The Public Competition Enforcement Review

Fifth Edition

Law Business Research

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Fifth Edition

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FOREWORD

It is immediately apparent from the reports in *The Public Competition Enforcement Review* that competition enforcement remains vigorous across the world. An overwhelming majority of authorities continue to prioritise anti-cartel enforcement and 2012 witnessed, in the United States and the EU, some of the highest cartel fines ever to be imposed in respect of individual cartels. Authorities in newer competition law regimes such as India, China and Taiwan followed suit. There was a common focus on illegal conduct within the context of trade associations and bid rigging.

The Business and Industry Advisory Committee – representing business within the framework of the OECD – and its Competition Committee regard the pursuit and elimination of 'hardcore' cartel conduct as a priority. Businesses suffer when markets are not working effectively and are victims of cartel behaviour as much as consumers and society as a whole. But caution must always be exercised to ensure that justifiable, even pro-competitive, conduct is not inadvertently swept up into an offending category. The reports for Australia, India and the United Kingdom describe developments that serve as a reminder that many commercial activities – including information exchange, price parallelism and certain trade association activities – need to be analysed in context (and not simply presumed to be anti-competitive).

International cooperation and the convergence of laws and procedures are important objectives for many of the authorities covered in this book. There is a good reason for this. Not only did the infringing companies in many of the cartels uncovered have their headquarters outside the country imposing the penalties but, more generally, globalisation – particularly the transformation of regional markets into worldwide markets – has increased the propensity for conduct and transactions to be scrutinised by numerous competition authorities in parallel. Convergence of laws and procedures holds many attractions for competition authorities and business alike. But convergence is a complex matter. The keynote article in *The Public Competition Enforcement Review*, 'Public v. Private Enforcement: Rethinking the Thirst for Competition Litigation', is a strong reminder that a thoughtful approach to convergence is always needed. There may

be a logic to aligning a new regime with the most established regimes but in practice that may not be the most appropriate approach to every aspect of the law and policy.

To ensure that the law and related procedures develop optimally, authorities must take stock of what is working (and what is not working), reflecting on achievements but also re-examining fundamentals. This *Review* makes a useful contribution to the process of reflection with its timely and authoritative comments on the past year's developments and trends. *Ex post* evaluations (where an authority evaluates whether its intervention was appropriate and achieved its objectives) are also essential. These studies are becoming more common, particularly in the merger control sphere. They can be used in well-established regimes, but also by those countries that have newly amended their rules. The reports for Brazil, China and India describe major progress in respect of merger control activity. Evaluations can ensure that improvements are made in the early years to keep the merger control regime on track. A key work stream for the OECD is looking at how *ex post* evaluations are conducted, what methodologies function best in practice and how the process can be improved. Like the competition authorities, international competition organisations such as the OECD and ICN can usefully carry out evaluations of their own measures and recommendations. The OECD is setting a good example by evaluating its own merger recommendations from 2005.

The country reports also describe a substantial amount of enforcement activity taking place in relation to abuse of dominance. The wide variety of cases being brought by different competition authorities suggests that this area is perhaps the least convergent in terms of substantive competition law. This has been the case for so long that it is not surprising but nor is it without risk. The chapter for Argentina expresses concern that dominance cases may be targeted to achieve price control objectives. In Australia, misuse of market power is identified as a key priority. The US authorities are moving away from a policy that 'favoured extreme caution' in this area and are debating the scope of appropriate enforcement against unfair methods of competition. This *Review* encapsulates the fierce debates under way. International organisations should continue to help build consensus on the key elements of an abuse of dominance case. In 2012 the OECD produced a useful report on excessive pricing discussing how to ensure that intervention is principled and evidence-based.

It is also apparent that competition authorities are continuing to address industry sectors with growing global importance, including media and communications, the high-tech sector, the digital economy and financial services. The issues are complex and the global implications of intervention can be immediate. The OECD has developed roundtable reports on all these sectors where business input is a key contribution to the debate given the fast-evolving technological environment.

Overall, the level and nature of enforcement described in the country reports demonstrates that competition authorities across the world have succeeded in 'holding the line' when budgets and even the role of competition law itself has been under fire. The chapters in this publication prove that the competition authorities did not let the rules slip in the face of economic difficulties. However, ongoing reflection is needed now

to ensure that there is a good understanding of how companies and governments respond to current economic challenges. Reflections in this post-crisis time will be essential for ensuring that business and regulators play their part in ensuring that the events leading to the global recession are not repeated. Surveying policies, objectives, enforcement and trends, *The Public Competition Enforcement Review* contributes to such reflections.

