] upholding a fine imposed by the Commission in 2009 on AC Treuhand. Treuhand is a Swiss consultancy firm which had been found liable for 'facilitating' the *Heat stabilisers* cartel.[21] The ECJ endorsed the Commission's approach and ruled that it was appropriate to find Treuhand liable for an infringement despite it not being active on the market that was affected by the cartel, since its behaviour had been directly linked to the cartel's effective implementation.

Recidivism: Case C-93/13 P, Versalis

On 5 March 2015, the ECJ[22] dismissed an appeal by Versalis SpA in relation to the Synthetic rubber cartel.[23] Versalis challenged the General Court's[24] prior ruling on several grounds, including its finding that the Commission had correctly attributed liability to Versalis for the conduct of its parent, Eni. In a cross-appeal, the Commission challenged the General Court's ruling that it had failed to produce sufficient evidence to support the finding that the fines imposed upon Versalis and Eni should be increased for recidivism. The ECJ upheld the General Court's conclusions and its ruling that the fine imposed upon Versalis and Eni jointly and severally should be reduced. The ECJ emphasised that the Commission must provide a clear statement of reasons, at the time when it adopts a fine, that enables the addressee and the Courts to understand in what capacity and to what extent it is alleged to have been involved in the previous infringement which gives rise to the finding of recidivism.

In addition to these judgments handed down by the ECJ in 2015, the General Court also gave judgment in a number of significant appeals including those relating to the *Airfreight, Animal feed phosphates, Heat stabilisers, Cathode ray tubes, Prestressing steel* and *Bananas (Southern Europe)* cartels.

Lack of reasoning: Case T-9/11, Air Canada v. Commission etc.

On 16 December 2015, the General Court[25] handed down its ruling in 13 appeals relating to the *Airfreight* cartel.[26] Every appeal was upheld, with the Court annulling entirely the Commission's finding of an infringement and its imposition of fines totalling €790 million on airlines including British Airways, Air France-KLM, Cathay Pacific and Lufthansa.

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19 Case C-194/14 P, *AC-Treuhand v. Commission*, Judgment of 22 October 2015.

20 Case T-27/10, *AC-Treuhand AG v. European Commission*, Judgment of 6 February 2014.

21 Case COMP/38589 – *Heat stabilisers*, summary published in OJ 2010 C307/9.

22 Case C-93/13 P, *Commission and Others v. Versalis and Others*, Judgment of 5 March 2015.

23 Case COMP/38628 – *Synthetic rubber*, summary published in OJ 2009 C86/7.

24 Case T-103/08, *Versalis SpA and Eni SpA v. Commission*, Judgment of 13 December 2012.

25 Case T-9/11, *Air Canada v. Commission*; Case T-67/11, *Martinair Holland NV v. Commission*; Case T-56/11, *SAS Cargo Group A/S v. Commission*; Case T-48/11, *British Airways plc v. Commission*; Case T-46/11, *Deutsche Lufthansa AG v. Commission*; Case T-43/11, *Singapore Airlines Ltd v. Commission*; Case T-40/11, *Latam Airlines Group SA v. Commission*; Case T-39/11, *Cargolux Airlines International SA v. Commission*; Case T-38/11, *Cathay Pacific Airways Ltd v. Commission*; Case T-36/11, *Japan Airlines Co. Ltd v. Commission*; Case T-28/11, *Koninklijke Luchtvaart Maatschappij NV v. Commission*, Judgments of 16 December 2015.

26 Case COMP/AT.39258 – *Airfreight*, summary published in OJ 2014 C371/11.

The basis for the Court's ruling in each case was that the grounds and the operative part of the Commission's decision were contradictory. The grounds of the decision alleged a single and continuous infringement by which the airlines coordinated various aspects of the price of air cargo services. By contrast, the operative part of the decision delineated four separate infringements relating to different routes. In its judgments, the Court emphasised the importance of the Commission adopting clear and unambiguous decisions. In the context of the increase in follow-on damages litigation, in particular, it is vital that national courts (as well as claimants and defendants) are able to understand and apply the conclusions reached in Commission decisions.

Settlement procedure and fines: Case T-456/10, Timab

On 20 May 2015, the General Court dismissed an appeal[27] by Timab and its parent company, Rouillier, against the Commission decision in the *Animal feed phosphates* price-fixing cartel.[28] This was the first EU cartel to be resolved using the 'hybrid' procedure, under which some undertakings agree to settle (and receive a fine reduction of 10 per cent) when others do not. In this case, Timab was the only participant that elected not to settle. Before the General Court, Timab argued that the Commission had penalised it for not doing so by imposing a fine exceeding that which the Commission had proposed while Timab was still engaged in settlement discussions. The Court held that, on the facts, the discrepancy could be justified. More importantly, the Court underlined as a matter of principle that the Commission is not bound by proposals made in prior settlement discussions when it comes to impose a fine upon an undertaking that withdrew from the settlement procedure.

Limitation period: Case T-485/11, Akzo v. Commission; Case T-250/12, Uralita

On 15 July 2015, the General Court[29] partially upheld an appeal by Akzo Nobel challenging the Commission's decision regarding the *Heat stabilisers* cartels[30] (see also *AC Treuhand,* above). Akzo Nobel argued that the Commission was time-barred from imposing penalties in respect of the conduct of Akzo Nobel Chemicals GmbH and Akzo Nobel Chemicals BV which had ceased on 29 July 1993, since the Commission did not take any action to investigate such conduct until 2003. The investigation therefore began after the five-year limitation period on the Commission's power to impose penalties had expired. The General Court upheld Akzo Nobel's appeal in part and annulled the Commission's decision insofar as it imposed fines upon those two companies, while noting that the limitation period relates only to the imposition of a fine and not to the Commission's right to find an undertaking liable for an infringement.

On 6 October 2015, the General Court[31] upheld the Commission's re-imposition of a fine on Uralita in relation to the *Sodium chlorate* cartel,[32] finding that it was not time-barred.

