The Public Competition Enforcement Review

Seventh Edition

Editor
Aidan Synnott

Law Business Research

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For further information please email
Nick.Barette@lbresearch.com

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Editor
Aidan Synnott

Law Business Research Ltd

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Gideon Roberton

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Nick Barette

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EDITOR'S PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries that attracted government enforcement attention during the past year.

Cartel enforcement remains robust, particularly by the European Commission and the United States. These jurisdictions, along with Brazil, China and Japan, have continued their enforcement actions against automotive parts cartelists, and have levied substantial fines in this area. Other areas of cartel enforcement include ocean shipping, with Japan and the United States undertaking notable activity in this area; and continued enforcement against alleged cartels related to liquid crystal displays. Many investigations have been marked by cooperation among enforcers in several jurisdictions, and this trend toward cross-border cooperation appears to be increasing.

In the area of restrictive agreements, there have been significant public enforcement actions relating to payment card network rules and fees, including a finding of liability in a litigated government challenge in the United States; as well as actions by the European Commission, Germany, Switzerland, Italy and Croatia. We have also seen several examples of actions against manufacturer-imposed restrictions on retailers' behaviour, particularly against resale price maintenance (including in Croatia, Germany, Greece, Italy and Japan); and restrictions on online sales (in Switzerland and elsewhere). The apparent concern with resale price maintenance in these jurisdictions might be seen to contrast with the relative dearth of recent public enforcement actions against these arrangements in the United States, which itself may reflect a change in the interpretation of the relevant law by United States Supreme Court several years ago.

In the area of dominance, there has been much attention devoted to standard essential patents – patents that cover intellectual property that becomes part of a widely used technology standard – including in the United States, the European Union and China. Cypriot, Finnish, Australian and other enforcers have taken action with respect to food and some of these actions have focused on the bargaining power of large supermarket

chains. The European Commission, the United Kingdom, Belgium, Slovenia and Taiwan have taken action in the energy sector.

We can also see several jurisdictions active in the health-care sector and related fields. The United States, the European Commission, the United Kingdom, Brazil and Italy have all undertaken or continued enforcement actions related to alleged attempts by pharmaceutical manufacturers to delay the entry of generic competitors. In addition, the European Commission has issued its Fifth Report on the Monitoring of Patent Settlements, which are sometimes allegedly used to delay generic drug entry into pharmaceutical markets in violation of competition rules. We also read of enforcers' actions with respect to hospital mergers and the provision of health care in the United States, the United Kingdom, Germany and Spain. In addition, many jurisdictions, including Ecuador, Mexico and Italy, have taken action in the telecommunications sector.

Merger review and enforcement activity remains robust, and the chapters that follow note increases in activity in the United States, the European Union, the United Kingdom, China, Argentina and elsewhere. Many of these investigations reflect an uptick in pharmaceutical firm mergers; and indeed a number of these have involved cooperation among multiple national enforcement authorities. Several of the reports, including the reports from the United States and India, note enforcement actions involving 'gun jumping' in which merging firms are alleged to have engaged in impermissible cooperation prior to the resolution of government merger investigations. We also have reports from the United Kingdom and the United States illustrating that even merger activity in small markets may generate scrutiny.

Many jurisdictions continue to enact new competition laws or amend the existing laws; others continue to develop the implementation of laws enacted in recent years. In this regard, of particular interest is the report about the formal adoption of the European Commission's Antitrust Damages Directive, which, among other things, concerns the interplay of Commission and national competition authority proceedings and follow-on, private damages actions. In relation to this, the essay entitled 'Public v. Private Enforcement: Why Europe should Change Course on Private Enforcement', updated from last year, sets forth a sceptical view of the efficacy of private competition actions in Europe. Also of note are the reported developments in the enforcement regimes and governing laws in the United Kingdom, Spain, Japan, Mexico and Argentina. Here we read of the United Kingdom's new Competition and Markets Authority, which last year replaced the Office of Fair Trading and Competition Commission; the second year of the Spanish National Markets and Competition Commission; the imminent implementation of amendments to Japan's Act on Prohibition of Private Monopolization and Maintenance of Fair Trade; continued development of enforcement under the Mexican Antitrust Act; and the amendment last year to the Argentine Antitrust Law.

Similarly, the continued introduction and expanded use of leniency programmes to aid enforcers in detecting, investigating and punishing cartel activity is of particular interest. For some time, the leniency programme in the United States has been

an important element in US competition law enforcement; and the reports from Switzerland, Columbia, Argentina and elsewhere highlight enforcers' increasing use of these programmes in competition investigations. Indeed, the expanded use of these programmes and the global reach of many cartels will undoubtedly require cartelists to consider carefully the varying incentives and penalties in these programmes among jurisdictions when their activity may be subject to international scrutiny.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2015

Chapter 11

EUROPEAN UNION

Oliver Geiss and Will Sparks[1]

I OVERVIEW

2014 was a significant year in EU public enforcement due to the arrival of a new Commission, which formally began its five-year term in November. Danish politician Margrethe Vestager replaced Joaquin Almunia as Competition Commissioner, however, unlike her predecessor she did not become a Vice-President of the European Commission. As a result of restructuring by the new Commission President, Jean-Claude Juncker, Vestager herself will work in conjunction with the Vice-Presidents for Jobs, Growth, Investment and Competitiveness, for the Digital Single Market and for Energy Union. It is yet to be seen how this restructuring might alter the priorities and enforcement practices of DG Competition. In early statements, Vestager expressed her commitment to using fines as a cartel enforcement tool, improving the transparency of DG Competition and focusing increased 'ambition on the big things'. This would suggest an emphasis on cases in major industries and service sectors causing real harm to consumers throughout the internal market.[2]

The Commission was particularly active in cartel enforcement in 2014, adopting 10 cartel decisions imposing total fines of €1.7 billion. Eight of these decisions followed the settlement procedure. The EU courts delivered two important decisions on the concept of a restriction of competition by object, in *Intel* and *Groupement des Cartes Bancaires*, and reached a decision on the long-running Mastercard transaction fees dispute. 2014 also saw the introduction of the highly anticipated Directive on Antitrust

1 Oliver Geiss is a partner and Will Sparks is a senior associate at Squire Patton Boggs. The authors are grateful for the assistance of Sabra Ferhat, Kate Stokes and Natalie Ingram in the preparation of this chapter.

2 Hearing of Margrethe Vestager, 2 October 2014, www.elections2014.eu/resources/library/media/20141022RES75845/20141022RES75845.pdf.

Damages, which aims to facilitate follow-on actions related to antitrust infringements by harmonising national procedural rules.