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London
April 2013

Chapter 10

EUROPEAN UNION

Tim Frazer, Susan Hinchliffe, Mark Gardner and Thomas McNeil[1]

I OVERVIEW

The European Commission ('the Commission') has had a busy past 12 months with developments in all the main areas of competition law enforcement.

In relation to cartels, the Commission imposed its highest ever aggregate fine in the *TV and Computer Monitor Tubes* cartel, with fines totalling €1.47 billion. Three other cartel cases were also prosecuted, including one where the Commission's settlement procedure was used. Outside the cartel field, the Commission challenged anti-competitive agreements concerning non-compete restrictions, sales of e-books and 'pay for delay' arrangements in the pharmaceutical sector.

Regarding abuses by dominant firms, the Commission chose to focus its attention on standard-essential patents, opening investigations into practices by Samsung and Motorola. Meanwhile, the Court of Justice of the EU ('CJEU') handed down judgments in the *Tomra* case (concerning loyalty rebates) and in *AstraZeneca* (a case concerning abuse of regulatory procedures).

The Commission did not launch any new sector studies in 2012 but it did keep up its interest in the pharmaceutical sector, and raised the possibility of an EU-wide sector inquiry in relation to the food sector. Separately, it also consulted in relation to scrapping its current competition law guidelines for the maritime shipping sector.

Finally, in the field of state aids, the Commission launched its state aid modernisation project.

1 Tim Frazer and Susan Hinchliffe are partners, Mark Gardner is a senior associate and Thomas McNeil is an associate at Arnold & Porter (UK) LLP.

II CARTELS

i Commission decisions

The Commission adopted four new cartel decisions in 2012 (the same number of decisions it adopted in 2011) including the largest total cartel fine it has ever imposed.

TV and computer monitor tubes[2]

At the end of 2012, after a five-year investigation, the Commission fined six groups of companies – Samsung, Philips, LG Electronics, Technicolor, Panasonic and Toshiba – a total of €1.47 billion for participating in either one or both of two cartels involving cathode ray tubes used in the production of computer screens and TVs.[3]

The Commission found that over a 10-year period the companies fixed prices, shared markets, allocated customers and restricted output. The cartels were described by Commissioner Almunia as 'textbook cartels' involving the most harmful kinds of anti-competitive behaviour;[4] the cartels were highly organised and it was apparent that the companies knew that they were breaking the law.

The aggregate fine imposed by the Commission in this case is the largest fine it has ever imposed in a cartel case, surpassing its previous highest total of €1.38 billion imposed in the *Car Glass* cartel.[5] Philips and LG Electronics received fines of approximately €705 million and €687 million respectively. These are the second and third largest fines imposed by the Commission on individual companies for cartel infringements.[6]

2 Case COMP/39.437, decision dated 5 December 2012. Commission Press Release IP/12/1317, dated 5 December 2012. Decision not yet available.

3 The exact fines per undertaking were as follows: Chunghwa2, €0 (as it received full immunity); Samsung SDI, €150.842 million; Philips, €313.356 million; LG Electronics, €295.597 million; Philips and LG Electronics2, 391.940 million; Technicolor, €38.631 million; Panasonic, €157.478 million; Toshiba, €28.048 million; Pansonic, Toshiba and MTPD2, €86.738 million; and Panasonic and MTPD2, €7.885 million. One company, rumoured to be Technicolor, received a reduction in its fine of approximately 85 per cent as a result of the Commission applying the inability-to-pay principles.

4 Commission Press Release IP/12/1317, dated 5 December 2012.

5 European Commission's statistics on cartels, 2012.

6 The largest fine on a single undertaking is the €896 million fine imposed on Saint Gobain in 2008 following its involvement in the *Car Glass* cartel (Commission Press Release IP/08/1685, dated 12 November 2008). In February 2013, it was reported that Panasonic, Samsung and LG Electronics are challenging the Commission's fine before the General Court. The appeals are expected to dispute the cartel's duration, whether it affected the European market and how the sanctions were calculated. The case numbers are: Panasonic T-82/13, Samsung T-84/13, LG Electronics T-91/13 and Philips T-92/13.

The Commission's other cartel decisions in 2012 concerned *Window Mountings*,[7] *Freight Forwarders*[8] and *Water Management Products*.[9] In the *Window Mountings* cartel, the Commission found that nine producers of window mountings had engaged in price fixing over a 10-year period and covering all Member States. In the *Freight Forwarders* cartel, the Commission found that 14 company groups had participated in four separate cartels aimed at fixing prices and trading conditions in the market for international air freight forwarding services. The conduct primarily involved establishing surcharges, which were then added on to customer invoices.