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27 Case T-456/10, *Timab Industries and Cie financière et de participations Roullier (CFPR) v. European Commission*, Judgment of 20 May 2015.

28 Case COMP/38866 – *Animal Feed Phosphates*, summary published in OJ 2011 C111/15.

29 Case T-485/11, *Akzo v. Commission*, Judgment of 15 July 2015.

30 Case COMP/38589 – *Heat stabilisers*, summary published in OJ 2010 C307/9.

31 Case T-250/12, *Corporación Empresarial de Materiales de Construcción, SA (formerly Uralita) v. Commission*, Judgment of 6 October 2015.

32 Case COMP/38695 – *Sodium Chlorate*, summary published in OJ 2012 C162/6.

A previous judgment in 2011[33] had annulled the fine payable by a subsidiary of Uralita, after which the Commission adopted a new decision which lowered Uralita's fine from €9.9 million to €4.3 million to reflect this judgment. Uralita argued unsuccessfully that the second decision imposed a new fine after the expiry of the relevant limitation period.

Single and continuous infringement: Case T-84/13, Samsung; Case T-91/13, LG – Electronics, Inc; Case T-92/13, Koninklijke Philips Electronics NV

On 9 September 2015, the General Court[34] dismissed three appeals (brought by Samsung SDI, LG Electronics and Philips) in relation to the *Cathode ray tubes* cartel[35] but partially upheld the appeals brought by Toshiba[36] and Panasonic.[37] The General Court held that the Commission had failed to establish to the requisite standard that Toshiba had participated directly in a single and continuous infringement before it entered into a joint venture with Panasonic. The evidence adduced also did not show that Toshiba knew of the existence of the overall cartel and had intended to contribute to it by its own conduct, or that it could have reasonably foreseen the objectives of the cartel and was prepared to take the risk. As regards Panasonic, the Court found that the Commission had failed to use the most accurate data available on the company's sales when calculating its fine, contrary to the principle stated in its 2006 Fining Guidelines.[38] The Court recalculated Panasonic's fine accordingly.

Liability for agents and subsidiaries; inability to pay: Case T-389/10, SLM v. Commission etc.

On 15 July 2015, the General Court[39] handed down judgments relating to 12 separate appeals against the Commission's decision in the *Pre-stressing steel* cartel.[40] The decision, adopted in June 2010, had found a particularly long-lasting price-fixing and market-sharing cartel that

33 Case T-349/08, *Uralita v. Commission*, Judgment of 25 October 2011.

34 Case T-84/13, *Samsung SDI Co. Ltd, Samsung SDI Germany GmbH and Samsung SDI (Malaysia) Bhd v. European Commission*; Case T-91/13, *LG – Electronics, Inc. v. European Commission*; Case T-92/13 – *Koninklijke Philips Electronics NV v. European Commission*, Judgment of 9 September 2015.

35 Case COMP/39437 – *TV and computer monitor tubes*, summary of the OJ 2013 C103/13.

36 Case T-104/13, *Toshiba v. Commission*, Judgment of 9 September 2009.

37 Case T-82/13, *Panasonic and MT Picture Display v. Commission*, Judgment of 9 September 2009.

38 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ 2006 C210/02.

39 Case T-389/10, *SLM v. Commission*; Case T-391/10, *Nedri Spanstaal v. Commission*; Case T-393/10, *Westfälische Drahtindustrie*; Case T-398/10, *Fapricela - Indústria de Trefilaria v. Commission*; Case T-406/10, *Emesa-Trefilería and Industrias Galyca v. Commission*; Case T-418/10, *voestalpine and voestalpine Austria Draht v. Commission*; Case T-419/10, *Ori Martin v. Commission*; Case T-413/10, *Socitrel v. Commission*; Case T-414/10, *Companhia Previdente v. Commission*; Case T-422/10, Emme v. Commission; Case T-423/10, *Redaelli Tecna v. Commission*; Case T-426/10, *Moreda-Riviere Trefilerías SA v. Commission*, Judgment of 15 July 2015.

40 Case COMP/38344 – *Prestressing steel*, summary published in the OJ 2011 C339/7.

had covered almost all EU Member States. Six of the appeals were dismissed in their entirety. Of the appeals that were partially successful, the more notable were those relating to Austria Draht, Ori Martin and Westfälische Drahtindustrie.

In *voestalpine and voestalpine Wire Rod Austria (Austria Draht),*[41] the General Court upheld the Commission's finding that Austria Draht had participated in the Italian branch of the cartel through its agent, despite there being no evidence that Austria Draht had been aware of the agent's illegal behaviour. To the extent that the agent had been acting within its authority, it could be regarded as forming part of the same undertaking as Austria Draht and the latter could be held liable for its conduct. It followed, however, that Austria Draht could not be held liable for the agent's behaviour in other markets where it did not have authority to act. The General Court accordingly reduced the fine imposed on Austria Draht and its parent.

In *Ori Martin,*[42] the Court addressed the liability of a parent for infringements committed by its subsidiary. In the Commission decision, Ori Martin had been found jointly and severally liable for the fine imposed upon its subsidiary, SLM. When the Commission reduced SLM's fine subsequently to account for errors in its original calculation, Ori Martin received no reduction in the amount for which it was jointly and severally liable. The General Court ruled that this was an error, and that Ori Martin's fine should also be reduced proportionately.

In *Westfälische Drahtindustrie (WDI)*,[43] the applicants argued that the Commission had erred in its assessment of their ability to pay the fines imposed. The Court agreed that the Commission's approach had been flawed, but nevertheless determined on the basis of its own assessment that the applicants remained viable concerns and that paying the fine would not result in their assets losing all their value. The fines were therefore upheld.