II CARTELS

i Significant cases

There was a high level of Commission enforcement activity in 2014, with the adoption of 10 cartel decisions imposing combined fines of €1.7 billion. This represents a marked increase on the four decisions adopted in 2013 and five in 2012, although the total fines imposed each year were relatively constant (€1.8 billion in 2013 and €1.7 billion in 2012). By far the largest decision of the year concerned the *Bearings* cartel, in which six parties were fined a combined €953.3 million. 2014 was also notable for the prevalence of settlements: eight of the 10 decisions adopted by the Commission followed the settlement procedure.

At the level of the European courts, parental liability and economic succession were central to several judgments handed down by the European Court of Justice (ECJ), which also criticised the General Court for unjustified delays in hearing several cartel appeals.

Bearings[3]

In March 2014, the Commission adopted a decision finding that two European companies (SKF and Schaeffler) and four Japanese companies (JTEKT, NSK, NFC and NTN along with its French subsidiary NTN-SNR) had implemented a price-fixing cartel in the market for automotive bearings. It imposed fines totalling €953.3 million, the fourth highest cartel fine in Commission history, of which Schaeffler was liable for €370.4 million. This was the third decision adopted by the Commission so far in its investigation of automotive components, following decisions adopted in *Polyurethane Foam*[4] in January 2014 (fines totalling €114 million) and *Wire Harnesses*[5] in July 2013 (fines totalling €141 million). Investigations into other automotive components remain ongoing (see below).

Other Commission enforcement decisions

As in previous years, the majority of the decisions adopted by the Commission in 2014 involved the more 'classical' forms of cartel behaviour such as price fixing (alleged in *Polyurethane Foam, Bearings, Steel Abrasives*, and *Canned Mushrooms*[6]) or market sharing

3 Case COMP/39922 – *Bearings*, Decision of 19 March 2014.

4 Case AT.39801 – *Polyurethane Foam*, Decision of 29 January 2014.

5 Case AT.39748 – *Wire Harnesses*, Decision of 10 July 2013.

6 Case AT.39792 – *Steel Abrasives*, Decision of 2 April 2014; case AT.39965 – *Mushrooms*, Decision of 25 June 2014.

(*High Voltage Power Cables, Power Exchanges*[7]). The *Smart Card Chips*[8] case, by contrast, was based solely on a finding of unlawful information exchange. The parties concerned were found to have engaged in a network of bilateral discussions on prices, customers, contract negotiations, production capacity, production utilisation and future market conduct, for which they received total fines of €138 million; however, the companies were not found to have entered into any agreement or form of coordination. This case is consistent with the Commission's insistence in its 2011 Horizontal Guidelines that information exchange between competitors can be restrictive of competition in and of itself.[9] *Smart Card Chips* was also one of only two cartel decisions in 2014 that was not settled, the other being *High Voltage Power Cables*, a market-sharing and bid-rigging cartel involving 11 firms that were fined a combined €302 million.

ECJ judgments on liability for cartel fines

Several judgments in cartel appeals handed down by the ECJ in 2014 considered issues of parental liability, joint and several liability, and economic succession.

In March, the court reduced a fine imposed on Ballast Nedam from €4.65 million to €3.45 million on a finding that the Commission had breached the applicant's rights of defence.[10] The Commission had sent a statement of objections (SO) to Ballast Nedam NV, the parent of a subsidiary active in the *Dutch Bitumen* cartel,[11] but did not state in which capacity it was called upon to answer the allegations. This fault was compounded, the court held, by the Commission's failure to also send the SO to the subsidiary itself.

In April, the ECJ partially upheld appeals by Areva and Alstom[12] in relation to the *Gas Insulated Switchgear* cartel.[13] It found that the Commission had imposed *de facto* joint and several liability on two companies that had successively been the parents of a subsidiary that committed an infringement, contrary to the principle of legal certainty and the principle that fines must be specific to the offender and the offence. The court found that it should have calculated separate fines for the subsidiary and its first parent, and the subsidiary and its second parent, respectively.

The same month, FLSmidth lost its appeal to the ECJ[14] in relation to the *Industrial Bags* cartel.[15] The court agreed with the Commission that a fine reduction granted in respect of an undertaking's cooperation with the Commission cannot be extended to a

7 Case AT.39610 – *Power Cables*, Decision of 2 April 2014; case AT.39952 – *Power Exchanges*, Decision of 5 March 2014.

8 Case AT.39574 – *Smart Card Chips*, Decision of 3 September 2014.

9 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ 2011 C11/1.

10 Case C-612/12 P, *Ballast Nedam v. Commission*, Judgment of 27 March 2014.

11 Case COMP/F/38456 – *Bitumen*, Decision of 13 September 2006.

12 Case C-247/11 P, *Areva SA v. Commission*; Judgment of 10 April 2014; case C-253/11 P, *Alstom and Others v. Commission*, Judgment of 10 April 2014.

13 Case COMP/39966 – *Gas Insulated Switchgear*, Decision of 27 June 2012.

14 Case C-238/12 P, *FLSmidth v. Commission*, Judgment of 30 April 2014.

15 Case COMP/38354 – *Industrial Bags*, Decision of 30 November 2005.

company that controlled the undertaking in the past, but which did not itself contribute to the detection of the infringement.

Finally, in September, YKK won a fine reduction from €19.25 million to €2.79 million when the ECJ found that the Commission had wrongly calculated a fine imposed jointly and severally on YKK and a subsidiary.[16] YKK Stocko had been found solely liable for participating in the *Fasteners* cartel during a period before it was acquired by YKK.[17] However, the Commission wrongly used the whole of YKK's group sales when applying the cap that limits fines to 10 per cent of a company's annual turnover. The court held that the cap should have been applied in relation to YKK Stocko's sales, which were considerably lower, and reduced the fine on YKK accordingly.

ECJ criticism of General Court delays

In five separate judgments in 2014, the ECJ upheld arguments that cartel appeal proceedings before the General Court had taken an unreasonable amount of time.[18] In each case, the ECJ found that the delay in the proceedings should not annul the lower court's ruling, but did entitle the party concerned to bring an action for damages. These cases follow similar judgments in favour of Kendrion and Gascogne Sack in relation to the *Industrial Bags* cartel that were handed down by the ECJ in 2013,[19] which have resulted in three damages actions being lodged before the General Court.[20] Kendrion, Gascogne Sack and Aspla, another party to the original cartel appeal, are claiming compensation for both material damage (the costs of financing their exposure to the fine) and non-material damage (including loss caused by uncertainty due to the delay). In a fourth action of the same kind, Aalberts Industries is suing for the General Court's delay in hearing its appeal in the *Copper Fittings* cartel.[21] The General Court had upheld Aalberts' appeal of the Commission's decision in 2011 and quashed its fine of €100 million, but took more than four years to do so. In total, the lower court faces claims for almost €20 million in damages in these ongoing cases.