Water Management Products

The Commission's decision in *Water Management Products* is only the sixth time that the Commission has used its settlement procedure for cartels.[10] During its investigation, the Commission found that three companies had coordinated their prices for water management products (primarily used in heating, cooling and sanitation systems) in Germany and several other Member States. The Commission imposed fines totalling €13.6 million. The parties were found to have exchanged confidential information and informed each other of the date and amount of future price increases. Of the three parties involved, one obtained complete immunity under the Commission's leniency procedure, and the remaining two undertakings were awarded a 10 per cent reduction in their fine for acknowledging their participation and subsequently settling the case.

ii General Court decisions

The General Court handed down several judgments in 2012, largely upholding the previous Commission's decisions. The most important decisions concerned issues regarding: parental liability for activities of a joint venture; evidencing the role of a cartel 'instigator'; and the inability of infringing parties to pay the fine imposed by the Commission.

Parental liability in a joint venture

In its original decision in the *Chloroprene Rubber* cartel,[11] the Commission had found that DuPont and Dow were each liable for the conduct of a joint venture that they jointly controlled.

On appeal, the General Court agreed that the Commission had correctly imputed liability to DuPont and Dow, noting in particular that the committee established to supervise the business of the joint venture was subject to absolute rights of veto held by

7 Case COMP/39.452 – Mountings for windows and window doors.

8 Case COMP/39.462 – Freight forwarding.

9 Case COMP/39.611 – Water management products.

10 Regulation 622/2008 of 30 June 2008. Under the Commission's settlement procedure, companies can admit their participation in the conduct in question, in return for a shortened administrative procedure and a 10 per cent reduction in the amount of fine that might otherwise have been imposed.

11 Case COMP/38.629 – Chloroprene Rubber.

both DuPont and Dow, and at the time the joint venture was established the Commission concluded that the parent companies held joint control for the purposes of the EU Merger Regulation.[12] In addition, the fact that, upon hearing about the Commission's investigation into the cartel, the parent companies had ordered an internal investigation to establish whether the joint venture was involved was further evidence that the parent companies believed they had the means to require the joint venture to conduct itself in accordance with competition law.

In rejecting the parties' arguments, the General Court also explained that it was not relevant that the joint venture was a 'full-function joint venture'.[13] Although a full-function joint venture is deemed to perform on a lasting basis all the functions of an autonomous economic entity, the Court noted that such autonomy does not mean 'that the joint venture enjoys autonomy as regards the adoption of its strategic decisions and that it is not therefore under the decisive influence exercised by its parent companies for the purposes of the application of Article [101]'.[14] The appeals were therefore dismissed.

Evidencing the role of a cartel instigator and leader

In its decision in the Dutch *Road Bitumen* cartel,[15] the Commission had concluded that Shell had played the role of an instigator and leader in the infringement and increased its fine, in accordance with the Commission's fining guidelines.[16] However, on appeal,

12 Case T-76/08 (*EI du Pont de Nemours and Others*) and case T-77/08 (*Dow Chemical*).

13 Being defined as a 'full-function joint venture' is relevant for considering whether a particular joint venture should be considered a concentration for the purpose of being reviewed by the Commission pursuant to the Merger Regulation. The Commission's Consolidated Jurisdictional Notice (2008/C 95/01) says:

Article 3(4) provides in addition that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the Merger Regulation. The full-functionality criterion therefore delineates the application of the Merger Regulation for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a 'greenfield operation' or whether the parties contribute assets to the joint venture which they previously owned individually. In these circumstances, the joint venture must fulfil the full-functionality criterion in order to constitute a concentration.

14 Case COMP/38.629 – *Chloroprene Rubber*, para 78.

15 Case COMP / 38.456 – *Bitumen* – NL.

16 In order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other undertakings to establish the cartel or to join it. The Commission considered that Shell within the group of bitumen suppliers bears a special responsibility for their respective role in instigating the cartel. The Commission considered that Shell's instigation of parties coming together was instrumental in persuading other undertakings, both W5 road builders and bitumen suppliers, to establish the cartel together with the market leader from each group. Further Shell was considered a leader in the cartel activities, and it was alleged evidence showed it was, for example, often the first to approach with proposed price changes. The Commission concluded that the basic amount for the individual fine should be increased by 50 per cent

the General Court found that the Commission had not provided sufficient evidence of Shell's role, and it reduced the €108 million fine to €81 million.

The General Court explained in particular that the evidence did not prove that Shell instigated the imposition of a rebate that was central to the cartel, or whether it did so at the request of one of the other cartelists. In addition, early exchanges between Shell and other parties may not have concerned the activities of the cartel.