Rights of defence: Case T-655/11, FSL Holdings

On 16 June 2015, the General Court[44] issued its judgment on the appeal by Pacific Fruit against the Commission's decision[45] regarding a cartel among banana importers in southern Europe (see also *Dole*, above, relating to the cartel which affected northern Europe). One notable aspect of the judgment was the Court's ruling that the Commission had not breached essential procedural requirements or the applicant's rights of defence by relying as evidence upon documents that had been gathered by the Italian tax authority, in the context of an unrelated investigation, and subsequently transferred to the Commission. The Court held that the rule which prohibits information gathered by the Commission and national competition authorities from being used for purposes other than those for which it is obtained does not prevent the Commission from using as evidence information collected by a different national

41 Case T-418/10, *voestalpine and voestalpine Wire Rod Austria v. Commission*, Judgment of 15 July 2015.

42 Case T-389/10, *SLM v. Commission* and Case T-419/10, *Ori Martin v. Commission*, Judgments of 15 July 2015.

43 Case T-393/10, *Westfälische Drahtindustrie and Others v. Commission*, Judgment of 15 July 2015.

44 Case T-655/11, *FSL Holdings, Firma Léon Van Parys and Pacific Fruit Company Italy SpA v. European Commission*, Judgment of 16 June 2015.

45 Case COMP/39482 – *Exotic Fruits (Bananas)*, summary published in OJ 2012 C64/09.

authority. Only if a national court determines that the transfer of documents from the national authority to the Commission was unlawful could they be considered inadmissible as evidence.

ii Trends, developments and strategies

The most notable trend in Commission cartel enforcement in 2015 was a significant drop in the number of decisions adopted and fines imposed, after a particularly active 2014. The Commission adopted just four new infringement decisions in 2015 – compared to 10 in 2014 – and imposed only €364.5 million in total fines, which had exceeded €1 billion in each of the previous 10 years (with the exception of 2011). The decisions related to cartels in *Blocktrains*[46] (rail cargo operators) and *Parking heaters*,[47] both of which were adopted under the settlement procedure, and *Optical disk drives*[48] and *Retail food packaging*,[49] which were adopted under the standard procedure. The Commission also adopted a decision fining ICAP €14.9 million for its role in the several *Yen interest rate derivatives* cartels,[50] after the other participants had settled, and closed its investigation into *Cement and related products*.[51]

During the course of 2015, the Commission conducted unannounced inspections in the *Biofuel*[52] sector, later opening a formal investigation into suspected manipulation of price benchmarks by ethanol suppliers, and sent statements of objections to suspected participants in the *Capacitors,*[53] *Car battery recycling*[54] and *Canned mushrooms*[55] cartels.

The Commission adopted several amendments to its antitrust procedural rules in 2015, amending Regulation 773/2004 and four related notices (access to the file, leniency, settlements, cooperation with national courts).[56] The changes were largely intended to

46 Case COMP/40098 – *Blocktrains*, summary published in OJ 2015 C351/5.

47 Case COMP/40055 – *Parking heaters*, summary published in OJ 2015 C425/14.

48 Case COMP/39639 – *Optical Disc Drives.*

49 Case COMP/39563 – *Retail food packaging*, summary published in OJ 2015 C402/8.

50 Case COMP/39861 – *Yen interest rate derivatives*.

51 Case COMP/39520 – *Cement and related products*.

52 Case COMP/40054 – *Oil and biofuel markets*, Commission Memo/15/4822 of 21 April 2015.

53 Case COMP/40136 – *Capacitors*, Commission press release IP/15/5980 of 4 November 2015.

54 Case COMP/40018 – *Car battery recycling*, Commission press release IP/15/5254 of 24 June 2015.

55 Case COMP/39965 – *Canned mushrooms*, Commission press release IP/15/5065 of 28 May 2015.

56 Commission Regulation (EU) 2015/1348 of 3 August 2015 amending Regulation (EC) No. 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2015 L208/3; Amendments to the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004), OJ 2015 C256/3; Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 2015 C256/1; Amendments to the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in

reflect the implementation of Directive 2014/104/EU, the Antitrust Damages Directive. In addition, the Commission published new best practice guidelines on the use of data rooms in antitrust proceedings,[57] and issued guidance on the preparation of non-confidential versions of antitrust and merger control decisions.[58] The latter provides further clarity on the nature of information that parties can ask to be protected as business secrets or other confidential information. The Commission also published a revised version of its explanatory note on unannounced inspections[59] (or 'dawn raids'), which focused in particular on the nature and scope of the Commission's IT searches.

iii Outlook

In light of the low number of new investigations commenced by way of inspections or opened in 2015, it is possible that 2016 will again see the Commission adopt relatively few cartel enforcement decisions and yield limited fines. A decision may be adopted in the *Euro interest rate derivatives (EIRD)* cartel[60] against Crédit Agricole, HSBC and JPMorgan, who received a statement of objections in 2014, while further developments may lie ahead in relation to certain auto parts cartels (*Occupant safety systems, Thermal systems* and *Exhaust systems*).[61] Statements of objections may also be in the pipeline in relation to the Commission's two inquiries in the biofuel/bioethanol sector.[62] With regard to legislation and guidance, the Commission may issue draft guidelines on the quantification by national courts of antitrust damages actions.

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cartel cases, OJ 2015 C256/2; Amendments to the Commission Notice on the cooperation between the Commission and courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2015 C256/4.

57 DG Competition, Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf.

58 Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation http://ec.europa.eu/competition/mergers/legislation/guidance_on_preparation_of_public_versions_mergers_26052015.pdf.

59 Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No. 1/2003 http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf.

60 Case COMP/39924 – *Swiss France Interest Rate Derivatives*, summary published in OJ 2015 C72/9.

61 Case COMP/39881 – *Occupant Safety Systems*, Commission Statement Memo/2011/395 of 9 June 2011; Case COMP/39960 – Thermal systems, Commission Statement Memo/2012/563 of 13 July 201; Case COMP/40170 – Exhaust systems, Commission Statement Memo/2014/218 of 25 March 2014.