16 Case C-408/12 P, *YKK Corp. and Others v. Commission*, Judgment 4 September 2014.

17 Case COMP/39168 – *Fasteners* cartel, Decision of 19 September 2007.

18 Case C-238/12P, *FLSmith v. Commission*, Judgment of 30 April 2014; Case C-243/12P, *FLS Plast A/S v. Commission*, Judgment of 19 June 2014; Case C-578/11P, *Deltafina SpA v. European Commission*, Judgment of 13 June 2014; Case C-467-13P, *Industries Chimiques du Fluor v. European Commission*, Judgment of 18 June 2013; Case C-580/12P, *Guardian Industries Corp and Guardian Europe Sàrl*, Judgment of 12 November 2014.

19 Case C-50/12, *Kendrion NV v. European Commission*, Judgment of 26 November 2013.

20 Case T-479/14, *Kendrion v. Court of Justice of the European Union*, Action brought on 26 June 2014; Case T-577/14, *Gascogne Sack Deutschland and Gascogne v. Court of Justice*, Action brought on 29 July 2014; Case T-40/15, *Aspla and Armando Álvarez v. European Union*, Action brought on 27 January 2015.

21 Case T-385/06, *Aalberts Industries and Others v. Commission*, Judgment of 24 March 2011.

ii Trends, developments and strategies

In November 2014, the Directive governing actions for damages for infringements of competition rules (the Antitrust Damages Directive) was formally adopted.[22] The Directive establishes minimum requirements that must be implemented by all Member States to ensure full and equal access to seek compensation in national courts for loss caused by antitrust infringements. It includes the following key provisions:

a The Directive establishes a rebuttable presumption that antitrust infringements cause harm, placing the burden of proof on the defendant to show that their infringement caused no harm to the claimant.

b Member States are required to ensure that victims of antitrust infringements can claim full compensation for any harm suffered, including actual loss and loss of profit.

c National courts can order defendants to disclose evidence to the claimant on the basis of a reasoned justification, and vice versa. Information of a confidential nature should also be disclosed if objectively justified but may be subject to safeguards (such as disclosure to a limited 'confidentiality ring').

d Statements made to the Commission or national authorities in the context of a leniency application are protected from disclosure, as are settlement submissions (provided that these were not withdrawn after being submitted).

e A finding of infringement by the Commission or a national competition authority will automatically constitute proof of liability before a court in the same Member State. If a decision is adopted by the authority of a foreign Member State, it may be presented before the national court as *prima facie* evidence of an infringement.

f The limitation period for bringing damages actions must be at least five years. This period is suspended if a competition authority commences proceedings in the same matter, ending at the earlier of one year after the authority's decision becomes final or one year after the proceedings are closed.

g The Directive recognises the 'passing-on defence', allowing defendants to argue that the claimant passed on the whole or part of the overcharge resulting from the infringement to their own customer(s). The burden of proving such passing on lies with the defendant. Consequently, indirect customers can also claim damages.

Member States are required to implement the Antitrust Damages Directive into national law within two years. It will be interesting to observe both the effect the Directive has on the number of follow-on claims brought at national level – especially outside the UK, the Netherlands and Germany, the most common fora for such actions at present – and its impact on Commission and national leniency programmes. Litigation in the UK based on the *Airfreight* cartel, which has seen a prolonged stand-off between the Commission, the parties and the national judge over access to the Commission's confidential decision, suggests that putting the Directive's provisions into practice may not be unproblematic.

22 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1.

iii Outlook

At the close of 2014, cartel investigations were ongoing in several sectors. The Commission conducted unannounced inspections in relation to automotive exhaust systems and at the premises of biofuel producers and traders during the course of the year, as well as issuing statements of objections in its investigations concerning trucks and euro interest rate derivatives. These cases will be added to a growing list of pending matters that may lead to decisions in 2015, along with cases such as *Cement and Related Products*, *Optical Disk Drives*, and multiple *Car Parts* investigations. 2015 will also see the Commission amend Regulation 773/2004 (the Procedural Regulation) as a result of the adoption of the Antitrust Damages Directive, including to introduce new provisions on leniency.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

The Commission adopted only one enforcement decision under Article 101 TFEU in 2014 that was unrelated to cartel behaviour, namely *Servier*. However, it adopted four decisions concerning abuse of dominance based on Article 102 TFEU, three of which imposed fines, with a fifth case closed by settlement. This reflects an active year for the Commission, which had not adopted any infringement decisions under Article 102 TFEU in 2013. 2014 brought two important judgments on the concept of a restriction of competition by object (the General Court in *Intel* and the ECJ in *Groupement des Cartes Bancaires*) and the ECJ also concluded the long-running dispute over Mastercard's transaction fees.

Commission enforcement decisions

In July 2014, the Commission issued a decision imposing a €427.7 million fine on Servier and several generic pharmaceutical manufacturers relating to so-called 'pay-for-delay' settlements concerning Servier's blood pressure drug Perindopril.[23] The agreements involved the settlement of patent litigation brought against the generic suppliers by Servier, in return for cash payments. The Commission stated that this amounted to 'a strategy to systematically buy out any competitive threats to make sure that they stayed out of the market'.[24] Servier and other addressees have announced that they will appeal the Commission's decision to the General Court; like the *Intel* judgment, this decision attracted criticism for concluding that pay-for-delay settlements are anti-competitive 'by object', meaning that no analysis of their actual effects is required for a finding of infringement.

23 Case COMP/39612 – *Perindopril (Servier)*, Decision of 9 July 2014.

24 IP/14/799, Antitrust: Commission fines Servier and five generic companies for curbing entry of cheaper versions of cardiovascular medicine, 9 July 2014.

Two abuse of dominance cases in 2014 concerned standard essential patent (SEP) holders in the telecommunications sector. The *Motorola*[25] and *Samsung*[26] investigations considered the circumstances in which an application for an injunction on the basis of SEPs can constitute an abuse of a dominant position. The Commission held that where the holder of a SEP has given a commitment to license it on fair, reasonable and non-discriminatory (FRAND) terms and a potential licensee has agreed to accept those terms, seeking an injunction preventing a licence would constitute an abuse.