As to Shell's role as leader, the General Court concluded that references to Shell as 'leader' in certain contemporaneous documents were in fact references to its position as a market leader. Moreover, the General Court explained that statements by another cartel member – who may have a particular motive in painting another party as leader of the cartel – had a lesser value unless they could be corroborated by other evidence. As no additional evidence was provided, the General Court found that it was not clear that Shell had a leadership role in the cartel and it therefore reduced the fine imposed by the Commission.

Inability to pay

Under paragraph 35 of the Commission's 2006 Fining Guidelines, the Commission may, upon request, reduce a company's fines in exceptional cases, taking into account social and economic circumstances. Such a decision must be made solely on the basis of objective evidence that the imposition of the fine would irretrievably jeopardise the economic viability of the undertaking concerned and cause all its assets to lose their value.

In its decision in the *Calcium Carbide* cartel,[17] the General Court upheld the Commission's decision not to apply the inability to pay provisions to reduce the fines on the companies involved. The General Court held that the mere fact that the fine may result in the bankruptcy of a company is not a sufficient basis on which to find that inability to pay provisions should be invoked.

iii CJEU decisions

The CJEU continued to hear a number of appeals concerning parental liability, largely upholding the previous findings of the General Court that the Commission had been correct to impute the liability of a subsidiary company to its parents.[18]

(para 342-349). In conclusion, when also taking into account Shell's past cartelist conduct (recidivism), the Commission further held that in total the fine should be increased for Shell by 100 per cent.

17 T-352/09 (*Novácke chemické závody*), T-400/09 (*Ecka Granulate*), T-410/09 (*Almamet*) and T-392/09. Original Commission decision: Case COMP/39.396 – Calcium carbide and magnesium based reagents for the steel and gas industries.

18 *Copper Fittings* cartel: Case COMP/289/11 P – *Legris Industries SA v. Commission*; *Acrylic Glass* and *Sodium Chlorate* cartels: Case COMP/404/11 P – *Elf Aquitaine v. Commission* (sodium chlorate) and Case COMP/421/11 P – *Elf Aquitaine and Total v. Commission* (acrylic glass); Italian *Raw Tobacco* cartel: Case COMP/654/11 P – *Transcatab SpA v. European Commission* and Case COMP/593/11 P – *Alliance One International Inc v. European Commission*; *Lifts*

Outside the field of parental liability, the CJEU also dismissed an appeal arising from the *Copper Fitting* cartel that the imposition of fines was against the Charter of Fundamental Rights and the European Convention on Human Rights,[19] and an appeal in relation to the Dutch *Beer Cartel* confirming that the General Court had not infringed the principle of equal treatment because the circumstances of the Dutch *Beer Cartel* were different and could not be compared to the circumstances of a previous Commission decision relating to the Belgian beer sector.[20]

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Commission made some important competition law decisions in 2012, in relation to both anti-competitive agreements (under Article 101) and abuse of a dominant position (under Article 102).

i Significant cases – Article 101

***Areva/Siemens*[21]**

In 2001, Areva and Siemens created a joint venture (Areva NP), in which they combined their respective activities in relation to nuclear power plants. As part of the arrangements, the parties agreed on a non-compete obligation that was intended to apply for up to 11 years beyond the duration of the joint venture itself.

When the joint venture came to an end following Siemens' exit in 2009 (leading to Areva acquiring sole control over Areva NP), the Commission expressed concerns that the non-compete obligation and confidentiality clause may inhibit competition because it prevented Siemens from competing on markets where the joint venture acted as reseller of Siemens' products (in relation to other markets, where the joint venture sold its own products, the Commission found that the non-compete clause could be accepted in principle but that its duration was excessive).

As regards confidentiality, the Commission considered that as a parent company, Siemens had had privileged access to the joint venture's confidential business information, which it could use to compete more easily against Areva NP after its exit from the joint venture. However, on the basis of 'concrete evidence', the Commission found that

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and Escalators cartel: Case COMP/493/11 P – *United Technologies Corporation v. Commission* and Case COMP/494/11 – *Otis Luxembourg Sarl, Otis SA, Otis GmbH & Co, Otis BV and Otis Elevator Company v. Commission*; *Bleaching Chemicals* cartel: Case COMP/495/11 P – *Total SA and Elf Aquitaine SA v. Commission*; and Spanish *Raw Tobacco* cartel: Joined Cases COMP/628/10 and COMP/14/11, *Alliance One International Inc and Others v. European Commission and Others*.

19 Case COMP/290/11 P – *Comap v. Commission* and Case COMP/289/11 P – *Legris Industries SA v. Commission.*

20 Case COMP/452/11 P – *Heineken Nederland BV and Heineken NV v. Commission*.

21 Case COMP/39.736 — *Siemens/Areva*; Commission Press Release IP/12/618, dated 18 June 2012.

'protection' against the use of such information was no longer necessary after three years, since the information would then become irrelevant or too uncertain.

