Recent Developments in EU Competition Law

PRESENTATION TO DELOITTE & TOUCHE

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Purpose of this presentation
1. The output
   1. Article 101 TFEU
   2. Article 102 TFEU
   3. Merger control
   4. Institutional and procedural issues

2. The pipeline
   1. The Commission
   2. The EU Courts
1. The output
1.1. Article 101 TFEU

- General
  - Observable customer benefits from cartel decisions adopted in 2011 are in the range of €2.8 billion to €4.2 billion
  - Observable customer benefits derived from the Commission’s intervention in the form of a decision prohibiting a horizontal merger or clearing such a merger subject to remedies in the range of €4.0 billion to €5.8 billion
  - Source: DG COMP’s annual management plan, 2012, p.7
1.1. Article 101 TFEU

- Commission
  - Cartel cases
    - Observable customer benefits from cartel decisions adopted in 2011 are in the range of €2.8 billion to €4.2 billion;
    - Four decisions in 2011
      - **Washing Powders and Consumer detergents**, April 2011 (3 firms, total of 315,000,000 €)
      - **Exotic fruits**, October 2011 (2 firms, total of 8,900,000 €)
      - **CRT Glass** cartels, October 2011 (4 firms, total of 128,736,000 €)
      - **Refrigeration Compressors**, December 2011 (5 firms, total of 161,198,000 €)
    - Three settlement cases (**Washing Powders**, **CRT Glass**, **Refrigeration Compressors**) => 3y to decide;
    - Two are full leniency cases (**Washing Powders** and **Refrigeration Compressors**)
    - Inability to pay in **Refrigeration Compressors**;
  - Almost no other cases...
    - COMP/39.803, *Italian Association of Lehman Brothers' Bond Holders / Consorzio Patti Chiari, Banche Consorziate e Agenzie di Rating*
1.1. Article 101 TFEU

- The EU Courts
  - Mostly annulment and revision proceedings against fines
  - Many issues re. imputability, in mother-subsidiary relationships (Elf Aquitaine case)
1.2. Article 102 TFEU
1.2. Article 102 TFEU

The Commission

- *S&P*, Commitments Decision, 15 November 2011
  - Has S&P set unfairly high prices for the distribution of International Securities Identification Numbers (ISINs)?
  - ISINs are the international key identifiers for securities based on the international standard ISO 6166
  - Indispensable for a number of operations such as interbank communication, clearing and settlement, custody, reporting to authorities and reference data management
  - S&P has been designated by the American Bankers Association as the competent NNA and as such enjoys a monopoly for the issuance and the first-hand distribution of ISINs
  - The ISO provides for cost-recovery principles, fair pricing of ISIN, and no charge for indirect users
  - S&P charges on indirect users; S&P charges more than costs on direct users; S&P charges for full ISIN database, rather than the relevant ISIN number
1.2. Article 102 TFEU

- S&P commits to abolish all charges to indirect users for the use of ISINs within the EE.
- In respect of direct users and ISPs, S&P commits to distribute ISIN records separately from other added value information, consisting solely of the ISIN Record, via an FTP delivery on a daily basis. The initial price of this service will be set at USD 15 000 per year.
1.2. Article 102 TFEU

- The Commission
  - *IBM*, Commitments Decision, 13 December 2011
    - Refusal to grant adequate access to certain inputs necessary for the maintenance of IBM mainframe hardware and OS software products
    - IBM might have imposed unreasonable supply conditions, with regard to certain inputs required for the maintenance of IBM mainframes, on its competitors in the maintenance market, thus putting them at a competitive disadvantage
    - Restricts competition from third party maintainers (TPM)
    - IBM commits, for a period of five years, to the expeditious availability of critical spare parts and technical information under commercially reasonable and non-discriminatory terms and to allow third parties to enforce the commitments
1.2. Article 102 TFEU

- Mostly commitments decisions, as in 2010 (4 decisions)
- Unlike in 2010, decisions do not exclusively cover the energy sector
- Weird focus on exploitation?
- But a classic: Telekomunikacja Polska S.A, June 2011, € 127 million, exclusionary abuse in broadband Internet markets
1.3. Merger Control

- *Agean Airlines/Olympic Airways*, January 2011 => Prohibition decision, 90% of Greek domestic air transport market, insufficient remedies
- *Deutsche Börse/NYSE*, February 2012 => Prohibition decision, near monopoly on European financial derivatives traded on exchanges
1.3. Merger Control

- **Intel/McAfee**, January 2011 => conglomerate effects arising from computer chips + computer security solutions (interoperability issues, with possible foreclosure of McAfee’s rivals re. essential information on chips, remedies)
- **Microsoft/Skype**, October 2011 => conglomerate effects of Skype with MSFT’s communications services (Live messenger and Lync), interoperability issues (degrade OS interoperability, access to Skype users conditional on Lync); fast moving market, with growing rivals, etc.
- **Motorola Mobility/Google**, February 2012 => tie up of tablets and smartphones + Android OS; foreclosure of other tablet and smartphone OEM from Android (Samsung and HTC)?; Google wants to push its services, including peripheral ones, and thus needs to be present on the largest possible number of tablets and smartphones; Motorola is a small player
1.4. Institutional and procedural issues

- CJ, *Pfleiderer* => It is not incompatible with EU law to force NCAs to display leniency-related evidence in context of follow-on actions for damages
- CJ, *Tele2 Polska* => It is incompatible with EU law that a NCA takes a positive decision finding that there is no infringement of Article 101 and/or 102 TFEU
- CJ, *KME v. Commission* => §102, re. judicial review in cartel cases, “in carrying out such a review, the Courts cannot use the Commission’s margin of discretion [...] as a basis for dispensing with the conduct of an in-depth review of the law and of the facts”
2. The pipeline
2.1. The Commission