In March 2014, the Commission adopted a decision finding that OPCOM, the operator of the national power exchange in Romania, had discriminated against traders on the basis of their nationality or place of establishment by requiring them to hold a Romanian VAT registration to operate on the short-term electricity trading market.[27] This was not required under Romanian law but was introduced by OPCOM's standard agreement. The requirement was held to have restrictive effects on entry to the market and was deemed an abuse of OPCOM's dominance. The Commission imposed a fine of €1.031 million on OPCOM and its parent company, Transelectrica.

Finally, on 15 October 2014, the Commission fined Slovak Telekom and its parent company Deutsche Telekom a total of €69.9 million for infringing Article 102 TFEU by restricting competitors' access to the Slovak broadband services market.[28] Slovak Telekom was found to have engaged in a margin squeeze and denied its rivals unbundled access to local loops. The fine for which Deutsche Telekom was held liable was increased by 50 per cent to reflect its previous abusive behaviour and a further 20 per cent due to its size.

Intel[29]

In June 2014, the General Court rejected Intel's appeal against the 2009 Commission decision which imposed a then-record €1.06 billion fine for abuse of dominance.[30] The Commission had found that Intel occupied a dominant position in the market for 86 central processing units, and abused that position to foreclose its main rival AMD. Its abuses included paying manufacturers rebates to buy all, or almost all, of their CPUs from Intel, and paying Europe's largest electrical retailer to stock only Intel products.

In upholding the fine, the court held that exclusivity rebates, when granted by a dominant firm, are capable of restricting competition by their very nature. Since they are restrictive 'by object', the Commission does not need to prove in such cases that any harm actually took place on the market or was likely to; however, the dominant firm may still argue that the rebates were objectively justified. The court also rejected the use of the 'as efficient competitor' test in these circumstances, stating that there was no need

25 Case AT.39985 – *Motorola Enforcement of GPRS standard essential patents*, Decision of 29 April 2014.

26 Case AT.39939 – *Samsung Electronics*, Decision of 29 April 2014.

27 Case AT.39984 – *OPCOM/Romanian Power exchange*, Decision of 5 March 2014.

28 Case COMP/AT.39523 – *Slovak Telekom*, Decision of 15 October 2014.

29 Case T-286/09, *Intel Corp v. Commission*, Judgment of 12 June 2014.

30 Case COMP/37990 – *Intel*, Decision of 13 May 2009.

to consider whether the Commission correctly assessed the likelihood of the rebates foreclosing a competitor as efficient as Intel.[31]

The General Court's judgment has proved controversial among commentators who interpret it as a finding of *per se* illegality. Intel's appeal to the ECJ[32] will be keenly followed.

Groupement des Cartes Bancaires

In this September 2014 judgment, the ECJ made important clarifications on the distinction between restrictions by object and restrictions by effect.[33] The judgment overturned the General Court's earlier finding[34] that pricing measures adopted by the French Groupement des Cartes Bancaires[35] had the object of restricting competition contrary to Article 101 TFEU. The ECJ rejected the General Court's ruling that the concept of a restriction by object need not be interpreted restrictively. Rather, it held that the concept relates exclusively to types of conduct that are capable of harming competition by their very nature (especially hard-core cartels such as price fixing and market sharing), in which cases the Commission need not assess the actual effects of the conduct on the market to find an infringement. In light of this, the ECJ ruled that the General Court had not properly assessed whether the Commission had done enough to establish that the Groupement des Cartes Bancaires' pricing measures fell into that category. The General Court was therefore wrong to infer the group's anti-competitive object without considering the wider context of its conduct (i.e., the economic and legal framework in which it took place). It is possible that this judgment will encourage the Commission to undertake a more detailed examination of cases that do not clearly involve a restriction of competition by object in the future.

Card transaction fees: Mastercard and Visa

Also in September, the ECJ closed one front in the Commission's 20-year plus battle with credit card operators over interchange fees (the fees raised as balancing payments between a retailer's and a consumer's bank to cover transaction costs).[36] The ECJ upheld an earlier General Court ruling[37] which endorsed the Commission's decision that Mastercard's fees

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31 In Case C-295/12 P, *Telefónica SA v. Commission*, Judgment of 10 July 2014, the Court of Justice did employ the 'as efficient competitor' test when dismissing Telefónica's appeal against a 2012 judgment of the General Court finding that Telefónica had abused its dominant position by imposing an illegal margin squeeze on wholesale and retail broadband markets, and upholding the Commission's 2007 fine of €151.875 million.

32 Case C-413/14 P, *Intel Corporation v. Commission,* case pending.

33 Case C-67/13 P, *CB v. Commission*, Judgment of 11 September 2014.

34 Case T-491/07, *Groupement des cartes bancaires 'CB' v. Commission*, Judgment of 29 November 2012.

35 A group of banks which allow their customers to make payments to or withdrawals from affiliated members via ATMs.

36 Case C-382/12 P – *Mastercard and Others v. Commission*, Judgment of 11 September 2014.

37 Case T-111/08, *MasterCard and Others v. Commission,* Judgment of 24 May 2012.

were too high. The ECJ supported the General Court's conclusions that Mastercard constituted an association of undertakings for the purposes of Article 101 TFEU; that the undertakings agreed to coordinate their conduct regarding the setting of fees; and that the payment system would survive without such fees.

In February 2014, the Commission closed an investigation into Visa's interchange fees on the basis of commitments including a pledge by Visa to cap its fees at the levels prescribed in proposed legislation. The proposal in question, the Commission's draft Regulation on Interchange Fees,[38] limits charges to 0.2 per cent of the purchase value for debit card transactions and 0.3 per cent for credit card transactions. The Regulation gained the consent of Parliament in December 2014 and is expected to be adopted in early 2015. Meanwhile, the Commission is continuing two more investigations into both Mastercard and Visa's international fees, including those charged on cards from outside the EU.

ii Trends, developments and strategies

In June 2014, the Commission adopted a revised Notice on Agreements of Minor Importance, updating the rules that provide a 'safe harbour' for agreements that are presumed not to appreciably restrict competition under Article 101(1) TFEU.[39] While the *de minimis* market share thresholds remain the same as in the previous 2001 notice, at 10 per cent for agreements between competitors and 15 per cent for agreements between non-competitors, the 2014 Notice expressly states that the safe harbour does not apply to agreements whose object is the prevention, restriction or distortion of competition. Previously, the safe harbour could benefit agreements whether they had an anti-competitive object or anti-competitive effects. The specific exclusion of agreements with an anti-competitive object was necessary in order to bring the Commission's policy into line with the jurisprudence established in 2012 by the ECJ in *Expedia*.[40]

To accompany the new *de minimis* Notice, the Commission also published a staff working document on restrictions of competition that have already been considered restrictions by object, based on its own past decisions and the case law of the European courts.[41]

In March 2014, the Commission adopted a new Technology Transfer Block Exemption Regulation,[42] along with revised Guidelines on the application of Article

38 See http://ec.europa.eu/competition/sectors/financial_services/enforcement_en.html.

39 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (*De Minimis* Notice), 30 August 2014, OJ 2014 C 291/1.