In response to the Commission's concerns, Siemens and Areva offered commitments under Article 9 of Regulation 1/2003. They agreed to limit the duration of the confidentiality clause to three years following Areva's acquisition of sole control over Areva NP in relation to the joint venture's core products and services, and agreed to remove the non-compete obligation in its entirety for all other products and services. After market testing the commitments, the Commission was satisfied that they addressed its concerns and closed its investigation. In June 2012, the commitments were made legally binding by the Commission.

The pharmaceutical sector – 'pay for delay'

The Commission's close scrutiny of the pharmaceutical sector continued. In July 2012, the Commission sent Lundbeck and Servier statements of objections regarding agreements concluded with four generic competitors concerning Citalopram and Perindopril respectively.[22]

In relation to Citalopram, the Commission has formed the preliminary conclusion that Lundbeck reached agreements with generic companies to prevent the market entry of competing generic versions of its medicine, Citalopram. While generic entry became possible when certain of Lundbeck's Citalopram patents expired, the Commission alleges that the companies entered into agreements that foresaw substantial value transfers from Lundbeck to its four generic competitors, and that they subsequently abstained from entering the market. The value transfers were alleged to include direct payments from Lundbeck to the generic competitors and the purchase of generic Citalopram stock for destruction, or the guarantee of profit levels in a distribution agreement.

In relation to Perindopril, the Commission objected to actions taken by Servier to acquire 'scarce' competing technologies to produce Perindopril (thereby rendering generic market entry more difficult or causing delayed entry). The Commission has also challenged Servier for unduly protecting its market exclusivity by inducing its generic challengers to conclude patent settlement agreements.

E-books

On 13 December 2012, the Commission formally settled its investigation into the marketing of e-books by accepting commitments from Apple and four international publishers.[23] The Commission found that in late 2009 Apple and the publishers met to discuss Apple's entry into the e-books market, with the aim of limiting retail price

22 Case COMP/39.226 – *Lundbeck* and Case COMP/39.612 – *Servier* (perindopril). In the citalopram case, the statement of objections is also addressed to Merck KGaA, Generics UK, Arrow, Resolution Chemicals, Xellia Pharmaceuticals, Alpharma, AL Industrier and Ranbaxy, which belonged to the generic groups that concluded the agreements.

23 Commission Press Release IP/12/1367, dated 13 December 2012. The four publishers are Hachette Livre, Harper Collins, Verlagsgruppe Georg von Holtzbrinck and Simon & Schuster. A fifth publisher is also seeking a settlement.

competition. As a result of their meeting, they agreed to switch from a wholesale model to an agency model, meaning that e-book prices could be determined by the publishers rather than by retailers.

The switch was achieved by all participants on the same key terms and on a global basis. One key term that the Commission considered particularly problematic was a 'most-favoured customer' clause for retail prices. This clause stipulated that if any retailer sold an e-book at a lower price than that on Apple's iBookstore, publishers would have to lower the price of the e-book sold through Apple, so that the price matched that charged by other retailers. This obligation meant that there was little incentive for the publisher to allow any retailer to lower prices, as to do so would result in price reductions with Apple as well. The Commission therefore considered that the incentives of publishers were aligned.

The Commission considered such coordination between publishers to be anti-competitive. However, to avoid a long investigation, which, according to the Commission, would likely have resulted in fines, it accepted commitments from Apple and the publishers as a preferable resolution, particularly given the nascent and fast-moving nature of the market. The commitments provide that: Apple and the four publishers are to terminate the existing agency agreements; for a period of two years (subject to certain conditions) publishers cannot hamper e-book retailers from setting their own prices and discounts; and for a period of five years the parties cannot conclude agreements concerning e-books with retail price most-favoured nation customer clauses.[24]

ii Significant cases – Article 102

Tomra[25]

The CJEU finally handed down its judgment in this long-running case. The case originated from a complaint to the Commission that Tomra had abused its dominant position by offering quantitative rebates on sales of reverse vending machines (machines that refund cash in return for used drinks containers). In particular, it was alleged that Tomra, through agreements with several large retail companies, prevented the complainant from accessing the market.

In 2006, the Commission fined Tomra €24 million for implementing an exclusionary strategy in a number of national markets. The strategy was said to involve exclusivity agreements, individualised quantity commitments and retroactive rebate schemes, which, the Commission concluded, had the effect of foreclosing competition.[26] Tomra's appeal against the Commission's decision was rejected by the General Court.[27] Tomra appealed to the CJEU, challenging in particular the General Court's assessment of retroactive rebates.