62 Case COMP/40054 – *Oil and biofuel markets*, Commission press release IP/15/6259 of 7 December 2015.

At the level of the European Courts, several significant cartel appeals are pending judgment before the ECJ (including in relation to the *Power transformers,*[63] *Bitumen Spain,*[64] *Bathroom fittings and fixtures*[65] and *Calcium carbide and magnesium based reagents*[66] cartels). Of particular interest will be the ECJ's ruling[67] on appeals brought by four cement producers concerning the lawfulness of Commission information requests received in the course of an Article 101 TFEU investigation. An Advocate-General's Opinion in the case (from October 2015)[68] found several faults in the General Court judgment[69] that dismissed the parties' initial appeals, including on the basis that the purpose of the information requests was insufficiently clear and unambiguous, that the Commission had breached the principles of proportionality and legal certainty, and that the Commission was not entitled to require the parties to provide information in a specific format.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

2015 saw the continuation of several significant ongoing antitrust investigations – including those of Google, Gazprom, Amazon and MasterCard – but little definitive action on the Commission's part in terms of infringement decisions adopted. The ECJ issued particularly important judgments concerning the enforcement of standard essential patents (*Huawei*) and rebates/price discounts offered by dominant companies (*Post Danmark II*).

63 Note: the ECJ issued its judgment on 20 January 2016: Case C-373/14 P, *Toshiba Corporation v. Commission*, Judgment of 20 January 2016.

64 Case C-608/13 P, *Compañía Española de Petróleos v. Commission*; Case C-616/13 P, *PROAS v. Commission*; Case C-617/13 P, *Repsol Lubricantes y Especialidades and Others v. Commission*. Note: the General Court issued its Judgment on 21 January 2016 in Case C-603/13, *Galp Energia España and Others v. Commission*.

65 Case C-609/13, *Duravit AG v. Commission*; Case C-611/13, *Hansa Metallwerke AG and Others v. Commission*; Case C-613/13, *European Commission v. Keramag Keramische Werke and Sanitec Europe*; Case C-614/13, *Masco Corp and others v. Commission*; Case C-618/13, *Zucchetti Rubinetteria SpA v. Commission*; Case C-619/13, *Mamoli Robinetteria v. Commission*; Case C-625/13, *Villeroy & Boch AG v. Commission*; Case C-626/13, *Villeroy & Boch Austria GmbH v. Commission*; Case C-636/13, *Roca Sanitario v. Commission*; Case C-637/13, *Laufen Austria v. Commission*; Case C-638/13, *Roca v. Commission*; Case C-642/13, *Villeroy & Boch Belgium v. Commission*; Case C-644/13, *Villeroy & Boch France v. Commission*.

66 Case C-154/14, *SKW Stahl-Metallurgie Holding AG and SKW Stahl-Metallurgie GmbH v. Commission*; Case C-155/14, *Evonik Degussa GmbH and AlzChem AG v. Commission.*

67 Note: the ECJ issued its judgement on 10 March 2016: Case C-247/14 P, *HeidelbergCement AG v. Commission*; Case C-248/14 P, *Schwenk Zement KG v. Commission*; Case C-267/14 P, *Buzzi Unicem SpA v. Commission*; Case C-268/14 P, *Italmobiliare SpA v. Commission*, Judgments of 10 March 2016.

68 Case C-247/14 P, *HeidelbergCement AG v. European Commission*, Opinion of Advocate General Wahl, 15 October 2015.

69 Case T-302/11, *HeidelbergCement AG v. European Commission*, Judgment of 14 March 2014.

i Significant cases

Standard essential patents: Case C-170/13, Huawei Technology

On 16 July 2015, the ECJ issued a significant ruling[70] on the antitrust implications of enforcing standard essential patents (SEPs). The Court held, in response to questions referred to it by the Regional Court of Düsseldorf, that the owner of an SEP may be regarded as abusing its dominant position if it seeks an injunction against an alleged patent infringer and the owner has previously committed to license the SEP on fair, reasonable, and non-discriminatory (FRAND) terms. The Court clarified, however, that this will not be the case if the SEP owner previously brought the infringement to the other party's attention and offered a licence on FRAND terms. A party seeking to use an SEP, but who rejects the rights holder's offer of a licence, may only claim that a subsequent injunction preventing its use is abusive if it previously submitted a counter-offer on FRAND terms.

Rebates offered by dominant companies: Case C-23/14, Post Danmark II

On 6 October 2015, the ECJ issued a highly anticipated ruling[71] in relation to rebates. The Court held that competition authorities must look at 'all the circumstances' of a rebate system when determining whether it has anticompetitive effects, in particular 'the rules and criteria governing the grant of the rebates, the number of customers concerned and the characteristics of the market on which the dominant undertaking operates'. Following the line of reasoning proposed by Advocate-General Kokott in her Opinion,[72] the Court stated that it was not a legal obligation for competition authorities to apply the 'as efficient competitor' test when assessing rebates. The Court dismissed the 'as efficient competitor' test as of 'no relevance' in this particular case: in light of Post Danmark's position of very great market power, there could be no as-efficient competitor on the market. The Court also confirmed that it is sufficient, when establishing a breach of Article 102 TFEU, for the anticompetitive effects of a rebate system to be 'probable' rather than being of a 'serious or appreciable nature'.

Extent of anticompetitive agreements: Case C-172/14, ING Pensii v. Consiliul Concurenței

On 16 July 2015, the ECJ issued its ruling[73] on a question referred to it by the Romanian High Court regarding fines imposed on 14 private pension fund managers for agreeing to share certain clients. The ECJ was asked to determine whether, in relation to such an agreement, the specific number of customers involved is relevant for showing a significant distortion of competition for the purposes of Article 101(1)(c) TFEU. The ECJ ruled that it was not. The Court found that a collusive agreement to share customers is anticompetitive by object and, as such, establishing a breach of Article 101 TFEU does not depend on the actual number of customers who are so allocated (or the proportion of the market that they represent) but simply on the terms and the objective aims of the agreement.

70 Case C-170/13, *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH*, Judgment of 16 July 2015.

71 Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, Judgment of 6 October 2015.

72 Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, Opinion of Advocate General Kokott, 21 May 2015.

73 Case C-172/14, *ING Pensii – Societate de Administrare a unui Fond de Pensii Administrat Privat SA v. Consiliul Concurenței*, Judgment of 16 July 2015.