40 Case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*, Judgment of 13 December 2012.

41 Guidance on restrictions of competition 'by object' for the purpose of defining which agreements may benefit from the *De Minimis* Notice, 25 June 2014, http://ec.europa.eu/competition/antitrust/legislation/de_minimis_notice_annex.pdf.

42 Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of

101 TFEU to technology-transfer agreements.[43] Technology-transfer agreements enable companies to license patents, know-how or software with a view to facilitating innovation and the development of new products. The Technology Transfer Block Exemption Regulation creates a safe harbour for licensing between companies with limited market shares, specifically 20 per cent combined for competitors or 30 per cent each for non-competitors, exempting them from Article 101 TFEU. The revised 2014 Regulation amended the categories of so-called hard-core restrictions (which cause the entire agreement to fall outside the block exemption) and excluded restrictions (which can be severed from an otherwise compliant agreement). The latter now include all exclusive grant-back obligations. In addition, the updated Guidelines introduced new guidance including on settlement agreements and patent pools.

Following an earlier consultation, in June 2014 the Commission extended the application of the Liner Shipping Consortia Block Exemption Regulation[44] for a further five years until 25 April 2020. The Commission also opened a consultation on the extension of the Insurance Block Exemption Regulation, which expires in 31 March 2017.[45] In particular, it sought views on the current structure of competition in the insurance market, the application of the exemption in practice, options for the Regulation's renewal or non-renewal and the possible impact of this. The consultation took place between August and November 2014, and the Commission's final decision regarding the future of the Insurance Block Exemption is expected in 2015.

iii Outlook

Arguably the most significant pending antitrust case going into 2015 is the investigation into Google's internet search services and online advertising. The Commission received revised commitments from Google in February 2014 that it acknowledged were more likely to satisfy its concerns than those submitted in April 2013, for which the market test had been largely negative. However, the new commitments were also met with opposition and certain of the original complainants produced new evidence against Google. In a statement before the European Parliament in November 2014, Commissioner Vestager indicated that the complexity of the case and the sensitivity of the online search market meant that the investigation was likely to continue for some time. It remains to be seen whether a satisfactory resolution will be reached in 2015.

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technology-transfer agreements Text with EEA relevance, OJ 2014 L 93/17 applying from 1 May 2014.

43 Communication from the Commission – Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology-transfer agreements, 28 March 2014, OJ 2014 C 89/3.

44 Regulation 906/2009, of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies, OJ 2009 L256/31.

45 Consultation on the Insurance Block Exemption Regulation, http://ec.europa.eu/competition/consultations/2014_iber_review/questionnaire_en.pdf.

Other major pending investigations include the Commission's examination of online sales restrictions in the consumer electronics sector. After unannounced inspections at the premises of Philips, Samsung and other manufacturers, as well as the retailer Media-Saturn, late in 2013, it does not seem unlikely that the Commission may issue its statement of objections in 2015. The Commission also continues to investigate the behaviour of several leading energy suppliers, among them Gazprom, against whom proceedings were first opened in September 2012.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

The Commission maintained its focus on competition in the EU food supply chain in 2014. The 2013 Common Agricultural Policy reform, effective as of 1 January 2014, introduced new competition rules in the farming sector that permit certain producers to jointly sell their products through producer organisations and allow a temporary waiver of Article 101 TFEU for short-term quantity management measures. The Commission produced draft Guidelines on the application of antitrust rules to the agricultural sector in light of these reforms and launched a public consultation seeking stakeholders' views on their implementation. The Commission also revised and updated its Modern Retail Study, aimed at assessing both the impact of high concentration in the retail sector and the evolution of choice and innovation for consumers. The study will inform any future Commission work in this sector and the Commission invited comments until 30 January 2015.[46]

At the end of 2014, the Commission published its 5th Report on the Monitoring of Patent Settlements.[47] The publication of annual reports began after the 2009 pharmaceutical sector inquiry, which recognised the importance of continuing to monitor settlements between originator and generic manufacturers relating to patent disputes. The 2014 report, covering the period from 2010 to 2013, demonstrated that most companies (92 per cent) are able to solve patent disputes without giving rise to competition law concerns and noted a general decrease in settlements that involve a value transfer from the originator to the generic company.

ii Trends, developments and strategies

Two sectors witnessed notable developments in 2014: telecoms and energy. In telecoms, in May Directive 2014/61[48] was adopted to reduce deployment costs of high-speed electronic communication networks. The Directive sets out minimum requirements for

46 IP/14/1080, Competition: Commission publishes results of retail food study, 2 October 2014.

47 Commission 5th Report on the Monitoring of Patent Settlements, 5 December 2014.

48 Directive 2014/61/EU of the European Parliament and of the Council of 15 May 2014 on measures to reduce the cost of deploying high-speed electronic communications networks, OJ 2014 L 155/1.

network operators to provide access to their physical infrastructure, work coordination and transparency for existing broadband networks and planned works. Additionally, in October, the Commission adopted a revised recommendation on relevant product and service markets within the electronic communication sector susceptible to *ex ante* regulation, reducing the number of such markets from seven to four.[49] The Commission's proposed Connected Continent regulation made limited progress with only a first parliamentary reading taking place in April,[50] due to substantial Member State disagreement.

In the energy sector, significant steps were taken through the adoption of a new energy and climate framework for 2030 in January 2014[51] and a continued emphasis on the development of the internal energy market. Subsequently, the European Council agreed a binding EU target of a reduction in greenhouse gas emissions of at least 40 per cent, increased energy efficiency of at least 27 per cent, reform of the EU emissions trading system and the establishment of a new governance system.[52]

iii Outlook

The energy and telecoms sectors are expected to remain the focus of the Commission's attention in 2015. Its 2015 Work Programme details a commitment to achieving a European Energy Union through a Strategic Framework and the creation of a Digital Single Market through a strategy and package of supporting initiatives, both legislative and non-legislative.[53] Further action is also expected in 2015 relating to the food supply chain, in light of the publication of the Commission's study in this area.