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24 Commitments Decision of 12 December 2012 (Case COMP/39.847 – *e-books*).

25 Case C-549/10 P – *Tomra v. Commission*.

26 Commission Press Release IP/06/398, dated 29 March 2006, decision in Case COMP/E-1/38.113 – *Prokent-Tomra*, para 97.

27 Case T-155/06 – *Tomra Systems ASA and Others v. European Commission*.

In April 2012, the Court dismissed the appeal, explaining that individualised target rebates payable on all customer purchases, where the target volume is all or most of the customer's requirements, are likely to be unlawful for a dominant firm. The CJEU also agreed that Tomra had committed an abuse by deliberately tying customers into exclusive arrangements. It noted that although terms such as 'primary', 'main' and 'preferred' supplier might not appear to be equivalent to exclusivity, in contractual practice they were. This was evidenced by documents relating to the negotiations and other statements about the contracts. Moreover, the exclusivity in the agreement prohibited even the testing of competing products. The CJEU also noted that due to the nature of demand for the reverse vending machines and the long life-cycle of the product (seven to 10 years), even short-term exclusive arrangements could result in significant foreclosure.

AstraZeneca

The CJEU gave its judgment in AstraZeneca's appeal[28] against a 2010 judgment of the General Court concerning a Commission decision of June 2005, where the Commission imposed a fine of €60 million for abuse of dominant position. The abuses were described as including misleading representations made by AstraZeneca to the patent offices in certain Member States in an attempt to prolong the period of exclusivity granted to AstraZeneca's drug, Losec. AstraZeneca's practice of deregistering the marketing authorisations for Losec capsules in Denmark, Sweden and Norway (which the Commission found was aimed at preventing parallel trade and delaying generic entry) was also problematic.

In July 2010, the General Court rejected most of AstraZeneca's arguments.[29] However, it annulled part of the Commission's decision regarding the deregistration of market authorisations in Denmark, Sweden and Norway as the Commission had not proved that such activities were aimed at preventing parallel trade.

In December 2012, the CJEU rejected AstraZeneca's appeal, noting in particular that the law prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those within the scope of competition on the merits.[30] It concluded that the General Court was entitled to hold that AstraZeneca's conduct of submitting misleading representations was anti-competitive and an attempt to extend its dominance over the product market. Moreover, the CJEU confirmed that the deregistration of marketing authorisations, aimed at hindering the introduction of generic products without objective justification, amounts to abusive conduct.

28 Case C-457/10 P – *AstraZeneca v. Commission*.

29 Case T-321/05 – *AstraZeneca v. Commission*.

30 Case C-457/10 P – *AstraZeneca v. Commission*, para 75.

Microsoft

In the first such decision of its kind, Commissioner Almunia announced in October 2012[31] that the Commission was close to sanctioning Microsoft for its failure to comply with undertakings it gave under Article 9 Regulation 1/2003 regarding access to other internet browsers on its Windows platform.

Having been investigated by the Commission in 2009, Microsoft gave a formal commitment to allow the selection of browsers other than Microsoft's Internet Explorer. However, the Commission subsequently received information that some new software did not show the 'ballot-screen' (where consumers could elect to chose a particular browser). The Commission therefore commenced a new investigation, resulting in formal objections being sent to Microsoft on 24 October 2012. This is believed to be the first time that the Commission has taken such action in relation to alleged non-compliance with commitments given under Article 9 of Regulation 1/2003.

iii Trends, development and strategies: standard-essential patents

In one of the year's 'hot topics', the Commission investigated Samsung and Motorola Mobility (now owned by Google) over their commitments to license standard-essential patents ('SEPs')[32] on fair, reasonable and non-discriminatory terms ('FRAND') terms, following litigation against Apple and Microsoft respectively.

On 21 December 2012, the Commission issued a statement of objections against Samsung, formally setting out its competition concerns, despite Samsung having agreed to withdraw its SEP injunctions against Apple in the preceding week.[33] In short, the Commission alleges that Samsung abused its dominant position by seeking injunctions in relation to 3G telephony patents. Conversely, Samsung holds that it has only sought injunctions against Apple because Apple was an unwilling licensee that refused to enter into good-faith negotiations. In relation to Motorola, the Commission opened formal proceedings in April 2012.[34] It is alleged that Motorola abused its dominant position by using its SEPs to seek and enforce injunctions against Apple and Microsoft. Separately, the Commission is also considering complaints by Apple and Microsoft that Motorola offered unfair licensing conditions for its SEPs.