Non-compete clauses in leases: Case C-345/14, SIA Maxima Latvija v. Konkurences padome
On 26 November 2015, the ECJ handed down a ruling[74] on the application of Article 101 TFEU to non-compete clauses in commercial property leases. The specific case involved the grant to a large supermarket in Latvia of 'anchor tenant' status which included a right of refusal over the offer of leases to competitors. The ECJ held that non-compete clauses of this nature in commercial leases are not restrictions of competition by object, but may give rise to a restriction by effect. To identify an anticompetitive effect, the Court specified that relevant factors to be taken into account include the structure of the affected retail market and the size of the catchment area covered by the agreements; the possibility for a new competitor to establish itself elsewhere in the relevant catchment area; customer habits, including loyalty to existing brands; the extent of any other barriers to entry; the terms and duration of the non-compete clause; and the existence of other similar agreements which could have a cumulative impact on competition.

Fines for abuse of dominance: Case T-486/11, Orange Polska
On 17 December 2015, the General Court issued its judgment on Orange Polska's[75] appeal against a €127.5 million fine imposed by the Commission for abuse of dominance.[76] Orange Polska did not dispute the finding of an infringement, but rather argued that the Commission had erred in law when calculating the fine. It claimed that the Commission had failed to consider relevant factors, specifically the differing duration and intensity of the separate elements of the infringement, and other mitigating factors which should have resulted in a lower fine. The Court rejected the appeal and upheld the Commission's decision, finding in particular that the fact that Orange Polska had offered commitments to resolve the Commission's concerns did not amount to effective cooperation that merited a reduction in its fine.

ii Trends, developments and strategies

In non-cartel antitrust enforcement, 2015 was characterised by the adoption of relatively few decisions but the ongoing pursuit of several high-profile investigations. The Commission did not impose any fines under Articles 101 (excluding cartels) or 102 TFEU in 2015, but did accept commitments to resolve concerns in two cases. These related to a joint venture between AirFrance/KLM, Alitalia and Delta on transatlantic flight routes,[77] and the sale of wholesale electricity in Bulgaria by Bulgarian Energy Holdings.[78]

The Commission continued its investigation into the unilateral conduct of several major – notably, non-European – businesses in 2015. In April, it issued a statement of

74 Case C-345/14, *SIA Maxima Latvija v. Konkurences padome*, Judgment of 26 November 2015.

75 Case T-486/11, *Orange Polska S.A. v. European Commission*, Judgment of 17 December 2015.

76 Case COMP/39525 – *Telekomunikacja Polska*, Commission press release IP/11/771 of 22 June 2011.

77 Case COMP/39964 – *AirFrance/KLM/Alitalia/Delta*, summary published in OJ 2015, C212/5.

78 Case COMP/39767 – *BEH Electricity*, Commission press release IP/15/6289 of 10 December 2015.

objections[79] to Google alleging that it was abusing its dominance in the online search market by systematically favouring its own comparison shopping product in its general search results pages; and, on the same day, announced the opening of a formal investigation relating to Google's Android mobile operating system.[80] The latter will focus on concerns that Google may have hindered the development and market access of rival mobile operating systems, applications and services by entering into anticompetitive agreements and/or abusing its dominance.

In April 2015, the Commission also issued a statement of objections[81] to Gazprom following an investigation that began with dawn raids in 2011. The Commission's allegations relate to three potential infringements, namely territorial restrictions in eight Member States, unfair pricing and supply restrictions. Gazprom submitted a settlement proposal in September 2015, after which Commission Vestager stated that the Commission was 'not even close' to resolving its case, and an oral hearing took place in December.

Amazon is also the subject of a formal investigation which was opened in June 2015 and relates to the terms of its agreements with publishers of e-books.[82] The investigation addresses concerns that Amazon's use of parity clauses – by which publishers are required to offer it prices and other terms at least as favourable as those offered to other distributors – hinders the development of competition.

The Commission was also active in relation to several other cases, opening a formal investigation[83] into the membership rules of the International Skating Union and issuing statements of objections to Lietuvos gelezinkeliai[84] (concerning Lithuanian and Latvian rail transport); Bulgarian Energy Holdings[85] (concerning the natural gas market); to Sky UK and six leading film studios[86] (concerning territorial restrictions in pay-TV); to MasterCard[87] (concerning cross-border fees and interchange fees); and to Qualcomm[88] (concerning chipsets).

79 Case COMP/39740 – *Google Search*, Commission press release IP/15/4780 of 15 April 2015.

80 Case COMP/40099 – *Google Android*, Commission press release IP/15/4780 of 15 April 2015.

81 Case COMP/39816 – *Upstream gas supplies in Central and Eastern Europe*, Commission press release IP/15/4828 of 22 April 2015.

82 Case COMP/40153 – *E-book MFNs*, Commission press release IP/15/5166 of 11 June 2015.

83 Case COMP/40208 – *International Skating Unions,* Commission press release IP/15/5771 of 5 October 2015.

84 Case COMP/39813 – *Baltic rail transport,* Commission press release IP/15/2940 of 5 January 2015.

85 Case COMP/39767 – *BEH Electricity*, Commission press release IP/15/4651 of 23 March 2015.

86 Case COMP/40023 – *Cross-border access to pay-TV content*, Commission press release IP/15/5432 of 23 July 2015.

87 Case COMP/40049 – *MasterCard*, Commission press release IP/15/5323 of 9 July 2015.

88 Case COMP/39711 and Case COMP/40220, Commission press release IP/15/6271 of 8 December 2015.

iii Outlook

Further developments are likely in relation to the major Commission antitrust investigations noted above, in particular those of Gazprom (whose 2015 settlement proposal appears not to have allayed the Commission's concerns), Google and Amazon.