V STATE AID

i Significant cases

In October 2014, the Commission adopted its first ever decision approving state aid for nuclear power, in the context of the Hinkley Point C project in the UK.[54] The £24.5 billion investment in the new nuclear power station, to be constructed and operated by EDF, was supported by a 'contract for difference' under which the state guaranteed that electricity produced at the plant would be sold for £92.50/MWh (approximately twice the current wholesale electricity price) for its first 35 years. Should the market price fall

49 IP/14/1112, Telecoms: Commission to cut number of regulated markets in Europe, 9 October 2014.

50 IP/14/373, European Parliament votes to end roaming charges, expand consumer rights and make it easier to create better telecoms, 3 April 2014.

51 IP/14-54, 2030 climate and energy goals for a competitive, secure and low-carbon EU economy, 22 January 2014.

52 See http://ec.europa.eu/clima/policies/2030/index_en.htm and http://ec.europa.eu/clima/news/articles/news_2014102401_en.htm.

53 COMP/2014/910, Commission Communication on Commission Work Programme 2015.

54 Case SA.34947 – Support to Hinkley Point C Nuclear Power Station, Decision of 8 October 2014.

below that amount, the state will compensate EDF – and vice versa, should the market price increase above the benchmark. The Commission undertook a detailed and lengthy investigation, which required the UK to modify its original proposal, before concluding that the measure was proportionate and compatible with state aid rules.

Mediaset III[55]

In February 2014, the ECJ ruled on questions referred by an Italian court regarding the recovery of state aid from Mediaset. This judgment provides greater certainty on the issue of indirect state aid recovery for national courts and clarifies their role in determining the amount of aid to be recovered. In its judgment, the ECJ recalled the principle that national procedural law governs the recovery of state aid and acknowledged the possibility that a national court could conclude that the amount to be repaid is zero, without questioning the validity of the Commission's decision. The ECJ also held that while the Commission's recovery decision is binding on a national court, subsequent written communications exchanged between the Commission and the Member State are not binding but should be a relevant factor given the good faith obligation on Member States.

La Poste[56]

In April 2014, the ECJ dismissed in its entirety France's appeal of the Commission's decision[57] finding that the French state-owned postal provider, La Poste, had received state aid by virtue of its special legal status. Prior to 2010, La Poste had been a public limited company exempt from ordinary insolvency and bankruptcy rules whose debts and liabilities were, ultimately, covered by the state. The Commission found that this arrangement in effect amounted to an unlimited guarantee from the state to La Poste, which it considered to be incompatible state aid. France appealed to the General Court, which supported the Commission in a judgment of 2012.[58] On appeal a second time, the ECJ upheld the General Court's ruling that the Commission had proven that the measure in question involved the use of state resources, based on an actual obligation on the state to cover any debts La Poste might incur. The ECJ also supported the General Court's finding that the Commission had correctly established the existence of a selective advantage benefitting La Poste. By virtue of the unlimited guarantee, the postal operator could access financing on the market at more favourable terms than would otherwise be possible. The ECJ furthermore endorsed the view that the Commission was not required to show any actual effects of the loan; the mere possibility that the loan could benefit La Poste was sufficient to determine a selective advantage.

55 Case C-69/13 P *Mediaset SpA v. Ministerio dello Sviluppo Economico*, Judgment of 13 February 2014, not yet published.

56 Case C-559/12, *French Republic v. Commission*, Judgment of 3 April 2014, not yet published.

57 Case C-56/07, State aid C 56/07 (ex E 15/05) granted by France to La Poste, 26 January 2010, OJ 2010 L274/1.

58 Case T-154/10, *French Republic v. European Commission*, Judgment of 20 September 2012.

Ryanair[59]

In November 2014, the General Court partly annulled the Commission's decision finding that the exemption of transfer and transit passengers from payment of the Irish air travel tax (ATT) did not constitute state aid.[60] The case originated from a complaint lodged by Ryanair, which argued that the non-application of ATT to transit and transfer passengers constituted aid benefitting Aer Lingus and Aer Arann. The General Court held, firstly, that the duration of the Commission's preliminary investigation was excessive and unjustified and, secondly, that its examination was insufficient and incomplete, concluding that the Commission did not have the information needed to carry out a sufficient analysis of whether the exemption conferred a selective advantage on Aer Lingus and Aer Arran. The Commission, therefore, should have initiated a formal in-depth investigation to verify that the exemption did not constitute state aid.

Autogrill and Banco Santander[61]

Also in November 2014, the General Court issued two significant judgments on the concept of selectivity in state aid. Both cases concerned appeals of a Commission decision declaring that a Spanish measure that granted tax deductions to companies acquiring a shareholding in a foreign firm was incompatible with state aid.[62] The court disagreed, and found that the Commission had failed to establish that the measure granted a selective advantage. It ruled that the existence of an exception to a tax framework cannot itself favour particular undertakings, finding that the scheme was aimed at a category of economic transactions and did not exclude any category of undertakings. This judgment is particularly timely since fiscal state aid remains very much in the spotlight (see below), and it is likely to have wider implications for the Commission's standard of proof in showing the selectivity of a measure.

ii Trends, developments and strategies

Of particular interest in 2014 was the Commission's widespread scrutiny into Member States' tax rulings. Initially, the Commission addressed a specific group of tax rulings granted (mostly) in favour of US-based multinationals, opening up formal state aid investigations concerning Apple's arrangements in Ireland,[63] Starbucks in the Netherlands[64] and Amazon[65] and Fiat Finance and Trade in Luxembourg.[66] In December, the Commission announced that it had extended its investigation into tax rulings in all

59 Case T-512/11, *Ryanair Ltd v. Commission*, Judgment of 25 November 2014.

60 Case SA. 29064, *Ireland – Air Transport – Exemptions from Air Passenger Tax*, Decision of 13 July 2011.

61 Cases T-219/10, *Autogrill España SA v. Commission*, 7 November 2014 and Case T-399/11, *Santusa Holding SL v. Commission*, Judgment of 7 November 2014.

62 SA. 22309 *Spanish Goodwill*, Decision of 28 October 2009.

63 SA. 38373 *Alleged aid to Apple*, Decision of 11 June 2014.

64 SA. 38374 *Alleged aid to Starbucks*, Decision of 11 June 2014.

65 SA. 38944 *Alleged aid to Amazon*, Decision of 7 October 2014.

66 SA. 38375 *Alleged aid to FFT*, Decision of 11 June 2014.

28 Member States. Every Member State has been asked to inform the Commission of any companies to whom they provided tax rulings between 2010 and 2013.