- General (1)
  - Financial markets => State aid, CDS
  - Digital services (IT, media and telecoms) => interoperability (in mergers), standard setting and licensing (in antitrust), access to content
  - Pharmaceuticals => settlements and market concentration
  - Transport => antitrust (airlines) and State aid
  - Energy => guidelines for State aid in ETS
  - Source: DG COMP’s annual management plan, 2012
2.1. The Commission

- **General (2)**
  - Take a few *ex officio* decisions in cartel cases
  - Far reaching cooperation agreement with Switzerland and Canada, go further with emerging economy such as China and India
  - Specific proposal on antitrust damages actions in 2012
    - Clarify the relationship between antitrust damages actions brought before national courts and public enforcement
    - Set common standards to enforce rights before courts, in coherent manner
    - Safeguard leniency programmes
2.1. The Commission

- **Article 101 TFEU**
  - Sending of SO to Telefónica and Portugal Telecom, re. possible non-compete agreement in Iberian telco markets (Commission on velvet, with copy of the agreement, concluded in the context of JV)
  - Airlines
    - Two investigations re. code-sharing agreements (*TAP-Brussels Airlines* and *Deutsche Lufthansa-Turkish Airlines*):
      - Code-sharing agreements might go beyond the sale of seats on routes where companies compete
      - Such code sharing agreements already go beyond traditional code-sharing agreements (sale of seats on routes where parties do not compete)
    - One investigation against a transatlantic JV between four members of *SkyTeam Airline alliance*, re. effects of cooperation on capacity, schedules, pricing and revenue management
  - Opening of formal proceedings for collusion case between French water and water waste companies *SAUR, Suez Environnement/Lyonnaise des eaux and Veolia* (follow-up to seal case)
2.1. The Commission

- **Article 101 TFEU**
  - Opening of formal investigation against Apple and five international publishers (Hachette, Harper Collins, Simon & Schuster, Penguin and Georg von Holzbrinck), re. sale of e-books => with launch of iPad, publishers announce move from wholesale model (pro-retailers, who buy books and set prices) to agency model (pro-publishers, who set prices and share profits with retails), in a bid to force Amazon to change distribution practices
  - Patent settlements => Commission continues monitoring excercise + opens several investigations (J&J v. Novartis; Cephalon v. Teva; Servier (Perindropil); Lundbeck); but several cases dropped (!)
  - Inspection into the standardisation process for e-payments (payments over the internet)
2.1. The Commission

- **Article 102 TFEU**
  - *Thomson Reuters, December 2011*
    - Commission market tests Thomson Reuters’ commitments on Reuters Instruments Codes
    - RICs identify securities
    - RICs are used in the provision of real time market datafeeds by datavendors
    - Customers (individuals in banks and financial establishments) willing to change from data supplier need to change codes, and this is costly;
    - Need for interoperability => proposed licensing of RICs to retrieve data from other providers
2.1. The Commission

- **Article 102 TFEU**
  - *Credit Default Swaps* (CDS) investigations (3 cases, with possible 101 and 102 allegations)
    - Markit and 16 investments banks have colluded/abused a dominant position to control financial information on CDS markets
    - ICE Clear Europe and 9 banks have reserved for themselves preferential tariffs for the clearing of CDS, thereby locking in competitors
    - Inspection into Euribor in October 2011
2.1. The Commission

- Article 102 TFEU
  - Hi-tech wars
    - *Microsoft v. Google*, April 2011 => complaints re. Blocking tactics on search markets (manipulation of results to favour Google-related websites; improper Youtube indexing on competing search engines, lack of access to Youtube metadata for non Android smartphones, restrictions of advertisers use of their own data, etc.)
    - *Apple v. Samsung v. Apple*, November 2011 => Commission investigation re. patent war, re. Tablets, litigation in over 20 countries. Latest stage => investigation focused on Samsung, which would fail to license essential patents on FRAND terms
    - *Microsoft v Google-Motorola* (+ Apple?), February 2012 => MSFT complaint re. refusal by Motorola to make essential patents available, and blocking tactics on Xbox and other softwares
2.1. The Commission

- Article 102 TFEU
  - *Dupont & Honeywell, December 2011*
    - Commission opens investigation against two manufacturers of refrigerants used in car air conditioning;
    - New EU rules re. environmental standards request changing the existing global refrigerant
    - Society of automotive engineers (represents car manufacturers) chooses 1234yf refrigerant designed by Dupont & Honeywell
    - But JV might be anticompetitive
    - + Honeywell might not have disclosed patents and patent application during asessement of refrigerant, and then failed to give FRAND licenses
2.1. The Commission

- **Article 102 TFEU**
  - *Mathworks*, March 2012
    - Mathwork supplies mathematical computing software
    - Simulink and MATLAB are softwares that entitle other companies to design control mechanisms (*e.g.*, cruise and parking controls for cars), etc.
    - Competitor complains that it has not received information essential to interoperate with Simulink and Matlab, and to reverse engineer
    - Offshoot of *Microsoft* case
2.1. The Commission

• Mergers
  ○ \textit{Sony/EMI} => publishing music
  ○ \textit{Universal/EMI} => recorded music
2.2. The EU Courts

- General Court
  - *Cisco v. Commission*
  - *Deutsche Börse v. Commission*

- Court of Justice
  - *Tomra v. Commission*
Thank you!