It is also possible that 2016 will see further progress with regard to the Commission's review of the enforcement powers of national competition authorities. Following a July 2014 Communication on competition enforcement under Regulation 1/2003,[89] which identified certain areas where enforcement procedures diverge between Member States and where future action might be needed, the Commission opened a consultation in November 2015 on proposals to enhance the powers of national regulators. A summary of responses, and potentially an indication of the Commission's intentions in this area, may follow in 2016.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

The Commission took the significant step of launching a sector inquiry into e-commerce in May 2015.[90] This is the first Commission sector inquiry since the investigation into the pharmaceutical sector, which began in 2008 and culminated in multiple infringement decisions as well as new regulatory measures. The Commission's aim is to gather data on the functioning of e-commerce markets in order to identify possible competition issues, in light of broad concerns that cross-border e-commerce in the EU is developing at a slower than optimal rate. A Commission study from 2014, for example, found that while roughly half of the EU population had shopped online, only 15 per cent had shopped online from a supplier or retailer based in another Member State.

The sector inquiry will seek to identify current barriers to cross-border online trade, in particular contractual barriers (such as territorial restrictions in distribution agreements). It will focus initially on products where e-commerce is already well developed (such as electronics, apparel and shoes), as well as digital content (including music, films and books).

The Commission circulated information-gathering questionnaires to a very large number of operators at all levels of e-commerce in the EU during 2015, and it intends to publish a preliminary report on its findings in mid-2016. This will be followed by a public consultation, after which the Commission aims to publish its final report in the first quarter of 2017.

89 Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

90 http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

ii Trends, developments and strategies

Guidelines on the application of EU competition law to the joint selling of agricultural products

In November 2015, the Commission adopted new guidelines[91] clarifying how specific derogations from EU antitrust rules apply to the sale of certain agricultural products. The Guidelines explain the circumstances under which farmers may sell olive oil, beef and veal and arable crops jointly while remaining in compliance with EU competition rules.

Under certain specific derogations set out in the Common Market Organisation Regulation (Regulation (EU) No. 1308/2013), the standard EU competition rules which prohibit price-fixing and market allocation are waived such that producers of some goods may sell them jointly and set prices, volumes and other terms together through recognised organisations. This is only permitted if the organisation in question makes farmers significantly more efficient by providing them with supporting activities other than sales (such as storage, transport and distribution); and if the volumes marketed by the organisation stay below stated thresholds (20 per cent of the relevant market for olive oil and 15 per cent of the national market for beef and veal and arable crops). The guidelines are intended to provide further explanation of how these derogations, and the conditions applicable to their use, operate in practice.

iii Outlook

As noted above, 2016 will see the publication of the Commission's preliminary report on the e-commerce sector inquiry.[92] This should provide a valuable early indication of the likely course of action the Commission intends to pursue to bringing down barriers to competition in this segment.

In addition, the Commission is continuing its review of the Insurance Block Exemption Regulation (Regulation (EU) No. 267/2010), which grants an exemption to the application of competition rules to certain types of agreements in the insurance sector. The Regulation expires in March 2017, and the Commission is required to submit a report on its functioning and the future of regulation in this sector to the European Parliament and the Council by March 2016.[93]

V STATE AID

2015 may be looked back on as something of a landmark year for EU state aid enforcement. It saw the Commission adopt its first decisions on the compatibility of Member State tax

91 Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation for the olive oil, beef and veal and arable crops sectors, OJ 2015 C431/1.

92 The Commission published a Working Document setting out its initial findings on geo-blocking on 18 March 2016; Commission press release IP/16/922 of 18 March 2016.

93 The report has since been issued: Report from the Commission to the European Parliament and the Council, on the functioning of Commission Regulation (EU) No. 267/2010 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, Commission press release IP/16/861 of 17 March 2016.

rulings with internal market subsidy rules, in two cases which are likely to have repercussions for several years to come. The Commission also continued its efforts to modernise EU state aid legislation with the adoption of three updated regulations.

i Significant cases

Commission investigations into tax rulings

The Commission announced on 21 October 2015 that tax rulings issued in favour of Starbucks[94] (by the Netherlands) and Fiat Finance and Trade[95] (by Luxembourg) constituted unlawful state aid. It concluded that the relevant rulings, which related in particular to transfer pricing arrangements, endorsed artificial and complex methods to establish taxable profits that did not reflect economic reality. The Commission ordered the Netherlands and Luxembourg to recalculate the companies' respective tax bills and recover any additional amounts due. The amounts to be recovered are estimated at between €20 million and €30 million in both cases.

On 3 December 2015, the Commission announced that it had opened an investigation into Luxembourg's tax treatment of McDonald's Europe Franchising on similar grounds.[96] The Commission noted that, on the basis of two tax rulings given in 2009, McDonald's has paid no corporate tax at all in Luxembourg despite making considerable profits during the relevant period. Further Commission investigations into tax rulings that benefited Apple[97] and Amazon[98] also remain pending.

Eventech Ltd v. The Parking Adjudicator: Case C-518/13

On 14 January 2015, the ECJ ruled[99] on questions referred to it by the English Court of Appeal concerning a law allowing black cabs but not minicabs (two types of passenger hire vehicles subject to different licensing conditions) to use bus lanes in London. The case raised interesting points regarding the concept of state resources for the purposes of Article 107(1) TFEU (the prohibition on state aid) and the effect of a measure on inter-State trade.

While noting that the final determination must be made by the Court of Appeal, the ECJ stated that it did not appear that all of the elements of state aid were met by the measure in question. The Court found that the policy by which black cabs were permitted to drive in bus lanes without facing fines did not involve the use of state resources, since there was not a sufficiently direct link between the advantage given to the beneficiary (in this case, black cab operators) and a reduction of state resources. The Court also considered that the measure was not selective, in the sense of discriminating between operators in a similar position, due to the different characteristics of black cabs and minicabs. Finally, the Court held that (even though the measure essentially amounted to a traffic code in London) it was conceivable that

94 Case SA.38374 – *State aid implemented by the Netherlands to Starbucks*.

95 Case SA.38375 – *State aid implemented by Luxembourg to Fiat*.

96 Case SA.38945 – *Alleged aid to McDonald's – Luxembourg*.

97 Case SA.38373 – *Alleged aid to Apple*.

98 Case SA.38944 – *Alleged aid to Amazon – Luxembourg*.

99 Case C-518/13, *The Queen, on the application of Eventech Ltd v. The Parking Adjudicator*, Judgment of 14 January 2015.

inter-state trade could be affected. The measure could make the operation of minicab services less attractive, including for foreign operators. This was a sufficient basis to conclude that an effect on inter-state trade could be found, there being no *de minimis* threshold in this regard.