Although the Commission has no direct competence over Member States' national taxation policies, it can examine whether specific tax rulings or categories of rulings constitute state aid. The essential question in such cases is whether the ruling confers a selective advantage on certain undertakings – in other words, whether the measure is of general or specific application within a Member State. It is thought that the Commission does regard the tax rulings that the likes of Apple and Starbucks received as selective, meaning that the companies in question may be required to repay significant sums of unpaid tax to the state.

2014 also saw the continuation of the Commission's state aid modernisation programme, with new guidelines and rules issued in the aviation,[67] environmental and energy,[68] rescue and restructuring of non-financial undertakings[69] and risk finance investment sectors.[70] The Commission also published a communication on state aid supporting important projects of common European interest, a revised framework for research, development and innovation,[71] a new block exemption for the agriculture, forestry and rural sector[72] and the new General Block Exemption Regulation.[73]

iii Outlook

After a major focus for the past three years on developing new state aid legislation and guidelines across a very wide range of sectors, 2015 may see the Commission concentrate its enforcement efforts on Member States' compliance and the implementation of the new rules. Being in the final stages of its state aid modernisation programme, the Commission is expected to publish final guidance on the notion of state aid. Further progress should also be expected in the Commission's state aid investigations into national tax rulings (see above). In addition, the Commission is expected to continue

67 Communication from the Commission on Guidelines on State aid to airports and airlines, OJ 2014 C99/3.

68 Communication from the Commission on Guidelines on State aid for environmental protection and energy 2014-2020, OJ 2014 C200/1.

69 Communication from the Commission on Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ 2014 C249/1.

70 Communication from the Commission on Guidelines on State aid to promote risk finance investments, OJ 2014 C19/4.

71 Community Framework for State Aid for Research and Development and Innovation, OJ 2006 C323/1.

72 Council Regulation 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ 2014 L193/1.

73 Council Regulation 651/2014 of 17 June 2014 declaring certain categories of State aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EAA relevance, OJ 2014 L187/1.

with several other new investigations that were opened in 2014 including those into the public financing of Brussels' public IRIS hospitals,[74] proposed public financing for Volkswagen in Portugal,[75] compensation granted to a Polish motorway operator[76] and subsidies granted to public transport services in Île-de-France.[77]

VI MERGER REVIEW

i Significant cases

The Commission received 303 merger notifications in 2014, up from 277 in 2013. 280 transactions were approved unconditionally in Phase I while 13 were approved in Phase I subject to conditions. Three-quarters of the unconditional Phase I decisions were adopted under the simplified merger procedure, compared to two-thirds of such decisions in 2013. This indicates that the Commission's 2013 revision of the Implementing Regulation,[78] which was aimed in part at increasing the use of the simplified procedure in order to reduce both the Commission's workload and transaction costs for merging parties, achieved at least one of its goals.

Seven decisions in 2014 were adopted following an in-depth, Phase II investigation. Of these, two were approved unconditionally (*Holcim/Cemex West*[79] and *Cemex/Holcim Spanish assets*[80]) and five were approved subject to conditions.[81] No mergers were prohibited, for the first time since 2010.[82]

74 IP/14/1071, State aid: Commission opens in-depth investigation into part of public financing of Brussels public IRIS hospitals, 1 October 2014.

75 IP/14/1068, State aid: Commission opens in-depth investigation into proposed public financing for Volkswagen in Portugal, 1 October 2014.

76 IP/14/730, State aid: Commission opens in-depth investigation into compensation to operator of Polish A2 motorway, 25 June 2014.

77 IP/14/246, State aid: the Commission opens in-depth investigation into subsidies granted to public transport in Ile-de-France, 11 March 2014.

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

79 M.7009 *Holcim/Cemex West* (2014).

80 M.7054 *Cemex/ Holcim Spanish assets* (2014).

81 M.6905 *Ineos/Solvay/JV* (2014); M.6992 *Hutchison 3G UK/Telefónica Ireland* (2014); M.7000 *Liberty Global/Ziggo* (2014); M.7018 *Telefónica Deutschland/E-Plus* (2014); M.7061 *Huntsman Corporation/Equity Interests Held By Rockwood Holdings* (2014).

82 Prohibition decisions in the previous three years were adopted in the cases of M.5830 *Olympic/Aegean Airlines* (2011), M.6166 *Deutsche Börse/NYSE Euronext* (2012) and M.6570 *UPS/TNT Express* and M.6663 *Ryanair/AER Lingus III* (both 2013).

Lafarge/Holcim[83]

Arguably the biggest transaction reviewed by the Commission in 2014 was cleared in Phase I. In October 2014, Holcim and Lafarge notified their planned merger to create by some distance the world's largest cement manufacturer. At the same time, the parties submitted their proposal to divest substantial assets in the EU and US to address the Commission's likely competition concerns. The scale of these divestitures, which followed three inter-linked transactions already approved earlier in the year including the sale of Holcim's Spanish[84] and Czech[85] assets to Cemex, was enough to satisfy the Commission that no in-depth investigation was required despite its initial (and publicly stated) view that the case would almost certainly enter Phase II.

Hutchinson 3G/Telefónica Ireland,[86] ***Telefónica Deutschland/E-Plus***[87] ***and Liberty Media/Ziggo***[88]

Two of 2014's conditional Phase II clearance decisions involved Spanish telecoms operator Telefónica, which sold its O2 Ireland business to Hutchison Whampoa and acquired its German competitor E-Plus. In both cases, the Commission expressed concern that the loss of one mobile network operator (MNO) would reduce competition in the markets for retail mobile telephony and for wholesale access and call origination. The parties committed to similar remedies in both Ireland and Germany, namely selling network capacity and spectrum to assist the entry of mobile virtual network operators (MVNOs). H3G also offered to continue a network-sharing agreement with Eircom to ensure that the latter remains a competitive MNO in Ireland.

In the case of *Telefónica Deutschland/E-Plus*, the Commission rejected a request by Germany for the case to be referred for investigation at national level. Although this is relatively unusual, the Commission took the same approach regarding *Liberty Media/Ziggo*, also reviewed in 2014. The Commission considered in both cases that it was better placed to examine the transaction given its experience in assessing mergers in the telecommunications sector, and had competence to do so. Liberty Global's acquisition of the Dutch cable operator Ziggo was granted conditional approval in October 2014 following a Phase II investigation.

In all three telecoms investigations, the Commission showed some flexibility in suspending its review period to allow the parties more time to prepare remedy proposals. While in *Telefónica Deutschland/E-Plus* the clock was stopped for just three days, in *Hutchinson 3G/Telefónica Ireland* the suspension lasted more than one month.