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31 European Commission statement at the midday press briefing on the Commission's statement of objections sent to Microsoft, press room in Brussels (24 October 2012).

32 SEPs are patents over technology that is required in order to manufacture a product in accordance with an industry standard. The owners of SEPs commit to licensing those patents to technology manufacturers on FRAND terms. However, when parties cannot agree over the terms, the SEP owners often seek an injunction restricting other parties' use of the SEP. This may raise competition concerns where it raises barriers due to the SEP owners' proposed royalty rates being too high (ie not on FRAND terms), or because injunctions keep competitors out of the market.

33 Samsung Electronics Statement of 18 December 2012.

34 Case COMP/C-3/39.985 – *Motorola* and Case COMP/C-3/39.986 – *Motorola*.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Commission did not undertake any market investigations in 2012 but its monitoring of the pharmaceutical sector continues.[35] However, one sector that did attract some attention was the food sector, with both the European Competition Network ('ECN') and the Commission taking a renewed interest. As regards other sector-specific activities, the Commission also consulted on its intention to scrap its competition law guidelines for maritime transport.

i Food sector

In May 2012, the ECN published a report regarding the activities of national competition authorities in the food sector throughout Europe.[36] The report found that, in total, the national competition authorities of the ECN have undertaken more than 180 antitrust investigations, nearly 1,300 merger control proceedings and more than 100 market-monitoring actions relating to the food sector, since 2004.[37]

Authorities have imposed sanctions in over 50 cartels in the food industry and are investigating more than 30 further potential cartels. Vertical anti-competitive agreements amount to 19 per cent of all cases and abusive conduct by dominant operators amounted to 20 per cent of all cases.[38] Of the 1,300 mergers notified, 83 mergers raised concerns. These concerns materialised in particular in the retail sector, which represented 33 per cent of all mergers.[39]

Meanwhile, at the Commission level, in October 2012, Commissioner Almunia confirmed that the Commission has set up a task force to look into the food sector and is to consider if an EU-wide sector inquiry is appropriate.[40] However, he also noted that his services had not yet found a case for conducting an EU-wide inquiry. This action follows previous Commission action in relation to the food supply chain in 2009.[41]

ii Maritime shipping guidelines

In May 2012, the Commission launched a public consultation into the future of the Maritime Shipping Competition Law Guidelines.[42] The Guidelines are due to expire

35 Commission announcement at 25 July 2012: 'Antitrust: Commission enforcement action in pharmaceutical sector following sector inquiry'.

36 ECN Activities in the Food Sector: Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector (May 2012).

37 Ibid, para 3.

38 Ibid, para 8-10.

39 Ibid, para 12-13.

40 Speech by Almunia to MEPs in Brussels on 8 October 2012.

41 Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions: A better functioning food supply chain in Europe (28 October 2009).

42 Commission Press Release IP/12/446, dated 4 May 2012.

in September 2013. The Commission considers that there is no longer a need for the Guidelines to remain in place.

The Guidelines were established in 2006 following the repeal of the liner conference exemption (which exempted certain agreements between liner shipping companies on prices and other conditions of carriage from EU competition law rules). The Guidelines were intended to facilitate a transition from a specific competition law regime (under the linear conference exemption) to a general regime where EU competition law rules would apply to maritime shipping as they do in any other sector. In addition, the Commission also considers that the Maritime Shipping Competition Law Guidelines now overlap substantially with other general guidelines, particularly the Commission's Guidelines on Horizontal Cooperation Agreements.[43] In early 2013, the Commission decided to scrap the Maritime Shipping Competition Law Guidelines.[44]

V STATE AID

The Commission passed a number of measures in relation to state aid in 2012, including a prolongation of guidelines on state aid for rescuing and restructuring firms in difficulty[45] and the adoption of a regulation on *de minimis* aid for the provision of services of general economic interest.[46] However, perhaps the most important development was its announcement in May 2012 regarding its state aid modernisation ('SAM') project.[47]

Following previous reforms to its State Aid Action Plan (which was originally adopted in 2005[48] aimed at establishing less, and better targeted, aid), the Commission's SAM project sets out its guiding principles, which are aimed at achieving three interrelated objectives: to foster growth in a strengthened, dynamic and competitive internal market; to focus enforcement on cases with the biggest impact on the internal market; and to streamline rules and faster decisions within business-relevant timelines.

On 5 December 2012, the Commission announced[49] that it had adopted proposals to amend the state aid Enabling Regulation[50] and the state aid Procedural Regulation.[51] The Commission is proposing to revise the Enabling Regulation to extend the categories of aid for which it is authorised to make block exemption regulations.

43 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C11, 14.1.2011, p. 1).