Basque Country v. Commission: Case T-462/13

On 26 November 2015, the General Court[100] adopted six judgments in cases appealing the Commission's 2014 decision[101] concerning the switch from analogue to digital television in Spain. Of wider interest in these judgments are the Court's findings with regard to economic activities and services of general economic interest (SGEIs).

The Court held, in summary, that the characterisation of a service as economic does not depend on whether it would be carried out by a private investor, nor does the provision of the service for free prevent it from being considered economic. Thus, if a service is offered in the market – albeit on different terms to those on which it is offered by the state – it should be regarded as an economic activity. On the issue of whether a service constitutes an SGEI, the Commission reiterated the importance of showing that the provider was under an obligation imposed by the state. In these cases, the broadcasters who received state support to fund the switch over from terrestrial television to digital were under no such obligation.

Cases T-515/13 and T-719/13 Spain v. Commission and Lico Leasing, SA and Pequeños y Medianos Astilleros Sociedad de Reconversión, SA v. Commission

On 17 December 2015, the General Court found in favour of the applicants in the first of more than 60 pending cases relating to the Commission's decision on the Spanish Tax Lease (STL) system.[102] The STL allowed shipping companies to benefit from a rebate on the purchase of ships by way of tax benefits granted to an economic interest group (EIG) that agreed to buy the ship at a gross price. Overturning the Commission's finding on state aid, the Court held that there was no selective benefit as regards the investors – notwithstanding that the tax benefit applied only to the purchase of sea-going vessels – since all Spanish taxpayers were able to take advantage of an STL. The investors in the EIG therefore could not be considered as the beneficiaries of state aid.

100 Case T-461/13, *Spain v. European Commission*; Case T-462/13, *Comunidad Autónoma del País Vasco and Itelazpi v. European Commission*; Case T-465/13, *Comunidad Autónoma de Cataluña and Centre de Telecomunicacions i Tecnologies de la Informació de la Generalitat de Catalunya v. European Commission*; Case T-487/13, *Navarra de Servicios y Tecnologías v. European Commission*; Case T-541/13, *Abertis Telecom and Retevisión I v. European Commission*; Joined cases T-463/13 and T-464/13 *Comunidad Autónoma de Galicia and Redes de Telecomunicación Galegas Retegal v. European Commission*, Judgments of 26 November 2015.

101 Case SA.27408 – *Castilla La Mancha.*

102 Commission Decision 2014/200 of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System, OJ 2014 L114/1.

ii Trends, developments and strategies

Changes to state aid legislation: the Enabling Regulation, the Procedural Regulation and the Implementing Regulation

The Commission updated three elements of its state aid legislation in 2015, adopting Council Regulation 2015/1588[103] on the application of Article 107 and Article 108 of the TFEU to certain categories of horizontal state aid (the Enabling Regulation) and Council Regulation 2015/1589[104] laying down detailed rules for the application of Article 108 of the TFEU (the Procedural Regulation) in September, and Commission Regulation 2015/2282,[105] amending Regulation 794/2004 (the Implementing Regulation), in December.

Among the features of the new legislation are provisions extending the categories of aid for which the Commission may adopt block exemptions; the introduction of a new complaints-handling procedure and enhanced Commission information-gathering powers; and the creation of a new Commission power to conduct sector inquiries in relation to state aid. In addition, by way of the new Implementing Regulation, the notification forms required to be completed by Member States to inform the Commission of aid measures have been amended.

Analytical grids on the application of state aid rules to the financing of infrastructure projects

In September 2015, the Commission published updated guidance on state aid compatibility assessments in relation to infrastructure projects.[106] Covering a range of different sectors (broadband networks, airports and ports, R&D, culture infrastructure, sport and recreational, energy, waste management, and rail, metro and local transport), the checklists offer guidance on identifying when no state aid is involved; when aid is involved but no notification is required; and when aid is involved and a notification should be made.

iii Outlook

Exercising new powers gained under the updated Enabling Regulation, the Commission opened its first ever sector inquiry concerning state aid in April 2015. The Commission is examining capacity mechanisms, i.e., national measures intended to maintain adequate electricity production capacity at all times. The scope of the inquiry extends to 11 Member States, and the Commission's preliminary findings are expected in summer 2016.

Further Commission decisions on tax rulings, including those granted in favour of Amazon, Apple and McDonald's, are also expected in 2016.

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103 Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid.

104 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

105 Commission Regulation (EU) 2015/2282 of 27 November 2015 amending Regulation (EC) No 794/2004 as regards the notification forms and information sheets.

106 Analytical Grids on the application of State aid rules to the financing of infrastructure projects, September 2015 http://ec.europa.eu/competition/state_aid/studies_reports/state_aid_grids_2015_en.pdf.

VI MERGER REVIEW

The Commission received 337 merger notifications in 2015, an increase from 303 in 2014. Of these, 297 transactions were approved unconditionally in Phase I while 13 were cleared in Phase I with commitments. Three-quarters of the Phase I approval decisions (222) were adopted under the simplified procedure; the proportion of transactions that are subject to this streamlined and less onerous procedure remained consistent with 2014, and is a further indication that the Commission's 2013 revision of the Implementing Regulation was successful in its goal of increasing the use of the simplified procedure in order to reduce both the Commission's workload and transaction costs for merging parties.