83 M.7252 *Holcim/Lafarge* (2014).

84 M.7054 *Cemex/Holcim Spanish assets* (2014).

85 M.7054 *Cemex/Holcim Spanish assets* (2014).

86 M.6992 *Hutchison 3G UK/Telefónica Ireland* (2014).

87 M.7018 T*elefónica Deutschland/E-Plus Ireland* (2014).

88 M.7000 *Liberty Global/Ziggo* (2014).

Munksjo/Ahlstrom[89]

In February 2014, the Commission issued a statement of objections alleging that Munksjo AB and Ahlstrom Corporation had provided misleading information when notifying a merger that was cleared in May 2013. The Commission noted that market share estimates submitted in the notification differed from those in the companies' internal documents, which the parties had been obliged to submit. Although the Commission approved the transaction, it opened infringement proceedings under the EU Merger Regulation[90] and the Implementing Regulation[91] which permit fines of up to 1 per cent of turnover for providing misleading information. The Commission closed the proceedings in October 2014 after receiving a satisfactory explanation for the parties' decision to review their internal market share estimates when preparing the notification.

Unauthorised implementation of a transaction: Marine Harvest[92] ***and Electrabel***[93]

In July 2014, the Commission imposed a fine of €20 million on salmon producer Marine Harvest in relation to its acquisition of competitor Morpol. Marine Harvest had notified the transaction in August 2013 and received approval in September 2013. However, the Commission considered that Marine Harvest had in fact acquired control of Morpol in December 2012, without prior notification or approval, when it bought 48.5 per cent of the target's shares. In the Commission's view, this was sufficient to give Marine Harvest *de facto* sole control over Morpol due to its stable majority at shareholders' meetings, nine months before it acquired the remaining 51.5 per cent stake following Commission approval. The fine equals that imposed on Electrabel SA in 2009 for 'gun-jumping' in similar circumstances, a decision that was upheld on appeal by the ECJ in 2014.The two cases illustrate the heavy sanctions that the Commission will impose when it identifies any breach of the obligation to notify transactions and await approval before closing.

Editions Odile Jacobs[94]

In addition to the ECJ's judgment in *Electrabel* in July, there was one other significant EU court judgment concerning merger control in 2014. In September, the General court dismissed an appeal against the Commission's decision re-approving Wendel as the purchaser of assets that Lagardere was required to divest before acquiring part of Vivendi's publishing business.[95] The applicant, Editions Odile Jacobs, had sought to acquire the assets in 2004 when Lagardere's acquisition was conditionally approved, but lost out to Wendel.[96] Editions Odile Jacobs' first appeal of this decision was partially

89 M.7191 *Munksjö/Ahlstrom* (2014).

90 See Article 14(1)(a).

91 See Article 4(1).

92 M.7184 *Marine Harvest/Morpol* (2014).

93 Case C-84/13 P, *Electrabel SA v. European Commission*, Judgment of 3 July 2014.

94 Case T-471/11, *Éditions Odile Jacob SAS (EOJ) v. Commission*, Judgment of 5 September 2014.

95 M.4994 *Electrabel/Compagnie Nationale du Rhone* (2009).

96 M.2978 *Lagarde/Natexis/VUP* (2004).

successful in 2012, after which the Commission reviewed its reasoning but upheld the divestment to Wendel. Having appealed this re-approval unsuccessfully, Editions Odile Jacobs now takes its case to the ECJ.[97]

ii Trends, developments and strategies

Following the public consultation launched in June 2013 on proposals to improve EU merger control, in July 2014 the Commission adopted a White Paper[98] on possible reform of the current rules. The White Paper proposes changes in particular with regard to the acquisition of minority shareholdings, which are currently only subject to review if they lead to a change of control over the target company. The Commission plans to introduce a targeted transparency system requiring parties to submit information on any transaction that creates a competitively significant link. This is defined as an acquisition of a minority shareholding in a competitor or vertically related company of around 20 per cent, or a shareholding between 5 per cent and 20 per cent that is combined with other elements such as a *de facto* blocking minority, a seat on the board of directors, or access to commercially sensitive information.

The White Paper also addresses the process by which cases are referred from Member States to the Commission, proposing to do away with the current two-step procedure that requires parties to file a Form RS requesting the Commission to review their case before they can submit their merger notification.

iii Outlook

The Commission is currently reviewing the responses to its White Paper on merger control and should decide on further legislative action to implement its proposals in 2015.

At the level of the EU courts, 2015 may see the General Court issue judgment on the appeals of the *Deutsche Börse/NYSE Euronext*[99] prohibition decision and *Lufthansa/Austrian Airlines* clearance,[100] while the appeals of the *Ryanair/Aer Lingus III*[101] and *UPS/TNT Express*[102] prohibitions will continue with hearings due to take place before the General Court in Luxembourg.

VII CONCLUSIONS

Looking ahead to 2015, the first full year in office for Commissioner Vestager, we expect to see important developments in all areas of public enforcement. These could include further progress in the Commission's investigation of oil and biofuel pricing under Article 101 TFEU; a resolution (or otherwise) of its probe into Google, under

97 Case C-514/14 P, *Éditions Odile Jacob v. Commission*, case pending.

98 White Paper: 'Towards More Effective Merger Control', Staff Working Document.

99 Case T-175/12, *Deutsche Börse v. Commission*, Judgment due on 9 March 2015.

100 Case T-162/10, *Niki Luftfahrt GmbH v. Commission*, Action brought on 13 April 2010.

101 Case T-260/13, *Ryanair Holdings v. Commission*, Action brought on 8 May 2013.

102 Case T-194/13, *United Parcel Service v. Commission*, Action brought on 5 April 2013.

Article 102 TFEU; and significant changes to the EU Merger Regulation. It will also be interesting to observe the ongoing interaction between public and private enforcement. The adoption of the Antitrust Damages Directive in 2014 was based, at least in part, on the Commission's view that private litigation can serve as a form of indirect public enforcement, reinforcing the deterrent effect of fines with the potentially larger punishment of vast liability in damages. A priority for the new year, for general counsel and private practitioners alike, should be to better understand the Directive, determine how it could give rise to exposure or create opportunities, and decide how it affects their approach to immunity and leniency moving forward.

Appendix 1

ABOUT THE AUTHORS

OLIVER GEISS

Squire Patton Boggs

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.

SQUIRE PATTON BOGGS

Avenue Lloyd George, 7
1000 Brussels
Belgium
Tel: +32 26 27 11 11
Fax: +32 26 27 11 00
oliver.geiss@squirepb.com
will.sparks@squirepb.com
www.squirepattonboggs.com