44 Commission Press Release IP/13/122, dated 19 February 2013.

45 Commission Press Release IP/12/1042, dated 28 September 2012.

46 Commission Press Release IP/12/402, dated 25 April 2012.

47 Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions: EU State Aid Modernisation (8 May 2012).

48 State Aid Action Plan: Less and better targeted state aid: a roadmap for state aid reform 2005–2009 (7 June 2005).

49 Commission Press Release IP/12/1316, dated 5 December 2012.

50 Regulation 994/98.

51 Regulation 659/99.

The revisions to the Procedural Regulation include measures to clarify the requirements for lodging a complaint and to improve the Commission's handling of complaints. The Commission will also be given powers to seek information from market players and to conduct state-aid sector inquiries. In addition, the proposed revisions will also formalise the cooperation between the Commission and national judges in state-aid cases. The Commission hopes that the SAM project will be complete by the end of 2013.

VI CONCLUSIONS

The next 12 months promise to be another busy period for EU competition law enforcement. There are a number of interesting developments in the pipeline but three of the most important areas include access to leniency documents, the revision of the Commission's guidelines in relation to technology transfer agreements and the Commission's possible settlement with Google.

i Access to leniency documents

Questions continue to be raised regarding the extent to which claimants seeking damages from cartel participants may access documents provided to the European Commission in the context of cartel proceedings. In *Pfleiderer*[52] the CJEU ruled that EU law does not prohibit access to leniency documents by third parties seeking damages. Access should be determined according to national law, which must weigh the interests arguing in favour of and against a disclosure of documents received under leniency applications. Soon after the CJEU's decision, in a claim for damages brought by the National Grid, the English High Court was asked to apply the *Pfleiderer* judgment to consider whether to order disclosure of certain documents containing leniency materials. Applying the principles in *Pfleiderer*, the English High Court made an order for disclosure.[53] This has been particularly controversial and Commissioner Almunia has indicated that the Commission is preparing legislation to clarify how such issues should be dealt with.[54]

ii Revision of the Technology Transfer Block Exemption Regulation

In February 2013, the Commission announced a public consultation on its proposal for a revised competition regime for technology transfer agreements.[55] The current regime is due to expire in April 2014. Under the proposals, the new block exemption will make clear that the regime will only apply where the block exemption regulation on R&D agreements or the block exemption regulation on specialisation agreements do not apply. In addition, the Commission proposes an amended test for determining when the purchase of raw material or equipment is covered by the safe harbour, and a lower market-share threshold for certain licensing agreements between non-competitors. Other changes include excluding passive sales restrictions between licensees and all exclusive

52 Case C-360/09 – *Pfleiderer AG v. Bundeskartellamt*.

53 *National Grid Electricity Transmission Plc v. ABB Ltd and Others* [2012] EWHC 869 (Ch).

54 Announcement at AmCham 29th Competition Conference in Brussels on 6 December 2012.

55 Commission Press Release IP/13/120, dated 20 February 2013.

'grant-backs' from the benefit of the safe harbour. Finally, the Commission proposes that termination clauses should also fall outside the exemption. The consultation closes in May 2013.

iii Google – the final settlement decision?

During the second half of 2012, the Commission continued its probe into Google. This stemmed from complaints made early in 2010. A number of allegations are being pursued. First, it is alleged that Google's search-ranking algorithm anti-competitively promotes its own products over those of its competitors. It is also claimed that, as a result of Google's search criteria (which involves 'quality scores'), competing search sites that have not paid for advertising are artificially moved down the search results or will be placed lower than Google's own search products. Secondly, Google is challenged over its 'scraping' of content from competing search engines' websites. Thirdly, complainants allege that Google's advertising agreements impose exclusivity restrictions that prevent advertising partners from placing competing adverts on their websites, as well as restrictions on the portability of advertising data to competing online platforms. It is reported that Google filed its proposed commitments with the Commission to address these issues on 25 January 2013. The Commission is said to be conducting a preliminary assessment of the commitments before providing complainants with the chance to informally discuss any concerns they have over the remedies, before a more formal market test is conducted at a later date.

Appendix 1

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Tim is a partner in Arnold & Porter's European antitrust group and is based in London. He is also managing partner of Arnold & Porter's London office. He represents and advises clients in a range of competition issues including merger, transactional and conduct cases. His clients span the pharmaceuticals, tobacco, food, chemicals, medical devices and consumer products industries, and he has represented them before the UK Office of Fair Trading, the UK Competition Commission, and the European Commission. Tim is recommended by *Legal 500 UK, Chambers UK* and *PLC Which Lawyer?* for EU and competition law. He was previously a professor and Dean of Law at Newcastle University.

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