Eight merger decisions in 2015 were adopted following an in-depth, Phase II investigation. Of these, one was approved unconditionally (Case COMP/M.7429 *Siemens/ Dresser-Rand*) and seven were approved subject to commitments.[107] For the second consecutive year, no mergers were prohibited. Two deals, however, were abandoned following notification: the proposed *Teliasonera/Telenor*[108] joint venture and *Mondi/Walki Assets*,[109] both of which were aborted in Phase II when the parties were unable to agree satisfactory remedies to address the Commission's competition concerns.

i Significant cases

Deutsche Börse: Case T-175/12

On 9 March 2015, the General Court dismissed Deutsche Börse's[110] appeal against the European Commission's February 2012 decision[111] which had prohibited its proposed merger with NYSE Euronext.

Deutsche Börse alleged that the Commission had erred in its competitive assessment, in particular with regard to competition between the merging parties. The Court upheld the Commission's findings, including on issues of market definition and the analysis of the efficiencies that the merger would deliver. The Court also considered that the Commission was right to find that the remedies which the parties had proposed to address its competition concerns were inadequate.

Niki Luftfahrt: Case T-162/10

On 13 May 2015, the General Court[112] dismissed in its entirety an appeal against the Commission's conditional approval of Lufthansa's acquisition of Austrian Airlines in 2009.[113]

107 Case COMP/M.7278 – *General Electric/ Alstom*; Case COMP/M.7408 – *Cargill/ ADM Chocolate Business*; Case COMP/M.6800 – *PRSfM/ STIM/ GEMA/ JV*; Case COMP/M.7421 – *Orange/ Jazztel*; Case COMP/M.7292 – *DEMB/ Mondelez*; Case COMP/M.7265 – *Zimmer/ Biomet*; Case COMP/M.7194 – *Liberty Global/ Corelio/ W+W/ De Vijver Media*.

108 Case COMP/M.7419 – *Teliasonera/Telenor*.

109 Case COMP/M.7566 – *Mondi/Walki Assets*.

110 Case T-175/12, *Deutsche Börse AG v. European Commission*, Judgment of 9 March 2015

111 Case COMP/M.6166 – *Deutsche Börse/ NYSE Euronext*.

112 Case T-162/10, *Niki Luftfahrt GmbH v. Commission*, Judgment of 13 May 2015

113 Case COMP/M.5440 – *Lufthansa/ Austrian Airlines*.

The Court held that the Commission had properly assessed the structure of competition in the relevant markets and the likely impact of the acquisition, and was correct in its positive assessment of the remedies package offered by the parties.

ii Trends, developments and strategies

The Commission did not prohibit any mergers in 2015, although the withdrawal of two notifications late in Phase II (*Teliasonera/Telenor* and *Mondi/Walki Assets*) indicates that prohibition decisions may have been on the horizon had the parties failed to concede to the Commission's preferred commitments. Indeed, almost all of the mergers that were approved following an in-depth investigation required significant remedies. These included *General Electric/Alstom*,[114] which closed in November 2015; the Commission required an up-front buyer for parts of Alstom's heavy-duty gas turbines business in order to approve the deal. A number of remedy packages endorsed by the Commission in 2015 consisted of a combination of structural and behavioural remedies or behavioural remedies on a stand-alone basis. These included *Liberty Global/Corelio/W&W/De Vijver Media*,[115] in which the parties offered a commitment to distribute certain TV channels on fair, reasonable and non-discriminatory terms; the music licensing joint venture *PRSfM/STIM/GEMA/JV*;[116] *DEMB/Mondelez*,[117] in which the commitments included the sale of two business and the grant of a brand licence for five years; and *Orange/Jazztel*,[118] in which the parties divested an optical fibre-to-the-home network and committed to grant the buyer access to their national network.

iii Outlook

At the time of writing, the Commission was pursuing detailed investigations into several significant deals in Phase II, among them *Hutchison/O2 UK,*[119] *Staples/Office Depot,*[120] and *Halliburton/Baker Hughes.*[121] Yet to be notified, but almost certain to face Commission scrutiny in 2016, are Anheuser-Busch InBev's acquisition of fellow brewing giant SABMiller[122] and the US$130 billion merger of Dow Chemical and DuPont.

Finally, 2016 may see further light shed on future reforms of the EU merger control regime. After the publication of a White Paper in 2014 which outlined potential areas for change,[123] including in relation to the review of the acquisition of minority shareholdings, the Commission may provide clearer indications of any action it intends to take.

114 Case COMP/M.7278 – *General Electric/Alstom.*

115 Case COMP/M.7194 – *Liberty Global/Corelio/W&W/De Vijver Media.*

116 Case COMP/M.6800 – *PRSfM/STIM/GEMA/JV.*

117 Case COMP/M.7292 – *DEMB/Mondelez.*

118 Case COMP/M.7421 – *Orange/Jazztel.*

119 Case COMP/M.7612 – *Hutchison/O2 UK.*

120 Case COMP/M.7555 – *Staples/Office Depot.* Note the Commission approved the transaction conditionally on 10 February 2016.

121 Case COMP/M.7477 – *Halliburton/Baker Hughes*.

122 Note: the transaction was notified to the Commission on 30 March 2016 as Case M.7881.

123 COM(2014) 449 – White Paper Towards more effective EU merger control.

VII CONCLUSIONS

It is perhaps too early to say, after only one full year of Margrethe Vestager's tenure as Commissioner for Competition, that the Commission under her watch is a less proactive enforcer than under that of her predecessors. It is noticeable, however, that the Commission in 2015 made limited use of its powers to carry out unannounced inspections, and new investigations (in relation to either cartels or antitrust) were relatively few and far between. The Commission clearly has an appetite for stern examination of Member State tax measures, by contrast, and it remains focused on tackling perceived abuses by the largest of multinationals (among them Gazprom, Google and Amazon). It may well be, as these cases come to a head in 2016 and a raft of high-value, high-profile mergers pass before the Commission for examination, that 2015 will come to be seen as merely the calm before the storm.

Appendix 1

ABOUT THE AUTHORS

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Oliver Geiss is a partner in Squire Patton Boggs' 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 telecommunications.

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

Squire Patton Boggs

Will Sparks is a senior associate in the antitrust and competition practice based in Squire Patton Boggs' 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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